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Revisiting EUMR Jurisdictional Thresholds

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

Diplomová práce

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Datum vypracování práce (uzavření rukopisu) : 23. dubna 2023

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1. Introduction

A spectre is haunting Europe – the spectre of killer acquisitions.

On 26 March 2021, the European Commission ("**Commission**") published its Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases ("**Art. 22 Guidance**").[1] This marked the culmination of an ongoing debate[2] about a hypothetical enforcement gap in which incumbents, especially in the digital, pharmaceutical, and technological sectors, acquire potentially highly competitive undertakings before they develop a turnover large enough to be caught by the jurisdictional thresholds of EU Merger Regulation ("**EUMR**").[3] In a catchy slogan coined by an influential economic paper[4] some call these the "killer acquisitions".

This thesis examines the jurisdictional challenge posed by these so-called killer acquisitions and other low-turnover concentrations to EU merger control regime. In particular, it focuses on concentrations that could merit an in-depth investigation due to their anticompetitive potential but fall short of the current EUMR turnover thresholds since their competitive potential is not fully reflected in the turnover of one of the undertakings concerned ("**low turnover acquisitions**"), which is reportedly the crux of the perceived enforcement gap.[5]

Specifically, the research focuses on the current approach the Commission adopted in tackling this enforcement gap, its new Art. 22 referral policy under the Art. 22 Guidance. It aims to contribute to the budding discourse on this policy by analysing the mechanism of Art. 22 EUMR and by highlighting and discussing its characteristics from three different approaches, i.e., as regards to its ability to capture relevant low-turnover concentrations, its impact on market participants, and its impact on the broader perspective of EU merger control.

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1 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)

2 To that effect, see for example Opinon of Advocate General Kokott of 13 October 2022, C-449/21 *Towercast SASU v Autorité de la concurrence and Ministre chargé de l'économie* [2022] ECLI:EU:C:2022:777 para 48, which takes the existence of this gap for granted.

3 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

4 Colleen Cunningham, Florian Ederer and Song Ma, 'Killer acquisitions' (2021) 129 The Journal of Political Economy 649

5 See for example, Margrethe Vestager, 'Refining the EU merger control system (Speech at the Studienvereinigung Kartellrecht, Brussels, 10 March 2016)' <https://wayback.archive-it.org/12090/20191129204644/https:/ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en> accessed 22 December 2022 para 84, or Václav Šmejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' (2020) 7 InterEULawEast: J Int'l & Eur L, Econ & Market Integrations 1 p 4.

Based on this analysis, it provides an overview of the basic interplays and trade-offs inherent to Art. 22 EUMR, which should be considered when attempting to find a working solution to the jurisdictional challenges posed by killer acquisitions and other relevant low-turnover concentrations.

Chapter 2 the scope of this thesis is explained together with the approaches used for analysing the Art. 22 referrals. These are the ability of the referrals to establish jurisdiction over relevant low-turnover concentrations, the features of these referrals which impact the market participants, and the broader implications which the reformed referral practice spells for the system of EU merger control. Finally, it acknowledges some of the limitations of this thesis. Chapter 3 introduces the current EUMR jurisdictional framework, as well as the principles guiding EU merger control. Then, it discusses the potential enforcement gap, the economic theories behind it, as well as the different types of possible anticompetitive phenomena in this gap. In Chapter 4, the main task of this thesis, an in-depth analysis of the use of Art. 22 referrals to tackle the jurisdictional issues arising in connection with low-turnover concentrations, is performed. What follows in Chapter 5 is a brief discussion on some of the possible alternatives to the reformed referral policy. Finally, Chapter 6 concludes with the findings of this thesis, summarising the features of Art. 22 referrals which should considered.

2. Methods of research

This chapter outlines the methods of research used in this thesis, its analytical framework, as well as limitations of the chosen approach.

2.1. Scope of the thesis

This thesis provides only a partial analysis of the issues arising in EU merger control in connection with low-turnover concentrations. Notably, it does answer whether there in fact is an enforcement gap that needs to be bridged by expanding the jurisdiction of the Commission. As further explained in Chapter 3.3.4, the very existence of this enforcement gap is a matter of debate.[6] However, since there is a political will to tackle the perceived enforcement gap, as evidenced by the Commission's adoption of Art. 22 Guidance, this thesis presumes that there are compelling reasons to expand EU jurisdiction over the concentrations in question and asks instead about the features of this expansion.

Furthermore, this thesis does not tackle the jurisdictional issues arising in connection with other types of transactions, such as the question whether the definition of "concentration" should be expanded to cover acquisitions of non-controlling minority shareholdings.[7]

Importantly, the scope of this thesis is limited in the choice of potential solutions to capture relevant low-turnover concentrations. The decision to examine the Art. 22 referral mechanism is straightforward since it is the solution recently adopted into practice and it is currently the tool intended to establish jurisdiction over the concentrations in question. However, since the regime under Art. 22 Guidance is highly controversial,[8] the thesis briefly discusses potential substitutes to this regime.

While the possibilities are numerous,[9] a transaction value criterion is the most frequently discussed alternative,[10] heralded once by the Commission itself[11] and already adopted in Austria and

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6 See e.g., Commission Staff Working Document - Evaluation of procedural and jurisdictional aspects of EU merger control SWD(2021) 66 final para 134.

7 WHITE PAPER - Towards more effective EU merger control COM(2014) 449 final para 24-58.

8 Criticised recently e.g., by the U.S. Chamber of Commerce, see U.S. Chamber of Commerce, 'The EU's Significant Extraterritorial Expansion of Its Merger Control Regime Threatens Harm to National Governments, Consumers, and Businesses Both in and outside of Europe' <https://www.uschamber.com/assets/documents/Article-22-Paper-FINAL-12-19.pdf> accessed 22 December 2022.

9 For an overview of various thresholds see e.g., David Bailey and Laura Elizabeth John, *Bellamy & Child : European Union Law of Competition* (8th edn, Oxford University Press 2018) p 762-766.

10 Staff Working Document 2021 para 84.

11 See Vestager, 'Refining the EU merger control system (Speech at the Studienvereinigung Kartellrecht, Brussels, 10 March 2016)'.

Germany,[12] the latter being the biggest economy of the EU.[13] Another option discussed in more detail is the long dormant, but recently reaffirmed[14] application of Art. 102 of the Treaty on the Functioning of European Union ("**TFEU**")[15] to low-turnover concentrations.

Finally, it should be noted that even though this thesis incorporates a body of economic literature, it remains a legal, not an economic work. While it discusses various economic trade-offs in its analysis, it focuses mainly on the legal aspects of these mechanisms.

2.2. Analytical framework

The thesis aims to analyse various aspects of the referral mechanism and describe their interplay to provide an overview of advantages, disadvantages, and various trade-off that should be considered when turning Art. 22 EUMR into a tool to tackle killer acquisitions and other low-turnover concentrations. For this reason, it employs three approaches intended to describe various aspects of Art. 22 referrals. After analysing the jurisdictional tool from these three aspects, the thesis outlines the interplay of its various characteristic that need to be remembered.

2.2.1. Ability to capture relevant low-turnover concentrations

First criterion through which the instrument is analysed is its ability to capture relevant low-turnover concentrations. On the one hand, this focuses on its capacity to close the enforcement gap by establishing jurisdiction over as many potentially relevant concentrations as possible. On the other hand, an overly extensive expansion of Commission's jurisdiction over concentrations lacking a Community dimension can create additional issues, such as subjecting unproblematic mergers to Commission review, hindering competition and incurring unnecessary costs to market participants. Considering this, the first criterion is used to identify the characteristics of Art. 22 referrals that have an impact on their ability to filter out anticompetitive concentrations which would have otherwise slipped under the radar, while limiting the impact on innocuous concentrations, which should be left to proceed unhindered.

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[12] Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG).

[13] See Eurostat, 'Gross domestic product at market prices' <https://ec.europa.eu/eurostat/databrowser/view/tec00001/default/table?lang=en> accessed 22 December 2022.

[14] See Judgement of 16 March 2023, C-449/21 Towercast SASU v Autorité de la concurrence and Ministre chargé de l'économie [2023] ECLI:EU:C:2023:207 (CJEU).

[15] Consolidated Version of the Treaty on the Functioning of the European Union 2012/C 326/01.

2.2.2. Impact on market participants

The second approach is used to pinpoint the features of Art. 22 EUMR that have an impact, both negative and positive, on market participants, especially in terms of costs incurred by undertakings engaging in mergers and acquisitions. The analysis deals with those aspects of the Art. 22 EUMR that impact e.g., the legal certainty of market participants, the one-stop shop principle,[16] or the standstill obligation.[17] It explores how negative effects to market participants could be mitigated and describes which necessary trade-offs cannot be avoided when expanding EU jurisdiction beyond the turnover thresholds.

2.2.3. Broader perspective of EU merger control

The third and ultimate point of examination is that of a broader perspective of EU merger control. In the first place, it tackles the question whether the reformed Art. 22 referral practice is in accordance with EU law.[18] Furthermore, this approach analyses among others various collateral effects of the referrals, such as the political and international implications of the new Art. 22 policy, as well as the potential effect of the enforcement on competition in the market.

2.3. Limitations

As any novel topic, this thesis must at times overcome a lack of relevant literature. Although the potential tools to combat low-turnover concentrations have been hotly discussed, some aspects of the discussion still suffer from underrepresentation in academic literature. There are sources arguing about existence of a potential enforcement gap and the need to close it,[19] debating the introduction of Commission's Art. 22 policy,[20] as well as sources dealing with the economic proof of anticompetitive mergers[21] and substantive, as opposed to jurisdictional, legal aspects of these mergers, such as novel theories of harm.[22] However, sources dealing in detail with the various

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[16] As emphasised for example in EUMR rec 11.

[17] Art. 7 ibid.

[18] Currently reviewed by the Court of Justice in case C-611/22 P - Illumina v Commission. As of 24 April 2023, no relevant documents regarding these proceedings have been published.

[19] See e.g., Massimo Motta and Martin Peitz, 'Big tech mergers' (2021) 54 Information Economics and Policy 100868, or Rachel Brandenburger, Logan Breed and Falk Schöning, 'Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?' (2017) 31 Antitrust 28.

[20] See e.g., Salomé Cisnal de Ugarte, Mélanie Perez and Ivan Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' (2022) 6 Eur Competition & Reg L Rev 17, or Nicholas Levy, Andris Rimsa and Bianca Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' (2021) 5 Eur Competition & Reg L Rev 364.

[21] See e.g., Cunningham, Ederer and Ma, 'Killer acquisitions', or Sai Krishna Kamepalli, Raghuram Rajan and Luigi Zingales, 'Kill Zone' NBER Working Paper No 27146 May 2020, Revised June 2022 <https://www.nber.org/system/files/working_papers/w27146/w27146.pdf> accessed 28 February 2023.

[22] See e.g., Motta and Peitz, 'Big tech mergers' ch 3

implications of the reformed approach to low-turnover concentrations have only recently emerged, and they are still few in numbers.[23]

Furthermore, as the discussion is largely prospective, this thesis cannot benefit from a body of empirical research that would support some of its conclusions. Due to the relative novelty of Art. 22 Guidance, relevant case-law is limited and there has not yet been an empirical review of its effects. While the thesis does not include original empirical research, the author tries to remedy this lack of empirical data by adopting a doctrinal approach towards the topic of this thesis and where necessary, by using analogical research conducted by other authors. Nevertheless, some of the conclusions remain hypotheses whose validity will be confirmed only by future developments and researchers.

[23] For detailed discussion on Art. 22 referrals see e.g., A. Looijestijn-Clearie, C. S. Rusu and J. M. Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' (2022) 29 Maastricht Journal of European and Comparative Law 550, or Jan Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' (2022) 5/2022 Právní rozhledy 153.

3. Principles of the current merger control regime and the need for reform

This chapter sets out the framework of the EUMR, namely the current thresholds, the general principles and outlines the challenges undermining the current merger control regime.

3.1. Scope of EUMR

To discuss the possible reforms of the EUMR's jurisdictional tools, it is necessary to first understand the current jurisdictional rules contained in the regulation. Subject to exceptions explained below, the regulation applies to all (i) concentrations (ii) with an EU dimension.[24] However, only the concept of EU dimension is relevant for the purposes of this thesis, since the lack of it is said to allow relevant low-turnover concentrations to escape merger review.

3.1.1. EU Dimension and the turnover thresholds

The EU dimension is a concept intended to filter concentrations which bring about significant structural changes with impact to markets beyond the borders of one Member State ("**MS**"). As a rule, these should be reviewed solely at the EU level, as opposed to various national jurisdictions.[25] Since identifying this impact on a case-by-case basis is impossible, the EU instead uses a quantitative proxy in the form of turnover thresholds. These do not reflect the actual market impact of the concentration, but rest on the assumption that higher turnover of the undertakings concerned equals to greater economic resources being combined which in turn increases the likelihood of an economic impact on the internal market.[26] To put it simply, only concentrations that are "big enough" warrant the involvement of the Commission.[27]

In particular, an EU dimension is found when the combined turnover of the undertakings concerned exceeds one of two turnover thresholds. The first uses worldwide turnover to measure the overall size of the undertakings, EU turnover of at least two undertakings to establish a minimum link to the internal market, that is the local nexus, and the so-called two thirds rule to exclude concentrations that are purely domestic.[28] Where the first threshold is not met,

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[24] Art. 1(1) EUMR.

[25] ibid rec 8.

[26] Ulrich Dittert von Koppenfels, Daniel 'Jurisdiction - European Union Dimension' in Lisa Weinert and Christopher Jones (eds), *EU competition law : mergers and acquisitions* (2nd edn, Edward Elgar Publishing 2021) p 147.

[27] J. W. van de Gronden and Catalin Stefan Rusu, *Competition law in the EU : principles, substance, enforcement* (Edward Elgar Publishing 2021) p 326.

[28] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) para 125.

the second one can apply. Once again, it uses worldwide turnover, but since the threshold is lower, it adds turnover thresholds in at least three MSs for both the concentration and for at least two of the undertakings concerned. It also includes a two-thirds rule.[29] The local nexus in both thresholds serves to ensure that the reviewed concentrations have a relevant link to the EU's internal market and is a crucial part of jurisdictional frameworks worldwide.[30] Notably, a concentration of two undertakings where one generates no turnover will never satisfy any of the thresholds.

These turnover thresholds, while identifying the scope of EUMR by defining EU dimension, also serve as notification thresholds. Since notification of concentrations with EU dimension is mandatory,[31] the jurisdictional and notification thresholds are identical, as opposed to regimes like the US, where non-notified concentrations still fall under the jurisdiction of competition authorities,[32] or like the UK, where concentrations are subject only to voluntary notification.[33]

The bright-line quantitative thresholds provide simplicity, objectivity and straightforward application, but inevitably lead to cases where the allocation of jurisdiction between the Commission and the MSs is not appropriate.[34] For this reason, the EUMR uses the referrals which are a *"corrective mechanism"*[35] to *"fine tune"*[36] the system of EU merger control. The EUMR currently contains four types of referrals. While Art. 22 referrals are discussed in detail in Chapter 4, it is helpful to briefly present the other three.

3.1.2. Referrals to the Commission

Asides from Art. 22 referrals, Art. 4(5) EUMR allows parties to a concentration to request, by means of a reasoned submission, a referral to the Commission if they believe that the concentration should be examined at the EU level. Not all concentrations can use this procedure. First, the concentration must be capable of being reviewed by at least three MSs. It is of note that the words "capable of being reviewed" do not equal "being subject to mandatory review." This is relevant in MSs for example, which allow for the notification and review of below-the-threshold

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[29] ibid para 126.
[30] Local Nexus and Jurisdictional Thresholds in Merger Control DAF/COMP/WP3(2016)4/REV1 para 10-12.
[31] Art. 4(1) EUMR.
[32] Rhonda L. Smith, 'Mergers' in Deborah Healey, Michael Jacobs and Rhonda L Smith (eds), *Research handbook on methods and models of competition law* (Edward Elgar Publishing 2020) p 232.
[33] Sandra Marco Colino, *Competition law of the EU and UK* (8th edn, Oxford University Press 2019) p 469.
[34] Alison Jones and Brenda Sufrin, *EU competition law : text, cases, and materials* (6th edn, Oxford University Press 2016) p 1102-1103.
[35] EUMR rec 11.
[36] von Koppenfels, 'Jurisdiction - Referrals' p 169.

concentrations, such as Ireland.[37] Second, the Commission informs all MSs capable to review the concentration and if one of them refuses the referral, the case cannot be referred. If no MSs express their disagreement, the Commission takes over the case and, in line with the one-stop-shop principle, no MS can apply national law to the concentration anymore.[38] This ensures that cases with cross-border effects, but lacking EU dimension, are reviewed by the Commission, while ensuring that no competent MSs are deprived of their jurisdiction without consent. It also allows parties to such a cross-border concentration to avoid parallel merger control proceedings, save costs, and eliminate the threat of conflicting decisions made by national competition authorities ("**NCAs**"),[39] which is why some market participants prefer this procedure.[40]

3.1.3. Referrals to Member States

EUMR also provides for a transfer of jurisdiction in the other direction, from the Commission to the MSs, either before, or after a concentration with an EU dimension is notified.

Before a notification to the EU, the parties themselves may submit a reasoned submission under Art. 4(5) EUMR, informing the Commission that the concentration may significantly affect competition in a market within a MS presenting all the characteristics of a distinct market. The Commission transmits this submission to the relevant MS and unless that MS disagrees, the Commission refers the whole or a part of that concentration to that MS and only national law shall apply.[41] This allows for concentrations with an EU dimension to be examined on a national level, since there is no European interest to review cases which do not have an impact on a substantial part of the internal market and the Commission itself would be ill-suited to the substantive review of these concentrations.[42]

The second procedure, under the so called "German clause,"[43] allows for post-notification referrals to MSs. Subject to conditions, MSs can use this procedure to claim jurisdiction, where a concentration with an EU dimension might have an impact on a distinct market within that MS.[44] This way, national authorities may reclaim power where they feel their national interests might be

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[37] Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky'.
[38] Art. 4(5) EUMR.
[39] ibid rec 12.
[40] Joanna Goyder and Albertina Albors-Llorens, *Goyder's EC competition law* (Oxford EC law library, 5th edn, Oxford University Press 2009) p 432.
[41] Art. 4(4) EUMR.
[42] von Koppenfels, 'Jurisdiction - Referrals' p 179.
[43] Jones and Sufrin, EU competition law : text, cases, and materials p 1111.
[44] Art. 9(2) and 9(3) EUMR.

better protected at national level.[45] While the procedure is slightly different from pre-notification referrals to MSs, the result is the same, as the jurisdiction over the concentration in question passes wholly, or partly, to national, rather than EU authorities.[46]

3.2. Principles behind the framework

To understand the EUMR jurisdictional framework, it is essential to look not only at the procedures, but also at the underlying reasons and principles guiding the whole EU merger control regime.

In the words of Frank Easterbrook *"Antitrust is costly."*[47] This saying is even truer with multijurisdictional merger review. Companies pay lawyers, translators, economic advisors, administrative workers, and filing fees. Share purchase agreements need to contain elaborate risk assignment clauses and conditions. Various competition authorities employ dozens of workers, devote vast resources to investigation and conduct in-depth investigations. Recent data is hard to find, but in 2003, PwC calculated the median direct external costs of a multijurisdictional merger review to companies at € 821,000 and the median direct internal costs at 14 person-weeks for initial merger review. In both cases, the average values were much higher than the median, hinting that some merger review cases are substantially costlier to companies.[48] Indirect costs, such as opportunity costs, error costs, etc. are unlikely to be any less substantial. The ideal merger control regime should mitigate these costs as much as possible. The EUMR is built on several principles that promote this goal.

3.2.1. One-stop-shop principle

First, is the one-stop-shop principle. Simply put, this principle says that concentrations with an EU dimension shall be reviewed solely by the Commission and according to EUMR.[49] This principle was promoted by businesses to facilitate operations in the internal market[50] and was one of the key features ensuring the MS would support the adoption of EUMR.[51] Thanks to this principle, corporations that operate within multiple jurisdictions in the EU and would likely fall under multiple merger control regimes can avoid both the direct costs of parallel proceedings, such as the legal and filling fees, but also the indirect costs, such as the increased risk of contradictory

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45 Jones and Sufrin, EU competition law : text, cases, and materials p 1111.
46 Art. 9(3) EUMR
47 Frank H. Easterbrook, 'THE LIMITS OF ANTITRUST' (1984) 63 Texas Law Review 1 p 4.
48 Report on the Costs and Burdens of Multijurisdictional Merger Review p 7-8.
49 Art. 21(1)-(3) EUMR
50 Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 331.
51 Goyder and Albors-Llorens, *Goyder's EC competition law* p 430.

decisions. However, as discussed in Chapter 4, referrals are an important exception to this rule, despite the Commission's avowed respect for this principle in referral proceedings.[52]

3.2.2. Legal certainty

The principle of legal certainty requires that legal rules are *"clear and precise"* and *"their application must be foreseeable by those subject to them."*[53] The principle dictates that *"legislation enables those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly."*[54] In the context of EUMR, it follows that the *"authority having competence to examine a concentration must be able to be identified in a way which is foreseeable"*.[55]

In the area of jurisdictional thresholds, the International Competition Network ("**ICN**") provides several recommendations to enforce this principle. Jurisdictional thresholds, in the case of EU identical with mandatory notification thresholds, should capture only transactions with a material nexus to the jurisdiction,[56] which should relate to the activities of two parties or of the target company.[57] These thresholds should be clear and understandable,[58] objectively quantifiable,[59] and based on information readily available to the parties of the transaction.[60] The EUMR turnover thresholds meet all these recommendations, and they contribute to the goal of making *"a clear allocation between the interventions to be made by the national and by the Community authorities."*[61]

Since referrals, as a form of deviation from these bright-line thresholds, can impact legal certainty, the Commission sought to further clarify the regulatory framework by publishing documents explaining how the Commission interprets different concepts of the EUMR.[62]

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52 Commission Notice on Case Referral in respect of concentrations (2005/C 56/02) para 11.

53 Judgement of 13 July 2022, T-227/21 *Illumina, Inc. v European Commission* [2022] ECLI:EU:T:2022:447 (CJEU) para 173.

54 ibid para 173.

55 Judgement of 18 December 2007, C-206/06 P *Cementbouw Handel & Industrie BV v Commission of the European Communities* [2007] ECLI:EU:C:2007:814 (Court of First Instance) para 38.

56 International Competition Network, 'Recommended Practices for Merger Notification and Review Procedures' <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf> accessed 11 March 2023 p 3.

57 ibid p 4.

58 ibid p 5.

59 ibid p 6.

60 ibid p 7.

61 Cementbouw Handel & Industrie v Commission para 37.

62 See e.g., Art. 22 Guidance, Jurisdictional Notice, or Case Referral Notice.

3.2.3. Ex ante review

After foreseeably establishing exclusive jurisdiction of the Commission in line with the principle of legal certainty and the one-stop-shop approach, transactions are subject to an ex ante review. While ex ante review has its disadvantages such as the need to rely on predictions, rather than accurate ex post information about the merger's effects, it is a safer alternative, since unwinding some of the irreversible changes brought by a concentration may be akin to *"unscrambling the eggs"*.[63] Indeed, the preference for ex ante review has been one of the reasons behind the move from using Articles 101 and 102 TFEU to tackle anti-competitive mergers to the adoption of a separate merger control regime.[64]

To ensure that ex ante control does not become ex post during the proceedings, EUMR provides for a standstill obligation. A concentration with an EU dimension or a one that has been referred to the Commission under Art. 4(5) EUMR shall not be implemented before its notification or before the review has been concluded.[65] The Commission has been strict in interpreting this obligation[66] and its violation, the so-called gun jumping can be subject to considerable fines.[67] Moreover, recent trends show that the Commission has taken a more vigorous approach in enforcing the standstill obligation.[68]

3.2.4. Swift procedure

As the saying goes, time is money. Considering the disruption of merger transactions accompanying the standstill obligation, the EUMR puts emphasis on ensuring that merger control operates *"within deadlines compatible with both the requirements of sound administration and the requirements of the business world."*[69] Indeed, Art. 10 EUMR contains strict time limits and in the longest cases, the regular merger review may last up to 160 days. However, for cases not raising anticompetitive concerns, the Phase I proceedings last 25, resp. 35 working days from the notification at maximum.[70]

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[63] Andreea Cosnita-Langlais, 'Enforcement of Merger Control - Theoretical Insights for Its Procedural Design' (2016) 67 Revue économique 39 p 45.

[64] Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 317.

[65] Art. 7(1) EUMR.

[66] Ulrich von Koppenfels, 'Jurisdiction - Notification' in Lisa Weinert and Christopher Jones (eds), *EU competition law : mergers and acquisitions* (2nd edn, Edward Elgar Publishing 2021) p 695.

[67] Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 339.

[68] Philipp Werner, Serge Clerckx and Henry de la Barre, 'Commission Expansionism in EU Merger Control – Fact and Fiction' (2018) 9 Journal of European Competition Law & Practice 133 p 143.

[69] Cementbouw Handel & Industrie v Commission para 37.

[70] Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 341.

3.3. Potential enforcement gap

As explained above, the turnover thresholds serve as a proxy for the economic resources that are combined in a concentration. It is natural that these thresholds strike as less effective in cases, where these resources are not calculated in terms of money and turnover.

The debate on the efficiency of turnover thresholds was sparked by the 2014 Facebook acquisition of WhatsApp.[71] Since WhatsApp at the time generated revenue of around $ 10 million,[72] the concentration did not have an EU dimension. However, because Facebook bought the target company for $ 19 billion,[73] it raised questions about the reliability of turnover as a proxy for the economic resources held by WhatsApp.

This created the fear that some competitively significant transactions might fly under the radar of current merger review systems. Some call these *"pre-emptive acquisitions,"*[74] or the *"acquisitions of a nascent or potential competitor,"*[75] some distinguish the term *"killer acquisition"*[76] from the term *"nascent acquisitions"*.[77] The common trait is that at the time of the acquisition, the target company generates little to no turnover, but plays, or may develop into a significant competitive force.[78] The economic resources not captured by turnover may for example be user bases or data sets in digital technology, research and development projects in the pharmaceutical sector, IP rights, infrastructure, or other valuable assets.[79] Authors have proposed various theories as to the economic reasoning behind these transactions. While most of these can be ignored when examining the jurisdictional aspects of EUMR, this chapter nevertheless presents some of the prominent ones which highlight traits of these transactions that potentially play into the jurisdictional challenges.

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71 Richard Bunworth, 'Pre-Emptive Acquisitions in the Technology Sector: Is It Time to Reconsider the Turnover Thresholds?' (2021) 52 IIC - International Review of Intellectual Property and Competition Law 734 p 738.

72 Kalpana Tyagi, Promoting competition in innovation through merger control in the ICT sector : a comparative and interdisciplinary study (Springer. 2019) p 277.

73 Staff Working Document 2021 para 9, however, some sources quote different price, see e.g. Tyagi, *Promoting competition in innovation through merger control in the ICT sector : a comparative and interdisciplinary study* p 277, stating the purchase price at $ 22 billion. This may be due to different calculation used to valuate the consideration, which consisted of different types of assets, see Commission decision of 3 October 2014, M.7217 *Facebook/WhatsApp* [2014] C(2014) 7239 final (European Commission) footnote 2.

74 See e.g., Bunworth, 'Pre-Emptive Acquisitions in the Technology Sector: Is It Time to Reconsider the Turnover Thresholds?'

75 Kelly Fayne and Kate Foreman, 'To Catch a Killer: Could Enhanced Premerger Screening for "Killer Acquisitions" Hurt Competition?' (2020) 34 Antitrust 8 p 8.

76 See e.g., Cunningham, Ederer and Ma, 'Killer acquisitions'.

77 OECD, 'Start-ups, Killer Acquisitions and Merger Control' <https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> accessed 21 February 2023 p 9.

78 Art. 22 Guidance para 9.

79 ibid para 9.

3.3.1. Killer acquisitions and the pharmaceutical industry

Colleen Cunningham *et al*, coined the term "killer acquisitions" in their eponymous paper[80] for acquisitions in the pharmaceutical sector, where the incumbent company acquires the target company with the intention to discontinue its innovation projects.[81] Cunningham *et al* estimate that 5.3% to 7.4% of acquisitions of potential competitors in the pharmaceutical industry are undertaken with the intent to stifle competition.[82] This estimate, described as lower bound, translates to about 46 to 63 acquisitions per year.[83] More alarmingly, the paper finds that killer acquisitions are more likely to appear just below the US merger review thresholds.[84]

The pharmaceutical sector is well suited to this kind of research, since drug research is divided into quantifiable phases, there are well defined markets, as well as clearly substitutable products.[85] Nevertheless, despite, or perhaps because of the fact, that this analysis is not easily reproducible in other sectors, the term killer acquisitions has lost its original meaning and is today used as an umbrella term for various types of low turnover anticompetitive concentrations, many outside of the pharmaceutical industry.[86]

Since these transactions target companies before they develop a marketable product, in this case a drug, it is natural that the target companies generate no turnover. What is more, unlike technological platforms which often acquire a user base before generating any turnover, by the time of the acquisition these companies often do not have any commercial activities, let alone any customers. As the subsequent chapters will show, this might pose additional challenges when designing potential jurisdictional and notification thresholds.

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[80] Cunningham, Ederer and Ma, 'Killer acquisitions'.
[81] ibid p 1.
[82] ibid p 39.
[83] ibid p 40-41.
[84] ibid p 34-35.
[85] Mats Holmström and others, 'Killer Acquisitions? The Debate on Merger Control for Digital Markets' (2019) 2018 Yearbook of the Finnish Competition Law Association p 9.
[86] ibid p 2-3. Note that the Hart-Scott-Rodino thresholds in question are a form of a transaction value threshold.

3.3.2. Kill zones and the digital sector

Another sector often cited in connection with low turnover concentrations is the digital sector. Indeed, large technological companies have engaged in an aggressive acquisition spree with hundreds of transactions,[87] many of which had escaped both national and EU merger review.[88]

The existence of low turnover companies with disproportionate competitive potential in digital markets is caused by a range of factors. Among these can be the reliance on data, as a form of non-monetary asset, as well as the prevalence of "free" services where the users barter data instead of monetary compensation for the use of digital technology.[89] The Commission notes that digital services are often launched with the aim of building up a significant user base or data inventories before the service is monetised and starts generating turnover.[90]

There have been efforts to apply the theory of killer acquisitions into the technological sector as well. Gautier and Lamesch[91] have attempted to replicate the research of Cunningham *et al* on a sample of 175 GAFAM[92] transactions between the years 2015-2017. On this sample, they found that a vast majority of the transactions had indeed resulted in a discontinuation of the acquired brand.[93] However, the nature of technological industry did not allow them to distinguish discontinuations with an anticompetitive intent from pro-competitive transactions aimed at integrating the target's skilled workers, know-how, or intellectual property into the incumbent's operations, and their research could not prove the anticompetitive intent hypothesised by Cunningham *et al*.[94] Indeed, other authors have offered pro-competitive justifications for these transactions, such as the explanation that they aim to further develop the services of the target by integrating them into the incumbents ecosystems,[95] or the suggestion that these acquisitions serve as a form of technology transfer in an industry, where the transfers of intellectual property are

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87 Between 2008 and 2018, Google acquired 168 companies, Facebook acquired 71 companies and Amazon acquired 60 companies, see Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2020) 17 Journal of Competition Law & Economics 95 p 98.

88 Jason Furman, Unlocking digital competition : Report of the Digital Competition Expert Panel (HM Treasury 2019) p 92.

89 Luigi Zingales and Filippo Maria Lancieri, 'Stigler Committee on Digital Platforms: Policy Brief' <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> accessed 12 March 2023 p 29-30.

90 Art. 22 Guidance para 9.

91 See Axel Gautier and Joe Lamesch, 'Mergers in the digital economy' (2021) 54 Information Economics and Policy 100890.

92 GAFAM – Google, Apple, Facebook, Amazon, Microsoft.

93 Gautier and Lamesch, 'Mergers in the digital economy' p 2.

94 ibid p 10.

95 Peter Alexiadis and Zuzanna Bobowiec, 'EU Merger Review of 'Killer Acquisitions' in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' (2020) 16 Indian Journal of Law and Technology 64 p 69.

difficult to conduct through traditional transactions.[96] Another explanation, though discarded by Gautier and Lamesch, may be that predicting success in the technological market is difficult and many discontinued products simply do not live up to expectations.[97]

A theory of anticompetitive effects original to acquisitions in the technological sector was developed by Kamepalli *et al*.[98] Their paper describes the existence of "kill zones" in which the acquisitions of important potential competitors by incumbent digital platforms decrease new entry and investment in markets similar to that of the acquired competitor.[99] They argue that early adopters of novel technological solutions weigh the switching costs of adopting a new technology against the benefits gained by that technology, as well as against the expectation that the technology remains independent from incumbent digital platforms. The prospect of an integration into an existing platform decreases the benefits of adopting the innovative technology, since after a merger, its benefits will be available to anyone. The resulting unwillingness to adopt innovative technologies makes it difficult for new entrants to compete even if their technology is superior, which hampers competition.[100] Nevertheless, their findings are not exclusive to transactions falling outside the scope of merger review and the concept of kill zones is largely independent from the debate about capturing low turnover concentrations.

The economic theories behind these transactions should be discussed in relation to substantive assessment of mergers review. However, from the procedural point of view it is important to understand that digital markets provide for low turnover concentrations, which may differ from those in pharmaceutics. Besides target companies similar to those examined by Cunningham *et al*,[101] that is research and development companies that had not yet launched any products, the target companies in the digital sector often have a product and sometimes even a considerable customer base. After all, at the time of acquisition, WhatsApp had approximately 600 million users worldwide and between 50 and 150 million users within the European Economic Area,[102] but still generated marginal turnover.

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96 Luís Cabral, 'Merger policy in digital industries' (2021) 54 Information Economics and Policy 1 p 4-5.
97 Gautier and Lamesch, 'Mergers in the digital economy' p 10.
98 See Kamepalli, Rajan and Zingales, 'Kill Zone'.
99 ibid p 2.
100 ibid p 35.
101 See Cunningham, Ederer and Ma, 'Killer acquisitions'.
102 Facebook/WhatsApp para 84.

3.3.3. Other industries

Despite being frequently discussed in this context, pharmaceutics and digital technology sectors are not alone in suspicion of being underenforced. For example, in response to the adoption of the new Art. 22 policy, the Belgian competition authority has suggested that companies benefiting from state aid might warrant referrals to the Commission[103] and Commissioner Vestager voiced her worries about below-the-threshold concentrations in the sector of green innovations.[104] Another possible gap may arise from unconventional business models. A paper by Polk and Primec describes a merger of two leading German providers of coaching bus services that was able to evade merger review due to the companies using the internet to act as intermediaries between nominally independent transportation companies.[105]

Other authors argue even wider anticompetitive effects of below the threshold mergers. Wollman[106] examines below-the-threshold mergers following the US to the Hart-Scott-Rodino Act ("**HSR**"). While the US merger review does not rest on jurisdictional thresholds, the HSR introduced a mandatory notification obligation on the basis a modified transaction value threshold. In 2001, this threshold was amended so that below a transaction size of $ 50 million, no deal is subject to a mandatory ex ante notification requirement, while over $ 200 million, all deals must be notified. Between these thresholds, the size-of-person test applies, which, based on further conditions, requires minimum assets on the side of the target company. [107] Wollman finds that mergers exempt from mandatory notification, while still being within the jurisdiction of competition authorities, face a significantly lower probability of being reviewed. The data further shows that since the HSR raised the lower notification threshold to the transaction size of $ 50 million, there has been a disproportionate increase in horizontal mergers falling under these thresholds with most of these transactions occurring in the services sector.[108] The paper concludes that this comes with the lower likelihood of being subject to merger review, resulting in the so-called "stealth consolidation" of industries.[109] In a subsequent paper, Wollman estimates that from 2002 to 2016, these unreported

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[103] Levy, Rimsa and Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' p 375-376.
[104] Looijestijn-Clearie, Rusu and Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' p 564.
[105] Andreas Polk and Andreja Primec, 'Slovenian and German Competition Policy Regimes: A comparative analysis' (2017) 63 Naše gospodarstvo/Our economy 3 p 10.
[106] Thomas G. Wollmann, 'Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act' (2019) 1 American Economic Review 77.
[107] ibid p 80-82.
[108] ibid p 87-90.
[109] ibid p 91-92.

mergers constituted around 80% of all mergers in absolute numbers and 30% of all mergers adjusted for the value of transaction, amounting to $ 2.3 trillion.[110]

While Wollman's results are based on US data, it is not unlikely that similar processes occur in the EU as well. Wollman argues that stealth consolidation correlates with the lower likelihood of merger review for unreported transactions. This effect is even stronger within the framework of EU merger control, since the likelihood of antitrust investigations for low turnover concentrations has historically been minimal, with the potential Art. 22 procedure or the application of Art. 102 TFEU being theoretical threats, rather than actual deterrents.

3.3.4. Is there an enforcement gap?

However, it must be noted that despite the vocal criticism of this perceived enforcement gap, there is conflicting evidence on whether the current EUMR regime is in fact unable to deal with low turnover concentrations. After all, even the *Facebook/WhatsApp* merger which sparked the discussion about the enforcement gap had not escaped EUMR review, as it was referred to the Commission under Art. 4(5) EUMR.[111]

This uncertainty is well demonstrated by the Staff Working Document 2021. First, the Commission found that only a minority of respondents voiced fears about a potential enforcement gap with regards to high value low turnover concentrations.[112] Then, the Commission conducted research into over 3.500 unreported transaction that had occurred between 2015 and 2019, looking chiefly at the existence of the enforcement gap and on the hypothetical impact of a transaction value threshold.[113] In particular, the focus was on potentially problematic high value acquisitions of low turnover concentrations.[114] While the Commission found that a significant number of transactions valued over € 1 billion had a high value-to-turnover ratio, most of these transactions occurred in the real estate or real estate investment trusts sectors, that is sectors raising little antitrust concern.[115] The Commission then conducted a qualitative review of a subset of 744 transactions valued over € 1 billion, out of which it identified 87 transactions as having a sufficient local nexus and meriting a review. Notably almost half of these potentially relevant concentrations occurred in the digital

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[110] John M. Barrios and Thomas G. Wollmann, 'A New Era of Midnight Mergers: Antitrust Risk and Investor Disclosures' Becker Friedman Institute Working Paper January 2022 <https://bfi.uchicago.edu/wp-content/uploads/2022/04/BFI_WP_2022-50.pdf> accessed 28 February 2023 p 31.
[111] Facebook/WhatsApp para 11.
[112] Staff Working Document 2021 para 90.
[113] ibid para 99.
[114] ibid para 68.
[115] ibid para 103.

sector and more than 25% in the pharmaceutical industry.[116] However, only 30% of these transactions could be identified by a high value-to-turnover ratio, increasing to little over 50% when lowering the ratio.[117]

In other words, out of 87 potentially relevant transactions that could have warranted review, only 50% could have been detected by a disproportionate value-to-turnover ratio. The Commission determined that while there have been some cases avoiding scrutiny under the EUMR, this potential enforcement gap would not be bridged by the introduction of a transaction value threshold.[118] What is more, the Commission concluded that the referral system, strengthened by the expansion of Art. 22 referrals, is capable of mitigating the shortcomings of turnover thresholds and of bringing low turnover concentrations under the Commission's jurisdiction within the existing EUMR framework,[119] setting the scene for this thesis.

While time will tell whether this conclusion is valid, future discussions will also have to consider the quasi-merger control to be established by the Foreign Subsidies Regulation ("**FSR**").[120] Notwithstanding that the FSR regime prescribes mandatory notification for different transactions, i.e., those involving foreign subsidies,[121] and assesses them on a different basis, i.e., on the impact of those foreign subsidies on the internal market,[122] it is well possible that the transactions reviewed and the decisions rendered under FSR might capture and tackle the same transactions currently occurring in the enforcement gap.

3.4. Summary of the chapter

It is evident that the current EUMR jurisdictional thresholds serve as a crude, but simple and mostly efficient tool to identify concentrations warranting the attention of competition authorities. In this way, they allow for competition authorities to focus their resources on relevant transactions, while limiting the costs to businesses, all in line with the principle of legal certainty, the one-stop-shop principle, and in the form of swift, ex ante proceedings. Potential shortcomings of these blunt instruments are, at least in theory, mitigated by the referral mechanisms.

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116 This does not necessarily mean that anticompetitive concentrations are more likely to occur in those sectors, since their disproportionate represenation in this sample could be influenced by the Commision's enforcement priorities and its overal willingnes to intervene in these sectors.
117 Staff Working Document 2021 para 107.
118 ibid para 113.
119 ibid para 132-133.
120 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.
121 Art. 20(3) ibid.
122 Art. 25(3)(c) ibid.

However, there has been a growing fear about a potential body of anticompetitive transactions occurring below the jurisdictional and notification thresholds of most merger control regimes, leading to phenomena such as what economic literature calls killer acquisitions, kill zones and stealth consolidation.

Some have proposed the introduction of a transaction value criterion into the EUMR. Nonetheless the Commission has concluded the current EUMR framework is sufficient and that these transactions might well be captured by the increased use of Art. 22 referrals. The next chapter analyses the advantages and disadvantages this solution.

4. Capturing low-turnover concentrations through Article 22 of EUMR

This chapter deals with the Art. 22 referral policy as recently expanded by the Commission. First, it provides a brief overview of the Art. 22 procedure and its history, and it describes the emblematic *Illumina/GRAIL* transaction. Then, it examines the policy with respect to its ability to capture relevant low turnover concentrations, the impact it has on market participants, and with a view to the broader perspective of EU merger control.

4.1. Article 22 and its application to low-turnover concentrations

The predecessor Article 22 EUMR was introduced into the EU merger control regime in 1989 on the wishes of the Kingdom of the Netherlands, which at the time did not have a merger control system and wished to be able to refer relevant concentrations to the Commission for review, giving it the name "Dutch clause".[123]

The Article allows MSs to refer to the Commission any concentration that does not have an EU dimension. Due to its original intent, the criteria for a referral are different from other referrals. Unlike under Art. 4(5) referrals, which can be made only by parties to the concentration and only where the concentration would be notifiable in at least three national jurisdictions, any single MS can refer any concentration affecting trade between MSs and threatening to significantly affect competition within the territory of the referring MS. Interestingly, Art. 22 EUMR does not expressly require that when the MS has a mandatory pre-merger notification system, the concentration should be notifiable in order for a referral.[124]

In a nod to the swift procedure principle, the referral should be made within 15 working days of the date the concentration was notified or "otherwise made known" in MSs where notification is not required.[125] After the referral request, the Commission informs all MSs and the parties to the concentration, which triggers an additional 15 working days deadline within which all MSs can join the request. After its expiry, the Commission has further 10 working days to accept the referred jurisdiction with respect to all or some of the referring MSs.[126] To prevent gun-jumping, Art. 22 prescribes a standstill obligation from the moment the Commission informs the parties about the

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[123] Illumina v Commission para 96-97.
[124] Art. 22(1) EUMR.
[125] Art. 22(1) ibid.
[126] Art. 22(2)-(3) ibid, for case where the Commission refused jurisdiction with respect to certain MSs, see e.g. the proceedings in Commission decision of 15 November 2005, COMP/M.3986 *Gas Natural/Endesa* C(2005) 4468 (European Commission).

initial referral request.[127] However, unlike under the other referral mechanisms, the transfer of jurisdiction is not complete, as the MSs that did not join the referrals keep any jurisdiction over the concentration they might have had and the Commission's assessment and decisions relate only to the referring MSs' markets.[128] Finally, when finding that a concentration fulfils the criteria of Art. 22, the Commission may take initiative and "invite" MSs to refer the case to it.[129]

Considering that all but one MS have adopted a merger control regime since the introduction of the original Dutch clause, Art. 22 referrals have been seldom.[130] Indeed, the Commission has until recently discouraged referrals in cases where the concentration in question fell outside the jurisdiction of the referring MS.[131] However, the Commission has not forgotten the tool in its arsenal. In 2021, it concluded that this practice of discouraging had had a negative impact on the efficiency of referrals as an effective corrective mechanism[132] and later issued the Art. 22 Guidance.

In a *"spectacular U-turn,"*[133] the Art. 22 Guidance specifically encourages MSs to refer certain otherwise non-notifiable mergers in order *"to ensure the effective protection of competition in all markets affected by the transaction."*[134] To do so, the Commission targets transactions in which the turnover of one of the parties does not fully reflect its competitive potential, such as the acquisitions of startups, innovators, potential competitors, companies having access to assets such as big data and IP rights, or providers of "bottleneck" services or products. Following up on the debate about closing the potential enforcement gap by the introduction of a transaction value threshold, the Art. 22 Guidance does not forget acquisitions where the consideration received by the seller disproportionate to the turnover of the target, which could signify the disproportionate competitive potential .[135]

4.1.1. Model acquisition – Illumina/GRAIL

In practice, the Commission did not wait for the release of Art. 22 Guidance and even before announcing this shift in policy decided to test its novel approach on a transaction that would have otherwise fallen below the turnover thresholds of EUMR and most EU jurisdictions.

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127 Art. 22(4) EUMR.
128 von Koppenfels, 'Jurisdiction - Referrals' p 186.
129 Art. 22(5) EUMR.
130 Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 335.
131 Staff Working Document 2021 para 56.
132 ibid para 146.
133 de Ugarte, Perez and Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' p 20.
134 Art. 22 Guidance para 18.
135 ibid para 19.

On 21 September 2020, Illumina, Inc. ("**Illumina**") announced its intention to acquire sole control of the company GRAIL, LLC ("**GRAIL**"). Illumina is a US-based pharmaceutical company developing, manufacturing and selling equipment and technologies for the sequencing of human genome. As of 2023, it serves 140+ countries worldwide and operates *inter alia* 6 facilities in 5 MSs.[136] GRAIL is a US-based company developing early cancer detection tests. In 2019, the financial year preceding the acquisition, Illumina had a global revenue of $ 3.5 billion,[137] while GRAIL had no turnover at all, putting the acquisition outside of the scope of both EU and national merger control rules.[138] Nevertheless, the Commission received a complaint from a third party on 7 December 2020, and launched internal examination of the transaction. After almost two months of internal deliberations within the Commission and with various NCAs, the Commission invited NCAs to submit an Art. 22 referral in accordance with Art. 22(5) on 19 February 2021.[139] According to the Commission, it was only this invitation letter, issued almost 5 months after the public announcement of the transaction, that "made the concentration known" to NCAs and triggered the 15 working days deadline for a referral request,[140] despite the fact that the invitation letter contained predominantly publicly available information.[141]

Only after the invitation letter has been issued, the Commission informed the undertakings that the concentration might be subject to merger review. During subsequent weeks, the French competition authority referred the transaction to the Commission, several other NCAs joined, and on 19 April 2021, the Commission accepted jurisdiction over the concentration.[142] Illumina and GRAIL contested the Commission's competence to review the merger, but the Commission's actions were upheld by the General Court later in 2022.[143]

In the meantime, Illumina completed the transaction on 18 August 2021, to which the Commission responded with interim measures. Finally, on 6 September 2022, the Commission announced it had prohibited the acquisition.[144] As of the date of this thesis, there have been numerous appeals lodged

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[136] Illumina, 'Illumina @ a Glance Fact Sheet' <https://www.illumina.com/content/dam/illumina-marketing/documents/company/illumina-at-a-glance.pdf> accessed 13 February 2023.
[137] Illumina, 'Illumina Reports Financial Results for Fourth Quarter and Fiscal Year 2019' <https://s24.q4cdn.com/526396163/files/doc_financials/2019/q4/ILMN-Earnings-Release-Q419-and-FY19.pdf> accessed 13 February 2023.
[138] Illumina v Commission para 9-10.
[139] ibid para 11-12.
[140] ibid para 20-21.
[141] ibid para 232.
[142] ibid para 19.
[143] See ibid.
[144] European Commission, 'Mergers: Commission prohibits acquisition of GRAIL by Illumina' <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364> accessed 19 March 2023.

before the Court of Justice of the European Union ("**CJEU**") regarding the referral,[145] the breach of the standstill obligation and the imposition of interim measures,[146] and the prohibition of the merger.[147] Additionally, there have been reports of the Commission seeking the maximum fine for gun-jumping of almost EUR 0.5 billion.[148] In a latest development, in response to the Illumina's ongoing and costly fight against the Commission and reacting to the dramatic drop in Illumina's capitalisation, shareholders lead by Carl Icahn launched a proxy battle for the control of Illumina, arguing *inter alia* that the company should abandon the proposed merger in an effort to minimise damage.[149]

4.2. Critical analysis

This subchapter analyses the suitability of Art. 22 referrals to the task of capturing anticompetitive low-turnover concentration, namely considering its ability to filter out and capture relevant low-turnover concentrations, its impact on market participants, notably on their legal certainty, and its implications for the broader perspective of EU merger control regime.

4.2.1. Ability to capture relevant low-turnover concentrations

The ability of Art. 22 referrals breaks down into two aspects. It is both necessary to examine whether Art. 22 can establish jurisdiction over any low-turnover concentration meriting review, as well as to assess if the procedure allows for the identification of suitable candidates for referral out of a large body of previously non-notified transactions.

4.2.1.1. Establishing jurisdiction

At first glance it is evident, that the flexible nature of Art. 22 referrals allows them to establish jurisdiction over large body of low-turnover concentrations. Literal interpretation of Art. 22 makes it clear that a low-turnover concentration must meet four conditions for it to be Art. 22 referrable.[150] The first two narrow the scope only superficially, as they only require that the transaction in fact is a concentration within the meaning of EUMR and that this concentration falls

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145 Case C-611/22 P - Illumina v Commission and C-625/22 P - Grail v Commission and Illumina.
146 Case T-755/21 - Illumina v Commission and T-5/23 - Illumina v Commission.
147 Case T-709/22 - Illumina v Commission.
148 Reuters, 'Exclusive: Illumina to face EU fine of 10% of turnover over Grail deal -sources' <https://www.reuters.com/markets/deals/illumina-face-eu-fine-10-turnover-over-grail-deal-sources-2023-01-11/> accessed 1 April 2023.
149 Financial Times, 'Carl Icahn takes aim at genome sequencer Illumina over Grail deal' <https://www.ft.com/content/653c4d1c-d5cf-406c-b2e8-fa24ee453153> accessed 1 April 2023, and CNBC, 'Carl Icahn wants to bring back Illumina's ex-CEO 'immediately' as proxy fight intensifies' <https://www.cnbc.com/2023/03/29/carl-icahn-wants-to-bring-back-illuminas-ex-ceo-immediately.html> accessed 1 April 2023.
150 Illumina v Commission para 89.

below the turnover thresholds. Since all low-turnover concentrations meet these conditions by definition, only the other two, which serve as a local nexus of the Art. 22 procedure,[151] are of actual concern.

Under the first condition the transaction must affect trade between MSs. This criterion, unique in the context of EUMR,[152] be interpreted in line with the same concept used in Art. 101 and 102 TFEU, asks whether the transaction *"is liable to have some discernible influence on the pattern of trade between MSs"*.[153] In practice, this criterion is likely to be met in most cases of relevant low turnover acquisitions.[154] As Kupčík points out, the courts interpret this condition rather broadly and it is probable that any concentration threatening to significantly affect competition within any MS also has a discernible influence on the pattern of trade between MSs.[155] According to some, competition authorities might face difficulties in arguing this effect in case of low-turnover concentrations with no product,[156] which can be the case in true killer acquisitions. However, as demonstrated in the case of *Illumina/GRAIL*, this might well instead lead to a loosening of this condition, finding effect on trade between the MSs even when the target does not operate within the internal market at all.

The second criterion establishing the local nexus is similarly broad and provides only that, based on *prima facie* evidence, the concentration may have a significant adverse impact on competition in the territory of the referring state.[157] While the Commission lists some considerations to be assessed, such as the creation or strengthening of a dominant position of one of the undertakings concerned, or the elimination of an important competitive force,[158] these are just demonstrative and do not restrict the competition authorities in referring any potentially relevant cases falling outside of these examples. Indeed, some have even questioned whether a mere speculation of an adverse impact on competition might be sufficient to allow for a referral.[159]

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[151] Art. 22 Guidance para 17.
[152] Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt IV.2.1.
[153] Case Referral Notice para 43.
[154] von Koppenfels, 'Jurisdiction - Referrals' p 182.
[155] Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt IV.2.1.
[156] Looijestijn-Clearie, Rusu and Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' p 563.
[157] Art. 22 Guidance para 15.
[158] ibid para 15.
[159] Gavin Bushell, 'How Illumina-ting: the EU Merger Regulation and the brutal operation of power under Article 22 EUMR' <https://competitionlawblog.kluwercompetitionlaw.com/2021/04/20/how-illumina-ting-the-eu-merger-regulation-and-the-brutal-operation-of-power-under-article-22-eumr/> accessed 15 April 2023.

Despite the General Court's assurance that the referral conditions are *"very specific"*, *"clear and precise"*, and that they *"significantly restrict the Commission's freedom of action"*,[160] it is submitted that their ambiguous nature allows for a flexible application maximising the number of captured low-turnover concentrations. While it is up to the MSs to demonstrate the fulfilment of all the conditions, cases where the Commission refused a referral because it had not fulfilled the referral requirements have been scarce.[161] Indeed, in *Illumina/GRAIL*, the Commission found that both conditions were met even when the target company had no operations anywhere in the world, was based in the US, and was not operating or indeed even intending to operate on the same market as the acquiring company. Another room for interpretation lies in the lack of specification as to the moment in the transaction process at which the referral conditions should be fulfilled. An extensive interpretation might further increase the scope of Art. 22 EUMR.

Moreover, an Art. 22 referral is unlikely to be precluded based on the lack of competence on the side of NCAs. Since the Commission is not empowered to examine the competence of the referring NCAs,[162] it is up to national courts to prevent referrals made in contravention of national laws. However, national courts might be reluctant to intervene, as demonstrated by the *Illumina/GRAIL* transaction where the French Council of State rejected jurisdiction to review a referral,[163] while the Dutch Court of the Hague found itself competent,[164] but decided that the Dutch NCA would be precluded from joining a referral only had it been evident there would be no negative consequences to competition.[165]

Given the considerable discretion the Commission enjoys in accepting Art. 22 referrals,[166] the author finds it unlikely that the Commission would ever find itself prevented from reviewing a relevant low-turnover concentration it wished to review because this concentration would not fulfil the criteria set out in Art. 22 EUMR. This is further reinforced by the ability of the Commission to invite any of the 27 MSs to refer any concentration on which the Commission puts its sights.[167] In short, the very flexible and discretionary nature of the conditions means that

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160 Illumina v Commission para 171.
161 Such as the *Gas Natural/Endesa* transaction, see von Koppenfels, 'Jurisdiction - Referrals' p 183.
162 See *Illumina v Commission* para 110 and the case law cited therein.
163 Jérémie Marthan, Tilman Kuhn and Mark Powell, 'Latest developments on the Article 22 EUMR referral mechanism: the only thing that's certain is the uncertainty' <https://www.whitecase.com/insight-alert/latest-developments-article-22-eumr-referral-mechanism-only-thing-thats-certain> accessed 20 February 2023.
164 Levy, Rimsa and Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' footnote 135.
165 Looijestijn-Clearie, Rusu and Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' p 563.
166 von Koppenfels, 'Jurisdiction - Referrals' p 183, emphasised by the Commission in Art. 22 Guidance para 7.
167 Art. 22(5) EUMR.

the Commission can establish jurisdiction over any low-turnover concentrations it wishes to review, while ignoring those it considers innocuous.

4.2.1.2. Identifying candidates for referral

While the Art. 22 referrals appear well suited to establish jurisdiction over any low-turnover concentration the Commission decides to review, they are dependent on the ability to identify relevant low-turnover concentrations in body of unreported concentrations, many of them occurring outside of the EU. To understand how this affects the ability of Art. 22 EUMR to capture relevant low-turnover concentrations, the concept of "made known" is vital.

To comply with the general preference for strict deadlines in the EU merger control regime,[168] Art. 22 provides that in the case of non-notified concentrations the MSs shall make the referral no later than 15 working days from the moment the concentration was made known to them. However, EUMR does not specify when this moment occurs and how much information must be available to the MSs in order to trigger the deadline.

A concentration being "made known" could entail to a mere public announcement of a transaction, such as a press release, since, *"in line with the principle of sincere cooperation (Article 4(3) TEU) and having regard to the overall need for speed in merger control proceedings, it is up to the Member States to equip themselves with adequate enforcement tools allowing them to obtain, within a reasonable period of time, sufficient information on the case at issue."*[169] In effect, NCAs would have to develop tools to quickly identify potential candidates in a daily flow of publicly available press releases dispersed on the internet. While this might be possible in a MS's own local jurisdiction, it is hard to imagine this in the context of foreign-to-foreign mergers, certainly not without the development of automatic tool, possibly based on AI language models, allowing NCAs to identify relevant transactions among a multilingual body of thousands of press releases worldwide.[170] Nonetheless, even if MSs possessed these capabilities, it might be impossible to ascertain even the basic facts of the transaction necessary to make a reasoned referral request on the basis of a mere press release.[171]

Alternative interpretation dictates that the MSs should be actively informed about the concentration, to the extent necessary to allow an evaluation of the fulfilment of the referral

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[168] See Section 3.2.4.

[169] von Koppenfels, 'Jurisdiction - Referrals' p 185.

[170] To this effect, it might be interesting to follow the future results of the Computational Antitrust project, see Stanford Law School, 'Computational Antitrust' <https://law.stanford.edu/codex-the-stanford-center-for-legal-informatics/computational-antitrust/> accessed 16 April 2023.

[171] Bushell, 'How Illumina-ting: the EU Merger Regulation and the brutal operation of power under Article 22 EUMR'.

conditions. In practice, the Commission has embraced a very strict interpretation of the "made known" concept.[172] In *Illumina/GRAIL,* the concentration was made public months before the start of the proceedings, it was reported to the Commission by a third party, the Commission discussed the concentration with the parties to the transaction and with various NCAs, and only when the Commission subsequently invited NCAs to refer the transaction in accordance with Art. 22(5) EUMR, the concentration was deemed to be "made known" and the deadline was triggered.[173] The General Court has supported this strict interpretation and ruled that making known entails an active transmission to MSs of all the information necessary for them to assess whether the four conditions for referral have been met, though this conclusion is currently under appeal.[174]

A strict interpretation of the conditions promotes the capture of as many relevant concentrations as possible. Indeed, extensive demands on the amount of information make the 15 working day deadline unlikely to be triggered and if it is triggered, that the NCAs have sufficient information to assess the concentration.

It is also important to note that the 15 working day deadline is not in any way linked to the transaction process, allowing for a possibility of ex post merger control. The Commission itself has suggested it would not accept referrals in cases where more than six months have passed since the completion of the transaction, but the Commission does not rule out exceptions to these self-imposed restraints.[175] This, along with the recently reconfirmed ability to examine non-notified mergers under Art. 102 TFEU,[176] de facto complements the EUMR framework of ex ante merger review for notifiable concentrations with a possibility of ex post review of non-notifiable concentrations. In line with the original intent of capturing concentrations with cross border effects occurring in individual MSs without their own merger control system, Art. 22 EUMR further extends the temporal scope of merger control by allowing for a separate triggering of the deadline in individual MSs. A referral is not precluded even where the transaction had been notified and reviewed in some of the MSs, for example those like Germany or Austria, which do not rely solely on turnover thresholds, even though the Commission currently cites this as one of the arguments

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[172] See Art. 22 Guidance para 28 and Case Referral Notice footnote 43.
[173] See Section 4.1.1 for the timeline of the Illumina/GRAIL transaction.
[174] *Illumina v Commission* para 204, currently under appeal in C-611/22 P - Illumina v Commission.
[175] Art. 22 Guidance para 21.
[176] See *Towercast*, discussed in more detain in Section 5.2.

it would consider in refusing a referral.[177] Moreover, as seen in the *Illumina/GRAIL* case, not even the Commission's knowledge of a concentration has an impact on the run of the deadlines.[178]

In short, the Commission might obtain jurisdiction over a low-turnover concentration at any point before or during the transaction, as long as there is but a single MS in which 15 working days have not lapsed since the MS was actively informed about the concentration in detail, provided that the concentration fulfils the ambiguously defined conditions of Art. 22(1) EUMR.

4.2.1.3. Quasi-notification system

However, even with flexible conditions for a referral, with a strict reading of the concept of made known, and despite the fact that concentrations can be referred long after their completion or even after their public announcement, the Dutch clause has little use if competition authorities never actually become aware of relevant low-turnover concentrations. In other words, the referrals lack the system of mandatory notifications to which they serve as a corrective mechanism, and the ability of competition authorities to identify suitable candidates for an Art. 22 referral would be best reinforced by mandatory notification of all transactions.

While this would clearly go far beyond the original purpose of an "effective corrective mechanism," there has been a shift towards the decoupling of notification and jurisdictional thresholds in relation to certain transactions, and a discussion emerged regarding the introduction of a mandatory notification all transactions occurring in sensitive sectors of the economy.[179]

The biggest step in this direction is the recently introduced Digital Markets Act ("**DMA**") obligation of "gatekeepers" to notify the Commission of all concentrations involving other providers of core platform services or any other services in the digital sector, or enabling the collection of data.[180] While the list of gatekeepers does not yet exist at the time of the thesis,[181] it is likely that an acquisition such as that of WhatsApp by Facebook would fall within this obligation (even though in case of the concentration in question, the lack of awareness on the side

[177] Art. 22 Guidance para 22.
[178] See Section 4.1.1 for the timeline of the Illumina/GRAIL transaction.
[179] See e.g., Furman, *Unlocking digital competition : Report of the Digital Competition Expert Panel* p 12, Björn Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System' (2021) 5 Eur Competition & Reg L Rev 344 p 349 or Šmejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' p 7.
[180] Art. 14(1) 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) (Text with EEA relevance).
[181] The formal process of compiling the list will start in May 2023, see Christophe Carugati, 'The difficulty of designating gatekeepers under the EU Digital Markets Act' <https://www.bruegel.org/blog-post/difficulty-designating-gatekeepers-under-eu-digital-markets-act> accessed 16 April 2023.

of NCAs was not an issue). The DMA expressly states that the Commission shall share information from these notifications with NCAs, which might use this information to request an Art. 22 referral.[182]

Another quasi-notification system is established under the FSR, targeting acquirers benefiting from significant government subsidies.[183] Unlike the DMA, the FSR contains its own merger review procedure.[184] Since the Commission reviews the concentrations on a different basis,[185] the FSR does not preclude the same concentration from being reviewed under the EUMR.[186] While the FSR only mentions cases where a concentration is notifiable under both the FSR and the EUMR[187] and does not contain the same information sharing provision as the DMA, it is likely that the knowledge of a concentration notified under the FSR might help the Commission in identifying ideal referral candidates.

It seems that though both regulations serve a different purpose, information obtained by DMA and FSR notifications might help the Commission "cherry pick" relevant low-turnover concentrations suitable for a referral. However, both instruments still provide competition authorities with only partial information on relevant low-turnover concentrations in certain sectors. Short of outright mandatory notification of all concentrations around the world or the creation of investigatory branches within competition authorities devoted to scouring publicly available sources of information on M&A activity, there are limited options on how to further increase the scope of concentrations that get caught in the net. One option is to incentivise third party submissions, such as was the one that alerted the Commission about the *Illumina/GRAIL* acquisition in the first place. Indeed, it appears that the Commission is keen on creating a framework to facilitate these submissions, which are a cost-efficient way to shift the burden of discovering relevant low turnover submissions to those in whose interest their discovery is, such as competitors of the transaction parties.[188] Another option is to promote cooperation between

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182 Art. 14(4)-(5) DMA.

183 Art. 21 FSR.

184 Art. 25 ibid.

185 Art. 25(3) ibid.

186 Art. 44(1) ibid.

187 ibid rec 39.

188 See Art. 22 Guidance para 25 and European Commission, '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" - Frequently Asked Questions and Answers (Q&A)' <https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf> accessed 16 April 2023 pt IV.

various competition authorities and information sharing on a transnational, as well as transatlantic basis, for example through the European Competition Network ("**ECN**").[189]

4.2.2. Impact on market participants

While it is clear that the Art. 22 referrals are capable of establishing jurisdiction over relevant low-turnover concentrations, the flexibility of the Dutch clause comes at a cost.

The most notable is the impact on the principle of legal certainty. In a narrow sense, this principle demands that *"legislation enables those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly"*, [190] and that the *"authority having competence to examine a concentration must be able to be identified in a way which is foreseeable"*.[191]

Whereas turnover thresholds allow for a rather straightforward identification of the NCAs, the Commission, or no one, as the competent authority, as well as the extent of obligations, such as the notification obligation and the standstill obligation, that are imposed on individuals, the Dutch clause allows for neither. On the contrary, the Dutch clause introduces a level of uncertainty in transactions which would have previously been thought outside of the scope of merger review. In the past, this was mitigated by the Commission's practice of discouraging referrals from states where the case would have fallen outside of the scope of national jurisdictional rules. However, with the new approach, it is difficult to predict, whether a transaction will be subject to merger control, which would increase the costs of the transaction as it would require lawyers, economists, collection of information for the competition authorities, and the expensive time of senior management.[192] It also makes it necessary to account for the risk of delays or, in the worst case, of a prohibition of the transaction, further increasing the transactional costs in M&A deals.[193]

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[189] In line with the active cooperation envisioned by European Competition Authorities, 'Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation' <https://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf> accessed 16 April 2023.

[190] Cementbouw Handel & Industrie v Commission para 38.

[191] ibid para 38.

[192] Paul K. Gorecki, 'Too Many Unnecessary Merger Notifications in Ireland?' (2011) 7 Journal of Competition Law & Economics 651 p 652.

[193] For an overview of the practical implication of Art. 22 referrals on M&A practice see, e.g. Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt IV.2.5, or Lucy Frost, 'EU Illumina/Grail ruling creates another regulatory hurdle for dealmakers' (2022) International Financial Law Review.

4.2.2.1. The conditions for a referral as a means of establishing local nexus

This uncertainty is intensified by the rather broad delineation of concentrations eligible for a referral. There are two substantive conditions, which can in practice exclude a concentration from being eligible for a referral, the effect on trade between the MSs and the threat to significantly affect competition within the territory of the referring MS.

As explained above, a broad interpretation enhances the ability of the Dutch clause to close any gaps in the current EU merger control regime. The Commission is incentivised to adopt a highly flexible reading of these conditions if it intends to use Art. 22 referrals to establish jurisdiction over previously unregulated low-turnover concentrations. As a result, the Commission's need for a flexible jurisdictional tool runs counter to the wish of companies to have clarity as to whether their concentration is eligible for a referral.

Based on a loose interpretation of the conditions for a referral, the Commission is able to establish jurisdiction over foreign-to-foreign mergers even where one of the undertakings concerned has no activity at all in the internal market. As a result, it can affect transactions in which none of the parties have had a reason to acquaint themselves with the EU regulatory framework, such as when a local branch of a larger conglomerate acquires local competitors in a foreign market.

The current interpretation of both conditions makes the eligibility for a referral based on the interpretation of abstract legal concepts of EU law, as opposed to real life qualities of the transaction. To establish the overall likelihood of EU intervention, the private parties to a concentration are in effect asked to perform a self-assessment dependent of both the knowledge of EU law, as well as the market conditions of every MS,[194] contrary to the formalistic view taken by the General Court.[195] However, as opposed to NCAs, and especially in the case of foreign-to-foreign mergers, the parties might lack both the legal and economical expertise and data to do so. In most cases there seems to be few legitimate reasons to demand that companies develop the resources to perform this analysis, as even the ICN recommends that the criteria for establishing a local nexus *"should be clearly defined, […], transparent, and readily accessible by parties whether or not domiciled in the local jurisdiction."*[196]

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[194] Bunworth, 'Pre-Emptive Acquisitions in the Technology Sector: Is It Time to Reconsider the Turnover Thresholds?' p 745.

[195] Based on the fact that there is no explicit requirement to self-asses, the General Court found that the parties do not have to perform this evaluation and as a result their legal certainty is not infringed upon, see *Illumina v Commission* para 180.

[196] International Competition Network, 'Recommended Practices for Merger Notification and Review Procedures' p 7.

It is submitted that, in line with the ICN Recommendations, the parties would benefit if the two conditions forming the local nexus of a transaction eligible for a referral were based on tangible information accessible to the parties and on real life qualities of the concentration, establishing a *"material nexus"* to the reviewing jurisdiction.[197]

However, designing this local nexus might prove difficult, since the most straightforward tool of measuring the local nexus, local turnover,198 is for obvious reasons hardly applicable. What is more, as we have seen, the possible anticompetitive acquisitions vary in their characteristics, as some have no product and business operations, while others may have millions of customers.199 The Art. 22 Guidance briefly indicates factors to be considered when assessing effect on trade between MSs, such as the location of potential customers, the availability and offering of products or services, or the development of R&D project which may be commercialised in more than one MS.200 Nevertheless this list appears demonstrative at best and hardly limits the scope of Art. 22 EUMR, since for example the last criterion is likely to be met in case of every R&D project.

For the threat to significantly affect competition, the Commission includes some aspects to be considered, such as the creation or strengthening of a dominant position, the elimination of an important competitive force, or the reduction of competitors' ability to compete.[201] NCAs, to whom content of Art. 22 Guidance is largely directed,[202] are equipped to assess this criterion, provided that they possess sufficient information. However, it is hard to imagine companies wielding the same capability, which is probably why the ICN advises against the use of such translation-related effects in jurisdictional thresholds.[203]

This uncertainty could by diminished by a set of alternative criterions to establish whether a concentration possesses a sufficient local nexus, such as the number of daily active users, the domicile of the parties to the concentration, or other sector specific thresholds. This revised guidance could be modelled on the Austrian and German local nexus of substantial domestic activities, especially on the robust and detailed guidance offered by the German and Austrian competition authorities.[204] A contrary approach could see the Commission explicitly list

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197 ibid p 3.
198 Local Nexus and Jurisdictional Thresholds in Merger Control DAF/COMP/WP3(2016)4/REV1 p 11.
199 See Section 3.3.
200 Art. 22 Guidance para 14.
201 ibid para 15.
202 Looijestijn-Clearie, Rusu and Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' p 559.
203 International Competition Network, 'Recommended Practices for Merger Notification and Review Procedures' p 6.
204 See Guidance on Transaction Value Thresholds p 19-28.

circumstances in which the establishment of a local nexus is unlikely, such as in the case of foreign-to-foreign transactions where none of the parties has any current activities within the internal market.

While any clarification from the Commission risks being casuistic, it would still provide parties with more clarity regarding the possibility of an EU intervention, and for example regarding the need to hire legal advisors specialized in EU law, lowering costs imposed on companies.

The Commission provides a possibility for the parties to obtain an early indication of whether a concentration fulfils the conditions of Art. 22(1) EUMR.[205] However, in order to obtain this indication, the parties have to submit a vast array of information, including their own legal and economic analysis of both their transaction as well as of the affected markets.[206] What is more, while this early indication might suggest the Commission's view of the transaction, it is ultimately the MSs, not bound by this indication, who make the actual referrals. Additionally, the parties are asked to voluntarily draw more attention to their transaction, which will make companies evaluate the risks and advantages of these indications and the indications ultimately do not solve the legal uncertainty.[207]

4.2.2.2. Triggering the deadlines

Another factor increasing uncertainty is hidden in the interpretation of the words "made known," crucial to trigger the deadlines after which a referral is no longer possible. One interpretation, likely to be favoured by the businesses, is the one proposed by Illumina, triggering the deadlines when the information about the concentration becomes publicly available.[208] As we have seen the Commission embraced an opposite approach, requiring an active, and as a result cost-inducing, transmission of information, which is how businesses can rule out a subsequent referral.[209] Additional difficulties lie in the extent of information needed to trigger the deadlines, since according to the General Court, the MSs should be made known of information necessary to assess

[205] Art. 22 Guidance para 24.

[206] European Commission, '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" - Frequently Asked Questions and Answers (Q&A)' pt III.3.

[207] See Levy, Rimsa and Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' p 378 and Claire Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' (2021) 5 Eur Competition & Reg L Rev 112 p 120.

[208] Illumina v Commission para 186.

[209] Šmejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' p 13.

the fulfilment of the conditions for a referral.[210] In practice, the extent of this requirement is dependent on the interpretation of the referral conditions. In the broadest sense, the information should include information amounting in effect to a notification. This extensive approach is hinted by the vast amount of information required by the Commission in order to provide an early indication on the referability of a concentration.[211]

In a rather surprising argument, the General Court found, that the Commission's interpretation protects the legal certainty of companies better than triggering the deadlines by a mere press release, since it links the start of the deadlines to a well-defined point in time.[212] However, the Court failed to reflect that this reading for all practical purposes deprives the parties of a possibility to trigger the deadlines of their own accord, making it prohibitively costly for companies to make their concentration known to all MSs. To do so, every concentration irrespective of its size, including foreign-to-foreign transactions, would have to be *de facto* notified in every MSs, in accordance with diverse national procedural rules or the lack thereof, and requiring costly translation of wide-ranging documentation.[213] Additionally, this would create a significant administrative burden on NCAs, which could be overwhelming without a sacrifice of substantial resources.

An effective compromise could interpret making known as an active transmission of information to a single one-stop-shop point of contact with the transmissions assessed and distributed for example through the ECN network.[214] However, if the extent of this information is too broad, this system could in effect lead to the creation of a new quasi mandatory notification obligation, one more burdensome than the one imposed on concentrations with an EU dimension, especially since the potential welfare generated by capturing relatively smaller and less frequent anticompetitive low-turnover concentration could be much lower.

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[210] Illumina v Commission para 204.

[211] European Commission, '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" - Frequently Asked Questions and Answers (Q&A)' pt III.3.

[212] Illumina v Commission para 207.

[213] Since *„It follows, therefore, that Reasoned Submissions should be made in a language that all NCAs understand."* See European Competition Authorities, 'Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation' para 14.

[214] On the information sharing through ECN, see Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt III.2.

4.2.2.3. One-stop-shop and ex post review

An active use of Art. 22 referrals could lead to further ramifications for the one-stop-shop principle.[215] Not only does the literal interpretation of Article 22 EUMR lead to 27 mutually independent deadlines for referral, but a referral is also not precluded even when the concentration was in fact subject to national merger review in some of the MSs. While the Commission cites this situation as a possible reason to refuse a referral, in line with the one-stop-shop principle, it expressly does not rule out the possibility of accepting a referral even in previously reviewed concentrations.[216] As such, not even transactions subject to merger review in one of the MSs are safe from a subsequent Commission inquiry.[217]

Coupled with the previously described difficulties in triggering the deadlines, the new Art. 22 policy *de facto* opens the door to ex post merger review of all concentrations suitable for a referral.[218] The Commission indicated it would not accept referrals of concentrations later than 6 months from their completion but admitted the possibility of accepting referrals past this deadline.[219] While this further increases the scope of Commissions powers and allows for intervention with the posterior knowledge of a concentration's effects, it introduces another source of uncertainty, necessitating parties to not only assess the possibility of merger review during the transaction, but to negotiate appropriate risk assignment clauses in the transactional documents.[220]

Even when Art. 22 referrals occur ex ante, the current framework allows for parallel proceedings in case a transaction is subject to merger review in only some of the MSs. This further increases the risk of contradicting decisions,[221] lowering the benefits associated with the one-stop-shop principle. In the past, there have been attempts to amend Art. 22 EUMR in a way, which would allow for exclusive jurisdiction of the Commission where the referral is accepted, with the power to veto this exclusive transfer in the hands of MSs. However, this proposal envisioned that in the event of a veto, the original MSs would retain their competence to review the transaction.[222]

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215 Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt IV.2.3.
216 Art. 22 Guidance
217 See Looijestijn-Clearie, Rusu and Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' p 570.
218 ibid p 568.
219 Art. 22 Guidance para 21.
220 White & Case, 'EU General Court confirms European Commission's Article 22 EUMR referral policy' <https://www.whitecase.com/insight-alert/eu-general-court-confirms-european-commissions-article-22-eumr-referral-policy> accessed 20 February 2023.
221 Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt IV.2.3.
222 White Paper 2014 para 69.

Since low-turnover concentrations are defined by the fact that in most cases no MSs are competent to review them, this mechanism would hardly solve the issue at hand.

4.2.2.4. Standstill obligation and time limits

The last major burden for the parties hides in the imposition of a standstill obligation, which, unlike with notifiable transactions, cannot be foreseen beforehand. Art. 22 EUMR triggers the standstill obligation when the parties to the concentration are notified that a referral has been made.[223] What is more, as highlighted in the *Illumina/GRAIL* merger, an NCA can be "made known" of a concentration months after it had demonstrably become aware of it, even weeks after the Commission had started examining the concentration.[224] As a result, parties can be left in prolonged state of uncertainty awaiting the sword of Damocles in the form of a pending activation of the standstill obligation. In this period, parties have to choose whether to bear the costs of delay awaiting the referral or implement the transaction risking the potentially higher costs of ex post merger review.[225] This is amplified by the fact that the Dutch clause allows for longer proceedings than in the case of concentrations with an EU dimension. After all, after an Art. 22 referral, standstill obligation may run for up to 25 days, a period comparable to the entire duration of Phase I proceedings, before even entering the actual Phase I.[226]

Since the standstill obligation has its place in the mechanism of Art. 22 EUMR and can hardly be omitted, competition authorities should strive to minimise the costs of this obligation by making their proceedings as swift as possible, notwithstanding the longer deadlines provided in the EUMR.

4.2.3. Broader perspective of EU merger control

In the broader perspective of EU merger control, the most apparent obstacle to the application of Art. 22 referrals to killer acquisitions lies in the potential illegality of this procedure. This subsection briefly tackles these legal challenges, while also stopping to elaborate on the political aspects, as well as the international implications of the increased use of the Dutch clause.

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223 Art. 22(4) EUMR.

224 In the case of Illumina/GRAIL, even the CJEU found that the 47 days it took the Commission to invite NCAs to a referral we not reasonable, see *Illumina v Commission* para 237-239.

225 See European Commission, '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" - Frequently Asked Questions and Answers (Q&A)' pt III.5.

226 Compare the deadline set in Art. 10(1) EUMR with those in Art. 22(1)-(3) ibid.

4.2.3.1. Legal challenges

As of the time of this thesis, there have been numerous challenges raised in courts regarding the legality of various actions of the Commission in its crackdown on the *Illumina/GRAIL* acquisition.[227] In July 2022, the General Court upheld the Commission's policy shift, as well as the interpretation of the Dutch clause proposed in the Art. 22 Guidance.[228] In the only objection raised by the judges, the Court found that the invitation letter, issued 47 working days after the receipt of the initial complaint, was made within an unreasonable period of time. However, according to the General Court, this delay did not infringe on the rights of defence of the parties and accordingly did not invalidate the contested decisions.[229] What is more, aside from this procedural misstep, the General Court supported the substance of Art. 22 Guidance, performing an extensive and meticulous legal argumentation and interpretation.

One of the controversial issues is the question of whether MSs with their own national merger systems need to be competent to review a transaction in the first place in order to have the competence to refer it the Commission. If MSs can refer concentrations falling outside the scope of national jurisdictional thresholds, they can in effect create, rather than transfer jurisdiction. The General Court elaborated on this question in great detail and found that there is nothing in Art. 22 EUMR to suggest that MSs falling outside the scope of their merger control regime, provided they have one.[230] In the past, referrals have already been joined by MSs lacking original jurisdiction,[231] even if this was usually in a situation where at least the original referring MS had jurisdiction.[232]

Since an appeal of the judgment is currently pending before the Court of Justice,[233] it is not the intent of this thesis to speculate in detail on whether the approach proposed in Art. 22 Guidance is legal and to what extent. In the opinion of the author, the General Court's interpretation regarding referrals made by MSs lacking original jurisdiction is persuasive, notwithstanding the fact

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227 See Case C-611/22 P - Illumina v Commission, Case C-625/22 P - Grail v Commission and Illumina, Case T-755/21 - Illumina v Commission, Case T-5/23 - Illumina v Commission, Case T-23/22 – Grail v Commission and Case T-709/22 - Illumina v Commission. Unfortunately, only very limited information has been published on these cases as of the time of this thesis.

228 See Illumina v Commission.

229 ibid para 239-250.

230 ibid para 85-151.

231 See e.g., Commission decision of 6 September 2018, M.8788 *Apple/Shazam* [2018] C(2018) 5748 final (European Commission).

232 Kupčík, 'Spojování soutěžitelů a interakce mezi Evropskou komisí a národními úřady : pozapomenutá „holandská" klauzule a další otázky' pt IV.2.3.

233 See Case C-611/22 P - *Illumina v Commission.*

that some have called its legality doubtful pending the appeal.[234] Additionally, the author believes that in *Towercast*, both Advocate General ("**AG**") Kokott and the CJEU have already hinted that Art. 22 referrals might be a legal basis for merger review in cases where a concentration does not have an EU dimension and falls outside the scope of national jurisdictional thresholds,[235] possibly foreshadowing the final decision in the *Illumina/GRAIL* appeal.

However, it appears that the original objective behind the Dutch clause, as hinted by its very name, was different from the Commission's current approach, and even if there are other legitimate objectives behind Art. 22 EUMR,[236] the author sides with those who argue that the Commission is going against the *ratio legis*.[237] As highlighted in the previous subsections, every aspect of the new policy was construed in a way which maximises Commission's ability to review low-turnover concentrations, often at the expense of companies.

Moreover, it is submitted that while the General Court's reasoning regarding the competence of MSs lacking original jurisdiction to make a referral is sound, its subsequent arguments, especially those regarding the principle of legal certainty, are sometimes highly formalistic and, in cases, rather creative.

As a way of example, the General Court found that parties to a low-turnover concentrations are *"not required to notify that concentration to the Commission or to assess whether the conditions laid down in Article 22(1) of [EUMR] have been met. In addition, they are not likely to be subject to penalties in the event that the concentration is not actively 'made known', within the meaning of the second subparagraph of Article 22(1) of [EUMR].'*[238] This is most certainly true in the literal reading of Art. 22 EUMR. However, the Court failed to address that a notification of a concentration to the Commission for an early indication or a self-assessment of the referability of a transaction are necessary if the parties wish to obtain any certainty regarding the possibility of a potential future review. Moreover, while there is no fine for not making a concentration known, the parties may very well be subjected to the "penalty" of a costly ex post merger review.

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[234] See e.g., Heiko Richter, 'Prospects of Merger Review in the Digital Age: A Critical Look at the EU, the United States, and Germany' (2023) 54 IIC - International Review of Intellectual Property and Competition Law 223 pt 5.3.3.

[235] See *Towercast,* Opinion of AG Kokott para 47, and *Towercast* para 34.

[236] For a historical interpretation of the various objectives pursued by Art. 22, see *Illumina v Commission* para 96-117.

[237] Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' p 119.

[238] Illumina v Commission para 180.

In a similarly dubious conclusion, the General Court declared that the question of MSs competence to refer a concentration outside their own jurisdiction has no impact on the predictability of a referral, since, thanks to its lack of merger control regime, Luxembourg would always be able to refer any concentrations even if other MSs could not.[239] However, it is clear that assessing whether a concentration meets the conditions of Art. 22 EUMR in the territorially small Luxembourg's market and whether it has been made known to authorities of one MS allows for a significantly higher predictability than if this assessment is required in respect to 27 national markets.

The author hopes that the eventual ruling of the Court of Justice will clarify not just the legality of the individual referral in question, but also the limits in which competition authorities may exercise their discretion granted by Art. 22 EUMR, as well as guidance regarding some of the concepts discussed in the previous subsections of this thesis.

4.2.3.2. Political dimension

In assessing the use of the Dutch clause to tackle low-turnover concentrations, it is necessary to consider the political dimension of extending the EU's jurisdiction.

First, as Šmejkal noted, it is unique among the possible solutions to the enforcement gag in that it does not require an amendment to the EUMR.[240] Since any amendment to the EUMR would require unanimous approval of the Council, reaching a consensus could be strenuous. Additionally, the Commission might fear opening a discussion on the topic altogether, since it might entice MSs to seek greater political control over competition policy, as has recently been signalled by France and Germany.[241]

However, as Art. 22 EUMR was designed with another purpose in mind, its application to low-turnover concentrations carries political complications of its own. Notably, the Commission's powers are dependent on the NCAs eagerness to play along and to follow the Commission's lead.[242] What is more, referrals, as well as their acceptance may be subject to political pressure in respect to individual transactions.[243] The previously predictable jurisdictional aspects of the EUMR might

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[239] ibid para 175.
[240] Šmejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' p 10.
[241] ibid p 9.
[242] Richter, 'Prospects of Merger Review in the Digital Age: A Critical Look at the EU, the United States, and Germany' pt 5.3.3.
[243] Bunworth, 'Pre-Emptive Acquisitions in the Technology Sector: Is It Time to Reconsider the Turnover Thresholds?' p 745.

be further complicated by the diverse approach of different NCAs. Some NCAs have welcomed the Art. 22 Guidance, while others have questioned their authority to refer concentrations falling outside their jurisdiction.[244] Indeed, the German Bundeskartellamt has already signalled it would not refer transactions outside of its own jurisdiction and that it would be unlikely to refer those that would get caught by the German transaction value threshold.[245]

This approach already manifested its implications for the one-stop-shop principle when Germany decided against joining the Austrian referral in the case of the *Meta/Kustomer* transaction, arguing that *"a referral requires a merger to be subject to notification under national competition law."*[246] In a twist, the German NCA later found that the transaction had been subject to a notification in Germany, and as a result, the transaction was reviewed both at national and EU level.[247]

In conclusion, it appears that while Art. 22 referrals seemingly offer the possibility to close the enforcement gap without the need for a politically sensitive amendment to the EUMR, this benefit might be more than offset by the lack of consensus among the NCAs that could lead to the fracturing of the EU's response to the issue of low-turnover concentrations.

4.2.3.3. International dimension

Another issue which could arise if the Commission further expands its Art. 22 practice to foreign-to-foreign mergers lies in the extraterritorial application of EUMR. In *Gencor v Commission*, the Court of First Instance found that it is in line with public international law to apply the EU merger control regime to foreign-to-foreign concentrations, if it is *"foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."*[248] While the parties in *Illumina/GRAIL* have so far not argued against the extraterritorial application of EUMR, it is well possible that where a low-turnover concentration concerns an undertaking without an existing product, a foreseeable, immediate and substantial effect in the EU might be hard to establish.

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244 Levy, Rimsa and Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' p 375-376.

245 White & Case, 'German and Austrian competition authorities publish updated joint guidance on transaction value thresholds' <https://www.whitecase.com/insight-alert/german-and-austrian-competition-authorities-publish-updated-joint-guidance> accessed 20 February 2023.

246 Bundeskartellamt, 'Bundeskartellamt considers Meta/Kustomer merger to be subject to notification' <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/09_12_2021_Meta_Kustomer.html> accessed 20 April 2023.

247 Viktoria H.S.E. Robertson, *Merger review in digital and technology markets: Insights from national case law* (Publications Office of the European Union 2022) para 46.

248 Judgement of 25 March 1999, T-102/96 *Gencor Ltd v Commission of the European Communities* [1999] ECLI:EU:T:1999:65 (Court of First Instance) para 90.

Aside from the principles of public international law, a rigorous use of the Dutch clause over foreign-to-foreign low turnover concentrations might create diplomatic tensions. In the past, the Clinton administration has clashed with the EU over its outreach to review the *Boeing/Mc Donnell Douglas* and *General Electric/Honeywell* transactions.[249] While this transatlantic rift has subsided, it is of note that in all the abovementioned cases, the EU exercised jurisdiction over concentrations which, despite their foreign-to-foreign nature, had an EU dimension.[250] The application of EUMR to mergers lacking an EU dimension is likely to incite even more controversy, as has already been evidenced by lobbying in the US against the new Art. 22 policy.[251] While the Biden administration has taken a hard stance on antitrust[252] and has not raised any objections to the Art. 22 Guidance, this might very well change should the political landscape in the US change in favour of more protectionism.

4.2.3.4. Cost of enforcement

Finally, it is necessary to consider the direct and indirect costs of this expansion in enforcement. As demonstrated above, the proactive use of the Dutch clause, especially in its extensive interpretation championed by the Commission, significantly limits the ability of companies to predict whether their transaction might be interrupted by a merger review. This is bound to translate into higher transactional costs for businesses, as well as influence risk analysis preceding transactions.

As pointed out by Fayne and Foreman, direct and indirect costs associated with premerger review might not be evenly distributed among the parties to a transaction, because the ability of parties to decrease their own costs is dependent on their bargaining power.[253] Since the target in low-turnover concentrations is likely to be a fraction of the acquirer's size, this dynamic could be even more

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[249] Ariel Ezrachi, EU competition law : an analytical guide to the leading cases (7th edn, Hart Publishing 2021) p 708.

[250] See *Gencor v Commission* para 10, Commission decision of 3 July 2001, COMP/M.2220 *General Electric/Honeywell* [2001] C(2001) 1746 (Commission of the European Communities) para 7, and Commission decision of 30 July 1997, IV/M.877 *Boeing/McDonnell Douglas* [1997] C(97) 2598 final (Commission of the European Communities) para 7.

[251] See e.g., U.S. Chamber of Commerce, 'The EU's Significant Extraterritorial Expansion of Its Merger Control Regime Threatens Harm to National Governments, Consumers, and Businesses Both in and outside of Europe' or Members of Congress, 'Bipartisan Letter of 9 Members of Congress to Secretary Gina Raimondo' <https://fitzpatrick.house.gov/_cache/files/1/1/1159519d-4a49-4cbf-a12a-5a8d07de2301/61FB9C5940F38D77B62BD6FF560E2EE6.letter-to-sec.-raimondo-on-e.c.-article-22---12.2.22.pdf> accessed 20 April 2023.

[252] See American Bar Association, 'Biden administration steps up antitrust enforcement' <https://www.americanbar.org/news/abanews/aba-news-archives/2021/11/antitrust-enforcement/> accessed 20 April 2023.

[253] Fayne and Foreman, 'To Catch a Killer: Could Enhanced Premerger Screening for "Killer Acquisitions" Hurt Competition?' p 10.

impactful in the case of killer acquisitions. Additionally, startups and other companies at the outset of their life cycle are much more sensitive to both direct and indirect costs of merger review since they are usually funded by raising capital. Not only can the direct costs consume a considerable amount of this capital, but combined with interim operating covenants, merger review might prevent startups from raising any new capital for prolonged periods of time.[254] As a result, increased scrutiny of low-turnover concentrations could actually hurt the same nascent competitors it seeks to protect.

Moreover, many have noted that the prospect of selling a startup to an incumbent willing to pay a premium is a significant incentive for both entrepreneurs and venture capitalists. If the parties face an increased risk and uncertainty regarding the costs of merger review, it could decrease the number of startup acquisitions and as a result, diminish the expected rewards of starting a disruptive business as well as reduce investment in innovators.[255] Indeed, there has been some evidence of that laws facilitating acquisitions lead to higher investment by venture capitalists, stimulating growth and competition.[256] As Cabral warns, stricter merger enforcement could actually have a chilling effect on competition.[257]

Additionally, a proactive use of the Dutch clause is likely to make merger enforcement costlier also for competition authorities. As explained above, one of the unforeseen implications of the reformed Art. 22 policy could be an increase in the number of de facto notifications to multiple NCAs.[258] Due to the vast amount of non-superficial information needed to trigger the deadlines, developing the capability of processing these notifications, as well as actually processing them, might be costly.[259] In addition to these costs, additional resources might be required if the NCAs are expected to obtain investigative tools necessary to allow them to identify potentially relevant low-turnover concentrations on their own. Finally, it is necessary to consider not just the resources devoted to a proactive use of the Dutch clause, but also the risk that these resources might have been more efficiently used in other areas of antitrust enforcement. The damage to competition resulting from this potential underenforcement in other areas of competition law could diminish

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[254] ibid p 10.
[255] ibid p 10.
[256] Geoffrey A. Manne, Samuel Bowman and Dirk Auer, 'Technology Mergers and the Market for Corporate Control' (2021) 86 Mo L Rev 1047 p 1067.
[257] Cabral, 'Merger policy in digital industries' p 6.
[258] See subsection 4.2.2.2 for more details.
[259] Looijestijn-Clearie, Rusu and Veenbrink, 'In search of the holy grail? EU Commission's new approach to Article 22 of the EU Merger Regulation' p 569.

any potential welfare generated by preventing anticompetitive low-turnover concentrations by Art. 22 referrals.

These costs of a stricter EUMR enforcement under the new Art. 22 policy can be justified if the negative effects stemming from the enforcement gap are well established. However, since the very existence of the enforcement gap as well as the theories of harm behind low-turnover concentrations are sometimes questioned, it is of utmost importance that policy makers keep the costs of any EUMR reform intended to capture low-turnover concentrations to the minimum.

4.3. Summary of the chapter

This chapter attempted to examine whether Art. 22 referrals are a suitable tool to tackle the issues facing antitrust enforcement in connection with killer acquisitions and other low-turnover concentrations. While it demonstrated that the Dutch clause is able to establish jurisdiction over a vast amount of potentially relevant transactions, it also highlighted its various shortcomings in the form of uncertainty for market participants, as well as its potentially negative impacts on the broader system of EU merger control. The next Chapter looks at some alternatives to the Dutch clause and briefly discusses their potential advantages and shortcomings.

5. Possible alternatives

For the time being, the Commission opted for a proactive use of the Art. 22 EUMR in order to deal with what is perceived as a potentially underenforced body of anticompetitive low-turnover concentration, possibly due to the fact it would not require an amendment to the EUMR. However, this choice is not without its disadvantages, some of which were demonstrated in the previous Chapter. Should the Commission find that the Dutch clause is not up to the task of closing the enforcement gap, what are some of the tools which could help prevent anticompetitive low-turnover concentrations?

5.1. Transaction value threshold

An often-floated idea is the introduction of a transaction value threshold which would require mandatory notification when the value of a transaction, usually expressed in the consideration paid by the acquiring company to the seller, exceeds a certain threshold. A threshold of this kind would not be without precedence, as it already exists for example in the US,[260] in Mexico,[261] and was recently introduced in Germany and Austria.[262] The underlying idea is that while turnover serves as a proxy for current competitive potential, the value assigned to a company by its prospective acquirer is a proxy of the expected competitive potential of a business in the eyes of its competitor.[263] What is more, showing it is possible for the acquirers to pay above the market price and recoup their investment, this premium paid in excess of the target's turnover should in theory reflect the monopoly profits that can be earned by an incumbent after the acquisition.[264] Should the EU adopt a transaction value threshold along the Austro-German model in its fight against anticompetitive low-turnover concentrations, it would make any concentration notifiable provided the value of the consideration received by the seller exceeds a certain threshold and, to ensure a local nexus, where the target has substantial domestic operations.

5.1.1. Where to draw the line

However, the design of this criterium might be less than straightforward. One of the greatest difficulties would be in setting the threshold at a right level. In the words of the Commission's chief economist Pierre Régibeau, *"if you start fishing with a net with a finer mesh, you are going to catch a lot*

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260 See subsection 3.3.3 for more detail.
261 See Imanol Ramirez, 'Merger Thresholds in the Digital Economy' (2021) 45 Del J Corp L 433 p 449-450.
262 See Guidance on Transaction Value Thresholds.
263 Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' p 118.
264 Manne, Bowman and Auer, 'Technology Mergers and the Market for Corporate Control' p 1139.

of small fish that we frankly don't have the resources to deal with."[265] Conversely, setting the thresholds too high could in turn make them ineffective. Possible threshold could require a certain ratio between the consideration and turnover. However, this would only add another layer to the complicated procedure and since these ratios would not be representative in case of marginal turnovers, a complementary nominal value threshold would still be needed. But, even if the thresholds are set at the right level, how do you calculate the value of a consideration to trigger those thresholds?

M&A deals can include options, deferred payments and other complicated pay-out provisions, making it difficult to calculate the exact value of a transaction,[266] especially since assets in R&D projects could include personal capital whose expected competitive potential would be expressed in salaries.[267] If the calculation is too narrow, the companies could easily evade triggering the thresholds by hiding the purchase price behind convoluted contractual mechanisms. However, a complex and encompassing concept of consideration, such as the one adopted under the Austro-German model,[268] makes the calculation an arduous and costly task, made only more complicated by the various valuation and discounting methods that the parties could use. What is more, it is important to note that a transaction's value is subjective and both parties might place different value on various parts of the consideration, sometimes due to the differing expectations on the likelihood of meeting the contractual milestones.[269]

Last, but not the least, it is difficult to select a moment in time at which the value is to be calculated, since fluctuations in stock prices, as well as in the value of other assets, might change the consideration drastically. This is compounded by the fact that the threshold would likely be supplemented by a standstill obligation, which could trigger on and off depending on the fluctuations of asset prices.[270]

Some dismiss the notion that companies could game these thresholds in order to avoid detection, as the companies would be unable or would lack the incentive to do so.[271] However, this ignores the fact that larger potential profits from an anticompetitive merger increase the incentive

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[265] For this and other comment on the appropriate level of the threshold, see Levy, Rimsa and Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to 'Brightline' Jurisdictional Rules?' p 168.

[266] Brandenburger, Breed and Schöning, 'Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?' p 34.

[267] Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System' p 349.

[268] Which requires detailed explanation and guidance, see Guidance on Transaction Value Thresholds p 3-19.

[269] To that effect, see ibid para 23.

[270] See ibid para 28-36.

[271] Bunworth, 'Pre-Emptive Acquisitions in the Technology Sector: Is It Time to Reconsider the Turnover Thresholds?' p 741.

of companies to try and escape scrutiny of competition authorities. Indeed, as Cunningham or Wollman have pointed out, potentially anticompetitive mergers might occur especially below jurisdictional thresholds.[272]

5.1.2. Establishing local nexus

What is more, on its own, transaction value threshold is unable of establishing a local nexus, possibly expanding the scope of EUMR too wide.[273] For this reason, the Austro-German model includes the criterium of significant domestic operations on the side of the target company.[274] However, as opposed to local turnover, this is quality of a concentration is hard to qualify, even if it admittedly provides for more certainty than the conditions for referral discussed in Chapter 4.2. Despite detailed guidance, there have already been difficulties in its application, as companies were fined in part as a result of wrongly assessing the level of their Austrian operations,[275] while in Germany, the courts adopted a more stringent approach and in the abovementioned *Meta/Kustomer* transaction used a restrictive interpretation of substantial domestic operations.[276] Moreover, it is questionable whether any local nexus could be established in cases such as that of *Illumina/GRAIL*, where the target had no operations in the EU, but which according to the Commission warranted merger review.

5.1.3. Is value a good proxy?

Even if all these difficulties could be mitigated, it is still questionable whether transaction value is actually a good proxy which should be used by NCAs in detecting relevant low-turnover concentrations. Pierre Régibeau, the Commission's own chief economist for competition, has argued that while premium prices might be telling of how successful a competitor might have been if not for the acquisition, they provide little information as to the anticompetitive effect enjoyed by the acquirer or as to the anticompetitive intent behind the transaction.[277] Indeed, they might not be

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[272] See Cunningham, Ederer and Ma, 'Killer acquisitions' p 34-35, and Wollmann, 'Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act' p 80-82.

[273] Šmejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' p 6.

[274] For more details see Guidance on Transaction Value Thresholds p 19-28.

[275] Konstantin Köck, 'Facebook accepts a EUR 9.6 million fine for failing to notify GIPHY acquisition in Austria' <https://competitionlawblog.kluwercompetitionlaw.com/2021/07/04/facebook-accepts-a-eur-9-6-million-fine-for-failing-to-notify-giphy-acquisition-in-austria/> accessed 22 April 2023.

[276] Marcel Nuys and Florian Huerkamp, 'Düsseldorf Court clarifies transaction value threshold in Meta/Kustomer deal' <https://hsfnotes.com/crt/2023/01/04/dusseldorf-court-clarifies-transaction-value-threshold-in-meta-kustomer-deal/#page=1> accessed 4 March 2023.

[277] Pierre Régibeau, 'Killer acquisitions? Evidence and potential theories of harm' in Claudia Raya Lemus and Ioannis Kokkoris (eds), *Research handbook on the law and economics of competition enforcement* (Edward Elgar Publishing Limited 2022) p 311.

motivated by the acquirers expectations of monopoly prices after the concentration, but for example by the synergies which could benefit the acquirer.[278]

Even if the value of a transaction were a telling indication of anticompetitive transactions, it is questionable whether it would indeed capture many transactions. The Commission itself found that the EUMR jurisdictional issues would not be solved by the introduction of a threshold intended to capture concentrations with a high value-to-turnover ratio.[279] This corresponds with the first results of the transaction value threshold's application in Austria and Germany, where the reform of jurisdictional thresholds has failed to capture any "killer acquisitions".[280]

Given that the benefits of using transaction value as a proxy are dubious, it is necessary to weigh them against the possible implications of a transaction value threshold. As Lundqvist pointed out, the threshold might push down acquisition prices for startups.[281] By doing so, it would undermine the incentive to invest in innovations, possibly hampering startup activity.[282] Finally, a transaction value threshold could motivate incumbents to engage in a speculative buying at lower prices,[283] which could lead to an inefficient use of their resources.

Given all these considerations, it is evident that the introduction of a transaction value threshold is hardly the straightforward answer to tackle low-turnover concentrations many paint it to be. While the actual benefits of the reform are doubtful, it would certainly bring about a plethora of difficulties, some of which could even hurt the very competition the threshold is supposed to protect.

5.2. Article 102 TFEU

As of late, another tool to tackle low-turnover concentrations has been discussed, one which is hardly new at all. Before the introduction of a European merger control regime, the *Continental Can* case established that where the conditions of Art. 102 TFEU were met, anticompetitive mergers

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[278] Holmström and others, 'Killer Acquisitions? The Debate on Merger Control for Digital Markets' p 15.

[279] See Staff Working Document 2021 para 99-113.

[280] See Richter, 'Prospects of Merger Review in the Digital Age: A Critical Look at the EU, the United States, and Germany' para 5.3.4., even though an explanation which cannot be simply discarded is that the implementation of a transaction value threshold failed to capture any acquistitions because it had deterred them in the first place.

[281] Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System' p 349.

[282] Brandenburger, Breed and Schöning, 'Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?' p 32.

[283] Alexiadis and Bobowiec, 'EU Merger Review of 'Killer Acquisitions' in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' p 75.

could constitute an abuse of dominant position.[284] What is more, it was later found that not only Art. 102 TFEU, but also Art. 101 TFEU could be applied. Nonetheless, the application of both provisions was not without difficulties, which contributed to the general preference for adopting a separate merger control instrument, paving the way for the EUMR.[285] Nowadays, Art. 21(1) EUMR explicitly excludes other competition law instruments from applying to concentrations.[286] Despite the fact that a regulation cannot disapply the TFEU, many have concluded that this made the use of Art. 102 TFEU to concentration highly improbable, since in the absence of implementing legislation, competition authorities would have to resort to applying the TFEU directly.[287] However, they did not preclude the possibility of private parties invoking Art. 102 TFEU.[288]

The question of the relationship between Art. 102 TFEU and Art. 21(1) EUMR remained unresolved, despite the fact that at least one national court has previously explored the possibility to review non-notifiable mergers under abuse of dominance rules, arguing that the EUMR disapplies other competition law instruments only when a concentration has an EU dimension.[289] However, in 2017, the French company Towercast SASU ("**Towercast**") complained to the French NCA, arguing that a non-notifiable merger of its competitors constituted an abuse of dominance under Art. 102 TFEU. In the course of the proceedings, a French court referred a question regarding the relationship of Art. 102 TFEU and Art. 21(1) EUMR.

In her opinion in the case, AG Kokott reiterated that that even though the EUMR can disapply other competition law instruments, it cannot provide any justification for excluding the direct applicability of Art. 102 TFEU.[290] What is more, the AG went on to explicitly state that Art. 102 TFEU could ensure effective protection of competition with respect to killer acquisitions.[291] Following up on that recommendation, the CJEU ruled that even when a transaction constitutes a concentration within the meaning of EUMR, the rules on the

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284 Judgement of 21 February 1973, C-6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECLI:EU:C:1973:22 (CJEC) para 25-26.
285 Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 317.
286 Art. 21(1) EUMR.
287 Alison Jones, B. E. Sufrin and Niamh Dunne, *Jones and Sufrin's EU competition law : text, cases, and materials* (7th edn, Oxford University Press 2019) p 1097-1098.
288 Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 317, see also EUMR rec 7.
289 For details of that case, see Philippe Jonckheere, 'Alken-Maes/AB InBev (Bosteels) – A 'Residual Jurisdiction' for the Belgian Competition Authority to Assess Non-notifiable Mergers?' (2018) 9 Journal of European Competition Law & Practice 454 p 455.
290 *Towercast,* Opinion of AG Kokott para 46-47.
291 ibid para 48.

prohibition of abuse of dominance still apply.[292] However, only national authorities may apply them and solely on the basis of national procedural rules.[293] While it is possible that the Commission could assert jurisdiction on the basis of Art. 104 TFEU and Art. 105 TFEU, it has been dismissed by authors as highly unlikely.[294]

Despite some NCAs making use of this rediscovered power,[295] it is unlikely that this could be a lasting response to the issue of anticompetitive low-turnover concentrations. First, Art. 102 TFEU comes into play only where a dominant position already exists and the question of whether it can also apply to concentrations which will result in the creation of a dominant position has not been resolved.[296] Second, the procedural rules and powers of the NCAs, but especially those of the Commission, are largely in a vacuum where mostly national law applies. This would leave the EU's response to the phenomenon of anticompetitive low-turnover concentrations fragmented and without legislative changes to the EUMR, it would create even more uncertainty than the use of the Dutch clause or the introduction of a transaction value threshold.

5.3. Other possibilities

It is submitted that neither a transaction value threshold, nor the application of Art. 102 TFEU do not provide the EU with a simple and straightforward solution to the enforcement gap. Various other solutions other than the ones discussed in this thesis have been proposed.

One of the options is the Swiss model, which requires a notification where one of the stakeholders in a concentration has been found to be dominant on a market by a final decision in competition proceedings and the concentrations occurs in that market, in adjacent markets or in upstream or downstream markets.[297] Another could be the introduction of a sector specific notification obligation alongside the model of Norway.[298] There have been discussions about truly embracing ex post merger control or even about reversing the burden of proof in a combination with

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292 *Towercast* para 53.
293 ibid para 50.
294 Jones, Sufrin and Dunne, Jones and Sufrin's EU competition law : text, cases, and materials p 1097-1098.
295 See Hein Hobbelen and Baptist Vleeshouwers, 'EU: Towercast casts its shadow on merger control' <https://www.lexology.com/library/detail.aspx?g=f55783c4-9d27-4e85-bd4a-fa840ccc13e1> accessed 22 April 2023.
296 Gronden and Rusu, Competition law in the EU : principles, substance, enforcement p 316.
297 Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' p 119.
298 Šmejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' p 6.

a transaction value threshold.[299] Finally, some have sung praises about the flexibility of the UK's share of supply test, which would have allegedly allowed the UK's competition authority to review much of the transactions in question.[300]

These are but some of the many possibilities which lay open in front of the EU legislator when designing a future antitrust response to the issue of killer acquisitions and other relevant low-turnover concentrations. However before adopting any of them, it is necessary to conduct a meticulous analysis into their design, as well as to carefully assess their possible advantages and drawbacks. While the scope of this thesis does not allow the author to discuss these solutions in detail, it is submitted that without caution and prudence, a possible radical reform of EUMR could result in more harm than good.

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[299] ibid p 7-9. For a detailed argument concerning the burden of proof, see Massimo Motta and Martin Peitz, 'Challenges for EU Merger Control' CRC TR 224 Discussion Paper Series <https://EconPapers.repec.org/RePEc:bon:boncrc:crctr224_2019_077>.

[300] Furman, Unlocking digital competition : Report of the Digital Competition Expert Panel p 94-95.

6. Conclusion

The analysis showed that while the Commission's use of Art. 22 EUMR as a jurisdictional tool to tackle low-turnover concentrations is not without its merits, it comes at a cost.

On the one hand, the flexible nature of the substantive and procedural conditions for a referral under Art. 22 EUMR allows the EU to assert jurisdiction over virtually every relevant low-turnover transaction. The ambiguous criteria for establishing local nexus leave room to the discretion of NCAs and the Commission in applying the referrals. A strict interpretation of the "making known" which triggers the referral deadlines helps competition authorities in obtaining knowledge about the concentrations at hand, simultaneously making it very unlikely that the deadlines are ever triggered in every MSs. This opens the door to ex post merger review. Nonetheless, the effectivity of Art. 22 referrals rests on the presumption that competition authorities ever become aware of the concentration. The notification obligation introduced by the DMA and the FSR mitigates this shortcoming, but competition authorities should develop other ways of obtaining information about relevant concentrations.

On the other hand, the flexibility of Art. 22 EUMR comes at a cost to market participants, mostly with respect to their legal certainty. The vague nature of referral conditions makes the possibility of merger review unpredictable, as it requires companies to perform a complex legal and economic analysis which is beyond their capabilities. Moreover, interpreting "making known" as actively informing MSs with all the data necessary for the evaluation of these vague referral conditions makes triggering the referral deadlines prohibitively costly. Further costs may accrue due to the slower procedure of Art. 22 EUMR, leading to a longer standstill obligation. Finally, Art. 22 referrals decrease legal certainty by allowing ex post merger control and by weaking the one-stop-shop principle.

Additionally, the reformed policy faces significant legal challenges in courts, may raise international concerns by extending the extraterritorial scope of the EUMR and suffers from a reliance on MSs, introducing a political aspect into merger review. Lastly, by increasing the costs of merger enforcement for both companies subject to it and for its enforcers, the Art. 22 referrals could inadvertently hamper competition.

All of this shows that in its current state, the Art. 22 EUMR is far from an ideal tool to tackle a potential enforcement gap with respect to low-turnover concentrations and that it may foster legal uncertainty. While some of this uncertainty may have a procompetitive deterrent effect, it leads to a deformed situation where merger control is far more burdensome for low-turnover

concentrations than for potentially far more impactful concentrations with an EU dimension. However, there are no clear alternatives to Art. 22 referrals and its closest substitutes would either face similar difficulties or would set the EU merger control back by decades.

This thesis suggests some adjustments to improve the Art. 22 referrals, such as the introduction of a single point of making known or the provision of detailed guidelines as to the referral conditions. However, the analysis shows that in many cases, the interpretation and practice of Art. 22 EUMR is a zero-sum game in which every step towards legal certainty benefiting market participants narrows the leeway of the Commission in establishing jurisdiction over concentrations which could merit scrutiny. If the Commission intends to use Art. 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. If not, it risks that the Art. 22 referrals could do more harm than good. After all, *"the road to hell is always paved with good intentions."*

7. Abbreviations

<u>**Legislation and policy documents**</u>

"**Art. 22 Guidance**"	Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases
"**Case Referral Notice**"	Commission Notice on Case Referral in respect of concentrations (2005/C 56/02)
"**DMA**"	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) (Text with EEA relevance)
"**EUMR**"	COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)
"**FSR**"	Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market
"**Guidance on Transaction Value Thresholds**"	Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)
"**HSR**"	Hart-Scott-Rodino Act
"**Jurisdictional Notice**"	Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01)

"**Staff Working Document 2021**"	Commission Staff Working Document - Evaluation of procedural and jurisdictional aspects of EU merger control SWD(2021) 66 final
"**TFEU**"	Consolidated Version of the Treaty on the Functioning of the European Union 2012/C 326/01
"**White Paper 2014**"	WHITE PAPER - Towards more effective EU merger control COM(2014) 449 final

Case law

"***Apple/Shazam***"	*Apple/Shazam,* Commission decision of 6 September 2018, M.8788 [2018] C(2018) 5748 final (European Commission)
"***Boeing/McDonnell Douglas***"	*Boeing/McDonnell Douglas,* Commission decision of 30 July 1997, IV/M.877 [1997] C(97) 2598 final (Commission of the European Communities)
"***Cementbouw Handel & Industrie v Commission***"	*Cementbouw Handel & Industrie BV v Commission of the European Communities*, Judgement of 18 December 2007, C-206/06 P [2007] ECLI:EU:C:2007:814 (Court of First Instance)
"***Continental Can***"	*Europemballage Corporation and Continental Can Company v Commission,* Judgement of 21 February 1973, C-6/72 [1973] ECLI:EU:C:1973:22 (CJEC)
"***Facebook/WhatsApp***"	*Facebook/WhatsApp,* Commission decision of 3 October 2014, M.7217 [2014] C(2014) 7239 final (European Commission)
"***Gas Natural/Endesa***"	*Gas Natural/Endesa,* Commission decision of 15 November 2005, COMP/M.3986 C(2005) 4468 (European Commission)
"***GE/Honeywell***"	*General Electric/Honeywell,* Commission decision of 3 July 2001, COMP/M.2220 [2001] C(2001) 1746 (Commission of the European Communities)

"***Gencor v Commission***"	*Gencor Ltd v Commission of the European Communities,* Judgement of 25 March 1999, T-102/96 [1999] ECLI:EU:T:1999:65 (Court of First Instance)
"***Illumina v Commission***"	*Illumina, Inc. v European Commission,* Judgement of 13 July 2022, T-227/21 [2022] ECLI:EU:T:2022:447 (CJEU)
"***Towercast*, Opinion of AG Kokott**"	*Towercast SASU v Autorité de la concurrence and Ministre chargé de l'économie,* Opinon of Advocate General Kokott of 13 October 2022, C-449/21 [2022] ECLI:EU:C:2022:777
"***Towercast***"	Towercast SASU v Autorité de la concurrence and Ministre chargé de l'économie, Judgement of 16 March 2023, C-449/21 [2023] ECLI:EU:C:2023:207 (CJEU)

Miscellaneous

"**AG**"	Advocate General
"**CJEU**"	Court of Justice of the European Union
"**Commission**"	European Commission
"**ECN**"	European Competition Network
"**GRAIL**"	GRAIL, LLC
"**ICN**"	International Competition Network
"**Illumina**"	Illumina, Inc.
"**low-turnover concentrations**"	Concentrations that could merit an in-depth investigation due to their anticompetitive potential but fall short of the current EUMR turnover thresholds since their competitive potential is not fully reflected in the turnover of one of the undertakings concerned.
"**MS**"	Member State
"**NCA**"	National competition authority
"**Towercast**"	Towercast SASU

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9. Český abstrakt a klíčová slova

Revize notifikačních kritérií EUMR

Potenciální nástroje k založení pravomoci k přezkumu „zabijáckých akvizic“ a dalších koncentrací s nízkým obratem

Evropská komise v roce 2021 vydala pokyny k postoupením podle článku 22 Evropského nařízení o spojování, které mají umožnit přezkum zabijáckých akvizic a dalších spojení s nízkým obratem jedné ze stran. Tato práce analyzuje tento přístup, zejména vhodnost postoupení k založení pravomoci nad danými spojeními, jejich dopad na tržní subjekty a jejich důsledky pro systém kontroly spojování v Evropské unii. Z analýzy vyplývá, že tento jurisdikční nástroj má své výhody i nevýhody. Flexibilní podmínky pro postoupení dle článku 22, zejména co se týče lokálního nexu a institutu „dání na vědomí“, umožnují Evropské unii získat pravomoc k přezkumu naprosté většiny předmětných spojení, dokonce i formou následného přezkumu. Celý mechanismus však funguje pouze tehdy, pokud se úřady o příslušných spojeních vůbec dozví. K tomu přispějí oznámení podle aktu o digitálních trzích a podle nařízení o zahraničních subvencích, ale úřady by měly vyvinout i jiné způsoby, jak se o spojeních dozvědět. Flexibilita článku 22 zvyšuje náklady spojené s kontrolou spojení, jelikož od společností vyžaduje, aby prováděly právní a ekonomickou analýzy nad jejich síly a neumožňuje jim levně získat právní jistotu. Nový způsob využití článku 22 byl také napaden před soudy, může vést k diplomatickým roztržkám a vnáší do kontroly spojení politické aspekty. Ve výsledku může postupování zvyšováním nákladů na kontrolu spojování poškozovat hospodářskou soutěž. Neexistuje však jednoduché alternativní řešení. Tato diplomová práce navrhuje některé reformy, jako je zavedení jednotného kontaktního místa, skrz které může být spojení „dáno na vědomí“, nebo vydání podrobnějších pokynů k podmínkám pro postoupení. V mnoha případech ale nelze posílit právní jistotu bez snížení flexibility článku 22. Pokud má Evropská komise v plánu využívat postoupení podle článku 22 ke kontrole spojení s nízkým obratem, měla by najít správnou rovnováhu mezi flexibilitou a právní jistotou a minimalizovat negativní dopady postoupení na systém kontroly spojování.

Článek 22 Evropského nařízení o spojování – zabijácké akvizice – Holandská klauzule – kritérium hodnoty transakce – Illumina/GRAIL

10. English abstract and key words

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.

Article 22 of European Merger Regulation – Killer Acquisitions – Dutch clause – Transaction value threshold – Illumina/GRAIL