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The assessment of killer acquisitions under an antitrust point of view

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CHAPTER I - INTRODUCTION

1.1 Overview

This thesis aims at shedding light on the phenomenon of "*killer acquisitions*", their main implications and the effects on market competition.

As it will be discussed more comprehensively *infra* (§ 1.2), the phenomenon has been described as the intention of the acquiring party in a merger to "*discontinue the development of the targets' innovation project and pre-empt future competition*".[1].

Killer Acquisitions became recently a heavily debated topic thanks to the contribution of several legal scholars who raised awareness on the main competitive concerns stemming from this strategic behaviour.[2]

Apparently, during the past years there has been a tangible increase in the number of these merger activities especially in the technological and pharmaceutical industries. Many incumbent firms in these sectors began to acquire innovative start-ups, integrating them in their internal ecosystem killing their growing potentials and vanishing innovative patents that might been source of future potentially dangerous market rivalry, though not only start-ups are victims of killer acquisitions, but also smaller well established firms.

Killer Acquisitions are wrongly perceived as the strategic acquirement of a start-up by an incumbent firm abusing of its dominant position, though frequently also firms medium sized firms with healthy accounts may become victims of this type of acquisitions. Thanks to a more dynamic and globalized market scenario, this kind of acquisitions increased in the last 10 years. Start-ups are often the designated victim since they are designed in seeking for capital and investments to survive, they foster creativity and innovation, with new processes and technologies that can often be considered as a threat to incumbents.

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[1] C. Cunningham, F. Ederer, M. Song, *Killer Acquisitions,* p. 3, available at SSRN: https://ssrn.com/abstract=3241707 or http://dx.doi.org/10.2139/ssrn.3241707.

[2] See *inter alia*: C. Scott Hemphill & T. Wu, *Nascent Competitors*, University of Pennsylvania Law Review, forthcoming (8 May, 2020), available at: https://scholarship.law.columbia.edu/faculty_scholarship/2661.

We therefore face these types of acquisitions when incumbent firms acquire smaller firms (usually start-ups) mainly because they see in those smaller firms dangerous potential growing opportunities that might in the future harm the incumbent firm's position.

Identifying these acquisitions is not easy, since they are multifaceted. They may occur under different features. In addition, competition authorities may face intervention difficulties due to ineffective regulation (e.g. excessive thresholds).

These acquisitions may also occur because acquiring a new product or innovation from a smaller business by then killing it in many cases is more profitable and less risky than an internal product integration. Incumbents who acquire a product line with parallel features and market characteristics but with higher technological processes or a better design may face the risk of destroying their own product due to internal competition. Therefore, killer acquisitions, may serve the purpose of terminating the acquired product or service.

1.2 Definition

Such acquisitions have been called "killer acquisitions" because the primary intention of this type of nascent acquisition is to discontinue the company/product development in order to prevent the dominant firm from facing new future competition or to integrate the target business in the incumbent's ecosystem.

The main methodology to assess whether and how a firm is implementing a killer acquisition is establishing a theory of harm, through which understanding if the acquisition presents competitive concerns.

Determining competitive concerns is crucial and often difficult, as authorities face complex and heterogeneous scenarios that not always can be related to an established theory of harm.

For example, a product in a two-sided market[3] structure originally may seem to be unrelated in a single market context, though it can actually be a substitute on the other side arising both a conflict of interest or strategically pre-empting competition on the other side of the market. This point is crucial because the competitive consequences of killer acquisition can be frequently misconceived

[3] Two sided markets are markets where buyers and sellers both meet bidding in order to buy or sell, usually interacting through an intermediary.

due to an inappropriate analysis of the relevant market structure (which is a particularly sensitive topic in markets of that kind).

As said, there is no single theory of harm. Rather, theories of harm are diversified and can be applied to specific cases for example, theories of harm might be based on a vertical analysis in which the acquired product might grow into a key input that allows input foreclosure in downstream markets. They might also be based on conglomerate analyses, "*in which the acquired product might grow into a complement that might be bundled or tied to the incumbent's product in order to exclude rivals*".[4]

When an incumbent company integrates a business in its own ecosystem a theory of harm cannot be easily established, and other methodologies might help us in understanding the competitive consequences of the acquisition.

For example, at first glance a product integrated in a business might not seem to have been discontinued, as the product may still be marketed after a strategic acquisition though with a tangible reduction of competitive threat. It is evident that in this specific case general theories of harm might be ineffective because the product line or business is still present on the market.

Nonetheless, we must still consider these types of acquisitions as killer acquisitions because, as it will be seen in this thesis, they intentionally harm competition. The "harmed" party is not only market competition but also the product itself to some extent is damaged, though continuing living, because the product lines growing estimates are intentionally harmed and reduced due to an excessive discontinuation. In this way not only the product estimates and competition are tangibly harmed but also consumers. The future growing opportunities of the harmed product could have increased the market quality welfare leading consumers to be better-off, whereas in this scenario consumers who will still choose that product are damaged.

[4] *Start-ups, Killer Acquisitions and Merger Control- Background Note*, released by the OECD 10th-12th June 2020, pp. 7-42.

1.3 Effects on the market

As it will be seen *infra*, the effects of killer acquisitions on the market are generally negative, though the magnitude of their effect may change depending on the industry concentration and market structure. Killer acquisitions may create a tangible distortion of market competition by reducing the level of product differentiation, hence harming consumers preferences. In markets with low concentration the market share distortion is more elastic.

For example, in an industry with only four firms developing similar services with similar core competencies and capabilities, Company A holding a dominant position may decide to acquire Company B (in terms of revenues its smallest competitor) due to its growing potential. In case that the main purpose of the dominant firm is to discontinue the growth of Company's B products and/or the structural company growth, we are clearly facing an example of killer acquisition. The outcomes of this acquisition in terms of competition distortion are evident: consumers of Company B will have to modify their preferences. Less firms in a market mean less competition and greater market share for the remaining companies that gain a higher pricing power advantage and a sensible value-cost gap increase.

Killer Acquisitions may also be a way for incumbents to reach a dominant position and, in extreme cases, a monopoly, thus raising high barriers of entry and reducing or eliminating competition. This means that these firms can increase product prices, leading to an increase in output by diminishing inputs in the production processes harming the overall product quality and increasing prices to the detriment of consumers. Therefore, under the perspective of incumbents, killer acquisitions are a profitable "safe "choice.

In some cases, a killer acquisition can also be treated as a general "*exclusionary conduct*"[5], that goes beyond acquisitions. In this case, its main scope would be to avoid rival entry in the market by overpaying inputs so that they cannot be used by a rival. Harming competition means lower consumer welfare and can therefore be deemed unlawful.

[5]An exclusionary conduct is a conduct which has as its object the exclusion of a competitor from the market.

1.4 Scope and methodology

This thesis discusses the effectiveness of both EU and Italian antitrust legislation, in treating killer acquisitions. The scope of this thesis is understanding the dynamics that bring the acquiring parties to enact such an anticompetitive behaviour.

As we have already mentioned, and will forwardly be discussed in the following paragraph, one of the main constraints relies on the excessive thresholds' levels, which are too high in order to catch many of these acquisitions. This thesis will analyse the European merger control regulations, as applied to the EU Commission, the domestic rules applied by the Italian Competition Authority (ICA).

Through a detailed substantive analysis, we will understand and describe the methodology used by the controlling authorities, especially the European Commission. This methodology will help us in accruing our understanding of the phenomena and its dynamics. The purpose of this substantive analysis, which is based on a detailed analytical economic background, is recognising the feature of killer acquisitions, through a process which follows three fundamental steps.

As we will see, in order to assess the occurrence or non-occurrence of a killer acquisition it is fundamental to consider the relevant counterfactual. This means that courts or authorities must depict an artificial scenario where the acquisition is not occurring so that we can understand the outcomes arising from it, and the possible harm to the market competition.

Also, the thesis discusses the role of the most accredited harm theories and the necessity for the EU Commission to update many of these harm theories to new developing markets.

Our analysis will focus also on the competitive assessment criteria, which will be crucial in the understanding of the competitive threat. We will have a complete understanding of how these acquisitions damage market competition and how they can be identified by analysing the concept of substitutability and the overlapping pipelines process method.

At the end of this thesis we will concentrate on a controversial case of acquisition occurred in 2014 by an American pharmaceutical company named Covidien. This case study will help us in understanding the effectiveness of the outlined substantive analysis, the rationale that brought the court to assess this acquisition as anticompetitive.

Conclusions will finally close the thesis.

1.5 Outcome of the research and proposals for improvement

The outcome of this analysis shows that following a methodological framework is possible to identify and recognize killer acquisitions' main features and characteristics. As described in our analysis, this type of acquisitions aren't a new phenomenon, though they have frequently increased during the last years thanks to the digitalization that contributed to the creation of a more dynamic market context that facilitates those sort of operations.

Following the analysis outlined in this thesis, every court should assess an economical substantive case study analysis, aimed in perceiving the scope of the operation by establishing a relevant counterfactual followed by a competitive assessment, in order to evaluate whether a killer acquisition has actually occurred.

This paper will deeply describe the fundamental changings in market dynamics that should be followed by a same paced development in merger control's laws and regulations. Nowadays e-commerce platforms for example, are constrained under a fixed and sometimes non-enforceable regulation, which leads to the need of a tangible update.

To the same extent, many harm theories that currently are the heuristic base of authorities' competition analysis, should be updated to more realistic scenarios with modern outcomes, as it is often ineffective for courts to use theories of harms developed and introduced 20/ 30 years ago.

The EU Commission should primarily be concerned in lowering the thresholds' levels that in many cases do not allow the competent authorities to investigate. To this extent a decrease of these limits would increase the number of analysed transactions.

Another important obstacle that arises in the analysis of killer acquisition cases, is the thresholds' differences between Member States. In a multicultural single market a unique system of threshold volumes should better be applied.

CHAPTER II - JURISDICTIONAL ANALYSIS

2.1 Merger control and relevant thresholds

Mergers occurring or having effects in the European Union may be supervised by either Member State's authorities at national level or by the European Commission, when the turnover volumes of these important concentrations exceed the relative thresholds.EU law provides for all concentrations exceeding specific thresholds a mandatory *ex ante* notification system to the European Commission.

These thresholds are not referred to the transaction's value. Rather, the jurisdictional thresholds define the total parties' operational turnover.

More in detail, according to the EU Merger Regulation[6], a transaction shall be notified to the EU Commission when:

> "*(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and*
>
> *(b) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,*
>
> *unless each of the undertakings concerned achieves more than two-thirds of its aggregate Union-wide turnover within one and the same Member State*".

According to the same Regulation, a concentration not meeting the abovementioned thresholds has a Union dimension where:

> "*(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;*
>
> *(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;*

[6] Council Regulation (EC) No 139/2004 of 20 January 2004 on *The control of concentrations between undertakings* (the EC Merger Regulation).

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State".

Lastly, the Regulation provides that a concentration

"*which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to* […], *before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.*"

The referral system enables the EU Commission to supervise transactions occurring under the maximum turnover levels, increasing its controlling power and enabling it to oversee a greater number of concentrations under its jurisdiction.

The referral system is recently bringing under the EU Commission's supervisions many transactions with relevant volumes below the thresholds especially in the High-tech and digital sectors.

The EU Commission periodically reviews its merger control tools, since in a rapid developing changing scenario as European Merger Control, they can easily become inefficient and lose their effectiveness, disabling them from reaching their scope.

As it will furtherly be discussed in this thesis, the referral system is not the solution. Many transactions that potentially harm competition affecting their internal market, due to their low turnover, fail in falling under the EU Commission's jurisdiction. The number of transactions captured by this system is still relatively low compared to the overall number of acquisitions that should be examined and that pre-empt future competition.

Apparently, the EU Commission is gaining awareness on this concern analysing how these high-valued transactions with low turnover escape to their control. For example, in October 2016 the Commission began a consultation assessing the urgency of capturing new lower acquisitions by introducing more severe notification systems based on the transaction value. Though, determining the transaction value might not always be simple especially in the digital sectors. These operations are complex, they do not involve only a simple cash payment, they may involve assets transactions or complex shares operations.

Aware of the huge developments in the digital markets, in December 2020, the Commission presented a huge and innovative reform proposal named Digital Services Act.[7]

This reform is aimed in adapting the EU framework to the digital environment, fostering the creation of fair and regulated transparent digital markets. The proposal clearly tries to define and enumerate duties and responsibilities for both digital intermediaries and platforms, by providing specific regulations mainly aimed at protecting consumers.

Together with the Digital Services Act, the Commission proposed another innovative regulatory tool: the Digital Markets Act.[8] This instrument is less focused on the relationship between consumers and digital platforms. Rather, it focuses its attention on the competitive environment related to the activities of platforms that act as "gatekeepers" in the digital sector.

The aim of this instrument is to prevent gatekeepers from imposing unfair commercial conditions on businesses and consumers. The instrument is also aimed at ensuring the openness of important digital services in order to foster innovation and growth also by providing a single and clear EU framework.

Article 12 contains a key point of this proposal. It reads:

"*1.A gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004 involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable*

[7] (EC) Regulation Proposal No. 361/2020 of 15 December 2020 on *a Single Market for Digital Services*.

[8] (EC) Regulation Proposal No. 374/2020 of 15 December 2020 on *contestable and fair markets in the digital sector*.

to a Union competition authority under Regulation (EC) No 139/2004 or to a competent national competition authority under national merger rules.

A gatekeeper shall inform the Commission of such a concentration prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

2.The notification pursuant to paragraph 1 shall at least describe for the acquisition targets their EEA and worldwide annual turnover, for any relevant core platform services their respective EEA annual turnover, their number of yearly active business users and the number of monthly active end users, as well as the rationale of the intended concentration.

3.If, following any concentration as provided in paragraph 1, additional core platform services individually satisfy the thresholds in point (b) of Article 3(2), the gatekeeper concerned shall inform the Commission thereof within three months from the implementation of the concentration and provide the Commission with the information referred to in Article 3(2)".

It is likely that this rules, which confer additional review powers to the EU authorities, will facilitate their ability to analyse smaller business' acquisitions. However, the real impact of this tool on the competitive scenario will only be seen in a few years.

2.2 The EU Commission's methodology

Analysing the acquisition of a small innovative firm by a large incumbent raises several different issues. The EU Commission follows a pre-determined methodology.

Assessing the relevant harm theory for each operation is the first step, then the EU Commission needs to measure the relevant market power of the undertakings, it will also have to establish the counterfactual, by then finally analysing the differences in the market level of competition and innovation with and without the merger occurring.

In all its investigations according to the structure of the operation and the features of the undertakings, the EU Commission sets out all possible harm theories selecting the one that better suits the acquisition. Basing their considerations on specific circumstances: the relevant activities, industry and relevant market functioning, external third parties' evidence, and dominant positions. Harm theories differ depending on the scope of the incumbent and the nature of the transaction.

They may regard horizontal, vertical or conglomerate transaction.

Beside identifying the correct theory of harm, the EU Commission measures the market power of the parties involved in the acquisition. Specifically, for the digital industries where measuring market power is difficult if not impossible, to be assessed the assessment meter can be both market share and installed base users shares. In any case the Commission uses the most accurate metric indicator condition for each market. Finally, is crucial to understand how precise market shares are in each context.

Commission needs to determine which is the correct counterfactual, establishing the delta competitive effects with and without the merger occurring, to assess the possible outcomes. Usually the most accurate indicator in order to identify the relevant counterfactual is the dominant market condition that prevails in the market. "*However, in acquisitions of nascent competitors, the current reality may be a poor proxy for the situation absent the merger, given the high potential of the young target and dynamic nature of the markets*".[9]

This means that in situations involving nascent competition this method is imprecise mainly due the dynamic market structure of the target. This approach is very intuitive, the EU Commission uses all the available data in order to make precise future predictions, taking in consideration all sources of information and documents. The framework used by the EU Commission to assess potential competition is defined in its Merger Guidelines, which have as principal goal the clarification of whether a merger between two parties, which are competitors, may have anticompetitive implications for other mergers already existing in the market.

Killer Acquisitions have a tangible effect on both competition and technological innovation.

Therefore, the EU Commission needs to assess whether the merger has anticompetitive effects.

It has been suggested that it shall do it on the basis of the following criteria:(i) "*The potential competitor must already exert a significant constraining influence or there must be a significant*

[9] OECD, Background note on *Start-ups, killer acquisitions and merger control - Note by the European Union*, p. 7.

likelihood that it would grow into an effective competitive force"[10]; and (ii) "*There must not be a sufficient number of other potential competitors*"[11].

According to the Merger Guidelines, the primary advantage is that competition fosters innovation, and the EU Commission assess a merger by evaluating the positive or negative outcomes on innovation, by considering whether the merger would eliminate or reduce "*an important competitive force*".[12]

The EU Commission analysis does not only focuses on the product market but also on larger spaces of innovation, though these kinds of consideration change from sector to sector. In some sectors it is harder to identify innovation and other developments spaces. The potential competition analysis is crucial, its main function is understanding the scope of the operation by analysing the relation between the pipelines of merging parties' products. In case of overlapping pipelines, the EU Commission can be able of demonstrating an uncompetitive behaviour, if one of the merging parties intentionally discontinues or redirects pipelines of the other party, moreover even if the project or product development continues as previously planned (un realistic outcome), the products with same overlapping characteristics will be under control of the incumbent party, harming competition and market welfare. Assessing effective or potential competition is discontinuation, re-arrangement or redirection of innovation is a key method used by the EU Commission in understanding causes and effects of debatable mergers.

In some sectors the Commission is able to identify in an easier way competition concerns, for example in the Pharmaceutical and Medical industry, mainly due to the fact that these sectors have often overlapping pipelines between acquiring and nascent parties' products, whereas more developing industries such as the digital sector cannot be subject to this innovation approach. Innovation in these markets' changes with a faster pace and pursues processes that are less organized.

[10] *Id.*, p. 8.

[11] *Ibid.*

[12] *Id.*, p. 9.

CHAPTER III - SUBSTANTIVE ANALYSIS

After having defined the differences and the scope of harm theories and the relevant counterfactual and jurisdictional analysis, that the EU Commission examines with a specific methodological scheme we can concentrate on implementing an economical substantive analysis on how these acquisitions should be investigated and on their outcomes.

We will concentrate on the relative counterfactual of this type of nascent acquisition, this analysis aims in helping us defining and how these concentrations should be examined by the competent authorities.

The aim of this paragraph is understanding the nature of this phenomena by describing deeply the differences between the most used theories of harm, the effects generated by killer acquisitions and how these should be measured. It will be crucial to discuss more deeply the relevant counterfactual concept, understanding the relevant time frame, the gathered evidence, and uncertain outcomes.

As seen in the previous chapter, the EU Commission assesses, in analysing a merger, whether the acquisition damages potential innovation or alters potential competition.

3.1 Possible theories of harm

In the last decade, many harm theories have been developed by numerous competition authorities, aiming at a stricter merger regulation enforcement.

Accredited theories of harm require a general methodological and logical scheme to evaluate anticompetitive behaviours. As already mentioned in this paper the EU Commission uses different harm theories (depending on the industry concentration and market sector) in assessing whether an anticompetitive act by one or more parties occurred.

In European merger control for every controversial merger case the Commission examines which harm theory best fits the current scenario, choosing one harm theory among all the others.

Nowadays, the sector in which most frequently killer acquisitions take place is probably the digital sector. Large incumbents frequently decide to acquire strategically young start-ups.

The digital market is built on a continuous forward moving scenario, the s-curves (curve used to assess the stage development of a technology or good)[13]of these smaller start-ups are more sloped than ordinary business processes development, the stages in between the first moving and early adoption are necessarily narrow, they dangerously foster innovation by creating future competitive threats to more established incumbents. For these reasons incumbents are focused on recruiting and acquiring those firms whose technology or process might in a future short term (with adequate investments) dominate the market. This strategic surveillance in many cases can lead to killer acquisitions.

This is a serious concern for the EU Commission so that, in April 2019, the Commissioner Margrethe Vestager charged three special consultant advisers for outlining a report on this concern.[14] This report does not enter in conflict with the EU's substantive analysis though to capture a higher number of digital acquisitions it suggests an increasing focus of the authorities on the development of horizontal harm theories analysis. Greater attention must be paid on those dominant incumbents based on multi-dimensional platform markets of products since they easily gain from network effects and strategically acquire a nascent firm in the ilk user market portion.

3.2 Relevant counterfactual: evidence gathering and uncertainty

Establishing the relative counterfactual for both the merging parties should be the first challenging step of the substantive analysis. This framework aims in considering the most probable outcomes with the non-occurrence of the targeted acquisition. The key questions on which, when outlining the counterfactual for the target party, authorities should focus, is assessing whether the target independence is threatened.

Determining the relevant counterfactual implies the need of establishing the relevant time frame. Regulation and Merger Guidelines never precisely specify the timeframe but is generally

[13] The S-Curves "*definition stands for 'Sigmoidal', which is a mathematical term related to the way the curve is derived. You can, however, think of it as an S-shaped curve that predicts how a business will grow over its life cycle. It's pretty easy, in retrospect, to see how your business grew following the S-curve. However, it can be a bit more challenging to navigate this curve as you're moving through it"*. See definition available at https://smallbusiness.chron.com/s-curve-business-23032.html.

[14] J. Cremer, A. de Montoye, H. Schweitzer, *Competition for the Digital Era*, released by the EU Commission, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

widely conceived as being approximately of 2-3 years. Timeframe is important for nascent acquisitions because the effects on competition or consumers rising from these acquisitions might (in some cases) not be tangible in the short term.

Often, we face cases of acquisitions whose outcomes become evident after more than 6 years[15], therefore underestimating the length of the relevant timeframe might lead to evaluation mistakes and for policymakers and authorities it may be misleading in judging a controversial merger or nascent acquisition.

Another important obstacle in assessing these acquisitions' relative counterfactual involves "uncertainty", more precisely the uncertainty of the developed technology or product implemented by the targeted party. Uncertainty is multidimensional, assessing the expectations gathering from a nascent acquisition is certainly not easy for the authorities. Trying to predict the expectations for assessing the relevant counterfactual is much easier in cases where the acquisition is horizontal and the two merging parties are on the same level of productivity, technology development and revenues. Courts should try to answer some simple questions, useful to understand the level of uncertainty and the scope of the operation.

These questions (as suggested by an OECD background note)[16] are the following:

"• *Will the product prove popular?*
- *Will the product benefit from access to network effects?*
- *Will the costs of producing the product fall as the firm obtains economies of scale or takes advantage of learning-by-doing?*
- *Will the nature of the product change as it develops, bringing it into competition with new rival products?*
- *Will demand for the product change, bringing it into competition with new rival products*?".

Answers to some of these questions may seem straightforward, though it is not always true. Authorities in order to assess whether the conduct of one or both parties is unlawful, examine all the available information.

[15] "*In the case of WhatsApp, seven in the case of Waze, eight in the case of Instagram, 14 in the case of YouTube*" OECD, Background note on *Start-ups, killer acquisitions and merger control - Note by the European Union*, p. 17.

[16] *Start-ups, Killer Acquisitions and Merger Control- Background Note*, cit., p. 17.

A common mistake in evaluating the relevant counterfactual is trying to understand if the acquired party would have gained a greater development with or without the acquisition. Authorities, for a proper substantive analysis, should try to assess the harm to the competitive threat to whom the target would have suffered whether the merger did not occur. In cases where the authority finds a tangible proof that the targeted party would have successfully developed a closed substitute good or service, then the evidence of the transaction's competitive effect would become significant. Though authorities must consider that also small start-ups may be subject to a comparable or larger competitive effect. Nevertheless, if the authority believes that the smaller acquired party development would have furthermore increased or decreased, without the acquisition occurring is irrelevant for the competitive valuation impact effect.

Authorities in order to assess the relevant counterfactual may use an "*heuristic approach*"[17], by selecting the best and worse outcome occurring from the market operation, by then concentrating on the most probable scenario (imperfect biased method), or try to follow an agent rational computational approached designed on the probability calculation of the relevant counterfactual.

Authorities compute counterfactual probabilities (extremely challenging method) by calculating the impact that the merger could have in different parts of the world , by then multiplying this estimates with the best estimate of the probability "*this would allow the adoption of a complex/composite counterfactual as the relevant counterfactual against which to compare the impact of the merger*"[18].

This is a challenging method for courts. Generally, this method is accepted in cases where the Commission feels confident with the counterfactual analysis. Though greater issues arise when there are several different acceptable counterfactuals, this means that decision makers will have to charge for each counterfactual an approximation of the evaluated harm.

An important innovation in assessing the counterfactual may be introduced by analysing five different circumstances with the non-occurrence of the targeted acquisition:

1. *"Independent growth of the nascent firm into an oligopolist with market power"*

[17] OECD, Background note on *Start-ups, killer acquisitions and merger control - Note by the European Union*, p. 17.

[18] *Id.*, p.18

2. *"Independent growth of the nascent firm into an oligopolist with little market power"*
3. *"Inability of the nascent firm to remain independent leading to acquisition by another firm resulting in growth into an oligopolist with market power"*
4. *"Inability of the nascent firm to remain independent leading to acquisition by another firm resulting in mild growth into an oligopolist with little market power"*
5. *"Exit of the nascent firm following failure as an independent and no acquisition by an alternative".*[19]

As already discussed previously in this paragraph calculating probabilities is very challenging but at the same time difficult for courts. This method is usually used in situations where courts feel confident in assessing probabilities but when courts have to face "*multiple credible counterfactuals*"[20], this method becomes impractical.

The EU Commission needs to use a rational framework aimed in the understanding of the scope of the corporate transaction, by understanding what vision the acquirer has on the relevant target party.

The EU Commission should then try to evaluate in absence of the merger whether other incumbent competitors would charge the same corporate transaction, and if occurring at a comparable price, in order to gather evidence from these other competitor's firms. This will help the authority in understanding the real potential of the target, its strength and its perception by other competitors of the same relevant market. In cases in which no other incumbent or well stablished fir is interested in the smaller innovative target, or no firm is interested in purchasing it at such a high price, then the authority has a gathered evidence of the incumbent's controversial strategy. The authorities will eventually try to analyse all the available information or deductive evidence of the status of the target firm, by analysing the reliability of the internal achieved information. In many cases impartial experts are consulted by the authorities.

In many cases, dominant platforms or benchmarks are able to collect market preference information by its customers, by then copying or restyling those services or goods that are majorly preferred by their users. The designated victims are those medium and small independent companies. Not only but after producing similar goods these platforms are able to convince the customers to ran

[19] *Ibid.*

[20] *Ibid.*

away from those smaller firm's products. How? These platforms present rankings of the best rated and worse rated products, they therefore inflate their reviews. As it has been argued, indeed, the *"ability of some platforms to then also use the market power that it might hold to distort competition between its own copy of the product and the original product could be a concern. In particular, if its market power as a platform is such that it faces little pressure to cultivate an innovative and diverse ecosystem of complementary products that are sold on the platform, then it may guide consumers towards its own-brand, regardless of the impact on the value of the platform as a whole. This can be expected to reduce the incentive for small firms to innovate or invest in obtaining efficiencies".* [21]

3.3 Competitive assessment

The authority's main scope is understanding whether after the merger or acquisition there is an anticompetitive behaviour by the incumbent leading to heavy price discrimination or a decrease in quality and product innovation.

This leads to the need of focusing on the substitutability of the product on both parts of the market (two-sided market). It is possible to understand the incumbent's level of market power by evaluating the level of substitutability of the products. Assessing the level of substitutability of the two products in many cases can be easily understandable, though it is crucial to analyse the level of substitutability on both sides of the market and for all the goods and services involved.[22]The reduction of the competition's level should be calculated strictly considering also the level of competition in the market, thus uncompetitive market operations in uncompetitive markets need to be more evident. In order to understand the substitutability of the products in two sided markets, the authorities will use all their available instruments (general surveys, case studies, general experts' consultancies, dynamic price correlation theories).

This framework in order to evaluate the competitive assessment follows two requirements:

a.) "*The information on the prospects of third party entry absent the merger*"[23] ;

and

[21] *Id.*, p. 22.

[22] "*These concerns on the future substitutability and competitive constraints between products constitute potential horizontal competition concerns, and so should not be confused with conglomerate effects*" in *id.*, p. 23.

[23] *Id.*, p. 23.

b.) "*The evidence on the likely development path and growth of the target's product and the acquirer's product, and to use these to gather evidence on the competitive constraints that the target's product would impose on the acquirer's product, and vice versa*".[24]

Gathered evidence relied on the substitutability of two future goods or services cannot be based on the analysis of old documents, or historic firm's behaviours, because such data will not be useful. Authorities will need to use a further looking approach to gather evidence on the future qualitative substitutability. This implies that investors presentations and reports or statements and risk evaluating reports, minutes and business cases may undermine the evidence of competitive concerns and might reliable in assessing it.

Furthermore it is important, beside these qualitative analysis tools, to implement a quantitative approach designed on the ability of decomposing the acquisition price. This approach target is to verify whether firms are earning *"uncompetitive profits"*[25]. Authorities can find evidence in the existing of a killer acquisition analysing each element "*behind the bidding price*"[26]. In many cases of killer acquisitions or collusive act, the bidding price maybe significantly higher due to an unreasonable price premium. Some acquiring parties may decide to hide this premium amount behind false market collaborations. In many other cases instead, the parties might seek real future market partnerships leading to a tangible over market bidding price. Another method used to pump up the bidding price occurs when a firm intentionally lowers the discounted cash flows in order to increase the valuation and thus the price. Changing the merger plan right after the market operation occurred (with unchanged external market dynamics or shocks), might be a symptom of an arguable acquisition. Therefore, the authorities supervise if any change of expectation or corporate research and development structural change occurred after the merge.

Finally, as already said false strategic synergies may cover an augmented over market bidding price, so courts for an efficient competitive assessment need to evaluate the nature of these synergies. Clear evidence occurs when: "*if the actual price paid is higher than the estimated standalone value then the acquirer is, in effect, paying the target out of the synergies that it expects to achieve*".[27]

[24] *Ibid.*

[25] *Id*., p. 24.

[26] *Id*., p. 25.

[27] *Id*., p. 26.

3.4 Potential competition

As already discussed in this thesis, killer acquisitions impact on the technological development of the target's product. Thus, authorities need to face a larger focus aimed in understanding the complete market dynamics that alter directly or through wider externalities the level of competition and innovation.

Evaluating the potential competition effects resulting from an acquisition implies the use of pre-determined Merger Guidelines.[28] After having discussed all the possible implications and inquiring direct and indirect methods that the EU Commission uses while investigating controversial agreements between undertakings, it is unarguable that the primary factor of evaluation remains innovation. One of the greatest issues while analysing potential competition occurs when the commission faces pipe-line distortion of innovative processes of one of the two undertakings due to converging technologies with the other party.

Identifying competition concerns is frequent in the pharmaceutical sector and medical device sector. These sectors have highly intensive level of investment on research and development, firms foster sustainable technological solutions, that usually require massive amount of investments in order to be launched on the market. Resources that frequently smaller firms are not able to find at some point of their process development. This while negotiating an acquisition obviously decreases their bargaining power. These markets face significant barriers to entry due to their structure. The case study that will be discussed in the next chapter is an example of how killer acquisitions thrive in this industry context.

The digital industry instead is more challenging for the supervising authorities. It is less regulated; enforcement is not straightforward due to the quicker development pace. The market concentration is composed by some incumbent dominant firms that deliver heterogeneous services and a huge number of small non established firms and start-ups. Regulation is still not rightfully enforcing the rules in place mainly due to the excessive thresholds that are insufficient, for this kind of mergers. The data available for the authorities' investigation is poor and not sufficient. The network synergies are not always evident and establishing the relevant counterfactual is in many cases not necessary.

[28] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, Official Journal c31 (2004).

3.5 Distinguishing a killer acquisition from an anticompetitive nascent acquisition

As already mentioned in this paper a killer acquisition may also be a kind of nascent acquisition, though an anticompetitive acquisition is not always a killer acquisition. How can we distinguish a killer acquisition from an anticompetitive nascent acquisition?

The answer to this question is simple: "*agencies will want to look at the issue both in terms of intent, and in terms of factors that affect the incentive to implement such a strategy*".[29] In order to assess the intent, authorities will read and analyse every type of internal report, document, formal and informal communication that might state their scope. Authorities will eventually check whether sunk costs are presented in business plans, hence signalling their intentions. In addition, the agency may be willing to look at the pros to go beyond a de-fusing strategy. By doing so there would be a quantification of the savings due to the reduction of duplication, or from converting production in a more profitable way. This would take into consideration the computation of diversion ratios in the scenario of product closure. There would also be the usage of a critical loss framework able to assess the profitability linked to a possible shut down. *"*[30]

It seems quite obvious that for well-organized and balanced killer acquisitions it is very difficult to find these proofs, though in many cases such for example in the Covidien killer acquisition, which will be discussed later on in this paper, these documents might be useful to demonstrate firms conflicts of interest or anticompetitive behaviour or intentions.

[29] *Id*., p. 28.

[30] *Ibid.*

CHAPTER IV - CASE STUDY: NEWPORT MEDICAL INSTRUMENTS/COVIDIEN

Covidien is a company established in Ireland that produces global health care products and is active in the production of medical devices. The company was purchased in 2015 by Medtronic that is also active in the medical device industry.

In 2012, Covidien acquired Newport Medical instruments for approximately $108 mln. Newport was specialized in the production of ventilators, (medical machines that help diseased lungs during the respiration), while Covidien was considered as being one of the most influent and dominant firms in the US's pharmaceutical industry. This acquisition has been heavily debated in courts and give rise to two main legal school of thoughts: on one side that considering it as a clear example of killer acquisition, on the other deeming the transaction absolutely legitimate and lawful. Nowadays both Newport is continuing operating in the health care industry, while Covidien after facing some difficulties in 2014 has been itself acquired by another company.

This case study is extremely helpful in this thesis, it outlines the considerations gathered by the authorities in assessing the relevant counterfactual and the rationale behind this operation.

4.1 Merging parties and market scenario

Today, ventilators seem one of the most current topic due to the diffusion of the SARS COV-2, mainly called COVID-19, all hospital's intensive cares are struggling in order to have the highest number of ventilators in their departments, the same ventilators that both the merging parties were already producing in 2011 for other diseases. Covidien was selling its own ventilators at approximately $ 10k. Newport instead was a smaller well established company, which produced portable smaller ventilators, at a tangible lower market price. This is why the US government contracted Newport in supplying a massive number of 40 000 ventilators.

Everything changed when Newport was acquired by Covidien in May 2012, Covidien decided to raise the price of each productive component by therefore increasing the market selling price. The White House decided to give some additional funding to Covidien, though the production of this huge number of ventilators was heavily delayed and far from the scheduled plan. Covidien continued struggling in the production of these medical machines and in 2014 asked to be released its their

contractual duties because the production was harming the company's balance, since for Covidien those prices where unprofitable.

The US government had to reassign a new contract to a new supplier in April 2014 and this brought to huge delays. Philips was awarded the new production of medical machinery for $13.8 mln, and should had delivered them in mid-2020 . Unfortunately, as we all know at the beginning of January 2020 a heavy pandemic flu has spread globally. This left the government with something more than 12.000 units, instead of 40.000 as provided in the contract signed with Newport.

4.2 Rationale of the acquisition

It can be argued that this acquisition occurred may not be considered as a killer acquisition for two main reasons: the volumes and the market structure.

Unarguably the transaction price was very low, as we already discussed in this paper, courts follow cases with relevant turnarounds that must not exceed some outlined thresholds, moreover the market presented several other competitors, with this particular transaction Covidien wasn't altering the overall level of competition in the market, though Newport was the only firm producing that type of technology that would have most probably hit the market by tangibly becoming a threat to all the other producers, including Covidien.

The crucial point was assessing whether Newport's ventilator could have been considered a substitute or not. Covidien itself stated that the acquired Newport's portable ventilator components were providing support for those patients who weren't in a critical clinical situation, while their machinery was suited for long-term heavily invasive ventilation. Covidien clearly tried to demonstrate that the two products weren't substitutes, though on their website they were exactly stating the opposite, by declaring how these new machinery was designated also for more invasive patient's therapies.

It was now easy for the authorities to assess the rationale behind this operation. The US wanted to prevent situations comparable to those that occurred recently, where the medical equipment wasn't sufficient in emergency cases. This product line was therefore clearly a threat to Covidien's, especially nowadays where the demand of these devices would have tangibly increased reducing the acquiring party's market power.

There can be argued that there is clear evidence that the decision of releasing the contract was inconsistent with the market scenario. In fact Philips was able to sign a similar agreement and still

remain profitable. Covidien stopped the portable ventilator production by continuing other Newport's product lifecycles, though this as we already saw in the first chapter of this paper must be considered as a killer acquisition. Newport was fostering innovation presenting in the market a new technological disruptive device, whose lifecycle after the acquisition was first altered, and then killed.

4.3 The relevant counterfactual

In this particular case the relevant counterfactual can relatively easily be deducted. Evaluating the transaction under a correct and longer time frame, its competitive problems seem clear: in the pandemic situation that we are facing, 60.000 ventilators would have been an important resource for the US health care system. The delays and the withdrawal of the contract brought the US government to search for a new supplier shifting the delivery timings.

To some extent, someone may argue that the production and delivery of the stock of 40.000 units of portable devices by Newport could have not occurred for the same reasons for which Covidien decided to stop the production, though Newport was following the scheduled time table. They were ready to deliver the first stock of ventilators, therefore there is no evidence in assessing that Newport could have decided to stop the production for the same reasons that brought Covidien to do so. Finally, it is true that Covidien couldn't imagine what some years later would have happened globally due to the diffusion of COVID-19, though this was what the government was trying to prevent.

As we can see the relevant counterfactual method in this specific case study has been crucial in the analysis of this killer acquisition, without this acquisition there is enough evidence to state that the number of resources and equipment that should have been available would have increased the health care response to this disease, therefore the difference between the occurrence scenario and non-occurrence are tangible.

CHAPTER V - CONCLUSIONS

A crucial aspect emerging from our analysis relies on the enforcement of antitrust authorities decisions on killer acquisitions. There are two possible outcomes:

(i) authorities over-enforce their decisions through competitive assessments' and investigations, by also obstructing legitimate market transactions.

(ii) authorities under-estimate the level of enforcement needed by proceeding on analytical investigations only for evident anti-competitive cases.

When it comes to killer acquisitions, the first outcome is probably the most unlikely. Moreover, the antitrust enforcers often win the investigations they start. This means that courts have a risk-adverse approach and tend to act only in presence of clear anti-competitive agreements. In the stated general debate, there is therefore enough evidence to confirm the under-estimation opinion.

Some modifications in the assessment process are necessary to avoid under-enforcement. The counterfactual scenario should then be evaluated not only on the standard relevant counterfactual (see Section 3.2), but also with a broader enforcement toolbox.

One way of dealing with the problem would be to reverse the presumption of innocence, by stating that where there is a tangible damage to consumers, these operations should not be authorized even if it is not possible to prove that they are anticompetitive. With this framework the merging parties have the difficult duty of disclaiming the potential competition damage of their market operation.

Many suggestions have been introduced in this debate. The most feasible proposal is aimed at inverting the burden of proof. Therefore, when a firm who is holding a dominant position on the market decides to acquire a smaller entity, the dominant must demonstrate that the acquisition will have no potential impact on consumers, and that the potential future earnings are commensurable with the transaction. If the firm is unable to justify its scope on the basis of the offer submitted or/and there is a tangible impact on consumers, the operation must be forbidden.

Another line of thought essentially claims that the inversion of the burden of proof should be permitted only if the authorities are able to demonstrate a reasonable prospect of harm.

On the other side some scholars from Chicago, believe that courts should remain biased on an under-enforcing approach since the risk of excessive enforcement "*outweighs the risk of non-interventions*".[31] The reasoning on which is based this school of thought relies on the fact that markets tend to achieve an automatic general market equilibrium stabilization even in presence of dominant position. This means that the creation of a dominant position might be in many case a synonym of future potential industrial profit growth, which leads to the conception that the market in question is a profitable and exploitable, thus many other entrants may be attracted and follow the dominant entrance fostering competition and bringing prices back to the equilibrium level.

Though, the rationale behind this analysis implicitly states that the incumbent firm should not react to the entrance of new competitors with a price reduction or technological increase in quality of the good or service designed. Furthermore, an under-enforcing level of control by authorities might facilitate the dominant firm in the acquisition of new entrants, by therefore performing a debatable nascent acquisition.

Courts must assess whether there are favourable efficiencies, outlining their conclusions not only on a substantive economical approach, but actually basing their rationale on a conception stating that firms should have a clear and tangible operational margin based on a factual legal line of reasoning, being guarded and limited only if a tangible future harm occurring from the operation exists. This approach strengthens firms' position to the detriment of consumers.

In Section 3, we analysed the relevant counterfactual probability method that has mainly been used during investigations globally by the authorities, we saw the main strengths of this enforcing approach, though it seemed evident during our analysis that it was not applicable to every nascent acquisition case.

Furthermore, it was a complex heuristic approach designed on statistical multilateral probable scenarios (very complicated to be correctly assessed). As suggested by some scholars, authorities should shift their assessing method towards a more pragmatic *Expected Harm test*. This framework compared with the previous one would increase the quality level of the economic analysis basing its conclusions not only on the probability of future competitive harm, by at the same time evaluating the scales of the effects of the harm, whether it exists. Somehow people may argue that this kind of

[31] *Id*., p. 36.

analysis, may be extremely demanding for courts to be assessed, though the probability model gives rise to expectable responses, whereas the harm test is unlikely to be predicted.

5.1 Reduction of thresholds

One of the main concerns outlined in this paper is the threshold mechanism.

As we know, merger control applies throughout different industries, and these nascent acquisitions are multi-dynamical and multidimensional. As discussed in Section 1, lower general level of thresholds will mark a tangible increase in the number of investigations, catching a higher number of cases.

On the other side, lowering the threshold levels might seem a simple move, but in some cases, for some sectors might lead to some negative effects, for example for those markets with extremely high turnover levels. The higher amount of work will lead to a longer decision-making timing and will stress the capacity of competition authorities.

Though as analysed in our research for some industries, such as the digital industry for instance, a reduction of the threshold level is heavily needed. Therefore, a suggested solution may rely on a sectorial threshold reduction. It has to be assessed on what basis authorities should decide in which sector thresholds should be lowered.

Probably authorities should focus on dynamic markets, with high start-up concentrations and frequent technological changes and adoption, possibly with the presence of a consistent dominant firm, for instance the pharmaceutical industry. A solution may be the introduction of a *Screening threshold*, aimed at evaluating the transaction beside its turnover value. To this extent, authorities would put on the same level the probability of losing a potential competitor with the probability of losing a future dangerous competitor. Therefore, also this reduction is based on the assessment of future growth possibilities.

On the other side of the debate many firms argue that the adoption of this methodology will harm firms and will be an unnecessary burden. Also, assessing the transaction value is far away from being an easy task. External factors may directly impinge on the overall transaction value, and may change suddenly. For example, changes in rates might change the transaction value level. Therefore, this new referral system should be followed by an efficient update in the notification process, in order to avoid critical imbalances in the value assessment.

Finally, another difficulty might arise from the fact that this method would increase court's difficulties in evaluating under which sector (and therefore which threshold) the transaction value should comply.

Also the Commission is participating to this debate and declared that "*most respondents consider that: A general clause (possibly supplemented by guidance that could be sector-specific) requiring activity or measurable competitive impact within the EEA would be too vague and would lead to legal uncertainty, possibly leading to the notification of many transactions without a clear nexus to the EEA*". [32]

Some nations are moving towards this sectorial reduction. the European pioneer is Germany. The number of notifications with the new system has not increased as expected. In two years Germany caught 18 more cases due to the reduction, and unsurprisingly these cases were equally divided between two already mentioned markets: digital fintech and high-tech and pharmaceutical.

Obviously this is a first experimental step. Many firms in seeing the path taken by authorities, may be discouraged in proceeding with debatable acquisitions, facing increasing investigation's risks. Moreover, to some extent this new system can be considered as a more efficient measure of consumer protection.

The adoption of lower threshold may have a positive effect not only on the respective Member state's antitrust regulation system and welfare but also on other States. Mainly because the majority of these transactions are cross-border transaction, they must comply to more than one legislation, so the German binding system will catch transaction that, on the other side, due to the excessive thresholds may have not been investigated by the other authorities.

The opponents of this reduction argue that due to it, firms may find as a gimmick the possibility of acquiring in the earliest stages their target, in order to still avoid the threshold level. The solution may be the construction of a flexible unbreachable transaction test.

Whether a structural reform aimed in the dynamic reduction of the threshold is infeasible, an alternative solution may be the construction of a register recording firms subjected to case-specific jurisdictions. This means that each firm should inform the authority of which acquisitions it is aiming

[32] Summary of replies to the Public Consultation on *Evaluation of procedural and jurisdictional aspects of EU merger control*, (July 2017), p. 6 also available at https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf>.

to complete. The main pro of this method is the organizational simplicity according to which, each firm meeting some requirements, must list its acquiring future plans, giving the possibility of an European legal alignment, that is unattainable nowadays due to the differences in the notification system and threshold levels. An example may be UK which is actually performing a similar *Targeted Approach*. In Europe, also France is sailing towards this structured system.

However, updating and managing these registers with different firms is not easy as: "*the intention is to capture the risks posed by potential competition, then it is not clear that such risks are confined to defined sectors*".[33]

Another intervention path, when facing nascent acquisition aimed in a strategical discontinuation of a product development, in order to preserve market dominance and reducing dangerous competitors' growth, is *ex-post* review. We have seen during our research how it is crucial for the authorities to deal with each specific case with a detailed *ex-ante* analysis, which then has to be followed by an enforcing *ex-post* approach. Each state using *ex-post* review uses a different time frame. The only State using this system with any time constraint is the US. The greatest concern of which the courts must be aware is: being certain on the fact that under a counterfactual analysis the target's realisation was unforeseeable under any other entity's acquisition.

5.2 General conclusions

Greater attention has been placed on this kind of nascent acquisition, since authorities, not only have to analyse cases of mergers altering the level of competition in a market but also need to evaluate product discontinuation.

During our research we underlined the differences between killer acquisitions and other anticompetitive mergers. This anticompetitive act normally involves the end of the life of the targeted party's product.

We saw how the first implication of this type of merger beside competition, is consumers' welfare damage. Any kind of exclusionary behaviour alters both the level of competition and the level of welfare. These analysis lead to investigations by competent authorities, assessing whether a suspicious merger is a killer acquisition or not. As described in our last two sections: in order to

[33] *Id*., p. 42.

intervene, authorities must analyse the specific case *ex-ante* and *ex-post*, these two analyses are crucial and complementary.

Any kind of substantive economic analysis must be performed to assess the potential competition and innovation damage, beside ensuring whether the products of the two parties are substitutes or not. Usually the motive for such acquisitions relies on substitutability. In some cases, it may not be straightforward to assess whether the substitutability is tangible or not. For high-tech and digital mergers courts use an overlapping pipe-line framework, that ensures whether the two technologies are substitutes. Enforcing these cases requires a dynamic merger regulation. Every recent debated proposition is based on an economical approach followed by an antitrust legal framework.

The work behind each investigation is massive. Authorities have to listen the parties and their economic experts. They are obliged to collect all the public available and unavailable information, which play an important role on the final decision. Sometimes this material can directly or indirectly testify the acquiring's party aim.

Agencies will try to evaluate heightened uncertainty behind these market operations. This means that they have to recreate multilateral counterfactual scenarios based on the precedent collected information. In some cases, due to a very low level of evidence, the decision-making court may reject the investigation, cataloguing it as inconsistent or indemonstrable. This means that the agency is acting an over-enforcing strategy.

Finally the counterfactual tests based on the probabilities' tests evaluation may introduce a predictable bias, mainly due to the fact that there is a tangible harming effect not exceeding the 50%, therefore the counterfactual is not completely reliable, and therefore courts might will to add an economic risk-based analysis which might advise against inaction.

For nascent acquisitions authorities must consider how solely basing their decisions and considerations on : "*the historic evidence*"[34]. This, compared to future competition assessments, is a less effective instrument, therefore this situation gives rise to asymmetric information between the undertaking parties and the investigating authorities. Regarding nascent acquisitions, legislation maybe increasingly enforced due to agencies' introduction of rebuttable presumptions.

[34] *Id.*, p. 41.

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