

TALLINN UNIVERSITY OF TECHNOLOGY

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**ASSESSMENT OF EUROPEAN MERGER CONTROL
JURISDICTIONAL THRESHOLDS IN VIEW OF THE REFORM
PROPOSED**

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ABSTRACT

This graduation thesis objective is to analyse elements of merger control specifically, in the EU. Substantially the research will focus on the jurisdictional thresholds included in the European Union Merger Regulation. These jurisdictional thresholds are based on the turnover of the parties. In this thesis, their capability is evaluated. Doubts of the threshold system efficiency are arising out of the transaction which did not meet the thresholds and therefore, is not captured by the current system. Due to the perception of the turnover based threshold perceived inefficiency additional threshold based on the value of the transaction has been proposed.

To give in this thesis sufficient answer first, the current system is outlined for the purpose of giving the reader understanding of the present state of affair. Subsequently, this thesis deals with the reason why the reform of the now ruling system is proposed. Afterwards, this thesis will embody a couple of merger control regimes that have introduced the complementary threshold based on the transaction value concurrently, the case referral mechanism will be included.

The research for the thesis discovered that referral mechanism could be the way that the perceived flaws of the threshold system can be mend. Referral mechanism permits in certain situations, for concentration that does not meet the jurisdictional test of the EUMR to still end up to the Commission review. Conversely, a concentration that falls within the Commission jurisdiction may be also referred to national competition authorities.

Keywords: Competition Law, Merger control, jurisdiction, thresholds

INTRODUCTION

Over 125 legal systems in different parts of the world have adopted rules concerning competition law which is momentous, whereas compared to the mid last century, less than 10 competition system was in place.¹ These rules are basically created to guard competition against harm and to act against flaws originating from the free-flowing market economy.² Commonly, competition law covers three elements, anti-competitive agreements, abuse of dominant position and merger control.³ The newest one out of the three especially, in European Union, is the merger control. 21 September 1990 merger regulation was adopted.⁴ The aim of the merger control is to keep firms from acquiring assets that could hinder the competition.⁵

Research in this thesis focuses on European merger control with regards to recent consultation by the Commission to reform the current rules. The regulation in force is the European merger regulation 139/2004.⁶ This thesis particularly will review the jurisdictional thresholds which determine whether concentration has a union dimension and if the concentration falls within the EU jurisdiction.⁷ The EUMR in present-day applies only to concentration with union dimension in other words when the involved undertaking meets the relevant thresholds. The question which now has emerged, whether these thresholds are effective and complete enough as they might not capture all the relevant transactions which could have an effect on the internal market. In this thesis, the author will debate whether reform should be made or if the current approach is

¹ Bernanrd, C., Peers, S. (2014). *European Union Law*. 1st ed. New York: Oxford University Press. p 505 Referenced in UNCTD (UNCTD. Benchmarking Competition Systems: A Global Survey of Major Institutional Characteristics. Accessible: <http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Benchmarking-Competition.aspx>.

² *Ibid.*

³ Whish, R., Bailey, D. (2012). *Competition Law*. 7th ed. New York: Oxford University Press. p 809.

⁴ Levy, N. (2003). EU Merger Control: From Birth to Adolescence. – *World Competition* vol. 26, no. 2. Kluwer Law International. p 195-218.

⁵ Garrod, L., Lyons, B. (2016). Early Settlement in European Merger Control. – *The Journal of industrial economics*, Volume 64, Issue 1 p 27-63.

⁶ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004.

⁷ Broberg, M., (2014) Improving the EU Merger Regulation's Delimitation of Jurisdiction: Re-defining the Notion of Union Dimension. – *Journal of European Competition Law & Practice*, Volume 5, Issue 5, Pages 261–270.

sufficient enough. These questions have been relevant particularly in certain economy sectors where significant acquisitions have occurred which were not able to be captured by the discussed jurisdictional thresholds.⁸ These impactful acquisitions have fallen below the jurisdictional threshold due to the low turnover generated by the target company. Research question then is, are the current notification thresholds of EUMR sufficient enough to capture all the relevant transaction which may hinder the competition.⁹ EUMR has been questioned also for other different reasons, however, considering space constraints of this paper these issues will not be discussed.

This thesis objective is to examine the current approaches of merger control in the EU in order to do this the first chapter author will concentrate on the current approaches which are important first to be established before we can move on to actual issue in hand. In the second chapter focus is shift to the reason why this issue has actually emerged. Proceeding chapter will spotlight the effects which this discussion has caused inside the EU particularly, in certain member states, as well as focusing attention to the case allocation system in the union which has implied to be the solution jointly with the jurisdictional thresholds.

The research question successfully to be examined qualitative research method is used. This is done by analysing the current law and theory of legal sources. Because there have not been many cases come before the court of justice that directly connects with the issue in hand references are made frequently to the documents deriving from the Commission on the topic.

⁸ European Commission. (2016). *Mergers: Commission seeks feedback on certain aspects of EU merger control*. Accessible: http://europa.eu/rapid/press-release_IP-16-3337_en.htm, 11.03.2018

⁹ Case COMP/M.7217 (2014) Facebook/WhatsApp (Commission decision of 3 October 2014).

1. EXISTING APPROACHES OF EUROPEAN UNION MERGER CONTROL

To begin with, we have to first establish what actually is the concept of a merger. To put it simply, a merger is, when there are two or more previously self-sufficient undertakings, which then reorganize into one.¹⁰ A merger is generally comprehended to be a one form of concentration along with takeover and acquisition.¹¹ Concentration, on the other hand, means an action where the control of undertaking which the action is directed changes and thereby affect the structure of the market.¹² In principle, it may seem as a harmless act and even collaboration between undertakings may reflect positively into the market, however, some mergers may cause negative effects to the economy especially from the aspect of competition. Considering that aftermath of the merger may lean either way a type of supervision is necessary.

Merger control is one of the instruments of the European Union (EU) competition law.¹³ The function of merger control is to empower competition authorities so they are able to regulate changes in the market structure by determining whether the merger is allowed or not.¹⁴ Merger control can be understood as being a collection of rules along with procedures which cover the action of examining concentration under competition law.¹⁵ Competition authorities have to make sure that internal market of the union is not distorted by entities reorganizing in the form of concentration.¹⁶

This upcoming chapter aims to summarise the relevant content and objectives of the current European Union Merger Regulation (EUMR). Certain key definitions will be also covered in the following chapter which is important for the purpose of understanding the subject matter.

¹⁰ Jones, A. Sufirin, B. (2011). *EU Competition Law: Text, Cases, And Materials*. 4th ed. New York: Oxford University Press. p 855.

¹¹ Navarro, E., Font, A., Folguera, J., Briones, J. (2005). *Merger Control in the European Union*. 2nd ed. New York: Oxford University Press. p 7.

¹² *Ibid*

¹³ Council Regulation No 139/2004 *Supra nota* 6, p 1.

¹⁴ Jones, A., Sufirin, B. (2011), *supra nota* 10, p 855.

¹⁵ Carletti, E., Hartmann, P., Ongena, S. (2015). The economic impact of merger control legislation. – *International Review of Law & Economics*, Vol 42, p 88–104.

¹⁶ Council Regulation No 139/2004 *supra nota* 6, p 1.

Thereafter, the last two sections of the chapter will cover the procedural aspects of the merger control.

1.1. Applicability of merger regulation

The purpose of the EUMR is to provide a framework for the control of mergers and acquisition at the EU level. The current merger regulation went through many development phases before it became the merger regulation as we know it today.¹⁷ The up-to-date version came into force on 1 May 2004.¹⁸

EUMR is for concentration that has Union dimension.¹⁹ The term Union dimension was prior to the Lisbon treaty called Community dimension.²⁰ The purpose of Union dimension test is to determine which competition authority has the jurisdiction regarding certain concentration whether it is the Commission or member states national competition authorities (NCA's).²¹ When the Union dimension is evident in the concentration, then EUMR applies otherwise concentration is judged on the grounds of applicable national law.²² If the concentration is proved to be one with Union dimension application of EUMR is exhaustive and thus, the application of another legal source is excluded.²³ Union dimension is a pre-condition for the aggregate combined turnover threshold to be used.²⁴ In accordance with EUMR article 3, regulation concerns also concentrations with Union dimension even though the undertakings in question has not established their place of business in the EU.²⁵

The EUMR is not exclusively restricted to mergers.²⁶ The existence of concentration is imperative, the undertaking must pursue control either alone or jointly with others over another undertaking in a way that either of the undertakings involved cannot any longer perceive as

¹⁷ Council Regulation No 139/2004 *supra nota* 6, recital 1, p 1.

¹⁸ *Ibid.*

¹⁹ Jones, A., Sufirin, B. (2011), *supra nota* 10, p 866

²⁰ Leivo, K., *et al.* (2012). *EU:n ja Suomen Kilpailuoikeus*. 2nd ed. Helsinki: Talentum Media Oy. p 855.

²¹ Jones, A., Sufirin, B. (2011), *supra nota* 10, p 866.

²² *Ibid.*, p 866.

²³ *Ibid.*

²⁴ Cook, C.J., Kerse, C.S. (2000). *E.C. Merger Control*. 3rd ed. London: Sweet & Maxwell Limited p 5.

²⁵ Craig, P., de Búrca, G. (2011) *EU Law: Text, Cases, and Materials*. 5th ed. New York: Oxford University Press. P 1049 referenced in (25.03.1999, Gencor Ltd v. Commission, Case T-102/96, European Court Reports 1999 II-00753).

²⁶ Cook, C.J., Kerse, C.S. (2000), *Supra nota* 24, p 4.

being independent entities.²⁷ Taking into account that, an important factor for determining the existence of concentration is the notion of control in the relevant undertakings which occurs on lasting basis additionally, since the article 3 of EUMR is focused on the notion of control *de facto* concentration is determined by the subjective quality of the concentration itself, instead of quantitative criteria.²⁸ Article 3(1) of EUMR divides concentration into two categories: the ones where previously independent undertakings merge, and the other where the undertaking pursues control.²⁹ An undertaking has reached control of another undertaking when the particular undertaking has a crucial influence over the other, and the importance in the assessment of control is not put on the exercising of that control per se by one undertaking, rather on the undertaking capabilities to exercise it, if it chooses to do so.³⁰

As already indicated, the EUMR applies to concentration with union dimension (or EU dimension) to find out whether the act has a union dimension depends on if the certain thresholds are met.³¹ The European Commission, in fact, advocates parties' initiative to reach out to the Commission prior any concentration for them to get explanation whether EUMR would be applicable in their case, in other words, the Commission provides them with consultation.³²

It is unnecessary to investigate the same merger or takeover in both national and EU level thus if the actual union dimension is substantiated, the general rule is then, that the Commission is the only authority entitled to investigate (so-called one-stop-shop principle).³³ The notion of Union dimension has three different threshold test attach to it: worldwide, Union-wide and member state-wide test.³⁴ The test can be found in the article 1(2) of EUMR.³⁵ Worldwide turnover test is fulfilled if the aggregate combined worldwide turnover for all the involved undertakings is more than 5000 million EUR; and the aggregate Union-wide turnover of each of at least two of the undertakings involved is more than 250 million EUR; and lastly the so-called two-thirds rule there is no Union dimension, if the involved undertakings reach more than two-thirds of its

²⁷ *Ibid.*, p 4-5.

²⁸ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ C 95 of 16.04.2008, p 4.

²⁹ *Ibid.*, p 5.

³⁰ *Ibid.*, p 7.

³¹ Craig, P., de Búrca, G. (2011), *supra nota* 25, p 1051.

³² Cambell, D. (2011). *Mergers and Acquisitions in Europe Selected Issues and Jurisdictions: Comparative Law Yearbook of International Business*. Alphen aan den Rijn: Wolters Kluwer Law & Business. p 39

³³ *Ibid.*, p 1052.

³⁴ Leivo, K., *et al.* (2012), *supra nota* 20, p 1053-1054.

³⁵ Council Regulation No 139/2004 *supra nota* 6, article 1(2).

aggregate Union-wide turnover in one and the same member state.³⁶ Although, this is quite problematic theoretically since Commission-jurisdictional notice from 2008³⁷ does not actually make clear if the two-thirds rule should be examined separately from all the other jurisdictional thresholds or are they combined in their applicability. If the case is that they are connected, thus, the implication would be that two-thirds rule apply alone to concentrations which have union dimension.³⁸ The capacity of merger control does not stop there, it was perceived that if the case would be that certain concentration would not reach the thresholds set in article 1(2) it does not automatically mean that concentration cannot be examined by the laws of member states.³⁹ The second set of thresholds, therefore, were adopted to catch particularly concentrations which may have an impact in multiple member states.⁴⁰ If the concentration is not caught by the article 1(2) it may still have a Union dimension where; the combined aggregate worldwide turnover of all the undertaking involved is more than 2500 million EUR, or in each of at least three member states, the combined aggregate of all the undertakings involved is more than 25 million, and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 100 million.⁴¹ In essence, the abovementioned thresholds are used to dictate jurisdiction and not to estimate other criteria's and their calculation is essentially based on turnover thus purely quantitative.⁴² Besides, these traditional thresholds, EUMR provides, there is another safeguard for the member states.⁴³ The Commission can, at the appeal of a member state examine particular concentration even when the thresholds are not exceeded, hence, no Union dimension exists.⁴⁴

The effectiveness of purely turnover-based jurisdictional threshold is not although something considered self-evident. Current turnover-based-thresholds under the EUMR may not capture all the relevant concentrations in the market. The emergence of different business models which, we have been used to in the market has influenced this discussion. Re-evaluation may be needed. The author will focus on this issue in the following chapters.

³⁶ Jones, A. Sufrin, B. (2011), *supra nota* 10, p 876.

³⁷ Commission Consolidated Jurisdictional Notice (2008). *Supra nota* 28.

³⁸ Broberg, M.P. (2013). *The European Commission's Jurisdiction to Scrutinise Mergers*. 4th Edition European Monographs Series Volume 16 The Hague; New York: Kluwer Law International. P 24-25.

³⁹ Commission Consolidated Jurisdictional Notice (2008). *Supra nota* 28, p 30.

⁴⁰ Craig, P. de Búrca, G. (2011), *supra nota* 25, p 1051-1052

⁴¹ Council Regulation No 139/2004 *supra nota* 6, article 1(3).

⁴² Commission Consolidated Jurisdictional Notice (2008). *Supra nota* 28, p 31.

⁴³ Council Regulation No 139/2004 *supra nota* 6, article 22 and article 4(5).

⁴⁴ Cook, C.J., Kerse, C.S. (2000), *Supra nota* 24, p 59.

1.2. Procedure

The whole European merger control capability is built upon the pre-notification obligation prior to the concentration.⁴⁵ Pre-notification is covered in the EUMR article 4(1).⁴⁶ Article prescribes that every concentration, where the Union dimension is evident must be notified prior to its fulfilment and following the conclusion of the agreement.⁴⁷ If the undertaking does not obey the obligation to notify, the repercussions in the form of severe fines may be imposed.⁴⁸ Immediately after the Commission receives the notification they have to examine it.⁴⁹ The notification brings about a market investigation which to the extent of the investigation is based on the intricacy and how significant merger is in question.⁵⁰ Every concentration falling within the Commission jurisdiction must be notified furthermore, EUMR exemplifies the correct period when it should be made and as well which party is obliged to make it.⁵¹

1.2.1. Notification

The Commission does not start reviewing the merger until they have all the relevant material for the assessment of the merger.⁵² Competence of the Commission to deny the notification on the grounds that it is lacking does not come from the EUMR but from the Commission Regulation No 802/2004 of implementing council regulation 139/2004 on the control of concentrations.⁵³ Specifically, Article 4(1) and 5(2) of regulation 802/2004 lay down this.

Notification of concentration can also be done before the act which eventually constitutes a merger.⁵⁴ However, filing for notification at this early stage comes with condition that the parties manifest their real intention to follow through with the plan.⁵⁵ After that, reasoned submission by

⁴⁵ Craig, P., de Búrca, G. (2011), *supra nota* 25, p 1055.

⁴⁶ OJ L 24, 29.1.2004.

⁴⁷ Craig, P., de Búrca, G. (2011), *supra nota* 25 p 1055.

⁴⁸ *Ibid.*

⁴⁹ Council Regulation No 139/2004 *supra nota* 6, article 6(1).

⁵⁰ Calviño, N. (2011). When do Mergers Raise Concerns? An Analysis of the Assessment Carried out by the European Commission under the New Merger Regulation. – *Journal of European Competition Law & Practice*, Vol 2, issue 6, p 521–528.

⁵¹ Lorenz, M., (2013). *An Introduction to EU Competition Law*. New York: Cambridge University Press. p 294.

⁵² Navarro, E., Font, A., Folguera, J., Briones, J. (2005), *supra nota* 11, p 359.

⁵³ Commission regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004.

⁵⁴ Council Regulation No 139/2004 *supra nota* 6, article 4(1).

⁵⁵ Jones, A., Sufrin, B. (2011), *supra nota* 10, p 898.

the concerned party can be made, the Commission informs the member state involved. Party with the notification obligation varies depending on the type of transaction it is.⁵⁶ Typically, circumstances, where joint notification would be necessary are the mergers where two or more previously independent undertakings or parts of them merge or acquire the control.⁵⁷ In case of a merger, notification must be done by the merging parties and in the event of an acquisition, notification performed by the acquirers, otherwise if the concentration does not consist the element of the joint venture the one undertaking seeking the control has the notification obligation.⁵⁸

The Commission regulation 802/2004⁵⁹ along with the standard Form CO⁶⁰ set the guidelines how the notification should be made and the kind of information must be included.⁶¹ Form CO is not, however, a form in the traditional sense of the form, rather it is a guide which dictates how the information which the Commission request should be given.⁶² The Commission requests a significant amount of information about the case, for them to reach a decision on the matter.⁶³ The Commission may request details about the concentration, information about the involving parties, and outlook of the market among other things.⁶⁴ Safeguard set for the notifying parties in respect, from providing information can be found from the regulation 802/2004,⁶⁵ According to it, notifying party can disagree, that certain piece of information is relevant to the Commission's investigation.⁶⁶ If the Commission agrees with the notifying party, in accordance to the principle of proportionality, this provision should grant the relief for that particular information,⁶⁷ in addition, an exemption which can be found from Annex II of the regulation 802/2004⁶⁸ allows potentially, shorter version of notification in certain cases. This method can be used if the joint venture of multiple undertakings is not notably present in the European economic area (EEA) and regardless of this fact it is still falling within in Union dimension and therefore under the

⁵⁶ *Ibid.*

⁵⁷ Council Regulation No 139/2004 *supra nota* 6, article 4(2)

⁵⁸ *Ibid.*

⁵⁹ OJ L 133, 30.4.2004,

⁶⁰ *Ibid.*, Form CO is set out in the Annex I

⁶¹ Jones, A., Sufirin, B. (2011), *supra nota* 1 p 899

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ OJ L 133, 30.4.2004.

⁶⁶ Navarro, E., Font, A., Folguera, J., Briones, J. (2005), *supra nota* 11, p 357.

⁶⁷ *Ibid.*

⁶⁸ OJ L 133, 30.4.2004.

jurisdiction of the Commission.⁶⁹ For this option to be available to the notifying parties, it has to be first approved by the Commission.

The pre-notification, in fact, is beneficial for both the Commission and the notifying party by virtue of which the Commission gets heads up before the concentration comes to effect and thus is able to prepared measures of precaution, on the other hand, notifying party receives prior indication of the Commission perspective about their case along with details undertaking may have to provide for the Commission ahead of time.⁷⁰

1.2.2. Investigation

Concentration with Union dimension or concentration which is about to be examined by the Commission is not to be carried out prior the notification or until it has approved to be appropriate for the common market.⁷¹ Generally, concentration is postponed as far as the investigation goes on. This general principle is prescribed in article 7(1) of the EUMR.⁷² The article indicates complete suspensory term before the Commission has reached express⁷³ or implied⁷⁴ choice about the concentration in question.⁷⁵ The repercussion of not complying with the suspensory term may lead to a serious fine imposed by the Commission.⁷⁶ The EUMR provides two exceptions on the suspensory term; article; 7(2)⁷⁷ provides that public bids or multiple sets of transactions in securities along with those which are exchangeable to other securities accepted to trading comparatively to those traded in stock exchange, which has been notified, shall not impose with the suspensory term, as long as, purchaser does not apply the voting rights concerning those securities.⁷⁸ The purchaser can, however, exercise the voting right if the agenda behind is to preserve the full value of the asset on the grounds that, the permission is granted by the Commission.⁷⁹ According to article 7(3),⁸⁰ the second exemption is,

⁶⁹ Navarro, E., Font, A., Folguera, J., Briones, J. (2005), *supra nota* 11, p 358.

⁷⁰ *Ibid.*, p 356.

⁷¹ Jones, A., Sufirin, B. (2011), *supra nota* 10, p 902.

⁷² OJ L 24, 29.1.2004.

⁷³ Council Regulation No 139/2004 *supra nota* 6, articles 6(1)(b) and 8(1), (2).

⁷⁴ *Ibid.*, article 10(6).

⁷⁵ Navarro, E., Font, A., Folguera, J., Briones, J. (2005), *supra nota* 11, p 373.

⁷⁶ Council Regulation No 139/2004 *supra nota* 6, article 14.

⁷⁷ *Ibid.*, article 7(2).

⁷⁸ Navarro, E., Font, A., Folguera, J., Briones, J. (2005), *supra nota* 11, p 374.

⁷⁹ *Ibid.*

⁸⁰ OJ L 24, 29.1.2004.

if the party has requested special permission for it, to the Commission and they have granted this request.⁸¹ Grant of the request is not something that is self-evident.⁸² The Commission must have a reasonable base for the derogation of the suspensive effect.

As earlier mentioned, the Commission must start examining notification immediately after they receive it. Decision making about certain concentration can be divided into two investigation phases. Decisions about particular concentrations which go through phase I investigation, usually are made within 25 days following receipt of exhaustive notification.⁸³ In certain cases, this period can be extended to 35 working days if the notifying party provides assurance which makes the concentration compatible with the market.⁸⁴ The Commission adopts its decision under article 6 of EUMR. The Commission decision can entail that concentration is cleared completely and thus compatible with the common market or the concentration is cleared on certain condition which requires reparation from the notifying party.⁸⁵ If the Commission for some reason is unsuccessful to adopt the decision in time, the concentration in question is perceived to be compatible with the common market.⁸⁶ Particular, Concentration may still cause concerns after the phase I investigation, that is why Commission may initiate phase II investigation.⁸⁷

Phase II investigations have gained a quite unfavourable reputation as being time-consuming and requiring a large amount of manpower, the popular belief amongst the concerned parties is that phase II investigation should be refrain from.⁸⁸ Supposing that the Commission open the phase II of the investigation proceedings, the decision on the concentration must be reached within 90 working days.⁸⁹ Phase II time period may be extended in the same manner as phase I. When the undertakings concerned provide assurances about the concentration, the time period may be extended by 15 days.⁹⁰ It is not completely overruled that the time period in the phase II cannot be lengthened further. In complicated cases, the time period can be extended to be as long as 125

⁸¹ Navarro, E., Font, A., Folguera, J., Briones, J. (2005), *supra nota* 11, p 374.

⁸² *Ibid.*

⁸³ Council Regulation No 139/2004 *supra nota* 6, article 10(1).

⁸⁴ *Ibid.*

⁸⁵ Council Regulation No 139/2004 *supra nota* 6, Article 6(1).

⁸⁶ *Ibid.*, article 10(6).

⁸⁷ *Ibid.*, article 6(1)(c).

⁸⁸ Drauz, G., Mavroghenis, S., Ashall, S. (2012). Recent Developments in EU Merger Control. – *Journal of European Competition Law & Practice*, Vol 3, Issue 1, p 52–75.

⁸⁹ Council Regulation No 139/2004 *supra nota* 6, article 10(3).

⁹⁰ *Ibid.*

days, however, even this is not exhaustive.⁹¹ if the Commission does not reach a decision in this time period, concentration is conceived to be compatible with the common market.⁹² After the phase II investigation, the Commission may decide that the concentration is compatible with the common market or the Commission can impose certain terms in order that, the concentration in question can be cleared conversely, the concentration ruled to be incompatible with the common market.⁹³

The Commission has a difficult task at hand when comprehensive assessment of certain concentration must be made so rapidly. The EUMR gives the Commission the capability to collect information from the parties, as well as, from third parties.⁹⁴ The Commission has several ways to collect the information they need; by simply requesting the information or by formal decision sent to the relevant party, or by means of inspections whether they are unannounced, or the concerned parties are aware of it ahead of time.⁹⁵ in some cases, an oral interview may be held with the purpose of getting the personal opinion of the concerned parties.⁹⁶

⁹¹ Jones, A., Sufrin, B. (2011), *supra nota* 10, p 904.

⁹² *Ibid.*

⁹³ Council Regulation No 139/2004 *supra nota* 6, article 8(2), (6).

⁹⁴ Jones, A. Sufrin, B. (2011), *supra nota* 10, p 904.

⁹⁵ Council Regulation No 139/2004 *supra nota* 6, article 13.

⁹⁶ Jones, A. Sufrin, B. (2011), *supra nota* 10, p 905.

2. THE NEED TO REFINE JURISDICTIONAL THRESHOLDS

Until now, this paper has concentrated on the current approaches of the European merger control. Procedural and jurisdictional aspects of the present merger control have been briefly detailed still, the current views prescribed above are not ideas which are immune to reforms. All things considered, the common consensus is still, that EUMR works well and ensures the healthy internal market, however, the Commission recognizes opportunities for enhancement.⁹⁷ In fact, lately, the European Commission has taken the initiative and try to evaluate the operability of the merger control as well as, find specific areas that need development in regards to procedural clarity.⁹⁸ The appropriate precedent which shows the initiative that the Commission has taken is the 2014 white paper.⁹⁹ The objective of this document was to clarify the current merger control and to cut back the possible administrative and financial strain which the merger control procedure may encompass.¹⁰⁰ To support that white paper public consultation was sent to concern target groups. the Commission received rather positive feedback out of it and the respondents mainly agreed with reform proposals of the Commission.¹⁰¹ In this thesis, the author will not get into any detail of that particular public consultation, due to space restraints of this paper.

Although the Commission public consultation got a quite positive response it also raised certain new issues.¹⁰² One of those issues was the effectiveness of the present turnover based threshold.¹⁰³ The question which was heightened was whether the current threshold based on the turnover of the undertakings actually capture all the relevant concentration which can distort competition, and affect the union market.¹⁰⁴ This debate stemmed from the recent acquisition of an asset which was indeed significant in the market but however, felled below the current jurisdictional thresholds.¹⁰⁵

⁹⁷ The European Commission. Questionnaire document, (2016). *Evaluation of procedural and jurisdictional aspects of EU merger control*. accessible:

http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, 22.02.2018.

⁹⁸ *Ibid.*

⁹⁹ Commission Staff working Document 449. (2014) *Towards more effective EU merger control*. Accessible:

http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf, 17.03.2018.

¹⁰⁰ *Ibid.*

¹⁰¹ The European Commission. Questionnaire document (2016). *Supra nota 97*.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

In the following chapter, focus area will be the reasons behind the issue raised, also, this chapter will give an overview of the digital economy and why specifically this economy sector was significant for the emergence of this issue. The last section of this chapter will go through more comprehensively the Commissions public consultation and moreover, the responses which it and gathered from different target groups representing many different sectors.

2.1. Digital economy and the challenges it imposes

The efficiency of European merger control has been questioned from many different directions,¹⁰⁶ the European Commission, however, has achieved great prestige for not taking a soft attitude towards the enforcement of merger control.¹⁰⁷ This conclusion can be drawn from the number of phase II investigation carried out in previous years.¹⁰⁸ In addition to the strong practice on enforcement of merger control, the Commission is constantly considering ways to better and develop the scope of the EU merger control for it to capture types of transaction that maybe distort competition which also perhaps could have pass through the merger control scheme in the past.¹⁰⁹

The EUMR now empowers the Commission with investigative authority when the particular concentration has the union dimension. According to EUMR, present provision concentration has a union dimension when the turnover of the concerned undertaking reaches a certain limit.¹¹⁰ But what if, the concentration is significant in the internal market, still even when one of the undertakings turnover is not considerable, especially, in respect of current thresholds. These circumstances have appeared notably in the digital economy.¹¹¹ The common thing in this sector is the act of starting the businesses with the objective of gaining large numbers of users or

¹⁰⁶ Werner, P., Clerckx, S., de la Barre, H, (2018). Commission Expansionism in EU Merger Control – Fact and Fiction. – *Journal of European Competition Law & Practice*. Vol. 9, issue 3, Oxford University Press. p 133–145, referenced in (J. Stiglitz, America Has a Monopoly Problem – and It’s Huge, The Nation, 23 October 2017.).

¹⁰⁷ Cook, C., Novak, V., Frisch, S, (2017). Recent Developments in EU Merger Remedies. – *Journal of European Competition Law & Practice*, 2017, Vol. 8, No. 5, Oxford University Press. p 341–360.

¹⁰⁸Werner, P., Clerckx, S., de la Barre, H. (2018), *Supra nota* 106.

¹⁰⁹ *Ibid.*

¹¹⁰ Council Regulation No 139/2004 *supra nota* 6, Article 1 (2) and (3)

¹¹¹ The European Commission. Questionnaire document (2016), *Supra nota* 97, p 3

subscribers, and the aspiration of making a significant amount of revenue is ancillary.¹¹² In other words, these particular business models at the beginning are producing minimal revenue even though the service may be innovative and promising. The data which the company has obtained is in a sense, a better indication of the company value than the turnover which the company has accomplished to secure.¹¹³ Another concerning factor from the perspective of merger control is the fact that big corporation that has already obtain significant market shares in the economy are acquiring these start-up companies, which are using above mentioned business models in their companies.¹¹⁴ Now the European Commission has the question on its hand, whether the corporation obtaining a significant amount of data through the acquisition of these companies have to get the endorsement of the Commission even though, the prescribed turnover thresholds are not reached.¹¹⁵

Assessing whether a merger which occurs in the digital economy is negative or positive one, is a question which is complex to determine, insomuch as, that big corporation acquiring smaller company can deteriorate competition theoretically in a short-term, however, in the long haul it can be also positive on the account that two companies are joining forces which foster innovations.¹¹⁶ Big corporation buying smaller firms may saw as being a way to shut down a potential competitor in the future, considering that if the smaller companies would have been developed in the course of time possibly as big as the acquirer.¹¹⁷ This type of opposing and preventive take-over can happen in the digital economy on the grounds that competition, especially in this market, is built upon finding new consumer basis and creating constantly new markets.¹¹⁸

In the current approach, the notification obligation to the competition authorities is based on the turnover of the parties, nonetheless, due to the challenges that these types of takeovers impose

¹¹²*Ibid.*

¹¹³Capobianco, A., Nyeso, A. (2018). Challenges for Competition Law Enforcement and Policy in the Digital Economy. – *Journal of European Competition Law & Practice*, Volume 9, Issue 1. Oxford University Press. p 19-27.

¹¹⁴*Ibid.*

¹¹⁵ Davilla, M. (2017). Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules. – *Journal of European Competition Law & Practice*. Volume 8, Issue 6, Oxford University Press, p 370-381.

¹¹⁶Capobianco, A., Nyeso, A. (2018), *Supra nota* 113.

¹¹⁷*Ibid.*

¹¹⁸*Ibid.*

the discussion of complementary threshold has surfaced.¹¹⁹ The magnitude of the figures which these smaller companies are acquired is suggesting that additional threshold based on the value of the transaction perhaps is necessary.¹²⁰ In the digital economy value of the transaction which the target company is acquired can be considered to be a better indication of commercial value compared to the turnover which these target companies are gaining at that time.¹²¹ These transactions could be now overlooked by the EUMR, as a result of the small turnover of the target company still, carefulness is necessary before major changes in the merger control can be made.¹²² One could take the view that the available structure of the threshold test is not evaluating the relevant factors.¹²³ Turnover threshold test, however, is a test which is practical after all, whether the parties have aggregated amount of fund is an understandable concept and without difficulty identifiable also.¹²⁴

As an illustration of these type of transaction, we take a closer look at the acquisition of WhatsApp by Facebook.¹²⁵ The case was particularly intriguing and even recently once again discussed.¹²⁶ This acquisition particularly was one of the reasons behind the new evaluation of current threshold system and the public consultation initiated by the European Commission.¹²⁷ although, the 2014 public consultation was not the first time when the threshold structure efficiency is evaluated. Previous assessment dates back to 2008 where the threshold system found to be appropriate for the digital economy.¹²⁸

Both Facebook and WhatsApp were operating in the same market area. They both were the producers of an application for smartphones with the purpose of corresponding messages, videos, pictures and voices via the internet.¹²⁹ Facebook's whole operation did not however completely base on the Facebook Messenger application, after all, they also run notable social

¹¹⁹ *Ibid.*

¹²⁰ Capobianco, A., Nyeso, A., (2018). *Supra nota* 113.

¹²¹ *Ibid.*

¹²² K, Massimiliano, (2015). European Union Competition Law in the Digital Era. – *Zeitschrift für Wettbewerbsrecht*. Issue 4, p. 17.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Case COMP/M.7217 (2014), *supra nota* 9.

¹²⁶ European Commission press release. (2016). *Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover*. Accessible: http://europa.eu/rapid/press-release_IP-17-1369_en.htm. 17.03.2018.

¹²⁷ M, Davilla. (2017), *Supra nota* 115.

¹²⁸ Commission staff working paper accompanying the Communication from the Commission to the Council - Report on the functioning of Regulation No 139/2004 {COM (2009)} 281 final.

¹²⁹ Case COMP/M.7217 (2014), *supra nota* 9. p 2-3.

media platform. What both undertakings had although in common was the substantial user base they have in their possession. Statistically, when the Commission did make its decision, Facebook social media platform was in the use of 1,3 billion people internationally out of those users, 250-350 million people were using also the Facebook messenger app.¹³⁰ WhatsApp respectively had 600 million users globally.¹³¹ The acquisition of WhatsApp by Facebook value was 19 billion dollars.¹³² The actual pre-notification of the concentration did come from Facebook part taking the advantage of the one-stop-shop principle which the EUMR article 4 provides.¹³³ Voluntary pre-notification by the Facebook might have been a tactical one, whereas, this way Facebook was able to avert many different and separate investigations all over Europe, the situation would have been different if the Commission would have the jurisdiction to review the acquisition. Considering the fact that this particular acquisition did not fall within the traditional jurisdictional thresholds due to the WhatsApp small turnover at the time which add up to 10 million dollars annually.¹³⁴ It still did not, however, prevent case to be hand over to the Commission. The referral was supported by the article 4(5) of EUMR, where there is a concentration in question and it could be reviewed under the competition laws of at least of three-member states, then a referral is possible. In the end, notification was as said made by Facebook.¹³⁵

After the Commission established the existing union dimension of the acquisition they dove into examining the relevant market which consists of the relevant product market along with the geographic market.¹³⁶ When it comes to the relevant product market the Commission limit it, to the extent of the platform where these types of apps tend to be used.¹³⁷ The two WhatsApp and Facebook messenger are consumer connection application.¹³⁸ Geographically, one and the other influence is not insignificant, and the parties influence in the market may be actually more substantial in the EEA compared to the global spectrum.¹³⁹ Thereafter, the Commission begins to assess whether these two parties are actual competitors in the market. The Commission settled

¹³⁰ Ocello, E., Sjödin, C., Subočs, A. (2015). What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case. – *Competition Merger Brief*. Issue 1. p 2.

¹³¹ *Ibid.*

¹³² Case COMP/M.7217 (2014), *supra nota* 9, p 2.

¹³³ E, Ocello, C, Sjödin, A, Subočs. (2015), *supra nota* 130, p 3.

¹³⁴ Werner, P. Clerckx, S. de la Barre, H. (2018), *Supra nota* 106.

¹³⁵ Case COMP/M.7217 (2014), *supra nota* 9, p 2.

¹³⁶ *Ibid.*, p 4.

¹³⁷ *Ibid.*, p 4-6.

¹³⁸ *Ibid.*, p 3-4.

¹³⁹ *Ibid.*, p 7.

during the assessment of the concentration that the Facebook and WhatsApp are not close competitors furthermore, the reasoning of this decision was that regardless of this acquisition consumers will have a variety of other consumer communication application in their disposal, therefore, this acquisition alone is not capable shutting competitors from the market.¹⁴⁰ Evaluation if the parties are close competitors focused along with consumer communication market, also in social networking services and online advertising services market.¹⁴¹ Yet, anything deriving from the investigation of these subject matters did not show elements which indicate competition concerns and ultimately the Commission did not obstruct this acquisition.¹⁴²

From the perspective of this paper and the research question of the thesis, this case is certainly landmark case on the basis that, purely turnover based threshold could not capture this significant transaction, however, through the EUMR case referral mechanism¹⁴³ concentration felled within the Commission jurisdiction. Importance of the transaction manifest from the considerable user base of the companies and also from the value of the transaction. This acquisition really initiated the discussion whether the present jurisdictional threshold based on the turnover of the parties is the best approach to deal with concentration occurring in the digital economy.

2.2. The Commission's public consultation and the responses

The relevant public consultation from this thesis standpoint was an aftereffect of the previous document deriving from the Commission. The Commissions white paper "*Towards more effective merger control*"¹⁴⁴ was a careful evaluation of the present merger control and the white paper consists several proposals with the intention to make the EU merger control more effective.¹⁴⁵ One of those proposals is improving the current case referral mechanism with the objective of capturing specifically the concentrations which have somehow have succeeded to break away from the turnover test.¹⁴⁶ In a sense, the commission acknowledges with this statement insufficiency of the test as regards to certain concentrations.

¹⁴⁰ Case COMP/M.7217 (2014), *supra nota* 9, p 20-22.

¹⁴¹ *Ibid.*, p 27-30, 30-35.

¹⁴² *Ibid.*, p 36.

¹⁴³ Council Regulation No 139/2004 *supra nota* 6, articles 4(4), 4(5), 9, and 22.

¹⁴⁴ Commission Staff working Document 449. (2014), *Supra nota* 99.

¹⁴⁵ *Ibid.*, p 4.

¹⁴⁶ *Ibid.*, p 16.

October 2016 the Commission started public consultation¹⁴⁷ seeking the opinion from the ones with a vested interest with regards to the functionality of procedural and jurisdictional aspects of merger control.¹⁴⁸ One of the main functionality among others which was put under the evaluation was the effectiveness of purely turnover-based jurisdictional threshold of the EUMR.¹⁴⁹ In the questionnaire document¹⁵⁰ relating to this consultation, the effectiveness of the matter is analysed. In the questionnaire, the issue is raised explicitly, whether the current jurisdictional threshold system is able to capture all the relevant transactions which may affect the internal market.¹⁵¹ This issue raised corresponds with the statement made by Commissioner Vestager's in her speech on the 10th of March 2016.¹⁵² The Commissioner in her speech refers to the WhatsApp acquisition by Facebook, which I covered in the previous chapter, to that end, the Commissioner recognize the issue in hand, regarding the jurisdictional thresholds.¹⁵³

Although in this thesis, the focus has been on the digital economy, the public consultation as well as the Commissioner speech, another economic sector is heightened, the pharmaceutical industry.¹⁵⁴ Similarly, as the digital economy, the case might that particular pharmaceutical company own commercial rights to a certain innovative new breakthrough drug which has not hit the market yet, therefore, gained modest revenue if any at all, later that company is acquired by another big corporate in the same industry.¹⁵⁵ By the same token, the circumstance may be that target company is focused on research and development and the research that company has done holds enormous commercial value.¹⁵⁶ Recent years have shown us many instances where these type of transactions have occurred.¹⁵⁷ The context is once again same as in the illustration of WhatsApp acquisition by Facebook, due to the target company's low turnover, notification

¹⁴⁷ European Commission. (2016), *Mergers: Commission seeks feedback on certain aspects of EU merger control*. Accessible: http://europa.eu/rapid/press-release_IP-16-3337_en.htm, 11.03.2018.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ The European Commission. Questionnaire document (2016), *Supra nota 97*.

¹⁵¹ *Ibid.*, p 3.

¹⁵² European Commission. (2016). *Refining the EU merger control system*. Accessible: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en. 11.03.2014.

¹⁵³ *Ibid.*

¹⁵⁴ The European Commission. Questionnaire document. (2016), *Supra nota 97*; European Commission. Vestager speech (2016), *supra nota 152*.

¹⁵⁵ European Commission. Vestager speech (2016), *supra nota 152*.

¹⁵⁶ The European Commission. Questionnaire document (2016). *Supra nota 97*, p 20

¹⁵⁷ Kurane, S., Hirschler, B. (2015). *AbbVie boosts cancer drug pipeline with \$21 billion Pharmacyclics deal*. Accessible: <https://www.reuters.com/article/us-pharmacyclics-m-a-abbvie/abbvie-boosts-cancer-drug-pipeline-with-21-billion-pharmacyclics-deal-idUSKBN0M109920150305>, 19.03. 2018.

thresholds of EUMR are not reached. The commission in the public consultation put forth then, the question is the turnover based threshold system inefficient for these types of transactions.¹⁵⁸ The Commission also is asking in the consultation from the stakeholder's point of view what could be the other economic sectors besides the pharmaceutical and digital economy named previously which could be implicated in this potential inefficiency.¹⁵⁹

The EUMR currently catches concentration if the thresholds set in article 1 of EUMR applies to the particular case.¹⁶⁰ In the consultation, the proposal of a new threshold model is presented which is founded on alternative grounds compared to the current approach, this alternative ground may be the value of the transaction.¹⁶¹ Transaction value-based threshold is the suggestion explicitly named in the document although, the document itself does not get into specifics, such as, what transaction value threshold might be amounted to. In case that this type of approach would be adopted The European Commission suggests that this threshold model would deal with those transactions which have a considerable effect on the EEA.¹⁶² Essentially, the Commission is asking whether this inclusion should be made to the EUMR or if the case referral system along with the national merger control rules is sufficient enough to tackle concentration without the union dimension.¹⁶³ Even the Commissioner Vesteger has shown her support to transaction value-based threshold by acknowledging that this complementary model could separate significant transactions from others.¹⁶⁴ In conjunction, the Commissioner also be of the opinion that transaction must have evident *local nexus*, meaning that considerable attachment to EEA and the threshold must assess to be at reasonable standing.¹⁶⁵

The consultation period of the public consultation ended in February 2017.¹⁶⁶ The Commission received an overwhelming number of responses from many different entities with a vested interest, from both public and the private sectors.¹⁶⁷ Some of the responses, although, not

¹⁵⁸The European Commission. Questionnaire document (2016), *Supra nota* 97, p 20.

¹⁵⁹ *Ibid.*

¹⁶⁰ Council Regulation No 139/2004 *supra nota* 6.

¹⁶¹ The European Commission. Questionnaire document (2016), *Supra nota* 97.

¹⁶² *Ibid.*, p 25.

¹⁶³ European Commission. (2017). *Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control*. Accessible: http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf. 11.03.2018

¹⁶⁴ European Commission. Vestager speech (2016), *supra nota* 152.

¹⁶⁵ *Ibid.*

¹⁶⁶ European Commission. Summary of replies, (2017), *supra nota* 163, p 1.

¹⁶⁷ *Ibid.*

representing the majority of the people, reply to the questionnaire agreeing with the statement that the present notification thresholds are not sufficient, as well as, to the suggestion of additional complementary threshold base on the value of the transaction.¹⁶⁸ Many of the public entities were able to pinpoint this issue to be clear enforcement gap in the EUMR.¹⁶⁹ Areas of the economy where the insufficiency of the threshold system exist according to the responding entities are indeed the digital and pharmaceutical economies though, patent portfolio acquisitions also are mentioned by these respondents.¹⁷⁰ A patent portfolio is a group of complementary patents which is own by one business. One can build a patent portfolio by either patenting own ideas or acquiring patent rights from other companies.¹⁷¹ In other words, the company acquiring another company acting in the same market area receives the patent right through the concentration and thus expands its patent portfolio. Company growing its patent portfolio can easily foreclosure the market by doing so.¹⁷²

The minority of NCA's and other public authorities believe that complementary transaction value-based threshold is imperative furthermore, these entities suggest in case of adopting abovementioned jurisdictional threshold it should be designated adequately at a high level.¹⁷³ Additionally, the minority of the respondents see the functioning of jurisdictional thresholds being the problem.¹⁷⁴ These bodies justify their belief, attributing to recent acquisitions of small companies by big internet companies comparable to the acquisition Facebook/WhatsApp.¹⁷⁵ An interesting suggestion given by one stakeholder was instead of introducing notification threshold based on a volume of transaction, rather better solution would be adopting notification necessity based on the count of consumers which are affected by the particular merger.¹⁷⁶ To put it differently, if we take the Facebook/WhatsApp acquisition,¹⁷⁷ the user base of the companies was a considerable one, even without the acquisition. In accordance with this suggestion setting notification requirement base on the users or consumers of the merging companies may be a better solution than a transaction value-based threshold especially, in respect of mergers in the

¹⁶⁸ European Commission. Summary of replies, (2017), *supra nota* 163, p 4.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Carson, J., Nelson, E., Durrance, N. (2004). How to Effectively Build and Protect Business Assets with a Strategic Patent Portfolio. – *Intellectual Property Law Bulletin*, vol. 9, no. 1, p 1-10.

¹⁷² *Ibid.*

¹⁷³ European Commission. Summary of replies, (2017), *supra nota* 163, p 5.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Case COMP/M.7217 (2014), *supra nota* 9.

digital sector. In this economic sector better indication of commercial value might be the data which the particular company has managed to obtain.¹⁷⁸ The issue, therefore, is whether this notification threshold model suggested would be fitting only in the digital economy which was not the only problematic economy sector mentioned in this debate.

The minority of the respondents gone through had in common that they believed insufficiency exist in the EUMR and the complementary transaction value-based threshold may be necessary.

When it comes to the majority of respondents to the consultation consisting of many different actors both from the public and private sectors do not identify the enforcement gap designated being consequential one and being a matter, which needs legislative reform.¹⁷⁹ The reasoning behind this group of stakeholder's responses on the questionnaire was the confidence on EUMR case referral system jointly with member states own national merger control rules would be adequate to examine those circumstances where union dimension is not present.¹⁸⁰ Trust is put on the presumption that case would be examined at the national level or either be through referral examined by the Commission.¹⁸¹ The striking thing to see in this group responses is that some of them view that adopting notification thresholds base on the transaction value is still necessary in certain member states in order that here discussed high-value transactions are to be caught through the case referral mechanism.¹⁸² All things considered, replies classified among this group do not think notification threshold based on the value of transaction should be adopted.¹⁸³

Moreover, the respondent which did not trust on the inclusion of transaction value-based threshold into the EUMR affirms that factual confirmation of enforcement gap does not exist.¹⁸⁴ Besides, jurisdictional thresholds were not designed to catch all transaction with union dimension that is why EUMR incorporates case referral mechanism.¹⁸⁵ Case referral system aim is to assign the case to the authority which is better placed to act.¹⁸⁶ Some of the respondents also mention that the Commission should follow up on and evaluate the member states which have

¹⁷⁸ A, Capobianco., A, Nyeso. (2017) *Supra nota* 113.

¹⁷⁹ European Commission. Summary of replies. (2017), *supra nota* 163, p 5.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

added the transaction value-based threshold into their legal system.¹⁸⁷ These member states which have adopted discussed complementary threshold in their national merger control will be studied in greater detail in following chapters.

Basing the threshold on the purchase price of the company seem to be open to doubt from some of the stakeholder's viewpoint.¹⁸⁸ The assumption, that high purchase price indicates competitive significance is inaccurate to these respondents.¹⁸⁹ Determining what should the transaction threshold amount to is not something which can have a straightforward answer to these respondents.¹⁹⁰ Agreements of acquisitions tend to include quite complex terms which in time may alter the total sum of the purchase price.¹⁹¹ For instance, if we look at once again the Facebook/WhatsApp acquisition, the initially reported purchase price was 19 billion USD but due to the fact that Facebook shares were part of the payment, the total sum of the purchase price increased to 21.8 billion USD.¹⁹² Seeing that transaction value can fluctuate so freely fixing a clear threshold for a transaction may be an impracticable solution.

¹⁸⁷ European Commission. Summary of replies. (2017), *supra nota* 163, p 5.

¹⁸⁸ *Ibid.*, p 6.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Oreskovic, A., (2014). *Facebook's WhatsApp acquisition now has price tag of \$22 billion*. Accessible: <https://www.reuters.com/article/us-facebook-whatsapp/facebooks-whatsapp-acquisition-now-has-price-tag-of-22-billion-idUSKCN0HV1Q820141006>. 11.03.2018

3. THE IMPACT OF THE PUBLIC CONSULTATION AND THE EUMR CASE ALLOCATION

Being, that, in the previous chapter, outline of the public consultation and its feedback was covered, and as the majority of the respondents did not see the necessity to add the complementary threshold to the current notification system, this fact, however, did not stop certain merger control regimes to introduce transaction value-based threshold system into their own national system.

The discussion of the complementary threshold and particularly the Facebook acquisition of WhatsApp motivated the two Austria and Germany to react by introducing the new transaction value-based threshold.¹⁹³ The German merger law introduced a new merger control threshold 9 June 2017.¹⁹⁴ Essentially the new threshold system will be used as a backup threshold in case that the existing thresholds are not met. From 1 November 2017 as well, Austria added a new test into their merger control system which also will be based on the value of the transaction.¹⁹⁵

So far, this paper has not noted more than briefly the EUMR case allocation system which is believed to be the fill for the putative enforcement gap. In view of that, if there is a need to broaden the EU area of authority first, it is suitable to look at more closely the referral mechanism established in the EUMR. Their task is depending on the circumstances, for cases which missed the jurisdictional test of the EUMR to be referred to the Commission. Conversely, the circumstances might be that the case falls within EUMR jurisdiction but the case itself may be referred to NCA's.

In this following chapter first section, of the paper will give the reader brief overview how the two merger control regimes have implemented transaction value-based test into their merger control legislation. The second section will overview the EUMR's case referral mechanism.

¹⁹³ Flener, L. (2017). *New transaction-value-based test entails uncertainties for merger control*. Accessible: <http://www.fwp.at/en/legal-corner/new-transaction-value-based-test-entails-uncertainties-for-merger-control/>. 18.04.2018.

¹⁹⁴ Heinrich, C., (2017). *The New German Competition Law in a Nutshell*. Accessible: <https://www.lexology.com/library/detail.aspx?g=535d2bda-4598-413d-86c6-05b592b1c7b5>. 18.04.2018.

¹⁹⁵ Flener, L. (2017), *supra nota* 193.

3.1. New merger control rule in Germany and Austria

The ninth amendment to the German competition legal act covers *inter alia* the challenges that the digital economy imposes.¹⁹⁶ Prior to the intended amendment, German monopolies commission published a report.¹⁹⁷ The German monopolies commission is formed from self-reliant experts and their job description includes offering recommendations to German government regarding matters concerning competition law.¹⁹⁸ June 2015, a special report was published by them, in that paper, the monopolies commission recommends the act of introducing transaction value-based threshold to German legislator.¹⁹⁹ The German government agreed with the recommendation and launched the amendment to the present law.²⁰⁰ The new notification threshold planned to be adopted sets a notification obligation for transactions when their valuation surmounts to 400 million euros.²⁰¹

The amendment was purposefully made to object the takeover patterns that are now seen in the digital economy among other economy fields.²⁰² Considering that the digital economy is not the only field where these types of acquisition might happen it was important for German legislators when they were drafting this amendment that the new threshold would not be restricted to the digital economy only.²⁰³ At the same time, the planned amendment should make sure that the law fits its intended purpose.²⁰⁴ One could believe that straining small companies with merger control notification obligation is not something which is ideal.²⁰⁵ So, in theory, German merger control regime setting the transaction value threshold as high as 400 million is in a way a mean to exclude the acquisitions which are not as significant from the competition perspective.²⁰⁶

¹⁹⁶ Scholl, J. (2017) Why the New Merger Control Thresholds in Germany? – *Journal of European Competition Law & Practice*, Volume 8, Issue 4, p 219–220.

¹⁹⁷ *Ibid.*

¹⁹⁸ Monopolkommission. *Mission*. Accessible: <http://www.monopolkommission.de/index.php/en/monopolies-commission>. 24.04.2018.

¹⁹⁹ Scholl, J. (2017). *Supra nota* 196.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

The mentioned amendment did not come without worries what would it cause to the German economy. There was the question raised whether the new threshold impedes the growth of German start-ups, however, the thought that advocate against this statement is the fact, that United States merger control rules have consisted transaction value based threshold prior to this.²⁰⁷ furthermore, the United States thresholds that are based on the value of the transaction are set much lower than in the German law regardless of this, US legal system does not show any evidence that there is a risk for start-up companies to not grow.²⁰⁸

Similarly, the German adopts a new concept compared to their former approach that there can be concentration in question even though, a company has not gained any turnover, on top of that, they added that relevant market may exist and also determined for a company which business model includes providing their service without a compensation by their customer.²⁰⁹ These kind of interpretations by the courts were not previously possible.²¹⁰

The new provision in Germany declares that notification obligation is necessary when; combined aggregate worldwide turnover which is calculated each year of all the parties involved surpasses 500 million euros and turnover of at least one of the parties involved surpasses 25 million euros in Germany consequently, other parties involved besides the one mentioned latter has not surpass turnover amounting to 5 million euros and the financial worth of the purchase price surpassed 200 million euros additionally the target company has to have considerable presence in Germany.²¹¹

On the other hand, Austria implementation of transaction value-based threshold is nearly identical but the thresholds are set slightly lower. Merger is to be notified when the all the parties involved worldwide turnover surpasses 300 million euros their combined turnover is calculated year-by-year basis furthermore, all the involved parties combined turnover inside Austria surpass 15 million euros and when it comes to the value of the transaction, threshold is set in 200 million euros additionally, same way as the German legal system introduced the local nexus test Austria also did so.²¹²

²⁰⁷ Scholl, J. (2017). *Supra nota* 196.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Carlin, F., Burholt, C., Traugott, A., Hobson, J., (2017). *New value-based filing thresholds in European merger control regimes implications for healthcare and life sciences companies*. Accessible:

<https://www.lexology.com/library/detail.aspx?g=c85be631-c514-4f74-b7c6-8690de644f5d>. 26.04.2018.

²¹² *Ibid.*

But, adding a new threshold into the law is not something which should be taken lightly. Subjects of the law should have a legal certainty when the change concerns them. It seems that there are still questions that are unanswered relating to the new threshold as well as the assumption of practical difficulties in respect of the implementation of the discussed threshold. The German ninth amendment placing a review for all transactions that amount 400 million EUR may contain some practical difficulties. How would the transaction value be calculated?

Additionally, the new amendment also set complementary provision to the new threshold that requires target company to have a significant presence in Germany. How is that going to be interpreted and determined?

German act concerning merger control does, however, include calculation rule for transaction value threshold which states that you have to take into account essentially, all money which is paid by the acquirer to the seller as well as all the debt taking over by the acquirer.²¹³

The ninth amendment was followed by a supplementary document which purpose was to further clarify the new threshold. In this explanatory document, it states that all additional compensation must be taken into account when the value of the transactions is calculated although, the payments relating to royalties and compensations that have relations to some event or breakthrough is still unclear.²¹⁴ What can be observed from the few cases that the German federal competition office has reviewed, based on the new threshold is that they use a method of calculation of the value towards the additional compensation which the seller receives, in this method they count the difference of the current money that comes in, and the money that goes out in the extent of particular time period.²¹⁵ Austrian approach with regards to the value of the acquisition is not included in their merger control rules, however, Austria as well did publish a document with the purpose of clarifying the new law.²¹⁶ In that document, the approach is more or less similar to the German approach.²¹⁷

Then there is the second issue that is believed to create practical difficulties, determining when the target company has a significant presence in the German market. Purpose of this provision is

²¹³ Carlin, F., Burholt, C., Traugott, A., Hobson, J., (2017). *Supra nota* 211.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

to make sure that notification obligation would be imposed to those transactions that have an actual economic link to Germany and thus, affect the competition in the German economy.²¹⁸ The problem with this provision is that it leaves much room for ambiguity.²¹⁹ The explanatory notes do not give many answers that could make interpretation clearer.²²⁰ In these notes, an outline of circumstances where the presence might exist is detailed, even though they may be quite generic, as in, the undertakings having services that are consumed by the people in Germany.²²¹ Even, a company having a research and development facilities inside Germany might constitute a significant presence.²²² From the WhatsApp acquisition by Facebook, we learned that these attractive small target companies build their user base and that could be a better indication of commercial value than turnover. Therefore, the figure of users in Germany is a matter which may prove the significant presence additionally, how considerable is the statistic of the visitors of a certain company website is also mentioned in the notes.²²³ Austrian merger control approach is almost similar to the question of significant presence as Germany, although, owning just business buildings in Austria is enough of reason to rule that the company has a significant presence.²²⁴

These practical difficulties as small they seem may cause serious problems in a long haul. When the value of the consideration is plan to determined there are plenty variable factors listed above and on the other hand the question of significant presence as regards to the user base is something which still raises question despite Germany taking the approach that important is not the actual user base which the company has managed to obtain but rather, the potential user base that they could possibly obtain.²²⁵ Abovementioned difficulties have not gone unnoticed by both Austrian and German competition authorities. They have been in the works of co-publishing a common explanatory note that would be applied in both of their respective merger control regimes.²²⁶

²¹⁸ Janka, S., Stauber, P., (2017). *New transaction value threshold in German merger control*. Accessible: <https://www.noerr.com/en/newsroom/News/new-transaction-value-threshold-in-german-merger-control.aspx>. 27.04.2018.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Carlin, F., Burholt, C., Traugott, A., Hobson, J., (2017). *Supra nota* 211.

3.2. Case allocation system jointly with jurisdictional thresholds

In essence, the question which in this paper is tried to assess is whether the EU Commissions area of authority should be expanded. So far, this paper has only take into account one aspect of the jurisdictional test in detail, that is the turnover test in the EUMR. What has not still in this thesis covered thoroughly is the EUMR case referral system. EUMR also contains rules that make it possible to refer a concentration without union dimension to the Commission. The reason why the referral system is so important from the perspective of this thesis aim is due to the reasoning of the new threshold proposed. The transaction value based threshold was suggested for the believed enforcement gap in the current regime. Before there can be given an adequate answer for the research question case referral system must be first taken into account.

The EUMR article 4²²⁷ first of all, contains two referral types, first, out of the two categories is article 4(4). Article 4(4) permit the action for the parties of the concentration to notify the acquisition with a union dimension.²²⁸ Acquisition falls within the description of this article if it may considerably affect negatively to the competition of certain member state and it should be reviewed by that member state itself.²²⁹ Seeing that, this article is directed to the referral action in the member state in consideration of this thesis there is no further purpose to analyse this particular article more.

Article 4(5) is the same article that was also applied in the WhatsApp acquisition by Facebook. The difference between this article and the one discussed in the previous paragraph is that this article allows the referral to be made for the Commission, as well as, there not being in this article the criteria of established union dimension.²³⁰ For the article to apply, there first, must be a concentration complying with the definition of EUMR article 3 furthermore, another criteria for this referral method to be used is that the concentration in question has the merit to be under the review of three different member state NCA's.²³¹

²²⁷ Council Regulation No 139/2004 *supra nota* 6, Article 4

²²⁸ Jones, A., Sufrin, B., (2014). *EU Competition Law. Text, Cases and Materials*. 5th Ed. New York: Oxford University Press. p 1164

²²⁹ *Ibid.*

²³⁰ OJ L 24, 29.1.2004, Article 4(5)

²³¹ *Ibid.*

Article 4(5) at the time it was drafted, its main purpose was that it would be put into use when the particular concentration would not just affect the member state that it has the closest connection with but rather when the concentration could have cross-border influence.²³² Similar to WhatsApp acquisition by the Facebook or other possible digital economy mergers the actual place of establishment is irrelevant since these platforms and the services which these companies provide often have broad influence in multiple countries, therefore, triggering the merger review process in more than one country. Instead of initiating several investigations of certain concentration it would more fitting to launch all-encompassing investigation done by EU Commission.²³³

Article 4(5) referral is without a doubt, most frequently applied referral type. Since 2004 there have been made over 300 requests based on this article and less than 10 of those requests have been refused.²³⁴ Generally, it seems that the companies understand the benefits of one-stop-shop principles advantages compared to various different investigations happening all over the EU. To further illustrate the article 4(5) referral the Commission's case of acquisition of Navteq by Nokia²³⁵ is a great example of precedent concerning this referral type. Nokia, a big mobile and communication service had the acquisition of Navteq in the making. Navteq is a developer of navigation software. similar to the WhatsApp acquisition by Facebook this acquisition also was not captured by the jurisdictional thresholds set in the EUMR and thus, no evident union dimension exists in the case.²³⁶ Nonetheless, even that there was no union dimension in this acquisition it still could not miss the scrutiny which national merger regimes are able to impose, in fact, totally eleven EU merger control regimes were willing and planning to review this acquisition.²³⁷ In the end, concentration in question was reviewed by the Commission after referral with no opposition from the member states that were enabled to investigate the acquisition.²³⁸ On the grounds of, guidelines on the assessment of non-horizontal mergers and the Commissions prior precedents regarding the same subject matter the Commission ruled that this particular possible concentration would not cause impediment into the competition.²³⁹

²³² Council Regulation No 139/2004 *supra nota* 6, recital 16

²³³ Commission Notice on Case Referral in respect of concentrations. OJ C 56, 5.3.2005, paragraph 9-13.

²³⁴ European Commission. *Merger statistics*, Accessible: <http://ec.europa.eu/competition/mergers/statistics.pdf>. 29.04.2018.

²³⁵ COMP/M.4942. (2008). NOKIA/NAVTEQ.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

How then this referral type correlates with the research question of this paper? Before even considering adding a new jurisdictional test into the EUMR all the factors leading to jurisdiction belonging to the EU Commission must be evaluated. Seeing that, referral to the Commission can actually be beneficial for the undertakings compared to circumstances where it would be under the review and scrutiny of multiple member states applicability of EUMR is in reality, the better option for the undertakings. On the other hand, we can also see that even though turnover thresholds are not met there is still a significant possibility of the case to be referred. Jumping into conclusion without discovering all the layers of the jurisdictional test is not a reasonable thing to do.

Third referral type derives from the EUMR article 9.²⁴⁰ This article allows a referral when certain NCA appeal for a particular concentration that the concentration affects more significantly their region. Essentially, this referral type is for circumstances when the concentration would be better handled at the national level by the certain NCA. When a certain concentration is under the review of the Commission member state request it to be referred to them conforming with the article 9(2).²⁴¹

Before the Commission hands over the case to the member states, it has to first make sure that the concentration in question actually influences competition sphere of that member state.²⁴² If the abovementioned description applies with the case in hand the Commission has the option to refer the concentration to that member state completely or partially, however, the Commission might as well decide that they shall not refer it to the requested member state. The statistic, however, shows us that after the appeal of particular member state these cases commonly are referred either wholly or partially. Eventually, it all comes to the objective that each concentration should be reviewed at their appropriate level. This concept is compatible with the EU general principle which is also included in the article 5 of the treaty of European Union (TEU), the principle of subsidiarity.²⁴³ The competence should be with the EU when it's more suitable. When the purpose of the article 9 in a sense is that the control is given back, or in other words, protect the interest of the member states in circumstances where the concentration effect considerable the competition of that member state market. Broadening the jurisdiction, in theory,

²⁴⁰ Council Regulation No 139/2004 *supra nota* 6, article 9

²⁴¹ *Ibid.*

²⁴² Jones, A., Suftrin, B., (2016). *EU Competition law. Text, Cases and Materials*. 6th ed. New York: Oxford University Press. p 1111.

²⁴³ European union fact sheet. (2018). *The principle of subsidiarity*. Accessible: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf. 30.04.2018.

would lessen the amount of referral and thus, could take the influence from the member state which the article 9 now provides.

Finally, there is the article 22²⁴⁴ that constitutes the last referral type. In the beginning, the initial purpose was to enable member states to refer concentrations that were complex to the Commission. In fact, the first cases that were referred to the Commission were originating from member states that did not have merger control rules.²⁴⁵ In the EUMR, the purpose of this referral procedure is described to give member states the possibility to refer the cases that do not have evident union dimension but still may cause considerable impediment to the competition of that member state.²⁴⁶ Article 22 referrals are used in special circumstances and actually, the Commission has purposefully abstained from applying it.²⁴⁷ A situation where it would be acceptable to use this referral method is when concentration will cause considerable damage into that member states competition sphere, as well as to the internal market and it would be ideal that the concentration in question to be managed the case by the Commission.²⁴⁸

What was tried to illustrate in this chapter is that even though the article 1 of EUMR turnover based thresholds is missed there are still ways that particular concentration would end up to be reviewed by the Commission. There is not also a reason to question member states NCA's capabilities to pinpoint whether a concentration distorts competition or does not.

²⁴⁴ Council Regulation No 139/2004 *supra nota* 6, article 22.

²⁴⁵ See Cases, IV/M.784, Kesko/Tuko (1997) OJ L174/47 and Case Blokker/Toys'R'Us IV/M.890 (1998) OJ L316/1.

²⁴⁶ Council Regulation No 139/2004 *supra nota* 6, recital 15

²⁴⁷ Commission Notice on Case Referral in respect of concentrations. (2005). *Supra nota* 233. Paragraph 45.

²⁴⁸ *Ibid*,

4. CONCLUSION

The current test attached to the obligation to notify about the merger essentially is linked to the financial success of the merging parties. The recent case of WhatsApp acquisition by Facebook²⁴⁹ However, demonstrate for us that in every case financial success of the merging parties is not always the best type of manifestation of how considerable concentration is in question and also how impactful the concentration will be in regards to the EU common market besides, this particular acquisition also showed us that economic success of a company does not always correspond with actual value of the company. Facebook was willing to acquire a company that only generated 10 million euros with the purchase price of 19 billion euros. Therefore, one could assume even though a company is generating a limited turnover, it could still play a considerable part in the competition sphere of the certain distinct market.

There is a clear causal connection that if the one element of jurisdictional test is built on the basis of financial success or turnover of the merging parties and there are companies which are in fact considerable players in the competition sphere with relatively small turnover, that those concentrations cannot be captured by that aspect of jurisdictional test. These types of concentration are actually occurring in the economy and the Facebook/WhatsApp is a clear indication of that.

To oppose or cover this believed enforcement gap in the jurisdictional test implication that reform or supplementation for the test has been raised. What this supplementation should be according to some people, is adding a new jurisdictional threshold based on the value of the transaction. Before there can even be a discussion of adding anything new into the current merger control regime there first must be an undeniable fact that verifies that completed all elements encompassing test that is used to determine EU area of authority, does *de facto* miss these types of mergers. Secondly, there should be a demonstration, if the test actually has this mentioned enforcement gap that these discussed specific types of mergers should not be missed under no circumstances with regards to their significance and impact into the internal market.

As was discussed in the previous chapter, even though, the article 1 of EUMR test which is based on the turnover of the parties is for the reason of limited turnover of one of the parties

²⁴⁹ Case COMP/M.7217 (2014), *supra nota* 9.

missed, the concentration in question can be still referred to the Commission in accordance to referral mechanisms included in the articles 4 and 22 of the EUMR. If there is a concentration in hand which does not meet the jurisdictional threshold test and also does not fulfil the referral criteria's, would a concentration falling in that description, be one which EU merger control regime should be worrying about?

The current jurisdictional thresholds have been under contest and debate for a long time now. In fact, once before, the proposal of lowering the thresholds was suggested, this reform proposal did not get the approval of many member states.²⁵⁰ Member states have emphasized or given priority to the independence and the jurisdiction of their individual NCA's. This, along with article 9 of EUMR exhibit that centralized all-encompassing merger control regime governed by EU may not be something that member states would think is the best approach. Member states do indeed want to maintain their merger rules. The introductory text of the EUMR also separates the national merger authorities from the EU authorities, however, in the introductory text obligation is placed that close mutual effort of NCA's and Commission must be in each case, referral by article 22 support that mutual effort between the member state and EU.²⁵¹ The Commission-jurisdictional notice on case referrals clearly states accepted circumstances where the re-assigning the area of authority or jurisdiction, basically, it is when the other competition authority is simply more suitable to handle the concentration in question.²⁵² Suitability of the particular authority whether it is individual NCA's or the Commission is determined by certain criteria's such as, distinguishable factors of the particular case including the resources which certain have in their possession, for instance, manpower.²⁵³

Considering all the above, it seems that merger control in the EU is a product of a mutual effort by the member states and the Commission. Member state NCA's are more than capable to perform sufficient review of a concentration. If a certain concentration would not meet the article 1 of EUMR jurisdictional test and the jurisdiction is not re-assigned by a certain NCA's to the Commission that concentration it is still be handled by a qualified authority besides, if both the Commission and NCA's perform their duties as they are prescribed in the recitals of EUMR, every concentration should end up into their appropriate setting.

²⁵⁰ Jones, A., Sufrin, B., (2016). *Supra nota* 242. p 1091.

²⁵¹ Council Regulation No 139/2004 *supra nota* 6, recital 14.

²⁵² Commission Notice on Case Referral in respect of concentrations. (2005). *Supra nota* 233, paragraph, 9-10.

²⁵³ *Ibid.*

Not to forget, the referral opportunity which is possible to merging parties in accordance with article 4(5). This provision allows the parties to refer their planned concentration to the Commission. In this thesis text covered the beneficial aspect of the one-stop-shop principle from the perspective of the companies. Companies can trust the conclusively proved and coherent review process that is done by the Commission in sense article 4(5) give the merging parties positive assurance in a form of legal certainty. Conversely, if the case is that merging parties are not willing to refer the case to the Commission the article refer allows the NCA's to refer the case as well. Article 22 referral allows the Commission to review a merger which could possibly not have any union dimension element in it, however, this provision does not preclude that another NCA which did not enlist itself into the referral to carry its own investigation.

The present threshold system based on the turnover of the merging parties, although, possibly missing the merger types analysed in the thesis is largely clear to comprehend and corresponds well with legal certainty which the people with the vested interest would need. The proposed transaction value based threshold could more than likely convolute the present framework. In this thesis author also outlined the concerns with the actual use of the proposed complementary threshold. Purchase prices by their nature can fluctuate based on the market developments.²⁵⁴ Value of the transaction that did not initially meet the transaction value based threshold may by the time of the completion of the purchase be completely different. This was experienced in the WhatsApp acquisition.²⁵⁵

In the recent years the Commission has emphasized the simplification and functionality of the merger control procedure,²⁵⁶ addition of the discussed supplementary threshold which seems to come with recognized practicality flaws, would not it be something which directly goes against the wanted goal?

What can be seen from this thesis also is that there are not that much of cases which would advocate on behalf proposed complementary thresholds even though in the summary of replies to the public consultation stakeholders referred to acquisition that happened recently where several

²⁵⁴ See sub-chapter 3.1.

²⁵⁵ Oreskovic, A., (2014). Facebook's WhatsApp acquisition now has price tag of \$22 billion. Accessible: <https://www.reuters.com/article/us-facebook-whatsapp/facebooks-whatsapp-acquisition-now-has-price-tag-of-22-billion-idUSKCN0HV1Q820141006>. 01.05.2018

²⁵⁶ Commission Staff working Document 449. (2014) *Towards more effective EU merger control*. Accessible: http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf. 02.05.2018.

digital economy companies acquired smaller companies that for the most part missed the test of EUMR.

One could assume that there is formed in a sense a false perception that if the merger is not captured by the EUMR and therefore, reviewed by the Commission that then it will not be reviewed anywhere. What actually happens more than likely is that member states NCA's will take responsibility for it and they will choose whether investigation process will be done by them or will they re-assign it, to the Commission.

For now, the position of determining union dimension and thus, the applicability of EUMR to the merger is clearly defined rule and formed out of objective factors. If the reform would be made to the current jurisdictional threshold policy legislators should act with circumspection after all, considering just the mergers that may or may not be missed in the current system is not the advisable reasoning, forasmuch as, adding the new threshold could changes the whole merger control sphere such as the one in the EU which strongly relies on the cooperation and mutual effort.

5. LIST OF REFERENCES

Books

1. Bernanrd, C., Peers, S. (2014). *European Union Law*. 1st ed. New York: Oxford University Press. p 505.
2. Broberg, M.P. (2013). *The European Commission's Jurisdiction to Scrutinise Mergers*. 4th Edition European Monographs Series Volume 16 The Hague; New York: Kluwer Law International. p 24-25.
3. Cambell, D. (2011). *Mergers and Acquisitions in Europe Selected Issues and Jurisdictions: Comparative Law Yearbook of International Business*. Alphen aan den Rijn: Wolters Kluwer Law & Business.
4. Cook, C.J., Kerse, C.S. (2000). *E.C. Merger Control*. 3rd ed. London: Sweet & Maxwell Limited p 5.
5. Craig, P., de Búrca, G. (2011) *EU Law: Text, Cases, and Materials*. 5th ed. New York: Oxford University Press.
6. Jones, A., Sufrin, B. (2011). *EU Competition Law: Text, Cases, And Materials*. 4th ed. New York: Oxford University Press.
7. Jones, A., Sufrin, B., (2014). *EU Competition Law. Text, Cases and Materials*. 5th Ed. New York: Oxford University Press.
8. Jones, A., Sufrin, B., (2016). *EU Competition law. Text, Cases and Materials*. 6th ed. New York: Oxford University Press.
9. Leivo, K., *et al.* (2012). *EU:n ja Suomen Kilpailuoikeus*. 2nd ed. Helsinki: Talentum Media Oy. p 855.
10. Lorenz, M., (2013). *An Introduction to EU Competition Law*. New York: Cambridge University Press. p 294.
11. Navarro, E., Font, A., Folguera, J., Briones, J. (2005). *Merger Control in the European Union*. 2nd ed. New York: Oxford University Press.
12. Whish, R., Bailey, D. (2012). *Competition Law*. 7th ed. New York: Oxford University Press. p 809.

Articles

13. Broberg, M., (2014) Improving the EU Merger Regulation's Delimitation of Jurisdiction: Redefining the Notion of Union Dimension. – *Journal of European Competition Law & Practice*, Volume 5, Issue 5, Pages 261–270.
14. Calviño, N, (2011). When do Mergers Raise Concerns? An Analysis of the Assessment Carried out by the European Commission under the New Merger Regulation. – *Journal of European Competition Law & Practice*, Vol 2, issue 6, p 521–528.
15. Capobianco, A., Nyeso, A. (2018). Challenges for Competition Law Enforcement and Policy in the Digital Economy. – *Journal of European Competition Law & Practice*, Volume 9, Issue 1. Oxford University Press. p 19-27.
16. Carletti, E., Hartmann, P., Ongena, S. (2015). The economic impact of merger control legislation. – *International Review of Law & Economics*, Vol 42, p 88–104.
17. Carson, J., Nelson, E., Durrance, N. (2004). How to Effectively Build and Protect Business Assets with a Strategic Patent Portfolio. – *Intellectual Property Law Bulletin*, vol. 9, no. 1, p 1-10.
18. Cook, C., Novak, V., Frisch, S, (2017). Recent Developments in EU Merger Remedies. – *Journal of European Competition Law & Practice*, 2017, Vol. 8, No. 5, Oxford University Press. p 341–360.
19. Davilla, M. (2017). Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules. – *Journal of European Competition Law & Practice*. Volume 8, Issue 6, Oxford University Press, p 370-381.
20. Drauz, G., Mavroghenis, S., Ashall, S. (2012). Recent Developments in EU Merger Control. – *Journal of European Competition Law & Practice*, Vol 3, Issue 1, p 52–75.
21. Garrod, L., Lyons, B. (2016). Early Settlement in European Merger Control. – *The Journal of industrial economics*, Volume 64, Issue 1 p 27-63.
22. Levy, N. (2003). EU Merger Control: From Birth to Adolescence. – *World Competition* vol. 26, no. 2. Kluwer Law International. p 195-218.
23. K, Massimiliano, (2015). European Union Competition Law in the Digital Era. – *Zeitschrift für Wettbewerbsrecht*. Issue 4, p. 17.
24. Ocello, E., Sjödin, C., Subočs, A. (2015). What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case. – *Competition Merger Brief*. Issue 1.
25. Scholl, J. (2017) Why the New Merger Control Thresholds in Germany? – *Journal of European Competition Law & Practice*, Volume 8, Issue 4, p 219–220.

26. Werner, P., Clerckx, S., de la Barre, H, (2018). Commission Expansionism in EU Merger Control – Fact and Fiction. – *Journal of European Competition Law & Practice*. Vol. 9, issue 3, Oxford University Press. p 133–145.

Electronic sources

27. Carlin, F., Burholt, C., Traugott, A., Hobson, J., (2017). *New value-based filing thresholds in European merger control regimes implications for healthcare and life sciences companies*. Accessible: <https://www.lexology.com/library/detail.aspx?g=c85be631-c514-4f74-b7c6-8690de644f5d>. 26.04.2018.
28. Flener, L. (2017). *New transaction-value-based test entails uncertainties for merger control*. Accessible: <http://www.fwp.at/en/legal-corner/new-transaction-value-based-test-entails-uncertainties-for-merger-control/>. 18.04.2018.
29. Heinrich, C., (2017). *The New German Competition Law in a Nutshell*. Accessible: <https://www.lexology.com/library/detail.aspx?g=535d2bda-4598-413d-86c6-05b592b1c7b5>. 18.04.2018.
30. Janka, S., Stauber, P., (2017). *New transaction value threshold in German merger control*. Accessible: <https://www.noerr.com/en/newsroom/News/new-transaction-value-threshold-in-german-merger-control.aspx>. 27.04.2018.
31. Kurane, S., Hirschler, B. (2015). *AbbVie boosts cancer drug pipeline with \$21 billion Pharmacyclics deal*. Accessible: <https://www.reuters.com/article/us-pharmacyclics-m-a-abbvie/abbvie-boosts-cancer-drug-pipeline-with-21-billion-pharmacyclics-deal-idUSKBN0M109920150305>, 19.03. 2018.
32. The European Commission. (2016). *Mergers: Commission seeks feedback on certain aspects of EU merger control*. Accessible: http://europa.eu/rapid/press-release_IP-16-3337_en.htm, 11.03.2018.
33. European Commission. *Merger statistics*, Accessible: <http://ec.europa.eu/competition/mergers/statistics.pdf>. 29.04.2018.
34. Monopolkommission. *Mission*. Accessible: <http://www.monopolkommission.de/index.php/en/monopolies-commission>. 24.04.2018.
35. Oreskovic, A., (2014). *Facebook's WhatsApp acquisition now has price tag of \$22 billion*. Accessible: <https://www.reuters.com/article/us-facebook-whatsapp/facebooks-whatsapp-acquisition-now-has-price-tag-of-22-billion-idUSKCN0HV1Q820141006> 11.03.2018.
36. The European Commission. Questionnaire document, (2016). *Evaluation of procedural and jurisdictional aspects of EU merger control*. accessible:http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf, 22.02.2018.

37. The European Commission. (2016). Refining the EU merger control system. Accessible: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en, 20.3.2018.
38. The European Commission. (2017). *Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control*. Accessible: http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf, 20.03.2018.
39. European union fact sheet. (2018). *The principle of subsidiarity*. Accessible: http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf. 30.04.2018.

European Union legislation

40. Commission regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004.
41. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004.

Other sources

42. Commission Notice on Case Referral in respect of concentrations. OJ C 56, 5.3.2005, paragraph 9-13.
43. Commission staff working paper accompanying the Communication from the Commission to the Council - Report on the functioning of Regulation No 139/2004 {COM (2009) 281 final.
44. Commission Staff working Document 449. Towards more effective EU merger control. 9.7.2014.
45. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ C 95 of 16.04.2008 p 4.

European commission decisions

46. Case COMP/M.7217, (2014). Facebook/WhatsApp (Commission decision of 3 October 2014).
47. COMP/M.4942. (2008). NOKIA/NAVTEQ.
48. IV/M.784. (1997). Kesko/Tuko.
49. IV/M.890 (1998). Blokker/Toys'R'Us.