DYNAMISM AND POLITICS IN EU MERGER CONTROL: THE PERILS AND PROMISE OF A KILLER ACQUISITIONS SOLUTION THROUGH A LAW & ECONOMICS LENS

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[TOC]

Competition law is experiencing a transformation. The culprits? Digitalization, technology and innovation are some.[1] Dynamic competition[2] in innovation-driven and high-tech industries puts mounting pressure on and challenges the fitness and limits of the existing antitrust apparatus to deal with novel and difficult to detect harms for markets and consumers.[3]

In this context, there is one area where dynamic competition meets EU competition policy that is standing out: "killer acquisitions"—a subset of mergers whereby large, incumbent companies buy small, innovative startups that hold significant competitive potential but have not proven themselves yet in the market.[4]

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[1] OECD, OECD HANDBOOK ON COMPETITION POLICY IN THE DIGITAL AGE (2022); NICOLAS PETIT, BIG TECH AND THE DIGITAL ECONOMY: THE MOLIGOPOLY SCENARIO (2020); Daniel F Spulber, *Antitrust and Innovation Competition*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 5 (2023); Rebecca Haw Allensworth, *Antitrust's High-Tech Exceptionalism Forum: Antitrust and Digital Platforms*, 130 YALE L.J. F. 588 (2021); William E. Kovacic, *Antitrust in High-Tech Industries: Improving the Federal Antitrust Joint Venture*, 19 GEO. MASON L. REV. 1097 (2012).

[2] J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 JOURNAL OF COMPETITION LAW & ECONOMICS 581, 600 (2009) ("Dynamic competition is a style of competition that relies on innovation to produce new products and processes and concomitant price reductions of substantial magnitude.").

[3] Id.; Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1 (2012); Nicolas Petit & David J Teece, *Innovating Big Tech Firms and Competition Policy: Favoring Dynamic over Static Competition*, 30 INDUSTRIAL AND CORPORATE CHANGE 1168 (2021); Michael G Jacobides & Ioannis Lianos, *Ecosystems and Competition Law in Theory and Practice*, 30 INDUSTRIAL AND CORPORATE CHANGE 1199 (2021).

[4] For a definition and related literature, see Part I *infra*. Acquisitions of nascent or potential competitors have also been an issue of major antitrust concern pointing to an "blind spot" in U.S. merger control. C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1879 (2020); A. Douglas Melamed, *Mergers Involving Nascent Competition*, STANFORD LAW AND ECONOMICS OLIN WORKING PAPER NO. 566 (2022); Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* (2022), https://papers.ssrn.com/abstract=4308233; Richard J. Gilbert & A. Douglas Melamed, *Potential*

Killer acquisitions exposed a unique "jurisdictional gap" in EU merger control not found in other jurisdictions such as the U.S. The EU Merger Regulation's high and singular turnover-based notification thresholds erect an almost impermeable barrier to ex ante review and substantive liability of mergers involving small-size targets.[5] Exceptionally, mergers meeting only national merger notification thresholds could be – and have been – referred to the Commission for review under the EUMR.[6] However, the Commission's jurisdiction following this route is conditional and could still miss "killer acquisitions" that may not hit such lower thresholds.

Eager for a quick and targeted fix, in 2021, the European Commission devised an ingenuous solution: "repurposing" the Article 22 EUMR case referral mechanism to flex its jurisdictional competence "on demand" over mergers below national thresholds that could affect competition and innovation in the EU especially in strategic and dynamic industries but escaped ex ante scrutiny.[7] Under a "recalibrated" approach, *any* affected Member State(s) could refer a merger case upwards for review by the Commission even if it had no jurisdiction.[8] On this basis, the Commission could have conditionally unlimited jurisidiction to review *any* deal that is non-reportable either at the EU or national level.

But the Court of Justice put a stop to this strategy with its judgment in *Illumina/Grail*, holding that the Commission could not accept referrals under Article 22 EUMR from Member States that are not competent to review the transaction

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Competition and the 2023 Merger Guidelines, 65 REV IND ORGAN 269 (2024). Notably, the U.S. DOJ and the FTC have changed the reporting rules under the Hart-Scott-Rodino (HSR) Act, in part to help capture acquisitions of nascent or potential competitors. FTC Rule, Premerger Notification; Reporting and Waiting Requirements, 89 FR 89216, 89232 (Nov. 12, 2024) (rule would provide more information about acquisitions of "nascent or potential competitors"). U.S. antitrust agencies have also aggressively sought to block potential killer acquisitions, some successfully (Visa/Plaid) and some unsuccessfully (Meta/Within, Microsoft/Activision). The Visa/Plaid merger was abandoned shortly after the DOJ's complaint. See Note by the United States, *OECD Roundtable on Theories of Harm for Digital Mergers*, 8–11 (2023).

[5] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1 ("EUMR").

[6] Examples of digital and technology mergers referred by national competition authorities to the Commission pursuant to Article 22 EUMR include Apple/Shazam, Facebook/Kustomer, Adobe/Figma, Booking/Etraveli. Yet, the Facebook/Kustomer merger led to parallel reviews by the Commission and a non-referring NCA while other mergers were exclusively reviewed at national level (Meta/Giphy). In addition, evidence shows that most such mergers go unchallenged and only rarely are successfully challenged by NCAs. *See* Viktoria H.S.E. Robertson, *Merger Review in Digital and Technology Markets: Insights from National Case Law*, REPORT TO THE EUROPEAN COMMISSION (2022) 26; Viktoria H.S.E. Robertson, *The Future of Digital Mergers in a Post-DMA World*, *in* FIRST ANNUAL CONFERENCE OF THE EUROPEAN COMMISSION LEGAL SERVICE (2023) 2.

[7] See *infra* Part II.D.

[8] See Communication from the Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases [2021] C 113/01 ("Article 22 Guidance").

under their national merger control rules.[9] As a consequence, the Commission withdrew its Article 22 Guidance.[10] But despite this defeat, the Commission reiterated in reaction to the judgment the need for an EU killer acquisition solution and its commitment to Article 22:[11] for now, under a "traditional approach" accepting referrals from Member States *with* competence to review the referred mergers, an increasingly popular jurisdictional route as several Member States have granted (or are in the process of granting) their competition authorities greater "call-in" powers;[12] or possibly in the future though a revision of the EUMR and Article 22 that could revive its "recalibrated approach" allowing referrals of "sub-threshold mergers by Member States *without* jurisdiction in defined circumstances."[13]

The Commission's creative solution to the killer acquisition challenge is curious by international standards. Granted, the EUMR turnover thresholds could result in shortcomings of a substantive and jurisdictional nature that would justify a fix.[14] Yet, the newly proposed regulatory framework of Article 22 referrals would not effectively address the "deterrence problem" and the "externality problem"—the main "deficiencies" of the EUMR thresholds[15]—or offer a theoretically coherent and

[9] Joined Cases C-611/22 P and C-625/22 P Illumina v Commission and Grail v Commission, Judgment of 3 September 2024, ECLI:EU:C:2024:677 ("Illumina/Grail*")*.

[10] Communication from the Commission concerning the withdrawal of act 2021/C 113/01, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024XC07190. See also the earlier press release: https://ec.europa.eu/commission/presscorner/detail/en/mex_24_6143.

[11] Anna Tzanaki, *Illumina's Light on Article 22 EUMR: The Suspended Step and Uncertain Future of EU Merger Control Over Below-Threshold "Killer" Merger*s, CPI ANTITRUST CHRONICLE DECEMBER 2024 (2024) 7.

[12] This trend has accelerated since the ECJ's *Illumina/Grail* judgment. For instance, France and the Netherlands are in the process of introducing national "call-in" powers; Belgium, the Czech Republic, Finland, Greece and Slovakia are considering this option while Cyprus, Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden already have such powers. Darach Connolly et al., *Predictably Uncertain: Managing Merger Control Call-in Risk at Local Level in the EU*, KLUWER COMPETITION LAW BLOG (Apr. 1, 2025), https://competitionlawblog.kluwercompetitionlaw.com/2025/04/01/predictably-uncertain-managing-merger-control-call-in-risk-at-local-level-in-the-eu/; Jan Kupčík et al., *The Evolution of Merger Proceedings in the Czech Republic and Slovakia*, SCHÖNHERR (Feb. 12, 2025), https://schoenherr.eu/content/the-evolution-of-merger-proceedings-in-the-czech-republic-and-slovakia; Jens-Uwe Franck, Giorgio Monti & Alexandre de Streel, *Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law*, TILEC DISCUSSION PAPER NO. DP2021-16, 2021, 12–16 (2021). Yet, in the pending appeal in *NVIDIA/Run:ai* (see *infra* note 226) the EU Court is expected to clarify the limits of the Commission's jurisdiction based on Article 22 EUMR and national "call-in" powers.

[13] Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions (September 3, 2024); Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association (Florence, September 6, 2024).

[14] See *infra* Part I.D and Part II.E.

[15] The Court of Justice rejected a broad interpretation, supported by the Commission and upheld by the General Court, of Article 22 EUMR as a general "corrective mechanism" intended to "remedy deficiencies" in the EU merger control system stemming from the rigidity of the turnover thresholds. *See* Illumina/Grail, *supra* note 9, ¶¶ 146, 149, 192 and 200-201.

practically methodical approach. Expansion of EU jurisdiction over small-size mergers in innovation driven markets could be unlimited but it would also be unprincipled.[16] An improvement on the status quo could not be guaranteed.[17] So, what can explain this choice? And what could be the implications for the functioning of EU merger control given its continued policy relevance?

Ironically, the root cause and the corollary of this choice of instrument to infuse "dynamism" and an "effects-based" approach to establishing jurisdiction under EU merger control are bound by politics. It was politics that determined the scope of the original EUMR.[18] The EUMR's thresholds had a historical purpose: to divide "exclusive" EU and national merger control competences to rule out any scope for competition and dispute over specific cases; their reform would necessitate political renegotiation with Member States.[19] By unleashing potential competition between the EU and Member States for jurisdiction over below-threshold transactions, the Commission's repurposing of Article 22 would unilaterally transform merger competence allocation from a "zero-sum" to a "non-zero-sum" game with important implications.[20]

A broader interpretation and use of the discretionary Article 22 referral mechanism, absent limiting principles, would erode defining and valuable features of the EUMR as a centralized and predictable ex ante control system such as transaction costs minimization and legal certainty.[21] EU merger control would be liable to become more strategic and ex ante uncertain. The upshot would be potential incentives costs in the form of overdeterrence and no safeguards that a given case will be dealt with by the "most appropriate authority" consistent with the principles of subsidiarity and "one-stop shop."[22] The envisioned status quo is unlikely to be an efficient setup or a lasting political equilibrium.[23] For that matter, the search for "future-proof" solutions and alternative institutional arrangements continues.[24] As such, recent developments

[16] Aurelien Portuese, *Making Sense of EU Merger Control: The Need for Limiting Principles*, CPI ANTITRUST CHRONICLE NOVEMBER 2023 (2023).

[17] See *infra* Part I.D and Part II.E.

[18] See *infra* Part II.A; and Opinion of Advocate General Emiliou of 21 March 2024 in Joined Cases C-611/22 P and C-625/22 P Illumina v Commission and Grail v Commission, ECLI:EU:C:2024:264, ¶¶ 98-101.

[19] *Id.*

[20] See *infra* Part II.E.

[21] Portuese, *supra* note 16. See also Illumina/Grail, *supra* note 9, ¶¶ 202-210, where the Court of Justice portrays the EUMR as striking a balance between various principles and finds that a broad interpretation of Article 22 in pursuit of maximum effectiveness to close enforcement gaps regarding anticompetitive mergers would upset this balance and undermine other objectives and principles such as predictability, legal certainty, effectiveness and efficiency of procedures, the "clear allocation of powers" and the "one-stop shop" principle.

[22] See *infra* Part I.D and Part II.C.

[23] Keith N. Hylton, *Getting Merger Guidelines Right*, 65 REV IND ORGAN 213 (2024) (analyzing the new [2023] U.S. Merger Guidelines as existing in a "political equilibrium" in antitrust enforcement).

[24] See *infra* Part III.

in EU merger policy and enforcement are only expected to be a prelude to further systemic reforms.[25]

I. THE ECONOMICS OF KILLER ACQUISITIONS: WHY MERGER CONTROL THRESHOLDS AND THE LAW MATTER

Killer acquisitions are the latest "schlager" hit in competition policy circles. With an unwavering wave of "digital" M&A in the last two decades, many of which involve startup acquisitions in markets dominated by large digital platforms, this newly revealed phenomenon not only found a catchy name, but it is also hitting sensitive emotional cords.[26] BigTech acquisitions of small, innovative companies are causing anxiety and unrest. Recent economic trends such as increasing concentration, higher profit margins, lower labor share, rise of superstar firms, declining investment and business dynamism have found a potential suspect.[27] Is there any merit to these concerns and if so, can the law do something about it? Or is the law part of the problem? Indeed, it has been argued that the current economic trends not only indicate a need to adjust the law but also that underenforcement of the antitrust and merger laws

[25] The Court of Justice made clear that despite the need to address jurisdictional and enforcement gaps regarding concentrations with significant effects on competition in the EU, an extension of the scope of the EUMR and the Commission's competence to review below-thresholds transactions would require legislative change (rather than unilateral revisioning by the Commission). Alternatively, Member States are free to expand their own national competence to fill gaps or resort to Article 102 TFEU to tackle mergers below national notification thresholds. See Illumina/Grail, *supra* note 9, ¶¶ 211 and 214-217. The latter possibilities may eventually lead to EU initiatives in this field.

[26] For an overview of the empirical literature, see OECD, *Start-Ups, Killer Acquisitions and Merger Control*, Background Note DAF/COMP(2020)5, 13–16 (2020); Pierre Régibeau, *Killer Acquisitions? Evidence and Potential Theories of Harm*, *in* RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF COMPETITION ENFORCEMENT 300, 315–322 (Ioannis Kokkoris & Claudia Lemus eds., 2022); Axel Gautier & Joe Lamesch, *Mergers in the Digital Economy*, 54 INFORMATION ECONOMICS AND POLICY 100890 (2021); Elena Argentesi et al., *Ex-Post Assessment of Merger Control Decisions in Digital Markets*, FINAL REPORT PREPARED BY LEAR FOR THE UK COMPETITION AND MARKETS AUTHORITY, 10–20, 142–148 (2019); Carl Shapiro & Ali Yurukoglu, *Trends in Competition in the United States: What Does the Evidence Show?*, NBER WORKING PAPER 32762, 29–31 (2024).

[27] For a summary of the economic literature and associated antitrust concerns especially in relation to digital markets and killer acquisitions, see Régibeau, *supra* note 26 at 300–303; Jonathan B. Baker et al., *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, CONGRESSIONAL AND OTHER TESTIMONY 18, 1–6 (2020), https://digitalcommons.wcl.american.edu/pub_disc_cong/18/. But see also Shapiro and Yurukoglu, *supra* note 26 (assessing an alternative explanation, competition in action, of empirical evidence relating to these trends); Nathan H. Miller, *Industrial Organization and The Rise of Market Power*, NBER WORKING PAPER 32627 (2024) (suggesting that technological advances are the key catalyst for observed rising market power but that rigorous antitrust enforcement remains important).

may have contributed to increasing market power.[28] Let us address the economic and legal determinants of the problem in turn.

A. THE KILLER ACQUISITION PROBLEM

"Killer acquisitions" are acquisitions of innovative companies by larger established firms that may eliminate or suppress "potentially promising, yet likely competing, innovation."[29] The epithet is warranted on the theory that "incumbent firms may acquire innovative targets solely to discontinue the target's innovation projects and preempt future competition."[30] However, the term has been used to encompass either acquisitions where the acquirer buys the target to shut it down completely and discontinue its product or activity (*elimination* of future competition) or milder cases where the target is not "killed" but its project is not developed to its full potential so that competition is diminished compared to the pre-acquisition situation (*suppression* of future competition).[31] Killer acquisitions may involve either "nascent" or "potential" competitors, i.e. existing companies or future entrants, as targets that may represent dynamic competitive threats.[32]

A variant of the theory relates to "*reverse* killer acquisitions."[33] These are acquisitions where the acquirer buys the target with the objective of discontinuing its

[28] Underenforcement in merger control occurs not only for jurisdictional (legal thresholds) but also for substantive reasons (scientific uncertainty, underappreciation of harms to innovation or potential competition, standard of proof test). See Tommaso Valletti & Hans Zenger, *Increasing Market Power and Merger Control*, 5 COMPETITION LAW & POLICY DEBATE 40 (2019); Régibeau, *supra* note 26 at 301–302; Baker et al., *supra* note 27.

[29] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 JOURNAL OF POLITICAL ECONOMY 649, 650 (2021) (showing "that acquired drug projects are less likely to be developed when they overlap with the acquirer's existing product portfolio, especially when the acquirer's market power is large" and "that 5.3%–7.4% of acquisitions in [their] sample are killer acquisitions.").

[30] *Id.* at 649.

[31] David Pérez de Lamo, *Assessing "Killer Acquisitions": An Assets and Capabilities-Based View of the Start-Up*, CPI ANTITRUST CHRONICLE MAY 2020, 3 (2020); John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 18, 653, 656 (2020).

[32] Although both are special types of the killer acquisition theory, their substantive assessment differs. Yun, *supra* note 31; Hemphill and Wu, *supra* note 4; Melamed, *supra* note 4; Herbert Hovenkamp, *Potential Competition*, ANTITRUST LAW JOURNAL, FORTHCOMING (2024).

[33] Cristina Caffarra, Gregory Crawford & Tommaso Valletti, *'How Tech Rolls': Potential Competition and 'Reverse' Killer Acquisitions*, VOXEU BLOG (May 11, 2020); Oliver Latham, Isabel Tecu & Nikita Bagaria, *Beyond Killer Acquisitions: Are There More Common Potential Competition Issues in Tech Deals and How Can These Be Assessed?*, CPI ANTITRUST CHRONICLE MAY 2020, 11 (2020).

own products or diminishing its own innovation efforts.[34] Both standard and reverse killer acquisition theories have been actionable in merger practice.[35]

B. ANTITRUST THEORIES OF HARM

The moniker "killer" acquisition presupposes an anticompetitive motivation for the acquisition.[36] Régibeau suggests that killer acquisitions can be problematic for the same reasons as any other horizontal merger: the theories of harm are the same.[37] He distinguishes between three types: (i) "hard killer" acquisitions where the target is shut down post-merger and there are no synergies; (ii) "soft killer" acquisitions where the target is shut down, and there are positive but limited merger-specific synergies; (iii) "victimless killer" acquisitions where the target continues to operate but are likely to have a net anticompetitive effect absent remedies. In all these cases, the anticompetitive effects dominate. The first two cases are distinguishable in that there is an observable "killing." Hard killers are clearly anticompetitive absent merger-specific efficiencies whereas soft killers are less clear-cut cases since with sufficient efficiencies they might lead to an increase of consumer welfare, e.g. if they involve transfer of assets such as technological know-how or talented personnel that could not be acquired without the merger at comparable cost.[38]

In practice, it is the likely presence or extent of merger-specific efficiencies, among other factors, that determine whether a given merger is a "killer" and of what type.[39] However, balancing these effects in an ex ante setting when the right

[34] Latham, Tecu, and Bagaria, *supra* note 33 at 11–12 (in this scenario, "the incumbent is a competitive threat to the target rather than vice-versa." Although these are essentially conglomerate mergers with potential efficiencies, "competition agencies are likely to increasingly view any large conglomerate transaction as a potential competition case in disguise" that merits merger scrutiny.).

[35] Adobe/Figma is a merger that could be prohibited based on both theories. See Press release, Commission sends Adobe Statement of Objections over proposed acquisition of Figma, September 17, 2023: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5778. The merger was eventually abandoned before a prohibition decision was issued.

[36] *See* Cunningham, Ederer, and Ma, *supra* note 29 at 650.

[37] Régibeau, *supra* note 26 at 304–305, 322; *cf.* OECD, *supra* note 26 at 10.

[38] Régibeau, *supra* note 26 at 303–306.

[39] For an analysis of relevant factors to filter cases and some examples, see *Id.* at 303–317; Latham, Tecu, and Bagaria, *supra* note 33 at 4, 11–12. For examples of presumably hard killers, see Cunningham, Ederer, and Ma, *supra* note 29 at 650. For a broader overview of the mixed pro- and anticompetitive effects on competition and innovation that startup acquisitions by larger firms especially BigTech may have, and in which contexts, see Marc Bourreau & Alexandre de Streel, *Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control*, CERRE ISSUE PAPER FEBRUARY 2020, 8–13 (2020); OECD, *supra* note 26; Chiara Fumagalli, Massimo Motta & Emanuele Tarantino, *Shelving or Developing? The Acquisition of Potential Competitors Under Financial Constraints*, CSEF WORKING PAPER 637 (2022); Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, *Kill Zone*, NBER WORKING PAPER 27146 (2020).

counterfactual and the relationship of the merging parties' activities as substitutes or complements might be difficult to assess, is particularly challenging.[40]

C. SECTOR SPECIFICITY OF THE PROBLEM

The risk and prevalence of killer acquisitions are not uniform across industries or sectors. Theory, empirics and enforcement practice suggest that the risk of killer acquisitions is higher in pharmaceuticals than in the tech and digital sectors.[41] The differences pertain both to the type and number of potential killer acquisitions in each sector. This is understandable given that innovation and competition dynamics differ from industry to industry.[42] For instance, "hard killer" acquisitions are more likely in pharmaceutical industries. Pharma acquisitions are often horizontal and targeted around potential overlaps.[43] Market and regulatory structures may also indicate that anticompetitive strategies are more plausible and easily verifiable. Acquisitions in concentrated and patent protected markets long before patent expiry may point to an anticompetitive "killer" instinct while the ease of market definition due to regulatory approval of same-use drugs may reliably identify product substitutability and potential targets to prey upon.[44]

By contrast, killer acquisitions are perceived to be more rare in digital markets.[45] That does not necessarily make them less harmful, however, or imply that they should be immune to antitrust scrutiny.[46] Empirical studies find that "hard killers" and "horizontal" at the time acquisitions are unlikely and infrequent; the possibility of "softer killers" is not excluded but it is difficult to verify in practice.[47] Theories of harm are more complex, the characterization of products in digital markets as complements or substitutes is vague and dynamic, anticompetitive strategies are difficult to distinguish from other plausible explanations such as efficiency enhancing integration of complementary assets and capabilities, which are typical of non-horizontal

[40] Régibeau, *supra* note 26 at 311–312, 314, 323; Shapiro and Yurukoglu, *supra* note 26 at 29–31.

[41] Régibeau, *supra* note 26 at 302, 315–322; Marc Ivaldi, Nicolas Petit & Selcukhan Unekbas, *Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries*, TSE WORKING PAPER NO. 13-1420 (2023); Latham, Tecu, and Bagaria, *supra* note 33.

[42] Ivaldi, Petit, and Unekbas, *supra* note 41 at 5; Mark A. Lemley, *Industry-Specific Antitrust Policy for Innovation*, 2011 COLUM. BUS. L. REV. 637 (2011) (comparing pharmaceuticals and Schumpeterian innovation with the Internet and competitive innovation); Amy C. Madl, *Killing Innovation?: Antitrust Implications of Killer Acquisitions*, 38 YALE JOURNAL ON REGULATION BULLETIN 28, 51–52 (2020).

[43] Ivaldi, Petit, and Unekbas, *supra* note 41 at 5; Régibeau, *supra* note 26 at 321; Cunningham, Ederer, and Ma, *supra* note 29 at 651.

[44] Régibeau, *supra* note 26 at 302, 312, 316, 321–323; Cunningham, Ederer, and Ma, *supra* note 29 at 679–682.

[45] Régibeau, *supra* note 26 at 315–322; Ivaldi, Petit, and Unekbas, *supra* note 41 at 5–6; Latham, Tecu, and Bagaria, *supra* note 33 at 3, 11; Gautier and Lamesch, *supra* note 26.

[46] Latham, Tecu, and Bagaria, *supra* note 33 at 3, 11; Ivaldi, Petit, and Unekbas, *supra* note 41 at 6.

[47] Régibeau, *supra* note 26 at 316–317, 319–321; Argentesi et al., *supra* note 26.

acquisitions and common in digital industries.[48] Although the overall number of digital acquisitions is larger compared to pharma deals, this is not instructive as to their likely competition and innovation effects.[49] In addition, unlike pharma acquisitions, there is scant evidence regarding below-threshold digital transactions except those reported under the recently introduced DMA.[50] In this light, there is merit in further research that sheds light on the extent of the killer acquisition phenomenon in different settings.[51]

D. INSTITUTIONAL SPECIFICITY OF THE PROBLEM: THE LAW'S IMPACT ON BUSINESS INCENTIVES

The institutional details of the regulatory environment also matter. Premerger notification thresholds may affect the empirical dimensions of the killer acquisitions problem by affecting merging firms' incentives and conduct. For instance, there is evidence suggesting that likely killer acquisitions "intentionally" and "disproportionally occur just below thresholds for antitrust scrutiny."[52] Merger control thresholds can thus have a distortive effect in a double sense. Firstly, reportability thresholds induce strategic behavior of firms that may aim to avoid scrutiny by conducting acquisitions involving *smaller size* deals or targets.[53] Secondly, *more anticompetitive* acquisitions could be planned to occur below the thresholds.[54] Indeed, empirical research shows that after an increase in applicable thresholds, newly non-reportable horizontal mergers increase dramatically as the likelihood of detection and enforcement fall.[55] Consequently, the way the law is designed and enforced may amplify the problem (below the thresholds) as it influences the number and nature of

[48] Régibeau, *supra* note 26 at 312–321; Ivaldi, Petit, and Unekbas, *supra* note 41 at 5–6; Luís Cabral, *Merger Policy in Digital Industries*, 54 INFORMATION ECONOMICS AND POLICY 100866 (2021).

[49] Régibeau, *supra* note 34 at 315–321 (criticizing the quality of the limited empirical literature as often "divorced from any solid theory of harm" and thus of little practical value and providing his own empirical account comparing BigTech and pharma acquisitions).

[50] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1 ("DMA").

[51] Ivaldi, Petit, and Unekbas, *supra* note 41 at 21.

[52] Cunningham, Ederer, and Ma, *supra* note 29 at 649, 685–687. See also Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AMERICAN ECONOMIC REVIEW: INSIGHTS 77 (2019).

[53] Cunningham, Ederer, and Ma, *supra* note 29 at 685–686; Régibeau, *supra* note 26 at 311, 317, 319 (suggesting that digital platforms may focus on smaller and earlier acquisitions).

[54] Economic studies show that unreportable transactions are more likely to involve horizontal acquisitions that "kill" innovative targets' projects, lead to consolidation in local markets or large price increases. Cunningham, Ederer, and Ma, *supra* note 29; Wollmann, *supra* note 52; Josh Feng et al., Mergers That Matter: The Impact of M&A Activity in Prescription Drug Markets (May 23, 2024), https://papers.ssrn.com/abstract=4523015.

[55] Wollmann, *supra* note 52 at 78–79, 86–87, 91 (indicating "an endogenous response" of firms "to relaxing antitrust law"); See also George J. Stigler, *The Economic Effects of the Antitrust Laws*, 9 THE JOURNAL OF LAW & ECONOMICS 225, 232 (1966) (documenting the opposite "strong deterrence" effect: sharp decline in the proportion of horizontal mergers following reforms that strengthened U.S. merger control enforcement).

mergers being proposed. The available empirical evidence, although U.S. focused, thus confirms a likely "deterrence gap" regarding below-threshold transactions.

Optimal deterrence theory predicts that rational agents engage in (M&A) actions when the expected benefits exceed the costs, in which case the law (and the threat of enforcement) can raise the cost side of the calculus and thus discourage or prevent undesirable conduct (deterrence).[56] Under this framework, optimal merger enforcement and settlement policy that aims to promote deterrence should "give merging firms an increased incentive to propose welfare enhancing mergers and restructure welfare-reducing mergers."[57] Put differently, in an environment with imperfect and uncertain enforcement, the deterrent effects of merger enforcement depend on the expected probability of detection and liability (merger prohibition), and the magnitude of the cost for proposing (more) harmful mergers (merger remedies).[58] Thresholds and other institutional details of a merger control system may affect deterrence to the extent they influence these parameters.

Seen from this perspective, the institutional differences between the U.S. and the EU could suggest that potential systematic underdeterrence could be more concerning in the EU merger control context. In the U.S. system, merger enforcement is *selective* irrespective of (i.e., above and below) the ex ante reporting thresholds.[59] That is, investigations of unreportable mergers are possible and are observed albeit with lower likelihood.[60] At the same time, U.S. agencies need not investigate all reportable mergers above thresholds but retain prosecutorial discretion. This institutional design implies (i) some probability of enforcement and some deterrence of harmful below-threshold transactions (albeit not full or optimal given the empirical findings presented above); (ii) some overdeterrence of beneficial below-threshold transactions given the possibility of ad hoc review and error costs (type I errors) or administrative costs (for unreportable mergers that are challenged);[61] (iii) transaction cost savings for above threshold transactions that are notified but go unchallenged. In addition, U.S federal agencies (DoJ and FTC) and state attorneys general have *fully concurrent* and unlimited jurisdiction to challenge both consummated and unconsummated mergers under merger and (federal or state) antitrust laws.[62]

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[56] Robert D. Cooter & Michael D. Gilbert, *Theory of Enforcement*, *in* PUBLIC LAW AND ECONOMICS , 462–463 (Robert Cooter & Michael Gilbert eds., 2022).

[57] Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 FORDHAM L. REV. 2647, 2669 (2013).

[58] *Id.* at 2668–2670; Jonathan B Baker, *The Case for Antitrust Enforcement*, 17 JOURNAL OF ECONOMIC PERSPECTIVES 27, 40 (2003); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 THE UNIVERSITY OF CHICAGO LAW REVIEW 652, 657 (1983); Cooter and Gilbert, *supra* note 56 at 463.

[59] Wollmann, *supra* note 52; Cunningham, Ederer, and Ma, *supra* note 29.

[60] Wollmann, *supra* note 52 at 87; Shapiro and Yurukoglu, *supra* note 26 at 29.

[61] Luke M. Froeb, Steven Tschantz & Gregory J. Werden, *Deterrence in Merger Review: Likely Effects of Recent U.S. Policy Changes*, CPI ANTITRUST CHRONICLE MAY 2024 (2024).

[62] Note by the United States, *OECD Roundtable on Disentangling Consummated Mergers – Experiences and Challenges*, 2 (2022); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 INDIANA LAW JOURNAL, 431 (1983); Jonathan Rose, *State Antitrust*

The situation in Europe had been quite different until a cascade of recent changes were introduced in large part responding to the challenge of digital markets and below-threshold killer acquisitions, starting with the Commission's new Article 22 Guidance.[63] Historically, potentially anticompetitive below-threshold mergers could not be scrutinized under EU merger control (ex ante) due to the absolute bar of the EUMR thresholds *or* antitrust rules (ex post) due to the Commission's constrained ability to employ them against mergers.[64] Indeed, in the "certainty-focused" EU merger control system not only the detection but also substantive liability of potentially harmful mergers used to depend *exclusively* on mandatory notification thresholds. The EU thresholds would preclude review of non-reportable transactions and dictate review of all transactions exceeding them—with no possibility for selection or discretion in investigating merger cases. The system of case referrals offers the only exception: for instance, under Article 22 EUMR non-reportable mergers may be referred to the Commission from Member States for EU review. Article 22 referrals have been rather infrequent and narrowly construed until recently—meaning historically a very low or close to zero probability of detection and conviction.[65] But even in those cases (i) the Article 22 referral mechanism is discretionary relying on Member States' and the Commission's voluntary agreement for it to work; and (ii) the Commission's ad hoc scrutiny based on it may be geographically limited in that it may obtain jurisdiction only for the territory of the referring Member State(s), not the whole of the EU.[66] By comparison to the U.S., this institutional setup entails (i) more underdeterrence of harmful below-threshold transactions; (ii) more transaction costs for above threshold transactions but (iii) more legal certainty for parties and less concern about overdeterrence of beneficial transactions below the EUMR's clearcut thresholds.

Taken altogether, EU merger control has been rigid and bounded, which undermined deterrence. National competition law enforcement could come to the rescue but only as an imperfect alternative of pursuing problematic mergers below the EUMR thresholds. Unlike the U.S., merger competence of EU Member States is often limited by national thresholds,[67] which may create deterrence and incentive distortions of their own. Even with expanded "call-in" powers in an increasing number of Member State merger control regimes,[68] this concern might not be completely eliminated. Enforcement of EU antitrust rules at Member State level is also perceived to be limited in geographic and material scope. True, in theory national competition

Enforcement, Mergers, and Politics, 41 WAYNE L. REV. 71, 115–116 (1994); William E. Kovacic, Petros C. Mavroidis & Damien J. Neven, *Merger Control Procedures and Institutions: A Comparison of EU and U.S. Practice*, 59 ANTITRUST BULLETIN 55, 72–73, 81–83 (2014).

[63] See *infra* Part II.D. The *Illumina/Grail* judgment, *supra* note 9, arguably preserves the pre-existing status quo but not quite as shown later in Part II.E.

[64] On the function and limitations of the EUMR thresholds, see *infra* Part II.A. On the Commission's incapacitation or rather historical commitment not to enforce antitrust laws against mergers after the adoption of the EUMR, see *infra* Part II.A and C.

[65] On the system of case referrals and their relative frequency, see *infra* Part II.C.

[66] On the history and operation of Article 22 EUMR, see *infra* Part II.C.

[67] However, this may be changing as noted later in this section.

[68] For an overview of this increasing trend in several Member States, see *supra* note 12.

authorities (NCAs) may act as "regional agencies" or closely cooperate cases across borders when enforcing EU antitrust law but practice shows this is exceptional.[69] In fact, until *Towercast* confirmed otherwise, it was not clear at all that EU antitrust law and in particular Article 102 TFEU could be invoked by national authorities (or courts) against previously unchecked mergers.[70] In any event, Article 102 has a narrower scope, compared to merger control instruments, so that the likelihood of enforcement could be higher only for some mergers (those fulfilling the dominance and abuse criteria).[71]

There are further issues that could dampen deterrence. For cases that should be reviewed at EU level (e.g., cross-border), national enforcement is not a perfect substitute to EU scrutiny. Decisions of national competition authorities (NCAs) may impose externalities with suboptimal deterrence implications. Cooperation among NCAs could mitigate such concern.[72] Recital 14 EUMR and the EU Merger Working Group's best practices aspire to such close cooperation in multijurisdictional (multiple filing) merger cases and in facilitating referrals, but this is voluntary and it neither applies in all cases nor is always successful.[73] Similarly, coordination of joint referrals under Article 22 EUMR is voluntary and cannot exclude partial referrals or parallel proceedings.[74] These institutional arrangements could potentially improve detection (and have proven to be effective in several below-EUMR threshold digital mergers),[75] but not necessarily the likelihood, precision or efficiency of enforcement.

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[69] Giorgio Monti, *Galvanising National Competition Authorities in the European Union*, *in* RECONCILING EFFICIENCY AND EQUITY 365, 366, 371, 377 (Damien Gerard & Ioannis Lianos eds., 1 ed. 2019). Such cooperation takes place within the European Competition Network (ECN), which comprises of the Commission and all EU NCAs, and was intended to be strengthened with the ECN+ Directive. Monti suggests that NCA enforcement focuses on cases or remedies whose effects are within national borders, and only the Commission is able to take cross-border cases. Hence, an enforcement gap may exist as to the latter cases.

[70] Case C-449/21 Towercast, Judgment of 16 March 2023, ECLI:EU:C:2023:207; see also Opinion of Advocate General Kokott of 13 October 2022, ECLI:EU:C:2022:777.

[71] On Towercast and its implications for the review of below-threshold mergers, see *infra* Part II.D.

[72] Note that cooperation in merger and antitrust cases under national law is outside the scope of the ECN. See Gabriele Carovano, *The 'ECN Plus-Plus': How Could It Look Like?*, 11 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 442, 444 (2020); Bruno Lasserre, *The European Competition Network*, 1 ITALIAN ANTITRUST REVIEW 11, 15 (2015).

[73] Andreas Bardong, *Cooperation between National Competition Authorities in the EU in Multijurisdictional Merger Cases—the Best Practices of the EU Merger Working Group*, 3 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 126 (2012); Lasserre, *supra* note 72 at 15.

[74] See Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation, January 2005 ("ECA Principles").

[75] ECA notices with basic case information are circulated to *all* NCAs after a merger is notified in some Member State. The intention is to alert *competent* NCAs of "imminent notification of a multijurisdictional case." Only those NCAs continue cooperating further on the case. As the transaction itself may be public by then, other NCAs can use this information to learn that parties do not plan to notify in their jurisdiction and to request notification. *See* Bardong, *supra* note 73 at 136.

Alarmed by the relative inadequacy of its system in the face of the novel killer acquisitions threat, the Commission was keen on a tailored solution that would facilitate merger review of transactions below national notification thresholds and boost the performance of EU merger control.[76] Substantive reassessment of competition risks in digital markets[77] and killer acquisitions[78] led to a series of – related – legislative and policy reforms at EU and national level. First, a general reporting regime for *all* M&A of designated "gatekeepers" was introduced under Article 14 DMA *specific to the digital sector*. Second, according to the Commission's new Guidance, broader use of the upward referral mechanism under Article 22 EUMR was envisioned *below national thresholds*, so that Member States could refer cases to the Commission even if not caught by their national merger rules.[79]

Certain EU Member States such as Germany and Austria chose to expand their national merger control regimes by adding "transaction value" notification thresholds, which unlike current turnover, can "reflect future strength" and capture loss of potential competition.[80] However, the Commission dismissed this approach under the EUMR. Instead, it prioritized minimizing transaction costs and favored the flexible instrument of case referrals while learning from experience in these jurisdictions.[81]

The effects of these changes were remarkable. At one level, the EU seemed to have taken a firm step towards addressing potential underenforcement in merger

[76] See Speech of European Commissioner for Competition Margrethe Vestager, *'Refining the EU Merger Control System'* (March 10, 2016): "A merger that involves this sort of [small, innovative] company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds."

[77] Mounting concerns over prone to "tipping" digital markets, highlighted in recent policy reports, raised the stakes of getting legal intervention and merger policy right. On "tipping" see PETIT, *supra* note 1 at 81; Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 JOURNAL OF ECONOMIC PERSPECTIVES 93, 106 (1994).

[78] OECD, *supra* note 26 at 20 (explaining that "these types of transaction were until recently generally considered harmless and hence a low priority").

[79] Further on these reforms and their contemplated relationship, see *infra* Part II.D.

[80] OECD, *supra* note 26 at 43–45. Germany also introduced a "New Competition Tool" that among others empowers the Bundeskartellamt, following a sector inquiry, to oblige undertakings active in a problematic sector to notify all future mergers subject to lower than regular merger control thresholds based on domestic turnover. The idea of a NCT was launched but abandoned at EU level. See Greg Bonné et al., *Germany's New Tool to Strengthen Competition: A Comparison with the UK's Markets Regime*, 45 EUROPEAN COMPETITION LAW REVIEW 132, 135, 139 (2024); Jens-Uwe Franck & Martin Peitz, *Germany's New Competition Tool: Sector Inquiry with Remedies*, 15 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 515, 517 (2024) (noting that this extended merger control is intended to capture "stealth consolidations" and "protect competition in regional markets").

[81] The Commission's 2016 public consultation concluded that reform of the EUMR to lower turnover or add transaction value thresholds to catch potential "gap cases" is not the "most proportionate" solution as they would entail significant cost for firms and regulators. See Staff Working Document, *Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control*, SWD(2021) 66 final (Brussels, 26 March 2021). On the theoretical and practical limitations of transaction value thresholds as screens for harm and jurisdictional criteria, see OECD, *supra* note 26 at 43–44; Régibeau, *supra* note 26 at 307–308, 311, 318.

control. Specifically, the DMA reporting obligation led to *increased* transparency over all digital mergers of entities considered "gatekeepers" under the DMA, and the "expansive" Article 22 referral solution enabled *selective* enforcement against below-threshold transactions that would be effectively unlimited (i.e., independent of EU or national thresholds and subject to minimal substantive criteria).[82] Until the Court of Justice reversed the Commission's *Illumina/Grail* decision, the Commission may have felt, for a short while, like Prometheus unbound.[83] The maximal flexibility gained, but for the dependence on Member States triggering referrals, would have brought EU merger control closer to its U.S. counterpart as far as non-reportable transactions are concerned. These and other developments in EU law such as merger enforcement based on Article 102 TFEU, post *Towercast*, and initiatives at national level could have filled (some) gaps in enforcement.[84] The multiplicity of enforcement tools and actors could increase the likelihood of review of problematic transaction and the credibility of the EU merger control enforcement. With this narrowing of the "enforcement gap" in EU merger control regarding small-size mergers, incentives for strategic business conduct could be minimized.[85]

On the other hand, the EU's strengthened merger enforcement based on the "repurposed" Article 22 EUMR could have been so unpredictable and unlimited that it defies the purpose: the gain in deterring harmful killer acquisitions could come at the (potentially greater) cost of chilling beneficial merger, innovation and investment activity. The main issue with the Commission's new Article 22 policy was that it could have overshot its mark. First, the *discretionary* character of Article 22 referrals could short circuit deterrence and undermine the accuracy of enforcement: it would have remained uncertain whether a harmful "killer" merger would be subject to prosecution and liability given the discretion of Member States triggering or the Commission accepting an Article 22 referral, even if such transaction were detected based on the new DMA reporting regime or agency intelligence or complaints. Conversely, harmless or beneficial "innocent" mergers could come under the enforcers' fire, and thus be subject to the burden and uncertainty of regulatory scrutiny or even convicted.[86] Self-interest rather than objective and foreseeable criteria could drive (non)referral or (non)enforcement decisions.[87]

Second, contingency of the Article 22 referral mechanism on the whims of both the Member States and the Commission could render merger enforcement below

[82] See Article 22 Guidance, *supra* note 8, marking this radical policy shift. Note that merger enforcement based on Article 22 referrals is not strictly time-limited either (¶ 21). On the (lack of) jurisdictional limits, see *infra* Part II.C and D. On the (lack of) substantive limits, see the discussion following in this section.

[83] Until the Court of Justice put a stop to its ambitious, unlimited use of Article 22 EUMR in its *Illumina/Grail* judgment. See *supra* note 9 and *infra* Part II.D.

[84] For an overview of national initiatives, see Franck, Monti, and de Streel, *supra* note 12 at 8–17 and supra note 12. On Towercast and its implications, see *infra* Part II.D.

[85] *See* Cooter and Gilbert, *supra* note 56 at 469–470, 479, 490 ("the state should enforce only when the marginal social benefit exceeds the marginal social cost").

[86] Froeb, Tschantz, and Werden, *supra* note 61.

[87] On the nature of the Article 22 referral mechanism, see *infra* Part II.C.

thresholds *strategic* and more difficult to predict. Interdependence of national (non)referral and EU (non)enforcement decisions could exacerbate the uncertainty of EU merger enforcement and breed its politicization.[88] In addition, with expanded national merger control powers in several Member States, due to broader ex ante reportability thresholds or ad hoc "call in" powers, it cannot be certain even after the Court of Justice's *Illumina/Grail* judgment whether and in which cases these powers may be used to complement (facilitate Article 22 referrals based on own competence) or antagonize the Commission's competence (retain national competence). Under these conditions, business incentives are unlikely to be optimized and transaction costs minimized.

Third, the Commission's Article 22 Guidance and its implementation in practice are likely *overbroad*. That is, selective below-threshold enforcement may lack self-restraint and precision from a substantive and jurisdictional point of view. The Guidance does not help in narrowing the Commission's prosecutorial discretion[89] and clearly identifying which mergers are the most likely to be problematic and could be enforcement targets. For instance, the Guidance does not exclude scrutiny of *any* below-threshold merger in *any* sector "where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential."[90] The list of cases indicated as appropriate for referral under this criterion points to transactions involving innovative targets and industries, such as digital and pharma, but not exclusively while the theories of harm that could be relevant in cases referred under the new Guidance are not limited to "killer" (or "reverse killer") theories.[91] Although the policy change was motivated by the killer acquisition narrative,[92] once it broke its jurisdictional chains, the Commission did not intend to tie its own hands,[93] as evidenced by one of the transactions for which it accepted a referral on grounds clearly outside the parameters of its own guidelines.[94] Eagerness for maximum effectiveness trumps clear guidance.[95] Indeed, the Commission's framing of the problem is made by

[88] For further discussion of these interactions, see *infra* Part II.E.

[89] Magali Eben & David Reader, *Taking Aim at Innovation-Crushing Mergers: A Killer Instinct Unleashed?*, 42 YEARBOOK OF EUROPEAN LAW 286, 310 (2024).

[90] Article 22 Guidance, ¶¶ 19-20. The Guidance adds that Article 22 has been used to allow "the Commission to review a significant number of transactions in a *wide* array of economic sectors, such as industrial, manufacturing, pharmaceutical and digital" that had led to Phase II review or approval subject to remedies (¶ 7).

[91] *Id.*, ¶¶ 19 and 15.

[92] See *id.*, ¶ 9 and *infra* Part II.D.

[93] See Vestager's speech, *supra* note 13, just after the Court of Justice limited its ability to use Article 22 to reach non-reportable deals under the EUMR to cases that are reviewable at national level, suggesting that the term "killer acquisition" is used as "shorthand" for any anticompetitive transaction "where large players takeover *innovative* targets with *low* turnover" and referring to innovation "in *many* sectors, that range from digital to biotech, pharma, chemicals and industrial products."

[94] *EEX/Nasdaq Powerdeals* (energy trading) https://ec.europa.eu/commission/presscorner/detail/en/mex_23_4221.

[95] Article 22 Guidance, ¶ 18.

reference to the EU jurisdictional gap (turnover) rather than the substantive problem per se (killer instinct).[96]

A look at the Commission's practice helps press the point: for the short time it could use its new Article 22 policy, the Commission accepted or invited referrals below national thresholds in three cases,[97] i.e., *Illumina/Grail* (biotech),[98] *Qualcomm/Autotalks* (semiconductor technology),[99] *EEX/Nasdaq Powerdeals* (energy trading)[100] while had it not been the Court's judgment limiting referrals without national competence, it could have tested asserting jurisdiction over a fourth case, *Microsoft/ Inflection* (AI technology).[101] It is debatable whether all these cases targeted deals occurring in innovation-driven industries where a killer instinct may be most palatable.[102] Besides, the first deal involved a vertical merger that was prohibited based on a "traditional" foreclosure theory of harm rather than a standard horizontal "killer" merger theory.[103] The last case also concerned a vertical acquisition of assets (talent and IP). The common determining factor in all these cases was the low turnover of the target company.[104] However, with the "turnover thresholds" (and local nexus) safe harbor eroded, any deal involving foreign companies and targets with no activities in the EU or any Member State, such as *Illumina/Grail*, could come under EU merger

[96] See *supra* Part I.B and *infra* II.D. The latter will typically be a subset of the former.

[97] Out of 100 below-threshold mergers screened by the Commission up to September 2024, "only a small minority of cases" (3%) raised serious concerns requiring in-depth review. See Vestager, *supra* note 13. Earlier reports suggest that 40 mergers were screened from 2020 until May 2023 to see if they warrant a referral. *See* Eben and Reader, *supra* note 89 at 310, 321. It is a separate question whether suspect below-threshold mergers may qualify as killer mergers. See Latham, Tecu, and Bagaria, *supra* note 33 at 8 (suggesting that 4% of the 409 BigTech acquisitions examined meet their filters as potential killer acquisitions).

[98] https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846. The merger was prohibited, and divestiture was ordered. After the Court of Justice annulled the Commission's decision to accept referral(s) under Article 22 without national competence, the prior decisions were withdrawn but the divestiture had already occurred.

[99] https://ec.europa.eu/commission/presscorner/detail/en/mex_23_4201. The deal was eventually abandoned following investigation by EU and other authorities.

[100] See *supra* note 94. Although remedies had been offered to secure EU approval, the deal was eventually abandoned.

[101] https://ec.europa.eu/commission/presscorner/detail/en/IP_24_4727.

[102] See *supra* Part I.C.

[103] OECD, COMPETITION AND INNOVATION - THE ROLE OF INNOVATION IN ENFORCEMENT CASES 15, 19 (2023); Portuese, *supra* note 16 at 11.

[104] There is such a low bar for the effect on inter Member State trade and effect on competition substantive criteria under Article 22(1) EUMR that they are almost indiscriminately fulfilled. See *infra* Part II.D.

scrutiny.[105] It is unclear whether future enforcement based on Article 22 referrals[106] may concentrate on *dynamic* sectors, other *strategic* sectors or *any* other sectors.[107]

On the whole, increased use of the Article 22 solution may not improve the deterrence record of EU merger control. The very broad uncertainty it creates may induce undercompliance and at least some (remaining) underdeterrence in the system.[108] At the same time, the unpredictability and regulatory burden it involves may have a chilling effect on legitimate business conduct (overdeterrence) and disproportionately affect welfare enhancing below-threshold transactions that enjoyed full immunity (zero chilling costs) under the previous system of "clearcut" and ex ante certain EUMR thresholds.[109] The costs of uncertainty may not only include beneficial deals discouraged and never proposed but also proposed deals that were abandoned[110] or approved subject to "exacting" remedies, which may actually undercut deterrence.[111] Any deterrence gains from increased enforcement would thus have to be balanced against chilling costs and other costs.[112] In general, increased enforcement does not guarantee increasing returns on deterrence: if additional enforcement is not well targeted or "disciplined"[113] – as in the case of Article 22-based enforcement, it

[105] Alec Burnside & Adam Kidane, *Double Dutch: Illumina/GRAIL, Article 22 and the General Court*, 8 COMPETITION LAW & POLICY DEBATE 140, 1–2, 12 (2024).

[106] Eben and Reader, *supra* note 89 at 310 (noting that NCAs will likely adapt their referral strategies "after a period of observing the types of mergers that the Commission accepts and rejects").

[107] See Vestager, *supra* note 13, underscoring that "innovation has become the key factor of competitiveness", which is at the center of President von der Leyen's Political Guidelines for the Next European Commission 2024-2029. The Guidelines and the Mission Letter of the incoming Competition Commissioner Ribera further highlight the need for "modernizing" competition policy to serve wider objectives such as innovation and competitiveness and explicitly refer to "killer acquisitions from foreign companies seeking to eliminate [small targets] as a possible source of future competition." See https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029_en.

[108] Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2(2) JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 279, 280 (1986); Jonathan B. Baker, *Taking the Error out of Error Cost Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1, 6 (2015).

[109] *Cf.* Froeb, Tschantz, and Werden, *supra* note 61.

[110] Qualcomm/Autotalks and EEX/Nasdaq Powerdeals offer examples of abandoned below-threshold mergers following the Commission's Article 22 policy change. Although we do not have enough information on the merits of the cases to assess their welfare impact, the abandonment of these deals is testament to merger control enforcement's deterrence effects at play. If any of these transactions were welfare enhancing, those effects would be negative.

[111] Salop, *supra* note 57 at 2661.

[112] Economic theory offers frameworks based on error costs, decision or enforcement theory to do this balancing and evaluate whether legal rules are optimal and promote efficient outcomes. See Baker, *supra* note 108 at 5–7; Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 280–283 (2015); Cooter and Gilbert, *supra* note 56 at 478.

[113] Salop, *supra* note 57 at 2670 (defining "discipline" as "commitment not to deviate" from the long-run optimal deterrence policies even if it would be "in the agency's short-run interest").

risks being inaccurate and counterproductive producing error costs ("false negatives" and "false positives")[114] and incentive costs (suboptimal deterrence).[115] In addition, as the risk of error is inherently high when reviewing suspect digital mergers with potentially mixed effects ("softer killer" mergers)[116] and considering the possibly limited institutional capacity of (national) competition authorities to assess more complex or innovation related cases,[117] these costs may be substantial.

In sum, the EU's innovative means to boost merger enforcement below thresholds may produce undesirable "bad" deterrence while it is debatable the extent to which it may bring about adequate deterrence of the "good" type.[118] It thus appears that whereas the past EU merger control regime based on absolute thresholds led to systematic *underdeterrence* (deterrence gap), the new regime of discretionary ex post referrals could lead to systematic *overdeterrence* (excessive deterrence). As business decisions are taken in the shadow of the law,[119] the precise choice of instruments and procedures matters. It would be ironic indeed if in the name of protecting dynamic competition and innovation, the EU ends up harming them—with its new rules being part of the problem in an effort to provide a solution.

II. THE POLITICS OF EU MERGER CONTROL: HOW A KILLER SOLUTION MAY HAVE TRIGGERED INSTITUTIONAL TRANSFORMATION

Killer acquisitions brought in not only more dynamism but also more politics in EU merger control. The EU turnover-based jurisdictional rules have had a notable political dimension. The turnover thresholds as a rule to determine the scope of the original EUMR offered not merely a technical benchmark, rather they were meant to carve out the outer limits of EU merger competence in relation to merger control powers of Member States. The Commission's "repurposing" of the Article 22 referral mechanism from a narrow exception to the turnover thresholds rule to an "across-the-board" gap filling tool can be seen as an attempt to overcome its political constraints.

[114] In the real world of imperfect information and enforcement, error is irreducible without cost. See Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then*, 68 GEO. L. J. 1131, 1138 (1980).

[115] The two issues are separate, and although errors influence behavior, either type of error does not a priori correspond to either type of suboptimal deterrence. See Baker, *supra* note 108 at 6; Salop, *supra* note 112 at 281, 284.

[116] See *supra* Part I.B and C; Madl, *supra* note 42 at 31–32.

[117] Eben and Reader, *supra* note 89 at 320–321; Jotte Mulder & Wolf Sauter, *A New Regime for below Threshold Mergers in EU Competition Law? The Illumina/Grail and Towercast Judgments*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 544, 546 (2023).

[118] Paolo Buccirossi et al., *Deterrence in Competition Law*, Volume 4 *in* THE ANALYSIS OF COMPETITION POLICY AND SECTORAL REGULATION 423, 427–429, 448–449 (Martin Peitz & Yossi Spiegel eds., 2014); Baker, *supra* note 108 at 6.

[119] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 THE YALE LAW JOURNAL 950 (1979); Baker, *supra* note 108 at 6.

The causes and consequences of this attempted deeper institutional transformation are explained next.[120]

A. THE LOGIC AND LIMITS OF TURNOVER THRESHOLDS

Let us start with the source of the EU's jurisdictional deficit. The EUMR has been designed as an *ex ante* mandatory notification regime.[121] But for exceptional instances of case referrals from national competition authorities, there is no possibility for ex post or any review by the Commission. Also, in the EU system, at least *two* undertakings involved in a merger must reach the requisite thresholds.[122] Naturally transactions where one party (target) has low or no turnover notwithstanding its (future) competitive potential escape detection and scrutiny. A blind spot and ensuing risk of systematic underenforcement against killer acquisitions was spotted that led to public consultation on potential solutions. Its outcome however was skeptical and inconclusive as to the actual extent of an economic problem and an enforcement gap, *given* alternative enforcement options and the costs against the benefits of widening the scope for notification, to justify fundamental revision.[123] The turnover thresholds remained intact and instead the thus far marginal and ad hoc referral tool under Article 22 EUMR was recalibrated to catch occasional suspect cases of killer acquisitions at EU level.[124]

But why turnover thresholds have proven so enduring and what was the rationale for their adoption? The thresholds embedded in the original and revised EUMR for all their shortcomings have had a very clear function.[125] On the one hand, they are an objective and predictable jurisdictional criterion. On the other hand, they

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[120] Hubert Buch-Hansen, *The Political Economy of Regulatory Change: The Case of British Merger Control*, 6 REGULATION & GOVERNANCE 101, 106 (2012) (distinguishing between "deep" and "shallow" regulatory transformation).

[121] Articles 4 and 7 EUMR.

[122] See Article 1(2) and (3) EUMR.

[123] See 2021 Staff Working Document, *supra* note 81. Many stakeholders suggested that, *given* the referral mechanisms under the EUMR, there is not a *significant* enforcement gap. In light of this and the cost inefficiency of extending notification obligations *across the board*, the Commission decided not to proceed with any changes regarding the thresholds.

[124] Speech of European Commissioner for Competition Margrethe Vestager, 'The Future of EU Merger Control', International Bar Association 24th Annual Competition Conference (September 11, 2020) ("we looked at [...] whether our thresholds for filing a merger, which are based on the companies' turnover, are still the right way to spot mergers that matter for competition. [...] referrals could be an excellent way to see the mergers that matter at a European scale, but without bringing a lot of irrelevant cases into the net.").

[125] Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/1 ("Jurisdictional Notice"), ¶ 127: "The thresholds as such are designed to govern *jurisdiction* and not to assess the market position of the parties to the concentration nor the impact of the operation. [They] are purely *quantitative*, since they are only based on turnover calculation instead of market share or other criteria. They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger in order to determine if their transaction has a *Community dimension* and is therefore notifiable."

aim to capture transactions that have an "EU dimension."[126] As such, they promote the principles of legal certainty and subsidiarity and assign jurisdiction to the Commission for deals that have sufficient EU nexus.[127] The turnover of the parties is calculated on a global and EU-wide basis and must be of certain size to meet the requisite thresholds. The primary test that exists since the adoption of the EUMR targets very *large cross-border* mergers.[128] The secondary test added a new set of lower turnover thresholds that expanded EU jurisdiction over mergers with likely substantial impact in *at least three Member States* that would require multiple notifications at national level with the risk of conflicting outcomes.[129] A proviso under both tests – the so called "2/3 rule" – excludes from EU review mergers of undertakings with turnover concentrated in a single Member State.

The intention or rather the political compromise reached when the EUMR text was agreed was that the Commission obtains jurisdiction only over mergers that are very large in size and are most likely to have an impact on competition across the EU and the integration of the internal market.[130] By contrast, mergers of smaller size remained a matter of Member State competence, the largest of which had already developed active merger enforcement practice that they were unwilling to abandon.[131]

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[126] LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET (1991) 33: "The turnover threshold is a necessarily arbitrary way of defining which concentrations have sufficient impact on the [EU] as a whole to merit decision by the Commission rather than by Member States. Alternative tests have been considered over the years, but the turnover test is the only one which is both reasonably certain in its application and not excessively complex.".

[127] Nicholas Levy, Andris Rimsa & Bianca Buzatu, *The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to "Brightline" Jurisdictional Rules?*, 5 EUR. COMPETITION & REG. L. REV. 364, 365 (2021); Sven B. Völcker, *Back to the Future: Merger Control Outside the Merger Regulation*, 61 COMMON MARKET LAW REVIEW 1223, 1224 (2024). The EUMR's jurisdictional setup aligns with international best practice requiring a "material local nexus and clear, objective and quantifiable thresholds". The "local nexus" requirement is particularly important for cross-border mergers. See OECD, LOCAL NEXUS AND JURISDICTIONAL THRESHOLDS IN MERGER CONTROL - BACKGROUND PAPER BY THE SECRETARIAT 2, 7 (2016).

[128] Article 1(2) EUMR.

[129] Article 1(3) EUMR, and Jurisdictional Notice, ¶ 126.

[130] Recital 8 EUMR: "this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State."

[131] Ethan Schwartz, *Politics as Usual: The History of European Community Merger Control*, 18 YALE J. INT'L L. 607, 650–651 and 656 (1993) (arguing that the thresholds for EU jurisdiction were "far too high" and they "represent[ed] how little authority the member states were willing to yield to Brussels" and as a result, many important transactions would escape the reach of the EUMR, for instance, if a large foreign firm with no EU activity would buy a very large firm in the EU or if a large EU firm would buy smaller firms of appreciable size but below the EUMR thresholds). Lee McGowan & Michelle Cini, *Discretion and Politicization in EU Competition Policy: The Case of Merger Control*, 12 GOVERNANCE 175, 181–182 (1999) (suggesting that "the [EUMR] was based on a compromise between all the parties, which meant that the thresholds originally proposed by the Commission were watered down" and noting the differing interests of Member States with no versus established merger regimes regarding the thresholds, which were "highly contentious").

Similarly, the "2/3 rule" aimed to carve out mergers of mostly national significance and impact, e.g., as between national players such as formerly state-owned utility businesses whose presence and activity focused predominantly within a given Member State.[132] Those were left to Member States as a sensitive matter to deal with.

It is this political balance that the thresholds were designed to safeguard and also the reason for their perseverance. Despite repeated attempts of the Commission to revise the originally agreed thresholds (with the later introduced secondary test as the only exception), Member States have consistently rejected change that would entail giving away more of their existing merger review powers.[133] The significance of the agreed thresholds can be traced further back in time by looking at earlier Commission proposals that aspired for a broader jurisdictional scope of the EUMR that the Council opposed.[134] The "EU dimension" that was set to delimit EU from national merger competence was part of the negotiations and political bargain between the EU and Member States culminating in the adoption of a pan-European system of merger control.[135]

In other words, the purely turnover-based jurisdictional thresholds along with other factors helped EU merger control get started and on good footing. Industry demand that favored a "one-stop-shop" system rather than separate filings in individual Member States or potential alternative review under EU antitrust or national merger control rules, and Member States' preference for a "contained" EUMR over the Commission's "unchecked freedom" to develop a *de facto* system of merger control under Articles 101 and 102 TFEU were contributing factors.[136] Besides, in its early days EU merger control enforcement was "easy" as the Commission only got to decide over cross-border mergers involving large national firms of different Member States. Its approach was generally permissive as EU markets were largely unconcentrated and cross-border mergers were perceived as a desired means to European integration rather

[132] Jurisdictional Notice, ¶¶ 125 and 126 (noting that the aim of the rule is to exclude purely or predominantly domestic transactions from EU jurisdiction). See also Schwartz, *supra* note 131 at 656–657.

[133] McGowan and Cini, *supra* note 131 at 194–196; GIORGIO MONTI, EC COMPETITION LAW 247, 301 (2007).

[134] Völcker, *supra* note 127 at 1228 (noting that under the 1973 Proposal notification would be triggered by reference to the parties' worldwide [but not EU] turnover and whether one of them was established in the common market while review even below these thresholds was possible "subject to a very limited safe harbour" based on turnover and market shares).

[135] *Id.* at 1229 ("Key changes vis-à-vis the 1973 Proposal included the requirement that the concentration have a 'Community dimension' [requiring that at least two of the undertakings concerned have their principal (or at least 'substantial') activities in different Member States], and the removal of the Commission's power to 'call in' transactions below the thresholds.").

[136] DAMIEN NEVEN, ROBIN NUTTALL & PAUL SEABRIGHT, MERGER IN DAYLIGHT: THE ECONOMICS AND POLITICS OF EUROPEAN MERGER CONTROL 79 (1993); MONTI, *supra* note 133 at 247–248; Anna Tzanaki, *Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking Through the Past to Return to the Future?*, *in* INTERSECTIONS BETWEEN CORPORATE AND ANTITRUST LAW 287, 290–291 (Marco Corradi & Julian Nowag eds., 2023).

than a concern.[137] The Commission could have its cake and eat it too: allow stronger EU firms to combine and gain prominence in the global business landscape while also promote the integration of the internal market.[138]

Merger policy had been at the service of a broader EU regulatory agenda albeit enforcement under the EUMR was strictly based on competition criteria,[139] a hard-fought battle for the Commission after long negotiations with Member States.[140] The fact that the EUMR was restrictive due to the operation of the high and limiting turnover thresholds was also indirectly helping to make the task more manageable: nationally sensitive and smaller size mergers were for the most part excluded from EU review which gave the Commission time to build experience and avoid being overwhelmed with an excessive number of merger filings they did not have the resources or capacity to handle.[141] A gap existed that was conscious but politically not feasible to overcome and not too important at that time. Progressively, the Commission also benefited from external factors that influenced in practice the operation of the thresholds. On the one hand, inflation has *de facto* increased the number of mergers that come within the scope of the EUMR as the nominal turnover numbers provided

[137] McGowan and Cini, *supra* note 131 at 187; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 79, 89, 151, 194 (suggesting that if anything there was concern from the outset that the EUMR may be "too lax" and presenting early merger cases analyzed and surveys as evidence of the Commission's permissive approach when assessing the substance of transactions or jurisdiction to accommodate firms; and that the EUMR was seen as "removing a number of national constraints [and] facilitating merger activity that might otherwise have been prevented").

[138] Mark Thatcher, *European Commission Merger Control: Combining Competition and the Creation of Larger European Firms*, 53 EUROPEAN JOURNAL OF POLITICAL RESEARCH 443 (2014).

[139] *Id.* at 461 ("The processes and criteria of competition have been applied, and individual firms have not been selected and favoured through political processes. But the application of competition criteria has led to outcomes sought by 'industrial policy' namely the development of larger European firms and notably 'European champion' firms [i.e., previous national champion firms which have retained their strong domestic base but expanded through mergers into other European markets]."); Jonathan Faull, *The Politics of Merger Control in the European Union*, *in* RESEARCH HANDBOOK ON GLOBAL MERGER CONTROL 267, 269 (Ioannis Kokkoris & Nicholas Levy eds., 2023) ("Using competition law to further a regulatory agenda [...] is nothing new" and suggesting the EU merger regulation is an example). On the interplay between competition policy and industrial policy (or wider EU interests) in EU merger control, see also MONTI, *supra* note 133 at 298–300.

[140] On the background and context, see Schwartz, *supra* note 131; Laurent Warlouzet, *The Centralization of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control (1956-91)*, 54 J. COMMON MKT. STUD. 725 (2016); Michelle Cini, *The European Merger Regime: Accounting for the Distinctiveness of the EU Model*, 30 POLICY STUDIES JOURNAL 240 (2002).

[141] Cini, *supra* note 140 at 248; James S Venit, *The "Merger" Control Regulation: Europe Comes of Age... or Caliban's Dinner*, 27 COMMON MARKET LAW REVIEW 7, 10 (1990) (reporting estimates that, for an initial period, the application of the EUMR would be limited to 50-60 transactions per year); Schwartz, *supra* note 131 at 657 (similarly reporting the expectation of 40-50 mergers a year).

for in the text of the Regulation have remained unchanged.[142] On the other hand, as the internal market has become more integrated, more and more large mergers come to qualify for EU review as the "2/3 rule" singling out "national" mergers increasingly lost its bite.[143]

B. One-stop shop and subsidiarity in EU merger control

The EU merger control regime has been founded on and shaped by the "one-stop shop" principle that the turnover thresholds and the system of case referrals seek to advance.[144] Given its jurisdictional design, the EUMR operates on a clear vertical division of competences that is set to "avoid concurrent EU and Member State jurisdiction over the same transactions."[145] A "one-stop shop" is always created for mergers exceeding the EUMR turnover thresholds and is exclusively allocated to the EU level.[146] That is, concentrations with an "EU dimension" are the sole competence of the Commission and parallel reviews at national level are not allowed.[147] The "one-stop shop" principle optimizes the predictability and cost efficiency of EU merger control as it translates into more legal certainty and less compliance costs for business engaging in cross-border mergers in the EU.[148] As importantly, the "centralized" system of EU merger control for all large scale mergers with significant cross-border impact that fall within the Commission's "exclusive" competence has another key function: it ensures uniformity in the market for corporate control and efficient development of the internal market as potential distortions from regulatory competition between Member States are excluded.[149] As such, the EU retains *partial* "preemptive federal competence" in the area of merger control that significantly limits national competition policy.[150] Concentrations *without* an "EU dimension" may be notifiable or reviewable under merger laws of the different Member States and potentially subject to multiple reviews.

There are three exceptions to these "bright-line" jurisdictional principles due to the operation of the "2/3 rule" and the possibility of "upwards" or "downwards"

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[142] Oliver Budzinski, *An Economic Perspective on the Jurisdictional Reform of the European Merger Control System*, 2 European Competition Journal 119, 132 (2006); Monti, *supra* note 133 at 302.

[143] *Cf.* Budzinski, *supra* note 142 at 132.

[144] Recitals 8 and 11 EUMR.

[145] Levy, Rimsa, and Buzatu, *supra* note 127 at 365 (collecting EU case law confirming this "clear division of powers" in merger control); Brittan, *supra* note 126 at 53 ("the clear division of tasks brought about by the Regulation will mean that there will be no scope for argument about jurisdiction between the Commission and Member States. The turnover threshold was chosen as a criterion for that very purpose.").

[146] Budzinski, *supra* note 142 at 131.

[147] Article 21 EUMR.

[148] Budzinski, *supra* note 142 at 125, 130–131.

[149] Report from the Commission to the Council on the application of the Merger Regulation thresholds, COM(2000) 399 final (Brussels, June 28, 2000) 2.

[150] James H. Bergeron, *Antitrust Federalism in the European Union after the Modernization Initiative*, 46 The Antitrust Bulletin 513, 514 (2001) (using the term in the context of analysing EU antitrust structures).

case referrals.[151] However, to the extent a single more appropriate authority at national level (NCA) or at EU level (Commission) reviews mergers in such cases, these exceptional rules are conceived not to undermine but to promote the "one-stop shop" principle.[152]

One may rationalize the EU system of competence allocation in merger control from an institutional economics perspective. The EUMR's turnover thresholds together with the "2/3 rule" are a rough proxy for locating anticompetitive effects in the appropriate geographic market to evaluate.[153] The turnover thresholds filter for significant cross-border effects to determine the "EU dimension" of merger cases.[154] Jurisdiction is divided accordingly: mergers with presumably significant "spillover effects" that likely affect competition at EU rather than Member State level are assigned to the Commission to decide.[155] The Commission as a "central actor" is most appropriate to scrutinize mergers with impact across the EU instead of self-interested Member States and thus internalize externalities that could result from national merger policies and enforcement decisions.[156] In legal terms, the institutional economic perspective is reflected in the principle of *subsidiarity* that underpins the EU's system of merger control competence allocation.[157] Under the principle of subsidiarity, in

[151] Levy, Rimsa, and Buzatu, *supra* note 127 at 365–366; Gianni De Stefano, Rita Motta & Susanne Zuehlke, *Merger Referrals in Practice—Analysis of the Cases under Article 22 of the Merger Regulation*, 2 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 537, 537 (2011).

[152] Budzinski, *supra* note 142 at 131.

[153] See *Id.* ("turnover thresholds serve as a cost-saving proxy for 'geographic relevant markets'"); Jurisdictional Notice, ¶ 124: "the turnover thresholds [are] designed to identify those operations which have an impact upon the Community and can be deemed to be of 'Community dimension'. Turnover is used as a proxy for the economic resources being combined in a concentration, and is allocated geographically in order to reflect the geographic distribution of those resources."

[154] Commission Green Paper on the review of the Merger Regulation, COM(96) 19 final (Brussels, January 31, 1996), ¶¶ 22-30.

[155] *Cf.* NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 179–181, 196–200.

[156] Budzinski, *supra* note 142 at 125 ("jurisdiction over an antitrust problem should be allocated to the jurisdictional level, which has the highest degree of congruency with the territorial or geographical scope of the problem. Otherwise, negative externalities provide incentives for the engagement in welfare-reducing strategies like selective [non-]enforcement of competition rules to discriminate against foreign producers or consumers [strategic competition policy]. Positive externalities, on the other hand, result if competition authorities are expected to consider anticompetitive effects on both the domestic market and on foreign jurisdictions' markets."); NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 237–238 (analyzing the costs and benefits of further centralization by lowering the EUMR thresholds and noting that "the benefit […] from the internalization of cross-border effects […] has to be weighed against the cost of imposing decisions on member states in which the assessment of competitive effects within their territory diverges from their own assessment").

[157] 1996 Green Paper, *supra* note 154, ¶¶ 24 and 30: "The allocation of cases between the Community and the Member States in the area of merger control was thus inspired by the same principles that underpin the notion of subsidiarity. [...] The application of the "one-stop shop" principle to concentrations with a Community dimension is related to the notion of subsidiarity: exclusive control at Community level is justified in view of the *scale* and *effects* of such transactions. It is also based on efficiency considerations."; Staff Working Paper accompanying

areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States but can rather be better achieved at EU level, by reason of the scale or effects of the proposed action.[158] As a reflection of subsidiarity, the "EU dimension" goes beyond merely screening for mergers that have material "local nexus" to the EU (compared to other countries with potential jurisdiction)[159] or an effect on inter-Member State trade which is presumed only for merger above the EUMR thresholds[160] (in contrast to Articles 101 and 102 TFEU where this criterion applies without any lower-bound limit).[161]

In addition, for mergers that benefit from the EU's "one-stop-shop" system, enforcement decisions are based purely on competition criteria rather than public interest or industrial policy grounds or being subject to political authorization powers of elected Ministers as in some Member States.[162] Objective substantive criteria (economic-based assessment) complement objective jurisdictional criteria (turnover-based thresholds) to characterize the operation of the EUMR and apply to large cross-border mergers within its scope.

C. Case referrals and the history of Article 22 EUMR

The EUMR also provides for case referral mechanisms that are intended to add certain flexibility to the EU merger control system and soften the strict division of

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the Communication from the Commission to the Council - Report on the functioning of Regulation No 139/2004, SEC(2009) 808 final/2 (Brussels, June 30, 2009), ¶ 2.

[158] Article 5(3) of the Treaty on European Union (TEU). See also Federico Fabbrini, *The Principle of Subsidiarity*, *in* Oxford Principles Of European Union Law: The European Union Legal Order, Volume I (Robert Schütze & Takis Tridimas eds., 2018); Roger Van Den Bergh, *Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy*, 16 International Review of Law and Economics 363 (1996); and Opinion AG Emiliou, *supra* note 18, ¶ 200.

[159] Brittan, *supra* note 126 at 43 ("If the significant amount of business within the [EU] required by the thresholds occurs, the merger will engage our jurisdiction."); Burnside and Kidane, *supra* note 105 at 151–152.

[160] Burnside and Kidane, *supra* note 105 at 143; Völcker, *supra* note 127 at 1230–1231; Brittan, *supra* note 126 at 42 ("the Commission has told the Member States that it does not intend to enforce the [TFEU] provisions under the threshold levels at which it believes that concentrations will not normally affect trade between Member States significantly"). Opinion AG Emiliou, *supra* note 18, ¶ 101: "both the Council and the Commission considered that it could be 'reasonably assumed' that concentrations below the ECMR thresholds had, generally, an insufficient impact on trade to justify review at EU level."

[161] Monti, *supra* note 133 at 300; see also Van Den Bergh, *supra* note 158 at 368 (noting that this requirement may be met "even in cases in which there are no significant cross-border effects").

[162] EU-level merger policy could thus be seen as more "neutral." See *supra* notes 138-139 and surrounding text; Stephen Wilks & Lee McGowan, *Discretion in European Merger Control: The German Regime in Context*, 2 Journal of European Public Policy 41, 53–54 (1995). See also Opinion AG Emiliou, *supra* note 18, ¶ 186 (highlighting that and adding that as a "compromise" a "legitimate interests" clause was included in the original EUMR granting Member States "some residual power of intervention" on non-competition grounds).

EU and national competences based on turnover thresholds.[163] To this end, the case referral system allows the reallocation of certain merger cases from national competition authorities to the Commission, and vice versa,[164] "with a view to ensuring that a case is dealt with by the most appropriate authority."[165] The rules on case referrals act as a "corrective mechanism" to the EUMR's threshold-based competence allocation rules under generally limited and narrowly circumscribed circumstances and in light of the principles of subsidiarity, legal certainty and "one-stop shop" that underpin the whole EU system of merger control.[166] Accordingly, to identify the "most appropriate" authority in a specific case, particular regard must be given to factors that reflect these principles such as the geographic scope and size of effects while ensuring effective protection of competition in all markets affected by the merger.[167]

The provision for case referrals in the EUMR text was also the product of political negotiations and necessity.[168] As the child of compromise, referral mechanisms were devised to address specific concerns and diverging interests of Member States to have them agree to the enactment of the EUMR.[169] For instance, Member States that feared effects in a distinct national or local market that does not constitute a substantial part of the common market could request referral of a merger with an EU dimension from the Commission even if initially it fell within the EUMR thresholds. This is Article 9 of the EUMR, or the so called "German clause."[170] In such cases, the turnover thresholds may be considered misleading in suggesting the existence of significant cross-border effects and the "2/3 rule" may have failed to indicate the absence of spillovers.[171] Reversely, Member States that feared effects within their territory but did not have any merger control regime in place at the time could refer a merger without an EU dimension to the Commission for review on their behalf. This is Article 22 of the EUMR, or the so called "Dutch clause."[172]

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[163] Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2 ("Case Referral Notice"), ¶ 7.

[164] Articles 4(4), 4(5), 9 and 22 EUMR. Referrals to the Commission may be requested (pre-notification) by the merging parties, or (post-notification) by Member States under Articles 4(5) and 22 of the EUMR respectively. Case Referral Notice, ¶ 65.

[165] Recital 14 EUMR.

[166] See Recitals 11 and 14 vis-à-vis Recitals 6 and 8 EUMR. See also Case Referral Notice, ¶¶ 5 and 7; Opinion AG Emiliou, *supra* note 18, ¶ 187; Burnside and Kidane, *supra* note 105 at 146–147; De Stefano, Motta, and Zuehlke, *supra* note 151 at 537.

[167] Case Referral Notice, ¶¶ 5 and 8-10.

[168] BRITTAN, *supra* note 126 at 39–43.

[169] See Schwartz, *supra* note 131 at 652–653, 657–660.

[170] *Id.* at 657 (this clause was "intended to allow member states to block mergers that may have anticompetitive effects in their territory that they fear the Commission may permit" and to ensure "that any EC-imposed regime would be at least as strict as Germany's.").

[171] NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 199–200.

[172] Schwartz, *supra* note 131 at 660 ("The clause allows member states - presumably small ones that either do not have a competition authority or that are unwilling to challenge larger member states or multinational corporations on their own - to petition the Commission to exercise its jurisdiction over concentrations below the Regulation's thresholds.").

The original purpose of Article 22 was for the Commission to be able to intervene in merger cases below the EUMR thresholds (that were beyond its exclusive competence) and cover enforcement gaps *at national level* when the referring Member State(s) *lacked* any merger legislation, and other enforcement options such as Article 102 TFEU were unavailable. As part of the bargain for the introduction of the EUMR was the disapplication of Regulation 17/62 implementing primary EU antitrust law to any concentrations, with the effect that the Commission lacked the procedural tools to apply Articles 101 and 102 TFEU to concentrations below the EUMR thresholds.[173] Although the Commission instrumentalized an expansive interpretation of EU antitrust rules to induce Member States' eventual agreement to the EUMR,[174] as a settlement it had to give assurances that these antitrust tools would not be deployed after the coming into force of the new EU merger regime – it won the battle but it had to drop its guns that bought about victory.[175] Thus, on the insistence of smaller Member States, the understanding was that Article 22 could be used so that the lacking national merger control enforcement is outsourced to the Commission.[176] Today that (almost) all Member States have domestic merger regimes,[177] this provision may be used when national authorities lack (not the law but) the institutional capacity such as resources or expertise to successfully pursue complex cases,[178] or given the nature of the relevant

[173] *Cf.* Völcker, *supra* note 127 at 1230 (suggesting that the enforcement gap in Member States without their own competition laws at the time was one of the Commission's making and providing historical background); Burnside and Kidane, *supra* note 105 at 143 (same, explaining the relationship between the EUMR and its Article 22, and Articles 101 and 102 TFEU).

[174] In the run up to the EUMR the Commission strategically used (or reinterpreted) its existing powers to push for change: attempting (or threatening) to aggressively deploy Articles 101 and 102 TFEU as a tool of *de facto* merger control. The EU Courts have also played their role confirming those extended powers in the seminal *Continental Can* and *Philip Morris* judgments making the Commission's threat credible. See Tzanaki, *supra* note 136 at 290–291; Schwartz, *supra* note 131 at 609–620, 640–642.

[175] BRITTAN, *supra* note 126 at 42, 52–53.

[176] Burnside and Kidane, *supra* note 105 at 143–144. See also Opinion AG Emiliou, *supra* note 18, ¶ 100: "the introduction of the 'Dutch clause' [...] permitted the Commission to 'step into the shoes' of the national authorities and act on their behalf, on an exceptional basis, when there was no merger review legislation."

[177] Luxembourg is the only Member State without a merger control regime but they proposed a bill to introduce one in August 2023 that is currently discussed in Parliament: https://www.chd.lu/fr/dossier/8296. Interestingly, Luxembourg requested a referral for the first time in a recent case that the Commission accepted, whose decision the General Court upheld on appeal. See Case M.11485 Brasserie Nationale/Boissons Heintz, Commission decision of 14 March 2024 and https://ec.europa.eu/commission/presscorner/detail/en/mex_24_1506; and Case T-289/24 Brasserie Nationale and Munhowen v Commission, Judgment of the General Court of 2 July 2025, ECLI:EU:T:2025:655 ("Brasserie Nationale"). The merger was considered to have local impact; it was not subject to merger control review in any Member State as it did not hit their national thresholds, and no Member State joined Luxembourg's referral request.

[178] In such cases the Commission may be the "best placed" authority to assess the case. See Eben and Reader, *supra* note 89 at 320–321 (because it could identify and successfully argue "the existence of innovation harms to the requisite legal standard"); Mulder and Sauter, *supra* note 117 at 546 (due to the "complexity or sensitivity" of cases that competent NCAs could be

markets involved or investigation and remedies required.[179] Generally, in cases referred under Article 22 the Commission examines the effects of the merger only in the territory of the referring Member State.[180]

Interestingly, after the amendment of the EUMR in 1997, Article 22 assumed a second function: it enabled "two or more [*competent*] Member States to make joint referrals to the Commission where they felt that the Commission was better placed to act" with the intention to strengthen the "one-stop shop" system and to alleviate the problem of multiple filings in merger cases with *cross-border effects* that fell below the EUMR thresholds.[181] This amendment was seen as complementary to the introduction, at the same time, of the Article 1(3) thresholds (secondary turnover test), which was intended to address the same issues.[182] Even in these cases, however, the Commission's competence is not necessarily EU-wide as Article 22 allows partial referrals by only one or some of the Member States capable of reviewing a concentration; non-referring competent Member States can run parallel reviews.[183] From this perspective the Article 22 referral mechanism remains suboptimal and not fully supportive of the "one-stop shop" principle although in practice the Commission's assessment of such cases is often EU-wide.[184]

Requests for, and the joining and acceptance of referrals are generally voluntary and subject to the discretion of Member States and the Commission. This may undermine their effectiveness.[185] The EUMR recognizes that the system of

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"uncomfortable" analyzing themselves); De Stefano, Motta, and Zuehlke, *supra* note 151 at 541, 546 (because referred mergers pose "issues, which may be bigger than the [referring] Member State" or "concern markets previously scrutinised in Brussels").

[179] E.g., if markets are wider than national, investigation beyond a given Member State is needed or a cross-border remedies package is appropriate. See 2009 Staff Working Paper, *supra* note 157, ¶ 143; ECA Principles, *supra* note 74, ¶ 19.

[180] Case Referral Notice, footnote 45; Article 22 Guidance, footnote 12. See also Article 22(5) of the original EUMR: 'pursuant to paragraph 3 [now Article 22(1)] the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.' This provision was repealed in 2004 given the new second function of Article 22 developed in the meantime. Opinion AG Emiliou, *supra* note 18, ¶ 166.

[181] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final (Brussels, December 11, 2001), ¶ 86.

[182] *Id.* The original Merger Regulation had linked the two issues as Article 22(6) provided: "Paragraphs 3 to 5 [present Article 22 EUMR] shall continue to apply until the thresholds referred to in Article 1(2) [primary turnover test] have been reviewed." This review was to be done in 1994 by the Council according to then Article 1(3). See Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1990] OJ L395/1. See also Opinion AG Emiliou, *supra* note 18, ¶ 169: noting that "the [Article 22] referral mechanism was initially conceived as a temporary one."

[183] ECA Principles, *supra* note 74, ¶ 18.

[184] Levy, Rimsa, and Buzatu, *supra* note 127 at 367; De Stefano, Motta, and Zuehlke, *supra* note 151 at 540, 545 (noting by reference to examples from the EU referral practice that "Article 22 is not an efficient tool to consolidate jurisdiction at the EU level").

[185] Budzinski, *supra* note 142 at 130, 132, 134, 137–138 (arguing that the voluntary nature and lack of clearcut criteria for referrals render the post-notification referral regime [Articles 9

"upward" referrals to the Commission is incomplete, particularly for cases of below-EU thresholds transactions requiring multiple national filings and should be further developed.[186] Some initiatives to that end have been taken over the years. For instance, prior to the last amendment of the EUMR in 2004 there was a proposal for the Commission to acquire "exclusive" EU jurisdiction when the referral is made by all or at least three competent Member States, which was eventually not adopted.[187] Instead, there was insertion of a new Article 22(5), which provides that the Commission "may invite" one or more Member States to make a referral request.[188] Further reforms in 2004 in the system of case referrals intended to streamline and simplify the allocation of cases between the Commission and Member States and to reduce the occurrence of multiple filings in the EU, consistent with the subsidiarity and "one-stop shop" principles.[189] The possibility of pre-notification referrals on the initiative of merging parties was introduced,[190] with parties empowered to request "upwards" referral to the Commission of a merger without an EU dimension "which is capable of being reviewed under the national competition laws of at least three Member States."[191]

Following these reforms, in 2005, the Commission issued guidance concerning all case referral mechanisms that clarified the types of cases that would be "most appropriate for referral" to the Commission pursuant to Article 22 and would be best addressed at EU level: cases that raise serious competition concerns (i) in markets that are wider than national, or (ii) in a series of national (or narrower) markets in different Member States whose coherent treatment in a single assessment is preferred.[192] In 2014 the Commission proposed further amendments to "upwards"

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and 22 EUMR] largely ineffective; given their discretion, the self-interest of authorities [EC and NCAs] can influence their decisions to refer or accept referred cases, leading to suboptimal results). Note that there are narrow circumstances under which the Commission has no discretion in Article 4(5) and 9 referral cases but not regarding Article 22 referrals. See Case Referral Notice, ¶¶ 7 and 50, and Article 22(3) EUMR.

[186] Recital 12 EUMR.

[187] Explanatory Memorandum to Commission Proposal for a Council Regulation on the control of concentrations between undertakings COM(2002) 711 final, [2003] OJ C 20/4, ¶ 26: "In order to make Article 22 an efficient mechanism for the review of cases with significant cross-border effects, and to reduce legal uncertainty, it is proposed that, where all, or at least three, Member States with jurisdiction under their national rules decide to refer a case to the Commission, the Commission should acquire exclusive jurisdiction over the case throughout the EEA."

[188] *Id.*, ¶ 28 (explaining however that the Commission's Proposal providing for its ability to send invitation letters to Member States under Article 22 applies "after the case has been notified," and that "the pre-notification referrals mechanism should only be triggered by the merging parties.") See also Opinion AG Emiliou, *supra* note 18, ¶ 94.

[189] Nicholas Levy, *EU Merger Control: From Birth to Adolescence*, 26 WORLD COMPETITION 195, 213 (2003). The Commission chose to promote these reforms rather than proposing further reduction of the EUMR's jurisdictional thresholds that had consistently faced Member State resistance in the past.

[190] Both downwards and upwards under Article 4(4) and 4(5) EUMR.

[191] Article 4(5) EUMR.

[192] Case Referral Notice, ¶ 45; Franck, Monti, and de Streel, *supra* note 12 at 23 (explaining further that "the first scenario appears to extend Article 22 EUMR to instances where there are

post-notification referrals from Member States intending to rationalize the Article 22 procedure and narrow its scope: (i) allowing only "Member States that are competent to review a transaction under their national law" to request a referral, (ii) clarifying that, in exercising its discretion, "the Commission may decide not to accept the request if the transaction has no cross-border effects", and (iii) providing that "if the Commission decided to accept a referral request, it would have jurisdiction for the whole of the EEA" unless some competent Member State(s) opposed the referral.[193] None of these proposals were followed through.

Seen in this perspective, the system of referrals and specifically Article 22 was to improve, not override the logic and function of turnover thresholds as a jurisdictional allocation tool.[194] Imperfections remained but referrals were meant to be exceptional[195] and rare.[196] The legislative evolution of the Article 22 referral mechanism is revealing in this regard. Under its original and now (almost) obsolete rationale of stepping in to fill national enforcement gaps, Article 22 was narrowly drawn and at the service of the principle of subsidiarity.[197] Under its second, broader but rationalized form of promoting joint referrals in cases of multiple national filings, Article 22 firmly advanced the principle of "one-stop shop" in congruence with subsidiarity.[198] Correspondingly, it is interesting to observe the changing role of the Commission along this evolutionary path: from initially seen as an ad hoc contracted "agent" of effective merger control enforcement within the EU and its Member States (for cases of national or local impact)[199] to later being a centralized "coordinator" of

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expected to be cross-border anticompetitive effects, while the second assumes the possibility of multiple notifications").

[193] White Paper 'Towards more effective EU merger control,' COM(2014) 449 final (Brussels, July 7, 2014), ¶ 68.

[194] BRITTAN, *supra* note 126 at 50–52 (emphasizing as then acting Competition Commissioner that none of the three "exceptions" to the clear-cut threshold-based division of competences in EU merger control – Article's 9 German clause, 21 "legitimate interests" clause, and 22 Dutch clause – breached or was a general exception to the "one-stop shop" principle).

[195] Case Referral Notice, ¶¶ 4 and 7.

[196] BRITTAN, *supra* note 126 at 40, 42, 52 (explaining that Article 9 and 22 referrals were expected to be used rather "infrequently" and "sparingly").

[197] *Id.* at 42, 52; 2021 Staff Working Document, *supra* note 81 at 13-14 ("the referral rules are intended to operate as a corrective mechanism to allow for more efficient and effective merger control enforcement as well as to protect the principle of subsidiarity. The specific objective of the referral system therefore also serves the general objective of EU merger control. This is most notable in those cases where only a referral allows jurisdiction to be established for certain parts of the EEA that were previously not covered by the jurisdiction of any of the NCAs, such as in certain cases pursuant to Article 22 of the EUMR.").

[198] See Illumina/Grail, *supra* note 9, ¶¶ 182 and 199; Opinion AG Emiliou, *supra* note 18, ¶¶ 161 ("The EUMR intended to develop the 'one-stop-shop' objective of the referral mechanism."), 173 and 182.

[199] BRITTAN, *supra* note 126 at 52 ("[Article 22] is a sort of agency arrangement whereby a Member State may call upon the Commission to deal with a competition problem within its territory. There is no question of double jeopardy or multiple shopping."); Stephen Wilks, *Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?*, 18 GOVERNANCE 431 (2005); NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 181. Contrast this to the decentralized system of EU antitrust

multi-jurisdictional EU merger cases (with cross-border impact).[200] Yet, the failed attempts for further reform bear witness to the incomplete and incoherent identity of the Article 22 mechanism. Its fully discretionary and possibly fragmented character leading to parallel reviews, and its very broad scope of application due to open-ended substantive criteria and arguably no formal lower bound on jurisdiction[201] could limit its efficiency and effectiveness.[202]

These features make it the odd kid on the EUMR block, albeit not as prominent to endanger its bright-line, rule-based and certainty-oriented edifice. Indeed, until recently, Article 22 referrals have not been particularly frequent in practice. From September 21, 1990, that the EUMR was enacted until September 30, 2024, there have been 51 referral requests from Member States to the Commission under Article 22 in contrast to "upward" referrals by merging parties under Article 4(5) which have been almost 10 times more frequent (452).[203] Two conclusions follow.

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enforcement where the Member States are bound to act as "agents" of EU law and its effective application. Katalin J Cseres, *Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities*, 14 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 410, 420 (2023).

[200] The Commission underscored the "central coordinating role" it plays under Article 22 procedures in the Frequently Asked Questions and Answers ("Q&A") concerning Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases" at 11: https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf. Under its new "expansive" Article 22 policy, however, this role would not be limited to multi-filing, cross-border cases but it would presumably extend to any case referred under this provision.

[201] 2009 Staff Working Paper, *supra* note 157, ¶¶ 133-146 (questioning "whether or not a Member State should be able to make a referral request without having jurisdiction in the case" for mergers not caught by its jurisdictional thresholds: the open wording of the EUMR does not exclude the possibility although the original purpose of this referral process for "no-jurisdiction" Member States has been rendered obsolete; and noting that opinion among Member States is split on this issue as "five thought that it should be allowed while nine thought that it should not"). See also Opinion AG Emiliou, *supra* note 18, ¶ 95.

[202] Budzinski, *supra* note 142 at 130–132 (arguing that but for certain counterproductive features, the case referral system could improve cost efficiency and lead to externalities-reducing reallocation of cases, thus promoting the "one-stop shop" and subsidiarity principles); De Stefano, Motta, and Zuehlke, *supra* note 151 at 538–542 (showing that the Commission has accepted referrals in cases where markets could be national or where not all the [joining] Member States had their national filing or jurisdictional thresholds met, unlike other referral mechanisms under the EUMR where this is a key criterion, suggesting the "that the reach of Article 22 can be significant" but its efficiency and effectiveness less so).

[203] *See* Commission statistics on merger cases: https://competition-policy.ec.europa.eu/mergers/statistics_en. Of all Article 22 referral requests, only four were refused by the Commission (none since 2013). Four referral requests were made before 1998 (when the provision assumed a secondary function to allow upward referrals to address the "multiple filings" problem) by Member States that lacked national merger rules at the time and one in 2024 by Luxembourg that still lacks a merger control regime. See Levy, Rimsa, and Buzatu, *supra* note 146 at 367; and *supra* note 177. There have been only 10 referrals from 2014 to 2020. Most of the cases referred under Article 22 "involved transactions affecting markets which were wider than national in scope" (all accepted by the Commission as of "EU

One, the operation of the referral rules including Article 22 has generally not detracted from the well-functioning of the EU merger control system as a whole.[204] Two, Article 22 was never intended to operate as a general basis for jurisdiction encroaching on the clearcut threshold-based jurisdictional rules of the EUMR.[205] Given its limited function and use, it had a marginal systemic effect.

D. The New Article 22 EUMR and Complementary Solutions

Set to address killer acquisitions in dynamic markets, and with the revision of the EUMR's thresholds out of the question, in 2021, the Commission turned to the referral mechanism under Article 22 EUMR for a flexible and "targeted" solution.[206] The open wording of the provision allowed creative reinterpretation by the Commission for this purpose.[207] By issuing Article 22 Guidance it allowed for an "enhanced" use of Article 22[208] in cases "where the merger is not notifiable in the referring Member State(s)" but "the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential" such as when "the target company is a start-up, a recent entrant, a nascent competitor, or a significant

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relevance") and fewer consisted of merger cases "involving a series of markets with a national or narrower geographic scope but where a coherent treatment of the case at the EU level was considered desirable." See 2021 Staff Working Document, *supra* note 81 at 46. However, since 2021 (when the Commission adopted its new policy repurposing Article 22 to reach mergers below national thresholds) 10 referral requests have been made according to the Commission's statistics. Three of those requests concern referrals from Member States with no jurisdiction under their existing national merger control regime that the Commission had accepted while there was a fourth case of similar attempted referrals that was withdrawn following the Court of Justice's *Illumina/Grail* judgment. See *supra* notes 98-101.

[204] 2021 Staff Working Document, *supra* note 81 at 46-47, 63-64.

[205] Brittan, *supra* note 126 (52: "[Article 22] may look like a general exception to the one stop shop principle. But it is not, and the Regulation would not have been adopted if any such provision had been included."; 42: "This provision is therefore narrowly defined and would not permit the Commission to deal with mergers below the threshold on a general basis, even if it were inclined to evade the spirit of the threshold provision in this way.")

[206] 2021 Staff Working Document, *supra* note 81 at 74: "Accepting and encouraging a referral of relevant transactions would give flexibility to the Member States and the Commission to target concentrations that merit review at EU level, without imposing the notification of transactions that do not."; Article 22 Guidance, ¶¶ 9; Speech by EVP Vestager at the International Bar Association 26th Annual Competition Conference in Florence 'Merger control: the goals and limits of competition policy in a changing world' (September 9, 2022): "[the new Article 22] is a targeted tool; one which can respond to the challenges posed by these dynamic markets and the special features of some digital players. Whether for 'killer acquisitions' or other types of 'pre-emptive acquisitions,' it is the dynamism of today's markets - in particular for pharma and tech - that makes this kind of targeted tool so vital."

[207] Speech by EVP Margrethe Vestager at the Merger Regulation 20th Anniversary Conference (Brussels, April 18, 2024) (then Competition Commissioner defended the repurposing of Article 22 suggesting that they "have given that provision its full effect") .

[208] Vestager, *supra* note 206 (explaining that "the enhanced use of Article 22" under its new Guidance means "referrals to the Commission from EU Member States for cases for which national jurisdictional criteria have not been met."); *confirmed* at first instance in Case T-227/21 Illumina Inc v Commission, Judgment of 13 July 2022, ECLI:EU:T:2022:447, ¶¶ 91, 128, 148.

innovator."[209] This change in approach was not considered to require a modification of the EUMR[210] although it gave Article 22 a "new" unlimited function. Effectively, as long as its broad substantive criteria were met, *any* sub-threshold deal could be "called-in" at EU level.[211] No gap would remain to plague EU merger control any longer.

The Commission's innovative "killer solution" could thus selectively aim at "killer acquisitions" that fall below *national* jurisdictional thresholds even when a Member State *had a functional merger control regime in place.*[212] Traditionally, having competence to review the transaction under existing national merger laws has been considered a prerequisite for a Member State to make an initial referral request, although there have been cases where non-competent Member States could later join such a referral.[213] However, the new Guidance encouraged upwards referrals from Member States without "original jurisdiction over the transaction at stake", that the Commission could be accept or even "invite", contrary to prior practice. [214]

The first case where this new policy was tested was the *Illumina/Grail* merger involving two US-based firms where the target had no activities in the EU and the deal was non-notifiable in any of its Member States.[215] The handling of the case itself had drawn heavy criticism, as the implementation of the new approach to Article 22 was

[209] Article 22 Guidance, ¶¶ 11-12 and 19; Speech by EVP Margrethe Vestager, 'Digital Mergers: Moving with the Curve' at the 22nd International Conference on Competition (Berlin, February 29, 2024).

[210] *Id.*, ¶ 11. Nonetheless, under its new Guidance, the Commisson could take into account a transaction's high "value-to-turnover" ratio as a relevant factor in its assessment of whether or not to accept a referral request. *Id.*, para 19. See also Anne Looijestijn-Clearie, Catalin S. Rusu & Marc J.M. Veenbrink, *In Search of the Holy Grail? The EU Commission's New Approach to Article 22 of the EU Merger Regulation*, 29 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 550, 560 (2022); Eben and Reader, *supra* note 89 at 304.

[211] Opinion AG Emiliou, *supra* note 18, ¶ 216: "In one fell swoop, by means of an original interpretation of Article 22 EUMR, the Commission gains the power to review almost any concentration, occurring anywhere in the world, regardless of undertakings' turnover and presence in the European Union and the value of the transaction, and at any moment in time, including well after the completion of the merger."

[212] Contrary to the provision's historical use. Article 22 Guidance, ¶¶ 6; Vestager, *supra* note 209: "This approach strikes the right balance: it captures the mergers that truly matter, without overburdening companies or Commission services. And both 'new' and 'traditional' Article 22 referrals play their part."

[213] Burnside and Kidane, *supra* note 105 at 141; Portuese, *supra* note 16 at 6; De Stefano, Motta, and Zuehlke, *supra* note 151 at 539, 544. But see Illumina/Grail, *supra* note 9, ¶ 198 (suggesting that the Court might be of the view that national competence is required to also join a referral). The *Adobe/ Figma* merger is an example of a "traditional" Article 22 referral. The merger fell below the EUMR thresholds, but it was notified in Germany and Austria meeting the national thresholds. Austria referred the case to the Commission with 15 other Member States, competent and non, joining the referral request.

[214] Article 22 Guidance, ¶¶ 8 and 11.

[215] Burnside and Kidane, *supra* note 124 at 141; Vestager, *supra* note 206 (noting that *Illumina/Grail* was "a case referred to us by six Member States, but for which the notification thresholds were not met in any jurisdiction").

put into effect before the issuing of formal guidelines[216] and without any prior public consultation specifically on this matter.[217] Having won the first battle in court,[218] more cases of "new" Article 22 referrals followed[219] until the Commission's "recalibrated" approach was eventually struck down as unlawful by the EU Court of Justice in its *Illumina/Grail* judgment that held that the Commission could not "accept a request under Article 22 [EUMR] in a situation where Member States making that request are not entitled, under their national merger control rules, to examine the concentration which is the subject of that request."[220]

But short-lived as it may have been, the Commission's unsuccessful expansive interpretation of Article 22 left its mark on EU merger control: on the one hand, its rejection triggered or precipitated the policy repositioning of the Commission and Member States; on the other hand, future legislative reforms do not exclude the coming back of "no-jurisdiction" upwards referrals via a revised and repurposed Article 22. More specifically, in response to the Court of Justice's *Illumina/Grail* judgment, the Commission was quick to stress that: (i) in the short to medium-term they will continue to pursue "traditional" Article 22 referrals from competent Member States relying on their expanding jurisdiction (resulting from increased "call-in" powers) to close enforcement gaps,[221] and (ii) in the longer term they will consider amending the EUMR and introducing a "safeguard mechanism" to enable the Commission to review problematic below-threshold transactions.[222] This could occur through a revision of Article 22 that "could allow for the referral of sub-threshold mergers by Member States without jurisdiction in defined circumstances."[223]

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[216] Eben and Reader, *supra* note 89 at 305 (noting that the Commission invited Member States to submit an Article 22 referral request "[a] week before adopting its revised Article 22 Guidance Paper and five months after the merger was first announced").

[217] Levy, Rimsa, and Buzatu, *supra* note 127 at 375; Portuese, *supra* note 16 at 6–7. See also Opinion AG Emiliou, *supra* note 18, ¶ 181: "Article 22 as a remedy to the multiple filing problem [...] required discussion and legislative amendment and was therefore not that article's initial purpose. [...] engaging Article 22 to remedy other, broader problems would also require discussion and amendments."

[218] Illumina v Commission, *supra* note 208.

[219] See *supra* notes 99-101.

[220] Illumina/Grail, *supra* note 9, ¶ 222. See also the Court's press release (No 127/24): "The Commission is not authorised to encourage or accept referrals of proposed concentrations without a European dimension from national competition authorities where those authorities are not competent to examine [them] under their own national law."

[221] The Commission's statement regarding its ability to use Article 22 based on purely national "call-in" powers was not an empty threat. Soon after the Court's judgment, the Commission accepted a "solo" referral from Italy whose national turnover thresholds were not met but that used its recently introduced powers to "call-in" the referred transaction. See Commission to assess the proposed acquisition of Run:ai by NVIDIA: https://ec.europa.eu/commission/presscorner/detail/en/mex_24_5623.

[222] Illumina/Grail, *supra* note 9, ¶¶ 216 and 217; Vestager statement and speech, *supra* note 13.

[223] Rather than alternative, but in the then Competition Commissioner's view less attractive, options of lowering turnover thresholds, or introducing a transaction value threshold or a standalone EU power to "call-in" transactions independently of Member States' actions.

As a result, Member States are now keen to expand their national merger control powers with the support of the Commission.[224] Also, the essence of the new Article 22 Guidance (although now withdrawn) is not completely deprived of value, as far as non-reportable deals falling within Member State competence are concerned that could qualify for "traditional" upwards referral based on national *"call-in"* powers.[225] Thus, for the time being, *non-notifiable* transactions at Member State level may be subject to referral under Article 22 EUMR on this basis even after the Court's *Illumina/Grail* judgment.[226]

Zooming out of the Commission's main solution for suspect "killer" mergers, there is one more piece completing the EU's regulatory puzzle: the Digital Markets Act.[227] The DMA is an ex ante regulation imposing fixed obligations on large digital "gatekeepers" with the goal of ensuring "contestable" and "fair" digital markets in the EU that complements any "case-by-case intervention under competition law."[228] A specific provision regulates mergers: under Article 14 DMA "gatekeepers have a duty to inform the Commission about any planned acquisitions, which can then lead to a referral through Article 22."[229] This reporting obligation covers *any* merger involving designated gatekeepers in the digital sector regardless of size, notification requirements or applicable thresholds under EU or national merger laws.[230] Reporting

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See Vestager speech, *supra* note 13. Another option is a "New Competition Tool" similar to the one proposed at EU level and currently operational in Germany. See *supra* note 80. Yet, it is not clear how EU merger policy may develop as the new Competition Commissioner Ribera and the Draghi Report may favor other solutions (transaction value, NCT) than "new" Article 22 referrals to non-reportable mergers and rapidly evolving digital markets. See Mario Draghi, *The future of European competitiveness – A competitiveness strategy for Europe*, Part B - In-depth analysis and recommendations, 302-304 (2024); Javier Espinoza, *Brussels Seeks Powers to Block 'Killer Acquisitions' in Europe and Beyond*, FINANCIAL TIMES, Oct. 16, 2024, https://www.ft.com/content/292f0080-3360-4095-9c1c-d383db33d883.

[224] See *supra* note 12. Commenting on the first merger case where an Article 22 referral based on national "call-in" powers was attempted (see *supra* note 221) that was eventually approved, the new Competition Commissioner Teresa Ribera highlighted the importance of this enforcement option "in enabling the Commission to continue to check potentially problematic transactions": https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6548.

[225] In light of the *Illumina/Grail* judgment, the Commission withdrew its Article 22 Guidance that allowed for "no jurisdiction" upward referrals on November 29, 2024: https://ec.europa.eu/commission/presscorner/detail/en/mex_24_6143 after the *NVIDIA/Run:ai* case was notified and was being reviewed by the EU authorities following a "call-in" referral.

[226] The Court of Justice did not take a clear position on the permissibility of such an approach in *Illumina/Grail*. See Tzanaki, *supra* note 11 at 8. However, NVIDIA has challenged in the General Court whether the Commission could accept an Article 22 referral of a transaction falling below EUMR and national thresholds based on national "loosely defined, ex post, discretionary call-in powers" after its merger with *Run:ai* was approved. *See* Case T-15/25: Action brought on 10 January 2025 – Nvidia v Commission.

[227] See *supra* note 50.

[228] Eben and Reader, *supra* note 89 at 312; Franck, Monti, and de Streel, *supra* note 12 at 8.

[229] Vestager, *supra* note 209.

[230] Article 14(1) DMA: "A gatekeeper shall inform the Commission of *any* intended concentration within the meaning of Article 3 [EUMR], where the merging entities or the target

is made to the Commission that shall then inform Member States, which in turn have the opportunity to refer any troublesome cases to the Commission based on Article 22 EUMR.[231] The original intention was that the tailor-made transparency regime created under Article 14 DMA would dovetail with the "new" Article 22 EUMR and pave the way for its practical operation in digital merger cases.[232]

The odd fit and complementarity of the two provisions has been purposeful and noteworthy for several reasons. To begin, the scope of application of Article 14 DMA and the "new" Article 22 EUMR was intentionally and evenly unlimited: at last unbound by any minimum EU or national thresholds and safe harbors, the Commission could systematically detect and effectively screen, and potentially prohibit or condition, any likely problematic digital mergers. But interestingly there has been a clear material division of tasks: ex ante reporting (akin to a "mini notification") is required across the board by Article 14 DMA,[233] whereas ad hoc enforcement could be possible under Article 22 EUMR. Article 14 is merely a transparency regime, initially only intended as a monitoring mechanism to ensure the effective and up-to-date implementation of the DMA rather than a trigger activating EU or national competition law enforcement.[234] The DMA does not grant the Commission any general powers to intervene or impose remedies in specific merger cases. Article 18(2) DMA allows for a "temporary merger ban" as a remedy in case of a gatekeeper's "systematic non-compliance" (requiring three non-compliance decisions within eight years) with

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of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules."

[231] Article 14(4) and (5) DMA.

[232] See Christophe Carugati, *Which Mergers Should the European Commission Review under the Digital Markets Act?*, BRUEGEL POLICY CONTRIBUTION ISSUE N°24/22, DECEMBER 2022, 2, 5–6 (2022); Viktoria H.S.E. Robertson, *The Future of Digital Mergers in a Post-DMA World*, *in* FIRST ANNUAL CONFERENCE OF THE EUROPEAN COMMISSION LEGAL SERVICE , 4–5 (2023).

[233] Article 14(2) DMA: "The information provided by the gatekeeper pursuant to paragraph 1 shall at least describe the undertakings concerned by the concentration, their Union and worldwide annual *turnovers*, their fields of activity, including activities directly related to the concentration, and the *transaction value* of the agreement or an estimation thereof, along with a summary of the concentration, including its nature and rationale and a *list of the Member States* concerned by the concentration."

[234] Eben and Reader, *supra* note 89 at 313 (analyzing the evolution of Article 14 during its legislative scrutiny and concluding that "[n]othing in the DMA's original draft suggests that a procedural relationship between Article 14 DMA and the Article 22 EUMR referral mechanism was envisioned"); Franck, Monti, and de Streel, *supra* note 12 at 20 (describing the "support to effective merger control of acquisitions by DMA addressees" as "only a [desirable] side effect"). See also Recital 71 DMA (noting that the goal of Article 14 is "to ensure the necessary transparency and usefulness of [reported] information for different purposes", e.g., "to ensure the effectiveness of the review of gatekeeper status, as well as the possibility to adjust the list of core platform services provided by a gatekeeper", "to provide information that is crucial to monitoring broader contestability trends in the digital sector [...] in the context of the market investigations", "to inform Member States [...] given the possibility of using the information for national merger control purposes and [...] for the national competent authority to refer those acquisitions to the Commission for the purposes of merger control.")

their obligations under Articles 5, 6 or 7 DMA following a market investigation.[235] But Article 18(2) is vague as to the timing of such intervention while Article 14 does not attach any standstill obligation or other procedural consequences to the ex ante reporting duty it imposes on gatekeepers.[236] Neither does Article 18(2) confer any power to the Commission to impose a notification obligation in specified circumstances[237] under a NCT market investigation instrument deployed in digital markets.[238]

The coupling of the DMA's transparency regime with the Article 22 referral mechanism would secure the Commission's "quick" and targeted fix to killer acquisition concerns but not without political compromises and compromised results.[239] While the option of introducing a sector specific regime for digital mergers or at least a fully-fledged notification obligation under the DMA was available, preserving the integrity and universal application of the EUMR was favored.[240] Besides, the effective combination of Article 14 DMA and Article 22 EUMR achieved the Commission's goal of plugging all gaps (of notification and enforcement) but without amending the EUMR (simply by dividing the task in two pieces). With two caveats. First, it was only a temporary and imperfect fix since, with the "new" Article 22 struck down by the Court of Justice, only merger cases detected under the DMA and unreported but prosecutable under national merger laws, e.g., based on national "call-in" powers, could be subject to an upwards referral to the Commission.[241] Second, the pairing of the two provisions at first glance applies only to the digital sector. In other sectors, Article 22 EUMR operates alone relying on third party

[235] Natalia Moreno Belloso & Nicolas Petit, *The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove*, 48 EUROPEAN LAW REVIEW 391, 409 (2023) (suggesting that during the legislative process, Article 14 was criticized for lacking teeth and ambition, especially by certain national governments, since "[a] mere duty of information does not remove the possibility that gatekeepers make 'killer acquisitions'"; following these deliberations the DMA draft proposal was amended adding Article 18(2)).

[236] Eben and Reader, *supra* note 89 at 314–315.

[237] Thorsten Käseberg, *The DMA—Taking Stock and Looking Ahead*, 13 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 1, 2 (2022).

[238] See *supra* note 80 and Anselm Küsters, *Whatever It Takes to Innovate: Draghi's Plans for EU Competition Policy*, KLUWER COMPETITION LAW BLOG (Sep. 11, 2024), https://competitionlawblog.kluwercompetitionlaw.com/2024/09/11/whatever-it-takes-to-innovate-draghis-plans-for-eu-competition-policy/. The Draghi Report recommends the introduction of a NCT in specifically defined areas. See Draghi, *supra* note 223, 302-304.

[239] Käseberg, *supra* note 237 at 2 (suggesting it would be preferable to provide "a general solution for killer acquisitions within the EUMR" and close gaps "by revised thresholds to capture low turnover/high transaction price acquisitions", or else, strengthen the Commission's powers under the DMA within explicit bounds).

[240] Franck, Monti, and de Streel, *supra* note 12 (outlining four options for extended EU control of digital gatekeepers' acquisitions: encouraging Article 22 EUMR referrals; introducing a new notification obligation in the DMA; amending the EUMR; and establishing a merger control regime specifically for large digital gatekeepers).

[241] See *supra* notes 221-226 and surrounding text.

complaints and competition authorities' market intelligence or possibly voluntary "notification" by the parties.[242]

Yet, a closer look reveals the envisaged de facto interdependence between Article 22 EUMR and Article 14 DMA extending beyond the digital sector. The Article 22 referral procedure does not require notification to begin with or impose penalties if a transaction is not actively "made known" to competition authorities.[243] However, for the merging parties to exclude any later risk of their transaction being "called-in" for review, and exposed to liability, they could be "driven to file informal notifications to all national authorities"[244] to ensure that the time limits provided in the second subparagraph of Article 22(1) EUMR are triggered.[245] Therefore, following the Commission's new Article 22 Guidance, "precautionary" or "shadow" filing could be de facto needed for non-notifiable deals under the EUMR.[246] In the oral hearing before the Court of Justice in the *Illumina/Grail* cases, the Commission suggested that the parties' "voluntary reporting" in this informal procedure could draw inspiration from and emulate the information content gatekeepers provide the Commission under Article 14 DMA.[247] This could mean up to 30 DMA-like "mini notifications" to NCAs for a single transaction under Article 22 EUMR in sectors other than digital rather than EU-level centralized reporting under the DMA for digital gatekeepers' mergers.

In another unexpected episode of EU competition law playing catch up with killer mergers, the EU's Court of Justice confirmed in *Towercast* that Article 102 TFEU is alive and kicking and could be used as a "backup" enforcement tool at national level in certain cases of non-reportable mergers.[248] The merger in this case was not notifiable under the EUMR and French merger control and did not give rise to an Article 22 referral as "it took place during the Commission's era of discouraging below-threshold merger referrals."[249] Triggered by a competitor's complaint, the French NCA found that since its introduction the EUMR applies exclusively to *all* concentrations having displaced Article 102 which is applicable only if there is an abuse separate from the

[242] Article 22 Guidance, ¶¶ 23-25.

[243] Illumina v Commission, *supra* note 208, ¶¶ 170 and 180.

[244] Opinion AG Emiliou, *supra* note 18, ¶¶ 201-203 and 207-208; Burnside and Kidane, *supra* note 105 at 149; Völcker, *supra* note 127 at 1243; Levy, Rimsa, and Buzatu, *supra* note 127 at 377.

[245] "Such a [referral] request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise *made known* to the Member State concerned." See Opinion AG Emiliou, *supra* note 18, ¶¶ 201-203; and the General Court's judgment in *Brasserie Nationale*, supra note 177, ¶¶ 62-63, confirming that the time limits start to run from the "active transmission" of sufficient information to the competent NCA to enable them to assess whether the substantive conditions of Article 22(1) EUMR are satisfied.

[246] Opinion AG Emiliou, *supra* note 18, ¶ 104; Burnside and Kidane, *supra* note 105 at 149. The Court of Justice dismissed such broad interpretation of Article 22 as inconsistent with fundamental EUMR principles. See Illumina/Grail, *supra* note 9, ¶ 210.

[247] Opinion AG Emiliou, *supra* note 18, ¶ 212.

[248] Towercast, *supra* note 70, ¶¶ 37 and 41; Opinion AG Kokott, *supra* note 70, ¶¶ 39, 48 and 54.

[249] Eben and Reader, *supra* note 89 at 317.

merger transaction itself.[250] *Towercast* clarified that Member State competition authorities or courts may apply Article 102 to mergers *without* an EU dimension that fall below the thresholds of EU or national ex ante merger control and have not been referred to the Commission under Article 22 EUMR, which could be found to constitute an abuse of a dominant position "in light of the structure of competition on a market which is national in scope."[251] Thus, ex post control of previously unchecked or non-notifiable below-threshold mergers is possible on the basis of the directly applicable Treaty provision on abuse of dominance which is not affected by the inapplicability of implementing Regulation 1/2003 to mergers.[252]

The complaint brought back the ghost of *Continental Can* as legal authority to support the applicability of Article 102 to mergers which was confirmed to be "good law."[253] Ironically, this was one of the key cases that helped put pressure on Member States and bring the EUMR into existence.[254] The Commission's promise at that time not to use Articles 101 and 102 TFEU against mergers after the adoption of the "one-stop shop" system of the EUMR was just that:[255] a statement of political intention but of no legal import as *Towercast* makes clear.[256] Or said differently, the Commission could bind itself (considering the disapplication of Regulation 1/2003 to mergers)[257] but not national authorities and third parties that derive direct rights and obligations through a provision of primary EU law.[258] Thus, although the Commission did not renege on the promise that formed the political basis for agreement on the EUMR, the "very certain" and temporary equilibrium of the last 35 years and the de facto lack of merger enforcement based on EU antitrust rules was brought to an end by outside forces: a complaint, to the effect that it is now unquestionable that Article102 enforcement cannot be excluded by Article 21(1) EUMR.[259]

Towercast also supports the original bargain and the threshold-based allocation of EU and national competences underlying the EUMR with the below-threshold space in principle being "occupied" by Member States. In the first instance,

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[250] The Autorité reached a different conclusion to that of its investigating departments. See Towercast, *supra* note 70, ¶ 21.

[251] *Id.*, ¶¶ 50 and 53.

[252] *Id.*, ¶¶ 41, 44-45, 47 and 50.

[253] Towercast, *supra* note 70, ¶¶ 23-24, 26, 46, 52; Opinion AG Kokott, *supra* note 70, ¶¶ 49-63.

[254] See *supra* notes 136 and 174 and surrounding text; Mulder and Sauter, *supra* note 117 at 550. Additionally, the EUMR was introduced to fill gaps left by Articles 101 and 102 TFEU regarding the regulation of mergers. Towercast, *supra* note 70, ¶¶ 36-38; Opinion AG Kokott, *supra* note 70, ¶¶ 35 and 44.

[255] BRITTAN, *supra* note 126 at 42, 52–53.

[256] See also Opinion AG Emiliou in *Illumina/Grail*, *supra* note 18, ¶ 99.

[257] See *supra* note 173 and surrounding text; Eben and Reader, *supra* note 89 at 317; Mulder and Sauter, *supra* note 117 at 552.

[258] Towercast, *supra* note 70, ¶¶ 44-45; Opinion AG Kokott, *supra* note 70, ¶¶ 32 and 40; Eva Fischer, *Double-Checking Mergers: Ex-Ante and Ex-Post Competition Law Enforcement and Its Implications for Third Parties*, 15 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 428, 430 (2024).

[259] Opinion AG Kokott, *supra* note 70, ¶¶ 27, 31, 33, and 39.

the EUMR and Article 102 TFEU are viewed as complements – they concern ex ante versus ex post control systems respectively that do not overlap but have exclusive spheres of application based on the line drawn by the EUMR's turnover thresholds.[260] Yet, Article 22 EUMR and Article 102 TFEU are framed as substitutes – both are applicable on a supplementary basis below the EUMR thresholds in cases such as killer acquisitions.[261] A transaction reviewed under an Article 22 EUMR referral procedure cannot be scrutinized again under Article 102 TFEU.[262] Besides, *Towercast* now acknowledges that Article 102 has a "gap filling" role regarding the control of mergers at Member State level,[263] which was in fact the original rationale for Article 22 EUMR.[264] It remains open whether a narrower scope for Article 22 referrals may leave wider room for the application of Article 102 to concentrations,[265] as Member States retain a de facto national "call-in" power based on Article 102 TFEU.

In practice, Article 22 EUMR and Article 102 TFEU are at best "partial substitutes". An important difference relates to timing: Article 22 may apply either ex ante or ex post (usually soon after a merger's implementation) whereas Article 102 only ex post.[266] A second key difference is the jurisdictional scope of application: post-*Illumina/Grail*, Article 22 is limited to "traditional" referrals initiated by competent Member State(s) under national merger law whereas Article 102 can apply to any merger case, regardless of national competence.[267] Another possible difference concerns the scope of geographic markets affected: Article 22 could address cases with cross-border effects whereas Article 102 could be reserved for mergers affecting national markets.[268]

However, such rationalized division of labor regarding non-EU dimension mergers is not anchored in hard principles: the Article 22 referral practice has not been disciplined to merely addressing cross-border cases based on an EU-wide

[260] Presumably to preserve legal certainty or avoid a parallel or successive "double assessment" of mergers under ex ante and ex post control rules. See Opinion AG Kokott, *supra* note 70, ¶¶ 38 and 56; *cf. Towercast*, *supra* note 70, ¶¶ 27 and 41. However, the Court of Justice does not expressly take a view on this point. See also Opinion AG Emiliou, *supra* note 18, ¶ 101: "it was clear that then Articles 85 and 86 EEC permitted an *ex post* intervention for all mergers not meeting the thresholds."

[261] Opinion AG Kokott, *supra* note 70, ¶ 48.

[262] Towercast, *supra* note 70, ¶ 53.

[263] Opinion AG Kokott, *supra* note 70, ¶¶ 2 and 48.

[264] See *supra* note 172 and ensuing text.

[265] Cases pending before the EU Courts are expected to clarify the scope of the Article 22 referral mechanism. See *supra* note 12.

[266] Article 22 Guidance, ¶ 21; Eben and Reader, *supra* note 89 at 319–320.

[267] See *supra* notes 221, 225-226 and surrounding text; Towercast, *supra* note 70, ¶¶ 53.

[268] Towercast, *supra* note 70, ¶¶ 53; Friso Bostoen, *Reviewing Mergers Under Article 102 TFEU: Proximus/EDPnet (Belgium)*, 15 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 258, 262 (2024); Fischer, *supra* note 258 at 430 (who also suggests that instead of Commission competence to enforce Article 102, there could be enhanced cooperation between NCAs in cross-border cases).

assessment[269] and the facts in *Towercast* were such to refer to potential enforcement by an NCA against a merger with national impact; the latter does not exclude the applicability of Article 102 by the Commission or to cases of a broader than national scope, neither does it indicate a clear hierarchy between the two provisions.[270] Given this indeterminacy and in light of the above, the choice of enforcement instrument could be (i) influenced by practical considerations (i.e., timing, available resources) rather than principle, or (ii) driven by the self-interest and priorities of interested actors (i.e., complaints by third parties or private actions before national courts;[271] "voluntary" reporting by merging parties to NCAs seeking to trigger the Article 22 time limits;[272] invitation letters by the Commission to Member States encouraging upwards referrals;[273] or refusal to accept referred cases when the mainly affected Member State has not joined the referral request[274] or the case is already notified at Member State level;[275] willingness of NCAs to request or join upwards referrals in certain (e.g. complex or sensitive) cases or their unwillingness to surrender jurisdiction to Brussels when "national" enforcement based on domestic merger control or Article 102 is an alternative[276]).

The substantive criteria of Article 22 EUMR and 102 TFEU also differ. Article 22 EUMR can apply when the transaction "*affects*" whereas Article 102 TFEU if it "*may affect*" inter-Member State trade. It is unclear how this higher standard might be met under Article 22 in merger cases where the target may have no turnover or products launched yet.[277] In practice, the effect on inter-Member State trade is a broad concept[278] and the new Guidance listed factors relevant to digital markets such as the location of customers, collection of data or commercialization of R&D in several Member States that could be used to assess such effect.[279] On the other hand, Article 22 EUMR only requires that the transaction "*threatens* to significantly affect competition within the territory of the [referring] Member State." The Article 22 Guidance clarified that the *creation* or strengthening of a dominant position of one of the undertakings concerned; the reduction of competitors' ability and/or incentive to compete; the elimination of an important competitive force such as a recent or future entrant or the merger between two important innovators satisfy this criterion.[280] In this light, Article 22 is broader and

[269] De Stefano, Motta, and Zuehlke, *supra* note 151 at 538–542, 545–546. See further *supra* Part II.C.

[270] Opinion AG Kokott, *supra* note 70, ¶¶ 38-39 and 47-48; Bostoen, *supra* note 268 at 262.

[271] Fischer, *supra* note 258 at 432–435.

[272] See *supra* notes 244-247 and surrounding text.

[273] Mulder and Sauter, *supra* note 117 at 553.

[274] De Stefano, Motta, and Zuehlke, *supra* note 151 at 542.

[275] Article 22 Guidance, ¶ 22.

[276] Eben and Reader, *supra* note 89 at 320; Levy, Rimsa, and Buzatu, *supra* note 127 at 376.

[277] Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 563; Portuese, *supra* note 16 at 4–5, 12–13. See also the General Court's judgment in *Brasserie Nationale*, *supra* note 177, ¶¶ 145-153 that confirms a broad interpretation of this criterion "consistent to that given to it in the context of Articles 101 and 102 TFEU."

[278] Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 563.

[279] Franck, Monti, and de Streel, *supra* note 103 at 24; Article 22 Guidance, ¶ 14.

[280] Article 22 Guidance, ¶ 15.

more flexible in application: it does not require pre-existing market dominance[281] but applies based on a "quick look" SIEC test.[282]

Article 102 TFEU is subject to more restrictive substantive criteria (dominance and abuse). According to *Towercast*, finding a "structural" abuse under Article 102 requires that the merger "substantially impedes competition" on the market.[283] A narrow reading suggests that this test is met (i) if there is a high degree of dependence (significant market power nearing monopoly) in line with the *Continental Can* case law and (ii) only in horizontal merger cases, whereas a broad reading suggests that (i) the legal standard for abuse is congruent to the EUMR's SIEC test[284] and (ii) applies to horizontal and non-horizontal merger cases alike.[285] However, other considerations may favor Article 102 over Article 22 EUMR. It is argued that a killer acquisition may amount to a "by object" abuse of dominance and that NCAs are empowered to impose any behavioral or structural remedies, which are necessary and proportionate, including divestitures and/or injunctions.[286] Furthermore, unlike the discretionary "upwards" referral procedure, Article 102 TFEU relies on a system of "decentralized" public and private enforcement leaving no discretion to national authorities for its application.[287] Another advantage of ex post review is that it does not involve prediction but can also rely on actual post-merger evidence.[288]

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[281] Although the acquirer's dominance is implied in a killer acquisition theory of harm, the flexibility of Article 22 may be helpful where market definition and dominance may be challenging to establish in specific merger cases.

[282] Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 555. After the 2004 amendment of the EUMR the test for referral and substantive merger assessment changed from a dominance to a SIEC test.

[283] Towercast, *supra* note 70, ¶ 52: "the mere finding that an undertaking's position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behavior depends on the dominant undertaking would remain in the market." The Commission's Draft Guidelines on the application of Article 102 TFEU to exclusionary abuses refer to Towercast twice, thus covering "structural" abuses (¶¶ 10 and 12).

[284] Völcker, *supra* note 127 at 1244–1246 (arguing that a narrower interpretation of Article 102 only targets "particularly severe and permanent impediments to effective competition" in line with the principles of subsidiarity and legal certainty); Bostoen, *supra* note 268 at 260–261 (arguing that the first application of Towercast by the Belgian NCA supports a broader interpretation).

[285] Fischer, *supra* note 258 at 432; Damien Gerard & Elisabeth Marescaux, *Non-Notifiable Concentrations and Residual Merger Control Under Article 102 TFEU: Case C-449/21 Towercast*, 14 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 427, 429 (2023). *Illumina/Grail*, the first case pursued by the Commission under its new Article 22 policy was a vertical merger.

[286] Opinion AG Emiliou, *supra* note 18, ¶¶ 230 and 232. But *see* contra Opinion AG Kokott, *supra* note 70, ¶¶ 48 and 63. The issue of remedies available under 102 was not addressed by the Court of Justice in *Towercast* and is debatable in practice. See Bostoen, *supra* note 268 at 261.

[287] Opinion AG Kokott, *supra* note 70, ¶ 40.

[288] Opinion AG Emiliou, *supra* note 18, ¶¶ 228 and 231.

To sum up, while previously only national merger law applied in practice below the EUMR thresholds, the situation is more complex and dynamic following *Illumina/Grail* and *Towercast* as more possibilities open up for EU or Member State enforcement over non-notifiable mergers.[289] The resulting merger control landscape in the EU is shown in Table 1 below. This also reflects the relative priority of available enforcement options, all else being equal, given the (i) priority given to ex ante merger control under the EUMR for mergers within its scope (with an EU dimension),[290] (ii) preference for ex ante scrutiny under Member State law based on national filing thresholds over ex post control or Article 22 EUMR especially if a below-threshold transaction is already notified in some Member State(s),[291] (iii) the possibility to use "call-in" powers under national merger control as a "hook" for "traditional" Article 22 referrals and the timing "advantage" of Article 22 EUMR over Article 102 TFEU, and taking into account the Commission's intention behind its "new" Article 22 approach to be able to selectively claim and preempt the below-threshold space when deemed appropriate, and (iv) that Article 102 TFEU is thus far considered to offer a (last resort) "residual power" of ex post merger control to NCAs and possibly the Commission under typically narrower conditions.[292]

[289] National competition authorities were quick to seize the opportunity offered by the *Towercast* case law to assert their powers to examine mergers below national thresholds, which had not been reviewed ex ante, under not only Article 102 but also Article 101 TFEU. See Press release Nº 10/2023 of the Belgian NCA (March 22, 2023): https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-10-2023, and Nº 3/2025 of the Belgian NCA (January 22, 2025): https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-3-2025 and Press release by the French NCA (May 15, 2024): https://www.autoritedelaconcurrence.fr/en/press-release/meat-cutting-sector-first-time-autorite-examines-under-antitrust-law-mergers-below; see also the reaction of the French NCA to the *Illumina/Grail* judgment: https://www.autoritedelaconcurrence.fr/en/article/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european-union (September 3, 2024). Moreover, there are two active *Towercast* investigations against below-threshold mergers in Finland, as announced by the Finnish NCA in May 2025. France is now in the process of introducing "call-in" powers under national merger control: https://www.autoritedelaconcurrence.fr/en/press-release/mergers-below-control-thresholds-following-public-consultation-autorite-continuing whereas Belgium, Finland and other NCAs have publicly expressed their desire or actively seek to obtain such powers. See *supra* note 12.

[290] Towercast, *supra* note 70, ¶¶ 40-41.

[291] Article 22 Guidance, ¶ 22.

[292] See Gerard and Marescaux, *supra* note 285 at 428–429 (outlining also procedural options for the Commission to apply Article 102 despite the disapplication of Regulation 1/2003 to concentrations). On the (in)ability of the Commission to apply Article 102 (and 101) TFEU without the implementing Regulation 1/2003, see Mulder and Sauter, *supra* note 117 at 552–553; Schwartz, *supra* note 131 at 658–660; Venit, *supra* note 141 at 15–16. Yet, the EUMR as secondary law cannot restrict the scope or applicability of primary EU law such as Article 102 TFEU. See Towercast, *supra* note 70, ¶¶ 33-34, 42, 51; Opinion AG Kokott, *supra* note 70, ¶¶ 30-31, 43 and 47. Depending on the outcome of the pending EU Court cases that will determine the scope of Article 22 referrals, this enforcement option may regain relevance not only for Member States but also for the Commission. See *supra* notes 12 and 221-226 and surrounding text. Thus, the relative priority of these options remains in flux as it is not clear how merger policy and practice on non-reportable transactions below the EUMR thresholds will develop.

Table 1. Merger control competence in the EU and priority of enforcement options

Notification thresholds	Merger control competence	Legal basis
Above EUMR thresholds	Commission	EUMR
Below EUMR thresholds	Member States	ex ante national merger control (notification)
	Member States	residual national merger control ("call-in")
	Commission	Article 22 EUMR referral
	Member States or Commission	Article 102 TFEU

E. Transforming EU merger control by repurposing Article 22

The Commission's "new" Article 22 offered a quick "silver bullet" solution to tackle several concerns all at once.[293] Not only it could make good on substantive gaps but also cover the Commission's chronic jurisdictional deficit exposed by the killer acquisitions phenomenon. In the background, there was a need to address once and for all underenforcement in the EU, and perhaps even more importantly, risks to the internal market itself. Internally, the increasingly fragmented regulation of sub-threshold mergers at Member State level[294] and externally, the global race for technological and industrial leadership where the EU's innovation and competitiveness stand center stage, have raised the stakes of EU (in)action.[295] The Commission, not only as a competition law enforcement body but also as a political organ representing

[293] See 2021 Staff Working Document, *supra* note 81.

[294] On the risk of fragmentation of the internal market, see Franck, Monti, and de Streel, *supra* note 12; Salome Cisnal de Ugarte, Melanie Perez & Ivan Pico, *A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape*, 6 Eur. Competition & Reg. L. Rev. 17 (2022).

[295] See European Commission, *Communication on A competition policy fit for new challenges*, COM(2021) 713 final (18 November 2021). President von der Leyen's Political Guidelines, *supra* note 107, at 7 and the Draghi Report, *supra* note 223, at 299 talk of "a new approach to competition policy" that supports EU competitiveness and EU companies scaling up in global markets. Draghi suggests that innovation and future or potential competition should take center stage whereas von der Leyen spotlights "killer acquisitions [of EU startups] from foreign companies" as a high-level priority in reshaping EU competition and merger policy.

the executive branch of the EU,[296] could have a significant stake and desire to have its own "say" on small-size acquisitions[297] in strategically important industries[298] that could undermine its core mission. Unlike the past, however, when M&A was seen as a "good" promoting the integration of the internal market and EU merger control was permissive,[299] the hunger for aggressive enforcement could not be served by keeping with the "restrictive" turnover thresholds of the EUMR. Against this backdrop, the Commission's goal was two-fold: to establish jurisdiction over elusive killer acquisitions by reprioritizing *harm* over certainty[300] (protection of competition and consumers) and to extend *EU* jurisdiction to address such concerns (protection of the internal market). An EU "killer" solution to killer merger concerns was needed.[301]

In this mission, the "repurposing" of Article 22 had undeniable practical appeal: the Commission thought it could make use of "soft law"[302] with its 2021 Guidance, to effectively amend the EUMR and unilaterally "rewrite" its competence allocation rules,[303] while eschewing more substantial and cumbersome reforms of the EU merger control regime that would involve negotiations with and among Member States with unknown or risky outcomes.[304] The "repurposed" Article 22 thus led to a "very significant"[305] expansion of EU jurisdiction via the "back door"[306] - in a convenient yet unsystematic way - to render EU merger enforcement more "dynamic" in response to dynamic competition concerns[307] and to serve the new circumstances

[296] Faull, *supra* note 139 at 268.

[297] Draghi, *supra* note 223 at 77: "Acquisitions by players outside the EU are weakening Europe's position in digital platforms. Of all global online platform acquisitions, 19% are acquisitions of EU companies by non-EU residents."

[298] See European Commission, Communication on the Long-term competitiveness of the EU: looking beyond 2030, COM(2023) 168 final (16 March 2023); Proposal for a Regulation establishing the Strategic Technologies for Europe Platform ('STEP'), COM(2023) 335 final (20 June 2023) highlighting biotech, digital and deep tech innovation as key strategic areas for the future with "profound impact on the competitiveness of the EU economy".

[299] See *supra* Part II.A.

[300] Mulder and Sauter, *supra* note 117 at 553–554 ("perceived gaps are being closed in the EU merger control, and the emphasis is placed on substantive competition issues rather than formal quantitative thresholds."). See also *supra* notes 114-115 and surrounding text.

[301] Tzanaki, *supra* note 11.

[302] Ben Van Rompuy, *Editorial: EU Merger Control from the Front to the Back Door*, 5 EUR. COMPETITION & REG. L. REV. 341, 343 (2021); Franck, Monti, and de Streel, *supra* note 12 at 25.

[303] The Court of Justice rejected the legality of this approach. Illumina/Grail, *supra* note 9, ¶¶ 215-216.

[304] On the possible legal basis and voting requirements (qualified majority v unanimity in the Council) for amending the EUMR today, compared to the past, see Franck, Monti, and de Streel, *supra* note 12 at 48–49, 50–53.

[305] Opinion AG Emiliou, *supra* note 18, ¶ 216.

[306] *Id.*, ¶ 185; Van Rompuy, *supra* note 302.

[307] Vestager, *supra* note 209: "Digital markets have a dynamic of their own, and our enforcement on those markets has been equally dynamic. With the Article 22 guidance and the DMA, we have developed new tools to ensure that killer acquisitions do not escape our scrutiny."

and the Commission's "crisis of competence."[308] But for all the good intentions, the envisioned changes could upset the EUMR's jurisdictional and institutional balance and produce further side effects.[309]

To begin, the expansive use of Article 22 as an "effects-based tool" to assert jurisdiction ad hoc below the EUMR thresholds would erode the EUMR's "rule-based" allocation of competences[310] that was purposefully set as a "zero-sum" game,[311] given the politics underpinning its negotiations.[312] Besides, the attempt to change the applicable competence allocation rule to the flexible "effects doctrine" rather than turnover thresholds,[313] would bring the EUMR's scope of application closer to that of Articles 101 and 102 TFEU. In turn, the jurisdictional transformation would also bring in institutional revisioning: under the "new" Article 22 the Commission would be the institutional actor with residual "gap-filling prerogative" in EU merger control. From an "agent" or "coordinator" within the frame of its previous Article 22 authority,[314] the role of the Commission would be elevated to that of an ad hoc "trustee" of effective merger control enforcement in the EU,[315] seeking to "mimic" the Commission's powerful institutional role under primary EU antitrust law. None of these radical changes were the subject of debate, let alone agreement between EU institutions and Member States at the inception of the EUMR.

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[308] Wilks, *supra* note 199 at 449 (coining the term but referring to Majone's analysis); Giandomenico Majone, *The European Commission: The Limits of Centralization and the Perils of Parliamentarization*, 15 GOVERNANCE 375 (2002) (suggesting that "the functional scope of [EU] competences has steadily increased, but the nature of new competences has changed dramatically", moving from "total harmonization, which gives the [EU] exclusive competence over a given policy area" to "more flexible but less 'communitarian' methods" and noting that "the risk today is not excessive centralization of decisionmaking in the [EU], but rather excessive fragmentation" and its consequences).

[309] Illumina/Grail, *supra* note 9, ¶¶ 193, 203, 207-208, 215.

[310] Rupprecht Podszun, *Thresholds of Merger Notification: The Challenge of Digital Markets, the Turnover Lottery, and the Question of Re-Interpreting Rules*, *in* RESEARCH HANDBOOK ON COMPETITION & TECHNOLOGY 1, 24–25 (Pier Luigi Parcu, Maria Alessandra Rossi, & Marco Botta eds., forthcoming) ("A per se-rule has been turned into a case-by-case assessment even though the per se rule remains in place – but only in one direction.").

[311] A "zero-sum" game is a "non-cooperative" game where the sum of the two players' payoffs is zero, meaning what one side (Member States) loses the other (Commission) gains. See R.J. Aumann, *Game Theory*, THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 460–463 (John Eatwell, Murray Milgate, & Peter K. Newman eds., 1987); Michael Bacharach, *Zero-Sum Games*, *in* GAME THEORY 253 (John Eatwell, Murray Milgate, & Peter Newman eds., 1989).

[312] See *supra* Part II.A.

[313] Budzinski, *supra* note 142 at 124 (describing nine competence allocation rules, two of which are turnover thresholds and the effects doctrine).

[314] See *supra* note 199-200 and surrounding text.

[315] Wilks, *supra* note 199 at 433, 439 (arguing in the context of the EU antitrust modernization reform that the Commission has "escaped" its agency constraints to become an independent "trustee" or "guardian" of market principles, market integration and Treaty powers); Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUROPEAN UNION POLITICS 103 (2001).

The policy shift was justified by the need to maximize effectiveness and flexibility of the EU merger control regime.[316] The reinterpretation of Article 22 was thus a creative attempt to render it from an exceptional to a back-up "catch-all tool"[317] of potentially anticompetitive non-notifiable deals "correcting" the EUMR thresholds and "supplementing" the Commission's competence.[318] This recalibration would grant the Commission broad "call-in" powers that it previously lacked,[319] whose jurisdiction would no longer be clear cut but rather depend on substance and its own priorities.[320] With the cooperation of some Member State(s) that are willing to refer the case upwards, the Commission could at its discretion bypass the presumption reflected in the thresholds that only mergers of certain size and quality ("EU dimension") may have "significant cross-border effects" on competition and trade in the internal market and decide on mergers outside its exclusive competence (without an EU dimension).[321]

It is worth pausing for a moment to consider the progressive evolution of that presumption in light of the different functions attached to Article 22 EUMR. While initially the presumption was *conclusive* (Article 22's original mission was to enable upward referral of mergers with national impact), it later became *rebuttable within narrow conditions* (under its expanded 1997 function only competent Member States could use it to refer mergers with cross-border effects or multijurisdictional impact involving multiple filings),[322] and then it was attempted to become *rebuttable without clear limiting principles* (following the 2021 Guidance, the "new" Article 22 could be used to target any small-size merger (cross-border or national, killer or non) regardless of Member State competence under national merger law based on a case-specific assessment of its effects on competition and trade). Following the *Illumina/Grail* judgment (2024), the "repurposed" Article 22 is now restricted to competent Member States but without further limitations (e.g. multiple filings or reviews at national level

[316] The General Court in Illumina v Commission, *supra* note 208, ¶¶ 140-143, 177 upheld the Commission's expansive interpretation of Article 22 suggesting that *the* EUMR's objective "is to permit *effective* control of *all* concentrations with significant effects on the structure of competition in the European Union". But overturned by the Court of Justice, see Illumina/Grail, *supra* note 9, ¶¶ 192, 198, 200-201, 205-211, 218.

[317] Burnside and Kidane, *supra* note 105 at 140, 147.

[318] See Illumina v Commission, *supra* note 208, ¶¶ 123, 141-142, 182. The General Court interpreted Article 22 as an "alternative" means of Commission competence when the "primary" rule based on turnover thresholds is not met. But the Court of Justice rejected this interpretation, see Illumina/Grail, *supra* note 9, ¶¶ 146, 148, 158, 192-193, 200-201; Opinion AG Emiliou, *supra* note 18, ¶¶ 166-168 (noting that Article 22 was not intended to have such "broad corrective function").

[319] See *supra* note 211 and surrounding text; Völcker, *supra* note 127 at 1228–1229, 1237–1238 (explaining that the Council rejected a similar proposal by the Commission in 1973 that was subject to a safe harbour).

[320] Carugati, *supra* note 232 at 2, 5–6 (noting that the Article 22 guidance "does not rely on clear and objective criteria but on theories of harm to identify problematic mergers [and it] is only illustrative").

[321] Illumina v Commission, *supra* note 208, ¶¶ 116, 140, 142, 182. But overturned on appeal. Illumina/Grail, *supra* note 9, ¶¶ 201, 211, 216-217.

[322] See *supra* Part II.C; Illumina/Grail, *supra* note 9, ¶¶ 182, 199.

in cases of EU significance).[323] Admittedly, the rigid and very high EUMR turnover thresholds, that in practice were never revised despite the Commission's initial hopes[324] and the set mechanisms for that,[325] may give rise to an "externality problem" that could entail suboptimal allocation of competence between the EU and Member States in some cases.[326] That is, the thresholds are an imperfect proxy for the existence and size of externalities involved in light of the geographic markets affected by a given merger.[327] In this sense, there could be merit in relaxing the presumption. As an exceptional basis for jurisdiction, Article 22 "matured" over time to help mitigate this problem and improve the efficiency of EU merger control within narrow and well-defined bounds.[328]

However, unlike its previous renditions, the last expansion of Article 22 was neither limited nor aligned with foundational principles of the EUMR and EU law.[329] The Article 22 mechanism as originally conceived (1989) is not really an exception: referred cases involve *delegation* of powers over national mergers rather than a "correction" of the thresholds;[330] there is no issue of competing or conflicting jurisdiction.[331] The EU steps in to fill a local gap where Member States cannot, at least in the short run, respecting the principle of subsidiarity.[332] Article 22's second function (1997) is an actual principled and limited exception:[333] it concerns *reallocation* of cross-border or multijurisdictional cases that deserve scrutiny at EU level but would escape the Commission's competence with a view to internalize externalities or avoid multiple filings or conflicts given Member States' concurrent jurisdiction below the

[323] See *supra* Part II.D; Illumina/Grail, *supra* note 9, ¶¶ 148, 185, 196-199.

[324] Schwartz, *supra* note 131 at 650, 656–657; BRITTAN, *supra* note 126 at 39 and 53.

[325] Article 1(4) and (5) EUMR; Illumina/Grail, *supra* note 9**Error! Bookmark not defined.**, ¶¶ 183, 216.

[326] Van Den Bergh, *supra* note 158 at 366, 372–373 ("Starting from the insight that externalities are a powerful argument in favor of centralization, the case for EC merger control will be stronger the more significant is the externalities' problem. [...] Small transactions may have substantial spillovers, which will not always be considered appropriately by national antitrust authorities.").

[327] *Id.* at 373, 382; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 198, 237–238.

[328] See *supra* Part II.C.

[329] Opinion AG Emiliou, *supra* note 18, ¶¶ 215, 218-226.

[330] *Id.*, ¶ 166: "the Commission appears to act under a sort of delegation of the powers held by the relevant national authority." See also *supra* notes 192-196 and 219 and surrounding text.

[331] BRITTAN, *supra* note 126 at 52–53. See *supra* note 164.

[332] While "a desirable transitional step", in the long run, subsidiarity may entail that Member States develop their own merger control competence and are free to determine its scope "for those aspects of competition without substantial cross-border effects". See NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 200.

[333] Opinion AG Emiliou, *supra* note 18, ¶¶ 87-88: "because of the *limits* to the use of the referral mechanism by the Member States *with a merger control system*, the practical use of the referral mechanism had been reduced over time. [...] Had the Member States with a merger control system been able to refer *any* concentration whatsoever, [...] the mechanism certainly would not have been 'limited'."

EUMR thresholds, in line with the principles of subsidiarity and "one-stop shop."[334] Reallocation operates within the existing "pie" of competences: individual cases may move from one side of the dividing line drawn by the thresholds to the other, but EU and national competences are fixed and ex ante known.[335]

By contrast, the broadly "repurposed" Article 22 could essentially override the rule: it could allow ad hoc *creation* of EU competence on a case-by-case basis making not only EU but also national filing thresholds irrelevant.[336] This would exacerbate the exceptional nature of Article 22 compared to other referral mechanisms under the EUMR that to a large part rely on EU or national filing thresholds being met for requesting a referral, and in the case of Article 4(5) upward referrals, at minimum, that the jurisdictional thresholds of three Member States are met.[337] As such, the expansive interpretation would sit at odds with key principles underlying the EUMR:[338] Member States could fill gaps at national level themselves based on their existing merger control regimes and powers[339] or Article 102 TFEU[340] (subsidiarity); the repurposed Article 22 referral mechanism could multiply rather than minimize parallel reviews by different authorities ("one-stop shop")[341] and could be triggered based on broad national "call-in" powers even if a transaction is not notifiable or reviewable in multiple Member States or based on clear criteria such as turnover

[334] See *supra* notes 164-165, 181, 194 and surrounding text; Opinion AG Emiliou, *supra* note 18, ¶¶ 65, 90-92; Illumina/Grail, *supra* note 9**Error! Bookmark not defined.**, ¶¶ 182, 192-193, 199.

[335] Illumina/Grail, *supra* note 9, ¶¶ 193, 203, 208-209.

[336] Opinion AG Emiliou, *supra* note 18, ¶ 219: "under the Commission's interpretation of Article 22 EUMR, the value of these thresholds and, indirectly, of the thresholds and criteria set out in national laws becomes only relative. A merger may well not be notifiable anywhere in the European Union, but that would by no means exclude the possibility that the Commission could claim jurisdiction to review it."

[337] Downwards referrals under Articles 4(4) and 9 EUMR from the Commission to Member States require that the transaction is notifiable at EU level (meeting the EUMR thresholds) and reviewable at national level whereas upwards referrals to the Commission under Article 4(5) EUMR require that the transaction is reviewable or notifiable (meeting national mandatory or voluntary notification thresholds) in at least three Member States. See Case Referral Notice, ¶ 65 and 70-71. In *Illumina/Grail*, the Court of Justice rejected the Commission's "new" approach to Article 22 that would allow "no jurisdiction" referrals (where *all* referring Member States may have *no* competence under their existing national merger laws), limiting its scope to "traditional" referrals, including "call-in" referrals, where Member States have competence even if national filing thresholds are not met. The legality of such more expansive "traditional" approach to Article 22 is subject to appeal. See *supra* notes 12, 221-226 and surrounding text.

[338] Opinion AG Emiliou, *supra* note 18, ¶¶ 192-214; Illumina/Grail, *supra* note 9, ¶¶ 202-210.

[339] Opinion AG Emiliou, *supra* note 18, ¶ 200; Illumina/Grail, *supra* note 9, ¶ 217.

[340] Opinion AG Emiliou, *supra* note 18, ¶¶ 227-232; Illumina/Grail, *supra* note 9, ¶ 214. On Towercast, see *supra* Part II.D.

[341] Opinion AG Emiliou, *supra* note 18, ¶¶ 203-205; Illumina/Grail, *supra* note 9, ¶ 210.

creating predictability and other procedural challenges for merging parties (legal certainty).[342]

Accordingly, Article 22's repurposing would increase possibilities for upward referral by loosening former strict requirements but with notable consequences. Most fundamentally, the system of EU and national merger controls would be transformed from one based on mutually *exclusive* jurisdiction (zero-sum game) to a complex web of latently *concurrent* spheres of EU and national competences below the EUMR thresholds with the Commission as the ultimate beneficiary (non-zero sum game). Unlike a reduction of the EUMR turnover thresholds, or introduction of transaction value ones, that would *uniformly* take away jurisdiction from Member States to expand EU competence downwards in a fixed way,[343] the expanded Article 22 referral mechanism could be used to capture non-EU dimension transactions, *unpredictably* taking away national competence from (some) Member States without clear justification (i.e. no delegation of national cases by NCAs lacking merger control, or reallocation of cases with cross-border effects or involving multijurisdictional filings). Relying on national "call-in" powers, any transaction reviewable in *any one* Member State could be "called-in" by the Commission for review.[344] By activating jurisdictional "competition" between the Commission and Member States for the first time since the adoption of the EUMR, EU competence could be extended below the EUMR thresholds "when needed" beyond the existing "pie" of turnover-based competence allocation but potentially *asymmetrically* affecting different Member States and private parties.

On the one hand, the expanded approach to Article 22 could lead to *ad hoc* "centralization" of merger control enforcement below the EUMR thresholds, taming "regulatory competition" among Member States[345] and encouraging informal coordination among Member States and the Commission, which could invite NCAs to cooperate and surrender their own review powers for cases better deserving scrutiny

[342] Opinion AG Emiliou, *supra* note 18, ¶¶ 206-213; Illumina/Grail, *supra* note 9, ¶¶ 208-210.

[343] Such amendments would not change the nature of the competence allocation game that would remain "zero-sum."

[344] See *supra* note 221 and surrounding text. Besides, on referral from Luxembourg that still lacks a national merger control regime, the Commission could claim jurisdiction over any concentration below the EUMR thresholds. See *supra* note 177 and surrounding text. Although Luxembourg can submit a referral in case of mergers with local effects under the original rationale for the Dutch clause, the situation is unclear if a merger has cross-border effects (there are no clear principles developed in the case law and the *Illumina/Grail* and *Brasserie Nationale* judgments, *supra* notes 9 and 177, do not directly govern this case): e.g. if a referral could be initiated by a non-competent [rather than a competent] Member State that lacks any merger control when the merger also affects competent Member States, and under what conditions [e.g. whether multiple national filings or reviews may be required by analogy to the secondary rationale of Article 22]).

[345] On the notion and its application in the antitrust context, see Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, 12 EUROPEAN LAW JOURNAL 440 (2006); Ben Depoorter & Francesco Parisi, *The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition*, 13 GEO. MASON L. REV. 309 (2005).

at EU level. Through this effort to achieve flexible harmonization of EU merger control and internalization of externalities at the supranational level "when appropriate," the situation could be turned into a "positive-sum" game.[346] The noble aims of protecting competition, avoiding fragmentation of the internal market and improving the efficiency of EU merger control could be achieved.

On the other hand, the broad jurisdictional competition introduced by the expanded Article 22 between the Commission and Member States, driven by self-interest, could also lead to undesirable and inefficient outcomes. The "non-zero sum" nature of the merger competence game opens the possibility for the conflict of interest (free riding) to prevail over the mutual benefit (cooperation), potentially resulting in "negative-sum" situations. For instance, a competent Member State could refuse to join a referral and prefer to enforce national law in certain cases given its individually rational options and incentives, even if the merger has cross-border character, thus blocking a "one-stop" EU review.[347] Given its open-ended design and the lack of judicial checks, a broader Article 22 could be over- or underused under "political pressure",[348] leaving room for regulatory capture and unaccountable decisions.[349] Conflicts could be limited as the Commission aims to avoid taking on jurisdiction over already notified transactions at national level.[350] However, it is not bound to do so.

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[346] In "positive-sum" games the total sum of wins and losses are greater than zero, the pie is enlarged and no one takes a gain at the expense of another. Such outcome is more likely when more different interests are involved. In "negative-sum" games the sum of gains and losses is negative and there is a shrinking pie for players to share. Most intense competition is evidenced in these situations. See Sarah Bonau, *A Case for Behavioural Game Theory*, 6 JOURNAL OF GAME THEORY 7, 8 (2017); Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 THE JOURNAL OF POLITICS 998 (2009).

[347] A recent example is the *Meta/Kustomer* merger that was reviewed separately by the Commission (on referral from 10 Member States) and Germany (after it was clarified that its national notification thresholds are met). See Van Rompuy, *supra* note 302 at 342; Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 566–567, 570.

[348] Carugati, *supra* note 232 at 6.

[349] Judicial review of NCAs' decisions to refer cases is neither given nor uniform across Member States. See Levy, Rimsa, and Buzatu, *supra* note 127 at 377 ("There is uncertainty about the extent to which NCAs' decisions to make a referral request could be appealed before national courts. [I]n Illumina/Grail a French court ruled that the FCA's decision could not be appealed, while a Dutch court considered itself competent to review the parties' appeal."); Athena Kontosakou, *European Antitrust Enforcement in the Digital Era: How It Started, How It's Going, and the Risks Lying Ahead*, 67 THE ANTITRUST BULLETIN 522, 529 (2022) ("The French Council of State found that [...] the decision to refer did not constitute in and of itself an appealable act and as such only the EU Courts had jurisdiction"). The EU Courts have no jurisdiction to rule on acts of national authorities including the legality of a referral request. See *Brasserie Nationale*, *supra* note 177, ¶ 128. Once the Commission decides to accept a referral, its decision may be challenged before the EU Courts. Yet, the "standstill obligation" under Article 7 EUMR applies since the parties are informed that a referral request has been made. See Article 22 Guidance, paras 27 and 31.

[350] If the transaction has already been notified in one or more competent Member States that have not made or joined a referral request, this constitutes *a factor* against the Commission accepting the referral. Yet, the Commission has full discretion to decide differently and accept jurisdiction by referring Member State(s) "based on *all relevant circumstances*,

Also, some NCAs follow a policy that they are "not empowered under their respective national laws to refer transactions to the EC that [are] not reportable under national merger rules,"[351] signaling a "commitment" not to "cooperate" in such cases.[352] The result could still be parallel reviews or partial referrals limiting EU review to the territory of the referring Member States.

As such referrals remain fully discretionary, the expanded Article 22 cannot guarantee mutually beneficial cooperation and outcomes that protect the interests of all Member States. Yet, arguably, the original "Dutch clause" can be rationalized as a safeguard to ensure that competition among Member States for merger control competence below the EUMR thresholds is "balanced" and the interests of (smaller) Member States are not negatively impacted by externalities imposed by merger enforcement and policy choices of other (larger) ones (i.e., an attempt to avoid "negative-sum" situations).[353] With Article 102 TFEU in the game, in addition to national merger control, as another "decentralizing threat" against the Commission's efforts to ad hoc "centralize" merger enforcement via Article 22 referrals, the likelihood of (at least in part) decentralized enforcement is even greater also for cross-border cases that would merit centralized EU review.[354]

The drive for centralization and the instrumentalization of Member States as decentralized market "monitors"[355] shows affinities to the DMA institutional setup where NCAs have a hybrid role of facilitating compliance and EU enforcement.[356] But in the DMA context the Commission is the sole enforcer with exclusive competence and the ability to short-circuit NCA activities by taking the "enforcement lead" itself.[357] By contrast, the Article 22 procedure can spark ad hoc centralization of merger enforcement but it relies on (some) Member States to "create" EU competence and lacks the institutional mechanisms to discipline (other) Member States' concurrent jurisdiction, when "one-stop" EU-wide review is appropriate. The NCAs' monitoring function could help "detect" non-reportable killer acquisitions but it is questionable to what extent they have sufficient incentives to do so for the benefit of the Commission's enforcement.[358] Mutually beneficial cooperation may not naturally arise without a

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including [...] the extent of the potential harm, and also the geographic scope of the relevant markets." See Article 22 Guidance, ¶ 22.

[351] Levy, Rimsa, and Buzatu, *supra* note 127 at 376.

[352] For example, NCAs in Germany and Austria that have gone to expand their national notification thresholds follow this approach. See *supra* note 80.

[353] *Cf.* Schwartz, *supra* note 131 at 653.

[354] Enforcement at national level based on Article 101 TFEU could have a similar effect.

[355] Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 570 (noting that the new Article 22 would transform NCAs into subcontracted "market watchdogs" for the Commission's benefit [...] "in relation to deals not having an EU dimension, not needing to be domestically notified, but nevertheless having potential to impact the EU internal market").

[356] Anna Tzanaki & Julian Nowag, *The Institutional Framework of the DMA: From Hybrid to Mature?*, JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE, FORTHCOMING, 11–13. Cooperation between EU and national authorities ensures effective regulation of gatekeepers under the DMA and avoids conflicts with national competition laws that apply in parallel.

[357] *Id.* at 12.

[358] Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 570.

disciplining structure resolving "prisoners' dilemma" and negative-sum situations. Under the current design, Member States' individual incentives (not) to refer or (not) to monitor could dominate the process and dictate outcomes.

As a result, despite the much touted for quest for effectiveness, the "repurposed" Article 22 was neither a "systematic"[359] nor an effective solution to the main substantive and jurisdictional "deficiencies" of the EUMR turnover thresholds: not only the "deterrence problem"[360] but also the "externality problem" would not be effectively addressed. Externalities could be addressed in some but not necessarily all cases. Effective resolution would entail that all anticompetitive merger cases deserving scrutiny at EU level are first detected and then referred to the Commission that accepts them. Yet, in its current form, the "expanded" Article 22 remains suboptimal, more "random" rather than principled and unlikely to be targeted only at the "right" deals.

Besides, the new Article 22 policy could have sweeping implications for other actors such as merging parties and complainants. Although the Commission would see its powers reinforced, the repurposed Article 22 would be institutionally "one-sided" against private parties.[361] Merging companies could no longer rely on the safe harbor that previously existed for transactions below EU or national merger control thresholds.[362] The Commission's commitment not to overuse or abuse its broad "subsidiary power" would neither be credible nor provide any "enforceable" reassurance to companies.[363] Procedurally, merging parties involved in small size transactions would also be disproportionately burdened by the added cost and uncertainty of the informal Article 22 procedure compared to the main "one-stop" EUMR procedure for large reportable transactions.[364] The "repurposed" Article 22 would also mutate the thus far ex ante *mandatory* notification EU system to a partially *voluntary* and ex post merger control regime.[365] Lack of notification would not bar the

[359] *Cf.* Podszun, *supra* note 310 at 16. See Opinion AG Emiliou, *supra* note 18, ¶ 167; Illumina/Grail, *supra* note 9, ¶¶ 183, 216 stressing that unlike Article 22 there has been "a *systemic* corrective mechanism built in [Article 1(4) and (5) of] the EUMR which permits a rapid adjustment of [its] scope if the jurisdictional criteria in use become, because of market developments, no longer apt to capture potentially harmful concentrations".

[360] See *supra* Part I.D.

[361] Podszun, *supra* note 310 at 25.

[362] *Id.* at 24–25.

[363] Opinion AG Emiliou, *supra* note 18, ¶ 216: "when asked at the hearing [about its significantly extended jurisdiction], the Commission confirmed that, in theory, that is true. Nevertheless, it added that, in practice, that will not be the case as the Commission has no interest in using that power frequently and will thus act with discipline in that respect."

[364] Opinion AG Emiliou, *supra* note 18, ¶¶ 203-213, 224-226; Illumina/Grail, *supra* note 9, ¶ 210.

[365] On the relative desirability of the two regimes, see Aldo Gonzalez & Daniel Benitez, *Optimal Pre-Merger Notification Mechanisms - Incentives and Efficiency of Mandatory and Voluntary Schemes*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 4936 (2009); Andreea Cosnita-Langlais, *Enforcement of Merger Control: Theoretical Insights for Its Procedural Design*, 67 REVUE ÉCONOMIQUE 39, 41–44 (2016).

Commission from later investigating or unwinding an already completed deal.[366] Other than objective criteria built in and limiting national merger control ("call-in") powers,[367] there are no factors "objectifying" or disciplining ad hoc EU competence. For instance, in the UK voluntary merger control system, jurisdiction is limited by a turnover or a share of supply test.[368] In the US, where unlimited ex post jurisdiction over mergers exists, there are institutional constraints on antitrust enforcement agencies, which need to litigate and win merger cases before courts, that discipline the arbitrary exercise or abuse of their power.[369] In the EU system of merger control where enforcement decisions are made in the first instance by an administrative agency and in the case of Article 22 referrals without certain or adequate judicial recourse that level of institutional control is lacking.[370] Similarly, third parties that could inform EU or national authorities of candidate cases for referrals have no formal rights in the Article 22 procedure.[371] Therefore, the expansion of the Commission's competence in this way would not be subject to appropriate institutional checks and balances that are typical of the EU system or any rule of law system.

III. LESSONS LEARNED AND THE WAY FORWARD: ALTERNATIVE INSTITUTIONAL OPTIONS

Where to now? The killer acquisitions phenomenon emerged without warning as a "stress test" for EU merger control and a call for calculated reform of EU competition policy towards "antifragile" solutions.[372] Although the "repurposed" Article 22 can be understood as a practical "path dependent" solution given the political constraints faced by the Commission, the record shows that the new status quo is neither an optimal nor a sustainable solution.[373] As illustrated above, it may not lead to systemic improvement. Also, while this option was chosen with a view to avoid a grand revision of the EUMR and its thresholds that would entail political

[366] Press Release, Commission orders Illumina to unwind its completed acquisition of GRAIL, October 12, 2023: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872.

[367] For an overview, see Connolly et al., *supra* note 12.

[368] Podszun, *supra* note 310 at 21.

[369] Kovacic, Mavroidis, and Neven, *supra* note 62 at 57.

[370] See *supra* note 349; and *Id.* at 56–57 (suggesting that the EU merger control model where there is "one agent and decisionmaker is compensated by extensive [but occasionally cumbersome] procedural rights for the parties").

[371] Cseres, *supra* note 199 at 419 (suggesting that third parties' participation in administrative procedures "functions as a complement to judicial review" adding transparency and accountability).

[372] NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER (Random House 2014). Taleb coined the term to denote things that not only persevere but gain from stress, disorder and uncertainty.

[373] Wolfgang Kerber, *An International Multi-Level System of Competition Laws: Federalism in Antitrust*, GERMAN WORKING PAPERS IN LAW AND ECONOMICS 13, 19 (2003) (noting that "legal development can be characterised by path dependencies, which might lead to the problem of inefficient legal rules prevailing for a long time"); Mario Mariniello, *Reinforcing EU Merger Control against the Risks of Acquisitions by Big Tech*, POLICY BRIEF 11/2025, BRUEGEL, 9 (2025) (highlighting the "untenability of the current EU framework").

renegotiation with Member States, ad hoc coordination in individual merger cases would be basically subject to the same dynamics, i.e. negotiation with Member States.

There are further key lessons to be learned. Killer acquisitions and dynamic competition concerns exert pressure to move from a model of "preemptive" towards one of more "dynamic federalism" prompting institutional approximation of the thus far divergent EU and U.S. two-level merger control systems. Clearcut jurisdictional rules as traditionally found in the EU are inherently imprecise, their rigid application is unable to fully cover substantive gaps or deter anticompetitive mergers and may also lead to imperfect internalization of externalities by national and EU merger control enforcers.[374] In the US system of parallel and overlapping spheres of federal and state merger competences under both merger and antitrust laws, consistent outcomes are not guaranteed in every case, but insufficient deterrence and externality internalization are not characteristic problems. The "repurposed" Article 22 EUMR and the revival of Article 102 TFEU as a tool of merger control enforcement show that dynamism in the law is a natural consequence of recent economic developments that demand flexible and "backup" solutions.[375] Divergences among "competing" jurisdictions may have a silver lining as they allow for experimentation and emergence of best practices through learning by doing and dialogue.[376] Soft cooperation mechanisms and repeated interactions may induce comity and self-restraint in the exercise and coordination of such unlimited and concurrent powers.[377]

Yet, a "best of all worlds" solution could be a hybrid between pure preemptive (monopoly) and pure dynamic federalism (competition) that combines elements from a market-driven (incentives) and a law-based approach (certainty).[378] Diversity and multiplicity of merger laws and enforcement actors may be coupled and balanced with discipline via judicial review, participatory and transparent procedures, centralized monitoring and ex post reviews of agency effectiveness.[379] Gaps and externalities may be addressed but not at the expense of arbitrary and unaccountable enforcement; local preferences and experimentation need not a priori be stymied in favor of hard convergence.[380] Unbridled discretion or unquestioned centralization is not a necessary or unavoidable consequence of infusing dynamism in the law.

[374] See *supra* Part I.D and Part II.E.

[375] See *supra* Part II.D.

[376] Giorgio Monti & Jasper van den Boom, *Designing a Cooperation Framework for Regulating Competition in Digital Markets – Lessons from Transnational Merger Control*, CPI ANTITRUST CHRONICLE OCTOBER 2022, 6–7 (2022); Deakin, *supra* note 345 at 444.

[377] NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 180, 197; Burnside and Kidane, *supra* note 105 at 151; BRITTAN, *supra* note 126 at 16–17.

[378] Deakin, *supra* note 345 at 445.

[379] *Id.* at 443–445; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at chapters 6-7; Van Den Bergh, *supra* note 158 at 373; Monti and van den Boom, *supra* note 376 at 5, 7.

[380] Deakin, *supra* note 345 at 444–445, 454; Monti and van den Boom, *supra* note 376 at 7; Florian Wagner-von Papp, *Digital Antitrust and the DMA: In Praise of Institutional Diversity*, 12 JOURNAL OF ANTITRUST ENFORCEMENT 338, 344 (2024).

So, what is in it for EU merger control? Institutional economics and the economics of federalism may be useful to develop alternative institutional options for the design of the EU system of merger competence allocation going forward.[381] These options may be thought of along a continuum of centralization and decentralization alternatives, or some hybrid combination of the two, that may affect the degree of uniformity (harmonization) or diversity of rules and the "spontaneous" or "centralized" coordination of enforcement. Economic criteria can be used to evaluate the relative desirability of these options such as their performance in terms of *internalization of externalities* between legal orders, *transaction cost savings* (e.g. through scale economies in regulatory scrutiny by "one-stop" review, or increasing legal certainty by reducing firms' search and information costs about divergent national laws and their enforcement),[382] deterrence effects and potential *incentive costs* of "inefficient" rules and procedures,[383] risk of regulatory capture and counterresponses to capture through accountability, independence and transparency, addressing information asymmetries between competition authorities and regulated firms or the general public (reflecting the quality and effectiveness of merger enforcement procedures and institutions), accounting for preference orientation (and the extent of differences or alignment among Member States), adaptability, scope for experimentation and knowledge gathering about the costs and benefits of alternative legal rules or institutional solutions, risk of prisoners' dilemmas and races to the bottom (or the top) due to regulatory competition between legal systems.[384]

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[381] See generally Van Den Bergh, *supra* note 158; Budzinski, *supra* note 142; Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 285 (2010); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEORGETOWN JOURNAL OF LAW AND PUBLIC POLICY 5 (2004); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 THE JOURNAL OF LAW & ECONOMICS 23 (1983); Pierre Salmon, *Decentralisation as an Incentive Scheme*, 3 OXFORD REVIEW OF ECONOMIC POLICY 24 (1987); NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136.

[382] Van Den Bergh, *supra* note 158 at 366–367, 374, 382.

[383] See *supra* Part I.D; *Id.* at 374 (defining "inefficient" rules as "legal rules that may induce inefficient behavior or may simply ban efficient conduct" and lamenting that advocates of "economizing" harmonized or centralized solutions "might feel happy with certainty about the contents of inefficient rules"). Incentive costs may be reduced if inefficient rules can be challenged in court, see PAUL H. RUBIN, BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES 173–174 (1983) (suggesting that the "law will move towards efficiency" when parties with symmetric interests can challenge inefficient rules through litigation; while government agencies may have a long-term interest in precedents and using litigation to achieve desired goals, these goals need not be strictly efficiency related); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARVARD LAW REVIEW 641, 641 (1996) (finding that "[a]though institutions that have survived cannot be too inefficient, evolution-toward-efficiency constrains but does not fully determine the institutions we observe"); but may increase legal uncertainty if they involve administrative discretion or the risk of regulatory capture, see Van Den Bergh, *supra* note 158 at 374.

[384] Van Den Bergh, *supra* note 158; Budzinski, *supra* note 142; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at chapter 6.

There are four reform alternatives to consider.

- The first option would be more *ex ante centralization* by reforming the EUMR's turnover thresholds to adjust them downwards or inserting additional criteria to expand EU jurisdiction.[385]
- The second option would be potential *ex post centralization* by reforming the EUMR's case referral system and tightening up the Article 22 referral policy to allow for principled and transparent enforcement.
- The third option would be *full flexibilization and decentralization* by decoupling EU-level liability from the EUMR thresholds and national competence ("call-in" powers), as well as Member State-level liability from any national filing requirements, to introduce unlimited, concurrent competences coupled with soft coordination as per the U.S. paradigm.
- The fourth option would be more *decentralization, and potential ad hoc centralization, with stronger centralized coordination and monitoring*, for instance through an organ such as the ECN,[386] that could resemble the institutional setup for the enforcement of EU antitrust rules under Regulation 1/2003.[387] This option could involve reform of the threshold rules particularly the 2/3 rule and the case referral system enabling competence and case (re)allocation downwards[388] and strengthening network governance.[389] This fourth alternative could be conceived as an extension of option two (promoting ad hoc decentralization, and centralization, via case referrals) or as a first step towards more systemic reform (greater decentralization and coordination of concurrent competences) depending on the long-term vision.

[385] See *supra* notes 80-81, 223, 343 and surrounding text.

[386] Speech by EVP Margrethe Vestager at the EU Competition Day: "Competition and competitiveness in uncertain geopolitical times" (Brussels, April 26, 2024) highlighting the key role of the ECN within the institutional framework created by Regulation 1/2003 that allows not only "to coordinate" antitrust enforcement among the Commission and NCAs but also "to allocate cases. Typically, the Commission is best placed to handle pan-European cases, the ones most directly threatening to the Single Market's integrity. This includes cross-border cartel enforcement to antitrust cases with a European or global dimension."

[387] For related ideas in the context of EU antitrust or DMA enforcement, see respectively Monti, *supra* note 69; Wagner-von Papp, *supra* note 380 at 344.

[388] Such reform could be designed (i) to support the "one-stop shop" principle in its decentralizing variant, by revising the "vertical threshold" of the 2/3 rule to "assign competence to the *most impacted* Member State" even for mergers exceeding the EUMR thresholds, and (ii) to minimize the multiple filing problem, by introducing an "ambitious and harmonized horizontal threshold" to ensure that "only a *substantial impact* on domestic markets constitutes jurisdiction over a specific Member State" – i.e., setting a uniform minimum jurisdictional "floor" for national merger competence. See Budzinski, *supra* note 142 at 131.

[389] Recital 14 EUMR provides for *voluntary* network cooperation for the Commission and NCAs to work in "close cooperation" to promote the principle of subsidiarity and avoid the multiple filing problem in merger enforcement. But this is a "*soft* guide towards more efficient competence allocation," without mandatory character and formally outside the scope of the ECN. See *Id.* at 138–139; and *supra* notes 69 and 72-75 and surrounding text.

Measured against the criteria listed above, option one (expanding the EUMR thresholds) is unlikely to be an effective or efficient solution given the elusive nature of the killer acquisition phenomenon. Its main drawback is the rigidity in its design, which may give rise to incentive costs and imperfect internalization of externalities while it would put a huge burden on Commission resources and could deflect enforcement attention from higher priority or impact merger cases. This option would also not be fully effective in addressing information asymmetries between agencies and firms (by a higher-level centralized agency), accounting for differing local preferences, allowing for adaptability and experimentation and it could be vulnerable to capture by sectoral albeit not national interests.[390] On the other hand, its relative clarity and simplicity could enhance legal certainty, although of possibly "inefficient" rules, and lead to transaction cost savings due to "one-stop" merger notification and review.

Option three (completely decoupling jurisdiction from mandatory notification and EU from national competence) is likely to reduce transaction costs due to multiple filings but not those due to coordination of parallel enforcement efforts or due to ex ante uncertainty regarding jurisdiction and merger enforcement and is further vulnerable to capture by special interests and prisoners' dilemma situations due to regulatory competition. Externalities, information asymmetries and underdeterrence are not inherent or at least major concerns although overdeterrence could be. However, flexibility is a major virtue that together with strong institutional checks such as court litigation could streamline the application and ensure the effectiveness of such system.[391] The key downside of this option is that it seems politically infeasible and not fit for the EU institutional environment.

Option two (a reformed referral system) is the most realistic and option four (greater decentralization, and ad hoc centralization, coupled with stronger centralized coordination) the most ambitious. Both options could be developed to pass muster under *Illumina/Grail* (by using a transparent rule making process) and could constitute an improvement compared to the status quo. One of the main improvements with option two could be adding ex ante transparency (guidelines that justify and constrain the possibility of referral based on *objective* criteria) and ex post transparency (*publicized* and reasoned acceptance or rejection of referrals by the Commission) into the Article 22 procedure.[392] This way any disagreements (differing preferences) among EU and national merger enforcement agencies could be fully transparent,[393]

[390] NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 179, 193–194; Van Den Bergh, *supra* note 158 at 381.

[391] See *supra* note 369 and surrounding text.

[392] NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 174, 220, 230–231; Eben and Reader, *supra* note 89 at 311 (suggesting that the Commission would need "reasoned explanations for its decisions to reject—as well as to accept—referral requests" to achieve transparency and consistent interpretation of its new Article 22 Guidance by NCAs). In addition, "procedural transparency" and participation of third parties in the process could improve the system of case referrals. NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 175; Cseres, *supra* note 199 at 419.

[393] Monti and van den Boom, *supra* note 376 at 4.

monitoring of agency enforcement and competence use by the general public could be feasible and the likelihood of capture or political decisions reduced.[394] With the option of streamlined ex post centralization, externalities could be internalized (and information assymetries mitigated) when needed, transaction costs of various kinds saved, and administrative discretion minimized. Ad hoc flexibility (adaptability) could be infused into the system while transparency and effective judicial review could ensure legal certainty, predictability, consistency of outcomes and put a check on possibilities for capture or abuse.[395] Negative deterrence effects and distortions of business behavior could be reduced and institutional quality and effectiveness promoted by a predictable ex post correction of imperfect ex ante merger competence allocation rules that is rationalized, targeted and balanced. Underdeterrence as well as overdeterrence concerns could be narrowed.[396]

In specific, the use of upward referrals could be rationalized in objective and ex ante foreseeable ways and aim to address the two key deficiencies, the deterrence and externality problem, of the EUMR turnover thresholds by minimizing agency discretion and jurisdictional uncertainty and competition among EU and national competition authorities created by an overbroad and "undisciplined" Article 22 referral policy and procedure. To ensure legal uncertainty, incentive costs and externalities reducing reallocation of cases, Article 22 referrals could be preserved only for merger cases that trigger multiple national filings or reviews – in at least three Member States, in line with the use of the Article 4(5) referral mechanism – or have cross-border impact and EU significance. Referral of mergers with national or local impact should only be an option for Member States without any merger control powers (Luxembourg). In this manner, bright-line principles could be build in referral guidelines and guide business. Moreover, the "soft" division of EU and national competences based on these principles should not leave room for discretion: the Commission would need to accept referrals of cross-border or multijurisdictional merger cases and not accept any non-cross-border cases. This streamiling of Article 22 would also align its operation with other referral mechanisms under Article 4(5) and 9(2)b EUMR where the Commission has no discretion.

Although competence allocation would not be strictly speaking fixed, the ad hoc flexibility added to the system would be predictable. The objective use of the Article 22 mechanism would enhance the integrity of the case referral system and render it more "legal" rather than "strategic" pressured by context-specific industrial, national and EU interests. The efficiency of Article 22 could further be improved if ad hoc EU competence could become "exclusive" in cross-border or multijurisdictional merger cases qualifying for referral, thus limiting inefficient "partial" referrals and

[394] NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 174.

[395] Budzinski, *supra* note 142 at 126–127; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 174–176, 222–223; Van Den Bergh, *supra* note 158 at 378–380. Judicial review could follow expedited procedures and should be uniformly available across Member States. Review by EU Courts of Commission acceptance or rejection decisions of Article 22 referrals, even after review of a given merger, could discipline the Commission's and Member States' referral practice. See *supra* note 226.

[396] See *supra* Part I.D.

excluding potentially destructive jurisdictional competition between the Commission and Member States. While some of these reforms may entail redrafting of Article 22 Guidelines by the Commission, the latter would require EUMR amendment as it would change the current turnover-based competence allocation rule under the EUMR. In any event, in light of *Towercast*, for this referral scheme to be effective and credible, guidelines on the proper use of Article 102 TFEU for merger enforcement by NCAs, and coordination of cases, need to be drawn up and agreed among Member States.

Option four is more complex and its performance may depend on the actual design of such more decentralized and centrally streamlined system. In principle, this option has several advantages, some similar to option two. For instance, the allocation of cases among EU or national authorities could be based on the actual geographic scope and significance of competition effects[397] – through a reformed 2/3 rule that allocates "original" jurisdiction to Member States over prima facie "EU dimension" mergers, through the steamlining of Article 22 referrals as per above or introduction of a minimum threshold for parallel national merger control reviews and joint referrals in multijurisdictional cases – so that responsible assertion of jurisdiction at the appropriate level could be facilitated and externalities could be dealt with but not at the expense of subsidiarity. Transaction costs and uncertainty could be limited and jurisdictional competition disciplined through supervisory network governance that is principle-based and serves as a forum for the resolution of disagreements and debate over enforcement approaches and best practices.[398] Transparency of case allocation and coordination via a network such as the ECN could enhance its impartial and legitimized functioning and its relative insulation from capture or political pressures.[399] Centralized oversight by the Commission and "soft" discipline and "peer pressure" could improve the system's performance.[400] Judicial review of agency decisions could reinforce the transparency of rules and procedures and indirectly safeguard the effectiveness and integrity of the network as a governance and competence allocation organ.[401] Information sharing through the network and decentralized market monitoring by NCAs could reduce informational asymmetries.[402] Such a system could be more open to mutual learning and experimentation and allow space for local preferences and evolving adaptation.[403]

With expanded decentralization, streamlined upwards referrals and centralized coordination, the focus and effectiveness of EU and national merger enforcement could be improved with positive effects on business incentives. In such complex, multi-level merger control system of many enforcement actors and

[397] Budzinski, *supra* note 142 at 131.

[398] Monti and van den Boom, *supra* note 376 at 6–7; Budzinski, *supra* note 142 at 138–139.

[399] NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 174–176.

[400] Monti, *supra* note 69 at 369–370.

[401] *Id.* at 370; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 136 at 222–223.

[402] Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 210 at 570; Van Den Bergh, *supra* note 177 at 365–366, 370–371; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 168, 177–178, 180–182.

[403] Monti, *supra* note 87 at 380, 382; Monti and van den Boom, *supra* note 515 at 6–7.

instruments, whose operation is "disciplined,"[404] the likelihood of escaping liability for anticompetitive mergers or being exposed to liability for procompetitive ones (and the incentives or disincentives for proposing welfare reducing or enhancing mergers) could be diminished and optimal deterrence could be more closely attained. Flexibility and predictability could thus become an enduring strength of EU merger control.

IV. CONCLUSION

For the last 35 years since its coming into being nothing seemed to shake the institutional setup of EU merger control. Notwithstanding their inherent limitations, turnover thresholds had been consciously chosen as the one and only jurisdictional criterion for EU merger review under the EUMR. The "clearcut" and "certain" threshold-based system of merger competence allocation was at the heart of the political bargain struck between the Commission and Member States that had been repeatedly skeptical of giving up part of their national powers for pan-European merger control to arise.

With the rise of digitalization, that era of contained and certain EU merger enforcement seems long gone. Killer acquisitions created demand for more "dynamism" and flexibility in merger control. In response, rather than reforming the EUMR's thresholds that would entail renegotiation of the original "zero-sum" competence allocation bargain with Member States, the Commission decided to unilaterally "repurpose" Article 22 EUMR. However, the discretionary Article 22 referral mechanism invited unpredictability and arbitrariness in merger review affecting companies' incentives (what deals they may choose to propose or forego proposing) and NCAs' strategies (what deals they may wish to refer upwards or rather regulate at home). As such, it could not cure to the deterrence or the externality problem plaguing the EUMR turnover thresholds. Even a "call-in" referral system, which remains permissible post-*Illumina/Grail*, is unlikely to lead to optimal results. In turn, given the persistent jurisdictional uncertainty facing below-threshold mergers in the EU, and the broad jurisdictional competition between the Commission and Member States it has activated, the Article 22 solution in its present unprincipled and "uncoordinated" form is unlikely to be an effective solution to the EU's merger enforcement deficit.

The quest for further systemic reforms and "antifragile" institutional arrangements continues. The most precious legacy killer acquisitions could leave us with is the realization of a needed transition towards a more "efficient" system of EU merger competence allocation: subsidiarity, adaptability, transparency and accountability could be some of its enduring virtues. While a "modernization" of EU merger control comparable to the post-Regulation 1/2003 EU antitrust regime may not be in immediate view, the long road to a more "dynamic" EU merger control system may pass at first instance through the streamlining of the EUMR's case referral system that in its current form remains suboptimal. Besides, while the road to EUMR revisions might have seemed long, that view has decisively changed after the Court of Justice's

[404] Salop, *supra* note 185 at 2670.

judgment in *Illumina/Grail* that can act as a catalyst for transformational action, if not retrenchment to the not so glorious past.

With the Commission committed to its mission for EU jurisdictional expansion over non-reportable mergers and its eyes set on European innovation and competitiveness, the stakes for getting competition policy on an EU "killer" solution right are high. Understanding the institutional dynamics and economic implications of possible solutions may set legal reforms on the right path. But until EU legislators or courts authoritatively decide, the outlook remains uncertain.