

Revisiting EUMR Jurisdictional Thresholds

Potential Tools to Establish Jurisdiction over Killer Acquisitions and other Low-turnover Concentrations

In 2021, the European Commission issued its Guidance on the application of referrals under Article 22 of the European Merger Regulation, aiming to allow merger control over killer acquisitions and other low-turnover concentrations. This thesis analyses this approach, in particular its ability to capture relevant concentrations, its impact on market participants and its implications for the European Union merger control regime. The analysis shows that this jurisdictional tool has merits but comes at a cost. The flexible conditions for a referral under Article 22, namely regarding the local nexus and the concept of “making known”, allow the EU to assert jurisdiction over virtually every relevant low-turnover transaction, even opening the door to ex post merger review. However, the mechanism requires that competition authorities discover the concentration in the first place. The notifications introduced by the Digital Markets Act and the Foreign Subsidies Regulation mitigate this, but competition authorities should develop other ways of obtaining relevant information. The flexibility of Article 22 makes merger review unpredictable, as it requires companies to perform a legal and economic analysis beyond their capabilities and makes obtaining legal certainty costly. This use of Article 22 also faces challenges in courts, may raise international concerns and introduces a political aspect into merger review. By increasing the costs of merger control, the referrals could hamper competition. However, there are no clear alternatives to Article 22 referrals. This thesis suggests some improvements, such as the introduction of a single point of making known or the provision of detailed guidelines as to the referral conditions. However, in many cases, promoting legal certainty directly hampers the flexibility of Article 22. If the European Commission intends to use Article 22 referrals to tackle low-turnover concentrations, it should find the right balance between flexibility and legal certainty, while minimising the policy’s negative implications for the whole merger control system.