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Taking aim at innovation-crushing mergers: a killer instinct unleashed?

Magali Eben * and David Reader †

ABSTRACT

The European Union (EU) has assigned competition policy an important role as part of an extensive new agenda to stimulate innovation, including by fostering the growth of small and medium-sized enterprises (SMEs). The ability of EU merger control to be receptive and responsive to innovation harms has therefore come under scrutiny, with some observers doubting its capacity to address innovation-crushing 'killer acquisitions' of innovative SMEs. This article reflects on several recent developments that have shaped the EU's response to these doubts. Substantively, the more central role afforded to innovation considerations in the European Commission's recent enforcement practice may well demonstrate its willingness to engage with innovation theories of harm in mainstream merger control going forward, although questions remain about the standards and methodology it can adopt under the EU Merger Regulation (EUMR). Jurisdictionally, the recalibrated approach to the Article 22 EUMR referral mechanism—assisted, in certain circumstances, by the new pre-merger information obligation for digital gatekeepers under Article 14 DMA—is capable of bringing an almost boundless range of cases before the Commission. The *Towercast* judgment casts the net further still, by confirming the potential for below-threshold mergers to face *ex post* reviews at the national level under the Article 102 TFEU abuse of dominance prohibition. The effect of these developments is that the Commission and national competition authorities may now be better equipped to unleash a killer instinct when faced with innovation concerns arising from killer acquisitions. However, an unwelcome pendulum swing towards over-enforcement risks untold harm to legal certainty, merger activity, and innovation itself.

I. INTRODUCTION

In recent years, competition law—the body of rules and enforcement powers designed to facilitate competitive markets and the benefits thereof—has been attracting unprecedented levels of attention on the international stage. The consolidation of market power in major global industries, most notably by the Big Tech firms, has prompted renewed calls for stronger enforcement to prevent potential harms arising from dominant firms wielding their

*Magali Eben, School of Law, University of Glasgow, United Kingdom. Email: magali.eben@glasgow.ac.uk
†David Reader, School of Law, University of Glasgow, United Kingdom. Email: david.reader@glasgow.ac.uk

power. One particular branch of competition law, merger control, is well-placed to limit the excessive build-up of market power in the hands of too few firms, enabling competition authorities to block or impose conditions on mergers that stand to result in so-called coordinated effects (where a merger results in market conditions that enhance the risk of firms colluding) or unilateral effects (where two intense competitors merge and, as such, the merged entity has fewer incentives to compete on eg price and quality of goods/services). In the European Union (EU), merger control rules are accommodated under the EU Merger Regulation (EUMR),[1] which specifies that large mergers meeting prescribed thresholds will fall within the exclusive competence of the European Commission, which is tasked with investigating whether a merger stands to result in a significant impediment to effective competition (SIEC) in the EU internal market. Conversely, mergers that fall below the EUMR thresholds may nonetheless be scrutinized by Member State national competition authorities (NCAs), assuming the merger meets the thresholds prescribed under national merger laws.

In response to some of the most pressing economic, social, and environmental challenges in living memory, the European Commission has embarked on implementing its most ambitious and diverse reform agenda to date. A key tenet of these reforms is the need to stimulate innovation in key sectors of the EU economy,[2] including by fostering small and medium-sized enterprises (SMEs) to become large-scale innovators.[3] In pursuit of this, competition policy has been designated an important role in promoting the incentives of firms to innovate as part of, *inter alia*, the twin (green and digital) transitions, economic recovery from the COVID-19 pandemic, and building resilience and adaptability within the Single Market.[4] The immediate and inevitable consequence is that EU competition law's approach to—and treatment of—innovation effects is now very much under the spotlight,[5] with commentators affording closer scrutiny to the ability of existing policies to be sensitive to the risks of innovation harm while also being permissive of innovation-enhancing conduct.[6]

[1] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.

[2] See, in general: Commission, 'A New European Innovation Agenda' (Communication) COM (2022) 332 final; Commission, 'A New Industrial Strategy for Europe' (Communication) COM (2020) 102 final; and Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

[3] U von der Leyen, 'A Union that Strives for More—My Agenda for Europe' (Political Guidelines for the next European Commission 2019–2024, 16 July 2019) 8; Commission, 'An SME Strategy for a Sustainable and Digital Europe' (Communication) COM (2020) 103 final; and Commission, '2030 Digital Compass: The European Way for the Digital Decade' (Communication) COM (2021) 118 final, 10.

[4] Commission, 'A Competition Policy Fit for New Challenges' (Communication) COM (2021) 713 final, s 3; N McNelis, 'Innovation is Key "to everything we are doing" at EU Competition Enforcer, Guersent says' (*MLex*, 9 September 2022) <https://mlexmarketinsight.com/news/insight/innovation-is-key-to-everything-we-are-doing-at-eu-competition-enforcer-guersent-says> accessed 15 September 2023.

[5] DF Spulber, 'Antitrust and Innovation Competition' (2023) 11 J Antitrust Enf 5, 6; M Todino and E Ry Schou, 'What Agenda for the Second Term of Commissioner Vestager?' (Fall 2019) 1 CPI Antitrust Chronicle 13–14 and 19.

[6] Away from merger control, the Commission has adopted revised rules on applying the R&D Block Exemption Regulation, intended to 'give more prominence to the protection of innovation competition'; Commission, 'Commission Adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines' (Press Release, 1 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990> accessed 15 September 2023. Changes have also been made to the Commission's State aid framework, aimed at providing greater legal certainty in order to 'make it easier for Member States to support research, development and innovation, including by small and medium-sized companies'; Commission, 'Commission Adopts Revised State Aid Framework for Research, Development and Innovation' (Press Release, 19 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6233> accessed 15 September 2023.

Nowhere has this scrutiny been more evident than in respect of the merger control regime under the EUMR, where doubts surrounding the Commission's ability to detect, call-in and adequately evaluate innovation-reducing mergers have fuelled suspicions of an 'enforcement gap' when it comes to mergers involving innovative start-up firms.[7] In particular, the regime has encountered criticism for allegedly endorsing a period of under-enforcement against so-called 'killer acquisitions'; namely, mergers involving large incumbent firms (often with market power) acquiring relatively smaller nascent competitors.[8] While most nascent acquisitions raise no competition concerns—and may, in fact, be innovation enhancing—the potential exists for such mergers to result in the loss of an innovation effort from the market. In these circumstances, consumers are denied the opportunity to purchase an innovative product or service that might otherwise have reached the market. Moreover, they no longer stand to benefit from the competitive constraint that the new product may have exerted on the price, quality and technological development of incumbent goods and services, nor the shorter timescale in which they are likely to reach the market. Regardless of the prevalence at which killer acquisitions arise in practice,[9] the prominent role afforded to competition policy in fostering innovation creates an expectation that EU merger control will, at the very least, be capable of intervening when any such transaction stands to result in harm to innovation.

The EU's response has been multi-pronged, with recent developments hoping to bridge the substantive and jurisdictional enforcement gaps that the EUMR regime has been accused of facilitating.[10] The substantive gap refers to lingering question marks vis-à-vis the Commission's capacity to engage with—and prove to the requisite legal standard—suspected innovation harms arising in nascent acquisition cases. By its nature, counterfactual analysis is speculative, placing even greater importance on the need for objective evidence and robust theoretical frameworks in merger control. The task of establishing whether a new product will reach the market, become commercially viable and enable a nascent competitor to exert a competitive constraint on an incumbent demands a degree of speculation beyond what is necessary in most merger investigations. The threat of a decision facing subsequent legal challenge on appeal has—quite legitimately—a constraining effect on decision-makers.[11] As such, competition

[7] Public consultations show a minority of respondents perceive the existence of an enforcement gap; Commission, 'Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control' (Staff Working Document) SWD (2021) 66 final, paras 89, 91 and 132. cf with the majority view, which claims that a lack of cogent evidence prevents a definitive conclusion from being drawn (para 92); see also N Jung and E Sinclair, 'Innovation Theories of Harm in Merger Control: Plugging a Perceived Enforcement Gap in Anticipation of More Far-reaching Reforms?' (2019) 40 ECLR 266.

[8] For a discussion of killer acquisitions in the context of innovation harms, see subsection II.B (i), below.

[9] The prevalence of killer acquisitions is the subject of ongoing debate, sometimes hinging on the definition that is attributed to the phenomenon; eg Gautier and Lamesch (2020), where the authors—in their original working paper—attribute a narrow definition to what constitutes a killer acquisition; A Gautier and J Lamesch, 'Mergers in the Digital Economy' (2020) CESifo Working Paper No 8056 <https://ssrn.com/abstract=3529012> accessed 15 September 2023. The working paper is oft-cited as evidencing the rarity of killer acquisitions; cf with the lesser-cited published version, Gautier and Lamesch (2021), which refrains from classifying killer acquisitions and commenting on their frequency, noting the difficulties of distinguishing them from other technology/asset acquisitions and, ultimately, calling for closer scrutiny of Big Tech mergers; A Gautier and J Lamesch, 'Mergers in the Digital Economy' (2021) 54 Inf Econ Policy.

[10] For an articulation of 'substantive' and 'jurisdictional' gaps in this context, see R Whish, 'Killer Acquisitions and Competition Law: Is there a Gap and How should it be Filled?' (2022) 34 NLSIR 1, 6.

[11] M Harker and D Reader, 'How Statutory Duties Shape the Decision-making of an Economic Regulator: Insights from the Energy Regulatory Community, Past and Present' (2022) 49 J Law & Soc 118, 144.

authorities are hesitant to adopt novel theories of harm and to engage in longer-term forecasting, especially where the availability of reliable evidence is limited. The Commission has itself been cautious and selective in drawing on innovation considerations, especially as part of the central reasoning for reaching a decision in any given case. However, while it is premature to suggest a sea change is afoot, the Commission's recent enforcement practice shows signs of affording a more central role to innovation considerations in merger control.

Efforts to bridge the substantive gap may, however, be in vain if jurisdictional gaps prevent acquisitions from being reviewed by the Commission in the first place. Mergers involving the acquisition of nascent competitors are more prone to flying under the enforcement radar (or outside the enforcement range of competition authorities), especially where the target firm has yet to commercialize and generate a meaningful revenue from its innovations—meaning the merger will typically fall short of the turnover-based thresholds employed in most merger control regimes. Options for addressing the jurisdictional gap are wide-ranging and the Commission has faced numerous calls to implement revolutionary reforms that would ensure the EUMR regime is sufficiently receptive to below-threshold innovation-reducing mergers. Yet while recent changes represent more of an evolution than revolution, the collective impact of three specific developments stands to be no less significant. Firstly, the Commission has set about recalibrating its policy on the Article 22 EUMR referral mechanism,[12] under which it is now willing to accept and even invite NCAs to refer problematic mergers that fall below national jurisdictional thresholds—an approach that has already found favour in the General Court (GC).[13] Secondly, among a host of new *ex ante* requirements introduced under the Digital Markets Act (DMA),[14] a firm operating within the digital services sector that has been designated as a 'gatekeeper' is now—by virtue of Article 14 DMA—under a legal obligation to inform the Commission of any merger it intends to pursue with another digital service provider. Thirdly, and most unexpectedly, a preliminary ruling by the Court of Justice (CJ) in *Towercast* has revived the previously dormant *Continental Can* case law,[15] confirming the potential for NCAs to subject below-threshold mergers to *ex post* review by way of abuse of dominance proceedings under Article 102 TFEU,[16] where the acquiring party is in a dominant position and certain other criteria are met.

While policymakers will hope that these jurisdictional changes can 'unlock' the potential for innovation considerations to play a mainstream role in substantive merger assessments, these developments—or at least those within the Commission's control—imply a desire to pursue a proportionate response to the threat posed by killer acquisitions. While under-enforcement is no longer an option under the EU's innovation agenda, a pendulum swing towards over-enforcement risks harm to legal certainty, merger activity and—counterproductively—innovation itself. The predictability facilitated under the EUMR's 'one-stop shop' regime—where merging parties can usually readily adduce whether their transaction should be notified and, as such, whether it requires prior approval from the Commission—is a

[12] Commission, 'Guidance on the Application of the Referral Mechanism Set out in Article 22 of the Merger Regulation to certain categories of cases' (Communication) COM (2021) 1959 final.

[13] Case T-227/21 *Illumina v Commission* [2021] OJ C252/27 [hereafter: 'Notice of action']; (GC, 13 July 2022) ECLI:EU:T:2022:447.

[14] Council Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

[15] Case C-449/21 *Towercast v Autorité de la concurrence and Ministère de l'Économie* [2021] OJ C452/9; (CJ, 16 March 2023) ECLI:EU:C:2023:207. The judgment cites the CJ ruling in *Continental Can*; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215.

[16] Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47.

testament to the EU having more to lose than most in this regard. Quite aside from the prospect of false positives arising at the assessment stage, practitioners and industry experts have expressed concerns about what the recent changes mean for the parties of innocuous below-threshold mergers—once incapable of being called-in for review, but now wary of the double threat posed by an unexpected *ex ante* assessment by the Commission (following an Article 22 EUMR referral) or, in rarer instances, *ex post* review by NCAs under Article 102 TFEU.[17]

In what continues to be a period of striking upheaval in EU merger control, this article seeks to take stock by providing a lay of the land in respect of the EU's recent attempts to strengthen enforcement efforts against innovation-reducing mergers, particularly killer acquisitions, and thereby aid the fostering of innovation in markets. Section II provides an introduction to the concept of innovation within the context of competition (law), distinguishing between innovation competition and innovation as a factor of product competition. It then describes potential innovation theories of harm in merger control, including killer acquisitions, and provides an introduction to the Commission's consideration of innovation.[18] Section III explores the Commission's adoption of a more permissive policy for the Article 22 EUMR referral mechanism, its survival—at least for now—of a test case in the form of the *Illumina/GRAIL* merger, and the implications of adopting it as the EU's primary means of capturing killer acquisitions. Section IV charts the legislative scrutiny that shaped the gatekeeper obligation to inform about concentrations under Article 14 DMA and comments briefly on the provision's capacity to detect targets for Article 22 EUMR referrals. Section V documents the role played by the *Towercast* judgment in reviving the potential for mergers to be subjected to *ex post* scrutiny under Article 102 TFEU and its possible implications for enforcement and legal certainty. Section VI presents concluding remarks.

II. INNOVATION HARMS AND EU MERGER CONTROL

A. Understanding innovation competition

Competition law is concerned with the preservation of competition in various parameters. Traditionally, these are static: focusing on price, output, or quality of products in an existing market. In recent years, however, competition scholars and enforcers have paid increasing attention to dynamic parameters of competition, with a particular focus on innovation, namely the bringing to market of new or substantially altered products or processes.[19] It is a Herculean task to provide an exhaustive definition of innovation. Luckily, an all-encompassing definition of innovation would not shed light on the issues in this article, and so we can leave such definitions to other scholars. It is crucial, however, to distinguish between innovation as an aspect of product competition, and competition in innovation (or 'innovation competition'). In this section, we therefore provide a primer on these concepts

17 These concerns are considered in Sections III–V, below.

18 While Section II engages with the wider context of innovation concerns and their substantive appraisal, we deliberately omit to engage with the ongoing debate regarding the prevalence of killer acquisitions and their observable impact on innovation. As merger control regimes globally have adopted reforms to 'shore-up' their enforcement efforts against killer acquisitions, the EU's decision to follow suit is neither controversial nor unexpected.

19 V Robertson, *Competition Law's Innovation Factor: The Relevant Market in Dynamic Context in the EU and the US* (Hart Studies in Competition Law by Bloomsbury Publishing 2020) 67; OECD and Eurostat, 'Oslo Manual: Guidelines for Collecting and Interpreting Innovation Data' (2005) para 146; TM Jorde and DJ Teece, 'Innovation, Dynamic Competition, and Antitrust Policy' (1990) 13 Regulation 35.

for the purposes of this article. This is followed, in subsection II.B, by an analysis of innovation theories of harm.

Most scholars are, by now, familiar with the 'Schumpeterian' idea that innovation is a parameter of competition, on par with—or perhaps even more important than—price.[20] This idea, although appealing, has not been the easiest to translate into competition law practice. Traditionally, competition law considers static competitive constraints, as illustrated by market definition's focus on demand and supply substitutes.[21] Static constraints are competitive forces which incentivize undertakings to improve the *price* and *quality* conditions of *existing* products in order to provide a better way of satisfying existing demand. This is distinct from the constraints which arise from competition through innovation: the type of competition which consists of introducing *new* or *significantly improved* products, whose novelty makes them distinct from existing products. By incorporating innovation in the parameters of competition, traditional rivalry on the conditions of sale of existing products is supplemented with competition through the offer of new products. This type of competition is usually called 'dynamic competition',[22] as opposed to the 'static competition' on price and output. Of course, static and dynamic competition are not mutually exclusive, as the introduction of new products tends to spur price reductions in existing products.[23]

This explanation, though easier to understand, glosses over the further complexities of the role that innovation plays in competition. Dynamic competition is a broad term that is unable to capture the *differences* in the competitive constraints flowing from innovation. Different forms of innovation will have different relationships with existing products and their markets and may form the basis for significantly different theories of harm. The term 'dynamic competition' does not, in and of itself, clarify whether the introduction of new products addresses existing but latent demand, or whether it addresses or creates entirely new demand. When a company innovates, it may be satisfying *existing* demand in a *different* way—improving upon or differentiating from existing products in an evolutionary manner—or it could be satisfying *new, previously unsatisfied* wants. To put it another way: A company may engage in 'sustaining innovation', 'giving existing customers something more and better in what they want' so as to secure growth and profits; or a company may engage in 'disruptive innovation', offering a novel value proposition altogether.[24] These different forms of innovation have different relationships with existing products and markets. Where the new introductions build on existing demand, their relationship with existing products and market participants tends to be relatively clear. Where they are introduced to satisfy previously unsatisfied wants, however, the undertaking is providing something which does not neatly fit into an established pattern of consumer preferences and behaviour. Thus, it may be difficult to identify the new products and new markets they create until after they have become commonplace.

20 JA Schumpeter, *Capitalism, Socialism, and Democracy* (1943; Routledge 2003) 84.

21 Even potential competition is largely interpreted as referring to 'known' production processes, which merely require more time and costs to be adapted to the production of the focal product; S Bishop and M Walker, *The Economics of EC Competition Law* (Sweet & Maxwell 2010) 73.

22 eg TM Jorde and DJ Teece (eds), *Antitrust, Innovation, and Competitiveness* (OUP 1992); JG Sidak and DJ Teece, 'Dynamic Competition in Antitrust Law' (2009) 5 J Compet Law Econ 581; A Jones, B Sufrin and N Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases and Materials* (7th edn, OUP 2019) 13.

23 Sidak and Teece, ibid 616.

24 A Ezrachi and M Stucke, *How Big-Tech Barons Smash Innovation—and How To Strike Back* (HarperCollins 2022) 24–26, citing C Christen, *The Innovator's Dilemma—When New Technologies Cause Great Firms to Fail* (Harvard Business Review Press 2016).

Establishing the relationship between the innovation and current markets is important for understanding the competitive landscape. When a company innovates, introducing new products, it may be striking at the demand for products currently for sale, but this can occur in two distinct ways. First, the products may be improvements upon existing products, so that the improved versions eat into the profits of the old versions. Secondly, the new products may render the old demand and products entirely obsolete. This happens in situations of disruptive innovation, where the new products cannibalize entire existing industries.[25] This phenomenon of 'creative destruction' has captured the attention of scholars and enforcers. Most scholars are familiar with the quote by Schumpeter:

> in capitalist reality as distinguished from its textbook picture, it is not that kind of competition which counts but the competition from the new commodity, the new technology, the new source of supply, the new type of organization […] —competition […] which strikes not at the margins of the profits and the outputs of the existing firms but at their foundations and their very lives.[26]

This type of dynamic competition is not 'in the market' but 'for the market'. Undertakings do not strive to develop substitutes to existing products, but products which will completely displace them.[27] Even before they are commercialized, these new products may represent competitive constraints; as undertakings fear this displacement, they profile themselves to customers as innovative and strive to capture these new profits.[28]

Thus, in industries characterized by dynamic competition, the mere *threat* of innovation might be enough to constrain the offer of existing products. An undertaking may compete for customers through its ability to innovate and may have to be cautious in the conditions it sets for existing products in order to counter-act potential innovation. The 'threat of innovation' can influence the behaviour of undertakings in different ways: it may prompt the undertaking to carefully consider the conditions it sets for the offer of its existing products (on static parameters such as price, quality, or brand recognition) to dissuade customers from considering new products which may be introduced to satisfy the same demand, usually at a high initial price.[29] It is also possible that the threat of new products spurs the undertaking to innovate as well. This can occur both when the future products emerging from innovation are clear, and when it is not yet certain exactly what form these products may take or whether they will even be successful.

Even before they are commercialized, future products may constrain the undertaking's conduct. Undertakings may face rivalry from products which do not yet exist, yet still have an impact on the conditions of sale of the existing product. This is the case, for example, if higher profits from the existing product will attract faster development and entry of substitutes; but it is also acute if customers are likely to adapt their preferences in response to innovation. A monopolist of horse-drawn carriages may, for example, seem to be in an excellent position to increase prices, before the invention of the automobile. However, the

[25] ibid.
[26] Schumpeter (n 20) 84.
[27] C Ahlborn and others, 'DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries' (2006), 16 <https://ssrn.com/abstract=894466> accessed 15 September 2023.
[28] ibid 16; Sidak and Teece (n 22) 613.
[29] Pleatsikas and Teece note that '[w]aves of new product introductions are frequently accompanied by premium prices initially, followed by rapid price declines as imitative products emerge'; C Pleatsikas and D Teece, 'The Analysis of Market Definition and Market Power in the Context of Rapid Innovation' (2001) 19 Intl J of Industrial Organization 666.

suggestion that automobiles will be commercialized in the near future could encourage the monopolist to make its existing product more attractive, by reducing prices or by engaging in marketing campaigns lauding the quality of horse-drawn carriages. It might also, if within its capabilities, consider changing its own product or including steam-powered or diesel-powered carriages in its offer. This supply-side constraint is reminiscent of traditional supply-side substitutability because it incorporates some immediacy (automobiles are to be commercialized *in the near future*); yet it is still fundamentally distinct: it does not concern the threat other undertakings represent with regard to the production *of the existing product*, but rather the production of *new products.* Innovation acts as a constraint because the production of new products *in the future* constrains the undertaking *in the here and now.*[30] Even when innovating undertakings develop new products which satisfy a distinct want from the existing product (and thus may not, in the long run, be substitutes), the distinction between the new products and the existing product may not be clear from the very start. Demand usually takes some time to settle, and preferences may shift only gradually. Initially, customers might consider the new product as an *alternative* to existing offers, before eventually considering it to be distinct and not interchangeable.[31] Often the shift from the old product to the new product happens gradually, meaning the old and new products are sold alongside each other.[32] This is the 'product migration' stage: a length of time during which consumer preferences are in flux, and customers may switch from the old to the new product as if the latter were a substitute for the former.[33] This occurs, despite the fact that, once the product migration stage is over, the new product will have taken on a life of its own, fulfilling a distinct want and in many cases almost entirely displacing the old product.

Less beneficially, an undertaking may respond to the threat of innovation by adopting strategies designed to lock customers into its existing product, in order to leverage its existing market power into a future new market or to impede the innovation by (potential) rivals. The consideration of these strategies could be incorporated into competition law as innovation theories of harm, which are discussed in subsection II.B for the purposes of merger control.

The discussion above has prompted us to consider the innovation's relationship with the sale of existing products, implicitly asking us to identify future products resulting from innovation. Innovation may indeed be used to describe the actual introduction of these new products and their rivalry with existing products or existing undertakings. In that sense, innovation has an impact on more 'traditional' competition between products, influencing the conditions on which they are offered. However, innovation can also be used to describe something a bit more nebulous: the different activities and incentives to produce something new, rather than the actual introduction of new products. Where undertakings compete to satisfy the same demand as existing products or as clearly identified products close to being commercialized, competition authorities have a clear reference point for identifying competitive constraints: the product(s) currently on the market. This is distinct from *competition in innovation*, where rivalry between undertakings consists of pursuing parallel research efforts,

[30] H Nevo, *Definition of the Relevant Market: (Lack of) Harmony between Industrial Economics and Competition Law* (Intersentia 2014) 88.

[31] JD Bohlmann and others, 'The Interplay of Customer and Product Innovation Dynamics: An Exploratory Study' (2013) 30 Product Innovation Management 228.

[32] G Niels, H Jenkins and J Kavanagh, *Economics for Competition Lawyers* (2nd edn, OUP 2016) 82; Nevo (n 30) 88.

[33] M Eben, 'Addressing the Main Hurdles of Product Market Definition for Online Services: Products, Price, and Dynamic Competition' (2019) PhD thesis, University of Leeds, 277 <https://etheses.whiterose.ac.uk/26343/> accessed 15 September 2023.

which may or may not lead to the commercialization of new products which cannot (yet) be identified.

While the explicit wording does not feature in the final adopted guidelines, the European Commission's Draft Revised Horizontal Cooperation Guidelines refer to R&D cooperation as affecting 'competition in innovation' as opposed to (or as well as) competition in existing product markets. These 'R&D efforts' can be 'for new products and/or technologies, that create their own new market'; they can also be R&D poles, which have a particular objective, but one which 'cannot yet be defined as a product or a technology or involves a substantially broader target then a specific product or technology on a specific market'.[34] To understand how innovation influences 'static' product competition, the impact of that innovation on existing or imminent products' prices, output, and quality has to be considered. Yet to understand how *innovation efforts* as such—as a type of competition—are affected by certain conduct, authorities would need to identify those innovation efforts which compete with each other.

B. Innovation theories of harm

(i) Evolving conceptions of innovation harm

There has been a marked evolution in the way innovation is considered in competition policy. Innovation has long had a place in competition policy and competition law enforcement. Even a competition policy driven by concerns about competition in existing markets may consider innovation, either as an additional consequence of market power and anti-competitive conduct or as a defence for such conduct. It is a more complicated question to consider how conduct may affect the rivalry *to* innovate, as distinct from specific product markets.

We will leave aside the vexed question of the relationship between market power and innovation, which is already extensively covered in the scholarship.[35] We assume, like the European Commission seems to do in its decisional practice,[36] that competition law has a role to play in combatting impediments to innovation competition. The more interesting question is what form this can take. Substantively, what theories of harm may involve innovation; and procedurally, what steps can be taken to bring cases, particularly against mergers, which may impede innovation? These are questions that have prompted some reimagining of the EU's current procedural and, to a more limited extent, substantive approaches to competition policy. We focus primarily on innovation theories of harm in merger cases in this article. There may be benefits to innovation when undertakings merge and combine their assets and resources. At the same time, such combinations may raise a range of concerns which involve innovation. Key concerns arise in horizontal mergers, though vertical and conglomerate mergers may also prove problematic.

In the context of innovation—not dissimilar to the context of 'static' competition—the most intuitive concern is that a merger may lead to non-coordinated (or 'unilateral') effects, by eliminating the competition between two undertakings, thus creating a more powerful merged firm. This can be a concern for innovation as an aspect of product competition, as

[34] Commission, *Draft Revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (version of 1 March 2022) paras 59–60 <https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en> accessed 15 September 2023.

[35] Good overviews can be found in: JB Baker, 'Beyond Schumpeter vs Arrow: How Antitrust Fosters Innovation' (2007) 74 Antitrust L J 575, 575–88; I Kokkoris and T Valletti, 'Innovation Considerations in Horizontal Merger Control' (2020) 16 J Compet Law Econ 220, 221–26.

[36] See subsection II.B(ii).

well as for innovation competition. The merger may *reduce innovation as an aspect of product competition*, where the parties are directly competing in an existing product market or in a future product market. In the first scenario, one of the parties is a potential competitor, who could introduce a new product within a short period of time which strikes at the demand for the other undertaking's existing product. In the second scenario, both undertakings may be engaged in parallel efforts to introduce identifiable products that would compete with each other once introduced. A merger may also lead to unilateral effects by *reducing innovation competition*. The parties to the merger may be rivals in innovation competition, pursuing parallel research efforts, further removed from an identifiable product.

Both in the case of innovation as an aspect of product competition and innovation competition itself, the concern is that, post-merger, the merged firm would be in a position to internalize future competition: it may have an incentive to reduce or eliminate its innovation efforts. The merged firm may *lower* its investment, by ending the now superfluous efforts of one of the two parties. It could go further still if, for example, the acquiring firm not only brings the acquired firm's innovation effort to a close but also reduces its own investments below pre-merger levels. The scale of such reduction will likely vary with the reduction in the competitive constraints after the merger. If the two undertakings merge, these two undertakings no longer compete and thus no longer spur each other's innovation efforts. However, other undertakings may remain that are not party to the merger and may still pose a (perhaps diminished) threat.[37]

In an extreme scenario, an undertaking may acquire another with *the purpose of eliminating* the target's future product or ongoing innovation project before it can challenge the acquirer's position. This is a simple example of what is commonly known as a 'killer acquisition', removing a nascent threat. Although killer acquisition theories have particularly captured the imagination of digital markets thinkers, the support for the 'killer acquisition' theory was initially developed within the pharmaceutical context: Cunningham, Ederer and Song's famous 2018 research paper focused on the strategy of incumbent pharmaceutical companies to buy up innovative companies in order to 'kill-off' their innovation projects, the outputs of which would have competed with the products of the incumbent.[38] Killer acquisitions are usually framed as the killing-off of the *acquired firm's* efforts, but it is also possible that the *acquiring firm* terminates its own product or innovation, sometimes called a 'reverse killer acquisition'.[39] It has been argued that killer acquisitions may be part of a larger strategy to 'monopolise' a market, by killing-off all potential threats, and entrenching dominance as a result.[40]

[37] JB Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 153 and 163; Kokkoris and Valletti (n 35) 203–34.

[38] C Cunningham, F Ederer and A Ma, 'Killer Acquisitions' (2021) 129 J Political Eco 649. The authors first published a working paper, which is the best-known version of their arguments, in 2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707> accessed 15 September 2023.

[39] Coined by C Caffarra, G Crawford and T Valletti in '"How tech rolls": Potential competition and 'reverse' killer acquisitions" (*VoxEU*, 11 November 2020) <https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions> accessed 15 September 2023.

[40] J Mulder and W Sauter, 'A New Regime for Below Threshold Mergers in EU Competition Law? The Illumina/Grail and Towercast judgments' (2023, early access) J of Antitrust Enforcement 2; A Ezrachi and M Stucke, 'Innovation Misunderstood' (2023, forthcoming) Am Uni L Rev 43 <https://ssrn.com/abstract=4547201> accessed 15 September 2023; J Crémer, Y-A de Montjoie and H Schweitzer, 'Competition Policy for the Digital Era' (2019) Final report for the European Commission 111 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 15 September 2023. This is a particular concern in digital ecosystem cases and we return to it in our discussion of conglomerate mergers.

Mostly, the discussion focuses on the development by start-ups and smaller ventures of new products which could have competed with the incumbents' clearly identifiable products. Companies buy up *potential* competitors, who create (future) products—products with a reasonable likelihood of commercialization within a shorter period of time—which would have competed with the acquirer's products absent the merger. However, the reasoning could also be applied to innovation efforts in the absence of soon-to-be commercialized future products: the acquisition would eliminate a player with the incentives and ability to innovate, whose innovation efforts are shelved once the merger is completed. A 'killer acquisition' kills-off innovation which either stands to render the acquirer's own product obsolete (innovation as potential competition in a product market) or which presents a threat through its broader innovation capabilities distinct from specific products (innovation competition).

Horizontal mergers may also reduce innovation by firms that are *not party* to the merger. The increased power of the merged firm may be able to deter innovation efforts by remaining competitors; for example, because they fear their innovation will be duplicated by the dominant merged firm or because the increased power of the merged firm will have a negative effect on the return on investment of firms remaining in the market.[41] The merged firm may also be able—and have the incentive to—reduce the access of competitors to important inputs or customers (so-called 'exclusionary effects').[42] This concern about access to inputs can also arise in vertical mergers if an undertaking sets out to acquire a supplier with assets of strategic importance for innovation. The traditional perception is that vertical mergers are mostly competitively neutral but, as Robertson has pointed out, vertical theories of harm are frequently assessed in digital markets.[43] Indeed, vertical mergers may have a negative impact on innovation, as is exemplified by the *Illumina/GRAIL* prohibition, which is the first time the Commission has blocked a vertical merger on the grounds of an innovation theory of harm.[44] In a scenario where the upstream undertaking owns assets essential for innovation or develops new technologies and intellectual property (IP) upon which the downstream undertaking and its rivals rely, the merged firm may have incentives to foreclose access to these assets or refuse to license the technology or IP after the merger. This may not only diminish product competition in the downstream market but could also reduce the ability of rivals to invest in innovation more broadly.

Conglomerate mergers are, at first glance, less obvious candidates for innovation theories of harm. Yet even they could conceivably raise concerns, particularly in the context of

[41] It appears the majority of the law and economics literature on innovation is focused on the impact that start-up acquisitions have on incentives to innovate (post-merger), but there is a related strand of literature (which seems to stretch beyond law and economics) that scrutinizes the authenticity of so-called 'kill zone theory', which suggests that venture capitalists avoid investing in start-ups that operate in 'kill zones' (product markets that are monopolized and, as such, have limited return on investment) and, also, that start-ups themselves may avoid entering into these markets because of the incumbent's dominance (or, as some have suggested, the incumbent's ability to simply replicate or acquire any new innovation), thus meaning innovation in the market is depleted. See C Teh, D Banerjee and C Wang, 'Acquisition-induced Kill Zone' (2022) Discussion Paper no 2022-24 <www.monash.edu/__data/assets/pdf_file/0015/3132051/2022-24.pdf> accessed 15 September 2023.

[42] Baker (n 37) 163–67.

[43] Robertson states that they are assessed in over 40% of all cases, see V Robertson, 'Digital Merger Control: Adapting Theories of Harm—Note by Viktoria Robertson for OECD' (2023) DAF/COMP/WD(2023)59, 16.

[44] *Illumina/GRAIL* (Case COMP/M.10188) Commission Decision (6 September 2022); at the time of writing, publication of the Commission's decision is pending. The jurisdictional aspects of the *Illumina/Grail* case are discussed in subsection III.A(iii).

(digital) ecosystems.[45] An undertaking which controls (the key platforms in) a digital ecosystem, may be tempted to consolidate its power over the ecosystem as a whole (its 'gatekeeper position' in the words of the Digital Markets Act) by acquiring complementor products or innovation.[46] Ezrachi and Stucke describe the situation in which an undertaking controlling an ecosystem of services acquires another firm, in order to divert the acquired firm's innovation and product development away from one which could pose a threat to the ecosystem's products, to one that aligns with the acquiring firm's own value chain.[47] They refer specifically to Meta's acquisition of WhatsApp—an acquisition which the US Federal Trade Commission explicitly described to be part of Meta's monopolization strategy through 'serial acquisitions'.[48] Relatedly, it has been argued that new entrants may invest more in innovations for products which would be offered on a platform held by a dominant undertaking, rather than attempting to develop products which would compete directly with the platform. If true, the platform owner might influence the innovation in the broader industry, on adjacent markets as well as its own market.[49] Thus, conglomerate mergers may raise specific concerns when it comes to innovation, which are distinct from those in horizontal or vertical merger contexts.

(ii) The Commission embraces innovation but faces criticism

There is no doubt that the European Commission acknowledges that innovation has a role to play in the assessment of mergers. Its 2004 Horizontal Merger Guidelines mention 'innovation' several times, either as a benefit which effective competition can bring, or as another parameter of competition alongside price, output, choice, and quality.[50] It also floats the possibility for a theory of harm based on non-coordinated effects, while suggesting that coordinated effects are less likely when innovation is a parameter of competition.[51] However, it remains relatively conservative, apparently sticking to product competition ('pipeline products related to a specific product market'[52]), and not venturing into the confusing world of innovation competition. The 2008 Non-Horizontal Merger Guidelines also mention innovation, describing 'diminishing innovation' as one of the various abilities of a firm with market power, and listing it alongside 'other parameters of competition'.[53] This indicates that the Commission would also consider innovation as a parameter of competition in vertical or conglomerate mergers, but does not tell us much about possible innovation theories of harm.

In its decisional practice, the Commission has ventured further, developing over time a braver body of innovation theories of harm which look not only at innovation affecting identifiable products (markets) but also at innovation activities distinct from final products. Scholarship

[45] Robertson argues that conglomerate theories of harm are particularly important in digital markets, see Robertson (n 43) 16.

[46] H Schmidt, 'Merger Regulation in the Digital Economy and the Forgotten Goal of Innovation' (2022) 11(suppl1) J Antitrust Enforcement i102, i103–i104; Crémer, de Montjoie and Schweitzer (n 40) 116.

[47] Ezrachi and Stucke (n 40) 36.

[48] See United States Court of Appeals for the District of Columbia Circuit (2021) 66 F.4th 288; *New York v Facebook, Inc. (Facebook I)*, 549 F. Supp. 3d 6 (DDC 2021).

[49] K Bryan and E Hovenkamp, 'Antitrust Limits on Startup Acquisitions' (2020) 56 Rev Industrial Org 615, 616; and C Turgot, 'Killer Acquisitions in Digital Markets' (2021) 2 CoRe 112, 114.

[50] Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* C(2004) 31/03, para 8. Paragraph 81 notes that mergers may also support innovation.

[51] ibid, paras 38 and 45.

[52] ibid, para 38.

[53] ibid, para 10.

has set out this evolution by assessing the decisional practice in depth, from cases in the early 2000s to the 2017 decision in *Dow/Dupont*.[54] Older decisional practice has considered innovation both as one of the benefits which may arise from a merger and as one of the parameters of competition which may be negatively affected by a merger. When doing so, the Commission relied on the ability to identify products which could be introduced within a short timeframe. Even in *AstraZeneca/Novartis*,[55] where the Commission raised the concern that the merger may negatively impact incentives to innovate of the merging parties and their competitor,[56] the assessment in the decision was based on clearly delineated markets for future products and disregarded ongoing innovation efforts in the industry because they would be unlikely to be introduced within a specific timeframe.[57] In essence, the Commission considered whether a merger may eliminate potential competition within an existing market. This is quite different from some of the concerns raised by the Commission, almost two decades later, in *Dow/Dupont*.[58] In this decision, the fear was not just that the merged firm may have fewer incentives to develop new products but that it may invest less in research and development overall, even if the Commission may not yet be able to identify what products could be the outcome of these innovation efforts.[59] The merger would not just reduce potential competition for existing or future *product* markets, but for a type of 'innovation market'—or 'innovation space', to use the wording of the Commission. [60]

Not everyone is delighted with this evolution in the decisional practice. Commentators both praise and condemn the *Dow/Dupont* decision. Criticism includes concerns surrounding the Commission's interpretation of the facts and the industry, as well as claims that this new innovation theory of harm should not have been introduced in such a manner in the first place because it has no basis in legal precedent nor in the Commission's guidelines.[61] Some scholars applaud the incorporation of innovation theories of harm but urge the Commission to go further in its consideration of innovation harm, not only in terms of the breadth of innovation incentives and outcomes it considers but also in terms of the diversity, quality and direction of innovation.[62]

Critics also worry about the definition of 'innovation spaces' disconnected from identifiable (future) products, labelling it too uncertain and unpredictable.[63] And yet it seems, absent a rebuttal by the EU Courts, detractors of the 'innovation markets' approach are

[54] Kokkoris and Valletti (n 35) 236–40; and M Todino, G van de Walle and L Stoican, 'EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation) (2019) 64 Antitrust Bulletin 11, 15–25.
[55] *AstraZeneca/Novartis* (Case COMP/M.1806) Commission Decision 2004/310/EC [2000] OJ L 110/1.
[56] ibid, para 219.
[57] Seemingly 3 or 5 years: see ibid, paras 67, 139, 144, 185–86.
[58] *Dow/Dupont* (Case COMP/M.7932) Commission Decision of 27 March 2017 [2017] OJ C353/05.
[59] ibid, para 3025.
[60] ibid, paras 342–43. For reflections on the wording 'innovation space' rather than 'innovation market', see L Landman, 'From Innovation Markets to Innovation Spaces in Europe: A New Phrase is not Innovation' (2020) 42 Eur Compet L Rev 30, 36.
[61] Todino, van de Walle and Stoican (n 54); P Ibáñez Colomo, 'Competition Law and Innovation: Where Do We Stand?' (2018) 9 J Euro Compet Law & Practice 561; P Werner, S Clerckx and H de la Barre, 'Commission Expansionism in EU Merger Control—Fact and Fiction' (2018) 9 J Euro Compet Law & Practice 133; and N Petit, 'Innovation Competition and Merger Policy: New? Not sure. Robust? Not Quite!' (2018) 2 Concurrences: Revue des Droits de la Concurrence.
[62] E Deutscher and S Makris, 'Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition' (2022, early access) J Antitrust Enf 1.
[63] Todino, van de Walle and Stoican (n 54) 22–24 reflect on this critique. Werner, Clerckx and de la Barre (n 61) 142; Petit (n 61); and N Petit, 'Innovation Competition, Unilateral Effects, and Merger Policy' (2019) 82 Antitrust L J 891.

fighting a losing battle. Despite their concerns about the methodology in *Dow/Dupont* for identifying what are essentially 'markets' for innovation,[64] innovation spaces have found their way into the Draft Revised Market Definition Notice, signalling they are here to stay.[65] There remain significant challenges in identifying competing R&D activities (or innovation activities more broadly). In its Draft Revised Market Definition Notice, the Commission referred to several factors to consider when seeking to identify competing innovation, such as the nature and scope of the innovation efforts, the objectives of the different lines of research, the specialization of the different teams involved or the results of the undertaking's past innovation efforts.[66] These are helpful, but broad, criteria. In both *Dow/Dupont* and *Bayer/Monsanto*, the Commission describes innovators as 'targeting specific spaces' or 'discovery targets',[67] which raises the question of what such spaces or targets consist of (and how they are distinct from future products[68]). If there is already concern about the difficulty of delineating competing innovation activities in the pharmaceutical and agrochemical industries, such concerns may be amplified when it comes to digital markets. Cunningham, Ederer, and Ma proposed identifying competing innovations in pharmaceutical industries by grouping together projects based on the same therapeutic classes and using the same mechanisms of action, well-known pharmaceutical categories.[69] Digital industries do not appear to have equivalent recognizable categories. Similarly, although spending on R&D in absolute terms is reported publicly in company documentation,[70] its relative importance in the overall industry—and particularly in relation to rivals—can be challenging to interpret. Patent data can also be useful, but it overlooks R&D that does not lead to patent applications.

The Commission has also had to face questions about its handling of killer acquisitions in digital markets. There has been an appeal to the Commission to review with caution any acquisitions made by big tech platforms, such as those run by Meta (Facebook) or Alphabet (Google). These platforms already have a track record, so the argument goes, of killing-off (or more likely 'diverting') innovation which might have posed a threat to the existing products or business model of the Big Tech firm. Critics point to acquisitions which were not reviewed, as well as merger decisions such as *Facebook/WhatsApp*[71] and *Google/DoubleClick*,[72] as examples where the Commission failed to anticipate harm.[73] Nonetheless, academic debate remains over the frequency and impact of killer acquisitions,[74] particularly in digital markets, and thus over the merits

[64] Eben (n 33) 285; Robertson (n 19) 130 and 143 (reflecting that it is not an 'actual market'); Landman (n 60).

[65] Draft Revised Commission Notice on the definition of the relevant market for the purposes of Union competition law (version of 8 November 2022) para 15, fn 25, paras 91–93 <https://competition-policy.ec.europa.eu/public-consultations/2022-market-definition-notice_en> accessed 15 September 2023.

[66] ibid, para 91.

[67] *Dow/Dupont* (n 58) para 350; *Bayer/Monsanto* (Case COMP/M.8084) Commission Decision [2018] OJ C456/10, para 80, fn 23.

[68] See, for the argument that there is no difference or it is irrelevant, Landman (n 60) 36.

[69] Cunningham, Ederer and Ma (n 38) 652.

[70] In a helpful table, Ezrachi and Stucke ((n 24) 16) summarize the last decade of R&D spending of Facebook, Google, Apple and Microsoft, as reported in their 10-K forms.

[71] *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision [2014] OJ C417/02.

[72] *Google/DoubleClick* (Case COMP/M.4731) Commission Decision [2008] OJ C184/06.

[73] eg Crémer, de Montjoie and Schweitzer (n 40) 115; Whish (n 10) 14; Gautier and Lamesch (published version) (n 9) 11; ML Katz, 'Big Tech Mergers: Innovation, Competition for the Market, and the Acquisition of Emerging Competitors' (2021) 54 Inf Econ Policy 1; Schmidt (n 46) i126; and E Argentesi and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2021) 17 J Compet L Econ 95.

[74] Gautier and Lamesch (n 9), a frequently cited paper on killer acquisitions, empirically maps acquisitions by GAFAM between 2015 and 2017 (175 acquired companies). The authors observe more than 60% of the products of target firms were discontinued in the wake of GAFAM acquisitions, noting that

of incorporating them in theories of harm.[75] Where an innovation effort is in its early stages, it can be challenging to anticipate how successfully it could have been completed and brought to market in the absence of a merger. The challenge is particularly acute where the target of the acquisition is not an established firm with a track record of previous commercialized innovation, but rather a start-up with no such track record and often with little revenue at the time of the merger. The speculative nature of counterfactual analysis increases a decision-maker's dependency on objective evidence and robust theoretical frameworks, without which it leaves itself exposed to a greater risk of a decision being overturned on appeal. As such, competition authorities can be hesitant to adopt novel theories of harm and to 'embrace uncertainty' by engaging in longer-term forecasting, where reliable evidence is sparse.

These challenges have prompted some to consider changing the substantive standards in EU merger control. They express concerns that the standard of proof to show the merger would result in an SIEC is too high, making it difficult for the Commission to successfully put a stop to mergers which kill-off innovation.[76] Thus, there have been calls to reconsider the substantive standards for innovation harm. First, some call for a move away from standards such as 'significant likelihood' or 'balance of probabilities', to adopt *lower* standards which are easier to prove in situations of uncertainty. This may require revisions to the Guidelines and EUMR.[77] Secondly, there have even been calls to *reverse* the burden of proof to evidence innovation harm. The most common proposal is the introduction of a rebuttable presumption of harm where mergers involve start-ups or particularly innovative undertakings. The Commission would be able to presume these harm innovation (as a factor of product competition or as innovation competition), and it would be up to the parties to provide evidence to the contrary.[78]

the main reasons for discontinuing a product post-merger included: (i) the product was not as successful as expected; (ii) the acquisition was for the assets/innovation effort (rather than the product/brand); or (iii) the discontinuation was to protect the acquirer's market power (to kill the competitive threat). In the working paper, the study finds no evidence that killer acquisitions are widespread and, rather, concludes that most acquisitions were driven by asset acquisitions. It is important to note a significant difference between the working paper and the published version, however, since these conclusions on the evidence are omitted from the published version, citing the inability to screen between technology/asset acquisitions and 'killer' eliminations of a potential rival (see page 3 of the published version). Other studies with a variety of findings include: L Cabral, 'Merger Policy in Digital Industries' (2021) 54 Inf Econ Policy; P Affeldt and R Kesler, 'Big Tech Acquisitions—Towards Empirical Evidence' (2021) 12 J Eur Compet L Practice 471; Katz (n 73); M Motta and M Peitz, 'Big Tech Mergers' 54 Inf Econ Policy; and J Haucap and J Stiebale, 'Non-price Effects of Mergers and Acquisitions' (2023) DICE Discussion Paper No 402 <www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/402_Haucap_Stiebale.pdf> accessed 15 September 2023.

[75] Gautier and Lamesch (working paper version) (n 9); RW Crandall and TW Hazlett, 'Antitrust in the Information Economy: Digital Platform Mergers' (2022) 65(suppl2) J L Econ S499; and M Ivaldi, N Petit and S Ünekbaş, 'Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries' (2023) TSE Working Paper No 13-1420 <https://ssrn.com/abstract=4407333> accessed 15 September 2023.

[76] Deutscher and Makris (n 62) 48–49; and B Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System' (2021) 4 CoRe 344, 359. The appropriate standard of proof for applying the SIEC test was at issue in the *CK Telecoms* saga, where the Court of Justice ultimately set aside the General Court's higher standard of proof ('strong probability') in favour of a lower standard ('more likely than not'); Case C-376/20 P *Commission v CK Telecoms UK Investments* (CJ, 13 July 2023) ECLI:EU:C:2023:561.

[77] OECD, 'Start-ups, Killer Acquisitions and Merger Control' (2020), 49–50 <http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf> accessed 15 September 2023; Deutscher and Makris (n 62) 48–49; and Whish (n 10) 10.

[78] M Motta and M Peitz, 'Removal of Potential Competitors—a Blind Spot of Merger Policy?' (2020) 6 Compet L Pol Debate 19, 24; Crémer, de Montjoie and H Schweitzer (n 40) 51; OECD (n 77) 50; Lundqvist (n 76) 361; and FS Morton and others, 'Stigler Committee on Digital Platforms—Final

Yet attempts to address the substantive enforcement gap will be largely futile if there continues to exist jurisdictional gaps preventing killer acquisitions from being detected and/or called-in by the Commission. Nascent acquisitions are typically more prone to flying under the enforcement radar, given they frequently fall short of the turnover-based thresholds employed in most merger regimes. Options for addressing the jurisdictional gap are wide-ranging and, in the next few sections, this article will provide an overview of three notable developments in the EU in this regard: first, Section III discusses the recalibration of Article 22 EUMR referrals which allow Member States to request a review of a merger by the Commission even where it does not meet the quantitative criteria to do so; secondly, Section IV discusses the obligation under Article 14 of the Digital Markets Act for designated gatekeepers to inform the Commission of their intended acquisitions; and thirdly, Section V reflects on the revival of the *ex post* review of mergers as abuses of dominance under Article 102 TFEU.

III. RECALIBRATING THE ARTICLE 22 EUMR REFERRAL MECHANISM

While effective enforcement of killer acquisitions stands to benefit from the steps taken to afford a more central role to innovation considerations in the Commission's substantive review, turnover-based jurisdictional thresholds have often been viewed as a hindrance to the EUMR's ability to routinely capture nascent acquisitions of possible concern, meaning such acquisitions may struggle to get 'through the door' and in front of the Commission in the first place.[79] Short of amending the jurisdictional thresholds themselves, which would constitute a premature move according to several eminent reports,[80] the Commission has opted for a 'recalibrated' and more permissive approach to the Article 22 EUMR referral mechanism as its primary means of bridging the perceived jurisdictional gap.[81] The referral mechanism affords Member States the opportunity to request the Commission to examine any merger ('concentration' as defined under Article 3 EUMR) that falls below the turnover thresholds prescribed by the EUMR—namely, a merger that lacks a 'Community (EU) dimension'—provided that merger stands to *affect trade between Member States* and threatens to *significantly affect competition within the territory of the referring Member State(s)*.[82]

Report' (2019) <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report> accessed 15 September 2023.

[79] B Van Rompuy, 'Editorial: EU Merger Control from the Front to the Back Door' (2021) 5 CoRe 341, 343.

[80] N Levy, A Rimsa and B Buzatu, 'The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to "Brightline" Jurisdictional Rules' (2021) 5(4) CoRe 364, 375 refers to some prominent reports (incl. the EU Special Advisors' Report, Scott Morton et al., Furman Report and Lear Report) which were each 'inconclusive as to the existence of a material enforcement gap that would justify expanding the jurisdictional scope' [of the EU and/or national laws], some calling for further empirical research before any such justification could be made.

[81] Here, the term 'recalibrated' is derived from the filename (article22_recalibrated_approach_QandA.pdf) of the Commission's 'Frequently Asked Questions and Answers (Q&A)' document to accompany the revised Article 22 Guidance, albeit the document itself affords no reference to the term; 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)' (2022) <https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf> accessed 15 September 2023.

[82] EUMR, art 22(1). At the point a Member State makes a request, the Commission will afford the NCAs of other Member States a 15 working day window in which to join the request (art 22(3)), before

Although mergers raising innovation concerns have previously been referred to the Commission under Article 22,[83] these have each involved transactions that meet national jurisdictional criteria. Under the Commission's recalibrated approach, even mergers lacking national jurisdiction have the potential to be referred. While subtle in substance, the policy shift stands to have significant implications for the reach of EU merger control and how parties to smaller transactions evaluate the risk of their deals facing scrutiny at the EU level.

A. Origins, stagnation, and revolution

(i) Limited scope under the Dutch clause

The original purpose of Article 22 was to enable Member States lacking a formal or effective system of merger control to request that the Commission review a particular case, even where the merger fell below the jurisdictional thresholds of the original EC Merger Regulation (ECMR).[84] One such Member State was the Netherlands which, in deliberations on the enactment of the ECMR, negotiated the inclusion of the referral mechanism, hence Article 22's common moniker as 'the Dutch clause'. Over time, once the Netherlands—and, indeed, all but Luxembourg—had established a functioning merger control regime, the original rationale for Article 22 had become mostly redundant. Yet two revisions around the turn of the century had seemingly transformed the provision into something 'more elaborate and sophisticated'.[85] From 1 March 1998, Member States were permitted to make joint requests for referral under Article 22 where it appeared that the Commission was better placed to review a merger, particularly where the undertakings operated in markets across multiple domestic states.[86] The changes sought to remove red tape for merging parties, utilizing Article 22 as a means of extending the application of the one-stop shop and avoiding the increased 'legal uncertainty, effort and cost' that parties encounter from multiple filings in several Member States.[87] In January 2004, at the point the EUMR repealed the provisions of the ECMR, the Article 22 procedure was elaborated to provide a specific procedural timetable, information requirements placed on the Commission, and—under Article 22(5) EUMR—an explicit stipulation that the Commission may invite Member States to make a referral request.

Although these changes repurposed Article 22 and extended its scope, the Commission—from at least March 2005 until late 2020—endorsed a policy of discouraging Member State NCAs from submitting referral requests where the merger in question fell below national jurisdictional thresholds.[88] Due to their limited size, below-threshold mergers were considered

then deciding—within 10 working days thereafter—whether the merger meets the two criteria that would make it appropriate to examine the merger at the EU-level (art 22(3)).

[83] eg *Apple/Shazam* (Case COMP/M.8788), full referral decision of 6 February 2018; and *Facebook/Kustomer* (Case COMP/M.10262), full referral decision of 12 May 2021.

[84] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1, art 22(3).

[85] M Broberg, 'Reforming the Merger Control Regulation's Article 22 Referral Mechanism: On the Member States' Access to Refer Mergers to the European Commission' (2012) 33(5) Eur Compet L Rev 215.

[86] Council Regulation (EC) 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1997] OJ L180/1, Amendment 12(b). Levy et al. suggest that this amendment effectively changed the 'primary purpose' of art 22; Levy, Rimsa and Buzatu (n 80) 366.

[87] ibid, recital 1.

[88] Commission Notice on Case Referral in respect of concentrations [2005] C56/02, especially para 45 and page 23. In general, the wording of the Notice implies that, for a merger to be eligible for any of the referral processes under the EUMR, it should usually be in possession of an 'original jurisdiction' (ie must meet either Member State or EU jurisdictional thresholds).

unlikely to have a significant effect on competition in the internal market. This meant any related Article 22 requests were a likely drain on resources and considered an unnecessary burden on merging parties. The result was a mechanism seldom applied in practice,[89] with Article 22 requests mostly limited to cases where NCAs possessed the jurisdiction to investigate the merger under national law, but the complexity or sensitivity of the transaction rendered the Commission best placed to review the merger.[90]

(ii) Article 22 reimagined as 'a killer of killer acquisitions'

In a speech delivered on 2 March 2020, Commissioner Vestager, responding to mounting criticism of the Commission's perceived inaction on killer acquisitions, rejected the suggestion that amending the EUMR's jurisdictional thresholds would provide an immediate solution, instead confirming that the Commission was considering whether to make greater use of referral mechanisms to review important below-threshold mergers.[91] Later that month, the Commission published a Staff Working Document acknowledging the shortcomings of the existing Article 22 policy. It noted an increase in the number of mergers involving firms with low turnover but high competitive potential and acknowledged the opportunity presented by Article 22 to target suspected killer acquisitions without imposing notification requirements on all nascent acquisitions.[92] In September 2020, Vestager confirmed the Commission's intention to abandon its policy of discouraging below-threshold referrals under Article 22 and its plan to publish guidance to establish a permissive policy 'around the middle of [2021]', describing it as the answer 'hiding in plain sight'.[93] When the Commission published its Article 22 Guidance Paper earlier than anticipated on 26 March 2021, a 'spectacular U-turn' on the referral policy was officially complete.[94] In addition to confirming that the referral mechanism is applicable to all mergers irrespective of whether they meet national jurisdictional criteria,[95] the Guidance provides a comprehensive explanation of the rationales, procedures, and requirements underpinning the provision.

Paragraph 13 of the Guidance Paper refers to Article 22's two legal requirements for referral; namely, that the concentration must: (i) *affect trade between Member States*,[96] and (ii) threaten to *significantly affect competition* within the territory of the Member State(s) making the request. Paragraph 15 offers further insight into this second criterion, confirming that the onus is placed on the referring Member State to demonstrate the existence of such a threat 'based on a preliminary analysis … without prejudice to the outcome of a full

[89] Mulder and Sauter (n 40), fn 6 refers to statistics indicating only 10 art 22 referrals between 2014 and 2020; and Levy, Rimsa and Buzatu (n 80) 367, where the authors note the (statistical) relative scarcity of occasions where art 22 has been used versus eg the art 4(5) route for mergers that have national jurisdiction (but lack an EU dimension) to be referred to the Commission by at least 3 Member States. Voluntary notification under art 4(5) was also the means by which the Commission was able to investigate the *Facebook/WhatsApp* merger (n 71).

[90] Mulder and Sauter (n 40) 3.

[91] M Vestager, 'Keeping the EU Competitive in a Green and Digital World' (Speech at the College of Europe, Bruges, 2 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_2624> accessed 15 September 2023.

[92] Commission Staff Working Document (n 7) paras 132 and 268.

[93] M Vestager, 'The Future of EU Merger Control' (Speech at the International Bar Association 24th Annual Competition Conference, 11 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/speech_20_2884> accessed 15 September 2023.

[94] S Cisnal de Ugarte, M Perez and I Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' (2022) 6 CoRe 17, 20.

[95] Commission Guidance on the application of the referral mechanism set out in art 22 of the Merger Regulation to certain categories of cases (2021) C113/1 (hereafter: '[Article 22] Guidance Paper').

[96] The meaning of which is elucidated in ibid, para 14.

investigation'. While the wording of paragraph 15 suggests that consideration may be afforded to an unlimited number of 'relevant considerations' when deciding whether a merger threatens to significantly affect competition, explicit mention is afforded to four particular considerations. These indicate that the Commission and Member State NCAs should consider whether the merger: (i) creates or strengthens a dominant position of one of the parties; (ii) results in the elimination of an important competitive force, including the elimination of a recent or future entrant, or where the merger is between two important innovators; (iii) reduces competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or (iv) enhances the ability and incentive of the parties to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.

It is notable that the list of named considerations under paragraph 15 attributes specific reference to the impact a merger stands to have on innovation, especially where the merger is between 'two important innovators'. This emphasizes the significant adverse impact on competition that may arise from the loss of an innovation effort, suggesting the Commission will be particularly open to accepting the referral of such cases. Equally, Member State NCAs can also have greater confidence that a below-threshold merger posing a 'real risk' of eliminating 'a recent or future entrant'—archetypal of a nascent acquisition—also stands a viable chance of being granted a request under Article 22. While the wording here is broad, this is to be read alongside the overarching 'relevant consideration' of whether the merger threatens to result 'in the elimination of an important competitive force', a risk that is not posed by all nascent acquisitions.

According to paragraph 19 of the Guidance Paper, mergers falling below Member State thresholds will normally be viewed as 'appropriate' for referral where the turnover of at least one merging party 'does not reflect its actual or future competitive potential'. It proceeds to specify a non-exhaustive illustrative list of examples where such a situation is likely to arise, including mergers where the target company: (i) is a start-up or recent entrant with significant competitive potential that has yet to generate significant revenues; (ii) is an important innovator or conducts potentially important research; (iii) is an actual or potential important competitive force; (iv) has access to competitively significant assets; and/or (v) provides products/services that are key inputs/components for other industries. Paragraph 19 also indicates the Commission's interest may be aroused where the value of the acquisition is 'particularly high' compared to the target firm's turnover.[97] Again, while this wording has the potential to capture a broad range of nascent transactions, a notable safeguard is provided by Article 22's central legal requirements—the need for the merger to affect trade between Member States and affect competition within the territory of the referring Member State(s).[98] In particular, mergers that are usually deemed appropriate for referral are those where the turnover of at least one party 'does not reflect its actual or future competitive potential', for example, where the target company is an important innovator or conducting potentially important research, or where the target is an actual or potential important competitive force.[99]

97 The Guidance Paper's reference to this is intriguing given that the adoption of value-based thresholds under the EUMR has been considered as an option for bridging the perceived jurisdictional gap in the past. Art 22 now facilitates the opportunity to screen for mergers on the basis of value, but value relative to turnover, rather than a specified value threshold.

98 P Callol, 'Merger Control Beyond Merger Thresholds and the Multiplication of Ex Ante Merger Notification' (2023) Eur Compet L Rev 117, 121.

99 Article 22 Guidance Paper (n 95) para 19.

Numerous other paragraphs provide procedural guidance to a degree that has never previously been attributed to Article 22, again indicative of the prominence the Commission intends to afford to the referral mechanism as an enforcement tool. One of the more striking of these is to be observed under paragraph 21 which, while suggesting that the Commission will generally be reluctant to accept a referral request where the material facts of a merger's implementation have been in the public domain for more than six months, exceptional circumstances may justify a referral beyond this six-month period. In this context, 'exceptional circumstances' are where the potential competition concerns and the detrimental effect of the merger are particularly substantial.[100] Such referrals will, of course, be far from the norm but—especially when one considers the rigid time limitations placed on launching investigations at the national and EU levels—this particular guidance steer will leave a lingering sense of dread for some mergers, fearing repercussions long after their deals have been completed. It creates the potential for Article 22 to be weaponized in order to create opportunities to unwind innovation-harming mergers. It therefore follows that the guidance may also have an unexpected remedial effect by deterring a merged entity from terminating innovation efforts, at least for an extended period of time.

(iii) An immediate test: the Illumina/GRAIL Saga

The Commission did not have long to wait until faced with its first opportunity to apply the revised Article 22 policy. The merger in question involved two US-based firms. The acquiring party, Illumina, operates in global genomics and is a *de facto* unrivalled supplier of next-generation sequencing (NGS) systems,[101] which are used in genetic and genomic analysis (including devices used to run blood tests that detect cancer and even select appropriate therapies for patients). Its US-based target, GRAIL, is a healthcare organization developing blood-based cancer detection tests that utilise, *inter alia*, genomic sequencing. As such, it is reliant on the next-generation sequencing systems supplied by Illumina in order to undertake these developments. Among GRAIL's product portfolio is 'Galleri', an early cancer detection test which, through a blood sample, purports to detect approximately 50 cancers in asymptomatic patients. GRAIL was once itself under the ownership of Illumina and, at the time the merger was launched, Illumina still possessed a 14.5 per cent stake in GRAIL. Upon announcement of the merger, observers expressed concern that Illumina may have represented the only viable supplier of NGS systems to GRAIL, presenting the post-merger risk of Illumina foreclosing the downstream market for the development of early cancer detection tests.

A week before adopting its revised Article 22 Guidance Paper and five months after the merger was first announced, the Commission—on 19 February 2021—exercised its discretion under Article 22(5) EUMR by sending 'invitation letters' to Member State NCAs, inviting them to submit an Article 22 referral request for the Illumina/GRAIL transaction. On 9 March 2021, the French Competition Authority submitted a referral request, later to be joined by five other competition authorities.[102] In response, Illumina lodged appeals—at the national level—against the decisions of the French and Dutch NCAs to issue referral requests, on the basis that the merger did not meet their national jurisdictional requirements. These appeals were dismissed—albeit for different reasons—by the domestic courts, effectively affording the Commission a green light to approve the referral request, having determined that the criteria for referral had been met. Approval was confirmed on 20 April 2021, with the Commission citing, *inter alia*, that the significant $7.1bn value of the deal amounted

100 ibid, para 21.
101 Illumina's worldwide market share was approximately 80%.
102 Namely, the authorities of Belgium, Greece, Iceland, the Netherlands, and Norway.

to notable evidence that 'GRAIL's competitive significance is not reflected in its turnover',[103] consistent with paragraph 19 of the Guidance Paper. The Commission expressed particular interest in exploring the potential for the merger to 'restrict access to or increase prices of next generation sequencers and reagents to the detriment of GRAIL's rivals active in genomic cancer tests'.[104]

Following an in-depth review and protracted discussions over suitable remedies, the Commission prohibited the (by that stage, completed) Illumina/GRAIL merger due to the risk of harm posed to innovation and patient choice in the emerging downstream market for blood-based early cancer detection tests.[105] The Commission concluded that, upon completion of the merger, Illumina would have incentives to cease supplying NGS systems to GRAIL's rivals, or otherwise disadvantage them.[106] The need to ensure the merger did not disrupt the innovation race for early cancer detection tests appears to have been a key driving force behind the decision, anticipating that tests of different prices and features were more likely to reach the market if the merger was to be unwound.

While Illumina contemplated an appeal of the Commission's prohibition decision, an earlier appeal—against the Commission's decision to accept the Article 22 referral request in the first place—presented a compelling early opportunity for the General Court to rule on the lawfulness of the revised Article 22 policy.[107] In its appeal request, Illumina cited four allegations: (i) that in taking its decision under Article 22(3) to examine the merger, the Commission had acted outside its competence; (ii) that delays during the referral process by both the Commission and the French Competition Authority rendered the Commission's referral decision invalid on the basis that either time limits elapsed and/or legal certainty was undermined by the delays; (iii) that Illumina's legitimate expectations and legal certainty were contravened by the Commission's decision to apply its new Article 22 policy to the merger, despite Commissioner Vestager previously—in her speech on 11 September 2020—making 'a precise and unconditional statement' that a policy change would take place *after* the issuance of new guidance[108]; and (iv) that the Commission, in reaching its referral decision, made a number of errors of fact and assessment.[109]

Having reflected on each of Illumina's grounds for appeal, the GC upheld the Commission's decision to accept the referral request, representing a significant endorsement of the revised Article 22 policy. On the question of whether the Commission had the competence to review the merger via the Article 22 mechanism—which involved assessing whether the two legal requirements of the provision had been met—the GC referred to the *literal, historical, contextual,* and *teleological* interpretations of Article 22.[110]

103 Commission, 'Mergers: Commission to assess proposed acquisition of GRAIL by Illumina' (*EC Press Corner: Daily News*, 20 April 2021) <https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846> accessed 15 September 2023.

104 ibid.

105 *Illumina/GRAIL* (Case COMP/M.10188) Commission Decision (6 September 2022); at the time of writing, publication of the Commission's full decision is pending.

106 Commission, 'Mergers: Commission Prohibits Acquisition of GRAIL by Illumina' (Press Release, 6 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364> accessed 15 September 2023.

107 *Illumina v Commission* (Notice of action) (n 13).

108 In actuality, the Commission had sent invitation letters to Member State NCAs *before* the publication of the new guidance, ie before the new policy was expected to take effect.

109 Illumina alleged, *inter alia,* that procedural errors had resulted in failure to respect the rights of the defence, and the Commission lacked a proper evidence base when determining that the two legal requirements for an art 22 referral had been met.

110 For a deeper dive into the Court's reasoning, see EH Kim and M Marquis, 'Illumina/GRAIL, Chapter 1: The Unexpectedly Broad Merger Control Powers of the European Commission (2023) 44(4) Eur Compet L Rev 162, 165–66.

In applying the *literal interpretation*, the GC referred to the cumulative criteria mentioned in Article 22(1), providing that such referrals are legitimate where: (i) they are made by one-or-more Member States; (ii) the merger amounts to being a 'concentration' within the meaning of Article 3 EUMR; (iii) the merger stands to affect trade between Member States; and (iv) the merger 'threatens to significantly affect competition' within the territor(ies) of the requesting Member State(s). The paragraph's reference to 'any concentrations', and its lack of reference to Member State jurisdictional thresholds bearing any significance, meant a literal interpretation was compatible with the Commission's decision to accept the referral request.[111] The GC was satisfied that the wording of Article 22(1) indicated that—despite its narrow 'Dutch Clause' origins—the provision may be applied to pursue other purposes, including the EUMR's ultimate purpose of enabling effective control of all mergers that stand to significantly affect competition in the EU. The referral mechanism serves as a corrective mechanism in this regard.[112] However, Callol is critical of the GC's literal interpretation of 'no notification is required', which appears in the second paragraph of Article 22 (1).[113] Rather than unequivocally implying that mergers do not need to meet national thresholds in order to be eligible for referral, the wording may have been intended to apply to Member States employing a voluntary notification regime or no merger control regime at all. In this regard, adopting a literal interpretation to scrutinize the legitimacy of a new revolutionary interpretation of Article 22 may be unsafe.

That said, the Court's analysis benefits from the supplementary interpretations it adopts. Under the *historical interpretation*, the GC considered Article 22's original conception as a mechanism to be used by Member States lacking formal merger control laws but ruled that this primary purpose never prevented referrals from Member States that had enacted merger laws.[114] Moreover, it held that it would be a sub-optimal use of resources to first require mergers with national jurisdiction to be reviewed before they could be referred under Article 22.[115] The *contextual interpretation* saw the GC acknowledge that Article 22, along with the Article 4(5) procedure, represents alternative means by which the Commission may assume competence over a merger, that is, where the EUMR's turnover thresholds are not met.[116] Yet while Article 4(5) can only be exercised in instances where a merger stands to be notifiable in at least three Member States, no such condition is applicable to Article 22(1).[117] Finally, in adopting the *teleological interpretation*, the GC drew on the rationales under the EUMR's recitals, concluding that Article 22 amounted to being a 'corrective mechanism' under the EUMR, affording flexibility to the rigid turnover thresholds, justifiable on the basis that any merger which stands to significantly impede competition in the internal market should be subject to review, regardless of its jurisdictional status.[118]

The GC also rejected Illumina's claim that the Commission's referral was contrary to the principle of legitimate expectations. Illumina had sought to argue it was legitimate to expect that the Commission's previous Article 22 policy—of discouraging referral requests of below-threshold mergers—would remain in place until 'around the middle of [2021]', which

111 *Illumina v Commission* (GC judgment) (n 13), [89]–[95]. See also Kim and Marquis, ibid 165; and Mulder and Sauter (n 40) 6.
112 *Illumina v Commission* (GC judgment) (n 13), [165].
113 Callol (n 98) 119.
114 *Illumina v Commission* (GC judgment) (n 13), [96]–[98].
115 ibid [108]–[112].
116 ibid [123].
117 ibid [126].
118 ibid [142]. Kim and Marquis consider the GC's adoption of the teleological interpretation to be particularly influential in confirming Article 22's revised purpose of enabling the Commission to review potentially anticompetitive below-threshold mergers; Kim and Marquis (n 110) 169.

Commissioner Vestager had revealed as a hopeful timeframe in a previous speech.[119] The GC concluded that the general nature of the speech (which made no direct reference to the Illumina/GRAIL transaction) did not convey a *precise, unconditional and consistent assurance* and, in any case, the Commission always maintained a prerogative to depart from its policy of discouragement, meaning no legitimate expectation had been established.[120] The Commission's historic practice did not establish a legitimate expectation and, for the same reason, the parties could not posit an argument on the basis that the Guidance Paper was released after the merger was launched.[121]

Despite Illumina's decision to appeal the judgment to the CJ,[122] the GC's ringing endorsement of the revised Article 22 policy appears, for the time being at least, to go a long way towards vindicating the Commission's decision to employ the Article 22 referral mechanism as a principal enforcement tool against killer acquisitions. Insofar as the Commission can be said to have 'hand-picked' the Illumina/GRAIL merger by sending out invitation letters to NCAs, one would struggle to find a more politically salient below-threshold merger to stress test the new policy. Not only did the merger fall below national notification thresholds in every Member State, but GRAIL does not generate a cent of revenue in the EU, and yet—save for a significant line of reasoning before the CJ—the merger stands to remain prohibited by the EU. The Commission is also likely to have public opinion on its side given, in its own words,[123] genomic cancer tests stand to be a game-changer in detecting early signs of cancer in asymptomatic patients. While the referral decision and the revised policy have garnered considerable controversy within the business and practitioner communities (see subsection III.B), one suspects the majority of onlookers focus on the Commission's ultimate prohibition decision in *Illumina/GRAIL*, a decision that illustrates the tough stance the EU is taking to combat innovation harms, and one which has the potential to change lives for the better.

Neither the Commission nor the GC has avoided criticism over the course of this saga. Members of the business and legal practitioner communities expressed surprise at the speed by which the Commission implemented its new policy on Article 22, with no specific public consultation or impact assessment conducted ahead of the changes.[124] The GC has also faced criticism for its bold interpretations in *Illumina v Commission*, which have been compared to judicial law-making akin to that which is usually reserved for the CJ.[125] Ultimately, the CJ will have a major say on whether Article 22 stands to be a panacea or merely a false dawn.

B. Panacea or false dawn?

In seeking to bridge the jurisdictional gap, the Commission's priority has been to identify a proportionate response; one that enables the review of innovation-stifling mergers, regardless of size or turnover, but that also preserves the certainty and predictability afforded by the one-stop shop of the EUMR, and avoids creating an overly burdensome regime of unnecessary costs and red tape for unproblematic mergers. In this regard, the decision to use Article 22 as the vehicle for reform, rather than substantive amendments to the jurisdictional thresholds under the EUMR,[126] can be seen as a measured response. Nevertheless, for such

119 Vestager (n 93).
120 *Illumina v Commission* (GC judgment) (n 13), [31] and [252]–[263].
121 ibid [251]–[252]; Mulder and Sauter (n 40) 6.
122 Case C-611/22 P *Illumina v Commission* [2022] OJ C432/13.
123 Commission, 'Mergers: Commission to assess Illumina/GRAIL' (n 103).
124 Levy, Rimsa and Buzatu (n 80) 375.
125 Kim and Marquis (n 110) 171.
126 It appears the Commission viewed changes to the turnover thresholds as a last resort option which, in the Commissioner's opinion, would require a careful and respectful approach to avoid vetting 'thousands and thousands of mergers'; M Acton, 'Vestager 'careful' about New Merger Thresholds to

a potentially significant broadening of the EUMR's coverage to arise by way of soft law amendments is striking.[127] The response from Member States has also been mixed, with Levy et al. observing senior figures at the French, Luxembourg and Belgian competition authorities expressing their willingness to make use of the revised Article 22 mechanism, in stark contrast to other authorities that have criticized the lengths to which the Commission has used soft law to exert jurisdiction where it previously had none.[128] Whether the revised approach to Article 22—compared to other reform options—represents an optimal policy response is also a matter of debate and, even if the Commission's approach survives the CJ's scrutiny, a number of factors will determine whether Article 22 proves successful in practice.

Legal certainty of jurisdiction is important to merging parties in all jurisdictions, and particularly so in the EU, where jurisdiction is essentially divided between the Commission and NCAs.[129] Where jurisdictional rules and parameters are revised to capture 'gap cases', such as killer acquisitions, the Commission faces a trade-off between, on the one hand, ensuring that the rules afford it the necessary scope to investigate all harmful mergers, and, on the other hand, managing the increased uncertainty and administrative burden that an excessively wide scope will create for businesses.[130] While the GC judgment in *Illumina v Commission* affords passing consideration to the legal certainty implications arising from the revised interpretation of Article 22,[131] it predominantly focuses on Illumina's legal certainty arguments regarding legitimate expectations and delays in the referral process. Observers predict that, on appeal of the case, the CJ is likely to attribute greater emphasis to the legal certainty issues associated with the revised interpretation of Article 22.[132]

A prevailing concern of the new approach is the risk it poses to the certainty facilitated under the EUMR's one-stop shop regime. Given its role in administering the one-stop shop, the Commission is clearly mindful of preserving the objectively predictable regime the EU has forged a reputation for. Yet, even in proceedings before the GC, the Commission contends that the one-stop shop is not an objective of the EUMR, but rather 'an important element thereof'.[133] The Illumina/GRAIL merger is itself a testament to how Article 22 now stands to extend the extraterritorial reach of EU merger control, opening the door to reviewing mergers that generate negligible revenue in the EU—a significant departure from the one-stop shop's guiding principle of restricting investigations to mergers with a quantitative EU dimension.[134] The worst case scenario for merging parties is that CJ approval of the GC's judgment will, in practice, prompt the Article 22 mechanism to 'become a default option in the context of non-notifiable concentrations, rather than the exception'.[135]

Catch Killer Acquisitions' (*MLex*, 24 April 2020) <https://mlexmarketinsight.com/news/insight/vestager-careful-about-new-merger-thresholds-to-catch-killer-acquisitions> accessed 15 September 2023.

[127] Van Rompuy (n 79) 343.

[128] Levy, Rimsa and Buzatu (n 80) 375–76.

[129] ibid 378.

[130] Kim and Marquis (n 110) 171. The authors doubt whether the former outweighs the latter in respect of the Commission's revised policy on art 22. They contend that legal certainty may only be preserved if the reinterpretation of art 22 is 'woven into the broader pattern of the pre-existing law in a manner guided by systemic coherence and consistency' (173).

[131] *Illumina v Commission* (GC judgment) (n 13), [173]–[178]. The GC was critical of suggestions that the new art 22 policy undermined legal certainty, countering that any requirement for a referred merger to meet national thresholds would itself create uncertainty over which Member States fell within the scope of examination, thus creating a fragmented approach; Kim and Marquis (n 110) 166.

[132] V Robertson, 'The Future of Digital Mergers in a Post-DMA World' (2023) Contribution based on remarks prepared for the Annual Conference of the European Commission Legal Service, 5 <https://ssrn.com/abstract=441036> accessed 15 September 2023.

[133] *Illumina v Commission* (GC judgment) (n 13), [86].

[134] Levy, Rimsa and Buzatu (n 80) 377.

[135] Kim and Marquis (n 110) 174.

The Commission will be more wary than most of the threat of Article 22 descending into a default 'catch-all' clause for below-threshold mergers. It will nonetheless take encouragement from the relatively comprehensive steer provided by the Guidance Paper to inform NCAs (and merging parties) of what constitutes an appropriate referral under Article 22. However, the nature of the guidance, as a mere general indicator of the types of cases that would be considered for referral, still affords the Commission a wide discretion over the mergers it may potentially call-in, thus leading some to foresee a potential floodgates event.[136] If the Commission were to receive an influx of requests that do not meet the criteria necessary for referral, it retains a prerogative to revise the Guidance in the future[137]; although, it seems more likely that NCAs will sooner adapt their own referral strategies after a period of observing the types of mergers that the Commission accepts and rejects under the referral mechanism. At present, with the revised policy still in its infancy and awaiting CJ scrutiny, there is little evidence to suggest that businesses are experiencing significant uncertainty due to the change,[138] nor that an impending 'tsunami of Article 22 cases' is on the horizon,[139] or that the Commission would be 'trigger happy' in accepting referral requests that come its way.[140] The bigger question is whether Article 22's application to below-threshold mergers will continue to be exceptional, to preserve the one-stop shop,[141] if the Commission's policy receives the endorsement of the CJ. There are competing views on this.

A prerequisite of Article 22's success is the willingness of Member States to submit requests in the first place. While several NCAs have expressed an intention to be active in this regard,[142] inconsistency between Member States is a realistic prospect. First, national merger control regimes with jurisdictional thresholds that are more sensitive to low-turnover mergers are, of course, more likely to capture nascent acquisitions and, as such, have the opportunity to review such cases at the national level. While an NCA in these countries may recognize a benefit to joining an existing Article 22 request, it is perhaps less likely to launch a referral request of its own volition and—where a merger stands to disproportionately impact its own domestic markets—it may initiate its own national-level inquiry to run parallel to the Commission's investigation of the same merger.[143] Secondly, reports surrounding the

136 ibid 170.

137 Article 22 Guidance Paper (n 95) para 3. Although, as of mid-2021, the Deputy Director-General of Mergers at the European Commission said it was 'too early to give more guidance', in response to a question asking for more concrete guidance for businesses; J Aranze, 'Too Early for Further Article 22 Guidance, European Commission Official Says' (*Global Competition Review*, 16 June 2021) <https://globalcompetitionreview.com/article/too-early-further-article-22-guidance-european-commission-official-says> accessed 15 September 2023.

138 A Boyce, 'EU's Merger Referral Change hasn't Triggered "flood" of Guidance Requests, Officials Say' (*MLex*, 3 December 2021) <https://mlexmarketinsight.com/news/insight/eu-s-merger-referral-change-hasn-t-triggered-flood-of-guidance-requests-officials-say> accessed 15 September 2023.

139 Despite the proactive efforts of the Commission and some NCAs to screen for suitable referral candidates; N Hirst, 'Some 40 Below-threshold Merger have been Checked out by the EU, Senior Official Says' (*MLex*, 23 May 2023) <https://mlexmarketinsight.com/news/insight/some-40-below-threshold-mergers-have-been-checked-out-by-the-eu-senior-official-says> accessed 15 September 2023; N McNelis, 'France Plans "proactive" Referral Policy for Non-notifiable Mergers, Chantrel says' (*MLex*, 21 November 2022) <https://mlexmarketinsight.com/news/insight/france-plans-proactive-referral-policy-for-non-notifiable-mergers-chantrel-says> accessed 15 September 2023.

140 J Masson, 'EU is not "trigger happy" in art 22 Approach, Senior Official Says' (*Global Competition Review*, 28 June 2023) <https://globalcompetitionreview.com/article/eu-not-trigger-happy-in-article-22-approach-senior-official-says> accessed 15 September 2023.

141 Kim and Marquis (n 110) 170.

142 Levy, Rimsa and Buzatu (n 80) 375.

143 Van Rompuy (n 79) 342.

Illumina/GRAIL saga suggest that as many as six Member State NCAs, including Germany's Bundeskartellamt, chose not to join the Article 22 request because of pre-existing policies to refrain from referring below-threshold mergers.[144] The practical implication of this inconsistency, as highlighted by Levy et al., is that—having granted the referral request—the Commission is able to review a merger's impact on some relevant territories, but not others.[145] Thirdly, there are certain Member State competition authorities which, historically, have simply chosen not to engage with the Article 22 mechanism,[146] be this as an entrenchment effect arising from the Commission's previous restrictive policy or because the NCA wishes to preserve its own autonomy by reviewing mergers under its national laws.

The prospect of a merger facing parallel reviews by both the Commission and one-or-more Member State NCAs is notably heightened by the inconsistent response of NCAs to the new Article 22 policy, increasing the risk of divergent outcomes for the same transaction.[147] The *Facebook/Kustomer* tie-up is one such example, where the Commission accepted a referral request from 10 Member State NCAs,[148] while in Germany—where the merger met domestic jurisdictional thresholds—the Bundeskartellamt opted to pursue a parallel investigation. Robertson criticizes such inconsistencies as a bad outcome for the one-stop shop.[149] However, others take a more optimistic view of the new Article 22 policy, suggesting it eases the pressure on Member States to amend their own domestic thresholds in response to killer acquisitions.[150] Should the salience of innovation concerns manifest as much within individual Member States as it currently does at the EU level, this might itself prove a motivation to encourage more Member State NCAs to make use of the referral mechanism, thereby reducing the occurrence of parallel investigations and divergent decisions.

Ultimately, a degree of uncertainty is inherent in the changes brought about under the revised policy on Article 22, but this uncertainty is likely to be mitigated by the Commission being seen to apply the essence of its Guidance Paper in a consistent and objectively transparent way. To achieve transparency and enable NCAs to interpret the Guidance Paper effectively, the Commission should be prepared to offer reasoned explanations for its decisions to reject—as well as to accept—referral requests, especially in cases involving below-threshold mergers. Of course, even if the revised policy stands to create short-term instability for the one-stop shop during its bedding-in period, if the Commission can utilize Article 22 effectively in combatting killer acquisitions and preserving important innovation efforts, the short-term harm would be justified by the long-term gains.[151]

While merger referrals under Article 22 are possible in all sectors, the Guidance Paper affords specific reference to the industrial, manufacturing, pharmaceutical and digital sectors,[152] each of which has housed mergers that have prompted recent intervention by the Commission and, in the case of the latter two, feature a number of start-up firms that the Commission is likely to consider 'important innovators'.[153] In addition, mergers involving

[144] Levy, Rimsa and Buzatu (n 80) 376. Robertson suggests that some NCAs are likely to maintain this policy; Robertson (n 132) 5.
[145] Levy, Rimsa and Buzatu (n 80) 367.
[146] T Käseberg, 'The DMA—Taking Stock and Looking Ahead' (2022) 13 J Eur Compet L Practice 1, 2.
[147] Cisnal de Ugarte, Perez and Pico (n 94) 20.
[148] Commission, 'Mergers: Commission to assess proposed acquisition of Kustomer by Facebook' (*EC Press Corner: Daily News*, 12 May 2021) <https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_2464> accessed 15 September 2023.
[149] Robertson (n 132) 5.
[150] Whish (n 10) 20.
[151] Levy, Rimsa and Buzatu (n 80) 338–39.
[152] Article 22 Guidance Paper (n 95), para 7.
[153] As per ibid, para 19.

start-ups engaged in 'green innovation' may also be suitable candidates for referral,[154] especially in light of the role afforded to competition policy in fostering innovation in pursuit of the EU's green transition.

IV. ESTABLISHING THE ARTICLE 14 DMA 'OBLIGATION TO INFORM ABOUT CONCENTRATIONS'

Mergers—and potential killer acquisitions—in digital markets are some of those earmarked for particular scrutiny by the Commission, in its efforts to foster innovation. This is occurring within the broader context of a move in the EU to regulate the conduct of powerful companies in digital markets—so-called 'gatekeepers'—holistically rather than through case-by-case intervention under competition law. This approach has culminated in a key piece of legislation: the Digital Markets Act (DMA).[155] The DMA, which came into force in November 2022 and has been applicable since May 2023, is *ex ante* regulation that is meant to achieve 'contestability' and 'fairness' in digital markets through a set of prescribed obligations and prohibitions. These obligations and prohibitions would only apply to those companies designated as gatekeepers and those products designated as core platform services, through a specific designation process. Part of the rationale for the adoption of this piece of *ex ante* regulation has been to overcome some of the challenges of ad hoc competition law enforcement, including the lengthy and burdensome procedures involved in competition law enforcement. Although the DMA is revolutionizing *ex ante* control of powerful actors in the EU's digital service markets in many ways with a whole host of obligations, very few provisions confer obligations pertaining to merger control specifically. One provision, however, stands to play a small yet significant role in efforts to close the jurisdictional enforcement gap in the sector. Article 14 DMA imposes an obligation on digital gatekeepers to inform the Commission of any merger they intend to pursue with another digital service provider,[156] regardless of whether the merger stands to be notifiable under the EUMR or any national merger rules. This obligation requires the gatekeeper to inform the Commission 'prior to [the merger's] implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest'.

The provision aids the Commission's ability to screen for problematic acquisitions in digital markets which are notoriously prone to concentration, often as a result of a large market actor engaging in a succession of nascent acquisitions over a prolonged period. The passage and evolution of Article 14, through several phases of legislative scrutiny, reveals much about its intended function and its relationship with Article 22 EUMR and provides an insight into its likely operation in practice.

A. Evolution during legislative scrutiny of the DMA

Recital 71 of the DMA specifies several rationales underpinning the Article 14 obligation, yet most did not feature in the recitals of the initial DMA draft—an indication of the legislature's vision for Article 14 becoming more ambitious over the course of the drafting process,

[154] Cisnal de Ugarte, Perez and Pico (n 94) 20–21.
[155] DMA (n 14).
[156] Specifically, where the gatekeeper engages in a 'concentration' (for the purposes of art 3 EUMR) with one-or-more entities that 'provide core platform services or any other services in the digital sector or enable the collection of data'; DMA, art 14(1). Callol (n 98) 124, points to an intriguing (albeit moot) oddity about the wording of art 14 DMA: it refers to 'core platform services *or* any other services in the digital sector' (emphasis added), which would appear to encompass *all* platform services in the digital sector.

but also a testament to parallel policy developments in other areas, including Article 22 EUMR. Nothing in the DMA's original draft suggests that a procedural relationship between Article 14 DMA and the Article 22 EUMR referral mechanism was envisioned. Rather, the draft rationalizes the information obligation on the basis of (i) supporting effective monitoring of gatekeeper status; (ii) informing possible adjustments to the list of core platform services provided by a particular gatekeeper; and (iii) facilitating the monitoring of broader contestability trends to the potential benefit of market investigations under the DMA.[157]

The practical relationship between Article 14 DMA and Article 22 EUMR can now be found under Article 14(4) DMA. This confers upon the Commission a duty to inform Member States of information it receives in respect of gatekeepers' acquisitions. The reason for requiring Member States—specifically, NCAs—to be informed of such acquisitions is due to 'the possibility of using the information for national merger control purposes' and because 'under certain circumstances, it is possible for the national competent authority to refer those acquisitions to the Commission for the purposes of merger control'.[158] Indeed, Article 14(5) explicitly refers to the opportunity for NCAs to use the information shared by the Commission as a basis on which to request a referral under Article 22 EUMR.

Perhaps unsurprisingly, given its track record of proposing amendments to the DMA that imposed stricter obligations on gatekeepers,[159] the European Parliament can be seen to play a more influential role than the Commission in emphasizing the relevance of Article 22 EUMR in relation to Article 14, particularly via amendments tabled by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) in response to the original draft of the DMA. Its initial draft report of the legislation, published on 1 June 2021, forwarded a preference for gatekeepers to be required to inform both the Commission *and* competent national authorities of their digital acquisitions, on the basis that Member States 'may wish to refer the assessment of those mergers to the Commission'.[160] The essence of this is captured in the IMCO Committee's final report, published on 30 November 2021, albeit with the proposal featuring across two separate amendments: the first placing the onus on the Commission (rather than gatekeepers) to inform competent NCAs of gatekeeper acquisitions, and the second explicitly acknowledging the ability of Member States to use this information as a basis for making referral requests under Article 22.[161] Each of these amendments featured in the IMCO Committee's compromise text,[162] and the amendments adopted by the European Parliament on 15 December 2021,[163] before further negotiations proceeded between the EP, Council and the Commission.

[157] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final, recital 31.
[158] ibid, recital 71.
[159] Käseberg (n 146) 1.
[160] European Parliament Committee on the Internal Market and Consumer Protection, 'Draft Report on the proposal for a regulation of the European Parliament and of the Council Contestable and fair markets in the digital sector (Digital Markets Act)' (1 June 2021) 2020/0374 (COD), Amendment 77.
[161] European Parliament, 'Report on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' (30 November 2021) A9-0332/2021, Amendments 154 and 156.
[162] European Parliament IMCO, 'Compromise Amendment A on Governance, Cooperation replacing all relevant amendments' (Consolidated amendments to the DMA proposal, 18 November 2021) <www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/11-22/DMA_Comrpomise_AMs_EN.pdf> accessed 15 September 2023.
[163] European Parliament, 'Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' [2022] OJ C251/227, Amendments 154 and 156.

The increased salience of the Article 22 EUMR mechanism during the course of DMA deliberations is also apparent from the later addition of minimum information requirements under Article 14. The DMA prescribes that, in order to 'ensure the necessary transparency and usefulness of such information for different purposes provided for by [the DMA]',[164] gatekeepers are required to at least provide details of, *inter alia*, the firms involved in the merger, their EU and worldwide annual turnovers, their fields of activity (incl. activities directly related to the merger), (an estimation of) the transaction value of the merger, and a summary of the nature of the merger, its rationale and a list of the Member States it stands to be relevant to.[165] This specific information is intended to assist NCAs when considering whether a gatekeeper acquisition is suitable for a referral, that is, whether it is likely to meet the legal requirements for referral under Article 22(1), as elucidated under the Article 22 Guidance Paper.[166]

Article 14 has been described as a 'somewhat unconventional solution' to the issue of establishing jurisdiction over digital mergers,[167] given that the obligation itself is limited to mere information disclosure and, to this extent, appears to be 'lacking the teeth' needed to initiate intervention or order a halt to the integration of a suspected killer acquisition.[168] Interestingly, during legislative scrutiny by the European Parliament, opinions forwarded by several standing committees,[169] and endorsed by the IMCO Committee,[170] called for the removal of the wording under Article 14 that qualifies the *types* of mergers that gatekeepers are required to provide information about. One committee recommended that the obligation 'should apply to any proposed concentration of the gatekeepers'.[171] Separately, the Committee on Transport and Tourism was content to retain the qualification of the types of mergers, but recommended that the obligation should be elevated from a mere 'duty to inform' to a fully-fledged 'duty to notify',[172] the implication being that gatekeepers would be required to obtain prior Commission approval before consummating their merger.

While none of these proposals ultimately found their way onto the final enacted version of the DMA, the EP's decision to approve the IMCO Committee's amended text at least afforded an opportunity for the EP, Council and the Commission to negotiate on the merits of removing the 'types of merger' qualification.[173] An optimistic reading of Article 14—at least from an enforcement perspective—is that it can be said to create a 'standstill effect' of sorts, albeit one that is distinct from a formal notification requirement and the enforcement measures therein.[174] Less generous readings are critical of the provision—or, rather, the legislature—for lacking ambition in terms of the requirements and powers underpinning the obligation, leading one commentator to opine that Article 14 is 'only proof that the Commission has seen the challenge—but not addressed it in an appropriate way'.[175] However, Article 14 may derive its teeth from elsewhere in the DMA.

[164] DMA (n 14), recital 71.
[165] ibid, art 14(2).
[166] Callol (n 98) 124.
[167] Robertson (n 132) 3.
[168] NM Belloso and N Petit, 'The EU Digital Markets Act (DMA): A Competition Hand in a Regulatory Glove' (2023) 48(4) Eur L Rev 391, 409.
[169] Including the Committees on: (i) Economic and Monetary Affairs; (ii) Industry, Research and Energy; and (iii) Legal Affairs; EP Report on DMA proposal (n 161); see, respectively, pp 211–12 (Amendment 142), 332–33 (Amendment 159), and 550 (Amendment 130).
[170] ibid 87 (Amendment 153).
[171] ibid 212.
[172] ibid 550 (Amendment 130).
[173] EP Adopted Amendments on the DMA Proposal (n 163), Amendment 153.
[174] Callol (n 98) 124.
[175] Käseberg (n 146) 2.

B. Giving 'teeth' to Article 14 DMA?

The IMCO Committee was among those most concerned that Article 14 would prove toothless and ineffectual in practice. Its Proposed Amendment 44 (to the draft Recital 64) recommended that in 'cases of systematic non-compliance', the Commission should have 'the power to impose any remedy, whether behavioural or structural, that is necessary to ensure effective compliance' with the DMA. This wording is mostly adopted in the enacted version (Recital 75), albeit qualified by the need to ensure the remedy adheres to the principle of proportionality.

Mindful of the opportunity to incorporate tangible merger control within the DMA, Amendment 44 also sees the European Parliament calling for the Commission to be afforded the power to 'prohibit gatekeepers from engaging on acquisitions (including "killer-acquisitions")' in digital markets. While this wording was not adopted within the recitals, its practical spirit is evident in the IMCO Committee's Amendment 167, which outlined the bare bones of a power for the Commission to impose temporary standstill obligations on gatekeeper acquisitions, which would eventually be articulated within Article 18(2) DMA. Following a market investigation where a gatekeeper is found to have systematically infringed any of its obligations under Articles 5, 6, or 7 DMA (assuming that gatekeeper has also maintained, strengthened or extended its gatekeeper position), the Commission may—to the extent that it is proportionate and necessary to maintain/restore fairness and contestability that has been harmed by the repeated infringements—prohibit (for a limited period) a gatekeeper from entering into merger proceedings with digital service providers that are affected by the systematic non-compliance.[176]

To this end, Article 18 might be seen to achieve the desired effect of 'giving teeth' to Article 14, with some commentators suggesting that the interplay between Article 14 DMA and Article 12 EUMR, combined with the potential application of Article 18, has the effect of 'weaponizing' merger control in an effort to enforce compliance from gatekeepers.[177] Käseberg opines that, while a solution to killer acquisitions within the EUMR would be preferable, Article 18 may have afforded greater opportunity to find political compromise during negotiations towards the DMA.[178] Restrictions on the application of Article 18 have also brought into question its ability to empower Article 14 as an effective enforcement tool in its own right. As the standstill remedy is applicable only in instances of systemic non-compliance by gatekeepers—rather than a standstill obligation that is triggered by any particular concern with a given acquisition—the criticism of Article 14 'lacking teeth' will continue to haunt it. Furthermore, the criteria the DMA attributes to 'systematic non-compliance' under Article 29 DMA—that is, a 3-strikes policy, whereby the Commission's powers under Article 18 only come into effect if a gatekeeper is found to have infringed its

[176] DMA (n 14), arts 18(1) and 18(2).

[177] N McNelis and A Boyce, 'EU's Gatekeeper Law Weaponizes Merger Control to Cement Grip on Big Tech Acquisitions' (*MLex*, 25 March 2022) <https://content.mlex.com/#/content/1367741/comment-eu-s-gatekeeper-law-weaponizes-merger-control-to-cement-grip-on-big-tech-acquisitions> accessed 15 September 2023. Before enactment of the DMA, Akman queries the legality of incorporating the art 18 standstill power, given the DMA's legal basis under art 114 TFEU; although, the author alludes to compelling arguments by Monti and de Streel, who argue that art 114 can provide a sufficient legal basis to amend EU merger control laws; P Akman, 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach in the EU Digital Markets Act' (2022) 47 Eur L Rev 85, 98, fn 75.

[178] Käseberg (n 146) 2. Although, the author suggests that art 18 should have been refined by affording the Commission: (i) a power to impose a notification obligation under specified conditions; and (ii) clarity on when it 'shall' impose certain measures, thereby providing greater certainty on discretion with be exercised.

core obligations on three occasions within an 8-year period—means the standstill remedy is unlikely to pose an immediate concern to digital gatekeepers.[179]

C. The dynamic between the DMA and Article 22 EUMR

While it has its shortcomings, Article 14 lessens—potentially to a great extent—the onus on third parties (ie customers, competitors, etc) to submit complaints in relation to nascent acquisitions within digital markets. While Article 22 EUMR can itself play a significant role in bringing cases to authorities' attention, the resource expenditure of screening for smaller-scale acquisitions should not be understated, particularly in complex online service markets. The Commission continues to rely heavily on stakeholder complaints to raise the alarm but, in terms of mergers in digital markets, this reliance is mitigated by the information obligation, especially given it is gatekeepers who have the greater incentive to engage in killer acquisitions.

Given the perceived prevalence of killer acquisitions in digital markets, relative to other sectors, Article 14 can play a key role in populating the pipeline for Article 22 referral requests.[180] One anticipates that the vast majority of problematic below-threshold mergers in the digital sector will now appear automatically on the Commission's radar.[181] It is unlikely that large firms in other sectors will interpret Article 22 as providing an analogous obligation (or recommendation) to inform the Commission of their own acquisitions,[182] yet they may feel compelled to do so—potentially, via the self-referral mechanism under Article 4(5) EUMR—if they consider it to be inevitable that their acquisition will face an Article 22 referral. Deutscher and Makris also see potential in the new EUMR–DMA dynamic as an effective enforcement framework in the fight against killer acquisitions, albeit one that is potentially tempered by the obstacles the Commission faces in satisfying the requisite standard of proof in its substantive assessments.[183]

As well as identifying potential cases for referral under Article 22 EUMR, further developments in EU case law—namely, the CJ's ruling in *Towercast*—have prompted some to suggest that Article 14 DMA may also act as a supplier of cases for *ex post* reviews of mergers under Article 102 TFEU.[184] It is reasonable to conclude that this possibility was unforeseen by the drafters of the DMA, and it is to this matter that the article now turns.

V. REVIVING THE ARTICLE 102 TFEU *EX POST* REGIME

To this point, we have touched upon developments—within the substantive assessment and jurisdictional aspects—that the Commission has had a hand in forwarding. However, another (potentially crucial) development in the enforcement against innovation-stifling killer acquisitions has arisen very much outwith the Commission's involvement. The CJ's 2023 ruling in *Towercast* now unlocks the potential for a merger lacking an EU dimension and lacking a referral under Article 22 EUMR to nonetheless face *ex post* scrutiny under the Article 102 TFEU abuse of dominance provision.

179 Robertson (n 132) 6.
180 Bostoen believes the DMA-EUMR framework 'could significantly enlarge the [Commission]'s jurisdiction over gatekeeper acquisitions'; F Bostoen, 'Understanding the Digital Markets Act' (2023) 68 Antitrust Bulletin 263, 283, fn 170.
181 Cisnal de Ugarte (n 94) 20.
182 Kim and Marquis (n 110) 163.
183 Deutscher and Makris (n 62) 44–45.
184 Mulder and Sauter (n 40) 10.

A. Towercast: waking a sleeping giant

(i) Resurrection of the Continental Can case law

The 1973 ruling of the Court of Justice in *Continental Can* confirmed the legal principle that mergers—or, specifically, company acquisitions by dominant firms—are capable of amounting to an abuse of a dominant position under certain circumstances. However, the principle had never previously been relied upon as a basis for applying Article 102 TFEU to completed mergers. For the most part, this can be attributed to the introduction of formal merger control into the EU, under the ECMR and EUMR. As part of the jurisdictional stipulations of the EUMR, Article 21(1) explicitly dismisses—at least on a literal reading—the potential for the Commission to use its powers under Regulation 1/2003 in the enforcement of mergers,[185] seemingly preventing the effective use of Article 102 as an *ex post* intervention tool for merger control. The merger-related principle of the *Continental Can* case law therefore laid dormant for almost half a century, until its reawakening in *Towercast*.

The case involved a third-party digital terrestrial TV (DTT) broadcaster, Towercast, issuing a complaint to the French Competition Authority on 15 November 2017, for an alleged abuse of dominance arising from the completion of a merger the previous year, on 13 October 2016. The merger in question was between TDF (formerly, Télédiffusion de France), a DTT broadcaster (and former monopolist) in France, which acquired sole control of Itas, a fellow DTT broadcaster. The merger fell short of the jurisdictional thresholds of both the EUMR and French merger laws and, because the merger took place during the Commission's era of discouraging below-threshold merger referrals under Article 22 EUMR, the merger did not face any *ex ante* investigation. Towercast alleged that the merger constituted an abuse of a dominant position for the purposes of Article 102 TFEU, as it significantly strengthened TDF's dominant position on the wholesale markets for DTT broadcasting in France, thereby restricting competition in the upstream and downstream markets.

The French Competition Authority addressed a statement of objections to TDF alleging it had abused its dominant position on the downstream wholesale market for DTT broadcasting services by merging with Itas, which was liable to have the effect of 'preventing, restricting or distorting competition' in the market, contrary to Article 102 and the equivalent French provision. However, on 16 January 2020, the French Competition Authority decided to bring the proceedings to a close, opining that mergers fall under the exclusive remit of the EUMR, thereby rendering the application of Article 102 devoid of purpose when the alleged abusive conduct is the act of launching or completing a merger.

This prompted Towercast to appeal the authority's decision before the Paris Court of Appeal (cour d'appel de Paris), where it relied on the *Continental Can* case law as legal authority for applying Article 102 to merger cases *ex post*, a legal principle that the French NCA deemed to have been superseded in the interim by the introduction of the ECMR and EUMR. The Paris Court of Appeal decided to stay proceedings and request a preliminary ruling from the CJ on the question of whether a merger that falls below EUMR and national jurisdictional thresholds and has not been the subject of an Article 22 EUMR referral may, nonetheless, be eligible for review as an abuse of dominance case under Article 102.[186]

[185] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

[186] Callol notes that the Paris court is likely to have seen absurdity in adopting a literal interpretation of the wording in art 21(1) EUMR, which could have potentially violated the scope of art 102 TFEU as 'a key or "constitutional" provision'; Callol (n 100) 122.

(ii) Opinion of AG Kokott

The first indication that the preliminary ruling would lead to a momentous revival of the *Continental Can* case law was to be found in the Opinion of Advocate General Kokott, published five months before the CJ's judgment was handed down.[187] In it, AG Kokott opines that, save for avoidance of 'double assessment' scenarios where a merger had already been assessed under the EUMR,[188] Article 102 TFEU has the potential to be applied to a merger transaction. While repeating her acknowledgement in the *Austria Asphalt* case that Article 102 may represent a 'weaker' and more limited tool for merger enforcement (especially in terms of remedies),[189] the AG nonetheless maintains that it should at least be possible for the Commission to review nascent acquisitions under the unilateral conduct provision where necessary.[190] Here, AG Kokott can be seen to base her opinion on the need to optimize opportunities to protect competition from killer acquisitions, alluding to the emergence of an enforcement gap in the *ex ante* merger control rules in recent years. Corresponding with the essence of the GC's decision in *Illumina v Commission*,[191] the opinion justifies the application of Article 102 as yet another gap-closing tool—in addition to Article 22 EUMR—in the enforcement against harmful acquisitions of innovative start-ups.

While the AG Opinion is notable for its reference to policy, a strong legal basis is also forwarded to justify the application of Article 102. Kokott emphasizes the direct applicability of Article 102 as a provision of primary law and, as such, is straightforward in applying the principle of *lex superior derogat legi inferiori* to reach the opinion that no provision of the EUMR—as a source of secondary law—is capable of limiting the scope or application of Article 102.[192] Accordingly, failure to meet the EUMR's turnover thresholds merely indicates that a merger does not require notification to the Commission; it does not preclude the potential for *ex post* review under Article 102.[193]

AG Kokott also reflects on whether a merger that has already been reviewed under the EUMR *ex ante* may also face subsequent *ex post* review under Article 102. Referencing the importance of legal certainty, she expresses a preference for the principle of *lex specialis derogat legi generali* to apply in such cases;[194] namely, that a merger which receives clearance by way of an *ex ante* assessment under the EUMR could no longer be subjected to *ex post* unilateral conduct proceedings, unless the acquiring party engages in abusive conduct that goes beyond the acquisition itself. This demonstrates a reluctance—on the part of the Advocate General—to see previously reviewed mergers face a tangible threat of post-completion penalties. That being said, as Mulder & Sauter observe, the threat of extreme sanctions—namely, divestiture—arising from *ex post* merger review is mitigated by the principle of proportionality and the primacy of administrative fines and behavioural remedies in Article 102 enforcement practice.[195]

187 Case C-449/21 *Towercast v Autorité de la concurrence and Ministère de l'Économie* [2021] OJ C452/9, Opinion of AG Kokott; (AG Opinion, 13 October 2022) ECLI:EU:C:2022:777.
188 ibid, para 59.
189 Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt* [2016] OJ C260/27, Opinion of AG Kokott, para 36; (AG Opinion, 27 April 2017) ECLI:EU:C:2017:322.
190 AG Kokott Opinion, *Towercast* (n 188), para 48.
191 Callol (n 98) 122.
192 AG Kokott Opinion, *Towercast* (n 187), paras 29–30.
193 ibid, para 36.
194 ibid, para 59.
195 Mulder and Sauter (n 40) 8.

(iii) Ruling of the Court of Justice

In its judgment of 16 March 2023,[196] the CJ—siding favourably with the general position in AG Kokott's Opinion—ruled that, while the EUMR introduced a means of centralized *ex ante* merger control for transactions possessing an EU dimension, this did not preclude the potential for *ex post* interventions of merger operations involving transactions that are not in possession of an EU dimension or even those that do not meet national jurisdictional thresholds.[197] This being the case, the principle in *Continental Can* remains effective.

In elaborating of the scope of its application in the mergers context, the CJ concluded that a breach of Article 102 TFEU may arise where[198]: (i) the merger does not meet EU or Member State notification thresholds; (ii) the merger has not already been referred to the Commission under Article 22 EUMR; (iii) the acquiring party was in a dominant position prior to the merger; (iv) the level of dominance post-merger would 'substantially impede' competition in the relevant market[199]; and (v) the merger would be likely to affect trade between Member States.

Ruling on the wording of Article 21(1) EUMR, which appears to expressly preclude the application of Regulation 1/2003 to mergers with an EU dimension, the CJ emphasizes the direct effect of Article 102 as a Treaty provision that is 'sufficiently clear, precise and unconditional' so as to remove any need for secondary law—such as the provisions of the EUMR—to prescribe or authorize its application.[200]

B. Implications for the revamped EU merger control regime

The scope of Article 102's application to mergers is likely to remain very limited, even post-*Towercast*, given the rigorous criteria required to bring successful Article 102 proceedings and, moreover, the potential offered by Article 22 EUMR referrals as a viable alternative for NCAs where the merger has yet to—or only recently been—implemented. However, this should not detract from the significance of the ruling, especially while there is lingering uncertainty over how the CJ will interpret the Commission's revised policy on Article 22, which will determine which enforcement route is more feasible and desirable for NCAs. As a potential last line of defence against killer acquisitions,[201] Article 102 may be well-placed to impose behavioural remedies that oblige dominant acquirers to preserve innovation efforts, or—insofar as they are proportionate—structural remedies that require the merged entity to carve-out and divest competitively significant R&D efforts. Even if only a small number of

[196] *Towercast* (CJ, 16 March 2023) (n 15).

[197] In addition to unleashing the potential for *ex post* interventions under art 102, McCarthy comments on the potential of the *Towercast* judgment to enable art 101 investigations into completed mergers, to scrutinize whether they constitute an anticompetitive agreement (the author does, however, acknowledge the uncertainty that surrounds this); A McCarthy, 'Control your Merges' (July 2023) Law Society Gazette 56, 57.

[198] The CJ references five conditions in *Towercast* (n 15) para 53 (for criteria (i) and (ii)), para 52 (for criteria (iii) and (iv)), and para 43 (for criterion (v)).

[199] In practice, this is a much higher hurdle for the competition authority to overcome compared to the SIEC test; meaning mergers with a particularly significant impact on market concentration (eg 3-to-2 mergers) and killer acquisitions are the most likely types of case to fall foul of the test. See *Towercast* (n 15) para 52: 'the mere finding that an undertaking's position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance [arising from the merger] would substantially impede competition [to the extent that] only undertakings whose behaviour depends on the dominant undertaking would remain in the market'.

[200] *Towercast* (CJ, 16 March 2023) (n 15), paras 50–51.

[201] It is likely that third parties (incl. competitors, such as Towercast) would have particularly strong incentives to bring 'last resort' claims under art 102, especially if they are unsuccessful in their efforts to petition an NCA to submit a referral request under art 22.

nascent acquisitions ultimately fall victim to Article 102 proceedings in the coming years, dominant firms will begin to factor this into their acquisition strategies, or at least bear in mind the threat of *ex post* enforcement when structuring deals for innovative start-ups.

Callol suggests that, on balance, it appears the Commission will have a preference for relying on the Article 22 mechanism, rather than Article 102, as is apparent from its recent practice of inviting Member States to submit referral requests.[202] Having said that, the author acknowledges that there might be procedural reasons why Article 102 would sometimes be a 'preferrable device' compared to Article 22; namely, where time limits come into play. The Commission has, however, invested considerable energy in reframing Article 22 as a 'killer' of killer acquisitions and, given the criticism that its revised policy has encountered from legal certainty advocates, it is very unlikely the Commission will seek to promote routine *ex post* interventions that would risk even more instability for the assessment framework. Article 102 is therefore more likely to be enforced by NCAs in this context, especially those that are reluctant to cede dominion to the Commission via Article 22 requests.[203]

Intriguingly, the CJ ruling in *Towercast* does not take the opportunity to engage with AG Kokott's opinion that mergers which have already benefited from *ex ante* clearance under the EUMR should not be at risk of consequent *ex post* challenges under Article 102—indeed, the judgment is completely silent on the issue. While failure to rule out the potential for 'double assessments' does not imply endorsement on the part of the CJ, especially in light of how closely its judgment aligns with the AG Opinion, the reasoning at the core of the decision—namely, that secondary law should not curtail the application of primary law—means that formal clarity on this point may be required in the future.

VI. CONCLUSION

The European Union has recognized the need to adopt a holistic approach to implementing its ambitious innovation agenda. Important reforms to State aid and block exemption frameworks are a testament to this approach, with attempts to align key areas of EU competition policy with the pursuit of fostering innovation in markets. Regardless of their precise prevalence, killer acquisitions pose a palpable threat to this pursuit. For all the new incentives to innovate that have been created by the Commission's reforms in other areas of competition law, a single killer acquisition can extinguish those incentives overnight. It is therefore entirely understandable that the Commission has invested significant time and resources into reviewing the scope and efficacy of its merger control regime, with both substantive appraisal and jurisdictional elements placed under the spotlight. Ultimately, each of the Commission's enforcement areas must be seen to pull in the same direction, or otherwise risk falling short of expectations.

The EU's enforcement gap appears to have been much of its own making. Prolonged periods of restrictive policy and interpretation—of Articles 22 and 21(1) EUMR—had nullified the potential for below-threshold mergers to be referred to the Commission or reviewed under Article 102 TFEU by NCAs. Departure from these interpretations means competition authorities are at least afforded the opportunity to review the innovation implications of such mergers, even though every agency has to contend with its own set of obstacles at the substantive review stage. In this regard, the Commission's recent decisional practice allows for cautious optimism that a central role can—and will—be afforded to innovation considerations in a wider range of substantive merger appraisals. This could well encourage more Member States to make use of the Article 22 mechanism, anticipating that the Commission

202 Callol (n 98) 123.
203 ibid.

may be best-placed to identify—and most likely to succeed in arguing—the existence of innovation harms to the requisite legal standard.

Just as our understanding of the nature and prevalence of killer acquisitions and other innovation-destroying mergers continues to evolve, innovation theories of harm themselves have space to evolve. The speculative nature of merger control means it has been necessary for competition authorities—the Commission included—to show bravery and embrace a degree of uncertainty in order to argue innovation theories of harm. While that uncertainty will gradually erode with time, it is apparent that some onlookers wish to see the process jump-started by lowering the standards of proof or by reversing the burden of proof so that there is less of an onus on the Commission to be brave when arguing the existence of innovation harms. The feasibility of such reform is unclear and, one imagines, will require more robust empirical evidence of the prevalence of killer acquisitions before there is political consensus for such change.

Recent developments to EU merger control's jurisdictional rules have certainly extended the range of transactions that are capable of being called-in for review. While changes brought about under Article 22 EUMR, Article 14 DMA and Article 102 TFEU can each be said to be individually justifiable, the collective empowerment of all three jurisdictional prongs has raised concerns of 'too much, too soon'. Legal certainty is unquestionably a central tenet of any well-functioning merger control regime, and pro-innovation reforms must be cautiously weighed against any possible destabilizing effect on the one-stop shop. However, it is premature to forecast a chilling effect on merger activity arising as a result of these changes. While it would have been desirable to implement more targeted reforms that stand only to impact suspected killer acquisitions, there is—at this moment in time—very little basis to liken the reforms to cracking a nut with a sledgehammer. The three prongs of the newly forged jurisdictional trident will each be afforded time to bed-in; decisional practice and the forthcoming ruling by the CJ in *Illumina v Commission* will ultimately paint a clearer picture of how each will function and, more significantly, how they will interact with each other in practice.

Further questions also remain. Article 14 DMA may well perform an important screening role to support bridging the jurisdictional gap for killer acquisitions arising in digital mergers, but doubts remain over whether other innovation-intensive sectors (eg pharma,[204] biochem, etc) are in need of similar screening mechanisms. In any instance, the CJ will have its opportunity to rule on the Commission's revised Article 22 policy—if the Commission's case does not succeed, other options will need to be pursued.

CONFLICT OF INTEREST

The authors declare that the research has been conducted in accordance with ASCOLA Transparency and Disclosure Guiding Principles (ascola.org/declaration-of-ethics). The authors have no conflicts of interest to declare.

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[204] Many of the first '40-odd mergers' considered for review under the new art 22 policy have involved acquisitions in the pharmaceutical sector; Hirst (n 139).