

KILLER ACQUISITIONS & MERGER CONTROL: MAKING A CASE FOR THE THAI ADOPTION OF THE GERMAN TRANSACTION VALUE THRESHOLD

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The emerging digital economy has given rise to new trends of business model and relations. Consequently, competition laws around the world have adapted in parallel with this changing commercial world to secure competitive pressure in different markets. Recently, Thai competition law has come under scrutiny regarding its effectiveness in merger control, where the notification thresholds have been criticised for being outdated. This paper will explore both the notification thresholds' mechanisms in merger control of Thai and German competition laws and analyse their efficacy in regulating mergers in the digital markets, especially when dealing with the 'killer acquisition'. Moreover, this paper will further extract the nature of certain Thai digital platform markets to answer the question of whether Thai competition law should adopt the German model, namely the newly implemented 'transaction value notification threshold' additional to the traditional 'market share' and 'turnover' notification thresholds.

I. INTRODUCTION

In today's contemporaneous commercial world, an understanding of mergers and acquisitions is becoming more vital. Big money may be made via mergers and acquisitions. They take place on a consistent basis and are persistently prevalent in the corporate realm. Many important mergers and acquisitions have reshaped specific industries or markets. Indeed, the financial magnitude associated with large-scale mergers is staggering. A prime illustration is the acquisition of Mannesmann, a German company, by Vodafone, a British company, in 2000, which carried an astounding valuation of US\$ 183 billion.¹ Similarly, in Thailand, the merger agreement successfully executed between Siam Makro Public Co Ltd and C.P. Retail Holding Company Limited, which amounted to an impressive US\$ 6,704.1 million, was a topic of widespread conversation.²

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¹ Alexander Roberts, William Wallace & Peter Moles, *Mergers and Acquisitions* (Harlow: Pearson Education, 2003).

² "Thailand: Five Largest Mergers & Acquisitions Deals by Value" (June 2022), online: <<https://www.globaldata.com/data-insights/macroeconomic/thailand--five-largest-mergers---acquisitions-deals-by-value--ltm-2087802/>>.

Even though mergers and acquisitions can benefit both the individual firm and the wider economy, by increasing value for shareholders and developing economies of scale and scope,³ such corporate activity has historically been viewed suspiciously from the competition regulator's point of view.⁴ In particular, certain mergers and/or acquisitions can result in a notable reduction of effective competition within the market which, in turn, harms consumers' welfare.⁵ More egregiously, a well-established firm may acquire a smaller, but no less economically important, firm, either because it has identified the latter to be a potential competitor⁶ or because it wishes to acquire certain intellectual property rights or new technology that the smaller firm possesses.⁷ In many cases, the main goal of such acquisitions is to stop the target firm from continuing to work on its innovative projects, which might become a threat to the incumbent or acquiring firm.⁸ Such acquisitions are colloquially known as 'killer acquisitions', and are a particular concerning strain of acquisitions as it can negatively impact consumer welfare and (future) market competition.⁹

Within the digital sector, one of the notable business trends over the past decade is that the global giants, such as Facebook, Amazon, Google, Microsoft, and Apple, have engaged in approximately 400 mergers.¹⁰ This surge in acquisitions is further supported by the fact that such

³ CFI Team, "Motives for Mergers", online: Corporate Finance Institution

<<https://corporatefinanceinstitute.com/resources/valuation/motives-for-mergers/>>.

⁴ "Competitive Effects", online: Federal Trade Commission <<https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects>>.

⁵ "On Mergers & Acquisitions: Self-Study Module #3", online: Philippine Competition Commission <<https://www.phcc.gov.ph/self-study-module-no-3-mergers-acquisitions/>>.

⁶ Colleen Cunningham, Florian Ederer & Song Ma, "Killer Acquisitions" (2020) 129:3 *Journal of Political Economies* 649 at 649-650 [Cunningham, Ederer & Ma, "Killer Acquisitions"].

⁷ *Ibid* at 692-693; "Introduction of Alternative Merger Control Thresholds – Is It the Way Forward?" (30 November 2018), online: AZB & Partners <<https://www.azbpartners.com/bank/introduction-of-alternative-merger-control-thresholds-is-it-the-way-forward/>>.

⁸ Alexander Kolloge & Sören Sievers, *Killer Acquisitions in the Platform Economy: Do Tech Giants Acquire Target Firms to Leverage Innovation or Eliminate Competition?* (MSc Finance & Strategic Management Thesis, Copenhagen Business School, 2021) (unpublished).

⁹ Cunningham, Ederer & Ma, "Killer Acquisitions", *supra* note 6 at 649-650.

¹⁰ United Kingdom, Digital Competition Expert Panel, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (London: HM Treasury, 2019), online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf>.

firms have collectively spent around USD 31.6 billion to merge with start-ups.¹¹ These statistics shed light on the significant scale of acquisition activities undertaken by these tech giants.

A. Facebook Acquiring Instagram

Since 2005, Facebook has embarked on an extensive acquisition campaign, acquiring a total of 68 companies at a remarkable cost. These strategies have firmly established Facebook as one of the most dominant forces in the global social media landscape, evident from its vast user base. By 2016, just over a decade after, Facebook had almost 1.8 billion users.¹²

The high-profile acquisition of Instagram by Facebook in 2012 for a substantial sum of USD 715 million raised eyebrows. At that time, competition authorities reviewed the transaction and categorised Facebook as a social network service provider while regarding Instagram as a photo-sharing application. Consequently, they stated that both parties did not operate within the same market.¹³ However, although Instagram expanded its functionalities after the acquisition, allowing users to share photos, data, and messages, as well as enabling the sale of advertising space, at the time of the merger, Instagram at least possessed the capacity to emerge as a significant competitor in the same social media market as Facebook. Similar to Facebook, Instagram initially served as a platform that facilitated the formation of social networks among users, capturing consumer views that could be profitable through advertising.¹⁴

B. Facebook Acquiring Oculus

¹¹ “American Tech Giants are Making Life Tough for Startups”, *The Economist*, (2 June 2018), online: <<https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups>>.

¹² Irfan Ahmad, “From Instagram to WhatsApp: A Timeline of Facebook’s Acquisitions” (12 February 2016), *Digital Information World* (blog), online: <[https://www.digitalinformationworld.com/2016/12/companies-acquired-facebookinfographic.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+blogspot%2FqtdAg+\(Digital+Information+World\)](https://www.digitalinformationworld.com/2016/12/companies-acquired-facebookinfographic.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+blogspot%2FqtdAg+(Digital+Information+World))>.

¹³ OECD, Competition Division, *Start-ups, Killer Acquisitions and Merger Control* (2020), online: <<https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm>> [OECD, *Start-ups*].

¹⁴ Australia, Australian Competition & Consumer Commission, *Digital Platforms Inquiry: Final Report* (Australia: ACCC, 2019) at 80-81.

Another example of a killer acquisition that resulted in impacts to the virtual reality market is Facebook's early acquisition of Oculus in 2014.¹⁵ Oculus was a virtual reality company that invented virtual reality headsets featuring a 90-degree field of vision, which was considered novel technology then.¹⁶ The acquisition could be inspected as Facebook's attempt to eliminate a potential competitor with prospective innovations from the virtual reality market. The reason could be observed from Facebook's ambition to compete in the virtual reality market, seeing from the official change of the company's name to Meta, which refers to the metaverse.¹⁷ Acquiring a newly formed innovative company would be an effective tool for Facebook, now called Meta, to quickly thrive in the virtual reality market by receiving the profits created by an acquired technology.¹⁸

C. Killer Acquisitions in Thailand

The problem of killer acquisitions is also seen in Thailand, especially in this era of emerging Thai start-ups. LINE's first acquisition of the Thai start-up, DGM59, to become LINE Thailand's engineering team in 2017 is an apparent example. Started as a software company in 2010 by Thai fresh graduates, DGM59 developed into a digital product company by launching disruptive and innovative digital marketing tools and mobile applications in the Thai market.¹⁹ The acquisition clearly facilitated LINE's plan to extend its area of digital services beyond providing a simple messaging platform, especially by applying the DGM59's innovation of Business Connect for Customer Relationship Management ("BCRM") into LINE's other services, such as its mobile payment service, food delivery, and online shopping platform in Thailand.²⁰

¹⁵ Chris Welch, "Facebook buying Oculus VR for \$2 billion", *The Verge* (26 March 2014), online: <<https://www.theverge.com/2014/3/25/5547456/facebook-buying-oculus-for-2-billion>>.

¹⁶ Dom Barnard, "History of VR – Timeline of Events and Tech Development", *Virtual Speech* (14 June 2023), online: <<https://virtualspeech.com/blog/history-of-vr>>.

¹⁷ Ishika Yadav, "Why Mark Zuckerberg changed Facebook's name to 'Meta'", *Tech Gig* (29 October 2021), online: <<https://content.techgig.com/technology/why-mark-zuckerberg-changed-facebooks-name-to-meta/articleshow/87353504.cms>>.

¹⁸ *Ibid.*

¹⁹ "ต้องเอาให้อยู่หมัด เบื้องหลัง LINE ซื้อกิจการ DGM59 ทางลัดเป็นบริการใหม่ นัดใจลูกค้าไทย 41 ล้านราย" [Background of LINE Acquiring DGM59 to Take a New Shortcut and Secure 41 Million Thai Customers], *Positioning* (14 July 2017), online: <<https://positioningmag.com/1132781>>.

²⁰ Maxime Schmitt, "Why You Need Line BCRM for Your Business Communications" 6 August 2019), *Lexicon* (blog), online: <<https://lexiconthai.com/blog/why-you-need-line-bcrm-for-your-business-communications/>>.

The second example is the acquisition in 2023 of FoodStory, a Thai start-up providing a Point of Sales (“POS”) system for restaurant management, by LINE MAN Wongnai, one of the main players in Thai e-commerce platform providing food and grocery deliveries, restaurant reviews, and taxi messenger.²¹ FoodStory had been developing technological advancement in its POS system, including mobile applications and digital payment systems, and was thriving in the POS markets.²² The acquisition provided LINE MAN Wongnai with innovative resources and the expertise of FoodStory that highly improved its restaurant operational efficacy. The acquisition resulted in the launching of Wongnai POS created by FoodStory, which leads the POS markets in Thailand with over 50,000 restaurants operators using Wongnai POS.²³

Another example can be seen in the market of online communication platforms in Thailand. In the telemedicine business, which often refers to technological or online platforms providing remote clinical services between the patient and the healthcare provider,²⁴ an 2021 acquisition, which could be seen as another killer acquisition, of Doctor Raksa, a Thai telemedicine platform start-up, by Doctor Anywhere, one of the biggest telemedicine platforms from Singapore, occurred in Thailand.²⁵ As Doctor Raksa, despite being a start-up established in 2016, had over 1 million users at the time of the acquisition by providing online doctor appointments and online medical prescriptions, this deal allowed Doctor Anywhere to strengthen its position in the communication

²¹ Techsauce Team, “LINE MAN Wongnai เข้าซื้อ FoodStory รุกขยายธุรกิจ Merchant Solutions ครอบคลุมทุกตลาดร้านอาหารในไทย” [LINE MAN Wongnai Acquiring FoodStory, Expanding Merchant Solutions, and Covering All of the Thai Restaurant Markets], *Techsauce* (20 July 2023), online: <<https://techsauce.co/news/lineman-wongnai-x-food-story-merchant-solutions>>. [Techsauce, “LINE MAN Wongnai”]

²² TechNode Global Staff, “LINE MAN Wongnai Acquires Thai POS Startup Foodstory”, *TNGlobal* (20 July 2023), online: <<https://technode.global/2023/07/20/line-man-wongnai-acquires-thai-pos-startup-foodstory/>>.

²³ *Ibid.*

²⁴ Liji Thomas, “What is Telemedicine?”, *News Medical* (18 January 2023), online: <<https://www.news-medical.net/health/What-is-Telemedicine.aspx>>.

²⁵ Techsauce Team, “Doctor Anywhere จากสิงคโปร์ ซื้อกิจการ Doctor Raksa สตาร์ทอัพไทย แพลตฟอร์ม telemedicine” [Doctor Anywhere From Singapore Acquired Doctor Raksa, A Startup Telemedicine Platform], *Techsauce* (12 November 2021), online: <<https://techsauce.co/news/doctor-anywhere-acquires-doctor-raksa>>.

platform market of telemedicine business in Thailand with its significant expansion of the customers pool and areas of services to around 40 Thai provinces.²⁶

Indeed, it should come as no surprise that many of these firms form part of the Thai digital economy. The current merger control under Thailand's Trade Competition Act, B.E. 2560 (2017)²⁷ ("TCA") is inadequate in dealing with killer acquisitions made in the context of the digital economy which, as will be elaborated upon, has its own unique features which demands a departure from existing standards. In particular, the current notification thresholds, dependent either on parties' turnover or market share,²⁸ definitionally leads to a situation where many – if not all – killer acquisitions are not caught. This is because, as aforementioned, many acquired firms in the context of killer acquisitions are nascent businesses with little to no market power or possess little turnover.²⁹ Further complicating this issue is the obvious fact that the digital economy is unlike the traditional marketplace, in which such notification thresholds were first promulgated.³⁰

The time is ripe for a review of the Thai merger control regime. In this regard, this paper will first lay out the merger control regime found in Thailand (in Part II). It will then critique both the turnover and market share thresholds and show how both standards are inadequate when seen in the digital economy context (in Part III). In Part IV, this paper will examine the new transaction value notification regime found in Germany. Part V will make the case that the Thai competition authority should implement a similar model. Finally, Part VI concludes.

II. THAILAND'S MERGER CONTROL

In Thailand, the merger control can be found in the TCA. The TCA, in turn, incorporates a dual merger control system.³¹ First, in the case of mergers that may reduce significant competition in a

²⁶ Sainul Abudheen K, "Doctor Anywhere Acquires Thai Startup Doctor Raksa to Add 1M Customers to the Platform", *E27* (11 November 2021), online: <<https://e27.co/doctor-anywhere-acquires-thai-startup-doctor-raksa-to-add-1m-customers-to-the-platform-20211111/>>.

²⁷ Trade Competition Act B.E. 2560 (2017) [TCA].

²⁸ *Ibid*, s 51, para 1 and 2.

²⁹ Techsauce, "LINE MAN Wongnai", *supra* note 21.

³⁰ Thailand, Trade Competition Commission, "Defining Market Definition and Relevant Market in the Multi-sided Market on Digital Platform", by Benjawan Tangsatapompan (Thailand: TCC, 2017) [TCC, "Defining Market Definition"].

³¹ TCA, *supra* note 27, s 51, para 1 and 2.

specific market, Thai law requires post-merger notification. This notification must be submitted to the Trade Competition Commission of Thailand (“TCCT”) after the completion of the merger by the acquiring party or surviving entities, provided that the turnover value achieved by any of the merging parties or their combined turnover value exceeds THB 1 billion in the relevant market, and these mergers do not result in a monopoly or establish a dominant position in a relevant market.³²

Second, in situations where a merger may lead to a monopoly or dominant position, the acquirer or merging parties must obtain pre-merger clearance from the TCCT.³³ In the first situation, the merger will lead to a monopoly where there will only be one business operator left in a relevant market, and this operator will have substantial power to independently determine its price and quantity of its product or service, and having at least THB 1 billion turnover value. In the second situation, a business operator is considered to hold a dominant position if it either forms a single dominance or collective dominance. For single dominance, a business operator holds at least 50% of market share or at least THB 1 billion turnover value in the relevant market. For collective dominance, the business operator is one of the top three business operators jointly possessing a market share of at least 75%, unless its market share is below 10% or its turnover value is less than THB 1 billion.³⁴

Therefore, the two notification thresholds for merger control under the TCA are the: (1) turnover threshold; and (2) market share threshold. These thresholds are regarded as traditional standards commonly used by competition authorities to capture – and investigate – transactions that may impact the competitiveness of a market.³⁵ However, the emergence of the digital economy has brought forth new business models and commercial relationships, and questions have arisen concerning the suitability and effectiveness of these thresholds.³⁶

³² *Ibid*, s 51, para 1.

³³ *Ibid*, s 51, para 2.

³⁴ *The Trade Competition Commission of Thailand Notice on Criteria for being an Undertaking with Dominant Position*, TCC (1 September 2020).

³⁵ Norton Rose Fulbright, “Thailand: Competition Law Fact Sheet”, Legislative Comment on the Trade Competition Act B.E. 2560 (2017) (March 2022), online: <<https://www.nortonrosefulbright.com/en-th/knowledge/publications/e5236fd9/competition-law-fact-sheet-thailand>>.

³⁶ TCC, “Defining Market Definition”, *supra* note 30.

III. A CRITIQUE OF THE THAI POSITION IN LIGHT OF THE DIGITAL ECONOMY

In the dynamic landscape of the Thai digital market, e-service platforms have rapidly emerged. These platforms have revolutionised the way businesses operate and interact with customers. Notably, a substantial portion of these platforms are cross-border businesses with significant investment power and capabilities, marking them as key players in the Thai digital economy.³⁷

One of the distinctive aspects of e-service platforms is their vibrancy. These platforms are categorised based on their unique usages and characteristics. Each category reflects specific needs and preferences of both businesses and consumers. The Thailand Electronic Transactions Development Agency (“ETDA”) has played a major role in defining these digital markets. The ETDA has identified various distinct categories of e-service platforms that continue to flourish within the Thai digital market, including e-marketplaces which facilitate online buying and selling, online travel agencies (“OTA”), online delivery services, social media platforms for digital interaction and connection, and streaming platforms for entertainment and content consumption, communication platform, advertising service, payment system and system support. The ongoing growth and development in these categories reflect the nature of the Thai digital market, with e-service platforms leading the way in innovation and market expansion.³⁸

A. Difficulty in finding the definition of relevant markets in the market share and turnover thresholds

Regarding the turnover and market share thresholds implemented in both pre-merger and post-merger notification requirements, an apparent issue may lie in the requirement for the merging parties to hold at least a specified amount of turnover value or market shares in a relevant market, which may be seen as an improbable acquisition result, especially in the digital economy possessing

³⁷ Thailand, Trade Competition Commission, การแข่งขันทางการค้าในธุรกิจบริการแพลตฟอร์มดิจิทัล [Competition Law in the Digital Platforms], 74 Competition Focus 2 (Thailand: TCC, October 2022) [Trade Competition Commission, *Competition Law in the Digital Platform*], online: <https://www.tcct.or.th/view/1/Pamphlet_Seeing_the_Competitive_World/TH-TH>.

³⁸ *Ibid.*

such unique characteristics. Fundamentally, the issue can be stated as such – what, exactly, is the relevant market?

The digital business models, characterised by numerous links between at least two groups of market players, complicate the indication of monopoly in the relevant market.³⁹ Specifically, the platform markets are multi-sided, where they join several groups of people together, such as the consumers. The interconnected nature of digital markets, driven by network effects, makes it difficult to define and separate each market to find whether this business operator is actually a single player.⁴⁰ For instance, the Android case can illustrate the functioning of the network effects, displaying the complex relationships among mobile users, application developers, and Android who owns the application store.⁴¹ Positive network effects, where more developers lead to more users, and more users use Android, create a challenging landscape for precisely defining competing markets, especially by using the Small but Significant Non-transitory Increase in Price (“SSNIP”) test.⁴²

The SSNIP test is generally used to define the relevant market but can be seen to be inefficient when applied to multi-sided markets, as the test does not recognise all of the complex structure of the network effects directly and indirectly.⁴³ To elaborate, price variation would not affect the demand of the products on just a single side of the market, but all the relating sides of the market in the digital regime. For example, if the online gaming platform increases the game price, the sales rate would decrease on both the gamers’ side and the game developers’ side.⁴⁴ Thus, the SSNIP

³⁹ Nisit Intamano, “ผู้มีอำนาจเหนือตลาดกับพระราชบัญญัติการแข่งขันทางการค้า พศ ๒๕๖๐ ในยุคดิจิทัลเทคโนโลยี” [Business Operations with a Dominant Market Power and Trade Competition Act BE 2560 in Era of Digital Transformation] (2020) 67:2 *Dunlaphaha Court of Justice Journal* 99.

⁴⁰ OECD, Competition Division, *Abuse of Dominance in Digital Markets* (2020) at 15.

⁴¹ Dan Rowinski, “Network Effects: How Google & Apple Dominate Mobile”, (28 November 2011), *Readwrite* (blog), online: <<https://readwrite.com/network-effects-how-google-apple-dominate-mobile/>>.

⁴² Ravi Kumar, “Understanding the Basics of Network Effects — The Power of the Platform” (29 July 2018), *Medium* (blog), online: <<https://medium.com/world-of-iot/understanding-the-basics-of-network-effects-the-power-of-the-platform-2cfef215fe4a>>.

⁴³ Evelin Hlina, “Dominant Undertaking in the Digital Era: A Call for Evolution of the Competition Policy Towards Article 102 TFEU?”(2016) 9 *Global Antitrust Review* 119 at 138.

⁴⁴ *Ibid.*

test, which was designed to only assess a traditional single-sided market, is not appropriate to be applied in assessing the digital market.⁴⁵

Moreover, since most of the digital platforms' services are free to use, this causes the SSNIP test to be inapplicable to define the relevant markets as price is a major consideration in the SSNIP test.⁴⁶ For example, Lazada is generally considered to be in the e-marketplace markets acting as a middle digital platform for people to buy and sell goods or services with more than one seller.⁴⁷ The nature of this multi-sided digital platform is to connect or facilitate communication between at least two groups of the platform customers, which are the buyers and sellers as both parties use the service given by Lazada. Since the buyers generally use the platform service for free, the SSNIP test cannot be applied as it lacks the presence of a price factor.⁴⁸ Similarly, in the Google Search (Shopping) case, the European Commission has indicated that the SSNIP test should not be applied since Google's provision of the searching service to the users is free of charge.⁴⁹

B. *Problems with turnover threshold*

1. *Impossibly high threshold of requiring a monopoly in the turnover threshold*

Looking from the business operators' perspectives, even if the relevant market is eventually defined by the authority, it would still be unlikely for the acquiring firm to jump into an obvious risk of creating a monopoly. The evidence of such improbability is clearly shown in one of the infamous killer acquisition results mentioned above: Facebook's acquisition of Instagram in 2012. The acquisition did not lead to Facebook earning a complete monopolist position, given the continuous presence of a few other apparent competitors, such as Twitter, Snapchat, and

⁴⁵ Anubhav Sharma & Chirag Jindal, "Digital Market and Zero-Pricing: Is SSNIP Test Applicable?" (2 October 2019), *IndiaCorpLaw* (blog), online: <<https://indiacorplaw.in/2019/10/digital-market-zero-pricing-ssnip-test-applicable.html>> [Sharma & Jindal, "Digital Market and Zero-Pricing"].

⁴⁶ *Ibid.*

⁴⁷ Trade Competition Commission, *Competition Law in the Digital Platform*, *supra* note 37.

⁴⁸ Sharma & Jindal, "Digital Market and Zero-Pricing", *supra* note 45.

⁴⁹ EC, Commission Decision of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, [2017] OJ, C 9/11.

Google+.⁵⁰ Although Snapchat faced difficulty competing in the market since Instagram has launched similar features called Instagram Stories later in 2016⁵¹ and Face Filters in 2017,⁵² and Google+ was eventually shut down in 2019,⁵³ they were still considered to be relevant competitors of Facebook at the time of the acquisition.⁵⁴

Turning to the Thai digital economy, a similar trend is observed. Regarding the example of Doctor Anywhere's acquisition of Doctor Raksa, although Doctor Anywhere could expand its telemedicine service areas across Thailand and lead the market, there were still a few Thai telemedicine services reserving spots in a market,⁵⁵ such as MorDee, Thailand's first telemedicine platform, which competed fiercely with Doctor Anywhere both before and after the acquisition.⁵⁶

2. Difficulty in valuing "turnover"

In addition to the competition authority's difficulty in finding that the merger had resulted in the merged entity being a 'monopoly', it is worth noting that inherent in the definition of 'killer acquisitions' lies the fact that the acquired firm is usually a small firm with insignificant turnover. To provide an example, consider an established online logistics services provider acquiring a

⁵⁰ Samantha Lile, "Complete History of Social Media: Then And Now", *Small Business Trends* (2 January 2024), online: <<https://smallbiztrends.com/history-of-social-media/>>; "The Evolution of Social Media: How Did It Begin, and Where Could It Go Next?", *Maryville University* (28 May 2020), online: <<https://online.maryville.edu/blog/evolution-social-media/>>.

⁵¹ Alex Kantrowitz, "Snapchat was 'An Existential Threat' to Facebook — Until an 18-year-old Developer Convinced Mark Zuckerberg to Invest in Instagram Stories", *Business Insider* (7 April 2020), online: <<https://www.businessinsider.com/how-developer-mark-zuckerberg-invented-instagram-stories-copied-snapchat-2020-4>> [Kantrowitz, "Snapchat was 'An Existential Threat' to Facebook"].

⁵² Andrew Griswold, "Instagram is One Step Closer to Killing Snapchat with New Face Filters", *FStoppers* (17 May 2017), online: <<https://fstoppers.com/apps/instagram-one-step-closer-killing-snapchat-new-face-filters-177223>>.

⁵³ Gennaro Cuofano, "What Happened To Google Plus?", *FourWeekMBA* (5 November 2023), online: <<https://fourweekmba.com/what-happened-to-google-plus/>>.

⁵⁴ Kantrowitz, "Snapchat was 'An Existential Threat' to Facebook", *supra* note 51.

⁵⁵ Pongpiphat Banchanont, "รวมแอปฯ 'แพทย์ทางไกล' ในไทย เพิ่มทางเลือก รับบริการการแพทย์" [Lists of Telemedicine Platforms in Thailand], *The Matter* (5 August 2020), online: <https://thematter.co/science-tech/telemedicine-app-in-thailand/119435#google_vignette>.

⁵⁶ "Journey of Thailand's First Telemedicine Platform "MorDee" and Aspiration to Ease Country's Healthcare Burdens" (4 December 2023), *True Blog* (blog), online: <<https://trueblog.dtac.co.th/blog/en/thailands-first-telemedicine-platform-mordee/>>.

relatively new market player in the online logistics market. Due to the nature of the industry, which typically exhibits low turnover figures, the transaction may not trigger the requirement for notification. However, the larger company's reason for acquiring the smaller market player could be because it had identified the latter's innovative business which may one day grow into a threat to its incumbent position.⁵⁷ Despite the seemingly low turnover figures, this acquisition nevertheless represents a high-value deal from the acquirer's perspective as it involves acquiring innovative ideas or disruptive technologies that have the potential to significantly impact the dynamics of the market.⁵⁸

Collectively, the problematic issues with both turnover and market share thresholds also mean that Thailand's merger control regime is inadequate and ill-equipped to deal with situations where it is most needed – that of killer acquisitions. To ensure a fair and competitive market environment, it is crucial for competition authorities to conduct rigorous assessments of these high-value transactions, even if these transactions appear to have low turnover figures, and even if the requisite market share is not established, because they have the potential to affect competition in the market. This paper will now turn to a plausible solution – Germany's recent innovation in regulating mergers through transaction value.

IV. GERMAN POSITION & THE TRANSACTION VALUE THRESHOLD

A. Background

In 2017, Germany introduced a new dimension into its merger control framework by incorporating a transaction value threshold. Germany was one of the first jurisdictions in the world which implemented preventative regulations with a purpose of combating the market power of giant digital platforms, especially on the issue of regulating killer acquisition.⁵⁹ Originally, the *Gesetz gegen Wettbewerbsbeschränkungen* ("German Competition Act"), implemented the main notification

⁵⁷ Claire Turgot, "Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime" (2021) 5:2 European Competition and Regulatory Law Review 112.

⁵⁸ *Ibid.*

⁵⁹ Daniela Seeliger *et al.*, "The Revolutionary Reform of German Competition Law – Leading the Pack in Digital Enforcement and Other Stories" (20 January 2021), *Linklaters* (blog), online: <<https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/the-revolutionary-reform-of-german-competition-law>>.

threshold for the merger control as a turnover threshold under section 35(1). This would require the combined aggregate worldwide turnover of all the undertakings concerned to be more than €500 million in the financial year before the acquisition⁶⁰, and the domestic turnover of at least one undertaking concerned to be more than €50 million and that of another undertaking concerned to be more than €17.5 million, to trigger the merging parties' obligation to notify a merger to the *Bundeskartellamt*, or the Federal Cartel Office, which is the competent authority under the German Competition Act.⁶¹

B. Mechanisms of the Transaction Value Threshold implemented in addition to the Turnover Threshold

This alternative criterion aims to ensure that only significant transactions, in terms of their financial impact, are subject to mandatory notification. It would be based on the value of the transaction, working in conjunction with the turnover value criteria. The primary objective of incorporating such complementary thresholds is to facilitate the investigation of high-value transactions with low turnover that could potentially pose a threat to competition in the market.⁶² By incorporating transaction value as a criterion alongside turnover thresholds, regulatory authorities would be empowered to scrutinise and evaluate transactions that, despite their low turnover, possess a substantial value that may signify a heightened risk to potential competition.⁶³ In other words, this threshold acknowledges the detrimental impact of losing a future significant competitor by the acquisition by an already established and influential competitor. This approach therefore recognises that the impact of a transaction on competition cannot be solely determined by turnover value.⁶⁴

The difference between the turnover threshold and the transaction value threshold lies in their distinctive characteristics. The turnover threshold is an established criterion that is predicated upon the business' operational performance within a business year, encompassing key financial indicators, such as revenue and profits generated by the company. In contrast, the transaction value threshold represents a new criterion that focuses on the valuation of a particular transaction,

⁶⁰ *Gesetz gegen Wettbewerbsbeschränkungen* [German Competition Act], s 35(1), para 1.

⁶¹ *Ibid*, s 35(1), para 2.

⁶² OECD, *Start-ups*, *supra* note 13 at 39-40.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

specifically exemplified by merger transactions. When the value of a transaction surpasses the prescribed benchmark, it triggers the mandatory notification requirement for the merging parties. The use of the transaction value threshold offers a notable advantage by directing attention towards the detection of competitive harm, particularly in the context of the digital market. This approach proves value in capturing killer acquisitions where powerful companies engage in anti-competitive behaviour against smaller businesses.⁶⁵

Furthermore, it is worth highlighting that section 35(1a)(1) of the German Competition Act states that the aggregate global turnover of the merging parties must be of a substantial level. This provision serves as an additional safeguard, affirming the significance of the combined worldwide turnover as a crucial element in determining the applicability of the transaction value threshold. Moreover, section 35(1a)(4) provides for a local nexus requirement, underscoring the importance of a connection to the German market in triggering the notification obligation. Therefore, the main elements of the transaction value threshold can be divided into, first, the consideration value; and second, the extent of domestic operations.⁶⁶ Both shall be discussed in turn.

C. Definition of “Value”

Under the German Competition Act, the value of consideration encompasses all forms of assets and benefits in form of money received by the seller from the buyer in relation to the specific merger. Within this context, the term asset is broadly interpreted to align with the principles of German commercial law, which includes payments, the transfer of voting rights, securities, tangible assets, intangible assets, and cash. Assets also include any additional payments, such as license fee, as they also form an integral part of the consideration value.⁶⁷

⁶⁵ Daniel Wiedmann & Daniel Hoppen, “Merger Control Comparative Guide” (20 November 2023), *Mondaq*, online: <<https://www.mondaq.com/germany/antitrustcompetition-law/843534/merger-control-comparative-guide>>.

⁶⁶ OECD, Competition Division, *Start-ups, Killer Acquisitions and Merger Control – Note by Germany* (2020) [OECD, *Start-ups – Note by Germany*].

⁶⁷ Germany, Federal Cartel Office & Austrian Competition Authority, *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)* (Germany: FCO & ACA, 21 January 2022) at [11] [FCO & ACA, *Guidance on Transaction Value Thresholds*], online: <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionssschwelle.pdf?__blob=publicationFile&v=2>.

In order to ensure that the competition authority receives essential information for review, including the turnover of merging parties and the consideration value, it is obligatory for the merging parties to notify the competition authority when the value exceeds specified thresholds.⁶⁸ In the case of a turnover exceeding the threshold, parties are obligated to provide notification, not only for turnovers in Germany, but also in the European Union, and globally for each relevant undertaking.⁶⁹ Importantly, even if the merger proceeds without notification to the competition authority, under the consideration by the merging parties that the thresholds are not satisfied and the notification obligations do not exist, the competition authority still retains the right to conduct an independent investigation into the merger's compliance with notification obligations and potential infringement.⁷⁰

D. Requirement of Significant Domestic Operations

The purpose of the requirement of significant domestic operations is to exclude cases that primarily involve the acquisition of a company solely engaged in foreign operations from the jurisdiction of the German competition authority. The acquisition of a company exclusively operating within the German market will mean a high level of domestic activity. This assessment is generally based on the target company's business activities rather than solely relying on its domestic turnover.⁷¹

Different fields and industries must use different criteria to assess conduct that adheres to industry standards and should be resistant to manipulation. For instance, in the digital sector, authorities may use several indicators, such as user numbers, monthly or daily active users, as well as the frequency of website access. The selection of specific criteria should be on a case-by-case basis, with the end goal of accurately establishing the connection between the relevant activity and the domestic market. This will ensure alignment with market dynamics.⁷²

⁶⁸ German Competition Act, *supra* note 60, s 39.

⁶⁹ *Ibid*, s 39(3), para 3.

⁷⁰ FCO & ACA, *Guidance on Transaction Value Thresholds*, *supra* note 67 at [19].

⁷¹ *Ibid* at [64]-[65].

⁷² *Ibid* at [66]-[67].

The local nexus of the target's activity can be assessed by the location of the customer or the location of service provision or product delivery.⁷³ Moreover, this assessment does not require the goods or service provision to be priced, which is suitable to the digital market's multi-sided structure that have most of services provided free of charge. Thus, the domestic activities will automatically presumed to be present when the domestic users have received or used a significant extent of the target's services or goods, regardless of the price labelling.⁷⁴

V. THAI COMPETITION LAW SHOULD ADOPT THE TRANSACTION VALUE APPROACH

Despite being a relatively new threshold when compared to the traditional thresholds of turnover and market share, the transaction value has had an immediate impact in Germany. Over a span of two years from 2017 to 2018, the German competition authority received 18 notifications regarding the transaction value threshold. Of these 18 cases, seven were subsequently withdrawn, as the authority deemed that the mandatory notification requirements had not been fulfilled. The remaining 11 cases were investigated, with regulatory clearance subsequently granted for each to proceed.⁷⁵ It would thus appear that the transaction value approach is now capturing cases which the competition authority previously could not investigate under the old approach.

It is argued that Thai competition law should adopt the transaction value approach, to protect nascent domestic start-ups from being acquired by international conglomerates operating within the Thai digital market. By shifting the TCCT's focus to the transaction value at which the acquirer is acquiring the acquired party, the TCCT will now be able to identify more effectively – based on what the acquirer subjectively values the acquired party – acquisitions which are 'killer' in nature. A high market value of the acquired party that is patently out of step with its turnover and/or market share in the relevant market should, *prima facie*, indicate to the TCCT that the acquisition is likely to be a killer acquisition. In such a situation, it is likely that the acquirer values the acquired

⁷³ *Ibid* at [71]-[72].

⁷⁴ *Ibid* at [72].

⁷⁵ Martin Sauermaun, "The Transaction Value Threshold in Germany – Experiences with the New Size of Transaction Test in Merger Control", *Competition Policy International* (8 October 2019), online: <<https://www.pymnts.com/cpi-posts/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/>>.

party for its future potential and/or sees the acquired party as a potential challenger to its entrenched position sometime in the future, due to the latter's innovative ideas or otherwise.⁷⁶

Moreover, the German model of transaction value threshold is well-suited to Thailand's context of merger control because it strategically organizes the relationship between the traditional turnover threshold and the new transaction value threshold, providing a comprehensive approach to capturing acquisitions. This approach aligns with the current notification thresholds in the Thai merger control regime. Unlike replacing the turnover threshold, the German model supplements it with an additional transaction value threshold,⁷⁷ recognizing the importance of both thresholds in assessing the mergers. Applying this structure in the Thai regime could address the existing inadequacy of the turnover threshold without disrupting the overall merger control notification threshold.⁷⁸ This adaptation could serve as a valuable example for the Thai merger control regime to enhance its framework.

One area of the Thai digital economy which stands to benefit from this new approach would be the online travel agency market. Definitionally, the online travel agency market encompasses all aspects of online reservation by tourists for flights and accommodation, including but not limited to hotels, hostels, and resorts. Within this market, Booking.com and Agoda are still currently the prominent market players⁷⁹ since they collectively hold over 25% of the online travel agency market within Thailand.⁸⁰

With the recovery of the domestic tourism industry, however, it is expected that new online start-ups, with fresh and innovative ideas, will be born. Indeed, various governmental authorities, such as the Tourism Authority of Thailand and the National Innovation Agency of Thailand, have significantly promoted the establishment of start-up firms to revive and kick-start the local tourism

⁷⁶ OECD, *Start-ups – Note by Germany*, *supra* note 66.

⁷⁷ FCO & ACA, *Guidance on Transaction Value Thresholds*, *supra* note 67 at [3].

⁷⁸ *Ibid* at [3]-[9].

⁷⁹ Seenam Paewchimplee, “สี่น้ำ คู่ควมพิล, 'เปิด 12 อันดับแพลตฟอร์มจองโรงแรมส่วนแบ่งทางการตลาดสูงสุดในไทย” [12 OTAs Having the Highest Market Shares in Thai Markets], *The Business Plus* (12 March 2023), online: <<https://www.thebusinessplus.com/onlinetravelagency/>>.

⁸⁰ Kasidech Setthapirom, “โครงสร้างตลาดและพฤติกรรมการแข่งขันของธุรกิจเว็บไซต์ที่ให้บริการรับจองห้องพักออนไลน์ในประเทศไทย” [Market Structure and Competitive Behaviour of OTAs in Thailand] (M.Econ Thesis, Thammasat University, Faculty of Economics, 2012) (unpublished).

industry.⁸¹ Such nascent market players – despite their relatively small size when compared to the international behemoths present within the domestic online travel agency market – can offer Thai consumers more competitive prices, advancing their overall societal welfare. One such example of a local start-up is TraveliGo.⁸² Compared to other international agencies, TraveliGo provides cheaper accommodation reservations prices without charging the usual additional fees, such as reservation fees.⁸³ In addition, as the platform is registered and operated in Thailand, it can also issue a tax invoice for the reduction of tax obligations for Thai consumers.⁸⁴ Therefore, it is likely that TraveliGo will be able to claim for itself, in time to come, a niche in the domestic online travel agency market, making it an attractive target for established market players to acquire it.

Another area of the Thai digital economy which would benefit from the implementation of the transaction value approach is online shopping. Considering the nature of the Thai e-marketplace, only a few main players have taken the spotlights in the market and are considered remarkably influential to online Thai customers. Here, the prominent market players are Shopee and Lazada.⁸⁵ Shopee and Lazada are the two noteworthy global firms that gained the most revenues and users according to reports.⁸⁶ Lazada has been taking over Thai and other Southeast Asian e-marketplace markets since 2012 before it was acquired by Alibaba approximately two years later, around the same time Shopee became its fierce competitor in the Thai e-marketplace market.⁸⁷

⁸¹ “ไทยรัฐ ออนไลน์, 'ทำความรู้จัก 5 สตาร์ทอัพท่องเที่ยวในช่วงโควิด-19' [Meeting 5 OTA Startups during Covid-19], *Thairath Online* (19 January 2021), online: <<https://www.thairath.co.th/news/local/2015492>>; Techsauce Team, “เที่ยวไทย ผ่านแพลตฟอร์มไทย เน้น 4 เครื่องมือท่องเที่ยวจาก Startup ไทย” [Travelling in Thailand via Thai OTA: Introducing 4 OTA Startups], *Techsauce* (9 September 2020), online: <<https://techsauce.co/tech-and-biz/travel-tech-startup-thai>>.

⁸² “About Us”, *TraveliGo*, online: [Traveligo](https://www.traveligo.com/about-us) <<https://www.traveligo.com/about-us>>.

⁸³ “TraveliGo สตาร์ทอัพ Travel Tech สัญชาติไทย จับกลยุทธ์แบรนด์ไทยเพื่อคนไทย ผู้ถือ OTA ต่างชาติ” [TraveliGo Startup: Thai OTA Which Aims to Compete with Global OTAs], *Bangkok Biz News* (1 November 2018), online: <<https://www.bangkokbiznews.com/advertorials/news/social-education/1064>>.

⁸⁴ *Ibid.*

⁸⁵ “มารู้จักกับ E-Marketplace คืออะไร เพิ่มโอกาสสำหรับคนทำธุรกิจออนไลน์” [What is E-Marketplace? Opening Opportunities for Online Business], *ZORT (blog)* (27 September 2022), online: <<https://zortout.com/blog/what-is-e-marketplace>>.

⁸⁶ *Ibid.*

⁸⁷ “ย้อนมอง JD Central ยกธงขาว เซย์ goodbye E-Commerce ไทย” [Looking Back to JD Central Withdrawing from Thai E-Commerce Market], *MRG Online* (4 February 2023), online: <<https://mrgonline.com/daily/detail/9660000011011>> [*MRG Online*, “Looking Back to JD Central Withdrawing”].

The Thai online shopping market has a certain feature which makes it vulnerable to killer acquisitions. It is that the playing field is extremely saturated. Between Lazada and Shopee, it is evident how vigorous their competition is and how rapid their growth and popularity are, that even large international conglomerates struggle to enter. In this regard, two examples stand out. The first is 11Street, one of the biggest online shopping platforms in South Korea.⁸⁸ 11Street invested in Thailand, with the ambitious intention to compete with Lazada and Shopee in the Thai online shopping market in 2016. Despite more than THB 1 billion of investments,⁸⁹ including high advertisement costs for hiring top Asian celebrities to endorse their brand and purchasing advertisement spots on the Bangkok Skytrain,⁹⁰ 11Street eventually decided to withdraw its business in Thailand after two years of investment due to its inability to penetrate the Thai online shopping market.⁹¹

Another example is the recent withdrawal of the Thai online shopping market's third-largest player, JD Central. Back in 2021, JD Central, an investment combination of JD.Com, the second largest e-commerce platform in China, and Central Group, the top Thai multinational retail business, rose to prominence as the main alternative for consumers to the two mainstays of the Thai online shopping market, Lazada and Shopee.⁹² Despite the joint investment of more than THB 17.5 billion, statistics showed that, in the first quarter of 2022, JD Central only gained around 2 million users in Thailand, incomparable to those of Shopee and Lazada with 56 million users and 36 million users, respectively.⁹³ Observed from its significant loss and enormous gap between the top two players, JD Central eventually announced its withdrawal from the Thai online shopping market in March 2023.⁹⁴

⁸⁸ 11Street Co. Ltd., "Brochure", online: <https://www.11stcorp.com/resources/guide/2023_11street_Brochure_Eng-.pdf?sessionid=C9C8F69DDF0CAD0CD7053C7A6BE9BEA2>.

⁸⁹ "ปิดฉากแบรนด์ 11Street (ประเทศไทย) ยุติเส้นทาง 27 เดือน หลังเอสเค เทเลคอม โบกมือลาอี-คอมเมิร์ซไทย" [Closure of 11Street After 27 months in the Thai E-Commerce Market], *Marketing Oops!* (11 July 2018), online: <<https://www.marketingoops.com/news/biz-news/11street/>>; *MRG Online*, "Looking Back to JD Central Withdrawing", *supra* note 87.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Topten, "ย้อนรอย 'JD Central' ชักมือใหญ่ที่กำลังโบกมือลาอีคอมเมิร์ซไทยตามรอย '11Street' [Looking Back at JD Central, A Main Player Withdrawing from the Thai E-Commerce Market like 11Street], *Positioning* (20 January 2023), online: <<https://positioningmag.com/1417229>>.

⁹³ *Ibid.*

⁹⁴ *MRG Online*, "Looking Back to JD Central Withdrawing", *supra* note 87.

Against this backdrop lies the Thai government's pro-start-up initiatives to boost the vibrancy of the domestic online shopping market, similar to its efforts in the online travel agency market. The National Innovation Agency of Thailand, being well aware of the potential growth of this market, has developed the 'Start-up Thailand Marketplace' project, in order to support and facilitate Thai start-ups to enter this market despite its high barriers to entry.⁹⁵ It is worth noting that the initiative has started to bear fruit. After two years involving approximately 200 Thai start-ups, the revenue of participating start-ups has increased by 10-20%,⁹⁶ and the value of the Thai digital platform markets increased by about THB 100 million.⁹⁷ This demonstrates that small domestic market players can threaten existing dominant market players, making them an attractive target to be killed early in their corporate lifespan.

The introduction of the transaction value approach – with its focus on the transaction value rather than on parties' turnover and market share – is likely to flag, for the TCCT's attention and regulation, more acquisitions of such nascent domestic start-ups that have the potential to go on to disrupt their markets for the overall benefit of Thai society. Crucially, the introduction of such an approach will provide regulatory support to the Thai government's initiative to ensure that the domestic digital economy remains vibrant and competitive, not just by international conglomerates but also by domestic firms. This is not to say that mergers and acquisitions of small innovative firms are always negative for the Thai economy. Rather, it is to make the case that the TCCT needs to be given more regulatory oversight so as to ensure that Thailand's digital economy remains open and competitive to new market entrants. In this regard, the adoption of the German transaction value approach will be the first step in that direction, by providing the TCCT with an additional ground to pre-emptively ensure that the proposed merger and/or acquisition is not harmful to Thai society – whether now or subsequently.

VI. CONCLUSION

⁹⁵ “NIA เป็น Startup Thailand Marketplace ปี 3 ส่ง 30 ไอเดีย ชื่อนตลาดสตาร์ทอัพ” [NIA Develops Startup Thailand Marketplace for the Third Year: Giving 30 Ideas for Thai Startups], *MRG Online* (19 September 2022), online: <<https://mgronline.com/smes/detail/9650000090058>>.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

In conclusion, the existing notification thresholds within Thai merger control law, which are the market share and turnover thresholds, exhibit inherent shortcomings in identifying and addressing emerging challenges, particularly the threat of killer acquisitions in the dynamic landscape of the Thai digital market. The requirement to define the relevant market is a vital aspect of these thresholds, and it becomes conspicuously problematic and uncertain in the context of digital markets characterized by multi-sided structures and network effects. Notably, the current turnover threshold proves to be insufficient in guarding against predatory practices by major digital corporations targeting smaller Thai start-ups. The limitations of this threshold are illustrated in sectors, such as e-marketplaces and online travel agencies, where a handful of global giants dominate the landscape, leaving innovative yet nascent Thai start-ups vulnerable due to their comparatively lower turnover values.

Recognising these deficiencies, it is imperative for the TCCT to contemplate the implementation of an additional notification threshold into the merger control regime. The adoption of a transaction value threshold, based on the recent implementation in German Competition Law, emerges as a pragmatic solution suitable to the current circumstances of the Thai digital market. This threshold would introduce a mechanism to capture the killer acquisitions that involve high transaction values due to the novel innovation created by the targeted start-ups, despite their turnover values sometimes not being proportionate to their potential impact to the market.

Thus, the implementation of a transaction value threshold could rectify the existing imbalance, ensuring a fair and competitive landscape in Thai digital markets and encouraging the entry of local start-ups without subjecting them to undue risks of anti-competitive harm. This would eventually fortify the TCCT's ability to safeguard the interests and innovations of all digital market participants, and ensure a level playing field for all, allowing Thailand to navigate the complexities of the emerging digital economy.