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

Anna Tzanaki\*

Competition law is experiencing a transformation. The culprits? Digitalization, technology and innovation are some.<sup>1</sup> Dynamic competition<sup>2</sup> 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.<sup>3</sup> Innovative business models based on data or unconventional monetization strategies, potential or indirect competition, longer-term time horizons, high-speed and high-risk technological change, uncertainty of entry or success, complex complementarities in the digital economy are some of the features of these markets that are testing traditional antitrust policy and doctrine.<sup>4</sup> These challenges are not limited to a single jurisdiction. Rather the search for fresh understanding and new solutions is ubiquitous.<sup>5</sup> The EU is no exception. The EU has

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<sup>1</sup> 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).

<sup>2</sup> 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.”).

<sup>3</sup> Sidak and Teece, *supra* note 2; 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).

<sup>4</sup> Anna Tzanaki, *Dynamic Challenges to Market Definition and Market Power Evaluation in Antitrust Cases: The Long Road Ahead*, NETWORK LAW REVIEW (2023).

<sup>5</sup> See for instance the numerous reports on competition concerns in digital markets, JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, *Competition Policy for the Digital Era*, Final Report prepared for the European Commission (2019); Jason Furman, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019), prepared for the UK Chancellor of the Exchequer and Secretary of State for Business, Energy

been steadfast in adapting to the changing times by introducing the Digital Markets Act,<sup>6</sup> complementary to EU and national competition laws proper, and by successfully modernizing its Market Definition Notice that now specifically addresses innovation-driven markets, multi-sided platforms and digital ecosystems.<sup>7</sup> Similar reform initiatives are undergoing in EU abuse of dominance law aiming to promote a “dynamic” approach to Article 102 TFEU<sup>8</sup> and substantive merger control by accommodating “novel” theories of harm that “fit the economic reality” of digital and tech markets.<sup>9</sup>

Yet, 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.<sup>10</sup> Killer mergers 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 thresholds erect an impermeable barrier to ex ante review and substantive liability of mergers involving small-size targets.<sup>11</sup> Eager for a quick and targeted fix, the Commission devised an ingenuous solution: “repurposing” the Article 22 EUMR case referral mechanism to flex its jurisdictional competence “on demand” over below-threshold

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and Industrial Strategy; *A new competition framework for the digital economy: Report by the Commission ‘Competition Law 4.0’* (September 2019), prepared for the German Ministry of Economic Affairs and Energy; *Memorandum: Digital platforms and the potential changes to competition law at the European level*, The view of the Nordic competition authorities (September 2020); Australian Competition and Consumer Commission, *Digital Platforms Inquiry - Final Report* (June 2019); University of Chicago Booth School of Business, *Stigler Committee on Digital Platforms: Final Report* (September 16, 2019); BRICS Competition Law and Policy Centre, *Digital Era Competition: A BRICS View* (September 18, 2019).

<sup>6</sup> 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”).

<sup>7</sup> Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, February 22, 2024: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6001](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6001).

<sup>8</sup> For the policy reforms regarding Article 102 TFEU see: [https://competition-policy.ec.europa.eu/antitrust/legislation/application-article-102-tfeu\\_en](https://competition-policy.ec.europa.eu/antitrust/legislation/application-article-102-tfeu_en). For background to these initiatives see Linsey McCallum et al., *A dynamic and workable effects-based approach to Article 102 TFEU* Policy Brief, Issue 1, March 2023 (“The Commission is committed to an effects-based enforcement of Article 102 TFEU, which fully takes into account the dynamic nature of competition and constitutes a workable basis for vigorous enforcement.”).

<sup>9</sup> NOTE BY THE EUROPEAN UNION, *OECD Roundtable on Theories of Harm for Digital Mergers*, 17 (2023); Viktoria H. S. E. Robertson, *Digital Merger Control: Adapting Theories of Harm*, 20 EUROPEAN COMPETITION JOURNAL 437 (2024).

<sup>10</sup> For a definition and related literature, see Part I *infra*.

<sup>11</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1 (“EUMR”).

mergers that could affect competition and innovation in the EU especially in strategic and dynamic industries but escaped ex ante scrutiny.<sup>12</sup> Under a “recalibrated” approach, *any* affected Member State(s) could refer a merger case upwards for review by the Commission even if themselves *not competent*.<sup>13</sup> Were the Court of Justice with its judgment on *Illumina/ Grail* not to put a halt to the Commission’s ambitions,<sup>14</sup> its assertive Article 22 policy would de facto lower the thresholds so that the Commission could review *any* deal albeit non-reportable either at the EU or *national* level.<sup>15</sup> But despite this defeat, the Commission reiterated in reaction to the judgment the need for an EU killer solution and its commitment to Article 22:<sup>16</sup> for now, under a “traditional approach” accepting referrals from Member States *with* competence to review the referred mergers whose laws though have been expanding since the Commission’s Article 22 policy change was set into motion, or in the future though a possible 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.”<sup>17</sup>

The Commission’s creative solution to the killer acquisition challenge is curious by international standards. Granted, the EUMR turnover thresholds had substantive and jurisdictional shortcomings that would justify a fix: systematic underdeterrence and suboptimal internalization of externalities were characteristic problems of the EU regime.<sup>18</sup> 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<sup>19</sup> – or offer a theoretically coherent and practically methodical approach. Expansion of EU

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<sup>12</sup> See *infra* Part II.C.

<sup>13</sup> 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”).

<sup>14</sup> 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.

<sup>15</sup> Anna Tzanaki, *Illumina’s Light on Article 22 EUMR: The Suspended Step and Uncertain Future of EU Merger Control Over Below-Threshold “Killer” Mergers*, CPI ANTITRUST CHRONICLE DECEMBER 2024 (2024).

<sup>16</sup> *Id.* at 7.

<sup>17</sup> 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).

<sup>18</sup> See *infra* Part I.D and Part II.D.

<sup>19</sup> Note that 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 and Grail v Commission*, *supra* note 14, paras 146, 149, 192 and 200-201.

jurisdiction over small-size mergers in innovation driven markets could be unlimited but it would also be unprincipled.<sup>20</sup> An improvement on the status quo could not be guaranteed.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> The Commission’s “shortcut” solution to its jurisdictional deficit would bypass the original principals (Member States) delegating it merger control powers strictly above the EUMR thresholds and unilaterally “rewrite” the EUMR’s competence allocation rules to its benefit.<sup>24</sup> In addition, the “enhanced” use of Article 22<sup>25</sup> – even if moot for the time being in light of the Court of Justice’s *Illumina/ Grail* judgment – triggered developments in EU and national merger control that seem irreversible. By unleashing potential competition between the EU and Member States for jurisdiction over below-threshold transactions, the option of Article 22 referral, even under a traditional approach, may materially affect the incentives of Member States to expand and exercise their own competence or refer cases upwards.<sup>26</sup>

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<sup>20</sup> Aurelien Portuese, *Making Sense of EU Merger Control: The Need for Limiting Principles*, CPI ANTITRUST CHRONICLE NOVEMBER 2023 (2023).

<sup>21</sup> See *infra* Part I.D and Part II.D.

<sup>22</sup> 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, paras 98-101.

<sup>23</sup> *Id.*

<sup>24</sup> See *Illumina and Grail v Commission*, *supra* note 14, paras 75 and 78. This was one of *Illumina*’s arguments against a broad interpretation of Article 22 not specifically confirmed by the Court of Justice. However, the Court emphasized that the EUMR is found on the principle of a “clear” and “precise” allocation of competences between the Commission and Member States that a broad reading of Article 22 would frustrate. See paras 192-193, 203 and 207.

<sup>25</sup> 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).

<sup>26</sup> See for instance the press release of the French Competition Authority, which triggered the Article 22 referral of the *Illumina/ Grail* merger to the Commission despite not having competence to review the case under national law at the time, immediately after the judgment. ‘The Autorité de la concurrence takes note of the *Illumina / Grail* judgment by the Court of Justice of the European Union and remains committed to tackle mergers that may harm competition in innovative sectors,’ September 3, 2024: <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european>.

Contrary to the original bargain, the competence allocation game is transforming from “zero-sum” to “non-zero-sum.”<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> The emerging status quo is unlikely to be an efficient setup or a lasting political equilibrium.<sup>30</sup> For that matter, the search for “future-proof” solutions and alternative institutional arrangements continues.<sup>31</sup> Complementary to Article 22 solutions such as the new reporting obligation under the DMA regarding digital gatekeepers’ mergers and the revival of Article 102 TFEU as a backup merger control tool add demand for dynamism and flexibility in EU merger control as well as competition to the Commission’s centralizing tendencies over merger enforcement.<sup>32</sup> As such, recent developments in EU merger policy and enforcement are only expected to be a prelude to further systemic reforms.<sup>33</sup>

Against this backdrop, the article proceeds as follows. Part I frames the economic problem killer acquisitions present for modern competition policy and expounds why that problem could be more significant in the EU given the shape of its merger control regime. Part II looks at the politics underpinning the original system of competence allocation under the EUMR and how those have influenced the “innovative” choice of EU solution to killer acquisitions indirectly leading to a

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<sup>27</sup> See *infra* Part II.D.

<sup>28</sup> Portuese, *supra* note 20. See also Illumina and Grail v Commission, *supra* note 14, paras 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.

<sup>29</sup> See *infra* Part I.D and Part II.B.

<sup>30</sup> 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).

<sup>31</sup> See *infra* Part IV.

<sup>32</sup> See *infra* Part II.C.

<sup>33</sup> 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). Illumina and Grail v Commission, *supra* note 14, paras 211 and 215-216.

transformation of the institutional balance between the Commission and the Member States that may bring more politics back into EU merger control through the “back door.” Part III takes the U.S. experience in merger control as a point of comparison to illustrate why and how the EU’s Article 22 solution in its “enhanced” form is unlikely to be effective or institutionally proportionate. Part IV discusses lessons learned and alternative institutional options for the future of EU merger control. Part V concludes.

## 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.<sup>34</sup> 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.<sup>35</sup> 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 may have contributed to increasing market power.<sup>36</sup> Let us address the economic and legal determinants of the problem in turn.

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<sup>34</sup> 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).

<sup>35</sup> For a summary of the economic literature and associated antitrust concerns especially in relation to digital markets and killer acquisitions, see Régibeau, *supra* note 34 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/](https://digitalcommons.wcl.american.edu/pub_disc_cong/18/) (last visited Aug 17, 2023). But see also Shapiro and Yurukoglu, *supra* note 34 (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).

<sup>36</sup> 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



## 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.”<sup>37</sup> 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.”<sup>38</sup> 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).<sup>39</sup> Killer mergers may involve either “nascent” or “potential” competitors, i.e. existing companies or future entrants, as targets that may represent dynamic competitive threats.<sup>40</sup>

A variant of the theory relates to “reverse killer acquisitions.”<sup>41</sup> These are acquisitions where the acquirer buys the target with the objective of discontinuing its

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Zenger, *Increasing Market Power and Merger Control*, 5 COMPETITION LAW & POLICY DEBATE 40 (2019); Régibeau, *supra* note 34 at 301–302; Baker et al., *supra* note 35.

<sup>37</sup> 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.”).

<sup>38</sup> *Id.* at 649.

<sup>39</sup> 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).

<sup>40</sup> Although both are special types of the killer acquisition theory, their substantive assessment differs. Yun, *supra* note 39; 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); Herbert Hovenkamp, *Potential Competition*, ANTITRUST LAW JOURNAL, FORTHCOMING (2024).

<sup>41</sup> 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.<sup>42</sup> Both standard and reverse killer acquisition theories have been actionable in merger practice.<sup>43</sup>

## B. ANTITRUST THEORIES OF HARM

The moniker “killer” acquisition presupposes an anticompetitive motivation for the acquisition.<sup>44</sup> Régibeau suggests that killer acquisitions can be problematic for the same reasons as any other horizontal merger: the theories of harm are the same.<sup>45</sup> 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 and make the merger profitable. 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.<sup>46</sup> 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.<sup>47</sup>

The key challenge is thus to distinguish potentially harmful killers from transactions that might be beneficial. First, this is particularly challenging in an *ex ante* setting when the right counterfactual, and the relationship of the merging parties’ activities as substitutes or complements, might be difficult to assess.<sup>48</sup> Second, startup acquisitions by larger firms especially BigTech generally have mixed effects on

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<sup>42</sup> Latham, Tecu, and Bagaria, *supra* note 41 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.).

<sup>43</sup> Adobe/ Figma is a merger that would 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](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_5778). The merger was eventually abandoned before a prohibition decision was issued.

<sup>44</sup> See Cunningham, Ederer, and Ma, *supra* note 37 at 650.

<sup>45</sup> Régibeau, *supra* note 34 at 304–305, 322; cf OECD, *supra* note 34 at 10.

<sup>46</sup> Régibeau, *supra* note 34 at 303–306.

<sup>47</sup> For an analysis of relevant factors to filter cases and some examples, see *Id.* at 303–317; Latham, Tecu, and Bagaria, *supra* note 41 at 4, 11–12. For examples of presumably hard killers, see Cunningham, Ederer, and Ma, *supra* note 37 at 650.

<sup>48</sup> Régibeau, *supra* note 34 at 311–312, 314, 323; Shapiro and Yurukoglu, *supra* note 34 at 29–31.

competition and innovation.<sup>49</sup> Anticompetitive effects can manifest as elimination of potential competition (if the products of the merging parties involve substitutes) or reinforcement of market leaders (if startups are bought by dominant firms rather than rivals), procompetitive effects include synergies (that arise from complementarities between the merging parties). Negative effects on innovation may involve killing innovation (when the acquirer has less incentive to develop it than the target) or distortion of innovation incentives and re-orientation of R&D (towards maximizing acquisition value rather than innovation value). Positive effects on innovation include stimulation of innovative entry (possibly inefficient), acceleration of innovation (if the acquirer has more incentive to develop it than the target) and complementarities in innovation capabilities (by having access to capital, skills or talent, data and other resources).<sup>50</sup>

The beneficial effects on innovation incentives are particularly important for small startup companies that have limited access to capital especially in areas where public and venture capital markets are less developed such as the EU.<sup>51</sup> Incumbents with financial resources<sup>52</sup> and “internal capital markets”<sup>53</sup> may offer an alternative for financing innovation and scaling up. Startup acquisitions by large incumbents may also provide a valuable “exit” strategy, and a more realistic alternative to an IPO,<sup>54</sup> for entrepreneurs.<sup>55</sup> On the other hand, such acquisitions may create a “kill zone,” which

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<sup>49</sup> Marc Bourreau & Alexandre de Stree, *Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control*, CERRE ISSUE PAPER FEBRUARY 2020, 8–13 (2020); cf Régibeau, *supra* note 34; OECD, *supra* note 34.

<sup>50</sup> Bourreau and de Stree, *supra* note 49 at 8–13.

<sup>51</sup> See Régibeau, *supra* note 34 at 312.

<sup>52</sup> Chiara Fumagalli, Massimo Motta & Emanuele Tarantino, *Shelving or Developing? The Acquisition of Potential Competitors Under Financial Constraints*, CSEF WORKING PAPER 637 (2022).

<sup>53</sup> Marc Bourreau & Alexandre de Stree, *Digital Conglomerates and EU Competition Policy* (2019), <https://papers.ssrn.com/abstract=3350512> (last visited Aug 17, 2023); Sharon Belenzon & Tomer Berkovitz, *Innovation in Business Groups*, 56 MANAGEMENT SCIENCE 519 (2010).

<sup>54</sup> Florian Ederer & Bruno Pellegrino, *The Great Start-up Sellout and the Rise of Oligopoly*, 113 AEA PAPERS AND PROCEEDINGS 274 (2023) (documenting the dramatic decline in the number of IPOs compared to the number of acquisitions since the mid-1990s).

<sup>55</sup> The pro-innovation incentive may derive from either merger-specific efficiencies or the acquirer’s willing to pay the target a “market power premium” but it may be difficult to disentangle the two in practice. See Régibeau, *supra* note 34 at 312–313; Latham, Tecu, and Bagaria, *supra* note 41 at 4; cf Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 BOSTON UNIVERSITY LAW REVIEW 1 (2021).

discourages entry and reduces incentives to innovate decreasing new entrants' acquisition price and VC incentives to finance their entry.<sup>56</sup>

### 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 mergers is higher in pharmaceuticals than in the tech and digital sectors.<sup>57</sup> 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.<sup>58</sup> For instance, “hard killer” acquisitions are more likely in pharmaceutical industries. Pharma acquisitions are often horizontal and targeted around potential overlaps.<sup>59</sup> 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.<sup>60</sup>

By contrast, killer acquisitions are perceived to be more rare in digital markets.<sup>61</sup> That does not necessarily make them less harmful, however, or imply that they should be immune to antitrust scrutiny.<sup>62</sup> 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.<sup>63</sup> Theories of harm are more complex, the characterization of products in digital markets as complements

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<sup>56</sup> Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, *Kill Zone*, NBER WORKING PAPER 27146 (2020).

<sup>57</sup> Régibeau, *supra* note 34 at 302, 315–322; Marc Ivaldi, Nicolas Petit & Selcukhan Uneqbas, *Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries*, TSE WORKING PAPER NO. 13-1420 (2023); Latham, Tecu, and Bagaria, *supra* note 41.

<sup>58</sup> Ivaldi, Petit, and Uneqbas, *supra* note 57 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).

<sup>59</sup> Ivaldi, Petit, and Uneqbas, *supra* note 57 at 5; Régibeau, *supra* note 34 at 321; Cunningham, Ederer, and Ma, *supra* note 37 at 651.

<sup>60</sup> Régibeau, *supra* note 34 at 302, 312, 316, 321–323; Cunningham, Ederer, and Ma, *supra* note 37 at 679–682.

<sup>61</sup> Régibeau, *supra* note 34 at 315–322; Ivaldi, Petit, and Uneqbas, *supra* note 57 at 5–6; Latham, Tecu, and Bagaria, *supra* note 41 at 3, 11; Gautier and Lamesch, *supra* note 34.

<sup>62</sup> Latham, Tecu, and Bagaria, *supra* note 41 at 3, 11; Ivaldi, Petit, and Uneqbas, *supra* note 57 at 6.

<sup>63</sup> Régibeau, *supra* note 34 at 316–317, 319–321; Argentesi et al., *supra* note 34.

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 acquisitions and common in digital industries.<sup>64</sup> 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.<sup>65</sup> In addition, while pharma acquisitions frequently occur below notification thresholds, there is hardly any evidence regarding nonreportable digital transactions.<sup>66</sup> In this light, there is merit in further research that sheds light on the extent of the killer acquisition phenomenon in different settings.<sup>67</sup>

#### 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, evidence shows that likely killer acquisitions "intentionally" and "disproportionally occur just below thresholds for antitrust scrutiny."<sup>68</sup> Merger control thresholds can thus have a distortive effect in a double sense. Firstly, reportability thresholds induce strategic behavior of firms that aim to avoid scrutiny by conducting acquisitions involving *smaller size* deals or targets.<sup>69</sup> Secondly, *more anticompetitive* acquisitions are planned to occur below the thresholds.<sup>70</sup> Indeed, empirical research shows that after an increase in applicable thresholds, newly non-reportable horizontal mergers increase

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<sup>64</sup> Régibeau, *supra* note 34 at 312–321; Ivaldi, Petit, and Uneqbas, *supra* note 57 at 5–6; Luís Cabral, *Merger Policy in Digital Industries*, 54 INFORMATION ECONOMICS AND POLICY 100866 (2021).

<sup>65</sup> 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).

<sup>66</sup> Ivaldi, Petit, and Uneqbas, *supra* note 57 at 21 (finding no evidence of underenforcement in most cases of all past EC above-threshold mergers in ICT industries studied, but excluding below-threshold mergers, "which is where some consider that the bulk of killer acquisitions happen"); Régibeau, *supra* note 34 at 311, 317, 319 (suggesting that digital platforms may focus on smaller and earlier acquisitions).

<sup>67</sup> Ivaldi, Petit, and Uneqbas, *supra* note 57 at 21.

<sup>68</sup> Cunningham, Ederer, and Ma, *supra* note 37 at 649, 685–687.

<sup>69</sup> *Id.* at 685–686.

<sup>70</sup> 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 37; Thomas G. Wollmann, *Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act*, 1 AMERICAN ECONOMIC REVIEW: INSIGHTS 77 (2019); Josh Feng et al., *Mergers That Matter: The Impact of M&A Activity in Prescription Drug Markets*, (2024), <https://papers.ssrn.com/abstract=4523015> (last visited Sep 14, 2024).

dramatically as the likelihood of detection and enforcement fall.<sup>71</sup> Consequently, the way the law is designed and enforced may amplify the problem (below the thresholds) as it influences the number and nature of mergers being proposed. The available empirical evidence thus confirms a likely “deterrence gap” regarding below-threshold transactions. This research focuses on the U.S., however. In the EU, we lack systematic data on the population of potential killer acquisitions below the EUMR thresholds.<sup>72</sup>

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).<sup>73</sup> To encourage efficient behavior, i.e. to deter harmful conduct but not deter beneficial conduct, the optimal penalty should equal the net harm to persons other than the offender.<sup>74</sup> This is important for practices such as mergers and in particular digital mergers that can have both anticompetitive and pro-competitive effects (“softer killer” suspects) where the aim is as much to avoid underdeterrence as to avoid overdeterrence.<sup>75</sup> To achieve optimal deterrence in an environment with uncertain enforcement, the expected penalty should be adjusted upward to account for the reduced probability of apprehension and conviction.<sup>76</sup> Under this framework, the deterrent effects of antitrust and merger enforcement “depend on the expected probability of detection and conviction and the magnitude of the penalty.”<sup>77</sup> Thresholds and other institutional details of a merger control system may affect deterrence to the extent they influence these parameters.

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<sup>71</sup> Wollmann, *supra* note 70 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).

<sup>72</sup> Cf Ivaldi, Petit, and Unekbass, *supra* note 57 at 21; Lamo, *supra* note 39 at 4. As the EU thresholds have remained unchanged it is difficult to empirically measure the phenomenon.

<sup>73</sup> Robert D. Cooter & Michael D. Gilbert, *Theory of Enforcement*, in PUBLIC LAW AND ECONOMICS, 462–463 (Robert Cooter & Michael Gilbert eds., 2022).

<sup>74</sup> William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 THE UNIVERSITY OF CHICAGO LAW REVIEW 652, 656 (1983); Cooter and Gilbert, *supra* note 73 at 482 (“Setting the expected cost equal to the harm incentivizes only those violations of law that yield net benefits.”).

<sup>75</sup> See Florian Wagner-von Papp, *Managerial Liability, Managerial Duties, And Liability Within Corporate Groups - Optimal Competition Law Sanctions by Rearranging the Deckchairs Within the Undertaking?*, in RESEARCH HANDBOOK ON COMPETITION AND CORPORATE LAW, 7 (Florence Thépot & Anna Tzanaki eds., forthcoming); cf Paolo Buccirossi et al., *Deterrence in Competition Law*, Volume 4 in THE ANALYSIS OF COMPETITION POLICY AND SECTORAL REGULATION 423 (Martin Peitz & Yossi Spiegel eds., 2014).

<sup>76</sup> Landes, *supra* note 74 at 657; Cooter and Gilbert, *supra* note 73 at 463.

<sup>77</sup> Jonathan B Baker, *The Case for Antitrust Enforcement*, 17 JOURNAL OF ECONOMIC PERSPECTIVES 27, 40 (2003).

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.<sup>78</sup> That is, investigations of unreportable mergers are possible and are observed albeit with lower likelihood.<sup>79</sup> 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 conviction 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);<sup>80</sup> (iii) transaction cost savings for above threshold transactions that are notified but go unchallenged. Besides, U.S. merger control is flexible and *pluralistic* from a jurisdictional point of view, which facilitates deterrence. That is, federal merger enforcement operates (i) in parallel to state enforcement which is not limited by any thresholds and (ii) in addition to other possibilities for enforcement under (federal and state) antitrust laws.<sup>81</sup>

The situation in Europe has been quite different until a cascade of recent changes were introduced in large part responding to the challenge of digital markets and killer acquisitions, starting with the Commission's new Article 22 Guidance.<sup>82</sup> 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.<sup>83</sup> 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 isolated cases of non-reportable mergers may be referred to the Commission from Member States for EU review. Such referrals have

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<sup>78</sup> Wollmann, *supra* note 70; Cunningham, Ederer, and Ma, *supra* note 37.

<sup>79</sup> Wollmann, *supra* note 70 at 87; Shapiro and Yurukoglu, *supra* note 34 at 29.

<sup>80</sup> 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).

<sup>81</sup> On the details of the U.S. merger control system, see *infra* Part III.

<sup>82</sup> See *infra* Part II.C. The Illumina and Grail judgment, *supra* note 14, arguably preserves the pre-existing status quo but not quite as shown later in Part II.D.

<sup>83</sup> 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.B and C.

been rather rare and narrowly construed until recently – meaning a probability of detection and conviction close to zero.<sup>84</sup> 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 is geographically limited in that it obtains jurisdiction only for the territory of the referring Member State(s), not the whole of the EU.<sup>85</sup> 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,<sup>86</sup> which may create deterrence and incentive distortions of their own. 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 authorities (NCAs) may act as “regional agencies” or closely cooperate cases across borders when enforcing EU antitrust law but practice shows this is exceptional.<sup>87</sup> 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.<sup>88</sup> In any event, Article 102 has arguably 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) while the likely severity of the penalty generally softer (as fines and behavioral remedies could be preferred over divestiture).<sup>89</sup>

There are further issues that could dampen deterrence. National (merger and antitrust) laws have national application, therefore more limited impact. Moreover, for cases that should be reviewed at EU level (e.g., cross-border), national enforcement is

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<sup>84</sup> On the system of case referrals and their relative frequency, see *infra* Part II.B.

<sup>85</sup> On the history and operation of Article 22 EUMR, see *infra* Part II.B.

<sup>86</sup> However, this may be changing as noted later in this section.

<sup>87</sup> 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.

<sup>88</sup> 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.

<sup>89</sup> On Towercast and its implications, see *infra* Part II.C.



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.<sup>90</sup> 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.<sup>91</sup> Similarly, coordination of joint referrals under Article 22 EUMR is voluntary and cannot exclude partial referrals or parallel proceedings.<sup>92</sup> These institutional arrangements could potentially improve detection<sup>93</sup> but not necessarily the likelihood or precision of enforcement, and may not lead to transaction cost savings either.

Alarmed by the relative inadequacy of its system in the face of the novel killer acquisitions threat, the Commission was keen on tailored solutions that would open threshold-independent possibilities for enforcement and boost the performance of EU merger control.<sup>94</sup> Substantive reassessment of competition risks in digital markets<sup>95</sup>

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<sup>90</sup> 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).

<sup>91</sup> 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 90 at 15.

<sup>92</sup> 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").

<sup>93</sup> 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 91 at 136.

<sup>94</sup> 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. So, by looking only at turnover, we might be missing some important deals that we ought to review. But before we think about changing our rules, we need to be sure we fully understand what's at stake. [...] we have to see how we could pick out the transactions that matter, without also covering a lot of mergers without much effect on competition in Europe."

<sup>95</sup> Mounting concerns over prone to "tipping" digital markets, highlighted in recent policy reports, raised the stakes of getting legal intervention and merger policy right. See *supra* note 5. 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).

and killer mergers<sup>96</sup> led to a series of legislative and policy reforms at EU 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.<sup>97</sup> Other 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.<sup>98</sup> However, the Commission prioritized minimizing transaction costs and favored the flexible instrument of case referrals while learning from experience in these jurisdictions.<sup>99</sup>

The effects of these changes are remarkable. At one level, the EU seems to have taken a firm step towards reversing systematic underenforcement in merger control. At another, the effects on business and NCAs’ incentives appear more complex and mixed. Specifically, the DMA reporting obligation led to *increased* transparency over all digital mergers, 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

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<sup>96</sup> OECD, *supra* note 34 at 20 (explaining that “these types of transaction were until recently generally considered harmless and hence a low priority”).

<sup>97</sup> Further on these reforms and their contemplated relationship, see *infra* Part II.C.

<sup>98</sup> OECD, *supra* note 34 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 Bonn   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); Martin Peitz & Jens-Uwe Franck, *Germany’s New Competition Tool: Sector Inquiry With Remedies*, CRC TR 224 DISCUSSION PAPER No. 598, 7–8 (2024) (noting that this extended merger control is intended to capture “stealth consolidations” and “protect competition in regional markets”).

<sup>99</sup> 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). But it underscored “the need to continue to closely monitor business developments in this area, notably in sectors such as digital and pharma, and to monitor experience in other jurisdictions. Jurisdictional changes at national level are an opportunity to learn from other competition authorities and may also contribute to easing the referral of cases to the Commission.” *Id.* at 74–75. On the theoretical and practical limitations of transaction value thresholds as screens for harm and jurisdictional criteria, see OECD, *supra* note 34 at 43–44; R  gibeau, *supra* note 34 at 307–308, 311, 318.

substantive criteria).<sup>100</sup> The Commission may have felt, for a short while,<sup>101</sup> as Prometheus that has broken her chains. The maximal flexibility gained, but for the dependence on Member States triggering referrals, would bring EU merger control closer to its U.S. counterpart as far as non-reportable transactions are concerned. In addition, the threat of enforcement vis-à-vis unreportable mergers could now be made *credible*. First, with the benefit of enforcement likely to exceed the cost, in the eyes of the enforcers, EU competition authorities could credibly commit to enforce merger and antitrust law below thresholds.<sup>102</sup> In turn, with the narrowing of the “enforcement gap” in EU merger control regarding small-size mergers, incentives for strategic business conduct could be minimized. No “hard” safe harbor would be left based on thresholds to produce extensive underdeterrence. Second, the Article 22 referral mechanism would not stand alone but would be bolstered by new “backup” enforcement options under Article 102 TFEU, post Towercast, and under “expanding” national merger laws.<sup>103</sup> These developments in EU law and initiatives at national level could fill (some) gaps in enforcement. The multiplicity of enforcement tools and actors could increase its likelihood and credibility.

On the other hand, the EU’s strengthened merger enforcement based on the “repurposed” Article 22 EUMR could be so unpredictable and unlimited that defies the purpose: the gain in deterring harmful killers could come at the (potentially greater) cost of chilling beneficial merger, innovation and investment activity. The deadly sin of the Commission’s new Article 22 policy could be overshooting the mark. First, the *discretionary* character of Article 22 referrals could short circuit deterrence and undermine the accuracy of enforcement: it would remain 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. Self-interest rather than objective and foreseeable criteria could drive (non)referral or (non)enforcement decisions.<sup>104</sup>

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<sup>100</sup> See Article 22 Guidance, *supra* note 13, marking this radical policy shift. Note that merger enforcement based on Article 22 referrals is not strictly time-limited either (para 21). On the (lack of) jurisdictional limits, see *infra* Part II.C. On the (lack of) substantive limits, see the discussion following in this section.

<sup>101</sup> Until the Court of Justice put a stop to its ambitious, unlimited use of Article 22 EUMR in the Illumina and Grail judgment. See *supra* note 14 and *infra* Part II.C.

<sup>102</sup> Cooter and Gilbert, *supra* note 73 at 469–470, 479, 490 (“the state should enforce only when the marginal social benefit exceeds the marginal social cost”).

<sup>103</sup> For an overview of national initiatives, see 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, 8–17 (2021). On Towercast and its implications, see *infra* Part II.C.

<sup>104</sup> On the nature of the Article 22 referral mechanism, see *infra* Part II.B.

Second, contingency of the Article 22 referral mechanism on the whims of both the Member States and the Commission could render merger enforcement below thresholds *strategic*. Interdependence of national (non)referral and EU (non)enforcement decisions could exacerbate the uncertainty of EU merger enforcement and breed its politicization. Considering additionally the (potential) competition for the regulation of “killers” unleashed by the “enhanced” use of Article 22,<sup>105</sup> the interaction between EU and national merger control has become even more complex and difficult to predict.<sup>106</sup> As an illustration, an increasing number of Member States has been expanding their ex ante reportability thresholds or introducing “call in” powers. These initiatives may be seen as attempts to antagonize (retain national competence) or complement the Commission’s competence (facilitate Article 22 referrals based on own competence) with Member States “repositioning” in response to EU level changes: that is, the Commission’s Article 22 policy change adopting a broad reading or the Court of Justice’s *Illumina* and *Grail* judgment reinstituting a narrow interpretation of Article 22 EUMR respectively.<sup>107</sup> Under these conditions, business incentives are unlikely to be optimized and transaction costs minimized.<sup>108</sup>

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<sup>109</sup> 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.”<sup>110</sup> 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.<sup>111</sup>

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<sup>105</sup> See Vestager, *supra* note 25.

<sup>106</sup> For detailed discussion of these interactions, see *infra* Part II.D.

<sup>107</sup> See Vestager, *supra* note 17.

<sup>108</sup> Additionally, on the risk of fragmentation of the internal market, see Franck, Monti, and de Streel, *supra* note 103; Salome Cissal 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).

<sup>109</sup> Magali Eben & David Reader, *Taking Aim at Innovation-Crushing Mergers: A Killer Instinct Unleashed?*, 42 YEARBOOK OF EUROPEAN LAW 286, 310 (2024).

<sup>110</sup> Article 22 Guidance, paras 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 (para 7).

<sup>111</sup> *Id.*, paras 19 and 15.

Although the policy change was motivated by the killer acquisition narrative,<sup>112</sup> once it broke its jurisdictional chains, the Commission was not intend to tie its own hands.<sup>113</sup> Eagerness for maximum effectiveness trumps clear guidance.<sup>114</sup> Indeed, the Commission's framing of the problem is made by reference to the EU jurisdictional gap (turnover) rather than the substantive problem per se (killer instinct).<sup>115</sup>

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,<sup>116</sup> i.e., Illumina/ Grail (biotech),<sup>117</sup> Qualcomm/Autotalks (semiconductor technology),<sup>118</sup> EEX/Nasdaq Powerdeals (energy trading)<sup>119</sup> while had it not been the Court's judgment limiting referrals without national competence, it could have asserted jurisdiction over a fourth case, Microsoft/ Inflection (AI technology).<sup>120</sup> It is debatable whether all these cases targeted deals occurring in innovation-driven industries where a killer instinct may be most palatable.<sup>121</sup> 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"

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<sup>112</sup> See *id.*, para 9 and *infra* Part II.C.

<sup>113</sup> See Vestager's speech, *supra* note 17, 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."

<sup>114</sup> Article 22 Guidance, para 18.

<sup>115</sup> See *supra* Part I.B and *infra* II.C. The latter will typically be a subset of the former.

<sup>116</sup> 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 17. 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 109 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 41 at 8 (suggesting that 4% of the 409 BigTech acquisitions examined meet their filters as potential killer acquisitions).

<sup>117</sup> [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_21\\_1846](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.

<sup>118</sup> [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_23\\_4201](https://ec.europa.eu/commission/presscorner/detail/en/mex_23_4201). The deal was eventually abandoned [following investigation by EU and other authorities](#).

<sup>119</sup> [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_23\\_4221](https://ec.europa.eu/commission/presscorner/detail/en/mex_23_4221). Although remedies had been offered to secure EU approval, the deal was eventually abandoned.

<sup>120</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_24\\_4727](https://ec.europa.eu/commission/presscorner/detail/en/IP_24_4727).

<sup>121</sup> See *supra* Part I.C.

merger theory.<sup>122</sup> 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.<sup>123</sup> 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 scrutiny.<sup>124</sup> It is unclear whether future enforcement based on Article 22 referrals<sup>125</sup> may concentrate on *dynamic* sectors, other *strategic* sectors or *any* other sectors.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> The costs of uncertainty may not only include beneficial deals discouraged and never proposed but also proposed deals that were abandoned<sup>129</sup>

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<sup>122</sup> OECD, *Competition and Innovation - The Role of Innovation in Enforcement Cases*, 15, 19 (2023); Portuese, *supra* note 20 at 11.

<sup>123</sup> 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.C.

<sup>124</sup> Alec Burnside & Adam Kidane, *Double Dutch: Illumina/GRAIL, Article 22 and the General Court*, 8 COMPETITION LAW & POLICY DEBATE 140, 1-2, 12 (2024).

<sup>125</sup> Eben and Reader, *supra* note 109 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”).

<sup>126</sup> See Vestager, *supra* note 17, underscoring that “innovation has become the key factor of competitiveness”, which is at the center of President von 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](https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029_en).

<sup>127</sup> 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).

<sup>128</sup> Cf Froeb, Tschantz, and Werden, *supra* note 80.

<sup>129</sup> 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.

or approved subject to “exacting” remedies, which may actually undercut deterrence.<sup>130</sup> Any deterrence gains from increased enforcement would thus have to be balanced against chilling costs and other costs.<sup>131</sup> In general, increased enforcement does not guarantee increasing returns on deterrence: if additional enforcement is not well targeted or “disciplined”<sup>132</sup> – as in the case of Article 22-based enforcement, it risks being inaccurate and counterproductive producing error costs (“false negatives” and “false positives”)<sup>133</sup> and incentive costs (suboptimal deterrence).<sup>134</sup> In addition, as the risk of error is inherently high when reviewing suspect digital mergers with potentially mixed effects (“softer killer” mergers)<sup>135</sup> and considering the possibly limited institutional capacity of (national) competition authorities to assess more complex or innovation related cases,<sup>136</sup> these costs may be substantial.

To conclude, 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.<sup>137</sup> 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,<sup>138</sup> the precise choice of instruments and procedures matters. It would be ironic indeed if in the name of protecting dynamic

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<sup>130</sup> Steven C. Salop, *Merger Settlement and Enforcement Policy for Optimal Deterrence and Maximum Welfare*, 81 *FORDHAM L. REV.* 2647, 2661 (2013).

<sup>131</sup> 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 127 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 73 at 478.

<sup>132</sup> Salop, *supra* note 130 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”).

<sup>133</sup> 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).

<sup>134</sup> 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 127 at 6; Salop, *supra* note 131 at 281, 284.

<sup>135</sup> See *supra* Part II.B and C; Madl, *supra* note 58 at 31–32.

<sup>136</sup> Eben and Reader, *supra* note 109 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).

<sup>137</sup> Buccirossi et al., *supra* note 75 at 427–429, 448–449; Baker, *supra* note 127 at 6.

<sup>138</sup> 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 127 at 6.

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 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. Although not entirely, as ad hoc EU competence is still conditioned on Member States' actions. What started as the quest for a means to extend the Commission's jurisdiction to capture potential killer acquisitions, it may end up reflecting the changing institutional and political economy environment of EU merger control. Seen in this light, recent policy changes are not only about the level of thresholds and the jurisdictional ambit of EU merger control but also about who decides and how in cases of below-threshold mergers. The institutional imprint of the Article 22 solution thus has much broader implications. It entails implicitly revising the political bargain between Member States and the Commission regarding competence allocation, recasting the role of the Commission as an institutional actor and fundamentally transforming the EU system of merger control.<sup>139</sup> The causes and consequences of this institutional transformation are explained next.

### A. THE LOGIC AND LIMITS OF TURNOVER THRESHOLDS

Let us start with the source of the EU's jurisdictional deficit. Until recently, killer acquisitions and generally mergers involving innovative startup firms were out of the reach of EU merger control. The well documented culprit has been the EUMR's *purely* turnover-based thresholds. Filing and substantive review depend on them. The EUMR has been designed as an ex ante mandatory notification regime.<sup>140</sup> 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.<sup>141</sup> Naturally transactions where one party (target) has low or no turnover notwithstanding its (future) competitive potential escape detection and scrutiny. A blind spot and

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<sup>139</sup> Hubert Buch-Hansen, *The Political Economy of Regulatory Change: The Case of British Merger Control*, 6 REGULATION & GOVERNANCE 101, 106 (2012) (conceptualizing regulatory change as transformations in the content, form and scope of regulation and distinguishing between "deep" and "shallow" depending on the degree of such transformation).

<sup>140</sup> Articles 4 and 7 EUMR.

<sup>141</sup> See Article 1(2) and (3) EUMR.



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.<sup>142</sup> 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 mergers at EU level.<sup>143</sup>

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.<sup>144</sup> On the one hand, they are an objective and predictable jurisdictional criterion. On the other hand, they aim to capture transactions that have an “EU dimension.”<sup>145</sup> As such, they promote the principles of legal certainty and subsidiarity and assign jurisdiction to the Commission for deals that have sufficient EU nexus.<sup>146</sup> The turnover of the parties is calculated on

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<sup>142</sup> See 2021 Staff Working Document, *supra* note 99. 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.

<sup>143</sup> 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.”

<sup>144</sup> Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/1 (“Jurisdictional Notice”), para 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.”

<sup>145</sup> LEON BRITTON, 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.”; 43: “The fundamental policy objective is clear: to set up a simple, predictable and clear [EU] merger control system with the Commission responsible for cases above the thresholds and the Member States below.”

<sup>146</sup> Nicholas Levy, Andris Rimša & 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

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.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> 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 were unwilling to shed away.<sup>150</sup> 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.<sup>151</sup> 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

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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).

<sup>147</sup> Article 1(2) EUMR.

<sup>148</sup> Article 1(3) EUMR, and Jurisdictional Notice, para 126.

<sup>149</sup> 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.”

<sup>150</sup> 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”).

<sup>151</sup> Jurisdictional Notice, paras 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 150 at 656–657.

exception), Member States have consistently rejected change that would entail giving away more of their existing merger review powers.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup>

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.<sup>155</sup> 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 than a concern.<sup>156</sup> 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

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<sup>152</sup> McGowan and Cini, *supra* note 150 at 194–196; GIORGIO MONTI, EC COMPETITION LAW 247, 301 (2007).

<sup>153</sup> Völcker, *supra* note 146 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).

<sup>154</sup> *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.”).

<sup>155</sup> DAMIEN NEVEN, ROBIN NUTTALL & PAUL SEABRIGHT, MERGER IN DAYLIGHT: THE ECONOMICS AND POLITICS OF EUROPEAN MERGER CONTROL 79 (1993); MONTI, *supra* note 152 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).

<sup>156</sup> McGowan and Cini, *supra* note 150 at 187; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 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”).

promote the integration of the internal market.<sup>157</sup> Merger policy had been at the service of a broader EU regulatory agenda albeit enforcement under the EUMR was strictly based on competition criteria,<sup>158</sup> a hard-fought battle for the Commission after long negotiations with Member States.<sup>159</sup> 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.<sup>160</sup> 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 for in the text of the Regulation have remained unchanged.<sup>161</sup> On the other hand, as the internal market has become more integrated,

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<sup>157</sup> Mark Thatcher, *European Commission Merger Control: Combining Competition and the Creation of Larger European Firms*, 53 EUROPEAN JOURNAL OF POLITICAL RESEARCH 443 (2014).

<sup>158</sup> *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: in the EU, the merger regulation [...] and other regulatory goals were [...] prepared, anticipated and promoted by individual cases brought by the Commission under the EU’s competition rules.”). On the interplay between competition policy and industrial policy (or wider EU interests) in EU merger control, see also MONTI, *supra* note 152 at 298–300.

<sup>159</sup> On the background and context, see Schwartz, *supra* note 150; Laurent Warloutzet, *The Centralization of EU Competition Policy: Historical Institutional 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).

<sup>160</sup> Cini, *supra* note 159 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 150 at 657 (similarly reporting the expectation of 40-50 mergers a year).

<sup>161</sup> 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 152 at 302.

more and more large mergers come to qualify for EU review as the “2/3 rule” singling out “national” mergers increasingly lost its bite.<sup>162</sup>

## B. ONE-STOP SHOP SYSTEM AND CASE REFERRALS

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.<sup>163</sup> 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.”<sup>164</sup> A “one-stop shop” is always created for mergers exceeding the EUMR turnover thresholds and is exclusively allocated to the EU level.<sup>165</sup> That is, concentrations with an “EU dimension” are the sole competence of the Commission and parallel reviews at national level are not allowed.<sup>166</sup> 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.<sup>167</sup> 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.<sup>168</sup> As such, the EU retains *partial* “preemptive federal competence” in the area of merger control that significantly limits national competition policy.<sup>169</sup> Concentrations *without* an “EU dimension” are liable 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” case referrals.<sup>170</sup> However, to the extent a single more appropriate authority at national

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<sup>162</sup> cf Budzinski, *supra* note 161 at 132.

<sup>163</sup> Recitals 8 and 11 EUMR.

<sup>164</sup> Levy, Rimsa, and Buzatu, *supra* note 146 at 365 (collecting EU case law confirming this “clear division of powers” in merger control); BRITTAN, *supra* note 145 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.”).

<sup>165</sup> Budzinski, *supra* note 161 at 131.

<sup>166</sup> Article 21 EUMR.

<sup>167</sup> Budzinski, *supra* note 161 at 125, 130–131.

<sup>168</sup> Report from the Commission to the Council on the application of the Merger Regulation thresholds, COM(2000) 399 final (Brussels, June 28, 2000) 2.

<sup>169</sup> 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).

<sup>170</sup> Levy, Rimsa, and Buzatu, *supra* note 146 at 365–366; Gianni De Stefano, Rita Motta & Susanne Zuehlke, *Merger Referrals in Practice—Analysis of the Cases under Article*

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.<sup>171</sup>

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.<sup>172</sup> The turnover thresholds filter for significant cross-border effects to determine the “EU dimension” of merger cases.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> Under the principle of subsidiarity, in

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22 of the *Merger Regulation*, 2 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 537, 537 (2011).

<sup>171</sup> Budzinski, *supra* note 161 at 131.

<sup>172</sup> See *Id.* (“turnover thresholds serve as a cost-saving proxy for ‘geographic relevant markets’”); Jurisdictional Notice, para 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.”

<sup>173</sup> Commission Green Paper on the review of the Merger Regulation, COM(96) 19 final (Brussels, January 31, 1996), paras 22-30.

<sup>174</sup> Cf NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 179–181, 196–200.

<sup>175</sup> Budzinski, *supra* note 161 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 155 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”).

<sup>176</sup> 1996 Green Paper, *supra* note 173, paras 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*

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.<sup>177</sup> Similarly, the “EU dimension” screens for merger cases that have material “local nexus” to the EU, and thus potentially significant competitive impact in its territory, to establish EU competence vis-à-vis other foreign countries that may have competing claims on jurisdiction.<sup>178</sup> As a crystallization of the international law principle of comity,<sup>179</sup> this aims to minimize jurisdictional conflicts and externalities imposed on other polities with a strong(er) nexus in a given case.

In addition, the “EU dimension” encapsulating the “one-stop-shop” principle tracks cases with an effect on inter-Member State trade. Under EU merger control rules such effect is *presumed* strictly for mergers *above* the EUMR turnover thresholds.<sup>180</sup> This is in contrast to EU antitrust rules (Articles 101 and 102 TFEU) that apply *whenever* the business practice in question *may* have an effect on trade between Member States (without any lower-bound limit).<sup>181</sup> Besides, 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 veto powers of elected Ministers as in some Member States.<sup>182</sup>

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of such transactions. It is also based on efficiency considerations.”; Staff Working Paper accompanying 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), para 2.

<sup>177</sup> 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 22, para 200.

<sup>178</sup> BRITTAN, *supra* note 145 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 124 at 151–152.

<sup>179</sup> BRITTAN, *supra* note 145 at 16–17; Burnside and Kidane, *supra* note 124 at 141, 151.

<sup>180</sup> Burnside and Kidane, *supra* note 124 at 143; Völcker, *supra* note 146 at 1230–1231; BRITTAN, *supra* note 145 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 22, para 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.”

<sup>181</sup> MONTI, *supra* note 152 at 300; see also Van Den Bergh, *supra* note 177 at 368 (noting that this requirement may be met “even in cases in which there are no significant cross-border effects”).

<sup>182</sup> EU-level merger policy could thus be seen as more “neutral.” See *supra* notes 157–158 and surrounding text; Stephen Wilks & Lee McGowan, *Discretion in European Merger*

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.

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 EU and national competences based on turnover thresholds.<sup>183</sup> To this end, the case referral system allows the reallocation of certain merger cases from national competition authorities to the Commission, and vice versa,<sup>184</sup> “with a view to ensuring that a case is dealt with by the most appropriate authority.”<sup>185</sup> The rules on case referrals act as a “corrective mechanism” to the EUMR’s thresholds-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.<sup>186</sup> 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.<sup>187</sup>

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*Control: The German Regime in Context*, 2 JOURNAL OF EUROPEAN PUBLIC POLICY 41, 53–54 (1995). See also Opinion AG Emiliou, *supra* note 22, para 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).

<sup>183</sup> Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2 (“Case Referral Notice”), para 7.

<sup>184</sup> 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, para 65.

<sup>185</sup> Recital 14 EUMR.

<sup>186</sup> See Recitals 11 and 14 vis-à-vis Recitals 6 and 8 EUMR. See also Case Referral Notice, paras 5 and 7; Opinion AG Emiliou, *supra* note 22, para 187; Burnside and Kidane, *supra* note 124 at 146–147; De Stefano, Motta, and Zuehlke, *supra* note 170 at 537.

<sup>187</sup> Case Referral Notice, paras 5 and 8-10. Relevant factors include the likely “locus” and significance of the merger’s competitive effects, the tools and expertise available to a more appropriate authority, the referral’s implications in terms of administrative effort (subsidiarity); the benefits of the merger’s handling by a single competition authority, provision for centralized scrutiny of mergers with a cross-border impact rather than multiple merger filings within the EU, avoiding fragmentations of cases and partial referrals unless multiple authorities appear better placed to ensure that competition in all affected markets is effectively protected (“one-stop shop”); the importance of legal certainty regarding jurisdiction, limiting referrals to cases where there is compelling reason for departing from “original jurisdiction” over the merger, particularly at the post-notification stage, or cases where it is relatively straightforward to establish, from the outset, the scope of the geographic market and/or the existence of a possible competitive impact, to be able to promptly decide upon such requests (legal certainty).



The provision for case referrals in the EUMR text was also the product of political negotiations and necessity.<sup>188</sup> 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.<sup>189</sup> 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.”<sup>190</sup> 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.<sup>191</sup> 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.”<sup>192</sup>

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.<sup>193</sup> Although the Commission instrumentalized an expansive interpretation of EU antitrust rules to induce Member States’ eventual agreement to the EUMR,<sup>194</sup> as a settlement it

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<sup>188</sup> BRITTAN, *supra* note 145 at 39–43.

<sup>189</sup> See Schwartz, *supra* note 150 at 652–653, 657–660.

<sup>190</sup> *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.”).

<sup>191</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 199–200.

<sup>192</sup> Schwartz, *supra* note 150 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.”).

<sup>193</sup> Cf Völcker, *supra* note 146 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 124 at 143 (same, explaining the relationship between the EUMR and its Article 22, and Articles 101 and 102 TFEU).

<sup>194</sup> 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*

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 fought about victory.<sup>195</sup> 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.<sup>196</sup> Today that (almost) all Member States have domestic merger regimes,<sup>197</sup> 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,<sup>198</sup> or given the nature of the relevant markets involved or investigation and remedies required.<sup>199</sup> Generally, in cases

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judgments making the Commission's threat credible. See Tzanaki, *supra* note 155 at 290–291; Schwartz, *supra* note 150 at 609–620, 640–642.

<sup>195</sup> BRITTAN, *supra* note 145 at 42, 52–53.

<sup>196</sup> Burnside and Kidane, *supra* note 124 at 143–144. See also Opinion AG Emiliou, *supra* note 22, para 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.”

<sup>197</sup> 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. 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](https://ec.europa.eu/commission/presscorner/detail/en/mex_24_1506). The latter decision is now challenged in court. See Case T-289/24: Action brought on 3 June 2024 – Brasserie Nationale and Munhowen v Commission [2024] OJ C/2024/4484. According to the authorities, the merger was understood to have local impact as it would “combine the two main wholesale beverage distributors in Luxembourg” (own translation from original in French) but the parties dispute (i) the plausibility of the analysis as regards its effect on trade between Member States and (ii) the risk of significant effects on competition in Luxembourg, maintaining that the geographic market is broader than national, and possibly for this reason (although this is not explained in the appeal lodged), (iii) the Commission's error “to accept the referral on account of the absence of a merger control system at national level.” The transaction was not subject to merger control review in any Member State as it did not hit their national thresholds, and no Member State has joined Luxembourg's referral request.

<sup>198</sup> In such cases the Commission may be the “best placed” authority to assess the case. See Eben and Reader, *supra* note 109 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 136 at 546 (due to the “complexity or sensitivity” of cases that competent NCAs could be “uncomfortable” analyzing themselves); De Stefano, Motta, and Zuehlke, *supra* note 170 at 541, 546 (because referred mergers pose “issues, which may be bigger than the [referring] Member State” or “concern markets previously scrutinised in Brussels”).

<sup>199</sup> 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 176176, para 143; ECA Principles, *supra* note 92, para 19.

referred under Article 22 the Commission examines the effects of the merger only in the territory of the referring Member State.<sup>200</sup>

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.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup>

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.<sup>205</sup> The EUMR recognizes that the system of

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<sup>200</sup> 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 22, para 166.

<sup>201</sup> Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final (Brussels, December 11, 2001), para 86.

<sup>202</sup> *Ibid.* 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 22, para 169: noting that “the [Article 22] referral mechanism was initially conceived as a temporary one.”

<sup>203</sup> ECA Principles, *supra* note 92, para 18.

<sup>204</sup> Levy, Rimsa, and Buzatu, *supra* note 146 at 367; De Stefano, Motta, and Zuehlke, *supra* note 170 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”).

<sup>205</sup> Budzinski, *supra* note 161 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 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

“upward” referrals to the Commission is incomplete, particularly for cases of below-EU thresholds transactions requiring multiple national filings and should be further developed.<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup> The possibility of pre-notification referrals on the initiative of merging parties was introduced,<sup>210</sup> 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.”<sup>211</sup>

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.<sup>212</sup> In 2014 the Commission proposed further amendments to “upwards”

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Commission has no discretion in Article 4(5) and 9 referral cases but not regarding Article 22 referrals. See Case Referral Notice, paras 7 and 50, and Article 22(3) EUMR.

<sup>206</sup> Recital 12 EUMR.

<sup>207</sup> 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, para 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.”

<sup>208</sup> *Id.*, para 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 22, para 94.

<sup>209</sup> 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.

<sup>210</sup> Both downwards and upwards under Article 4(4) and 4(5) EUMR.

<sup>211</sup> Article 4(5) EUMR.

<sup>212</sup> Case Referral Notice, para 45; Franck, Monti, and de Streel, *supra* note 103 at 23 (explaining further that “the first scenario appears to extend Article 22 EUMR to instances

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.<sup>213</sup> None of these proposals were followed through.

Seen in this perspective, the system of referrals and Article 22 in specific was basically to improve, not override the logic and function of turnover thresholds as a jurisdictional allocation tool.<sup>214</sup> Imperfections remained but referrals were meant to be exceptional<sup>215</sup> and rare.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> 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)<sup>219</sup> to later being a centralized “coordinator” of

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where there are expected to be cross-border anticompetitive effects, while the second assumes the possibility of multiple notifications”).

<sup>213</sup> White Paper ‘Towards more effective EU merger control,’ COM(2014) 449 final (Brussels, July 7, 2014), para 68.

<sup>214</sup> BRITTAN, *supra* note 145 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).

<sup>215</sup> Case Referral Notice, paras 4 and 7.

<sup>216</sup> BRITTAN, *supra* note 145 at 40, 42, 52 (explaining that Article 9 and 22 referrals were expected to be used rather “infrequently” and “sparingly”).

<sup>217</sup> *Id.* at 42, 52; 2021 Staff Working Document, *supra* note 99 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.”).

<sup>218</sup> See *Illumina and Grail v Commission*, *supra* note 14, paras 182 and 199; Opinion AG Emiliou, *supra* note 22, paras 161 (“The EUMR intended to develop the ‘one-stop-shop’ objective of the referral mechanism.”), 173 and 182.

<sup>219</sup> BRITTAN, *supra* note 145 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

multi-jurisdictional EU merger cases (with cross-border impact).<sup>220</sup> 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<sup>221</sup> could limit its efficiency and effectiveness.<sup>222</sup>

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 been particularly rare 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 whereas “upward” referrals by merging parties under Article 4(5) have been almost 10 times more frequent (452).<sup>223</sup> Two conclusions follow. One, the operation of the

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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 155 at 181. Contrast this to the decentralized system of EU antitrust 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).

<sup>220</sup> 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](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.

<sup>221</sup> 2009 Staff Working Paper, *supra* note 176, paras 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 22, para 95.

<sup>222</sup> Budzinski, *supra* note 161 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 170 at 538–542 (showing that the Commission has accepted referrals in cases where markets could be national or from [joining] Member States where national filing thresholds are not met, unlike referrals under Articles 4[4], 4[5] and 9 where this is a key criterion, suggesting the “that the reach of Article 22 can be significant” but its efficiency and effectiveness less so).

<sup>223</sup> See Commission statistics on merger cases: [https://competition-policy.ec.europa.eu/mergers/statistics\\_en](https://competition-policy.ec.europa.eu/mergers/statistics_en). Of all Article 22 referral requests, only four were

referral rules including Article 22 has generally not detracted from the well-functioning of the EU merger control system as a whole.<sup>224</sup> 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.<sup>225</sup> Given its limited function and use, it had a marginal systemic effect.

### C. THE NEW ARTICLE 22 EUMR AND COMPLEMENTARY SOLUTIONS

With the revision of the EUMR's thresholds out of the question, the Commission realized it had a hidden card up its sleeve. Killer acquisitions could not be defeated by bright-line jurisdictional tests, either based on turnover or transaction value, that inherently run the risk of being under- or over-inclusive and may entail more administrative burden (notification) without clear added value (catching the "right" deals) to close the enforcement gap.<sup>226</sup> A "targeted" solution was needed.<sup>227</sup> The "right balance" was found in the flexible and extraordinary referral mechanism under Article 22 EUMR.<sup>228</sup> The open wording of the provision allowed creative

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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 197. 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 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 99 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* and *Grail* judgment canceling the Commission's new Article 22 approach below national thresholds. See *supra* notes 117-120.

<sup>224</sup> 2021 Staff Working Document, *supra* note 99 at 46-47, 63-64.

<sup>225</sup> BRITTAN, *supra* note 145 (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.")

<sup>226</sup> Rachel Brandenburger, Logan Breed & Falk Schöning, *Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?*, 31(2) ANTITRUST 28, 29 (2017).

<sup>227</sup> 2021 Staff Working Document, *supra* note 99 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."

<sup>228</sup> Speech by EVP Margrethe Vestager, 'Digital Mergers: Moving with the Curve' at the 22nd International Conference on Competition (Berlin, February 29, 2024): "This approach

reinterpretation by the Commission to bypass jurisdictional impediments posed by the EUMR thresholds and tackle new concerns.<sup>229</sup> In the age of killer acquisitions, and above and beyond its prior use, Article 22 was assigned a “new” third purpose to serve: allow scrutiny of *any* potentially problematic mergers *regardless of size*, prior notification obligations or the existence and scope of national merger control rules with a view to safeguard effective competition in the internal market.<sup>230</sup> The “enhanced” use of Article 22 was set to catch transactions that escape merger control at *both* EU and national level.<sup>231</sup> No gap would remain to plague EU merger control any longer. The Commission’s innovative “killer solution” could selectively aim at “killer mergers” that would otherwise be difficult to capture within its jurisdiction.<sup>232</sup>

This final stretch in Article 22’s “raison d’être” came as a surprise. The novelty consisted in the unprecedented and unrestricted way the Commission’s merger review powers were extended: under its reinterpretation of Article 22, Member States could request a referral of mergers that fell short of *national* jurisdictional thresholds even when they *had a functional merger control regime in place*.<sup>233</sup> If nothing else, the Commission’s repurposing of Article 22 marked a significant policy reversal. Under the “traditional” approach to Article 22, 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.<sup>234</sup> Adobe/ Figma is a recent example of a below-threshold (reverse) killer merger that reached the Commission following a “traditional” Article 22 referral initiated by Austria that was competent to

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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.”

<sup>229</sup> Article 22(1) EUMR.

<sup>230</sup> Case T-227/21 Illumina Inc v Commission, Judgment of 13 July 2022, ECLI:EU:T:2022:447, paras 91, 128, 148.

<sup>231</sup> *Id.*, paras 140-143; Vestager, *supra* note 25 (explaining that “the enhanced use of Article 22” as per its new Guidance means “referrals to the Commission from EU Member States for cases for which national jurisdictional criteria have not been met.”)

<sup>232</sup> Article 22 Guidance, para 9; Vestager, *supra* note 25: “[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.”

<sup>233</sup> Article 22 Guidance, para 6.

<sup>234</sup> Burnside and Kidane, *supra* note 124 at 141; Portuese, *supra* note 20 at 6; De Stefano, Motta, and Zuehlke, *supra* note 170 at 539, 544. But note that the Court of Justice may be of the view that national competence is needed not only to make an initial request but also to join an Article 22 referral. See Illumina and Grail v Commission, *supra* note 14, para 198. This matters because the Commission’s jurisdiction is limited to assessing the effects of the merger only within the territory of the referring Member States.



review the case.<sup>235</sup> By contrast, under the Commission’s “recalibrated” approach, *no-jurisdiction* upwards referrals could be accepted or indeed “invited.” Thus, from a previous practice of discouraging Article 22 referrals from Member States without “original jurisdiction over the transaction at stake,” the Commission’s new Guidance moved to encourage such referrals.<sup>236</sup>

The Guidance clarified that 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” could be subject to a “new” Article 22 referral “in certain circumstances” such as if “the target company is a start-up, a recent entrant, a nascent competitor, or a significant innovator.”<sup>237</sup> In addition, although the Commission considered that the change in its approach did not require a modification of the EUMR,<sup>238</sup> it explicitly indicated a transaction’s high “value-to-turnover” ratio as a relevant but not decisive factor in its assessment of whether or not to accept a referral request under its new policy.<sup>239</sup> In practice, as long as the broad criteria of Article 22 – i.e., effect on trade between Member States and threat to significantly affect competition within the territory of the referring Member State(s) – are met, any sub-threshold deal could be *de facto* “called-in” at EU level.<sup>240</sup> The Commission hit its target without binding itself in any way: it would effectively have very wide discretion to assert jurisdiction on a case-by-case basis based on open-

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<sup>235</sup> 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. See *supra* note 43.

<sup>236</sup> Article 22 Guidance, paras 8 and 11. In practice, the Commission could even orchestrate such referrals by “inviting” Member States to make a referral request under Article 22(5) EUMR. See *id.*, para 26. That provision however was meant to be used post-notification to consolidate jurisdiction at EU level in case of multiple national filings, not where there were none at Member State level. See *supra* notes 208 and 220.

<sup>237</sup> Vestager, *supra* note 228; Article 22 Guidance, paras 11-12 and 19 outlining “the categories of cases that will normally be appropriate for a referral” under the new policy, e.g., “where the undertaking: (1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries.

<sup>238</sup> Article 22 Guidance, para 11.

<sup>239</sup> *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 109 at 304.

<sup>240</sup> Article 22(1) EUMR. Conditional on Member States’ willingness to refer the case. See *infra* Part II.D.

ended and underdefined criteria.<sup>241</sup> Or as Advocate General Emiliou eloquently put it: “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.”<sup>242</sup>

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.<sup>243</sup> The handling of the case itself had drawn heavy criticism, and not without merit, as the implementation of the new approach to Article 22 was put into effect before the issuing of formal guidelines<sup>244</sup> and without any prior public consultation specifically on this matter.<sup>245</sup> The Commission was eager to get their foot in the door. Two more cases of “new” Article 22 referrals followed that the Commission accepted, and another one was attempted<sup>246</sup> until the Commission’s quest for jurisdictional expansion via the “repurposed” Article 22 suddenly came to a halt. Despite winning the first battle in court,<sup>247</sup> the Commission’s “recalibrated” approach was eventually struck down as unlawful by the EU Court of Justice in its Illumina and Grail judgment.<sup>248</sup>

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<sup>241</sup> Note that contrary to the General Court’s utterances, *supra* note 230, para 171, the list of suitable cases for referral is indicative and neither narrowly nor coherently drawn while the criteria considered to determine jurisdiction are substantive in nature, difficult to assess before the investigation, and broad and not grounded on clear limiting principles.

<sup>242</sup> Opinion AG Emiliou, *supra* note 22, para 216. Just after the Opinion, the Competition Commissioner defended its new policy: “Obviously, we are not engaging in a power grab. Article 22 simply empowers Member States to refer any potentially problematic transaction, and we have given that provision its full effect.” See Speech by EVP Margrethe Vestager at the Merger Regulation 20th Anniversary Conference (Brussels, April 18, 2024).

<sup>243</sup> Burnside and Kidane, *supra* note 124 at 141; Vestager, *supra* note 25 (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”).

<sup>244</sup> Eben and Reader, *supra* note 109 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”).

<sup>245</sup> Levy, Rimsa, and Buzatu, *supra* note 146 at 375; Portuese, *supra* note 20 at 6–7. See also Opinion AG Emiliou, *supra* note 22, para 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.”

<sup>246</sup> See *supra* notes 118-120.

<sup>247</sup> *Illumina v Commission*, *supra* note 230.

<sup>248</sup> *Illumina and Grail v Commission*, *supra* note 14. The Court’s press release (No 127/24) summarized the judgment nicely: “The Commission is not authorised to encourage or accept referrals of proposed concentrations without a European dimension from national

But short-lived as it may have been, the new 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.<sup>249</sup> More specifically, in response to the Court of Justice’s *Illumina and 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 to close enforcement gaps,<sup>250</sup> 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.<sup>251</sup> The latter could take the form of a revision of Article 22 that “could allow for the referral of sub-threshold mergers by Member States without jurisdiction in defined circumstances.”<sup>252</sup> These developments have notable practical consequences. First, Member States are now keen to expand their national merger control powers with the support of the Commission.<sup>253</sup> Second, the essence of the new Article 22 Guidance is not completely deprived of value, at least as far as non-reportable deals falling within Member State competence are concerned, in case “traditional” upwards referrals could be based on national “call-in” powers.<sup>254</sup>

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competition authorities where those authorities are not competent to examine those proposed concentrations under their own national law.”

<sup>249</sup> See also *infra* Part II.D.

<sup>250</sup> The Commission’s statement of its readjusted position on Article 22 and its ability to use it based on purely national “call-in” powers was not an empty threat. Soon after the Court of Justice’s judgment in *Illumina and Grail*, 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](https://ec.europa.eu/commission/presscorner/detail/en/mex_24_5623).

<sup>251</sup> *Illumina and Grail v Commission*, *supra* note 14, paras 216 and 217; Vestager statement and speech, *supra* note 17.

<sup>252</sup> Rather than alternative, but in the outgoing 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. See Vestager speech, *supra* note 17. Another option is a “New Competition Tool” similar to the one proposed at EU level and currently operational in Germany. See *supra* note 98. Yet, it is not clear how EU merger policy may develop as the incoming 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> (last visited Oct 25, 2024).

<sup>253</sup> See *supra* note 103.

<sup>254</sup> The Court of Justice did not take a clear position on the permissibility of such an approach in *Illumina and Grail*. See Tzanaki, *supra* note 15 at 8. In the meantime, the Commission eventually approved the NVIDIA/Run:ai merger, the first case where the so-called

Third, the “new” Article 22 remains an option for potential future reform and of continuing policy relevance as it could be raised from the dead to haunt deals below national thresholds and outside the merger control competence of Member States.

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.<sup>255</sup> 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.”<sup>256</sup> 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.”<sup>257</sup> 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.<sup>258</sup> Reporting 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.<sup>259</sup> 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.<sup>260</sup>

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“traditional” approach to Article 22 based on national “call-in” powers was tested (see *supra* note 250) without the case being appealed to the EU Courts: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_6548](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6548). In light of the Illumina and Grail judgment, the Commission also withdrew its new Article 22 Guidance allowing *non-competent* Member States to refer any below-threshold mergers upwards for EU review on November 29, 2024: [https://ec.europa.eu/commission/presscorner/detail/en/mex\\_24\\_6143](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. On approving the merger, the new Competition Commissioner Teresa Ribera highlighted the importance of “call-in” referrals from *competent* Member States to enable the Commission to check potentially problematic transactions as a general matter.

<sup>255</sup> See *supra* note 6.

<sup>256</sup> Eben and Reader, *supra* note 109 at 312; Franck, Monti, and de Streel, *supra* note 103 at 8.

<sup>257</sup> Vestager, *supra* note 228.

<sup>258</sup> Article 14(1) DMA: “A gatekeeper shall inform the Commission of *any* intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004, where the merging entities or the target 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.”

<sup>259</sup> Article 14(4) and (5) DMA.

<sup>260</sup> 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 (2023).

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 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,<sup>261</sup> 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.<sup>262</sup> 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 their obligations under Articles 5, 6 or 7 DMA following a market investigation.<sup>263</sup> 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.<sup>264</sup> Neither does Article 18(2) confer any power to the Commission to

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<sup>261</sup> 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. [...]”

<sup>262</sup> Eben and Reader, *supra* note 109 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 103 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.”)

<sup>263</sup> 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)).

<sup>264</sup> Eben and Reader, *supra* note 109 at 314–315.

impose a notification obligation in specified circumstances<sup>265</sup> under a NCT market investigation instrument deployed in digital markets.<sup>266</sup>

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.<sup>267</sup> 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.<sup>268</sup> 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 additionally subject to an upwards referral to the Commission.<sup>269</sup> 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 complaints and competition authorities' market intelligence or possibly voluntary "notification" by the parties.<sup>270</sup>

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.<sup>271</sup> However, for the merging parties to exclude any later risk of their transaction being "called-in" for

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<sup>265</sup> Thorsten Käseberg, *The DMA—Taking Stock and Looking Ahead*, 13 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 1, 2 (2022).

<sup>266</sup> See *supra* note 98 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/> (last visited Oct 19, 2024). The Draghi Report recommends the introduction of a NCT in specifically defined areas. See Draghi, *supra* note 252, 302-304.

<sup>267</sup> Käseberg, *supra* note 265 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).

<sup>268</sup> Franck, Monti, and de Streel, *supra* note 103 (outlining four options for extended EU control of digital gatekeepers' acquisitions: 1. encouraging Article 22 EUMR referrals, 2. introducing a new notification obligation in the DMA, 3. amending the EUMR, and 4. establishing a merger control regime specifically dedicated to large digital gatekeepers).

<sup>269</sup> See *supra* notes 250 and 254 and surrounding text.

<sup>270</sup> Article 22 Guidance, paras 23-25.

<sup>271</sup> *Illumina v Commission*, *supra* note 230, paras 170 and 180.

review, and exposed to liability, they could be “driven to file informal notifications to all national authorities”<sup>272</sup> to ensure that the time limits provided in the second subparagraph of Article 22(1) EUMR are triggered.<sup>273</sup> 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.<sup>274</sup> In the oral hearing before the Court of Justice in the *Illumina* and *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.<sup>275</sup> 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 also be used as a “backup” enforcement tool in certain cases of non-reportable mergers.<sup>276</sup> The Advocate General placed the legal questions at issue in the broader context of killer acquisitions and the need to close enforcement gaps in EU competition law, on the one hand, and the new approach to the Article 22 EUMR and the General Court’s *Illumina* judgment, on the other.<sup>277</sup> The case is curious because it was triggered by a competitor’s complaint to the French Competition Authority alleging that a 3-to-2 merger involving the former State monopolist and another company active in the French DDT broadcasting market that would leave it as the only competitor, could amount to an abuse of a dominant position under Article 102.<sup>278</sup> The merger was not notified or examined ex ante as it fell short of the jurisdictional thresholds of the EUMR and French merger laws and did not give rise to an Article 22 EUMR referral procedure as “it took place during the Commission’s era of discouraging below-threshold merger referrals.”<sup>279</sup> The French NCA eventually

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<sup>272</sup> Opinion AG Emiliou, *supra* note 22, paras 201-203 and 207-208; Burnside and Kidane, *supra* note 124 at 149; Völcker, *supra* note 146 at 1243; Levy, Rimsa, and Buzatu, *supra* note 146 at 377.

<sup>273</sup> “Such a request [for referral to the Commission] 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 22, paras 201-203.

<sup>274</sup> Opinion AG Emiliou, *supra* note 22, para 104; Burnside and Kidane, *supra* note 124 at 149. The Court of Justice dismissed such broad interpretation of Article 22 as inconsistent with fundamental EUMR principles. See *Illumina* and *Grail v Commission*, *supra* note 14, para 210.

<sup>275</sup> Opinion AG Emiliou, *supra* note 22, para 212.

<sup>276</sup> See *supra* note 88.

<sup>277</sup> Opinion AG Kokott, *supra* note 88, paras 27 and 48.

<sup>278</sup> Friso Bostoen, *Reviewing Mergers Under Article 102 TFEU: Proximus/EDPnet (Belgium)*, 15 JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 258, 258 (2024).

<sup>279</sup> Eben and Reader, *supra* note 109 at 317.

rejected the complaint finding that since its introduction the EUMR and its ex ante control system applies exclusively to *all* mergers having displaced Article 102 which is applicable only if there is an abuse separate from the merger transaction itself.<sup>280</sup> The decision was challenged before the Paris Appeal Court, which then sent a preliminary reference to the Court of Justice about the interpretation of EU law.

*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 and find them to constitute an abuse of a dominant position “in light of the structure of competition on a market which is national in scope.”<sup>281</sup> That is, ex post control of previously unchecked or non-notifiable below-threshold mergers is possible on the basis of the Treaty provision on abuse of dominance which is directly applicable.<sup>282</sup> Article 102 TFEU allows for no exemption from its prohibition rule and its direct effect is not affected by the inapplicability of implementing Regulation 1/2003 to mergers.<sup>283</sup> For reasons of legal certainty, the EUMR procedure of ex ante merger control is given priority for mergers within its scope (with an EU dimension).<sup>284</sup> Article 102 can thus have a residual scope of application and national control on this basis is not excluded.<sup>285</sup>

The complaint brought back the ghost of *Continental Can* as legal authority to support the applicability of Article 102 to mergers which was acknowledged to still be “good law.”<sup>286</sup> Ironically, this was one of the key cases that helped put pressure on Member States and bring the EUMR into existence.<sup>287</sup> The Commission’s promise at that time not to use Articles 101 and 102 TFEU against mergers after the adoption of

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<sup>280</sup> *Towercast*, *supra* note 88, para 21: “That authority performed a different analysis to that conducted by its investigating departments, taking the view, in essence, that the adoption of Regulation No 4064/89 had drawn a clear dividing line between the control of concentrations and the control of anti-competitive practices and that Regulation No 139/2004, which replaced it, applied exclusively to concentrations as defined in Article 3 of that regulation, thereby rendering the application of Article 102 TFEU to a concentration operation devoid of purpose where the undertaking concerned has not engaged in abuse which can be separated from that operation.”

<sup>281</sup> *Id.*, paras 50 and 53.

<sup>282</sup> *Id.*, paras 41, 44 and 50.

<sup>283</sup> *Id.*, paras 45 and 47.

<sup>284</sup> *Id.*, paras 40-41.

<sup>285</sup> *Id.*, paras 37 and 41; Opinion AG Kokott, *supra* note 88, paras 39 and 54.

<sup>286</sup> *Towercast*, *supra* note 88, paras 23-24, 26, 46, 52; Opinion AG Kokott, *supra* note 88, paras 49-63.

<sup>287</sup> See *supra* notes 155 and 194 and surrounding text; Mulder and Sauter, *supra* note 136 at 550.



the “one-stop shop” system of the EUMR was just that:<sup>288</sup> a statement of political intention but of no legal import as *Towercast* makes clear.<sup>289</sup> Or said differently, the Commission could bind itself (considering the formal disapplication of Regulation 1/2003 to mergers)<sup>290</sup> but not Member States authorities and third parties that derive direct rights and obligations through a provision of primary EU law such as Article 102.<sup>291</sup> 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 Article 102 “enforcement is not blocked” by Article 21(1) EUMR and that residual power regarding non-EU dimension mergers is preserved by Member States, either on the basis of national merger control or Article 102 TFEU.<sup>292</sup> Implicitly, *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.

The judgment is additionally significant and interesting because it answers lingering questions as to the relationship between the two EU legal frameworks addressing structural and behavioral competition effects while it also raises new ones.<sup>293</sup> First, it views the EUMR and Article 102 TFEU 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.<sup>294</sup> Second, Article 22 EUMR and Article 102 TFEU are framed as substitutes – both are applicable on a supplementary basis below the EUMR thresholds.<sup>295</sup> A transaction reviewed under an Article 22 EUMR referral procedure cannot be scrutinized again under Article 102 TFEU and reversely, a transaction not

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<sup>288</sup> BRITTAN, *supra* note 145 at 42, 52–53.

<sup>289</sup> See also Opinion AG Emiliou in *Illumina and Grail*, *supra* note 22, para 99.

<sup>290</sup> See *supra* note 193 and surrounding text; Eben and Reader, *supra* note 109 at 317; Mulder and Sauter, *supra* note 136 at 552.

<sup>291</sup> *Towercast*, *supra* note 88, paras 44-45; Opinion AG Kokott, *supra* note 88, paras 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).

<sup>292</sup> Opinion AG Kokott, *supra* note 88, paras 31 and 33.

<sup>293</sup> Mulder and Sauter, *supra* note 136 at 550.

<sup>294</sup> Presumably so that a “double analysis” of mergers under ex ante and ex post control rules, applying either in parallel or successively, is avoided and legal certainty is preserved. See Opinion AG Kokott, *supra* note 88, paras 38 and 56; cf *Towercast*, *supra* note 88, paras 27 and 41. However, the Court of Justice does not expressly take a view for or against this point. See also Opinion AG Emiliou, *supra* note 22, para 101: “it was clear that then Articles 85 and 86 EEC permitted an *ex post* intervention for all mergers not meeting the thresholds.”

<sup>295</sup> Opinion AG Kokott, *supra* note 88, para 48.

reviewed under Article 22 leaves room for the application of Article 102.<sup>296</sup> Besides, Towercast now acknowledges that Article 102 has a “gap filling” role regarding the control of mergers at Member State level,<sup>297</sup> which was in fact the original rationale for Article 22 EUMR.<sup>298</sup> It is thus notable how perceived constraints in the law at different times lead to its renewal and (circular) evolution guided by the overarching objective of ensuring effective protection of competition in the internal market: the EUMR was introduced to fill gaps left by Articles 101 and 102 TFEU regarding the regulation of mergers;<sup>299</sup> the gap created by the Commission’s inability to enforce Articles 101 and 102 post-EUMR against mergers set the stage for the political demand for and bargain around Article 22 EUMR,<sup>300</sup> and gaps identified in the ex ante control of mergers under the EUMR or national law further push for an expansive application of Article 22 EUMR or Article 102 TFEU. Complementary solutions and potential competition among the different EU competition law provisions keep on evolving.

Together the Illumina/Grail and the Towercast judgments inaugurate a new era for the enforcement of non-reportable and non-EU dimension mergers in the EU. But albeit seemingly functional equivalents, Article 22 EUMR or Article 102 TFEU are at best “partial substitutes.” Differences in the applicability and the relative priority of the two provisions in certain cases over others raise questions as to the actual degree of the potentially competing (or complementary) relationship between Article 22 EUMR and Article 102 TFEU as merger enforcement instruments. For instance, 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.<sup>301</sup> A second key difference is the jurisdictional scope of application: post-Illumina and Grail, Article 22 is limited to only “traditional” referrals that some Member State(s) *with* competence to review the merger at stake can initiate (e.g., cases below ex ante reportability thresholds but subject to ex post control under national merger law) whereas Article 102 can apply to any merger case, even *outside* national merger competence.<sup>302</sup> 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.<sup>303</sup>

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<sup>296</sup> Towercast, *supra* note 88, para 53.

<sup>297</sup> Opinion AG Kokott, *supra* note 88, paras 2 and 48.

<sup>298</sup> See *supra* note 192 and ensuing text.

<sup>299</sup> Towercast, *supra* note 88, paras 36-38; Opinion AG Kokott, *supra* note 88, paras 35 and 44.

<sup>300</sup> See *supra* notes 193-196 and surrounding text.

<sup>301</sup> Article 22 Guidance, para 21; Eben and Reader, *supra* note 109 at 319–320.

<sup>302</sup> See *supra* notes 250, 254 and surrounding text; Towercast, *supra* note 88, paras 53.

<sup>303</sup> Towercast, *supra* note 88, paras 53; Bostoen, *supra* note 278 at 262; Fischer, *supra* note 291 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).

However, such workable and rationalized division of labor regarding mergers *without* an EU dimension is not anchored in hard principles: the Article 22 referral practice has not been disciplined or developed to merely addressing cases of cross-border significance based on an EU-wide assessment<sup>304</sup> and the facts in the Towercast judgment were such to refer to potential enforcement by an NCA against a merger with national impact; the latter is silent and does not itself exclude the applicability of Article 102 by the Commission or to cases of a broader than national scope and import, neither does it indicate a clear hierarchy between the two provisions.<sup>305</sup> Given this indeterminacy and in light of the above, the relative choice of enforcement instrument could be (i) driven by the self-interest and priorities of interested actors (i.e., complaints by third parties to NCAs or private enforcement actions before national courts;<sup>306</sup> informal “voluntary” reporting by merging parties to competition agencies seeking to trigger the time limits governing potential “upwards” referrals;<sup>307</sup> invitation letters by the Commission to Member States to refer cases under Article 22<sup>308</sup> or refusal to accept referred cases when where the mainly affected Member State has not joined the referral request<sup>309</sup> or the case is already notified at Member State level;<sup>310</sup> willingness of NCAs to request or join “upwards” referrals or their unwillingness to surrender jurisdiction to Brussels in certain cases when they can opt for “national” enforcement based on domestic merger control rules or Article 102<sup>311</sup>) or (ii) influenced by context-specific practical considerations (i.e., timing of enforcement action or availability of resources).

In addition, the substantive criteria of Article 22 EUMR and 102 TFEU differ in ways that influence their applicability in given cases. At one level, Article 22 EUMR implies a higher legal standard compared to Articles 101 and 102 TFEU: the former can apply when the transaction “*affects*” whereas the latter if it “*may affect*” inter-Member State trade. A practical question thus concerns how this standard might be met in merger cases where the target may as yet have no turnover or products launched.<sup>312</sup> To overcome such practical limitations, the new Guidance enumerates specific factors relevant for digital markets that could be used to assess the merger’s effect on the

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<sup>304</sup> De Stefano, Motta, and Zuehlke, *supra* note 170 at 538–542, 545–546. See further *supra* Part II.B.

<sup>305</sup> Opinion AG Kokott, *supra* note 88, paras 38-39 and 47-48; Bostoen, *supra* note 278 at 262.

<sup>306</sup> Fischer, *supra* note 291 at 432–435.

<sup>307</sup> See *supra* notes 272-275 and surrounding text.

<sup>308</sup> Mulder and Sauter, *supra* note 136 at 553.

<sup>309</sup> De Stefano, Motta, and Zuehlke, *supra* note 170 at 542.

<sup>310</sup> Article 22 Guidance, para 22.

<sup>311</sup> Eben and Reader, *supra* note 109 at 320; Levy, Rimsa, and Buzatu, *supra* note 146 at 376.

<sup>312</sup> Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 563; Portuese, *supra* note 20 at 4–5, 12–13.

pattern of trade between Member States such as “the location of customers (digital platforms have a multi-jurisdictional audience)”<sup>313</sup> or the collection of data in several Member States.<sup>314</sup> In general, however, the effect on inter-MS trade is a broad concept<sup>315</sup> and thus not a serious hurdle. 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”, which may make its scope of application broader compared to Article 102 TFEU. The Commission’s new Article 22 Guidance lists situations satisfying this criterion such as 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.<sup>316</sup> Accordingly, the test under Article 22 is less demanding and more flexible: (i) it is not pre-conditioned on existing market dominance;<sup>317</sup> (ii) it relies on a “quick look” SIEC test to apply.<sup>318</sup>

In contrast, Article 102 TFEU may be subject to more restrictive substantive criteria (dominance and abuse) and choice of remedies (preference for behavioral remedies and fines over divestitures).<sup>319</sup> According to Towercast, finding a “structural” abuse under Article 102 requires that the merger “substantially impedes competition” on the market.<sup>320</sup> A narrow reading suggests that this test is met (i) if there is a high

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<sup>313</sup> Franck, Monti, and de Streel, *supra* note 103 at 24.

<sup>314</sup> Article 22 Guidance, para 14 lists further relevant factors such as “the development and implementation of R&D projects whose results, including intellectual property rights, if successful, may be commercialized in more than one Member State.”

<sup>315</sup> Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 563.

<sup>316</sup> Article 22 Guidance, para 15.

<sup>317</sup> Although dominance of the acquirer is implied in a killer acquisition theory of harm, the more malleable test under Article 22 may be helpful where issues of market definition and proof of pre-existing dominance may be a challenge in specific merger cases.

<sup>318</sup> Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 555 (clarifying that this “is not a full-blown test of substance, but one of a preliminary nature, used more in relation to jurisdictional matters”). The 2004 amendment of the EUMR changed the referral as well as the substantive test of a merger’s competition effects from a dominance to a SIEC test.

<sup>319</sup> Opinion AG Kokott, *supra* note 88, paras 48: “it should therefore be possible for a national competition authority to resort at least to the ‘weaker’ instrument of *punitive* ex post control under Article 102 TFEU, provided that the conditions for it are met”; and 63: “in view of the primacy of behavioral remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration, but rather only the imposition of a fine.” But the issue of remedies available under 102 was not addressed by the Court of Justice in its final judgment and is debatable in practice. See Bostoen, *supra* note 278 at 261.

<sup>320</sup> Towercast, *supra* note 88, para 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

degree of dependence (significant market power nearing monopoly) in that “only undertakings whose behaviour depends on the dominant undertaking would remain in the market” in line with the Continental Can case law and (ii) only in cases of horizontal mergers, whereas a broad reading suggests that (i) the legal standard for abuse is congruent to the EUMR’s SIEC test<sup>321</sup> and (ii) Article 102 applies to horizontal and non-horizontal merger cases alike.<sup>322</sup> Note that the Illumina/Grail case pursued by the Commission based on its new Article 22 EUMR referral policy was a vertical merger. At the same time, it is also argued that a killer acquisition may amount to a “by object” abuse of a dominant position and that NCAs are empowered to impose any behavioral or structural remedies, which are necessary and proportionate, including partial or complete divestiture and/ or suspensive injunctions.<sup>323</sup> Such a view would imply a less limiting scope of application of Article 102 TFEU in cases of below-thresholds killer mergers. Other factors may also favor Article 102 over Article 22 EUMR. Importantly, contrary to the discretionary “upwards” referral procedure,<sup>324</sup> Article 102 TFEU operates based on a system of “decentralized” public and private enforcement leaving no discretion to national authorities for its application.<sup>325</sup> Moreover, albeit often “second best”, the advantage of ex post review is that it does not involve prediction but can also rely on actual post-merger evidence.<sup>326</sup>

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.<sup>327</sup> The resulting merger control landscape in

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abusive exclusionary conduct by dominant undertakings refer to Towercast twice and thus include “structural” abuses in the list of “possible types of exclusionary abuses by dominant undertakings” (paras 10 and 12).

<sup>321</sup> Völcker, *supra* note 146 at 1244–1246 (arguing that a narrower interpretation is in line with the principles of subsidiarity and legal certainty as on this reading the residual application of Article 102 targets “a narrower category of particularly severe and permanent impediments to effective competition”); Bostoen, *supra* note 278 at 260–261 (arguing that the first application of Towercast by the Belgian NCA supports a broader interpretation).

<sup>322</sup> Fischer, *supra* note 291 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).

<sup>323</sup> Opinion AG Emiliou, *supra* note 22, paras 230 and 232.

<sup>324</sup> See *supra* Part II.B.

<sup>325</sup> Opinion AG Kokott, *supra* note 88, para 40.

<sup>326</sup> Opinion AG Emiliou, *supra* note 22, paras 228 and 231.

<sup>327</sup> 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 respectively the Press release N° 10/2023 of the Belgian NCA (March 22, 2023): <https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-10-2023> and the Press release by the French NCA (May 15, 2024): <https://www.autoritedelaconcurrence.fr/en/press-release/meat-cutting-sector-first-time->

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) preference for ex ante scrutiny under national merger control over ex post control or Article 22 EUMR especially if a transaction is already notified in some Member State(s), (ii) the possibility to use ex post national merger control powers as a (necessary) “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 (iii) 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.<sup>328</sup> Yet, this schematic prioritization is not absolute but may rather differ depending on the specific circumstances of each case and the availability of enforcement instruments in light of the factors discussed above.<sup>329</sup>

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

Notification thresholds	Merger control competence	Legal basis
<i>Above EUMR thresholds</i>	Commission	EUMR
<i>Below EUMR thresholds</i>	Member States	national merger control ex ante

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[autorite-examines-under-antitrust-law-mergers-below](https://www.autoritedelaconcurrence.fr/en/article/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european-union). See also the reaction of the French NCA to the Illumina and Grail judgment: <https://www.autoritedelaconcurrence.fr/en/article/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european-union> (September 3, 2024).

<sup>328</sup> See Gerard and Marescaux, *supra* note 322 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 136 at 552–553; Schwartz, *supra* note 150 at 658–660; Venit, *supra* note 160 at 15–16. In any event, the EUMR as secondary law cannot restrict the scope or applicability of primary EU law such as Article 102 TFEU. See Towercast, *supra* note 88, paras 33–34, 42, 51; Opinion AG Kokott, *supra* note 88, paras 30–31, 43 and 47.

<sup>329</sup> 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. See *supra* notes 249–254 and surrounding text. Especially, it remains open how options 1 versus 3 and 3 versus 4 will play out and may be (re)prioritized depending on how the Commission and Member States (or third parties) may use their powers and discretion in a given context.

	Member States	national merger control ex post
	Commission	Article 22 EUMR referral
	Member States or Commission	Article 102 TFEU

#### D. TRANSFORMING EU MERGER CONTROL BY REPURPOSING ARTICLE 22

The “innovative” and for now defunct Article 22 solution stands center stage out of all developments aiming at the same problem. In attempting to once and for all reverse underenforcement in the EU, the Commission not only aimed to make good on substantive gaps but also to cover its chronic jurisdictional deficit exposed by the killer acquisitions phenomenon. But the threat was not merely killer mergers in the abstract. The real fundamental risks were to the internal market itself. Internally, the increasingly fragmented regulation of sub-threshold mergers in the EU through varying and uncoordinated Member State solutions under national merger laws raised the stakes of EU (in)action.<sup>330</sup> Externally, in light of the global competition for jurisdiction and competitiveness, merger (non) enforcement decisions or policy (in)action by non-EU countries could impact and impose externalities on the EU.<sup>331</sup> The issue was linked to the EU’s competition and innovation policy in a broader political economy context.<sup>332</sup> The Commission, not only as a competition policy and enforcement body but also as a political organ representing the executive branch of the EU,<sup>333</sup> could have a significant stake and the appetite to have its own “say” on small-size mergers and acquisitions<sup>334</sup> in strategically important industries<sup>335</sup> that could

<sup>330</sup> Franck, Monti, and de Streel, *supra* note 103 at 8.

<sup>331</sup> See European Commission, *Communication on A competition policy fit for new challenges*, COM(2021) 713 final (18 November 2021).

<sup>332</sup> President von der Leyen’s Political Guidelines, *supra* note 126, at 7 and the Draghi Report, *supra* note 252, 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.

<sup>333</sup> Faull, *supra* note 158 at 268.

<sup>334</sup> Draghi, *supra* note 252 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.”

<sup>335</sup> 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

undermine the internal market. 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,<sup>336</sup> the hunger for aggressive enforcement could not be served by keeping with the “restrictive” turnover thresholds of the EUMR. Market developments and broader political motivations fueled and complemented the need to fill technical gaps.

Against this backdrop, the Commission’s goal was two-fold: to establish jurisdiction over elusive killer mergers by reprioritizing *harm* over certainty<sup>337</sup> (protection of competition and consumers) and to extend *EU* jurisdiction to address such concerns (protection of the internal market). In other words, an EU “killer” solution to killer merger concerns was needed.<sup>338</sup> Accordingly, EU merger enforcement was rendered more “dynamic” in response to dynamic competition concerns.<sup>339</sup> EU jurisdiction was expanded in a “very significant”<sup>340</sup> and unsystematic way, via the “back door”:<sup>341</sup> a door forced open by the Commission and its quick action to “repurpose” Article 22 to serve the new circumstances and its “crisis of competence.”<sup>342</sup> The task had a well understood importance and urgency. But for all

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areas for the future that have a “profound impact on the competitiveness of the EU economy” and its industrial and technological leadership. The Draghi Report also focuses attention on pharma, digital and advanced technologies as dynamic sectors of economic and strategic importance and key drivers of the EU’s competitiveness and “open strategic autonomy” in an era of “heightened geopolitical competition.” See *supra* note 252, at 67, 187.

<sup>336</sup> See *supra* Part II.A.

<sup>337</sup> Mulder and Sauter, *supra* note 136 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.

<sup>338</sup> Tzanaki, *supra* note 15.

<sup>339</sup> Vestager, *supra* note 228: “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.”

<sup>340</sup> Opinion AG Emiliou, *supra* note 22, para 216.

<sup>341</sup> *Id.*, para 185; Ben Van Rompuy, *Editorial: EU Merger Control from the Front to the Back Door*, 5 EUR. COMPETITION & REG. L. REV. 341 (2021).

<sup>342</sup> Wilks, *supra* note 219 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 EC/EU competences has steadily increased, but the nature of new competences has changed dramatically”, e.g., moving from “total harmonization, which gives the Community exclusive competence over a given policy area”, to “more flexible but less ‘communitarian’ methods such as optional and minimum harmonization” and noting that “the risk today is not excessive centralization of decisionmaking in the EC/EU, but rather excessive fragmentation” and its consequences).



the good intentions, the infusion of dynamism by such unconventional means could upset the EUMR's jurisdictional balance and produce institutional side effects.<sup>343</sup>

To begin, the expansive use of Article 22 as an “effects-oriented tool” to assert jurisdiction ad hoc would de facto revise the EUMR's “rigid, static, formal” turnover-based jurisdictional rule.<sup>344</sup> The policy shift was justified by the need to maximize effectiveness and flexibility of the EU merger control regime.<sup>345</sup> The reinterpretation of Article 22 can be seen as a creative attempt to render it from an exceptional instrument to a back-up “catch-all tool”<sup>346</sup> of potentially anticompetitive non-notifiable deals “correcting” the EUMR thresholds and “supplementing” the Commission's competence.<sup>347</sup> By recalibrating Article 22 the Commission essentially would gain the ability to “call-in” problematic below-thresholds transactions under certain conditions.<sup>348</sup> Jurisdiction would no longer be as clear cut but rather influenced by substance, subject to the Commission's discretion and priorities.<sup>349</sup> By proactively

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<sup>343</sup> *Illumina and Grail v Commission*, *supra* note 14, paras 193, 203, 207-208, 215.

<sup>344</sup> 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.”).

<sup>345</sup> The General Court in *Illumina v Commission*, *supra* note 230, paras 140-143, 177 upheld the Commission's expansive (but misguided) 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” with the referral mechanism being applicable not only in cases falling below the EUMR turnover thresholds (“EU dimension”) but also national jurisdictional thresholds. But overturned by the Court of Justice, see *Illumina and Grail v Commission*, *supra* note 14, paras 192, 198, 200-201, 205-211, 218.

<sup>346</sup> *Burnside and Kidane*, *supra* note 124 at 140, 147.

<sup>347</sup> See *Illumina v Commission*, *supra* note 230, paras 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 such overbroad interpretation, see *Illumina and Grail v Commission*, *supra* note 14, paras 146, 148, 158, 192-193, 200-201; Opinion AG Emiliou, *supra* note 22, paras 166-168 (noting that Article 22 was not intended to have such “broad corrective function”).

<sup>348</sup> See *supra* note 240 and surrounding text; Völcker, *supra* note 146 at 1228–1229, 1237–1238 (explaining that the Commission's 1973 draft proposal for a merger regulation included such a general but delimited power to review transactions below thresholds subject to a safe harbor, which however was rejected by the Council).

<sup>349</sup> Carugati, *supra* note 260 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, meaning that the Commission can accept referrals of mergers that are outside the scope of the guidance” which creates risks of over-enforcement and legal uncertainty and urging the Commission to issue new guidance on which mergers are likely problematic based on clear objective criteria).

sending invitation letters to Member States regarding non-notifiable transactions<sup>350</sup> and 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 without an EU dimension and outside its exclusive competence.<sup>351</sup>

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),<sup>352</sup> 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).<sup>353</sup> Admittedly, the rigid nature and very high levels of the EUMR’s turnover thresholds, that in practice were never revised despite the Commission’s initial hopes<sup>354</sup> and the set mechanisms for that,<sup>355</sup> may give rise to an “externality problem” that could entail suboptimal allocation of competence between the EU and Member States in some cases.<sup>356</sup> That is, the thresholds are an imperfect proxy for the existence and size of externalities involved in light of the

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<sup>350</sup> See *supra* note 236 and surrounding text.

<sup>351</sup> *Illumina v Commission*, *supra* note 230, paras 116, 140, 142, 182. But overturned on appeal. *Illumina and Grail v Commission*, *supra* note 14, paras 201, 211, 216-217.

<sup>352</sup> See *supra* Part II.B; *Illumina and Grail v Commission*, *supra* note 14, paras 182, 199.

<sup>353</sup> See *supra* Part II.C; *Illumina and Grail v Commission*, *supra* note 14, paras 148, 185, 196-199.

<sup>354</sup> Schwartz, *supra* note 150 at 650, 656–657; BRITTAN, *supra* note 145 at 39 (“The Commission and several Member States believe that the threshold levels are too high. [...] We are confident that, within four years, the Council will be persuaded that the thresholds must come down.”) and 53 (similarly).

<sup>355</sup> Article 1(4) and (5) EUMR; *Illumina and Grail v Commission*, *supra* note 14230, paras 183, 216.

<sup>356</sup> Van Den Bergh, *supra* note 177 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.”).

geographic markets affected by a given merger.<sup>357</sup> In this sense, there could be merit in revising or 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.<sup>358</sup>

However, unlike its previous renditions, the latest reinterpretation of Article 22 has been neither limited nor aligned with foundational principles of the EUMR and EU law.<sup>359</sup> 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;<sup>360</sup> there is no issue of competing or conflicting jurisdiction.<sup>361</sup> The EU steps in to fill a local gap where Member States cannot, at least in the short run, respecting the principle of subsidiarity.<sup>362</sup> Article 22’s second function (1997) is an actual principled and limited exception:<sup>363</sup> 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 EUMR thresholds, in line with the principles of subsidiarity and “one-stop shop.”<sup>364</sup> 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 the turnover-based rule remains central while EU and national competences are fixed and

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<sup>357</sup> *Id.* at 373, 382; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 198, 237–238.

<sup>358</sup> See *supra* Part II.B.

<sup>359</sup> Opinion AG Emiliou, *supra* note 22, paras 215, 218–226.

<sup>360</sup> *Id.*, para 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.

<sup>361</sup> BRITTAN, *supra* note 145 at 52–53. See *supra* note 164.

<sup>362</sup> In the long run, subsidiarity may entail that Member States develop their own merger control competence in terms of laws and institutions. See NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 200 (“While in principle a desirable transitional step, it is somewhat at odds with the spirit of the subsidiarity principle, which implies that whether or not member states choose to have merger authorities should be a matter for the member states themselves. A state choosing to have weak or non-existent competition regulation should be free to do so for those aspects of competition without substantial cross-border effects.”).

<sup>363</sup> Opinion AG Emiliou, *supra* note 22, paras 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, irrespective of whether or not they were caught by their systems, the use and expediency of the mechanism for those Member States would not have been affected much by their adoption of a national regime, and the mechanism certainly would not have been ‘limited’.”

<sup>364</sup> See *supra* notes 184–185, 201, 214 and surrounding text; Opinion AG Emiliou, *supra* note 22, paras 65, 90–92; Illumina and Grail v Commission, *supra* note 14230, paras 182, 192–193, 199.

ex ante known.<sup>365</sup> By contrast, with the broadly “repurposed” Article 22 (2021) the exception would essentially override the rule: it would allow ad hoc *creation* of competence on a case-by-case basis where none existed before; not only the EU but also national thresholds are made irrelevant.<sup>366</sup> The expansive interpretation would also sit at odds with key principles underlying the EUMR.<sup>367</sup> Member States could fill gaps at national level themselves based on their domestic merger regimes<sup>368</sup> or Article 102 TFEU<sup>369</sup> (subsidiarity); the repurposed Article 22 referral mechanism could multiply rather than minimize parallel reviews by different authorities (“one-stop shop”)<sup>370</sup> and could be triggered even below national thresholds creating predictability and other procedural challenges for merging parties (legal certainty).<sup>371</sup>

This “recalibration” of Article 22 did not constitute a simple change but a mutation in the EUMR’s DNA. First and foremost, it introduced new dynamics in the relationship between the EU and Member States as well as among Member States. To appreciate the extent of institutional transformation ushered in EU merger control, a macro view is necessary with the help of game theoretic insights.<sup>372</sup> The EUMR’s “rule-based” allocation of competences has been purposefully set as a “zero-sum”

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<sup>365</sup> Illumina and Grail v Commission, *supra* note 14, paras 193, 203, 208-209.

<sup>366</sup> Opinion AG Emiliou, *supra* note 22, para 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.”

<sup>367</sup> Opinion AG Emiliou, *supra* note 22, paras 192-214; Illumina and Grail v Commission, *supra* note 14, paras 202-210.

<sup>368</sup> Opinion AG Emiliou, *supra* note 22, para 200: “I wonder whether a situation in which the competence for doing something (here, reviewing a merger) is given to an EU institution (here, the Commission), for the very reason that a Member State has considered that the scale or effects of situations such as that at issue are not significant enough to warrant any action at national level, would not be against the logic of subsidiarity.”; Illumina and Grail v Commission, *supra* note 14, para 217.

<sup>369</sup> Opinion AG Emiliou, *supra* note 22, paras 227-232; Illumina and Grail v Commission, *supra* note 14, para 214. On Towercast, see *supra* Part II.C.

<sup>370</sup> Opinion AG Emiliou, *supra* note 22, paras 203-205; Illumina and Grail v Commission, *supra* note 14, para 210.

<sup>371</sup> Opinion AG Emiliou, *supra* note 22, paras 206-213; Illumina and Grail v Commission, *supra* note 14230, paras 208-210.

<sup>372</sup> Game theory is the branch of social science that studies “strategic” or “interactive” decision making, i.e. “the behavior of decision makers (players) whose decisions affect each other.” See AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE 2 (1993); R.J. Aumann, *Game Theory*, THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 460 (John Eatwell, Murray Milgate, & Peter K. Newman eds., 1987). Game theoretic analysis is appropriate and useful here given the interdependent nature of decisions involved in Article 22 referrals.

game,<sup>373</sup> based on the politics underpinning the negotiations of the EUMR,<sup>374</sup> meaning what one side (Member States) loses the other (Commission) gains. Competence has been a finite resource (“fixed pie”) divided between the EU and Member States. What is remarkable about the ventured “new” Article 22 solution to the Commission’s jurisdictional gap regarding killer acquisitions is that it would fundamentally change the nature of the game.<sup>375</sup> Competence would no longer be “zero-sum;” EU competence would not be fixed but could extend beyond the existing “pie” of turnover-based competence allocation; potential competition for jurisdiction over below-thresholds transactions would be introduced between the Commission and Member States for the first time since the adoption of the EUMR. Unlike a reduction of the EUMR turnover thresholds that would *uniformly* take away jurisdiction from Member States to expand EU competence downwards in a fixed (and continuous) way,<sup>376</sup> the “repurposed” Article 22 referral mechanism could be used to cover gaps at the lower end of transactions in an ad hoc way that could *asymmetrically* affect Member States. It is thus said that the reinterpretation of Article 22 would create an unusual “competence sandwich” – Commission (large mergers) / NCAs (mergers below the EUMR thresholds but above the national thresholds) / Commission (mergers below the national thresholds).<sup>377</sup> But such a “static” view is a misleading oversimplification as it gives the impression that the EU would have fixed jurisdiction over the largest and smallest mergers in the EU (top and bottom tiers in the sandwich). Rather, the new jurisdictional situation would be highly dynamic and unpredictable: EU competence would not only be inflatable ad hoc but it could expand in the intermediate space of the sandwich “competing” with Member States that have jurisdiction to review a given merger case under their national merger laws.

But the EU is not the sole master of this process; the Commission’s competence is conditional on some Member State submitting a referral request that is

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<sup>373</sup> There are two general classes of games: “non-cooperative” and “cooperative” (or “bargaining”) games. “A game is called “cooperative” if commitments - agreements, promises, threats - are fully binding and enforceable [and] “non-cooperative” if commitments are not enforceable, even if pre-play communication between the players is possible.” A “zero sum game” is a *strictly competitive* “non-cooperative” game where the sum of the two players’ payoffs is zero. In such a game, “there is no point in cooperation or joint action of any kind” because the “preferences of the players over the outcomes are precisely opposed.” See Aumann, *supra* note 372 at 460–463; Michael Bacharach, *Zero-Sum Games*, in *GAME THEORY* 253, 253 (John Eatwell, Murray Milgate, & Peter Newman eds., 1989).

<sup>374</sup> See *supra* Part II.A.

<sup>375</sup> By dividing competence in a fixed and ad hoc irreversible way, the EUMR thresholds achieved to make competition over jurisdiction of merger cases between the EU and Member States mute. See *supra* note 164. The expansion of Article 22 as a basis for establishing EU competence would effectively reactivate this potential competition leading to possibly more cooperative or even more competitive situations as explained below.

<sup>376</sup> Introduction of a transaction value threshold would have a similar effect. It would not change the nature of the game, i.e., competence allocation would remain “zero-sum.”

<sup>377</sup> Opinion AG Emiliou, *supra* note 22, para 199; Völcker, *supra* note 146 at 1241.

then free to accept or reject. With the new Article 22 Guidance, all Member States would be made “equal” in their request for referrals to the Commission regardless of the shape or scope of their domestic merger laws. There would be no minimum (national) threshold for triggering merger review at the EU level.<sup>378</sup> Any Member State and the Commission, neither of which need have competence in their own right, could coordinate so that the first refers and the second accepts, for a suspect merger case to reach the Commission and EU jurisdiction to be “created.”<sup>379</sup> Under the Commission’s new approach, *ad hoc* “centralization” of merger control enforcement below the EUMR thresholds would thus be more liberally possible. Referrals by non-competent Member States could proceed regardless of potential parallel merger control powers of other competent Member States, i.e., even in situations where there would be some competing jurisdiction at national level but not multiple filings. By implication, national thresholds of certain Member States that have gone to expand the scope of their own *ex ante* merger control would essentially be made irrelevant.<sup>380</sup> From this perspective, the maximum “jurisdictional space” the Commission could claim in merger cases below the EUMR thresholds would extend from the highest national threshold below which killer and digital mergers are left unregulated (i.e. the threshold of the most conservative Member State merger regime) all the way to the bottom. At this point in time, Luxembourg still does not have an operative merger control regime in place, which effectively means that the Commission could claim jurisdiction over any concentration below the EUMR thresholds on referral from Luxembourg irrespective of the competence or decision to refer or join the referral by other Member States.<sup>381</sup> The jurisdictional landscape that would emerge following such “repurposing” of Article 22 can be seen in Table 2 below. By way of example, the Commission’s potential competence is illustrated by reference to the applicable thresholds in two different Member States (MS 1 and MS 2). The Commission could establish competence under Article 22 over cases below the national thresholds of any affected *non-competent* Member State as long as it would choose to refer the case

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<sup>378</sup> See *supra* Part II.C.

<sup>379</sup> Opinion AG Emiliou, *supra* note 22, para 65 (criticizing the expansive interpretation of Article 22 in light of the “legal maxim *nemo dat quod non habet* (no one can give what they do not have).”)

<sup>380</sup> Such as Germany and Austria. See *supra* note 98.

<sup>381</sup> See *supra* note 197 and surrounding text. Although Luxembourg could clearly submit a referral in case of mergers with local effects according to the original rationale for the Dutch clause (1989), the situation is more complicated if a merger has cross-border effects and/or falls within the competence of other Member States, especially if some may prefer not to submit or join a referral to the Commission for centralized EU review. In such scenario, there are no clear principles developed in the case law, even after the Court of Justice’s *Illumina and Grail* judgment that does not directly govern this case, if and under what conditions Article 22 referrals may be possible (e.g. if a referral could be initiated by a non-competent Member State that lacks any merger control powers [rather than when it has a merger regime in place but does not have competence over the merger at stake] when the merger also affects competent Member States, or whether multiple filings at Member State level may be required by analogy to the secondary rationale for Article 22 EUMR (1997) when both competent and non-competent Member States are involved in a cross-border merger case that could be subject to referral).

(blue), and given such a referral, possibly also above the national thresholds of any affected *competent* Member State if it would decide to join the referral request in any given case (yellow).

**Table 2. Merger control competence in the EU after the “repurposing” of Article 22**

Competence	Thresholds in MS 1	Thresholds in MS 2
<i>Commission</i>	above EUMR	above EUMR
<i>MS 1 + MS 2</i>	above national	above national
<i>MS 1 + Commission</i>	above national	below national
<i>Commission</i>	below national	below national

The new Article 22 Guidance was set to bring about two structural changes with material impact on the operation of the referral mechanism: i) it would flatten the playing field and intensify competition among Member States to refer cases to the Commission; ii) it would create counterincentives and dull competition among Member States to legislate or enforce national laws targeting killer acquisitions to cover EU gaps.<sup>382</sup> The first move would significantly enhance the incentives of Member States, especially non-competent ones, to refer cases by changing their cost-benefit calculus. For instance, Member States that would be bound by their national rules to remain passive in case a merger would fall below their radar, they would seem to have nothing to lose by referring it to the Commission that would have to bear the full cost of an investigation as well as other indirect costs,<sup>383</sup> while they could still benefit from a Commission decision. In the face of the Commission, they could find a competition policy “guardian.”<sup>384</sup> By broadening the path for upwards referrals, the new Guidance would also dampen “regulatory competition” among Member States, at least the ones that have no merger control powers in this area yet.<sup>385</sup> That is, it could

<sup>382</sup> However, with the striking down of the “new” Article 22 by the Court of Justice in *Illumina/ Grail* and reliance of the Article 22 mechanism on “traditional” referrals, this is not true anymore. See *supra* Part II.C.

<sup>383</sup> Such as costs and implications in terms of reputation and relations with other Member States that may have jurisdiction over the case.

<sup>384</sup> Wilks, *supra* note 219 at 439.

<sup>385</sup> On the notion (and varieties) of regulatory competition and an application in the EU 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).

become more attractive for non-competent Member States to ad hoc refer killer merger cases to the Commission for review rather than take up the cost of expanding their national competence and pursuing these cases themselves. At the same time, competent Member States could feel the “pressure” to cooperate and join an Article 22 referral that the Commission is willing to accept, if many Member States are already on board or end up using this enforcement path, which could mean reduced incentives and less gain from exercising their own jurisdiction and running a parallel review of the merger. The two changes would have a mutually reinforcing effect.

In the parlance of game theory, the recalibration of Article 22 could make it a “dominant strategy” for (some) non-competent Member States to refer cases upwards regardless of what other players are expected to do.<sup>386</sup> But this fact in turn could influence the strategic choices (“best response”) and outcomes (“payoffs”) of competent Member States.<sup>387</sup> One could rationalize the changes pursued by the new Guidance through the logic of game theory and institutional economics. The Commission’s competence under the new Article 22 could serve as a basis for informal coordination among Member States and the Commission “when appropriate,” with the latter “taking the lead” to invite the former to cooperate and surrender their own review powers for cases better deserving scrutiny at EU level. The task would be attempting to achieve flexible and ad hoc harmonization of EU merger control wiping out any “decentralizing threats” posed by ever-expanding national merger laws to tackle digital mergers and killer acquisitions and internalizing externalities at the supranational level. On the positive side, by transforming the EUMR’s competence allocation from a “zero-sum” to a “non-zero sum” game, the possibility could arise for mutually beneficial cooperation for all Member States and the Commission.<sup>388</sup> The situation could be turned into a “positive-sum” game.<sup>389</sup> In this way, the noble aims of protecting

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<sup>386</sup> DIXIT AND NALEBUFF, *supra* note 372 at 59: “We say [this] is the dominant strategy in this situation [if] it is better in some eventualities, and not worse in any. In general, a player has a dominant strategy when he has one course of action that outperforms all others no matter what the other players do.” If a player has a dominant strategy, it is expected to use it. However, in games with sequential moves when one moves first, one has the opportunity to influence its rival’s behavior whose move is not a given and in some circumstances it may be best choosing something other than one’s dominant strategy. See *Id.* at 59-67.

<sup>387</sup> If only one side has a dominant strategy, this side plays it and “the other chooses its best response to that strategy.” *Id.* at 64.

<sup>388</sup> Unlike zero-sum games where one person’s gain is another person’s loss, in non-zero-sum games such as the famous prisoner’s dilemma “there are possibilities for mutual advantage as well as conflict of interest.” They are *non-strictly competitive* as there is “a mixture of conflict and concurrence of interests.” *Id.* at 14. The outcome of such games can be either positive or negative.

<sup>389</sup> 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. A positive-sum solution 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. For definitions and an application in a delegation of authority context, see Sarah Bonau, *A Case for Behavioural Game Theory*, 6 JOURNAL OF



competition, avoiding fragmentation of the internal market and improving the efficiency of EU merger control could be achieved. However, given that Article 22 referrals are discretionary and may be “partial,”<sup>390</sup> nothing could guarantee that.<sup>391</sup>

It is also possible on specific occasions that the outcome of the game could be “negative-sum” where the conflict of interest prevails over the mutual benefit given the individually rational options of the agencies involved.<sup>392</sup> For instance, a competent Member State could refuse to join a referral procedure and prefer to enforce national law in given circumstances in light of its self-interest to do so, even if the merger would have cross-border character, thus blocking a “one-stop” EU-wide review.<sup>393</sup> Or a non-competent Member State could wish to refer a case with cross-border impact to the Commission contrary to other non-competent Member States, which would formally limit the Commission’s review to the territory of the referring Member State, or could de facto lead to an EU-wide assessment besides the letter of the law and the legislative intent or in the absence of consent of the non-joining Member States.<sup>394</sup> In fact, several national NCAs have followed 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.”<sup>395</sup> From a game theoretic point of view, this could serve as a commitment device signaling the intent of these Member States not to refer mergers below their national thresholds, i.e., not to “cooperate” in such cases. Arguably conflicts could be limited as the Commission expressed its intent to avoid taking on

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GAME THEORY 7, 8 (2017); Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 THE JOURNAL OF POLITICS 998 (2009).

<sup>390</sup> See *supra* notes 203-204 and surrounding text.

<sup>391</sup> Cf Franck, Monti, and de Streel, *supra* note 103 at 24–26.

<sup>392</sup> Deakin, *supra* note 385 at 441, 443 (discussing the possibility of negative externalities from imperfect regulatory competition and highlighting that “outcomes are critically dependent on the way in which the rules of the game are designed.”).

<sup>393</sup> Parallel reviews are not only possible but have already been observed in practice. See Van Rompuy, *supra* note 341 at 342; Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 566–567, 570 (noting that “in Germany the general practice of the Bundeskartellamt is that a concentration must be subject to notification under German law before a referral under Article 22 of the Merger Regulation may take place. [...] This is why Germany did not join on time” the referral of Meta/Kustomer alongside 10 other Member States. This led to parallel reviews of the transaction by the Commission [clearance with onerous commitments] and Germany [unconditional clearance], with the latter taking into account the Commission’s findings in its assessment.).

<sup>394</sup> Usually the Commission obtains jurisdiction for the territory of the referring or joining Member States and “will not examine the effects of the concentration in the territory of Member States which have not joined the request unless this examination is *necessary* for the assessment of the effects of the concentration within the territory of the requesting Member States”, e.g. “where the geographic market extends beyond the territory/or territories of the requesting Member State(s).” See 2021 Staff Working Document, *supra* note 99, para 57; Article 22 Guidance, footnote 12; Völcker, *supra* note 146 at 1241.

<sup>395</sup> Levy, Rimsa, and Buzatu, *supra* note 146 at 376.

jurisdiction in cases of already notified transactions at national level.<sup>396</sup> However, given the wide discretion it retains, it could not credibly commit not to exercise its option to deviate from this rule or engage in a shadow EU-wide assessment of partially referred mergers. The Commission is also free to refuse a referral without providing any justification<sup>397</sup> even if it agrees with the geographic scope of the market (cross-border) or the size of the externalities (large) involved.<sup>398</sup>

In general, the open-ended design of the Article 22 referral mechanism cannot guarantee “spontaneous” cooperation and outcomes that protect the interests of all Member States. Arguably, the original “Dutch clause” can be rationalized in this framework as a safeguard to ensure that competition among Member States for merger control competence below the EUMR thresholds is “balanced” and “disciplined” 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).<sup>399</sup> The jurisdictional competition that would be introduced with the “new” Article 22 between the Commission and Member States, driven by self-interest, could lead to undesirable and inefficient outcomes. Under the new Guidance, there would be more opportunities for Article 22 to be overused or underused under “political pressure.”<sup>400</sup> The discretionary nature of the referral procedure could allow for political considerations to enter EU merger control and conflicts to arise depending on the profile and significance of a given merger for national and EU interests, and leave room for regulatory capture.<sup>401</sup> International conflicts could also occur if the Commission were keen to review on referral killer acquisitions of targets with no turnover yet in the EU although non-EU countries that could also have jurisdiction and a stronger material nexus to the case, choose not to enforce their merger laws or have a different view on the substance.<sup>402</sup> In cases where there is no presence in the EU and only forward-looking or projected effects on trade and competition, it might be debatable how broadly and legitimately the jurisdictional

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<sup>396</sup> 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*, including [...] the extent of the potential harm, and also the geographic scope of the relevant markets.” See Article 22 Guidance, para 22.

<sup>397</sup> In such cases, the referring Member State(s) would be left with “no help” or recourse. See Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 567 (noting that this would be “an outcome which goes against the very rationale of the Dutch clause”).

<sup>398</sup> BRITTAN, *supra* note 145 at 49–50.

<sup>399</sup> Cf Schwartz, *supra* note 150 at 653.

<sup>400</sup> Cf Carugati, *supra* note 260 at 6.

<sup>401</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE 3 (1971); GEORGE STIGLER 50 YEARS LATER, (Luigi Zingales et al. eds., 2022).

<sup>402</sup> Cf Burnside and Kidane, *supra* note 124 at 149–152.

notions of “effect on inter-State trade” and the “qualified effects doctrine” could be stretched to address killer mergers in accordance with international law principles (territoriality, comity).<sup>403</sup> Overall, the broad scope of the “new” Article 22 and its voluntary and informal procedures would render EU merger control more “strategic” in nature and more untransparent in application creating the risk of arbitrary and unaccountable decisions.<sup>404</sup>

It follows that the attempted “new” interpretation of Article 22 would be without firm grounding principles and out of step with the logic of the whole system of allocation of competences between the EU and Member States. On the one hand, the repurposing of Article 22 would transform the system of EU and national merger controls from one based on mutually *exclusive* jurisdiction (zero-sum game) to a complex web of exclusive (above EUMR thresholds) and latently *concurrent*, potentially competing or complementary spheres of competences in certain cases (below EUMR thresholds) with the Commission as the ultimate beneficiary of this complex arrangement (non-zero sum game).<sup>405</sup> The drive for centralization and the instrumentalization of Member States as decentralized market “monitors”<sup>406</sup> of suspect cases shows affinities to the DMA institutional framework where NCAs have a hybrid role of facilitating compliance and EU enforcement.<sup>407</sup> But in the DMA context the

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<sup>403</sup> *Id.* at 151–152; BRITTAN, *supra* note 145 at 10–16; Opinion AG Emiliou, *supra* note 22, paras 221–223.

<sup>404</sup> Effective judicial checks on Member States’ decisions to refer cases are not a given or uniform across Member States. See Levy, Rimsa, and Buzatu, *supra* note 146 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”). See also Eben and Reader, *supra* note 109 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 Guidance by NCAs). Once the Commission decides to accept a referral, its decision may be challenged before the EU Courts. However, 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.

<sup>405</sup> See *supra* Table 2 for an illustration.

<sup>406</sup> Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 570 (noting that the new Article 22 “would transform the NCAs into ‘market watchdogs’, not only for the benefit of their own jurisdiction, but also for the Commission’s benefit”, i.e. “the Commission seems to have ‘decentralized’ [or] ‘sub-contracted’ certain enforcement activities relating to market monitoring, 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”).

<sup>407</sup> Anna Tzanaki & Julian Nowag, *The Institutional Framework of the DMA: From Hybrid to Mature?*, in THE LAW AND ECONOMICS OF THE DIGITAL MARKETS ACT, 11–13 (Christian Ahlborn, Pablo Ibáñez Colomo, & William Leslie eds., forthcoming). “Enhanced

Commission's role is much stronger as it is the sole enforcer with exclusive competence and the ability to short-circuit supporting or enforcement activities by NCAs by taking the "enforcement lead" itself.<sup>408</sup> 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, discouraging parallel proceedings or partial referrals, when "one-stop" EU-wide review is appropriate.<sup>409</sup> In addition, the NCAs' monitoring function could help "detect" killer mergers<sup>410</sup> but it is questionable to what extent they have sufficient incentives to do so or may do it for the benefit of the Commission's enforcement.<sup>411</sup> Third, rationalized and mutually beneficial cooperation may not naturally arise without a disciplining structure resolving "prisoners' dilemma" situations and avoiding negative-sum outcomes.<sup>412</sup> Under the current design, Member States' individual incentives (not) to refer or (not) to monitor could dominate the process and dictate outcomes.

On the other hand, despite the much touted quest for effectiveness, the "new" Article 22 would not be a "systematic"<sup>413</sup> or effective solution to the main substantive and jurisdictional "deficiencies" of the EUMR turnover thresholds: both the "deterrence problem"<sup>414</sup> and the "externality problem" would remain not effectively addressed. For them to be resolved, it would entail that all anticompetitive merger cases deserving scrutiny at EU level are first detected and then referred to and accepted by the Commission. De facto coordination by the Commission or cooperation among NCAs (through invitation letters or information exchanges) could streamline and boost the performance of the Article 22 mechanism and facilitate identification of

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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.

<sup>408</sup> *Id.* at 12.

<sup>409</sup> See *supra* Part II.B and C.

<sup>410</sup> On top of other mechanisms with a similar function such as the reporting of digital gatekeepers' mergers under Article 14 DMA or any voluntary reporting by merging or third parties under the "new" Article 22 EUMR. See *supra* Part II.C.

<sup>411</sup> Looijestijn-Clearie, Rusu, and Veenbrink, *supra* note 239 at 570.

<sup>412</sup> Such result could be achieved through either centralization or NCA cooperation that could be enforceable in a setting of repeated interactions. See NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 180; Aumann, *supra* note 372 at 468.

<sup>413</sup> Cf Podszun, *supra* note 344 at 16. See Opinion AG Emiliou, *supra* note 22, para 167; Illumina and Grail v Commission, *supra* note 14, paras 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, [ineffective and] no longer apt to capture potentially harmful concentrations" which could be revised accordingly.

<sup>414</sup> On the suboptimal performance of the thresholds and the Article 22 mechanism in terms of deterrence, see *supra* Part I.D.

appropriate cases for an upwards referral.<sup>415</sup> However, given its discretionary character, strategic dynamic and limited geographic scope to the territory of referring Member State(s), enforcement under the “new” Article 22 would be liable to remain suboptimal, more “random” rather than principled and unlikely to be targeted only at the “right” deals. Externalities could be addressed in some but not necessarily all cases. Indeed, containment of the use of the Article 22 mechanism to “traditional” referrals does not fundamentally help address these issues either.<sup>416</sup>

If one takes into account the recent Towercast judgment,<sup>417</sup> the dynamics of merger control competence in the EU become even more complicated. With Article 102 TFEU in the game,<sup>418</sup> another “decentralizing threat” is present against the Commission’s efforts to ad hoc “centralize” merger enforcement via Article 22 referrals.<sup>419</sup> In particular, the potential competition between Article 22 EUMR and Article 102 TFEU as a basis for establishing jurisdiction over below-thresholds transactions would change the structure (options, strategies and payoffs of the players) although not the nature of the game (non-zero sum). This in turn could materially affect outcomes. With Article 102 and national enforcement in general as a credible enforcement alternative, there could be instances where Member States that would be entitled to trigger an upwards referral – such as Member States with no national competence under the “new” approach, or with national “call-in” powers under the “traditional” approach<sup>420</sup> – prefer not to refer a non-reportable killer merger to the Commission for review under Article 22 (i.e. an upward referral might not be their “dominant” or optimal strategy). Further, given this, other Member States that are non-competent or have national powers to review the same merger could have increased incentives to enforce Article 102 or national law in certain cases given the lack of an Article 22 referral they could have joined to enable centralized EU review. The result could be decentralized enforcement, based on ex ante national merger control (yellow) or ex post enforcement based on Article 102, or equivalently ex post national merger control, (green) as shown in Table 3 below. By comparison to Table 2 above where there was no Article 102 alternative (or ex post merger control below national thresholds), the Commission’s competence below the EUMR thresholds under Article 22 (yellow and blue) could be displaced by national enforcement. This could be true even for cases that would more appropriately deserve scrutiny at EU level (e.g. due to the size of externalities of a cross-border merger). The corollary is that desirable

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<sup>415</sup> See *supra* notes 90-93 and surrounding text.

<sup>416</sup> See *supra* notes 234, 250 and 254 and surrounding text.

<sup>417</sup> See *supra* Part II.C.

<sup>418</sup> Towercast directly governs the ex post application of Article 102 to mergers by NCAs or courts. But an equivalent effect could have enforcement at Member State level based on Article 101 TFEU or national merger laws that allow ex post scrutiny (e.g. “call-in” powers).

<sup>419</sup> Article 102 (and 101) TFEU can have even greater impact as it can be enforced not only by NCAs but also by third parties in private enforcement actions before national courts.

<sup>420</sup> Under the Commission’s 2021 Guidance or after the Court of Justice’s Illumina and Grail judgment respectively. See *supra* Part II.C.

coordination upwards could be even more difficult to achieve “spontaneously” as the outcome of the “non-zero sum” competence game given the individual incentives of Member States to (not) trigger or join Article 22 referrals. On the other hand, the threat of Article 102, or national merger control ex post, could induce the Commission to accept referral of cases that would merit EU scrutiny but could have rejected otherwise for its own self-interested reasons. Results could therefore be open but given the “first-mover” advantage and the greater number of Member States, it is likely that the decentralizing tendency and partial referrals would prevail when Article 102 and national enforcement is an option on the table.

**Table 3. Merger control competence in the EU after the “repurposing” of Article 22 EUMR given Article 102 TFEU<sup>421</sup>**

Competence	Thresholds in MS 1	Thresholds in MS 2
<i>Commission</i>	above EUMR	above EUMR
<i>MS 1 + MS 2</i>	above national	above national
<i>MS 1 + Commission</i> [MS 2 Art.102]	above national	below national
<i>Commission</i> [MS 1 + MS 2 Art.102]	below national	below national

Besides, the new Article 22 Guidance could have sweeping implications for other actors such as the merging parties and complainants. While the powers of the Commission and (non-competent) Member States would be reinforced, the rights of private parties would be weakened. The repurposing of Article 22 was thus perceived as institutionally “one-sided.”<sup>422</sup> Merging companies could no longer rely on the safe harbor that previously existed for transactions below EU or national merger control thresholds.<sup>423</sup> Any transaction could be referred upwards and be subject to EU review based on substantive factors whose assessment would be highly uncertain in killer merger and dynamic competition cases rather than clearcut jurisdictional criteria. The Commission’s commitment not to overuse or abuse its novel and potentially very broad

<sup>421</sup> Or equivalently ex post national merger control. For ease of exposition, the table only illustrates the Article 102 TFEU option as representative of national enforcement ex post.

<sup>422</sup> Podszun, *supra* note 344 at 25 (criticizing the institutional design under the new Guidance that “one-sidedly grants flexibility” to the Commission vis-à-vis the merging parties).

<sup>423</sup> *Id.* at 24–25.

“subsidiary power”<sup>424</sup> would neither be credible nor provide any “enforceable” reassurance to companies.<sup>425</sup> 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.<sup>426</sup> The “new” approach to Article 22 would essentially turn the thus far ex ante *mandatory* notification EU system to a *voluntary* and potentially ex post merger control regime.<sup>427</sup> Lack of notification would not obstruct the Commission from investigating or unwinding a merger if already completed.<sup>428</sup> However, this first-ever decoupling of notification from liability review under the EUMR would be more apparent than real as shadow filings à la DMA could be needed in practice to completely exclude liability.<sup>429</sup> In addition, there would be no other factors “objectifying” or disciplining ad hoc EU competence. For instance, in the UK that also has a voluntary merger control system, jurisdiction is limited by a turnover test or a share of supply test.<sup>430</sup> In other countries with unlimited ex post jurisdiction over mergers, notably the US, 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.<sup>431</sup> 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 recourse for merging (or third) parties and Member States that discipline, and level of institutional

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<sup>424</sup> Illumina v Commission, *supra* note 230, para 142. But overturned on appeal. See *supra* note 14.

<sup>425</sup> Opinion AG Emiliou, *supra* note 22, para 216: “when asked at the hearing [about the significant extension of its 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.”

<sup>426</sup> Opinion AG Emiliou, *supra* note 22, paras 203-213, 224-226; Illumina and Grail v Commission, *supra* note 14, para 210.

<sup>427</sup> On the relative qualities and 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).

<sup>428</sup> See *supra* note 271 and surrounding text; and 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](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872).

<sup>429</sup> See *supra* notes 272-275 and surrounding text.

<sup>430</sup> Podszun, *supra* note 344 at 21. Völcker, *supra* note 146 at 1228 (noting that the 1973 Proposal for a Merger Regulation provided for ‘call-in’ powers of the Commission subject to a similar safe harbor). See *supra* note 153.

<sup>431</sup> 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, 57 (2014).

control are lacking.<sup>432</sup> Judicial review of decisions to submit or accept Article 22 referrals is limited.<sup>433</sup> Similarly, third parties that could inform EU or national authorities of candidate cases for referrals have no formal rights in the Article 22 procedure.<sup>434</sup> The expansion of the Commission's competence in such a way would therefore be unbalanced and not subject to appropriate institutional checks and balances that are typical of the EU system or any rule of law system.

All these changes that could be brought into being by the “repurposing” of Article 22 would be nothing short of revolutionary. Remarkably however, with its 2021 Guidance, the Commission made use of “soft law”<sup>435</sup> to unilaterally make a “U-turn” in merger policy,<sup>436</sup> to remain the “central arbiter” of suspect killer acquisition cases while eschewing more substantial and cumbersome reforms of the EUMR that would involve negotiations with and among Member States with unknown or risky outcomes.<sup>437</sup> The practical effect was amending the EUMR in spirit if not in form by “rewriting” its competence allocation rules, raising legality questions<sup>438</sup> that the Court of Justice eventually confirmed.<sup>439</sup> Had the “new” Article 22 approach been upheld by the EU's highest court, the applicable competence allocation rule in the EU could have been made “flexible” potentially relying on the “effects doctrine” rather than turnover thresholds.<sup>440</sup> From that point of view, the EUMR's scope of application would become more similar to that of Articles 101 and 102 TFEU.<sup>441</sup> The nature and interaction between EU versus Member State competences would be changed and have already changed by the introduction of the “new” Article 22 approach but also after its

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<sup>432</sup> *Id.* at 56–57 (suggesting that the EU model of merger control procedures where there is “one agent and decisionmaker is compensated by extensive [but occasionally cumbersome] procedural rights for the parties”).

<sup>433</sup> See *supra* note 404.

<sup>434</sup> Cseres, *supra* note 219 at 419 (suggesting that third parties' participation in administrative procedures “functions as a complement to judicial review” adding transparency and accountability).

<sup>435</sup> Van Rompuy, *supra* note 341 at 343; Franck, Monti, and de Stree, *supra* note 103 at 25.

<sup>436</sup> Podszun, *supra* note 344 at 24–25.

<sup>437</sup> 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 Stree, *supra* note 103 at 48–49, 50–53.

<sup>438</sup> *Id.* at 25; Alan Riley, *Killer Acquisitions and Article 22: A Step Too Far?*, KLUWER COMPETITION LAW BLOG 1 (Aug. 30, 2023), <https://competitionlawblog.kluwercompetitionlaw.com/2023/08/30/killer-acquisitions-and-article-22-a-step-too-far/> (last visited Oct 16, 2023).

<sup>439</sup> *Illumina and Grail v Commission*, *supra* note 14, paras 215–216.

<sup>440</sup> Budzinski, *supra* note 161 at 124 (describing nine competence allocation rules, two of which are turnover thresholds and the effects doctrine).

<sup>441</sup> See *supra* Part II.C.



discontinuation, in the aftermath of Illumina/Graill and Towercast (i.e., with ex post national merger control and Article 102 TFEU as increasingly available enforcement options). Besides, the jurisdictional transformation would also bring in institutional revisioning. The Commission's vision of its competence under the "new" Article 22 had symbolic significance: it portrayed itself as the institutional actor with residual "gap-filling prerogative" in EU merger control. Thus, from being viewed as an "agent" or "coordinator" within the frame of its Article 22 authority,<sup>442</sup> the role of the Commission would be elevated to that of an *ad hoc* "trustee" of effective merger control enforcement in the EU.<sup>443</sup> An attempt 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.

### III. THE U.S. EXPERIENCE: DYNAMISM AND POLITICS IN COMPARATIVE PERSPECTIVE

Issues relating to dynamic competition and killer acquisitions are not unique to Europe. Competition and mergers in digital markets and high-tech industries have been high on the policy agenda of U.S. antitrust agencies, state attorneys general, and politicians.<sup>444</sup> 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.<sup>445</sup> A series

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<sup>442</sup> See *supra* note 219-220 and surrounding text.

<sup>443</sup> Wilks, *supra* note 219 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).

<sup>444</sup> House Judiciary Antitrust Subcommittee on Antitrust, Commercial and Administrative Law, Majority Staff Report, *Investigation of Competition in Digital Markets* (October 6, 2020): <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>; Federal Trade Commission, Hearing #3: Multi-Sided Platforms, Labor Markets, and Potential Competition (October 15-17, 2018): <https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumerprotection-21st-century> (including the issue of "Acquisitions of Nascent and Potential Competitors in Digital Technology Markets"); FTC Hearings on Competition and Consumer Protection in the 21st Century: *Public Comments of 43 State Attorneys General*, National Association of Attorneys General (June 11, 2019): [https://www.doj.state.wi.us/sites/default/files/news-media/6.12.19\\_FTC\\_Comments\\_Submission.pdf](https://www.doj.state.wi.us/sites/default/files/news-media/6.12.19_FTC_Comments_Submission.pdf) (proposing ideas for increased enforcement in technology markets); Spencer Weber Waller & Jacob E. Morse, *The Political Face of Antitrust*, 15 BROOK. J. CORP. FIN. & COM. L. 75 (2020); Geoffrey Parker, Georgios Petropoulos & Marshall Van Alstyne, *Platform Mergers and Antitrust*, 30 INDUSTRIAL AND CORPORATE CHANGE 1307 (2021).

<sup>445</sup> Hemphill and Wu, *supra* note 40; Melamed, *supra* note 40; Bilal Sayyed, *Actual Potential Entrants, Emerging Competitors, and the Merger Guidelines: Examples from FTC Enforcement 1993-2022* (2022), <https://papers.ssrn.com/abstract=4308233> (last visited Aug 31, 2023); Kamepalli, Rajan, and Zingales, *supra* note 56; Richard J. Gilbert & A. Douglas

of legislative, guidance and enforcement initiatives followed in response. First, the U.S. DOJ and the FTC proposed changes to reporting rules under the Hart-Scott-Rodino (HSR) Act<sup>446</sup> expanding information demands in ways that would resemble a “mini Second Request” and show similarities to EU and U.K. merger control rules focusing on areas of previous underenforcement or new priorities.<sup>447</sup> Among others, it was proposed that merging parties disclose in the premerger notification form: (i) the strategic rationale for their transaction, (ii) any horizontal or potential future overlaps, (iii) any prior acquisitions in the past ten years regardless of size.<sup>448</sup> The final rule limits reporting of prior acquisitions to five years and a \$10 million threshold as under the previous HSR Rules but extends also to the target.<sup>449</sup> Thus, conditional upon a notifiable merger, certain past non-notifiable transactions of the parties are made known to U.S. antitrust agencies. Second, the FTC issued Special Orders to five large technology firms (Alphabet (Google), Apple, Amazon, Facebook, and Microsoft), requiring them to provide information about prior acquisitions consummated between 2010 and 2019 and not reported to the antitrust agencies under the HSR Act.<sup>450</sup>

Third, the FTC changed its policy requiring all companies that proposed harmful mergers and are subject to a consent order to receive prior approval and give prior notice for any future transaction in at least the same relevant market for a

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Melamed, *Potential Competition and the 2023 Merger Guidelines*, 65 REV IND ORGAN 269 (2024).

<sup>446</sup> 15 U.S.C. § 18a.

<sup>447</sup> Joseph M. Rancour et al., ‘FTC and DOJ Propose Dramatic Expansion of HSR Filings’ Scope’, Skadden Publication (July 6, 2023): <https://www.skadden.com/insights/publications/2023/07/ftc-and-doj-propose-dramatic-expansion>.

<sup>448</sup> FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023): <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

<sup>449</sup> FTC, Final Rule: Premerger Notification; Reporting and Waiting Requirements (October 7, 2024): <https://www.ftc.gov/legal-library/browse/federal-register-notices/final-rule-premerger-notification-reporting-waiting-requirements>. The final rule also covers current or planned horizontal overlaps, including products under development that not yet generate revenue. These changes aim to identify areas of emerging, nascent or potential competition and screen for anticompetitive “roll-up” strategies or “killer” acquisitions.

<sup>450</sup> FTC Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020): <https://www.ftc.gov/news-events/news/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>. The FTC may gather information from businesses for research or non-enforcement purposes under Section 6(b) of the FCT Act. The purpose was “to evaluate whether the federal agencies are getting adequate notice of transactions that might harm competition” in the digital tech sector, such as “small prior acquisitions.” See Statement of Chair Lina M. Khan Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules (June 27, 2023): <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioners-slaughter-bedoya-regarding-proposed-amendments>.

minimum of ten years.<sup>451</sup> “If needed,” prior approval provisions may extend to product and geographic markets beyond those affected by the merger and are also imposed on buyers of divested assets in merger consent orders.<sup>452</sup> Fourth, the DOJ and the FTC have issued new Merger Guidelines updating their substantive assessment frameworks to reinvigorate merger enforcement as required by market realities and new economic learning (e.g., on killers acquisitions).<sup>453</sup> Relatedly, Guideline 4 addresses mergers that eliminate a potential entrant in a concentrated market, including actual and perceived potential competition, and Guideline 6 concerns acquisitions of nascent competitive threats by dominant firms that entrench or extend their dominant position.<sup>454</sup>

Fifth, besides policy changes, U.S. antitrust agencies have aggressively sought to block potential killer acquisitions, some successfully (Visa/Plaid) and some unsuccessfully (Meta/Within, Microsoft/Activision).<sup>455</sup> More radically, there have been public enforcement actions against consummated digital mergers that may qualify as killer acquisitions. The FTC challenged Facebook’s past acquisitions of Instagram and WhatsApp, that were not blocked ex ante, as part of a series of anticompetitive acts under Section 2 of the Sherman Act and Section 5 of the FTC Act,<sup>456</sup> requesting divestitures.<sup>457</sup> 48 state attorneys general brought parallel claims

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<sup>451</sup> FTC Rescinds 1995 Policy Statement that Limited the Agency’s Ability to Deter Problematic Mergers (July 21, 2021): <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter-problematic-mergers>. Prior practice, which required such provisions only when there was a “credible risk” of an unlawful merger on a case-by-case basis, had been abandoned “based on the presumption that the Hart-Scott-Rodino premerger notification requirements would suffice.”

<sup>452</sup> Statement of the Commission on the Use of Prior Approval Provisions in Merger Orders (October 25, 2021): <https://www.ftc.gov/legal-library/browse/statement-commission-use-prior-approval-provisions-merger-orders>.

<sup>453</sup> White House, Council of Economic Advisers, ‘Protecting Competition Through Updated Merger Guidelines’ (July 19, 2023): <https://www.whitehouse.gov/cea/written-materials/2023/07/19/protecting-competition-through-updated-merger-guidelines/> (referring to the paper on “killer acquisitions” in the pharmaceutical space as new economic evidence indicative of anticompetitive mergers stifling innovation and backing the guidelines’ revision).

<sup>454</sup> DOJ and FTC Release 2023 Merger Guidelines (December 18, 2023): <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines>. The final version of Guideline 6 incorporates and discusses in connection to nascent threats the concept of “ecosystem competition.”

<sup>455</sup> Note by the United States, *OECD Roundtable on Theories of Harm for Digital Mergers*, 8–11 (2023). The Visa/Plaid merger was abandoned shortly after the DOJ’s complaint.

<sup>456</sup> 15 U.S.C. § 2 and § 45. Section 5 of the FTC Act prohibits “unfair methods of competition” including violations of the Sherman Act as well as other types of conduct that cannot be reached by other antitrust laws.

<sup>457</sup> FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competitor After String of Failed Attempts to Innovate (August 19, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed>.

against these acquisitions under Section 2 of the Sherman Act and Section 7 of the Clayton Act.<sup>458</sup> Similarly, the DOJ and eight state attorneys general sued Google for monopolization that “consisted of neutralizing or eliminating ad tech competitors through acquisitions” in violation of Sections 1 and 2 of the Sherman Act and requested divestment of DoubleClick that it had acquired without challenge in 2007.<sup>459</sup>

These initiatives are seen not only as a renewed commitment to aggressive merger enforcement given an evidence-based reassessment of the economy but also as a manifestation of “politically-driven variations in enforcement.”<sup>460</sup> The desire to plug gaps is mixed with signs of partisanship<sup>461</sup> reflecting the broader agenda of the Biden administration and its politically appointed antitrust agency leadership.<sup>462</sup> In the era of Big Tech firms and high-stakes dynamic competition, U.S. merger policy and enforcement thus became more controversial and maximalist.<sup>463</sup> The new Merger Guidelines offer a prime example.<sup>464</sup> The change in enforcement philosophy was in

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<sup>458</sup> Complaint, *New York v. Facebook, Inc.*, No. 1:20-cv-3589 (D.D.C. December 9, 2020): [https://ag.ny.gov/sites/default/files/court-filings/state\\_of\\_new\\_york\\_et\\_al.\\_v.\\_facebook\\_inc.\\_-\\_filed\\_public\\_complaint\\_12.11.2020.pdf](https://ag.ny.gov/sites/default/files/court-filings/state_of_new_york_et_al._v._facebook_inc._-_filed_public_complaint_12.11.2020.pdf)

<sup>459</sup> DOJ Sues Google for Monopolizing Digital Advertising Technologies (January 24, 2023): <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>.

<sup>460</sup> William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POLICY INTERNATIONAL 129, 137 (2009); see also Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST LAW JOURNAL 601 (2014).

<sup>461</sup> William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST LAW JOURNAL 687 (2014) (analyzing the long-lasting negative effects of partisanship on competition policy and agencies’ effectiveness).

<sup>462</sup> Eleanor Fox, *The Battle for Reform of US Antitrust Law*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 179 (2023); Terry Calvani & Thomas Ensign, *The New Brandeisians Are Here*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 168 (2023); Rachel Brandenburger & Jill Ottenberg, *Looking Backwards to Move Forwards: The Role of History in Current US Antitrust Enforcement?*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 162 (2023); Zephyr Teachout, *Democracy and Law in the New American Antitrust*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 278 (2023).

<sup>463</sup> Kovacic, *supra* note 460 at 131 (warning that activity levels do not equate with quality or effectiveness of enforcement: “To say that an agency is doing a lot of things or only a few things does not tell us whether it is doing the right things.”).

<sup>464</sup> This is one of the most controversial recent changes with the draft version of the Guidelines criticized as “political”, “partisan”, “ideological.” See Carl Shapiro, *Why Dropping Market Power from the Merger Guidelines Matters*, PROMARKET (Aug. 7, 2023); Dennis Carlton, *Have the Draft Guidelines Demoted Economics?*, PROMARKET (Aug. 4, 2023); Daniel Francis, *Comments on the 2023 Draft Merger Guidelines* (2023), <https://papers.ssrn.com/abstract=4569469> (last visited Apr 21, 2024); Bilal Sayyed, *The Draft Merger Guidelines Abandon the Persuasiveness of Their Predecessors*, PROMARKET (Aug. 30, 2023); but see Eleanor Fox, *Tackling the Critics of the Draft Merger Guidelines*, PROMARKET (Sep. 5, 2023) (countering that “Antitrust law is political economy. As political economy, it has

tune with particular agency goals: changes in reporting rules and substantive guidelines, by increasing the reporting burden and uncertainty for merging parties, are said to aim at maximizing agency discretion and enhancing detection and deterrence of acquisitions without committing own resources or bearing the risk and cost of litigation.<sup>465</sup> Dynamism and politics have entered in U.S. merger control too but in different episodes and form. By comparison to the EU, one thing is striking: reportability thresholds are not an issue of debate or reform focus. Why so? And how is the U.S. system faring against the novel pressures? To gain comparative perspective, I examine the U.S. system with reference to three key issues found to be problematic in the operation of EU merger control in the context of killer acquisitions: (1) the deterrence problem and (2) the externalities problem due to the EUMR's notification thresholds, and (3) the limited institutional checks the Article 22 procedure as a solution to killer acquisitions entails, especially if its use is politically driven.

Let us start with the function of notification thresholds under U.S. merger control and how the U.S. antitrust system operates. The HSR Act, the filing statute, requires premerger notification and imposes a mandatory waiting period for transactions that exceed certain thresholds based on the size of the transaction and the size of the parties, as measured by their sales and assets.<sup>466</sup> The thresholds are adjusted annually, and the reporting obligation applies if the parties engage in commercial activity in the U.S. (nexus requirement).<sup>467</sup> The multiplicity of HSR Act's notification thresholds that rely not only on sales (turnover) of the parties but additional indicia (assets or transaction value) suggest fewer mergers may go undetected and less opportunities for parties to strategically plan their deals below the thresholds.<sup>468</sup> Thus, as a first approximation, although U.S. thresholds also create issues of limited detection and deterrence, these may be of a narrower scope than in the EU. But a fuller analysis requires other features of the U.S. system to be considered. For non-reportable mergers under the HSR Act, the “enforcement agencies may also consider other ways to detect small but potentially competitively significant acquisitions, such as collecting more information about *prior* unreported acquisitions, or requiring prior approval or

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always been political.”); Steven C. Salop, *The 2023 Merger Guidelines: A Post-Chicago and Neo-Brandeisian Integration*, 65 REV IND ORGAN 79 (2024) (suggesting that “The 2023 MGs integrate the goals of post-Chicago and Neo-Brandeisian approaches to merger analysis by placing greater weight on avoiding false negatives over false positives. Another important theme is that competitive effects analysis [...] should also account for the dynamic effects, including the impact on the likelihood of entry.”).

<sup>465</sup> Rancour et al., *supra* note 447; Hylton, *supra* note 30; Luke M. Froeb, D. Daniel Sokol & Liad Wagman, *Cost-Benefit Analysis without the Benefits or the Analysis: How Not to Draft Merger Guidelines*, 97 S. CAL. L. REV. POSTSCRIPT 1 (2023); Randy Picker, *A Brief for the Public?*, PROMARKET (Sep. 15, 2023); Froeb, Tschantz, and Werden, *supra* note 80.

<sup>466</sup> 15 U.S.C. § 18a.

<sup>467</sup> *Id.* See also FTC, *Current Thresholds*: <https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>.

<sup>468</sup> Wollmann, *supra* note 70.

prior notice for *future* mergers that might otherwise go undetected.”<sup>469</sup> In contrast to the EU’s sector specific approach under the DMA (set to be used in tandem with the ad hoc Article 22 referral mechanism), the U.S. agencies follow a more flexible, company-specific approach in using these ad hoc mechanisms to boost detection and deterrence.<sup>470</sup> Similarly to the EU, the U.S. federal agencies have other complementary tools and sources to address the lack of transparency created by the thresholds (e.g., complaints or agency intelligence, assisted by state authorities).<sup>471</sup> Reporting of the prior acquisitions of the target in the premerger notification form will further enhance the U.S. agencies’ ability to detect non-reportable, and possibly previously unchecked, transactions on a *systematic* basis.<sup>472</sup> Accordingly, there are steps taken on both sides of the Atlantic to mitigate the under-detection of small problematic deals, although the U.S. seems to have more latitude beyond the digital sector.

When it comes to deterrence, however, there are considerable differences between the two systems suggesting that underdeterrence could be less of a concern in the U.S. than in the EU. Under Section 7 of the Clayton Act, the substantive merger control statute, federal antitrust agencies can challenge any acquisition where the effect “may be substantially to lessen competition, or to tend to create a monopoly,”<sup>473</sup> including likely anticompetitive mergers “at their incipency.”<sup>474</sup> Section 7 prohibits all anticompetitive mergers without exception and without time limitation.<sup>475</sup> Critically, unlike the EU, federal merger enforcement is not dependent on prior notification, any thresholds or the size of the transaction or the target. Substantive liability is “effects-based.”<sup>476</sup> There is no safe harbor in U.S. merger control: one may escape ex ante scrutiny under the HSR Act but not necessarily liability under Section 7.<sup>477</sup> In fact, Section 7 long preceded the HSR Act and explicitly allows the U.S. antitrust agencies to investigate and challenge consummated mergers.<sup>478</sup> The same

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<sup>469</sup> Note by the United States, *supra* note 455 at 5.

<sup>470</sup> See *supra* notes 448-450 and surrounding text. The type of information required under the DMA, however, shows similarities to existing or proposed U.S. reporting rules.

<sup>471</sup> NOTE BY THE UNITED STATES, *OECD Roundtable on Start-Ups, Killer Acquisitions and Merger Control*, 13 (2020).

<sup>472</sup> See *supra* note 449 and surrounding text.

<sup>473</sup> 15 U.S.C. § 18.

<sup>474</sup> *United States v. du Pont*, 353 U.S. 586, 589 (1957).

<sup>475</sup> Note by the United States, *OECD Roundtable on Disentangling Consummated Mergers – Experiences and Challenges*, 2 (2022).

<sup>476</sup> Tzanaki, *supra* note 155 at 292.

<sup>477</sup> Anna Tzanaki, *Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy*, 18 JOURNAL OF COMPETITION LAW & ECONOMICS 168, 193–195 (2022).

<sup>478</sup> OECD, *Disentangling Consummated Mergers: Experiences and Challenges*, OECD COMPETITION POLICY ROUNDTABLE BACKGROUND NOTE, 16 (2022). Initially, “the HSR Act reduced significantly the number of post-merger investigations, but it did not eliminate all

federal law applies to unreportable and reportable mergers alike.<sup>479</sup> In the latter case, if a merger was reported and not challenged *ex ante*, this does not preclude the agencies from challenging it later.<sup>480</sup> Moreover, the federal agencies can challenge mergers *ex post* on the basis of Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act without restriction to thresholds or size.<sup>481</sup> In the U.S. system there is no priority of merger over antitrust rules or mutual exclusion of *ex ante* and *ex post* review.

The institutional setup and system of competence allocation is also different in the U.S. system. At the federal level, there are two agencies, the Antitrust Division of the DOJ and the FTC, that have shared competence over merger enforcement.<sup>482</sup> The federal agencies have unlimited jurisdiction under both U.S. merger and antitrust laws. State attorneys general (and private parties) can also challenge both consummated and unconsummated mergers either under federal or state laws.<sup>483</sup> State authority is not bound by federal jurisdiction or the HSR thresholds. There are no notification obligations at state level.<sup>484</sup> Historically, “state and federal antitrust law was perceived as operating in mutually *exclusive* arenas” but today “the jurisdictional

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such review.” However, after 2001 when the HSR thresholds increased substantially, and thereafter following their annual adjustment, post-merger challenges also increased.

<sup>479</sup> Note by the United States, *supra* note 475 at 2.

<sup>480</sup> *Id.* at 3 (“The HSR Act facilitated the Agencies’ ability to review and challenge unconsummated mergers, but it did not impose any limits on the long-standing ability to challenge consummated mergers. [...] In the U.S., the Agencies do not “clear” or “approve” mergers as part of HSR reviews. The HSR Act explicitly provides that an Agency decision not to challenge a merger immediately following an HSR review does not affect the Agencies’ ability to challenge that merger in the future.”).

<sup>481</sup> *Id.* at 2; EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 10–12 (2011).

<sup>482</sup> For mergers requiring HSR filing, “parties proposing a deal file with both the FTC and DOJ, but only one antitrust agency will review the proposed merger” following a “clearance process.” See *Premerger Notification and the Merger Review Process*: <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process>; U. S. Government Accountability Office, Report to Congressional Committees, ‘Antitrust - DOJ and FTC Jurisdictions Overlap, but Conflicts are Infrequent’ (January 3, 2023): <https://www.gao.gov/products/gao-23-105790>.

<sup>483</sup> Note by the United States, *supra* note 475 at 2; HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 648–650 (4th ed. ed. 2011); Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 115–116 (1994); Kovacic, Mavroidis, and Neven, *supra* note 431 at 72–73, 81–83.

<sup>484</sup> The National Association of State Attorneys General (NAAG) has created the Voluntary Premerger Disclosure Compact but with limited impact; federal agencies may cooperate with states and share federal filings on a voluntary basis. See Rose, *supra* note 483 at 118. The states have also jointly issued merger guidelines which are generally stricter than the federal ones. See NAAG Revised Horizontal Merger Guidelines (1992).



boundaries of state and federal antitrust are almost *concurrent*.<sup>485</sup> Indeed, the states have become “a de facto third national antitrust enforcement agency” since the 1980s stepping in to fill gaps when federal enforcement was seen as less aggressive.<sup>486</sup> Yet, federal and state jurisdiction operate largely independent of each other and their relationship is not mediated by any thresholds.<sup>487</sup> Below-threshold transactions are not an issue in the U.S. as both federal and state authorities can fully and unconditionally exercise their jurisdiction to pursue such cases. In the U.S. system of “dynamic federalism,”<sup>488</sup> there is potential competition for competence over merger cases both between the federal agencies as well as between federal and state authorities, contrary to the sharp division of competences based on the EUMR’s turnover thresholds. This setup seems closer to the more “dynamic” jurisdictional situation observed in the EU after the expansive “repurposing” of Article 22 EUMR. But there two critical differences. First, the interaction of federal and state competence is not strategic. Exercise of state authority or refusal to consent to federal authority does not prejudice or limit the possibility and the geographic scope of federal enforcement (e.g., in the territory of that state). Second, conflicts and disagreements may arise under such a system of dynamic federalism but those are resolved informally or via soft cooperation mechanisms.<sup>489</sup> No state or federal actor has formal veto powers or a first-mover advantage in this context although the upper hand lies with federal agencies that need not cooperate or share filing information with state attorneys general.<sup>490</sup> Notification under the HSR Act may be centralized but enforcement of any merger is not.

There are two takeaways from the preceding analysis. One, the federal reportability thresholds have merely a procedural function in U.S. merger control.

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<sup>485</sup> Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 INDIANA LAW JOURNAL, 431 (1983). As long as there are “sufficient harmful effects within the state”, states may pursue any anticompetitive practice or merger that occurred anywhere in the U.S. The commerce clause of the U.S. Constitution is not a barrier to state authority and federal preemption is not a substantial barrier either. See also 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) (discussing “dual” and “overlapping” federalism favoring exclusive versus concurrent state and federal enforcement of antitrust laws).

<sup>486</sup> Mark Crane et al., *60 Minutes with Robert M. Langer, Assistant Attorney General State of Connecticut, and Chair, Naag Multistate Antitrust Task Force*, 60 ANTITRUST LAW JOURNAL 197, 198 (1991).

<sup>487</sup> Hovenkamp, *supra* note 485 at 431–432. “Double jeopardy” due to the “combined application of federal and state antitrust laws” is therefore not excluded.

<sup>488</sup> Bergeron, *supra* note 169 at 518.

<sup>489</sup> See generally Rose, *supra* note 483; Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 ANTITRUST BULL. 281 (2009). See also Protocol for Coordination in Merger Investigations: <https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations>.

<sup>490</sup> See *supra* notes 483–484. In fact, there is no “multiple filings” problem in the U.S. as merger filing is not required at state level in contrast to the EU. See *supra* Part II.B.



Jurisdiction and enforcement under the U.S. system of merger competence allocation is fully dynamic by design. From that point of view, deterrence may not be as major an issue in the U.S. as in the EU. Two, there is parallel and cumulative application of merger and antitrust laws, ex ante and ex post control, and state and federal laws. The federal agencies having concurrent jurisdiction to review mergers impose a check on each other, and state merger enforcement acts as an additional deterrent to federal (non)enforcement.<sup>491</sup> Hence, the killer acquisition phenomenon may be less worrisome in the U.S. especially as enforcement in this area is increasing.

Turning to the externalities issue and the limited ability of EU merger control to internalize externalities of small mergers at the supranational level due to the EUMR's rigid thresholds-based competence allocation rules, this may also be of lesser concern in the U.S. context. The flexible jurisdictional delineation of competences does not necessarily interfere with the possibility of asserting jurisdiction and pursuing merger control enforcement at the appropriate, federal or state, level as long as enforcement is principled and disciplined.<sup>492</sup> As federal jurisdiction is "effects-based" and unlimited, without size restrictions or reference to notification thresholds or state authority, federal agencies are free to challenge mergers that operate across states and might have significant national impact, thus internalizing externalities at national level. The U.S. filing thresholds *as such* do not create an externalities problem or bar U.S. merger enforcement when appropriate based on formalistic criteria. Similarly, for international mergers that could be harmful in the U.S. but are subject to merger control laws of foreign countries, U.S. agencies are free to step up and challenge such mergers. Nevertheless, conflicts may arise given the parallel application of multiple laws in specific merger cases: e.g., due to substantive differences such as different market conditions<sup>493</sup> or due to the *absence* of jurisdictional limits on the exercise of concurrent merger competences.<sup>494</sup> For instance, there might be cases where U.S. state or foreign authorities with parallel merger control powers decide to pursue and block a merger that the federal agencies would not enforce or challenge. In theory, such outcome may

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<sup>491</sup> This is not to say that there are not potential problems from these parallel and overlapping jurisdictions, but (under)deterrence seems not to be one. See Rose, *supra* note 483; David A. Zimmerman, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L. J. 337 (1999); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEORGETOWN JOURNAL OF LAW AND PUBLIC POLICY 5 (2004); First, *supra* note 489; Elyse Dorsey, *Deepening Fault Lines: Diverging Antitrust Enforcement at the DOJ and FTC*, CPI NORTH AMERICA COLUMN AUGUST 2023 (2023).

<sup>492</sup> The flexible Article 22 referral mechanism precisely sought to address this problem in the EU but its use is so far unprincipled and undisciplined. See *supra* Part II.D.

<sup>493</sup> Damien J. Neven & Lars-Hendrik Röller, *On the Scope of Conflict in International Merger Control*, 3 JOURNAL OF INDUSTRY, COMPETITION AND TRADE 235, 235 (2003).

<sup>494</sup> Parallel application of multiple laws at international level and within federal states with two-tier legal structures leaves room for potential conflicting outcomes, especially if their application is based on the "effects" doctrine. See Kovacic, Mavroidis, and Neven, *supra* note 431 at 81–82, 84; Wolfgang Kerber, *An International Multi-Level System of Competition Laws: Federalism in Antitrust*, GERMAN WORKING PAPERS IN LAW AND ECONOMICS 13, 10–11 (2003).

occur even if the merger could have a stronger link to the U.S. or significant effects across states. U.S. jurisdictional rules and federal nonenforcement cannot constrain or preclude other authorities' (unlimited) merger competence and enforcement.<sup>495</sup> In practice, such cases may be limited: (i) with federal agencies having the upper hand within the U.S., state merger enforcement may be disciplined, and (ii) international cooperation may minimize conflicts with foreign authorities' exercise of their concurrent powers relying on "soft" principles instead of "hard" jurisdictional rules.<sup>496</sup>

Let us now look at the institutional safeguards in U.S. merger control vis-à-vis agency discretion and potential political intrusion that the EU's new Article 22 solution risks to germinate. As seen, politics and its influence on merger enforcement are a current theme across the Atlantic too. Indeed, politics can always be traced in the background of the law as any system is built on assumptions and priors.<sup>497</sup> The institutional structure of a system is therefore all the more important. But despite politicization tendencies, the existing institutional checks on agency decisionmaking seem robust in U.S. merger control.<sup>498</sup> Critically, U.S. enforcement agencies need to bring and win cases in federal courts to block a merger, which rationalizes their incentives as to which merger cases to prioritize, pursue and litigate, especially given their limited budgets and resources.<sup>499</sup> Victories before courts are harder than in the "home court" when an administrative agency can take decisions internally in the first instance, even if those may be appealed later in court.<sup>500</sup> The latter is the norm in the EU with the additional note that EU courts (that is one centralized court, the Court of

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<sup>495</sup> Damien J. Neven & Lars-Hendrik Röller, *The Allocation of Jurisdiction in International Antitrust*, 44 EUROPEAN ECONOMIC REVIEW 845, 485 (2000) ("the current framework of public international law allows for wide discretion in the assertion of jurisdiction").

<sup>496</sup> International law norms such as comity or territoriality and "local nexus" indicators are used to limit such instances. See Opinion AG Emiliou, *supra* note 22, para 223.

<sup>497</sup> See generally Faull, *supra* note 158; Robert Pitofsky, *The Political Content of Antitrust*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1051 (1979). Or as Pitofsky puts it, certain "political values" and "political consensus" that lie at the foundation of antitrust and may entail different societal tradeoffs.

<sup>498</sup> Theodore Voorhees, *The Political Hand in American Antitrust - Invisible, Inspirational, or Imaginary?*, 79 ANTITRUST LAW JOURNAL 557, 576 (2014) ("the basic dynamics of [U.S.] antitrust - the engines that drive the law forward - including the common law framework, the paramount role of judges, the powerful impact of economic thinking, and the existence of redundant enforcement mechanisms operate in combination to yield a body of widely accepted law that is largely impervious to political intrusion.").

<sup>499</sup> Kovacic, Mavroidis, and Neven, *supra* note 431 at 74 ("To block a proposed merger, the federal agency handling the case must obtain an injunction from a federal court. Unlike the [European] Commission, the two national agencies lack the authority to issue prohibition decisions for proposed mergers on their own accord. [...] The commitment of the parties to litigate disputed issues is a credible threat and an important influence on agency decisionmaking.").

<sup>500</sup> Unlike prohibition decisions, when it comes to clearance decisions and remedies, there is no or limited judicial review in the U.S. See *Id.* at 74-75.

Justice of the EU, that consists of the General Court and the Court of Justice) are generally more deferential to the Commission.<sup>501</sup> Exceptionally, the FTC may also argue merger cases before its administrative courts, but not the DOJ.<sup>502</sup> In such exceptional cases politics may more easily infiltrate agency decisions and lead to more limited judicial review.<sup>503</sup> On the whole, however, administrative discretion in the U.S. system, no matter how broadly defined by the agencies themselves, is exposed to strong discipline by courts and judges that are trained to apply and “create” the law.<sup>504</sup> The last word is with the courts. Notably, the U.S. system has been designed since the outset as “incentives-driven” fitting the broader institutional model of dynamic federalism within which it operates whereas the EU system relies on “rules” and extensive procedural “rights” to compensate for having one institutional actor as investigator and decisionmaker.<sup>505</sup> This philosophy was imprinted in the EUMR’s original design based on clearcut jurisdictional rules, certainty-oriented procedures, strictly divided EU and Member State competences and compartmentalized scope of application of merger and antitrust laws. If these key elements of its institutional structure are taken away, as attempted with the new Article 22 solution, the solidity of the whole edifice may be put at risk. Error correcting and gap filling in light of new scientific insights is legitimate<sup>506</sup> but any adjustments in the law need to “fit” with existing institutional structures to ensure the effectiveness of the whole enterprise.<sup>507</sup> New policies that expand and flexibilize merger enforcement would need to be

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<sup>501</sup> ANDRIANI KALINTIRI, EVIDENCE STANDARDS IN EU COMPETITION ENFORCEMENT: THE EU APPROACH 173–194 (2019) (noting that this “deference” entails “marginal review” of the Commission’s discretion regarding policy issues and complex economic assessments unless there is a manifest error of assessment, which has led to criticism that EU competition enforcement fails the principle of effective judicial protection”).

<sup>502</sup> Kovacic, Mavroidis, and Neven, *supra* note 431 at 74.

<sup>503</sup> Calvani and Ensign, *supra* note 462 at 170 (suggesting that “now cases increasingly [are] tried in the FTC administrative courts. [The FTC] almost always wins the cases that it brings before itself. [This or other recent] “changes in FTC process have successfully advanced Chair Kahn’s agenda—all without exposure to litigation risk or securing new legislation.”).

<sup>504</sup> Voorhees, *supra* note 498 at 561 (“the decision to give the federal judiciary primacy of place in defining the scope and meaning of antitrust law and charting the law’s path as the nation’s economic and commercial circumstances evolved plainly expressed Congress’s determination that antitrust should be kept free from political interference.”).

<sup>505</sup> Kovacic, Mavroidis, and Neven, *supra* note 431 at 56–57.

<sup>506</sup> Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L.J. 219, 236 (2000) (highlighting the law’s “evolutionary process” of renewal “with old ideas being cast off in the light of new learning” and “[t]he continuing evolution of merger law suggests that the institutional framework within which it is administered should be conducive to the correction of error as views change”; yet, “[t]he conservatism of the law is a useful corrective to the dynamism of economic theory.”).

<sup>507</sup> Oliver Budzinski, *An Institutional Analysis of the Enforcement Problems in Merger Control*, 6 EUROPEAN COMPETITION JOURNAL 445, 473 (2010) (discussing the implications of “a lack of “fit” between the “new” economic approach to merger control and the “old” institutional environment of the legal procedures” for enforcement effectiveness).

counterbalanced by institutions that adequately constrain and discipline any arbitrary exercise of power. In this light, if a broad reading and enhanced use of Article 22 EUMR were to take roots in EU merger enforcement, corresponding procedures and institutional checks could be found lacking.

#### IV.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.<sup>508</sup> But before proceeding with possible ways forward, let us take a moment to recapitulate the lessons learned from recent experience and the preceding analysis. First, dynamic competition and killer mergers especially in digital markets exposed the limits of “preemptive federalism” as a fixed system of governance and competence allocation in merger cases under which the EU operated since the adoption of the EUMR. The carefully devised and tightly fitting “puzzle” of regulatory “monopoly spaces” created by the EUMR’s turnover thresholds, delineating exclusive spheres of EU and national merger competence, had a historical and political purpose but is difficult to adapt to the dynamic challenges of today or predict to what extent it may effectively respond to the new concerns of tomorrow. Such boundaries are inherently artificial, moving the puzzle pieces around may still leave gaps, and regulatory monopolists may be tempted to over- or under-enforce merger laws if their exclusive power is institutionally unchecked or uncontested by other enforcement actors.

Recent developments in EU merger control could perpetuate these negative features. Non-reform of the thresholds in principle keeps the scope of EU and national monopoly spaces intact. The new Article 22 EUMR solution would open up space sideways for regulatory competition between the EU and Member States with the hope of ad hoc coordination of outcomes from the “center” when needed conditional on Member States’ cooperation but without corresponding institutional checks.<sup>509</sup> The political constraints the Commission faces vis-à-vis Member States could rationalize these choices as a practical and “path dependent” response to the urgency and strategic importance of the killer acquisitions issue for the EU as a whole but the record shows that the new status quo is neither an optimal nor a sustainable solution. As it could create winners and losers, the novel EU solution based on “no jurisdiction” referrals, or even its narrower version based on “call-in” referrals,<sup>510</sup> is unlikely to be a political equilibrium in merger enforcement or lead to systematic improvement. Jurisdictional shortcuts may work only if everyone is on board and has some assurances of not being

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<sup>508</sup> NASSIM NICHOLAS TALEB, *ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER* (Random House 2014). Taleb coined the term “antifragile” to denote things that not only persevere but gain from stress, disorder and uncertainty.

<sup>509</sup> See *supra* Part II.D.

<sup>510</sup> See *supra* Part II.C.

worse off as a result.<sup>511</sup> With its “repurposed” Article 22, the Commission was set to avoid a grand revision of the EUMR and its thresholds that would entail political renegotiation with Member States, but ad hoc coordination in individual merger cases would be basically subject to the same dynamics, i.e. negotiation with Member States.

Second, killer acquisitions and dynamic competition concerns exert pressure to move towards more “dynamic federalism” models and prompt institutional approximation among two-level competition law systems such as the EU and the U.S. 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.<sup>512</sup> By contrast, parallel and overlapping spheres of (federal and state) competences, in addition to the parallel and cumulative application of (merger and antitrust) laws, as in the U.S. system leave no gaps and provide more opportunities and alternatives for enforcement. Consistent outcomes are not guaranteed in every case, but insufficient deterrence and externality internalization are not characteristic problems of such system.<sup>513</sup> The new 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 such as killer mergers that demand flexible and “backup” solutions.<sup>514</sup> 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.<sup>515</sup> Soft cooperation mechanisms and repeated interactions may induce comity and self-restraint in the exercise and coordination of such unlimited and concurrent powers.<sup>516</sup>

Third, a “best of all worlds” situation may constitute 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).<sup>517</sup> Diversity and multiplicity of merger laws and enforcement actors may be coupled and

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<sup>511</sup> “Pareto improvements” reflect solutions where no one is worse off while at least someone is better off. “Potential Pareto” or “Kaldor-Hicks improvements” where there is a net gain for society and *potential* compensation from winners to losers, could be turned into the former with *actual* transfers. See [https://market.subwiki.org/wiki/Pareto\\_efficiency\\_criterion](https://market.subwiki.org/wiki/Pareto_efficiency_criterion) and Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 651 (1984).

<sup>512</sup> See *supra* Part I.D and Part II.D.

<sup>513</sup> See *supra* Part III.

<sup>514</sup> See *supra* Part II.C.

<sup>515</sup> 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 385 at 444.

<sup>516</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 180, 197; Burnside and Kidane, *supra* note 124 at 151; BRITTAN, *supra* note 145 at 16–17.

<sup>517</sup> Deakin, *supra* note 385 at 445.

balanced with discipline via judicial review, participatory and transparent procedures, centralized monitoring and ex post reviews of agency effectiveness.<sup>518</sup> 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.<sup>519</sup> Unbridled discretion or unquestioned centralization is not a necessary or unavoidable consequence of infusing dynamism in the law.

So, what is in it for EU merger control? These insights can be formalized with the help of economic analysis and in particular institutional economics and the economics of federalism to lay out alternative institutional options for the design of the EU system of merger competence allocation going forward.<sup>520</sup> 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, exposure to 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.<sup>521</sup>

Transaction cost savings can take different forms: for instance, achieving *scale economies* in the regulatory scrutiny and in the production of information during merger enforcement by extending the size of jurisdiction and allowing “one-stop” review, or achieving *legal certainty* and reducing information costs by limiting diversity in rules, uncertainty over their content and interpretation and unpredictability regarding enforcement outcomes, thus limiting firms’ need to “spend on search costs” and “to inform themselves about differences in the substantive laws of the Member

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<sup>518</sup> *Id.* at 443–445; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at chapters 6–7; Van Den Bergh, *supra* note 177 at 373; Monti and van den Boom, *supra* note 515 at 5, 7.

<sup>519</sup> Deakin, *supra* note 385 at 444–445, 454; Monti and van den Boom, *supra* note 515 at 7; Florian Wagner-von Papp, *Digital Antitrust and the DMA: In Praise of Institutional Diversity*, 12 JOURNAL OF ANTITRUST ENFORCEMENT 338, 344 (2024).

<sup>520</sup> See generally Van Den Bergh, *supra* note 177; Budzinski, *supra* note 161; Mason Jones, *supra* note 485; Posner, *supra* note 491; 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 155.

<sup>521</sup> Van Den Bergh, *supra* note 177; Budzinski, *supra* note 161; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at chapter 6.

States and the way in which these rules are enforced.”<sup>522</sup> However, a complete economic analysis needs to take into account the tradeoff between savings on *information costs* that uniformity and certainty of rules may produce and the likely *incentive costs* of “inefficient” rules.<sup>523</sup> The latter costs may come about by insufficiently discriminating or suboptimal rules given their deterrence effects on business conduct.<sup>524</sup> Inefficient rules that may be challenged in court may decrease incentive costs.<sup>525</sup> However, inefficient rules that involve administrative discretion or the risk of regulatory capture may increase legal uncertainty.<sup>526</sup>

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.<sup>527</sup> 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 abolishing filing requirements, hence no minimum jurisdictional “floor”, at Member State level<sup>528</sup> coupled with soft coordination of unlimited, concurrent competences as per the U.S. paradigm. The fourth option would be more *decentralization but with stronger centralized coordination and monitoring*, for instance through an organ such as the ECN,<sup>529</sup> that could resemble the institutional setup for the enforcement of EU

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<sup>522</sup> Van Den Bergh, *supra* note 177 at 366–367, 374, 382.

<sup>523</sup> *Id.* at 374 (these are “legal rules that may induce inefficient behavior or may simply ban efficient conduct” and noting that “lawyers [or advocates of ‘economizing’ harmonized or centralized solutions] might feel happy with certainty about the contents of inefficient rules”).

<sup>524</sup> See *supra* Part I.D.

<sup>525</sup> 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, and thus that “the parties to disputes” matter; 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); cf Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARVARD LAW REVIEW 641, 641 (1996) (concluding that “[a]though institutions that have survived cannot be too inefficient, evolution-toward-efficiency constrains but does not fully determine the institutions we observe”).

<sup>526</sup> Van Den Bergh, *supra* note 177 at 374.

<sup>527</sup> See *supra* notes 98–99, 252, 376 and surrounding text.

<sup>528</sup> An equivalent effect could be achieved by decoupling liability under Member State merger laws from any national filing requirements.

<sup>529</sup> See 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

antitrust rules under Regulation 1/2003.<sup>530</sup> Alternatively, the latter 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<sup>531</sup> and strengthening network governance.<sup>532</sup> This fourth alternative could be conceived as an extension of option two (promoting ad hoc decentralization via case referrals) or as a first step towards more systemic reform (full decentralization) depending on the long-term vision.

Measured against the criteria listed above, option one is unlikely to 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 while it could be vulnerable to capture by sectoral albeit not national interests.<sup>533</sup> Its main drawback is the rigidity in its design, which may give rise to incentive costs and imperfect internalization of externalities. On the positive side, its relative clarity and simplicity could enhance legal certainty and scale economies in EU merger enforcement. Option three 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 equally vulnerable to capture by special interests and prisoners' dilemmas 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.<sup>534</sup> The key downside of this option is that it seems politically infeasible and not fit to the EU institutional environment.

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most directly threatening to the Single Market's integrity. This includes cross-border cartel enforcement to antitrust cases with a European or global dimension."

<sup>530</sup> For related ideas in the context of EU antitrust or DMA enforcement, see respectively Monti, *supra* note 87; Wagner-von Papp, *supra* note 519 at 344.

<sup>531</sup> Such reform could be designed (i) to support the "one-stop shop" principle in its decentralizing variant, by revisiting or expanding the "vertical threshold" of the 2/3 rule to "assign competence to the *most impacted* Member State" even for mergers exceeding the principal 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 jurisdictional "floor" for national merger competence. See Budzinski, *supra* note 161 at 131.

<sup>532</sup> 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 87 and 90-93 and surrounding text.

<sup>533</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 179, 193–194; Van Den Bergh, *supra* note 177 at 381.

<sup>534</sup> See *supra* Part III.



Option two is the most realistic and option four the most ambitious but both constitute an improvement compared to the status quo. The main improvement 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.<sup>535</sup> This way any disagreements (differing preferences) among EU and national merger enforcement agencies could be fully transparent,<sup>536</sup> monitoring of agency enforcement and competence use by the general public could be feasible and the likelihood of capture or political decisions reduced.<sup>537</sup> In addition, the use of upward referrals could be rationalized in objective and predictable ways and preserved only for cases that involve multiple filings or have a cross-border impact.<sup>538</sup> Otherwise Member States could be encouraged to develop their own national jurisdictional and institutional competence, possibly with the help of the Commission and other more mature authorities, in line with the precepts of subsidiarity.<sup>539</sup>

Moreover, with the option of streamlined ex post centralization, externalities could be internalized when needed, transaction costs of various kinds saved, administrative discretion minimized, and prisoners' dilemmas avoided by limiting free riding incentives of non-competent Member States to refer cases upwards.<sup>540</sup> 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.<sup>541</sup> If NCAs are engaged as decentralized market monitors of merger cases that could be good candidates for upward referral,<sup>542</sup> information asymmetries between the regulator and regulated firms and the relative disadvantage of the Commission as further away from local actors and conditions could also be addressed.<sup>543</sup> Distortions of business behavior in the form of incentive costs could be reduced and institutional quality and effectiveness promoted by a predictable ex post correction of imperfect ex ante merger competence allocation

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<sup>535</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 174, 220, 230–231; Eben and Reader, *supra* note 109 at 311. 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 155 at 175; Cseres, *supra* note 219 at 419.

<sup>536</sup> Monti and van den Boom, *supra* note 515 at 4.

<sup>537</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 174.

<sup>538</sup> See *supra* Part II.B.

<sup>539</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 200.

<sup>540</sup> See *supra* Part II.D. Or possibly similar incentives of competent Member States that could trigger the Article 22 mechanism based on national “call-in” powers.

<sup>541</sup> Budzinski, *supra* note 161 at 126–127; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 174–176, 222–223; Van Den Bergh, *supra* note 177 at 378–380.

<sup>542</sup> See *supra* note 406 and surrounding text.

<sup>543</sup> Van Den Bergh, *supra* note 177 at 365–366, 370–371; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 168, 177–178, 180–182.

rules that is rationalized, targeted and balanced. Systematic underdeterrence would no longer need to plague EU merger control whereas overdeterrence concerns could be narrowed.<sup>544</sup> The relative weakness of this option, if upward referrals were to be strengthened and favored over decentralized options (downward referrals or national enforcement), could be the limited room for varying local preferences and experimentation.

Option four is more complex and its performance may depend on the actual design of such decentralized but 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<sup>545</sup> 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. Minimization of transaction costs and of destructive outcomes from regulatory competition could be realized 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.<sup>546</sup> Transparency and independence of the network vis-à-vis both Member States and the Commission could ensure its impartial and legitimized functioning and its relative insulation from capture or political pressures.<sup>547</sup> Centralized oversight and discipline and “peer pressure” could improve the system’s performance.<sup>548</sup> 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.<sup>549</sup> Information sharing through the network and decentralized market monitoring by NCAs could reduce informational asymmetries.<sup>550</sup> Such a system could be more open to mutual learning and experimentation and allow space for local preferences and evolving adaptation.<sup>551</sup>

With expanded decentralization – that could be based on sharpening ex ante exceptions such as the 2/3 rule to the EUMR turnover-based thresholds and ex post case referral rules that favor subsidiarity, combined with centralized monitoring and reinforced network governance and institutions that make agency competence likely and credibly to be exercised at the appropriate EU or national level – the discriminating

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<sup>544</sup> See *supra* Part I.D.

<sup>545</sup> Budzinski, *supra* note 161 at 131.

<sup>546</sup> Monti and van den Boom, *supra* note 515 at 6–7; Budzinski, *supra* note 161 at 138–139.

<sup>547</sup> NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 173–176.

<sup>548</sup> Monti, *supra* note 87 at 369–370.

<sup>549</sup> *Id.* at 370; NEVEN, NUTTALL, AND SEABRIGHT, *supra* note 155 at 222–223.

<sup>550</sup> See *supra* notes 542–543 and surrounding text.

<sup>551</sup> Monti, *supra* note 87 at 380, 382; Monti and van den Boom, *supra* note 515 at 6–

ability of the system and the effectiveness of enforcement could be improved with positive effects on business incentives. In a multi-level but “disciplined” system of many enforcement actors and opportunities,<sup>552</sup> 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 diversity could thus become an enduring strength of EU merger control.

## V.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. Turnover thresholds had two key redeeming virtues: excluding jurisdictional competition between the Commission and Member States, with rare and narrow exceptions under a system of case referrals, and being relatively simple and predictable in their application. As a side deal to that bargain, it was promised by the Commission that EU antitrust rules – previously instrumentalized to get Member States to agree on the enactment of the EUMR – were not to be used as basis for merger enforcement going forward. The result was an institutional setup much different to the now decentralized system of EU antitrust enforcement: transactions above the EUMR thresholds were subject to “centralized” mandatory ex ante review at EU level whereas below-threshold transactions were left to national merger control laws (if any).

With the rise of digitalization, that era of contained and certain EU merger enforcement seems long gone. “Killer” acquisitions in particular created demand for more “dynamism” and flexibility in merger control. The challenge for the EU was unique. Acquisitions of small, innovative companies by incumbent BigTech firms not only required that substantive assessment frameworks are updated to take into account innovation-driven competition in dynamic industries but also brought to daylight the deficiencies of the EUMR’s thresholds. Small-size, below-threshold transactions could escape EU merger review with near certainty even if of cross-border nature or pan-European significance. Systematic underdeterrence and suboptimal internalization of externalities were characteristic problems of the EU threshold-based merger competence allocation rules. The Commission’s response to the demand for more dynamism in the law was equally creative. Rather than reforming the EUMR’s thresholds that would entail renegotiation of the original “zero-sum” competence allocation bargain with Member States, it decided to unilaterally “repurpose” the referral mechanism under Article 22 EUMR to catch potential killer mergers. Under a “new” expansive approach to Article 22, EU jurisdiction could be “created” on referral by a Member State that would have no competence to review the case under its national

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<sup>552</sup> Salop, *supra* note 185 at 2670.

merger law. Although this option could offer a quick, targeted and pragmatic solution for expanding EU competence ad hoc when some affected Member State(s) were willing to refer the case upwards for EU review, without overburdening companies or the Commission with unnecessary notifications, it could also have wide ranging and potentially unintended side effects.

Most importantly, potential competition between the Commission and Member States for jurisdiction over below-thresholds transactions had been introduced for the first time. Two important implications follow. First, enhanced use of Article 22 would transform merger competence allocation in the EU into a “non-zero sum” game with complex interactions between EU and national institutional actors, unpredictable outcomes and the risk that EU merger control becomes more strategic and more political. The risk is real as Member States and the Commission have almost unlimited discretion to trigger or join (or not join) and accept or reject referral requests respectively. From that point of view, the EU’s “path dependent” Article 22 solution to the killer acquisition challenge is found wanting and perplexing: it would not effectively solve the deterrence or the externality problem of the EUMR’s turnover thresholds while it would give away on their virtues. Second, the move from a pure “rule-based” to a more “effects-based” regime of establishing jurisdiction under EU merger control could represent an attempt by the Commission to overcome its political constraints vis-à-vis Member States – the original principals delegating it merger control powers strictly above the thresholds. Its reconceptualization of Article 22 from a narrow exception to an “across-the-board” gap filling tool outside its exclusive competence (below thresholds) could be seen as recasting its role as an institutional actor to the effect that the Commission would be elevated to an ad hoc “trustee” of effective merger control enforcement in the EU. As such, the new vision would seek to approximate the powerful and central role the Commission has under primary EU antitrust law.

Radical as they might have been, these changes would not guarantee an improvement on the previous state of affairs. The discretionary Article 22 referral mechanism invites 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, increased enforcement based on Article 22 need not bring increasing returns on deterrence: self-interest, errors and uncertainty could beset (non)referral or (non)enforcement decisions. Complementary solutions to the killer acquisition issue such as the new reporting obligation under the DMA regarding digital gatekeepers’ mergers and the revival of Article 102 TFEU as a backup merger control tool could increase detection of suspect mergers, although not necessarily their conviction, and offer an “outside option” to Member States (or third parties) dissatisfied with the Commission’s centralizing tendencies over merger enforcement. Accordingly, the Commission’s gains in increased competence and administrative discretion could come at the cost of overdetering beneficial transactions and inducing rival Member State enforcement under expansive national merger laws or Article 102 TFEU. Against this backdrop, the EU’s novel Article 22 solution based on “no jurisdiction” referrals, or even its narrower version based on “call-in” referrals that remain permissible post-

Illumina/Grail, is unlikely to lead to optimal results. In turn, given the persistently uncertain jurisdictional situation facing below-threshold mergers in the EU, and the potentially conflicting interests of the Commission and various Member States that it has activated, the Article 22 solution in its present “uncoordinated” form is also unlikely to be a political equilibrium or an effective response 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, diversity, 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 judgment in Illumina and 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. With the “new” Article 22 as one option among many on the negotiating table, and traditional referrals based on Member State “call-in” powers playing in the background, pragmatism and politics may find new expression in the future.