

Killer Acquisitions and Merger Control in the Digital Economy

An analysis of the EU legal framework following the Illumina/Grail judgment

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Abstract

The referral system, the ‘Dutch Clause’, in Article 22 EUMR has been one of the main pathways for the European Commission to effectively review killer acquisitions in the digital economy. The scope of the provision has been decided in the recent *Illumina/Grail* judgment where the Court of Justice of the European Union found the previous extensive interpretation of the referral system to be against the objectives and aims of the EUMR. The judgment calls for further research on how to catch killer acquisitions in the digital economy considering these developments. This essay analyses the EU merger control legal framework to conclude whether the current set of rules are sufficient to address killer acquisitions and the closely related phenomenon of kill zones, while maintaining the principle of legal certainty. Furthermore, potential amendments and clarifications are discussed *de lege ferenda*. The conducted research is utilising the EU Legal Method, the Legal Analytical Method, and results and findings from relevant economic research.

The economic theory of killer acquisitions by Cunningham et al. is investigated and analysed to determine the scope of the findings and whether the theory has bearings in the digital sector. Results from economic research suggest that the phenomenon of killer acquisitions extends to the digital sector. One obstacle is to gather sufficient and verifiable evidence to prove whether the incumbent’s intended use of the acquired technology or innovation is to integrate or eliminate. The kill zone theory by Zingales et al. suggests a decreased incentive to innovate as well as to invest in start-ups in the digital sector. Both theories, in the light of the objectives of EU competition law, may lead to less competitive pressure, foreclosure of nascent competitors, stifled innovation and less consumer choice. Nevertheless, the risk of overenforcement calls for a nuanced assessment and approach to these transactions to avoid a one-sided solution to a multifaceted matter.

Article 22 EUMR constitutes as an effective mechanism after the *Illumina/Grail* judgment since national merger laws with alternative jurisdictional thresholds are increasing in the Member States. These developments contribute to a fragmented and scattered system for EU merger control which may be repaired through increased transparency and effective and open cooperation between National Competition Authorities and the European Commission to not undermine the principle of legal certainty. The SIEC test in Article 2(3) EUMR allows for flexibility through the provision’s broad wording and scope. A more forward-looking approach may be required to assess potential future competition and elimination of innovation in digital markets. The interplay between Article

22 EUMR and Article 14 DMA promotes increased transparency and a system in which referrals can be encouraged and examined for a comprehensive approach. The-ex ante obligations in the DMA may result in decreased market concentration through contestability and ultimately limit kill zones around Big Tech. Article 102 TFEU, i.e., the ‘Towercast option’, allows for supplementary ex-post merger control to bridge the gap between the limitations within the ex-ante system in the EUMR. Article 102 TFEU is not limited to concentrations within Article 3 EUMR and offers a wider scope and applicability. However, the overhanging risk for double assessment could lead to negative impacts on legal certainty for merging parties.

The current set of rules are sufficient although not fully comprehensive. A widened scope and further developments of the referral system, alternative jurisdictional thresholds, a potential reversal of the burden of proof and a forward-looking and agile approach to the SIEC test should adequately address killer acquisitions in the digital sector. Kill zones are primarily addressed due to the interplay of the DMA and the EUMR and the system for ex-post merger control in Article 102 TFEU. However, excessive enforcement and further sector-specific legislation may only address these phenomena in isolation. A nuanced approach is required when addressing the conflicting interests actualised in this essay to avoid unjustified overenforcements based on indications or uncertainty.

Abbreviations

AG	Advocate General
AI	Artificial Intelligence
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority
DG COMP	Directorate-General for Competition
DMA	Digital Markets Act
EU	European Union
EUMR	EU Merger Regulation
FTC	Federal Trade Commission
GAFAM	Google Apple Facebook Amazon Microsoft
GC	General Court
GWB	German Competition Act
IPR	Intellectual Property Rights
KartG	Austrian Federal Cartel Act
M&A	Mergers & Acquisitions
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
SIEC	Significant Impediment to Effective Competition
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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1 Introduction

1.1 Background

One of the main objectives of competition law in the European Union (EU) is to promote fair and open markets, as stated in Article 3(3) Treaty on the European Union (TEU). A system ensuring that competition is not distorted within the internal market is necessary to achieve this objective, as stated in Protocol (No 27) on the internal market and competition.¹ However, EU competition law is currently facing challenges of significant market concentration within digital markets, and especially within the digital platform market, where the market is concentrated within the GAFAM² companies, also known as *Big Tech*, who exercise substantial market power on the digital platform market. Economists have found that from 2015-2017, the GAFAM companies acquired 175 companies ranging from innovative start-ups to billion US dollar acquisitions.³ Other studies have concluded that GAFAM have since 2010 acquired more than 400 companies.⁴ Many of these mergers & acquisitions (M&A) consist of an incumbent, and often dominant firm, targeting a nascent competitor developing or innovating a certain technology which might pose a threat to the incumbent firm. The promising, groundbreaking and potentially market-shifting start-up is often faced with two options, that is, to sell or try to compete with the dominant firms in a highly concentrated market.

As an example of this very phenomenon, Snapchat Inc. was allegedly offered \$3 billion US dollars to be acquired by Facebook Inc.⁵ However, according to internal sources, Snapchat rejected the offer and remains an independent firm in the digital marketplace.⁶ This raises several questions of interest within EU merger control and the legal framework available to examine these transactions as many of these innovative start-ups generate zero to no turnover. Many of these firms hold significant values which are not necessarily of monetary means and

¹ See Chapter 1.3.1 for the principle of conferred powers and EU competition law.

² Google, Apple, Facebook, Amazon and Microsoft (GAFAM), also referred to using other acronyms. GAFAM is at the time of writing the most widely recognised term in the legal literature and is therefore used in this essay.

³ Gautier, Axel, Lamesch, Joe, *Mergers in the Digital Economy*, CESifo Working Paper No. 8056, 2020, pp. 1 and 27.

⁴ Affeldt, Pauline, Kesler, Reinhold, *Competitors' Reactions to Big Tech Acquisitions: Evidence from Mobile Apps*, DIW Berlin Discussion Paper No. 1987, 2021, p. 1.

⁵ Now called Meta Platforms Inc. (Meta).

⁶ Reuters, Snapchat rejected \$3 billion buyout offer from Facebook: report, 13 November 2013. Available at: (<https://www.reuters.com/article/technology/snapchat-rejected-3-billion-buyout-offer-from-facebook-report-idUSBRE9AC11E/>). Last visited: 6 February 2025.

presented through generated turnover, particularly at the early stage of developments. A firm such as this could still hold a significant value in a potential transaction and have an effect on competition. How are these transactions to be addressed within EU merger control and what are the effects of this phenomenon for the objectives of EU competition law and consumer welfare?

An important aspect of competition law is for markets to be contestable, fair, and open. The digital economy has evolved and expanded over the years and has resulted in significant market concentration which has led to fewer firms entering the markets where Big Tech is operating. These developments can be both pro-competitive and anti-competitive, that is, increased market concentration through M&A activity could generate efficiencies and superior products and services on the one hand. However, on the other hand, increased concentration has the potential to reduce the competitive pressure in these markets along with a reduced incentive to innovate and to invest, stifled innovation and less consumer choice.

The fact that a dominant firm with substantial market power and significant market shares acquires smaller innovative firms to terminate nascent competitors and further solidify and entrench its own market position has been described as *killer acquisitions*.⁷ The study on this phenomenon was conducted by Colleen Cunningham and others and originally focused on developments within the pharmaceutical sector where killer acquisitions were defined as when incumbent firms acquire “[...] an innovative target and terminate the development of the target’s innovations to preempt future competition.”⁸ Furthermore, which the scholars concluded in the study, there is another potential side effect from these acquisitions of targets with low turnover in the digital sector, which has been described as the *kill zone*. Kill zones have been defined by economists as the area around an incumbent firm in the digital sector where young and innovative start-ups are facing significant difficulties to enter the market due to insufficient capital and funds through investors.⁹

Jurisdiction to review a concentration between two firms is based primarily around turnover thresholds in the EU Merger Regulation (EUMR).¹⁰ Transactions below the established turnover thresholds generally fall outside of EUMR, with a few exceptions. The European Commission (the Commission) has through different attempts strived to ‘catch’ these killer acquisitions in the digital sector through various means of legal nature. It has been a balancing act between 1) making it possible to review these transactions, and 2) the overhanging risk of

⁷ Cunningham, Colleen, Ederer, Florian, Ma, Song, *Killer Acquisitions*, Journal of Political Economy, Vol. 129, No. 3, 2021, p. 649.

⁸ Cunningham et al., p. 650.

⁹ Kamepalli, Sai Krishna, Rajan, Raghuram G., Zingales, Luigi, *Kill Zone*, 2021, p. 2. Available at SSRN: (<https://ssrn.com/abstract=3555915>). Last visited: 22 May 2025. See also Norbäck, Pehr-Johan and Persson, Lars and Svensson, Roger, *Creative Destruction and Productive Preemptive Acquisitions*, Journal of Business Venturing, Vol. 31(3), 2016, p. 326.

¹⁰ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. (EUMR).

overenforcement and potentially undermining the principle of legal certainty for merging parties, which is a vital interest for well-functioning merger control.

A recent judgment from the Court of Justice of the European Union (CJEU) in the long-awaited *Illumina/Grail* judgment provides guidance and clarity on the matter, that is, effective merger control for killer acquisitions while upholding the principle of legal certainty for merging parties, which is one of the main themes of this essay.

1.2 Aim and Purpose

The aim and purpose of this essay is to investigate and analyse whether the EU merger control legal framework and settled case law is sufficient for reviewing mergers and acquisitions in the digital economy, particularly transactions where the target company generates low or no turnover. The following research questions are investigated to achieve the overall aim of the essay:

- 1) How do the economic theories of ‘killer acquisitions’ and ‘kill zones’ relate to the EU merger control policy and objectives?
- 2) Is the legal framework sufficiently comprehensive or are clarifications or amendments required to address killer acquisitions and kill zones?
- 3) How can killer acquisitions be reviewed effectively without undermining the principle of legal certainty?

1.3 Methodology

1.3.1 The EU Legal Method

The EU Legal Method has been established in both the legal doctrine and through settled case law from the CJEU.¹¹ The EU is an autonomous legal system, and its provisions are to be interpreted in the light of the objectives and values stated in Articles 2-3 TEU. The Member States have jointly agreed to create a common legal system which unites the EU as *one* organisation.¹² Each provision of EU law must be placed in its relevant context to be interpreted within the EU legal system and its objectives as stated in the Treaties.¹³ The Member States have limited their sovereign rights through the conferred powers to the EU through the principle of conferral as stated in Article 5 TEU. The conferred powers are stated in Article 2-6 Treaty on the Functioning of the European

¹¹ Judgment of the Court of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81, EU:C:1982:335, para. 20.

¹² Andersson, Helene, Bakardjieva Engelbrekt, Antonina, Bernitz, Ulf, Granmar, Claes, Lundqvist, Björn, Paju, Jaan (ed.), *Kritiskt tänkande inom Europarätten*, Ragulka Press, Stockholm 2018, p. 29.

¹³ Case 283/81, *CILFIT v Ministry of Health*, para. 20.

Union (TFEU) with competition law as an exclusive competence to ensure a functioning internal market, according to Article 3(1)(b) TFEU.

The principle of primacy of EU law has been developed through CJEU's case law in order to avoid potential conflicts between national law in the Member States and EU law.¹⁴ In the *Costa v E.N.E.L* judgment the court confirmed the principle in which the Member States have, through conferred powers created an independent legal system with its own independent source of law, which cannot be overridden by national legislation.¹⁵ This conclusion was already established in the landmark case *Van Gend & Loos* from 1963, where the court confirmed the EU as a 'new legal order'.¹⁶ The principle of the primacy of EU law is not communicated in any of the provisions of the primary law instruments, however, it is stated in a declaration annexed to the Treaty of Lisbon.¹⁷

The research and analysis conducted within this essay is according to the methods of interpretation established by and developed through the CJEU's case law, as the EU courts are the sole interpreters of EU law, according to Article 19 TEU. The role of the EU courts is rather different than of the national courts in the 27 Member States and this must always be borne in mind when analysing the reasoning and the conclusions by both the General Court (GC) and the CJEU. In fact, the EU courts are often facing cases where there is uncertainty and are therefore at times accused of judicial activism. According to Hettne & Eriksson, some judicial activism may be necessary to give rulings in these difficult cases.¹⁸ Case law and the interpretation of judicial precedent is of certain interest in this essay as this is a driving force and creator of law within the EU law unlike many national jurisdictions in the Member States.¹⁹

When interpreting EU law, the courts are mainly analysing the relevant provisions using four methods of interpretation, that is, the literal, systematic, teleological and the historical methods of interpretation.²⁰ These methods of interpretation are established in settled case law from the CJEU and required when interpreting EU law. The overall goal with the EU as an organisation is the creation of a functioning internal market, which serves as an important benchmark and guiding star when interpreting EU law.²¹ The teleological method of interpretation is especially associated with the EU courts through analysing the aim and purpose behind a specific provision while striving toward the aims of the EU as

¹⁴ Paju et al., p. 44.

¹⁵ Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L*, Case 6-64, EU:C:1964:66, para. 3.

¹⁶ Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, EU:C:1963:1, para. 3.

¹⁷ See Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Declaration 17 concerning primacy.

¹⁸ Hettne, Jörgen, Otken Eriksson (ed.), *Ida, EU-rättslig metod: teori och genomslag i svensk rättstillämpning*, 2nd edition, Norstedts Juridik, Stockholm 2011, p. 59.

¹⁹ Hettne & Eriksson, p. 41.

²⁰ Judgment of the Court of 25 June 2020, *A and Others v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen*, Case C-24/19, EU:C:2020:503, para. 37.

²¹ Nääv, Maria, Zamboni, Mauro (ed.), *Juridisk metodlära*, 2nd edition, Studentlitteratur AB, Lund 2018, pp. 122-123.

stated in Article 3 TEU. The teleological interpretation is not to be compared to a general purpose-driven analysis. It is more complex than simply defining the aim of the provision itself and rather an analysis in the broader context of EU law and policy in a systematic manner.²² As for the aim and purpose of this essay, these established methods of interpretation are utilised to interpret case law from the EU courts, regulations, and the Treaties with a primary focus on the teleological, systematic, and lexical methods of interpretation. Furthermore, as the CJEU and the Commission must ensure consistency, effectiveness and continuity in their actions and policies according to Article 13 TEU, this is taken into consideration while analysing the legal framework within the chosen topic. A coherent system is therefore preferable within EU competition law.

The EU Legal Method is suitable for the chosen topic of academic research as EU competition law and policy is a legal framework within the EU legal system, which needs to be interpreted and analysed in the light of the above. The methods of interpretation are utilised in this essay when analysing the legal text in both primary and secondary EU law as well as case law from the EU courts. Due to the absence of preparatory works within the EU legislative process, the recitals provide guidance as to the purpose and objective behind the letter of the law and are often referred to by the EU courts when interpreting a specific provision in its context within a regulation.²³ Guidelines and other statements from the Commission are not legally binding acts according to Article 288 TFEU, however, these soft law official documents have significant bearings within EU competition law and from an enforcement standpoint, therefore are these source included and analysed thoroughly according to the EU hierarchy of norms.

The EU legal method consists of a comprehensive method for research which allows for in-depth legal analysis and to navigate EU competition law through the independent legal system of the EU with its own hierarchy of norms to determine the outcome and the effects and consequences of different solutions for EU competition law.²⁴ The legal method is primarily utilised while investigating research questions 2-3 while establishing *de lege lata* as well as discussing what the law ought to be or may be in light of future developments in the area of law *de lege ferenda*. However, the other chosen methods of analysis are present throughout the analysis and the following conclusions.

Economic research and analysis has influenced EU competition law, especially the Chicago School, or Law & Economics.²⁵ The early days of competition law within the EU were more formalistic and legalistic, however, a more economic approach has emerged in the last two decades.²⁶ Economic theories are often discussed in conjunction with legal analysis in EU competition law, which is further discussed in the section below and how this is incorporated in the essay.

²² Hettne & Eriksson, p. 158.

²³ Paju et al., p. 69.

²⁴ Hettne & Eriksson, p. 40.

²⁵ Nääv & Zamboni, p. 185.

²⁶ Whish, Richard, Bailey, David, *Competition Law*, 11th edition, Oxford University Press, Version: 2 August 2024, eBook, (Oxford University Press), 2024, p. 3.

1.3.2 Results and Findings from Economic Research

Inspiration for this topic was gathered mainly from the findings and results in the killer acquisitions and kill zones theories, conducted by prominent economists in their respective fields. By including interdisciplinary research and results it is possible to study the law from different perspectives and to determine whether the legal framework is sufficient to address the issues highlighted in other disciplines, such as economic theory.²⁷

The economic research conducted by Cunningham, Zingales and others have been acknowledged by both EU institutions as well as scholars and is considered to be supported by robust and reliable empirical data.²⁸ One of the objectives of this essay is to place these findings and results within digital markets, and especially within Big Tech's acquisitions of innovative start-ups and the effects on effective competition. Other studies conducted by prominent scholars in their respective fields are also considered, both of economic and legal nature. This is to further analyse the bearings of both theories in the digital sector through available data collected and compiled regarding these transactions to draw conclusions from these and place these conclusions in a legal context.

This interplay and relation between law and economics is investigated and analysed through every chapter of the essay as both disciplines have an impact on the other in EU competition law. M&A activity in the digital sector has faced minimal intervention from the enforcing authorities and the challenge market concentration has led to sector specific legislation and market intervention.²⁹ This market intervention from the public is necessary when markets are unable to self-correct effectively, for example through legislation.³⁰

With Big Tech's rapid growth and market concentration it is therefore interesting to examine digital markets where mergers can both increase efficiency as well as potentially stifle innovation, which is detrimental to consumer welfare. Merger control is only applicable in certain cases with the objective to stop harmful concentrations incompatible with the internal market. This legal framework is a form of intervention from the public and the essay explores the tension between economic efficiencies through M&A activity against public intervention, which can and may be justified in situations where markets are unable to self-correct.

This essay is primarily a *legal study*. Economic studies and relevant data are placed in an EU competition law context and to draw conclusions in the light of the objectives stated above. The ambition is therefore not to conduct an economic analysis in itself but rather to relate economic theories to the law and analyse the results in the light of EU competition law.

²⁷ Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: Ämne, material, metod och argumentation*, 5th edition, Norstedts Juridik, Stockholm 2021, p. 60.

²⁸ See Chapters 2.1-2.3 and 4.1-4.1.2.

²⁹ Jones, Alison, Sufrin, Brenda, Dunne, Niamh, *Jones & Sufrin's EU Competition Law: Texts, Cases and Materials*, 8th edition, Oxford University Press, Oxford 2023, pp. 1208 and 1216.

³⁰ *Ibid.*, p. 20.

1.3.3 The Legal Analytical Method

The above methods are missing a critical analytical aspect of the law.³¹ As EU law and EU competition law are both influenced by external factors, such as political compromises, potential market failures and often broadly worded provisions in both primary and secondary law, it is often required to analyse the law in this very context. The Legal Analytical Method widens the legal system and there is no ‘one’ correct answer to a legal problem, which allows for critical reasoning and analysis.³² The method is still focused on determining what the law is according to the hierarchy of norms, however, it requires a more nuanced analysis. With the new digital era it is therefore necessary to include materials which are not traditional sources of law, but rather to create an understanding and context of the legal issue at hand. This method of research allows for the inclusion of a broader scope of source material to place the legal problem in a wider context, such as news articles and other sources with forecasts on industry trends and market developments. This context is required in order to analyse the chosen subject and how the chosen theories relate to EU competition law which is primarily conducted within research question 1. Furthermore, relevant soft law instruments serve as a vital part of this essay these have an impact within EU competition law while not demonstrating the same legal status as other sources of EU law. This widened approach is required when assessing the relatively new phenomenon of anti-competitive conduct in the digital sector with its bearings in society.

Moreover, the method is used for legal reasoning and critical analysis where the outcomes are uncertain and to draw independent conclusions of the effects and impacts of the CJEU’s case law and further developments. Furthermore, the EU legislative process differs from the legislative process in the Member States. Regulations are generally based in a political compromise through lengthy negotiations which result in broadly worded provisions, which asks more of the legal scholar’s critical thinking.³³ The method is therefore present in the analytical elements of the findings in both research questions 2-3, and as a supplement to the EU Legal Method when required.

1.4 Scope and Limitations

The relevant legislation constitutes of the EUMR, Article 102 TFEU, and the Digital Markets Act (DMA).³⁴ This legal framework, along with relevant case law

³¹ The EU Legal Method is not a critical legal method per se; however, it is utilised with a critical approach in this essay. See Chapter 1.3.1, and the discussion of the political element of EU law as well as the role of the EU courts.

³² Sandgren, p. 54.

³³ Paju et al., pp. 67-68.

³⁴ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). (DMA).

from the EU courts, is the legal system for merger control in the EU, which is why the essay is limited to these main sources of law. Article 101 TFEU falls outside the scope of this essay and the chosen field of research and only illustrative examples of future developments are included to highlight future developments of merger control. All the mentioned sources of law are examined to investigate the overall aim and purpose of the essay and to answer the chosen research questions. In other words, the mentioned sources of law are considered only in aspects which align with the main purpose and aim of the essay and to answer the research questions.

As discussed in Chapter 1.3.2, results and findings from economic studies and research are utilised. The method of Law & Economics has been delimited due to the primary focus on the *legal aspects* of the chosen problem, which calls for only secondary use of economic research and primarily as inspiration and context to the legal study.

The scope of the academic research is focused on competition law within the EU. However, due to the global nature of competition law and policy, which is not dissimilar in many jurisdictions, some examples and comparisons with the United States and the United Kingdom are present for illustrative purposes without constituting as a comparative study. Other material, such as reports from the Federal Trade Commission (FTC), legal doctrine from jurisdictions other than the EU are considered, primarily for context and as inspiration within the chosen methods of research.

The EU Legal Method allows for the inclusion of some national legislation from the Member States for illustrative purposes due to the EU's exclusive competence without the need to conduct a separate comparative analysis.³⁵ Examples from the Member States Germany and Austria are included where national merger laws are either of similar nature or an attempt to address current issues discussed within EU competition law and policy. The reasoning behind excluding a comparative analysis is mainly based on the fact that the chosen material is subject to discussion within EU law and the interplay between the Member States through the referral mechanism system in the Article 22 EUMR. Therefore, due to this interplay, it is relevant and necessary to maintain this analysis within the EU Legal Method.

Finally, to not address the relationship between law and politics is inevitable when conducting research within EU law. Competition law and policy and the objectives within are often determined and heavily influenced by political goals. Political aspects to the chosen subject are primarily included to address the legislative process, goals and direction and the competence of EU institutions, primarily the Commission.³⁶

³⁵ Extensive use of national legislation from EU Member States for comparative purposes could possibly call for a comparative method of research.

³⁶ Cf. Sandgren, p. 56.

1.5 Disposition

Chapter 2 objectively outlines the economic theories and kill zones comprehensively. The theories are placed in an EU competition law context and discussed in light of the digital economy and digital markets compared to other sectors. The later parts of Chapter 2 consist of the characteristics of digital markets and their key elements in order to further place the theories in a digital context before outlining the relevant legal framework in which they are analysed.

Chapter 3 serves as the main overview of the legal framework of EU merger control relevant for addressing killer acquisitions and kill zones in the digital economy. Relevant provisions of each regulation and relevant primary law are introduced followed by an extensive section on the *Illumina/Grail* judgment from both instances. Chapter 3 is primarily an objective overview and outline of what the law is, *de lege lata*. As the *Illumina/Grail* judgments from the EU courts are a vital element of the essay and for the chosen subject, a comprehensive discussion is required. For structural purposes, an analytical section is therefore relevant to include in Chapter 3.

Chapter 4 is the critical analysis portion of the essay in which the chosen research questions are analysed and discussed at depth. The aim and objective of Chapter 4 is to conduct an independent critical legal analysis based on the findings in Chapters 2-3. Chapter 4 offers a broader scope than the previous sections and places the chosen field of research in a wider context through the inclusion of further studies, arguments, data, and potential solutions to the chosen legal problems. Different approaches on how to address these transactions are critically analysed from different angles where positive and negative effects of different options are investigated and highlighted. The final section of Chapter 4 includes a *de lege ferenda* discussion.

Chapter 5 includes a summary with concluding remarks followed by answers to research questions 1-3 as well as discussions about future developments in the field of killer acquisitions in the digital economy.

The chosen disposition consisting of three parts, outline, analysis and conclusion, is mainly motivated by structural purposes and the vast complex body of material which is introduced and systematised into its relevant context (Chapter 2-3). The introductory chapters serve as the platform allowing a comprehensive subsequent analytical section to unfold in the following chapters (Chapter 4-5). This established and recognised method and structure promotes transparency and allows for further inclusion of relevant sources and a more in-depth analysis.³⁷ Research questions 1-3 are answered and summarised in Chapter 5.

³⁷ Sandgren, pp. 83-84.

2 Elimination Through Acquisition: Causes and Effects in Digital Markets

2.1 Introduction

Innovative firms play a vital role for well-functioning and competitive markets.³⁸ These firms have, at least in theory, the potential to claim market shares from dominant firms with their cutting-edge technologies. The Scandinavian entrepreneurs behind the revolutionary software *Skype* in 2003 changed how we communicated and offered a solution for phone and video calls over the Internet. With this being said, Skype faced no actual competition at the time, but the duo identified an opportunity and created a solution through innovation which would benefit consumers and pave way for other competitors to challenge Skype's services. Fast forward to 2011 when Microsoft acquired 100% of the shares and sole control over Skype, a merger which was also reviewed by the Commission.³⁹ Skype presented a total revenue of 650 million EUR in 2010. The transaction value of 8.5 billion USD the following year indicates that the firm had significant value which could be beneficial to Microsoft, whether that was market shares, the customer base or the innovation requires a separate analysis. Microsoft decided to shut down Skype in May 2025.⁴⁰

Is this conduct to be considered as a killer acquisition in the digital sector? The answer is complex and requires a nuanced legal analysis while considering several different factors. Some would argue that Microsoft's acquisition of Skype is *not* to be considered as a killer acquisition per se and rather as an example of a success story with a young emerging firm creating a service which would eight years later be an important chess piece for firms within Big Tech to expand through integration. As mentioned in Chapter 1, killer acquisitions have been described as an incumbent firm's acquisition of a nascent innovative competitor to *eliminate* the target's innovation and preempt potential future competition.⁴¹ This economic theory developed by Colleen Cunningham, Florian Edered and Song Ma identified killer acquisitions where pharmaceutical firms engaged in this type of activity to eliminate potentially promising innovation by future potential competitors. It has been debated as to whether, and to what extent, this

³⁸ Cunningham et al., p. 649.

³⁹ Case M.6281, *Microsoft/Skype*, Commission Decision of 7 October 2011.

⁴⁰ Epper, Jeff, Microsoft, The next chapter: Moving from Skype to Microsoft Teams, 28 February 2025. Available at: (<https://www.microsoft.com/en-us/microsoft-365/blog/2025/02/28/the-next-chapter-moving-from-skype-to-microsoft-teams/>). Last visited: 1 March 2025.

⁴¹ Cunningham et al., p. 649.

phenomenon has any bearings in the digital sector and to what extent. The Commission and the Directorate-General for Competition (DG COMP) published the expert report *Competition policy for the digital era (The Digital Report)* in 2019 and held that there may be cases and situations in the digital sector, in which a dominant firm acquires innovative targets to later shut down the acquired technology or innovation. However, it is not certain whether this is the typical aim of these acquisitions or if the objective rather is to integrate said innovation into one of their existing programs or products.⁴²

Cunningham et al. found through theoretical and empirical analysis of acquisitions in the pharma sector that 5.3% to 7.4%⁴³ of the acquisitions in their samples through modelling to be killer acquisitions.⁴⁴ Can this theory be applicable through analogy for M&A activity in the digital sector, which is heavily reliant on innovation and start-ups to evolve and thrive? This is a phenomenon which is of certain interest to study in digital markets, which have developed rapidly in the last two decades with unique characteristics.⁴⁵

Innovative start-ups and nascent competitors are important for effective competition on the internal market. Innovative firms can through their new ideas disrupt the market and break up heavily concentrated markets, such as markets within the digital sphere.⁴⁶ Different theories of harm which can be derived from this economic theory are outlined and discussed in the following section.

2.2 Killer Acquisitions v. Nascent Potential Competitor: Theories of Harm

The nascent potential competitor theory of harm covers acquisitions of firms with a product or a service which in the future could or has the potential to turn into a competitor.⁴⁷ This theory of harm demonstrates the situation where the product or service of a nascent potential competitor is not removed or *killed* through acquisition but rather an attempt from the incumbent firm to acquire or control the potential future threat in order to secure or to strengthen its own position on the relevant market. As for Microsoft's acquisition of Skype, the acquired technology was not immediately shut down. However, it was at the time a nascent potential competitor which Microsoft potentially wished to gain control over before the launch of its own service *Microsoft Teams* in 2017. Potentially, Microsoft, as a major player in the digital sector and one of the companies within

⁴² European Commission, Directorate-General for Competition, Montjoye, Yves-Alexandre de., Schweitzer, Heike, Crémer, Jacques, *Competition policy for the digital era*, Publications Office, 2019, p. 117. (*The Digital Report*).

⁴³ 46 to 63 acquisitions per year.

⁴⁴ Cunningham et al., p. 654.

⁴⁵ See Chapter 2.4.

⁴⁶ OECD, *Start-ups, Killer Acquisitions and Merger Control*, 2020, p. 7. Available at: (https://www.oecd.org/content/dam/oecd/en/publications/reports/2020/05/start-ups-killer-acquisitions-and-merger-control_201583e4/dac52a99-en.pdf). Last visited: 22 March 2025.

⁴⁷ Ibid., p. 10.

Big Tech, identified an opportunity in which a nascent potential competitor offered a service in a market in which it later entered with its own service.

These mergers with a potential competitor can give rise to several anti-competitive effects. As for the Microsoft and Skype merger, the transaction required an assessment of the potential conglomerate effects since the firms were not direct horizontal competitors or vertically operating on different lines of the supply chain. The merger did give rise to minor horizontal overlaps due to both parties offering software for communication services. The main competitive assessment did focus on the conglomerate effects because of the complementary and closely related products and services.⁴⁸

By comparison, the killer acquisition theory suggests the acquisitions by the incumbent firms are to eliminate the target companies' close substitute rather than the to acquire and further develop the technology of the nascent firm.⁴⁹ As with Skype and Microsoft, digital mergers can give rise to concerns due to conglomerate effects and the strengthening of a dominant position rather than a significant horizontal overlap leading to a lessening of competition on a specific relevant market. Another example of this situation is the recent merger by Apple and Shazam. The Commission found in the appraisal that the merging parties' products were of a complementary nature rather than substitutable.⁵⁰ It is common for these companies to operate on several markets simultaneously, which creates challenges for the competitive assessment of such a merger.⁵¹

In summary, the killer acquisition theory of harm constitutes of the incumbent's effort through acquisition to effectively eliminate or 'kill' the relevant innovation, product or service whereas the nascent potential competitor theory of harm where the aim is to eradicate a future potential competitive threat.⁵² These two theories of harm are closely related and must often be assessed together and in comparison, when studying these mergers or acquisitions in the digital economy. As innovation is a vital factor to these acquisitions, this raises the question of the potential applicability of an innovation theory of harm.

The innovation theory of harm has been established by the Commission in the *Dow/DuPont* case.⁵³ The Commission reviewed the merger between the US companies Dow and DuPont, both active within the crop protection industry, and found that innovation was an important criterion for the appraisal.⁵⁴ The theory of harm was based on the fact that reduced rivalry in the industry leads to reduced incentive to innovate. Furthermore, the Commission found innovation to be an important parameter to competition in the product market at hand, and that the consumer harm would entail loss of product variety due to reduced

⁴⁸ Case M.6281, *Microsoft/Skype*, para. 133.

⁴⁹ Holmström, Mats, Padilla Jorge, Stützing, Robin, Sääskilähti, Pekka, *Killer Acquisitions? The Debate on Merger Control for Digital Markets*, 2018 Yearbook of the Finnish Competition Law Association, 2019, p. 9. Available at SSRN: (<https://ssrn.com/abstract=3465454>). Last visited: 22 May 2025.

⁵⁰ Case M.8788, *Apple/Shazam*, Commission Decision of 6 September 2018, p. 123.

⁵¹ To define the relevant market in the digital sector is complex, see Chapter 3.5.2.

⁵² OECD, *Start-ups, Killer Acquisitions and Merger Control*, p. 10.

⁵³ Case M.7932, *Dow/DuPont*, Commission Decision of 27 March 2017.

⁵⁴ *Ibid.*, para. 1990.

competitive pressure.⁵⁵ In conclusion, the innovation theory of harm analyses the non-coordinated effects in reduction of innovation in a specific market and the potential reduced incentive to innovate.⁵⁶ This interpretation of the innovation theory of harm is broadly defined and primarily focused on so-called ‘innovation spaces’ and not on the digital economy or digital markets. However, this does not preclude the theory of harm to be applicable in a digital merger where innovation constitutes as a vital factor of that specific market.

As for killer acquisitions, Cunningham et al. concluded that their findings could be extended to other sectors, and the digital sector in particular where acquisitions are a common exit-strategy for tech start-ups.⁵⁷ Economists and joint venture capitalists have argued that incumbent firms acquire innovative firms in the tech sector in order to integrate the nascent competitors technology or product and to develop and foster this innovation even further.⁵⁸ On the contrary, Cunningham et al. concluded through their study that the opposite could be occurring and emphasized the need for future research in the field of digital markets and the digital sector.⁵⁹

One of the main differences between the pharma sector and the digital sector is the protection through intellectual property rights (IPR), such as patents which are not present in the same extent in the digital sector. It is easier for a competitor to imitate, copy or reproduce an idea or a technology in a different format than creating a patent-protected drug. It is also complicated to establish patterns as to what extent this is occurring, as many transactions escape legal review due to the limited generated turnover to trigger the relevant legal framework, which is discussed in Chapter 3.⁶⁰

Even critics to the theory of killer acquisition’s presence in digital markets have acknowledged the complexities behind establishing the intent behind the incumbent, that is, acquire to integrate and develop or to ‘kill’?⁶¹ It is therefore necessary to study objective data and results and the structures of the markets post-merger through a forward-looking lens. The immense market consolidation in the digital sector has developed gradually over time and has been widely debated and discussed in the last couple of years, both in a societal and academic context. Yet, it is complex and challenging to gather evidence to draw certain conclusions on the matter.

Jones & Sufrin argue that Big Tech’s acquisitions over time has led to substantial growth, market power and entrenchment within the digital sector. The authors claim this to be due to the strategy of these dominant firms in which they eliminate potential future competition at an early stage and therefore secures their

⁵⁵ Ibid., paras. 2001-2003 and 2016.

⁵⁶ Ibid., paras. 2041-2043.

⁵⁷ Cunningham et al., p. 696.

⁵⁸ Ivaldi, Marc, Petit, Nicolas, Unekbass, Selcukhan, *Killer Acquisitions: Evidence from European Merger Cases*, Antitrust Law Journal – TSE Working Paper No. 13-1420, 2023, pp. 4 and 37-38.

⁵⁹ Cunningham et al., pp. 696-697.

⁶⁰ Ibid.

⁶¹ Ivaldi et al., p. 4.

own position. These markets are then more or less incontestable.⁶² The Commission has intervened in only a handful of acquisitions by the GAFAM companies to date. The reasons for this? One of the main arguments put forward in this aspect are the thresholds for merger control.⁶³ This means that the majority of these acquisitions fly under the Commission's radar. If this is the case, how are we then able to study this very phenomenon and to assess the legal framework around it? The *effects* of killer acquisitions in digital markets have been studied both theoretically and empirically by prominent economists in the field, which is covered in the following section below resulting in a closely related theory.

2.3 Kill Zones – The Shadow of Big Tech's Acquisitions?

Cunningham et al. found in their conclusion that the phenomenon of killer acquisitions is likely to be present in other sectors than the pharmaceutical sector. The pharma sector offers clear empirical and theoretical evidence for this claim grounded in thorough economic and industry analysis; however, the results and the findings also suggest that the phenomenon could be present in the tech sector:

“Our results caution against interpreting acquisitions of nascent technologies solely as incumbents' efforts to integrate and foster entrepreneurial innovation. Instead, a substantial part of what is fueling this trend may actually be killer acquisitions that potentially harm innovation and competition. In particular, the large number of acquisitions of *small entrepreneurial start-ups by large incumbents in the tech sector* would suggest a fruitful opportunity for investigating whether killer acquisitions extend beyond the pharmaceutical industry.”⁶⁴

The kill zone theory aims to examine whether there is a reduced incentive for venture capitalists to invest in digital markets where Big Tech are present, as this technology or innovation has the potential to be copied or acquired by the dominant firms. Luigi Zingales, Sai Krishna Kamepalli and Raghuram Rajan out of Columbia University and University of Chicago decided to study this very phenomenon in the digital sector, that is, the acquisitions of start-ups and whether incumbent firms' acquisitions can deter innovation from the digital platform markets.⁶⁵ The scholars studied whether incumbent firms in the tech sector acquire nascent competitors and if this conduct deterred new entrants from entering the digital platform markets due to a decreased incentive to invest in digital start-up firms.

⁶² Jones & Sufrin, p. 1216.

⁶³ See Chapter 3.2.1.

⁶⁴ Cunningham et al., p. 696 (emphasis added).

⁶⁵ Zingales et al., p. 1.

Albert Wenger⁶⁶, a venture capitalist engaged in the discussion and analysis of this phenomenon, has stressed that the anticipated future valuation of a start-up is of the essential for potential investors in these markets. Furthermore, Wenger confirmed the existence of kill zones from a practitioner's standpoint and that the scale of Big Tech has an impact on what can be funded and which kind of technology and innovation that can succeed on the market as well as co-exist with Big Tech.⁶⁷ One factor to consider is whether the acquired firm offers a product which can be classified as either complementary or as a substitute, which is often a challenge in digital markets.⁶⁸ Zingales et al. use the example of matches and lighters being substitutes for the complementary product cigarettes. Added tax on matches would have customers turn to lighters and added tax on cigarettes would lead to a decrease in sales and demand of both matches and lighters as complementary products.⁶⁹ Many acquisitions of complementary nature may not lead to anti-competitive effects per se, as the service would be complementing the incumbents' service rather than having the effect of fewer players on that specific market. An example of such merger is *Google/DoubleClick*, which was found by the Commission to not significantly impede effective competition in the internal market or in a substantial part of it.⁷⁰ A direct substitute, for example, WhatsApp to Facebook calls for a more delicate assessment as the direct competitive nature of the two companies are closer linked, both the service as is, and for the customers using them.

Through the study of acquisitions made by both Google and Facebook, Zingales et al. found in their conclusion that early adopters⁷¹ are an important parameter for new entrants with the aim to enter digital markets. These early adopters are willing to use the superior product, even if sold at a higher price and is more difficult to access in comparison to the ordinary customer. The occurred switching costs are simply justified by the early adopters because of the superior technology offered and since it is an independent technology. The scholars argue that a merger of these innovative start-ups means that the said technology of superior quality will be offered to the mainstream public and therefore *reduce the benefit* for the early adopters. The ripple effect of this is in turn that early adopters are less likely to engage with these kinds of services which can eventually reduce incentive to innovate and to invest. A new entrant with a small customer base is considered to be less valuable for a potential buyer in a future exit from the market. Therefore, this phenomenon of the 'kill zone effect' means that there is the potential of a reduced incentive to innovate as well as a reduced incentive to invest in these firms.⁷²

⁶⁶ Venture capitalist and Managing Partner at Union Square Ventures. Early investor in successful companies in the digital sector such as Twitter Inc. (now X).

⁶⁷ Zingales et al., p. 2.

⁶⁸ See Chapter 2.2 and Case M.8788, *Apple/Shazam*.

⁶⁹ Zingales et al., p. 29.

⁷⁰ Case M.4731, *Google/DoubleClick*, Commission Decision of 11 March 2008.

⁷¹ Someone who is one of the first people to start using a new product, especially a new piece of technology. See Cambridge Dictionary, "*early adopter*". Available at: (<https://dictionary.cambridge.org/dictionary/english/early-adopter>). Last visited: 5 May 2025.

⁷² Zingales et al., p. 35.

The kill zone theory has been discussed amongst economists, politicians, law scholars and practitioners. Even the media has contributed to the ongoing discussions, which indicates the public interest in this very phenomenon. The Economist published an article on 2 June 2018 discussing the theory and its implications in practice.⁷³ The article suggests that the kill zone theory has bearings in society, through interviews of entrepreneurs developing technical solutions only to be replicated by Big Tech at a later stage. However, some firms do resist this effect and manage to remain a strong player within digital markets. One example is Snapchat. As discussed previously, Facebook allegedly approached Snapchat in 2013, offering 3 billion USD to acquire the firm, which was declined by Snapchat. It did not take long until some of Snapchat's most central features started appearing on Facebook's service, which could have hindered Snapchat's future growth.⁷⁴ Snapchat is one of the firms with a significant user base still, even after attempts and offers of acquisition from other dominant firms.

This creation of the kill zone around Big Tech leaves the nascent competitor in the same relevant market with two options. The firm can either agree to a merger or acquisitions proposal or continue to compete with the incumbent and run the risk of having its technology either copied or replicated in the future. Is this a problem from an EU competition law point of view? The fact that one product or solution can be copied and reproduced in different formats could lead to efficiencies and synergies and increased consumer welfare. Rapid developments and standardisation at low transaction costs could stimulate competition through more firms being able to compete with lower barriers to entry. Further competitive pressure in a given relevant market contributes to the goal of consumer welfare through increased incentive to innovate further.

However, some technical solutions are protected by an IPR which grants the holder an exclusive right to freely and at his or her own discretion use the said IPR. The relationship between IPRs and competition law is an interesting relationship where there are two different goals present, exclusivity, and open markets with free competition (Art 2-3 TEU).⁷⁵ Many of these technologies are not protected in a sufficient manner from any potential registered IPRs in a way that is enforceable in order to secure exclusivity. It is therefore often possible for competitor to replicate the technology and offer this in a different format. If a dominant firm then uses its market power in order to distort competition between the original product and the copy it could be anti-competitive conduct.⁷⁶

2.3.1 Big Tech Acquisitions between 2010-2019 – A Pattern?

In addition to the research conducted by Zingales et al. and Cunningham et al. on the effects of dominant firms acquisitions on nascent competitors in the digital sector there is a report from the Federal Trade Commission (FTC) which

⁷³ The Economist, *Into the danger zone*, Vol. 427, Issue 9094, 2 June 2018, pp. 61-63.

⁷⁴ Ibid., p. 61.

⁷⁵ Jones & Sufrin, p. 833.

⁷⁶ OECD, *Start-ups, Killer Acquisitions and Merger Control*, p. 27.

compiled acquisitions made by companies within Big Tech between 2010-2019.⁷⁷ The FTC issued special orders to Big Tech companies requiring them to provide information on acquisitions not reported to the authority due to the turnover thresholds not being met. The report concluded 616 non-reportable transactions above 1 million USD, 101 Hiring Events and 91 Patent Acquisitions. The Big Tech companies reported a further 60 transactions below 1 million USD.⁷⁸ The data was collected over the span over 10 years in the last decade. The report indicates that there are several transactions which are never reviewed and analysed, which suggests that the extensive acquisitions over time has had the potential to create kill zones through the data and empirical evidence. The subjective intent behind these acquisitions is not certain, aggressive market expansion and growth is not anti-competitive conduct per se.

A common strategy for entrepreneurs and start-up companies in the digital sector is to innovate, attract users, perfect the technology through improvements to create value for the company. This value does not necessarily need to be of monetary means. It can rather be a cutting-edge product or service with the promise to attract a significant user base over time. Scholars have described this as an incentive to innovate, that is, there is a motive and aim to develop a firm which can generate as much value as possible before being acquired by incumbent firm. If there is only one or a small pool of buyers, for example Big Tech, this means that the incentive to innovate based around either what Big Tech does not already offer or where Big Tech is unlikely to venture in the future, which can be difficult to predict due to the nature of multi sided digital platforms.

Another aspect of this, from an economic point of view, is the fact that the incentive to innovate, i.e., the incentive for start-ups in the digital sector to create new services or new technology, diminishes when there is only one potential purchaser due to monopsony.⁷⁹ The start-up firm and the nascent competitor has a strong incentive to enter the market with their product or service whereas the potential acquirer would benefit from an early acquisition, which in itself, over time, can lead to a widening of the kill zone and further entrenchment of the dominant firms.⁸⁰ Innovation and start-ups in the digital sector is a necessary component in order to have a well-functioning and contestable market which, in turn, could promote innovation and increase consumer welfare.

The next section of Chapter 2 outlines the typical characteristics of digital markets in which these theories are to be applicable in the digital sector.

⁷⁷ Federal Trade Commission, *Non-HSR Reported Acquisition by Select Technology Platforms, 2010-2019: An FTC Study*, September 15 2021. Available at: (<https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf>). Last visited: 22 May 2025.

⁷⁸ Ibid., pp. 36-37.

⁷⁹ Lundqvist, Björn, *Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System*, European Competition and Regulatory Law Review – CoRe, Vol. 5, Issue 4, 2021, p. 357.

⁸⁰ Norbäck, Pehr-Johan, Persson, Lars, Svensson, Roger, *Verifying High Quality: Entry for Sale*, IFN Working Paper No. 1186, 2019, pp. 2 and 40. Available at SSRN: (<https://ssrn.com/abstract=3632370>). Last visited: 22 May 2025.

2.4 Digital Markets and Their Characteristics

The digital economy within EU competition law has been described as “[...] an expansive range of market circumstances where digital technologies play a central role, involving in particular the use of the internet to conduct business.”⁸¹ This somewhat broad definition of the digital economy tends to be interpreted as narrower within competition law and policy. The Commission has chosen to primarily focus on the conduct of the big digital platforms and their ecosystems.⁸² The legal framework within EU competition law and policy was developed well before the entrance of the digital revolution and was traditionally for markets with several competing firms fighting for market shares and increased profits through efficiencies, lower prices, better products, and more innovative technology. If the market could not self-correct, governments would then intervene in the markets through the legislative process and return to status quo.⁸³ The experts in *The Digital Report* concluded at the time (2019) that these new challenges did not call for separate legislation within merger control. Instead, a more adaptive approach with the necessary tools within EU competition law was deemed to be the way forward within the EU.⁸⁴ There are reasons to challenge this statement, which is one of the main objectives with this essay due to the ongoing developments in digital markets.⁸⁵

The characteristics of the digital economy and digital markets have been discussed at length in several different forums and within different disciplines. As for EU competition law, the expert report endorsed by the Commission, *The Digital Report*, serves as a valuable and reliable source in terms of EU competition law and policy and enforcement.⁸⁶ Another valuable source of information is the *Stigler Report* where some of the main characteristics of digital markets and digital platforms in particular, such as extreme returns to scale, network effects, strong economies of scale, marginal costs close to zero, low distribution costs and global reach, are discussed.⁸⁷

2.4.1 Extreme Returns to Scale

The first characteristic of digital markets is the extreme returns to scale, which can be explained as the cost of production for digital products being less than the proportion of the customers served of said digital product. As an example, the development of a specific word processing program such as Microsoft Word would through its enormous user base worldwide, especially for business users, lead to significant revenue over the cost of creating the software. Once a

⁸¹ Jones & Sufrin, p. 1208.

⁸² Ibid. See also *The Digital Report*, pp. 19-24.

⁸³ *The Digital Report*, p. 19.

⁸⁴ Ibid.

⁸⁵ This research is conducted between January-May 2025.

⁸⁶ Cf. Jones & Sufrin, p. 1209.

⁸⁷ Stigler Center for the Study of the Economy and the State, *Stigler Committee on Digital Platforms, Market Structure and Antitrust Subcommittee*, Final Report, 2019, pp. 34-35. (*Stigler Report*).

technology has been created, such as Microsoft Word or a similar program, it can be transmitted and used by billions of users immediately.⁸⁸ To illustrate the point, serving a billion customers with bicycles would incur significant costs for the firm involved in supplying these.⁸⁹ In the tech sector, serving customers once a specific product has been developed is still costly in terms of troubleshooting, improvements, support, and other maintenance tasks involved with keeping the service usable. However, it is significantly lower than many other sectors and sources suggest that Facebook had, as of September 2018, approximately 65,000 monthly users per employee.⁹⁰ This differs significantly from more traditional markets where a supplier needs to produce a physical product, ship, store and distribute this to the end-user and customer.

These extreme returns to scale offer a competitive advantage for incumbents in the digital markets and it may be out of reach for the scope of EU competition law. According to *The Digital Report*, it is unlikely that a firm would enter a market where a dominant incumbent is present, unless said firm had a noticeable superior product and severely cheaper technology.⁹¹ However, as for recent developments in the artificial intelligence (AI) market we have recently seen the Chinese start-up DeepSeek providing a low-cost generative AI software similar to Open AI's ChatGPT. Sources suggest that approximately 6 million USD was required to produce similar technology as the market leader, which suggests around 40 times lower than the dominant firm.⁹² A pricing war for AI services could be looming in the near future which suggests that markets can certainly be challenged and disrupted, even if they are seemingly non-contestable at first glance.

2.4.2 Network Effects and Network Externalities

The idea of network effects is a term and a concept which has been researched and studied for over 50 years. The concept is based on economic theory but has also been adopted by scholars in other fields such as law. In the digital sector, large social platforms exhibit network effects through more users. Each single user contributes to the total good and usefulness of the social platform which increases the probability of being able to communicate with the person they want to communicate with.⁹³ The more adopters, the more value the service creates to potential future adopters. Economists have described this as a positive feedback loop, which can also work in a reverse manner and eliminate a service which is

⁸⁸ Ibid., 36-37.

⁸⁹ Due to low marginal costs and distribution costs.

⁹⁰ *The Digital Report*, p. 20.

⁹¹ Ibid.

⁹² Reuters, DeepSeek's low-cost AI spotlights billions spent by US tech, January 29 2025, (<https://www.reuters.com/technology/artificial-intelligence/big-tech-faces-heat-chinas-deepseek-sows-doubts-billion-dollar-spending-2025-01-27/>), last visited: 5 May 2025.

⁹³ Whish & Bailey, p. 13.

no longer useful.⁹⁴ The experts in the *Stigler Report* describe network effects as “[...] where the more users are on the network, the richer the users’ experience is likely to be.”⁹⁵

The concept of network effects leads to efficiencies and can promote consumer welfare. The reason for this is simple. The more users on a social media platform, the more useful it will be for the consumers. A search engine can exhibit network effects but not through the same lens. A user would likely not base a choice on whether to use a certain search engine just because his or her close friends or family are using said search engine. However, more users can attract sales for advertising companies which can in turn lead to increased revenue for the search engine to develop a superior product. This would not be possible without the positive loop effect through its users.⁹⁶ A closely related phenomenon, or effect of network effects, is ‘tipping’ where the “[...] popularity of a product and its associated network effects may cause the market to ‘tip’ in favour of one product to the detriment – even to the elimination – of others.”⁹⁷ A challenge for legislators, policymakers and enforcing authorities in the EU and globally is to properly address any anti-competitive concern or conduct without the risk of unnecessary overenforcement which presents the opposite effect, that is, stifling innovation through hindered movements in digital markets as well as acknowledging the efficiencies through these effects.

One of the main objectives of EU competition law is to promote consumer welfare and through ensuring free, fair and open competition on the internal market. What happens when the network effects lead to the creation of a dominant position which could significantly impede effective competition in digital markets? Or on the contrary, network effects can also provide competitive effects which are in fact *beneficial* to consumers at early stages when different competitors are trying to tip the market through vigorous competition.⁹⁸ The legal framework for this and the potential effects are discussed Chapter 3 but first, another characteristic of digital markets is presented below.

2.4.3 Multi-Sidedness of Digital Markets

One aspect of digital markets that has gained attention in the last two decades is the two- or multi-sidedness of digital platforms operating on digital markets. This two-sidedness connects two different user groups, for example, Airbnb connects property owners and short-term renters, Uber connects drivers with passengers and eBay with sellers and buyers.⁹⁹ As mentioned, many of these platforms can be either two-sided or multi-sided. Facebook’s conglomerate nature offers a multi-sidedness whereas WhatsApp as a more traditional messaging service

⁹⁴ Varian, Hal R., *Use and abuse of network effects*, 2017, p. 1. Available at SSRN: (<https://ssrn.com/abstract=3215488>). Last visited: 22 May 2025.

⁹⁵ *Stigler Report*, p. 38.

⁹⁶ Varian, pp. 6-7.

⁹⁷ Whish & Bailey, p. 14.

⁹⁸ *Stigler Report*, p. 39.

⁹⁹ *The Digital Report*, p. 21.

without this two- or multi-sidedness still creates value through an increased user base through network effects.¹⁰⁰

The multi-dimensioned platforms have evolved over time. Many, if not all, of these products and services were at launch offering one service. Facebook served as a social media platform and has now branched out its services through multiple acquisitions into a multi-sided platform service under the name of Meta. Amazon was launched as an online bookstore in 1995 and is now a multi-sided platform in the digital sphere with substantial market shares.

The nature of the multi-dimensional platforms is of certain interest in this research focusing on killer acquisitions in the digital sector. Scholars have argued that the primary reason companies within Big Tech have grown at this immense rate and become dominant is due to the non-interventionist approach to the many acquisitions that have taken place over the last two decades.¹⁰¹ Growth through expansion into supplementary products or services makes it difficult for competition law enforcers to intervene in this aspect.

2.5 Chapter Summary

The findings by Cunningham et al. are verifiable and robust and demonstrates a pattern where innovative research projects are shut down in order to eliminate future competitive threats. Killer acquisitions are not only present in the pharma sector and can be observed in other sectors driven by innovation. As for the digital sector, some data suggests that killer acquisitions in fact are present, but further research is necessary to determine the actual scope of it. The analysis section of this essay (Chapter 4) discusses this through further studies and data within the digital sector from a legal lens.

Kill zones can be understood and interpreted as a side effect or cause of killer acquisitions in the digital economy. The theory claims the area surrounding dominant firms within Big Tech could lead to a decreased incentive to innovate for start-ups. Difficulties of creating a substantial user base through encouraging the early adopters to switch can be one explanation to the phenomenon. Furthermore, venture capitalists could be less inclined to invest in a start-up operating in the same market as Big Tech.

Digital markets are characterized by extreme returns to scale, low transaction costs, network effects and multi-sidedness. These factors can lead to ‘tipping’ where the market tips in favour of a products or a service at the detriment of the competitors. Network effects and the tipping phenomenon can also have pro-competitive effects as it may encourage vigorous competition in the attempt of tipping the market in one’s favour which can be beneficial to the end-customer.

¹⁰⁰ Ibid.

¹⁰¹ Jones & Sufrin, p. 1216.

3 EU Merger Control: An Overview of the Legal Framework

3.1 Introduction

The main tool and legal framework for reviewing transactions between undertakings¹⁰² of larger scale within the EU is the EUMR. Before the adoption of the EUMR there was no EU-wide regulation for reviewing mergers to assess their compatibility with the internal market of the EU.¹⁰³ The EUMR was adopted in order to achieve the set out aims as stated in Article 3(1)(b) TFEU¹⁰⁴, that is, to ensure effective competition on the internal market through sufficient rules on competition.¹⁰⁵ In order to achieve the objectives of a well-functioning internal market and an open market economy with free competition, the EU deemed it necessary to adopt a specific regulation with the tools to review concentrations with the potential to ‘significantly impede effective competition’ in the internal market or a substantial part of it, also known as the SIEC test.¹⁰⁶

Prior to the EUMR, the relevant provisions to rely on for merger control were Article 101-102 TFEU. These provisions were deemed to not be sufficient to control lasting structural market changes after mergers and acquisitions with the risk of permanent change in market structures on EU level.¹⁰⁷ EU competition authorities have had Article 101 TFEU as a viable option to review and scrutinise agreements for collusion of anti-competitive nature and suspected cartel activity and deem these incompatible with the internal market through a competitive assessment and examine any potential efficiency arguments from the parties according to Article 101(3) TFEU. However, as for mergers, these tend to create more of a structural change in market dynamics and Article 101 TFEU is not always suitable for this kind of assessment.¹⁰⁸

¹⁰² Judgment of the Court of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, Case C-41/90, EU:C:1991:161, para. 21. The concept of ‘undertaking’ is an EU-wide definition within EU competition law and encompasses every entity engaged in economic activity, regardless of the legal status of the entity and the way in which it is financed. The terms and definitions of undertaking, firm and company are used interchangeably and synonymously as the concept itself is not further analysed further within the scope of this essay.

¹⁰³ The first merger regulation was adopted 21 December 1989 through Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

¹⁰⁴ Cf. Article 3(3) TEU.

¹⁰⁵ Recital 2 EUMR.

¹⁰⁶ Recitals 2-5 EUMR.

¹⁰⁷ Recitals 7-8 EUMR and Jones & Sufrin, p. 1072.

¹⁰⁸ New developments in terms of primary law and Article 101 TFEU for merger control is discussed further in Chapter 4.4.3. See *infra* note 355.

A well-functioning instrument and legal framework for merger control is important for a thriving and dynamic internal market within the EU. A central part of a free-market economy is the option to buy or sell assets and capital. In other words, businesses benefit from the possibility to sell when the business is underperforming when other means have already been exhausted. Likewise can a successful business benefit from acquiring a failing firm if the stronger business has the monetary means to either bring the failing firm back to being successful again or integrating the product, service or innovation to the current business.¹⁰⁹ This promotes efficiencies for the involved undertakings with an effective allocation of resources, which in turn will generate added welfare for consumers on the market which also aligns well with the goals, aims and objectives of EU competition law and policy, according to Article 3(3) TEU and the conferred powers of exclusive competence to establish common competition rules to uphold a functioning internal market as stated in Article 3(1)(b) TFEU.

Why are horizontal mergers of competing undertakings then generally permitted? One of the main objectives of the EUMR is to review transactions of *higher value* with the potential to distort competition on the internal market. A merger of smaller scale, according to the EUMR, is unlikely to create any lasting structural changes incompatible with the internal market.¹¹⁰ One basic notion behind the general approval of mergers is the fact that it would be incredibly burdensome on the natural person who wishes to sell or liquidate his or her business if merger review was required in a broader sense.¹¹¹ By allowing free movement of assets as a general concept, maximised economic utility and welfare is then secured as well as the principle of freedom of contract. The assets are then placed where it generates the most value, not just for the business but also for general consumer welfare. This concept is also well aligned with the structure of the EU internal market which entails free movement of goods and capital (Article 26(2) TFEU).

The above has outlined a brief introduction to the EUMR and the objectives behind the regulation. The next section outlines the relevant provisions for ex-ante review of transactions in the digital economy.

3.2 The EU Merger Regulation

Before giving an overview of the relevant provisions in the EUMR, it is necessary to first outline different types of mergers. Firstly, a *horizontal merger* is a merger between two undertakings operating at the same level, in other words, direct competitors. The main concerns with horizontal mergers are, primarily, the potential creation or strengthening of a dominant position through either coordinated or non-coordinated effects after elimination of other competitors

¹⁰⁹ Jones & Sufrin, pp. 1072-1073.

¹¹⁰ Cf. supra note 64 and killer acquisitions in the digital sector.

¹¹¹ Turner, Donald F., *Conglomerate Mergers and Section 7 of the Clayton Act*, Harvard Law Review, Volume 78 No. 7, 1965, p. 1317.

operating on the same level.¹¹² Secondly, *vertical mergers* are between two undertakings operating on different levels of the supply chain where, for example, a firm on the upstream market merges with a firm on the downstream market such as a manufacturer and a distributor.¹¹³ Thirdly, *conglomerate mergers*, are mergers between two undertakings and the relationship between the two firms are neither of horizontal or vertical nature. In other words, the firms are not operating on the same relevant market and are not operating on different levels of the supply chain.¹¹⁴ Conglomerate mergers are common in the digital sector due to expansion into a different market by one undertaking or to minimise future risk.¹¹⁵ As for EU merger control, conglomerate mergers are rarely harmful to competition.¹¹⁶

As for the digital economy, conglomerates may lead to significant market consolidation in digital markets due to underenforcements. A recent merger case is the conglomerate merger in the *Microsoft/LinkedIn* case, which was found by the Commission to be compatible with the internal market.¹¹⁷ A general concern with conglomerate mergers is tying and bundling, which can lead to higher barriers to entry for potential competitors or a reduced incentive to compete with the stronger firm. In the *Microsoft* judgment from the General Court (GC), the tying of Windows Media Player to the operating system Windows was found to be anti-competitive under Article 102 TFEU.¹¹⁸ Microsoft had reduced any incentive and ability for potential competitors in the media player market to compete with Microsoft as a dominant firm. As for the *Microsoft/LinkedIn* case, the Commission was concerned that the merger would lead to foreclosure in the professional service market in the event that Microsoft would pre-install LinkedIn as a software on Microsoft's personal computers before putting these to market.¹¹⁹

3.2.1 Jurisdictional Turnover Thresholds and Concentrations

The EUMR applies to mergers which contribute to significant structural changes with effects on markets beyond a single Member State, that is, there needs to be an effect on trade between Member States in the EU.¹²⁰ These types of concentrations¹²¹ are of certain interest for the Commission and should be reviewed

¹¹² European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, para. 22. (Horizontal Merger Guidelines).

¹¹³ European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, para. 4. (Non-Horizontal Merger Guidelines).

¹¹⁴ Non-Horizontal Merger Guidelines, para. 5.

¹¹⁵ Jones & Sufrin, p. 1075.

¹¹⁶ Non-Horizontal Merger Guidelines, paras. 91-92.

¹¹⁷ Case M.8124, *Microsoft/LinkedIn*, Commission Decision of 6 December 2016.

¹¹⁸ Judgment of the Court of First Instance of 17 September 2007, *Microsoft Corp. v Commission of the European Communities*, Case T-201/04, EU:T:2007:289.

¹¹⁹ Case M.8124, *Microsoft/LinkedIn*, para. 306.

¹²⁰ EUMR, recital 8.

¹²¹ See Article 1(1) EUMR and Article 3 EUMR for definition.

exclusively at EU level instead of through national merger control legislation.¹²² This system is often referred to as a “one-stop shop” system where the merging parties can have a transaction reviewed by one authority rather than filing the merger in each jurisdiction of the EU which promotes efficiencies (Article 21 EUMR)

According to Article 1 EUMR, the regulation is applicable to *concentrations* with EU-dimension. A concentration has EU-dimension when there is:

- a) A combined aggregate worldwide turnover of all undertakings concerned of more than 5 000 million EUR; and
- b) A combined aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeding 250 million EUR.

There is an exception to this main rule. That is if each of the undertakings concerned achieves more than two thirds of its aggregate EU-wide turnover within one and the same Member State within the EU (Article 1(2) EUMR). The purpose behind this rule, also called the *proviso*, is to exclude concentrations where the effects are primarily seen in one Member State only, which calls for review under national merger control legislation rather than on EU level. A consequence of this rule is that severe consolidation of firms with large market shares and extensive market power could, technically, be allowed under the EUMR and be considered as non-notifiable transactions, even if there are effects in other Member States in the EU following the transaction.¹²³

The *turnover thresholds* are one of the most central and important aspects of the EUMR, and certainly for merger review in the digital sector with the risk of killer acquisitions and other below-threshold transactions. Any merger or acquisition below the set-out thresholds in Article 1 escape review entirely, at least on EU level.¹²⁴ The legal framework for merger review was enacted well before the digital age of today and many undertakings in the digital sector hold value other than turnover. It is possible for an influential player in the digital sector to be a valuable and important player on a specific market, completely without turnover or well below the set-out jurisdictional thresholds of the EUMR. The Commission proposed to lower turnover thresholds than the ones in Article 1(2), which led to a compromise.¹²⁵ The compromise is called: Article 1(3).¹²⁶

Article 1(3) EUMR applies to concentrations which do not meet the ordinary thresholds in Article 1(2) but when the following applies. The combined worldwide aggregate turnover of all undertakings concerned need to be more than 2 500 million EUR. In addition to this, the combined aggregate turnover of all undertakings concerned must be more than 100 million EUR in at least three Member States. In each of those at least three Member States, the aggregate turnover of at least two undertakings must be more than 25 million EUR and, finally,

¹²² Recital 8 EUMR.

¹²³ Jones & Sufrin, p. 1094.

¹²⁴ Unless caught by notification by merging parties or referred to the Commission, see Article 4(5) and Article 22 EUMR. See also Chapter 3.2.3.

¹²⁵ Supra note 123.

¹²⁶ Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

the aggregate EU-wide turnover of each of at least two undertakings concerned must be more than 100 million EUR. The exception to this rule is if each undertaking in question achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. This compromise, which is applicable depending on the generated turnover and activity, aims to catch concentrations which are likely to be subject to merger review in at least these three Member States of the EU.¹²⁷

The calculation of turnover is based on the rule provided in Article 5 EUMR. It has been described and defined in the regulation as ‘amounts derived from the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings’ ordinary activities. Turnover relating to a specific Member State within the EU has been defined as ‘products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be’.

A concentration is in this context to be interpreted as a definition exclusive to the EU, as defined in Article 3 EUMR which sets out the framework for when a transaction is deemed to be a *concentration*. The first situation is when there is a change of control on a lasting basis resulting from a merger of two or more previously independent undertakings or parts of undertakings (Article 3(1)(a)), an acquisition where one undertaking acquires control of another undertaking, either wholly or partially (Article 3(1)(b)). This control, either through a merger or by acquisition, should confer possibility to exercise decisive influence on an undertaking, in particular by ownership of a substantial part of the shares within the undertaking or rights which includes decisive influence over the undertaking, such as voting or decision rights within the deciding organs within an undertaking (Article 3(2)). This decisive influence, or sole control, can be presumed to be acquired when an acquisition confers more than 50% of the shares including voting rights.¹²⁸ Control is acquired either by undertakings or persons who are holders of the rights through contract or empowered to exercise those rights deriving from the contracts (Article 3(3)). Furthermore, a joint venture shall constitute a concentration within the meaning of Article 3(1)(b), according to Article 3(4) EUMR. However, joint ventures are not typically applicable within the digital sector and is therefore not analysed further here.

3.2.2 The SIEC test and the Competitive Assessment

The competitive assessment consists primarily of the SIEC test, as stated in Article 2(2) and (3) EUMR. The provision states that any concentration (Article 3 EUMR), which would significantly impede effective competition in the common market, or a substantial part of it, shall be declared incompatible with the common market. The creation of strengthening of a dominant position as a result of a concentration is particularly mentioned as a non-exhaustive example. The appraisal of any concentration shall always be conducted in accordance with the

¹²⁷ Jones & Sufrin, p. 1094.

¹²⁸ Jones & Sufrin, p. 1087.

objectives of the EUMR and the compatibility with the common market of the EU (Article 2(1) EUMR). The Commission needs to consider market structures, actual or potential competition from undertakings within or outside of the EU. Moreover, the market position of the undertakings concerned as well as their economic and financial power, barriers to entry, consumer interests among other things (Article 2(1)(a)(b)).

The SIEC test has evolved over time. In the EUMR from 1989 the test focused primarily on the creation or strengthening of a dominant position whereas the current regulation offers a more nuanced approach to M&A activity. The notion of SIEC is to be interpreted further and beyond the concept of dominance, which had not been the case in the EU courts up until that moment in time.¹²⁹ Therefore, for the sake of legal certainty, the provision was given a broader wording to include concentrations giving rise to non-coordinated effects, such as lessened competitive pressure and reduced players in oligopolistic markets.¹³⁰ As stated in the objectives of the regulation, a significant impediment to effective competition is likely to occur through a concentration which contributes to the creation or strengthening of a dominant position.¹³¹ By including this important wording in both the legal text and wording of the provision as well as in the recitals, there is an ambition from the EU legislator and the Commission to enhance and further strengthen legal certainty for the merging parties. The test is broad but consists of a competitive assessment where the Commission examines the effects of a merger through a competitive assessment, which is discussed further in the analysis section in Chapter 4.2.

3.2.3 The Referral System in Article 22 – The ‘Dutch Clause’

Many transactions in the digital sector are never subject to review by the Commission, simply because they are not ‘caught’ by the thresholds based on turnover in Article 1 EUMR or not notified by the merging parties according to Article 4(5) EUMR. The Commission has actively intervened in only a handful of cases of acquisitions by Big Tech, that is Microsoft’s acquisition of LinkedIn, Google’s acquisition of Fitbit and Microsoft’s acquisition of Activision Blizzard. These transactions were all approved subject to remedies.¹³² This means that many transactions were never reviewed, which leads to the question: Is this legal framework sufficient for effective merger control in the digital sector?

The turnover thresholds stated in Article 1 EUMR is not the only provision which allows the Commission to examine a concentration as defined in Article 3. The ‘Dutch Clause’ was introduced to EUMR at the request of the Netherlands and was introduced mainly for Member States without a national merger control regime to refer certain concentrations without EU dimension, which were suspected to be anti-competitive, directly to the Commission. The concentration in

¹²⁹ Recital 25 EUMR.

¹³⁰ Ibid.

¹³¹ Recital 26 EUMR.

¹³² See Jones & Sufrin, p. 1216.

question must affect trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request, according to Article 22 EUMR. As most Member States within the EU now have a merger policy instrument in place, what is the purpose of the provision as of today?

As the initial purpose of the provision has technically played out its role, Article 22 EUMR has over the years been used as a ‘corrective mechanism’ where the Commission is more suitable to review a concentration rather than on national level.¹³³ However, an official shift was introduced in March 2021 through a guidance from the Commission which allowed for referrals where Member States did not have jurisdiction over the case but “[...]where the criteria of Article 22 are met.”¹³⁴ This new approach was deemed to be necessary as the turnover-based jurisdictional-thresholds of the EUMR led to many transactions escaping review by both the Commission and the Member States, specifically in the digital and pharma sectors.¹³⁵ In other words, this new approach and new interpretation of Article 22 EUMR was adopted *specifically* to tackle killer acquisitions in certain sectors where the digital sector was one of them. This interpretation of the provision meant that the Commission could *target certain concentrations in certain sectors* without the need to amend the structure of the EUMR, which would have been a significant shift in competition law and policy across the EU. To lower the turnover-thresholds would have been an ambitious political undertaking which likely would have been a difficult project with years of negotiating with the Member States. The end result would have been difficult to predict and is likely to have been a political compromise, which often is the case with EU legislation.

The Commission found this reinterpretation a more adequate and efficient solution to address killer acquisitions, rather than to modify EUMR. To accept referrals in some instances in regard to transactions which merit review under the EUMR and without the obligation for other transactions which do not merit review, the Commission is then able to examine these types of transactions without the obligation to notify transactions which are considered unproblematic from a competition standpoint.¹³⁶ What does this mean for merging parties or incumbents trying to acquire a promising start-up or an undertaking with low turnover?

This communication from the Commission aims to provide transparency and clarity in the review process of the mergers in question. In a way, it aimed to promote legal certainty and foreseeability for the merging parties. This interpretation of Article 22 EUMR by the Commission was tried in the *Illumina/Grail* judgment which addressed the issue of killer acquisitions and below-threshold transactions with the potential to harm effective competition.

¹³³ Jones & Sufrin, p. 1111.

¹³⁴ European Commission, Communication from the Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 2021/C 113/01, para. 11. (The Article 22 Guidance).

¹³⁵ The Article 22 Guidance, para. 10.

¹³⁶ The Article 22 Guidance, para. 11.

3.3 The Illumina/Grail Saga

3.3.1 Facts of the Case

Illumina Inc. is active in the bio-tech industry supplying sequencing- and array-based solutions for genetic and genomic analysis. Illumina planned a merger to acquire sole control of Grail LLC, a company which develops blood tests for early detection of different cancer types.¹³⁷ This transaction did not qualify as a concentration within the EUMR, that is, the turnover-thresholds were not met as Grail did not generate any revenue in the EU or anywhere else in the world. In other words, it was not notifiable on EU level due to the lack of EU dimension. The Commission received a complaint in regard to the transaction and decided to investigate their competence with other Member States, including Germany, Austria, Slovenia and Sweden.¹³⁸ After consultations with these National Competition Authorities (NCA), the Commission came to the conclusion that the transaction in question could be subject to a referral under the referral system in Article 22(1) EUMR, mainly because the target company Grail was an important player but this was not reflected in the undertaking's turnover.¹³⁹ This led to the Commission inviting Member States to refer this transaction to the Commission's table, which several Member States did.¹⁴⁰ The Commission's decision to review the merger after accepting referrals from the Member States (Article 22 EUMR) were found by the GC to be a challengeable act under Article 263 TFEU.

The main arguments and grounds for annulment by the applicant and Grail were the following. Firstly, the Commission's lack of competence to examine the concentration. Secondly, the referral request was made out of time and that the principles of legal certainty and good administration were infringed. Thirdly, a breach of the principles of the protection of legitimate expectations and of legal certainty.¹⁴¹ The reasoning behind the findings of the GC is analysed in the following section below.

3.3.2 Interpretation by the General Court

The court conducted a legal analysis of the applicability of EUMR and especially the provision in Article 22 by interpreting the legal text from its wording, its context, the objective, and the purpose of said provision. In addition to this, the legislative history is also relevant when interpreting EU law, according to settled case law from the CJEU.¹⁴² This statement from the GC is a way to implement

¹³⁷ Judgment of the General Court of 13 July 2022, *Illumina, Inc. v European Commission*, Case T-227/21, EU:T:2022:447, paras. 6-7.

¹³⁸ *Ibid.*, para. 11.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, paras. 13-19.

¹⁴¹ *Ibid.*, para. 84.

¹⁴² *Ibid.*, para. 88. Cf. Case C-24/19, *A and Others v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen*, para. 37.

the EU Legal Method, which is prevalent in most case law from the EU courts and it is integral to fully understand the landscape of EU law and how it relates to national legislation of the Member States. After all, the EU is, through conferred powers from the Member States (Article 5(1) TEU), an independent legal system where the EU courts are the final interpreters of EU law (Article 19(1) TEU).¹⁴³

As for the *literal interpretation* of the letter of the law, the court found no legal criterion in Article 22 EUMR which requires the concentration to fall within the scope of national merger legislation of the referring Member State.¹⁴⁴ This, from purely a literal analysis of the wording of Article 22, is correct. The Court therefore concludes that, according to the literal interpretation, that a Member State can refer any concentration to the Commission if that concentration satisfies the cumulative criteria as stated in the provision, which remains silent in regard to national jurisdiction.¹⁴⁵

The *historical interpretation* gave rise to an analysis of the historical context of Article 22 EUMR, the referral mechanism particularly designed for Member States without a merger control system in place.¹⁴⁶ This made it possible for Member States to have a concentration examined by the Commission if the concentration had an adverse effect in the national territory if the concentration also affected trade between Member States.¹⁴⁷ As all Member States except the Grand Duchy of Luxembourg now have national legislation enacted for merger control, the original scope of the provision is very limited. However, the GC found the historical interpretation to align with the fact that Member States can refer concentrations to the Commission, irrespective of national merger rules, as long as there is an adverse effect in that Member State and there are significant cross-border effects present or looming.¹⁴⁸

As for the *contextual interpretation*, the following can be said. The court referred to the recitals of the EUMR, which state that Articles 101 and 102 TFEU were not sufficient to ensure effective competition and control concentrations which are not aligned with the objectives of primary law (TEU and TFEU). In light of an analysis where Article 22 EUMR is analysed in the contextual light of Article 1 and concluded that Article 22 is not dependent of Article 1.¹⁴⁹ The court found through a contextual interpretation of the relevant provisions that a referral through Article 22 is possible without establishing national jurisdiction through national merger control rules.¹⁵⁰

One of the most central methods for interpretation of EU law is the *teleological interpretation*, which was utilised to determine the objectives of the EUMR. The GC held that the main objective of the EUMR is to “[...] permit effective control

¹⁴³ Case 6-64, *Costa v E.N.E.I.*, para. 3.

¹⁴⁴ Case T-227/21, *Illumina, Inc. v European Commission*, para. 90.

¹⁴⁵ *Ibid.*, para. 94.

¹⁴⁶ See Chapter 3.2.3.

¹⁴⁷ Case T-227/21, *Illumina, Inc. v European Commission*, para. 97.

¹⁴⁸ *Ibid.*, para. 116.

¹⁴⁹ *Ibid.*, paras. 120-122.

¹⁵⁰ *Ibid.*, para. 139.

of all concentrations with significant effects on the structure of competition in the European Union.”¹⁵¹ The reasoning was based on the recitals behind the EUMR and the fact that some concentrations are best examined at EU level. In other words, the court found the EUMR, and its main objective is to be used as a ‘corrective mechanism’ where the system based on turnover fails. This, according to the court, leads to an instrument to control deficiencies in that specific system to prevent a distorted internal market.¹⁵²

The GC found that the Commission was right to accept the referrals from the Member States which had no national jurisdiction over the concentration in question. The first plea of the applicant and Grail was therefore rejected by the court after the GC’s interpretation of Article 22 EUMR.¹⁵³

As for the second plea, the second part of that plea alleging breach of principles of legal certainty is analysed in this section. Illumina and Grail argued that the delayed process which did not align with the time frames set out in Article 22 and that this in turn was against the principle of legal certainty and good administration, mainly because the merging parties in this case had no way of knowing with certainty which competition authorities that were competent to examine and review the concentration.¹⁵⁴ The court found that the period of 47 working days from the complaint to the Commission sending the invitation letters to the referring Member States to be unjustified and inefficient, however, the plea was found to be unfounded and rejected.¹⁵⁵

The third plea in regard to the principles of the protection of legitimate expectations and of legal certainty was found to be unfounded and rejected as well. The court stated that the contested decisions by the Commissions were based on a correct interpretation of Article 22 EUMR in line with the objectives of EU law according to established legal methods of interpretation.¹⁵⁶ The action brought forward by Illumina and Grail was therefore dismissed in its entirety. The outcome in the judgment before the GC has been subject to extensive discussions among scholars, practitioners, and policymakers. The section below aims to contribute to this discussion further from an academic standpoint.

3.3.2.1 Analysis of the Ruling and the Outcome in the General Court

The ruling meant that the Commission had interpreted Article 22 EUMR in a way which was deemed to be compatible with EU competition law and policy. As mentioned earlier, this broader interpretation of the letter of the law was an ambition to tackle specific transactions, i.e., killer acquisitions, in certain sectors where the turnover generated does not demonstrate an undertakings competitive potential and significance on a certain market.¹⁵⁷ This way forward enabled for the Commission to examine the concentrations of interest without adding the

¹⁵¹ Ibid., para. 140.

¹⁵² Ibid., para. 142.

¹⁵³ Ibid., para. 184.

¹⁵⁴ Ibid., para. 218.

¹⁵⁵ Ibid., paras. 233 and 247.

¹⁵⁶ Ibid., paras. 265-267.

¹⁵⁷ The Article 22 Guidance, para. 9.

unreasonable burden that would come with a lowered turnover-threshold in EUMR, which would not be possible without a political compromise between Member States. Important to note, however, the EU is, as mentioned earlier, in independent legal system which is built on the foundation of legal principles, such as legal certainty which applies to the merging parties in a concentration (Article 2 TEU). As for merger control, turnover-thresholds serves the purpose of providing legal certainty for the merging parties, the acquirer, and the target.¹⁵⁸ If a concentration falls below the turnover-thresholds as stated in Article 1 EUMR it is likely that this concentration will require multiple notification in different Member States, depending on the scope of the concentration. This leads to further legal uncertainty and the “one-stop-shop” principle does no longer apply.¹⁵⁹ The court interpreted the objectives of EU merger control within the referral system, which is the main tool to catch killer acquisitions, as being a ‘corrective mechanism’. The then European Commissioner for Competition, Margrethe Vestager addressed the outcome of the ruling in a speech on the 9th of September 2022:

“It is also true that the Merger Regulation was written to give us powers which in the past have not been needed. Here I am referring to the enhanced use of Article 22, i.e. referrals to the Commission from EU Member States for cases for which national jurisdictional criteria have not been met. These powers were always provided for in the legislation. In July, the General Court confirmed this in its ruling in the Illumina case, a case referred to us by six Member States, but for which the notification thresholds were not met in any jurisdiction. A few days ago, we issued our decision prohibiting this merger, because it was clear that the transaction would have hampered innovation in the market for blood-based cancer detection tests. Such an outcome would have been harmful not only to competition, but ultimately, to European patients as well.”¹⁶⁰

In the same speech, Commissioner Vestager also emphasised the need for these types of referrals in pharma and digital markets due to the emerging challenges in these sectors. Vestager further stressed that the new approach of interpreting Article 22 EUMR should not come with increased legal uncertainty for market players. As for digital markets, Vestager also referred to the DMA as part of the legal framework to capture killer acquisitions, that is, the Commission will receive information from Gatekeepers about upcoming concentrations according to Article 14 DMA where the Commission then can invite Member States to refer these concentrations back to the Commission for examination.¹⁶¹ As spokesperson for the Commission, Vestager is clear with the fact that there is no clear answer to effective enforcement of merger control with these types of

¹⁵⁸ See recitals 11, 21 and 34 EUMR.

¹⁵⁹ See recital 12 EUMR.

¹⁶⁰ European Commission, Speech by EVP Vestager at the International Bar Association 26th Annual Competition Conference in Florence “Merger control: the goals and limits of competition policy in a changing world”, Speech of 9 September 2022. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5423). Last visited: 12 March 2025.

¹⁶¹ See infra note 185.

transactions and concentrations. However, the change in course with the interpretation of Article 22 is bold and a way of addressing a specific market failure with creative legal interpretation.

The ruling was appealed to the CJEU, and the court gave its ruling in September 2024. The reasoning and arguments from the court is addressed in the following section as the ruling has a major impact on future merger control of killer acquisitions in the digital sector.

3.3.3 The Appeal to the Court of Justice of the European Union

The ruling from the GC was appealed to the CJEU where Illumina argued that the Commission's interpretation of Article 22 EUMR was incorrect and that the interpretation was against the principle of legal certainty, which is embodied in the EUMR as one of the objectives.¹⁶² Furthermore, Illumina argued that the GC's interpretation of the EUMR gives rise to legal uncertainty for merging parties as it widens the scope in a way which makes it possible to scrutinise concentrations below the turnover thresholds in both EUMR and national legislation. This view was shared by the target, Grail, and disputed by the Commission.¹⁶³

The CJEU gave its interpretation regarding the methods of interpretation within EU law and analysed the GC's reasoning and arguments. As for the literal interpretation of the wording in the provision, the CJEU confirmed that the GC's literal interpretation was correct. The provision *in isolation* does not state that the Member State or Member States need to have established national jurisdiction over the concentration in question. A provision with clear and precise wording within the EU legal system should be interpreted as such, according to settled case law.¹⁶⁴ However, the EU courts, as the sole interpreter of EU law, need to rely on all methods of interpretation in order to define and clarify the exact scope of a certain provision, Article 22 EUMR in this case. The interpreter, whether a court, a practitioner or a scholar, cannot solely rely on the letter of the law to determine the scope of a provision, which the CJEU made abundantly clear in its arguments and reasoning:

*“[...] every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its evolution at the date on which the provision is to be applied [...]”*¹⁶⁵

The CJEU confirmed in this case that the GC was, in fact, entitled and able to interpret the provision through the EU legal method in its entirety and not just through the legal text in isolation. This mandate is also clearly stated in EU primary law according to Article 19(1) TEU.

¹⁶² Judgment of the Court of 3 September 2024, *Illumina, Inc. v European Commission*, Case C-611/22 P, EU:C:2024:677, para. 69.

¹⁶³ *Ibid.*, paras. 81 and 91.

¹⁶⁴ *Ibid.*, para. 126 and cited case law.

¹⁶⁵ Case C-611/22 P, *Illumina, Inc. v European Commission*, CJEU, para. 127 (emphasis added).

As for the historical interpretation according to the CJEU, the court found no support of the GC's reasoning in the historical documents or the preparatory works. Therefore, it could not be concluded that the historical interpretation of the provision could give the Commission competence to examine concentrations which do not meet the EU wide turnover thresholds and where Member States have no national jurisdiction over the same.

By the CJEU's contextual interpretation the court found that Article 1(1) is separate from Article 4(5) and Article 22 and that the provisions serve different purposes. The court made it clear that Article 22 allows the Commission to examine certain transactions under the set out turnover thresholds. However, it held that this conferred competence cannot be used as a *selective tool* to decide on which concentrations to examine, which is an important statement from the court.¹⁶⁶ The CJEU argued that the interpretation by the GC based on the context of the EUMR did not support the findings and decision of the court. Article 1(4) and (5) EUMR makes it possible to review the thresholds when necessary due to market developments. In other words, there is a legal instrument available to address potential market failures, which is prominent in the *Illumina Grail* judgment. A contextual analysis of EUMR can therefore not be in line with the interpretation of the GC's conclusion.¹⁶⁷

The CJEU analysed the objectives of EUMR and the reasoning behind the GC's arguments in light of the teleological method of interpretation. The court confirmed that Article 22 EUMR is not to be interpreted as a 'corrective mechanism' to address any deficiencies in the EU merger control legal framework to allow for the review of certain transactions which do not have EU dimension or meet national turnover thresholds.¹⁶⁸ The objective of the referral mechanism was not to create a system which is inherently different from the scheme of EUMR based on turnover thresholds which cannot cover all transactions and concentrations which may be of concern for effective competition.¹⁶⁹

3.3.3.1 Analysis and Discussion of the Judgment in the CJEU

It is clear that the CJEU found the first instance's ruling to be incorrect in terms of both outcome and interpretation of the EUMR, not just Article 22 but the whole regulation and how this regulation is to function within the EU legal system in its entirety. The judgment is interesting as it invalidates the Commission's previous approach to killer acquisitions. This broad interpretation of the referral mechanism stated in Article 22 EUMR extends the scope of the regulation in a way that goes beyond the Commission's conferred competence as an EU institution to examine such concentrations. An interpretation which widens the scope of a regulation significantly creates increased legal uncertainty for the concerned parties and, in turn, society as a whole due to increased uncertainty for undertakings and increased transaction costs. Another important aspect of this is the

¹⁶⁶ Ibid., para. 159.

¹⁶⁷ Ibid., para. 183.

¹⁶⁸ Ibid., paras. 191-192.

¹⁶⁹ Ibid., para. 200.

principle of institutional balance and the very nature of the EU as an institution (Article 13 TEU). Each institution, the Commission in this case, must exercise its powers within the power conferred by primary EU law and also in alignment with the powers of other institutions.¹⁷⁰ Advocate General (AG) Emiliou found this interpretation by the Commission to jeopardise the institutional balance of the EU.¹⁷¹ Furthermore, AG Emiliou found that the interpretation by the Commission would give the Commission “[...] the power to review almost any concentration, occurring anywhere in the world, regardless of the undertakings’ turnover and presence in the European Union and the value of the transaction, and at any moment in time, including well after the completion of the merger.”¹⁷² The turnover thresholds defined in Article 1 EMUR are, according to AG Emiliou, one of the most fundamental elements of the regulation and European merger control as it triggers the notification obligation according to Article 4(1) EUMR. A merger without the obligation to be notified anywhere in the EU would not exclude the possibility for the Commission to review the merger and claim jurisdiction to do so.¹⁷³

The ruling from the CJEU declared the new approach by the Commission to be incompatible with EUMR. The Commission had through its guidance paper from 2021 sought to combat killer acquisitions in certain sectors, where the digital sector is one of them. “Killer acquisitions seek to neutralize small but promising companies as a possible source of competition. These companies’ size is often dwarfed by the large corporations that seek to acquire them, and they should be protected against the risk of elimination.”¹⁷⁴ The interpretation by the Commission was an attempt through extensive and one-sided interpretation to solve a problem in certain sectors which have contributed to considerable market consolidation and dominant firms. However, if the EU as an institution is to be accepted by the Member States, which the whole system is reliant on, there must be a firm system in place for legal certainty, the rule of law and choosing the most relevant method to address issues due to market developments. As stated by the CJEU, there is a system in place which makes it possible to review turnover thresholds for merger control.

The experts behind *The Digital Report* from 2019 found however that the turnover thresholds should not be changed. Instead, there is an ambition to closely monitor the developments within the Member States’ own national systems for merger control. Some states have introduced different thresholds based on transaction value instead of turnover, which would make Article 22 EUMR work in

¹⁷⁰ Ibid., para. 215.

¹⁷¹ Opinion of Advocate General Emiliou delivered on 21 March 2024, *Illumina, Inc. and Grail LLC v European Commission*, Cases C-611/22 P and C-625/22 P, EU:C2024:264, para. 216.

¹⁷² Joined Cases C-611/22 P and C-625/22 P, *Illumina, Inc. and Grail LLC v European Commission*, Opinion of Advocate General Emiliou, para. 216.

¹⁷³ Ibid., para. 219.

¹⁷⁴ European Commission, Statement by Executive Vice-President Margarethe Vestager on today’s Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions, 3 September 2024. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525). Last visited: 5 May 2025.

the Commission's favour.¹⁷⁵ To amend or to broaden the scope of EUMR in terms of turnover thresholds would have an impact on legal certainty for merging parties, significant increase in the administrative burden for the Commission and increased transaction costs for the merging parties. The risk of non-harmonisation of merger control on EU level is a scattered legal system within the EU. In that case, the challenge will be for EU merger control to co-exist with national merger control regimes in an efficient way which does not lead to increased legal uncertainty.¹⁷⁶

As for killer acquisitions in the digital economy, there are other possibilities available for reviewing these transactions and making them visible, which is covered in the following sections below.

3.4 The Digital Markets Act

3.4.1 Ex-ante Obligations and Contestable Markets

The DMA was enacted in order to make digital markets fair and contestable. The regulation comes as an effect and a response to increased demand of regulatory control of Big Tech and the core platform services which have emerged and grown over time. As stated in the recitals, a small number of undertakings offering core platform services exercise considerable economic and market power, which makes the digital economy difficult to challenge for smaller start-ups and other new potential entrants to the market, no matter how innovative they may be or how groundbreaking their service is.¹⁷⁷ This leads to higher barriers to entry with the potential to limit both consumer choice and innovation on the digital markets.¹⁷⁸

The DMA is to be interpreted as a complementary regulation to competition law as stated in the TFEU through Articles 101 and 102, according to Article 1(6) DMA.¹⁷⁹ The regulation is applicable to 'gatekeepers' providing 'core platform services' (Article 1(2) DMA). A gatekeeper is an undertaking providing core platform services (Article 2 DMA), which is a broad definition including, search engines, social networking services, video-sharing platform services, web browsers, cloud computing services, virtual assistants and more.¹⁸⁰ An undertaking is designated the role of gatekeeper if the undertaking has a significant impact on the internal market, providing a core platform service of importance for business users to reach end users and has an entrenched durable position in its operations currently or it is likely that the undertaking in question will enjoy such a position

¹⁷⁵ *The Digital Report*, p. 112.

¹⁷⁶ *Ibid.*, p. 114.

¹⁷⁷ See recital 3 DMA.

¹⁷⁸ *Ibid.*

¹⁷⁹ See recital 10 DMA and the complementary nature of the DMA in conjunction with ordinary EU competition law provisions.

¹⁸⁰ See Article 2(2) DMA for the exhaustive list of 'core platform services'.

in the near future (Article 3 DMA). The DMA provides a rule where an undertaking is presumed to be a gatekeeper when the undertaking achieves an annual turnover of a certain amount for a period of time and has a certain amount of monthly active users (Article 3(2) DMA). If an undertaking providing a core platform service meet these requirements as stated in the DMA, there is an obligation to notify the Commission and include relevant information. Once designated the role of gatekeeper, the undertaking concerned then have to comply with the obligations stated in Article 5-7 DMA and continuously demonstrate compliance with these obligations, according to Article 8 DMA.

Many of the obligations stated in the provisions are from settled case law or challenges which needed to be addressed in the digital sector. For instance, a gatekeeper must allow for users to uninstall software on the operation system of the gatekeeper and easily be able to change default settings, such as a pre-selected web browser (Article 6(3) DMA) and not prevent third-party software on their services or limit access to these (Article 6(4) DMA). Furthermore, a gatekeeper shall not treat their own services and products more favorably than the products or services of a third party in ranking services, such as search engines (Article 6(5) DMA). The latter prohibition is inspired by the *Google Shopping* judgment where the CJEU found Google to have abused its dominant position through the conduct of self-preferencing of its own shopping services which had a significant impact on competition.¹⁸¹ The CJEU found in conclusion that Google had abused its dominant position through a more favorable positioning of its own service on its own digital platform.¹⁸² This conduct has now been codified in the DMA as anti-competitive conduct by a gatekeeper through the obligations a gatekeeper must comply with. In other words, it is a targeted sector-specific regulation to address a specific issue and an *attempt to correct* an alleged market failure which could not self-correct due to the economies of scale, network effects and that the market had tipped in Google's favor.

One of the main differences is that DMA is a legal instrument which allows for *ex-ante* measures whereas for Article 101 and 102 TFEU to be applicable there needs to be a breach of the provision for any measure *ex-post*. The ordinary EU competition rules in primary EU law are to be separated from the DMA, however, the two sets of rules together with the EUMR work together within the EU merger control legal framework. One main difference between the DMA and other legislation within the EU competition law umbrella, which is discussed further in Chapter 3.5.2 below within Article 102 TFEU, is that there is no need to define the relevant market within the DMA.¹⁸³ The obligations within the DMA apply to gatekeepers, undertakings, providing *core platform services*, according to

¹⁸¹ Judgment of the Court of 10 September 2024, *Google LLC and Alphabet Inc. v European Commission*, Case C-48/22 P, EU:C:2024:726, para. 267.

¹⁸² Ibid.

¹⁸³ Due to the DMA being a sector-specific regulation with prohibitions and obligations it is not reliant on defining the relevant market for the provisions to be applicable. Cf. Article 3 and 5-6 DMA.

Article 2(2) DMA. This makes DMA as a regulation different from other EU competition law.¹⁸⁴

3.4.2 The Interplay Between DMA and EUMR for Merger Control

Designated gatekeepers have an obligation to inform the Commission of any planned concentrations within the meaning of Article 3 EUMR, according to Article 14 DMA. The obligation to inform is to be interpreted in broadly and includes concentrations where either the merging party or the target provide ‘core platform services or any other services in the digital sector or enable the collection of data’. Furthermore, there is no need for the concentration itself to be notifiable under the EUMR. In other words, the concentration in question does not need to have EU dimension or be notifiable to a NCA under national merger rules. This information acquired by the Commission will then, according to Article 14(4) DMA, be submitted to competent NCA’s in the Member States who may use this information received to request the Commission to examine the concentration by invoking Article 22 EUMR (Article 14(5) DMA) (Article 22(5) EUMR).¹⁸⁵

The DMA can be seen as a response from the EU from the entrenchment of Big Tech in digital markets. Critics have argued that the legal framework for EU competition law has not been sufficient to address this situation which may have resulted in stifled innovation due to the absence of effective regulations and enforcement in these markets.¹⁸⁶ There is a political dimension to competition law in digital markets, at least on EU level, which has led to sector-specific regulations to address certain concerns in digital markets. For example, the DMA can be seen as a response to these concerns from the EU as part of the EU’s Digital Single Market Strategy.¹⁸⁷

As for merger control policy in the digital sector, what does the DMA mean for gatekeepers and potential future gatekeepers? As the regulation is young it is partly for the future to decide the impacts and effects of the DMA.¹⁸⁸ However, the following conclusions can be drawn. Following the *Illumina/Grail* ruling, the Member States will not be able to refer concentrations to the Commission without national jurisdiction of that transaction. This opens up for questions in terms of potential gaps in the system for merger control in the EU, especially within the digital sector and killer acquisitions which has been one of the objectives behind the new strategies within the EUMR and also DMA. Scholars have suggested that this outcome in *Illumina/Grail* leads to enforcement gaps for concentrations which would have been flagged through the DMA. Furthermore, it

¹⁸⁴ The DMA is not purely competition law per se, rather a complement to existing competition law. Cf. recital 10 DMA.

¹⁸⁵ Jones & Sufrin, p. 1238.

¹⁸⁶ Ibid., p. 1246.

¹⁸⁷ Ibid.

¹⁸⁸ The regulation entered into force on 2 May 2023, see Article 54 DMA.

contributes to inconsistencies (Article 7 TFEU) within the legal framework and the completeness of DMA as a legal product within the EU.¹⁸⁹

Another consequence of the ruling in *Illumina/Grail* is a move towards a scattered and inconsistent system in the EU to correct the alleged market failure in this aspect. Article 14 DMA in conjunction with Article 22 EUMR was an attempt from the Commission to tackle killer acquisitions in the digital sector without the need to amend the jurisdictional thresholds as stated in Article 1 EUMR. The legality of this new approach from the Commission has proven to be inconsistent with EU law and it leaves the problem unsolved, again.

3.5 Primary EU Law: Article 102 TFEU and the ‘Towercast option’

3.5.1 From Regulation Back to Primary Law?

The EUMR was enacted to address the M&A processes Articles 101 and 102 TFEU were unable to catch. The ex-post nature of provisions in TFEU did not serve the purpose of effective merger control in the EU.¹⁹⁰ The EUMR is a sophisticated and well adapted legal tool for merger control, however, for the purpose of this essay it is necessary to investigate whether the residual functions of Article 102 TFEU and its case law from the CJEU serves as a viable option for killer acquisitions and merger control in the digital sector.

For Article 102 TFEU to be applicable there needs to be an undertaking abusing its dominant position within the internal market or a substantial part of it. Furthermore, the conduct by the undertaking in question needs to affect trade between Member States. A dominant position is, according to settled case law, present when an undertaking can prevent effective competition on the relevant market and behave, to an appreciable extent, independently from its competitors.¹⁹¹

3.5.2 Market Shares and Relevant Market for Article 102 TFEU

Market shares are a useful indicator as to whether an undertaking is exercising a dominant position. Low market shares below 40% on the relevant market is unlikely to be considered dominant. Higher market shares over substantial amount of time can indicate dominance, however, it is always necessary to interpret the

¹⁸⁹ Wolf, Sauter, Jotte, Mulder, *Merger jurisdiction in EU competition law after Illumina/Grail: What's next?*, Journal of Antitrust Enforcement, Volume 13, Issue 1, 2025, pp. 215–222.

¹⁹⁰ Jones & Sufrin, p. 1113.

¹⁹¹ Judgment of the Court of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, EU:C:1979:36, para. 4.

market shares in light of the relevant market conditions.¹⁹² When market shares are over 50% of the relevant market, it is often safe to presume dominance. An infringement of Article 102 TFEU requires the undertaking to *abuse* its dominant position. Being a dominant firm is not unlawful per se, or in other words, big is not always bad.

As for the relevant market within the digital sector, this is often complicated to determine, especially with the multi-sided digital platforms.¹⁹³ When determining the relevant market within the digital economy, one can turn to settled case law from either the Commission's decision in merger cases or rulings from the CJEU which has been included in the revised notice on market definition from the Commission.¹⁹⁴

To define the relevant market, one must determine the relevant *product market* and the relevant *geographic market*.¹⁹⁵ The concept of the relevant market has been established through the EU courts body of case law and can, as mentioned earlier, often be relied upon when analysing and determining the relevant market.¹⁹⁶ The SSNIP-test¹⁹⁷, often used to determine the relevant product market, has proven to be less useful in digital markets. Mainly as the test is based on a price increase to determine whether customers would likely switch to a different product or service. Many products and services on digital markers are offered at zero-cost and negative pricing to attract users, which makes the method unfit for this purpose.¹⁹⁸ The Commission is likely to rely on the product markets established by the EU courts when defining these and it is done on a case-by-case basis, depending on the product or service offered.¹⁹⁹ The reason for this is due to the fact that the SSNIP-test is difficult to apply in industries driven by innovation where undertakings compete on other parameters than price, which often is the case in digital markets which is characterized by zero monetary price products.²⁰⁰

¹⁹² European Commission, Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, paras. 13-15. (Article 102 Guidelines).

¹⁹³ See discussion in Chapter 3.4.1 on the relevant market and the DMA. Cf. supra note 183.

¹⁹⁴ See European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, C/2024/1645, paras. 97-98 and cited case law. (Market Definition Notice). Cf. Case M.814, *Microsoft/LinkedIn*, where the product market was defined as 'online recruitment services'.

¹⁹⁵ Market Definition Notice, paras. 11-12.

¹⁹⁶ See Case 85/76, *Hoffman-La Roche & Co. AG v Commission of the European Communities*, para. 21. Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Case 27/76, EU:C:1978:22, paras. 23, 31 and 32. Judgment of the Court of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, Case 322/81, EU:C:1983:313, paras. 7 and 22-24.

¹⁹⁷ Small but significant and non-transitory increase in price (SSNIP).

¹⁹⁸ Cf. Market Definition Notice, para. 97.

¹⁹⁹ Market Definition Notice, para. 104.

²⁰⁰ Ibid., para. 30.

3.5.3 Ex-post Merger Control

As mentioned above, Article 102 TFEU was the provision which could be invoked ex-post where merger control regulations failed.²⁰¹ This concept was introduced in the *Continental Can* judgment when the CJEU interpreted Article 102 TFEU in light of a merger allegedly strengthening an undertakings already dominant position on the market through the acquisition of a competitor and the remaining competitors are depending on the dominant undertaking.²⁰² It was long debated and rather unclear as to whether it was possible to invoke ordinary competition law, for example Article 102 TFEU, after the fact that EUMR had been enacted. In other words, was the conclusion in the *Continental Can* judgment still an option to review a merger ex-post for a merger which had strengthened a dominant position inasmuch as it constituted abuse of dominance? As with precedent on EU level, a legal question will only be answered by the EU courts if the dispute is not resolved before it reaches those courts. The CJEU had the opportunity to provide legal guidance on the Article 102 TFEU ‘option’ in regard to merger control in the *Towercast* judgment.²⁰³

3.5.3.1 The Towercast Judgment – Background and Analysis

Télédiffusion de France, a French company providing digital terrestrial television broadcasting services acquired sole control of Itas, a company active and operating in the same sector. The transaction was below the thresholds in Article 1 EUMR and national merger laws of France, which meant that the transaction was not notified to the NCA of France or to the Commission.²⁰⁴ Towercast filed a complaint to the NCA and alleged that the acquisition of Itas constituted an abuse of Télédiffusion de France’s dominant position on the relevant market. The reasoning behind the argument was that the acquisition of Itas had hindered competition on both upstream and downstream markets for television broadcasting services, which Towercast argued was a breach of Article 102 TFEU. This complaint was rejected by the NCA of France which led Towercast to appeal the decision to the Court of Appeal in Paris. The Court of Appeal referred the question to the CJEU through a request for a preliminary ruling (Article 267 TFEU).

The question referred to the CJEU was whether Article 21(1) EUMR precludes the application of Article 102 TFEU in the Member State. AG Kokott held that the exclusion stated in Article 21(1) EUMR does not provide guidance to the question in regards to the applicability of Article 102 TFEU.²⁰⁵

²⁰¹ Podszun, Rupperecht, *Thresholds of Merger Notification: The Challenge of Digital Markets, the Turnover Lottery, and the Question of Re-interpreting Rules*, p. 28. Available at SSRN: (<https://ssrn.com/abstract=4522433>). Last visited: 22 May 2025.

²⁰² Judgment of the Court of 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72, EU:C:1973:22, para. 12.

²⁰³ Judgment of the Court of 16 March 2023, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, Case C-449/21, EU:C:2023:207.

²⁰⁴ *Ibid.*, paras. 17-18.

²⁰⁵ Opinion of Advocate General Kokott delivered on 13 October 2022, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, Case C-449/21, EU:C:2022:777, para. 28.

Article 102 TFEU, as a source of primary EU law, was argued by Kokott to have direct applicability through direct effect²⁰⁶ in merger cases due to the provision being sufficiently clear, precise, and unconditional.²⁰⁷ Furthermore, and in regards to the function of merger thresholds in the EUMR, one could argue that the thresholds serve the function of delegating the merger to the most competent authority to examine the transaction at hand. The thresholds give an indicator on applicable law and a presumption of significant impact on competition and market structures when a merger exceeds the set-out thresholds of EUMR, which calls for an ex-ante control of the merger. On the contrary, where the relevant thresholds are not met in a merger case, there is a presumption according to the EUMR that the merger does not require ex-ante control. Kokott argues that the thresholds set out in EUMR, which is secondary EU law, say nothing about the need for ex-post control of mergers in certain cases where dominant undertakings engage in the conduct of a concentration which strengthens an already dominant position.²⁰⁸ In fact, Kokott argued in the Opinion that the direct applicability of Article 102 TFEU, and the provision's position in the hierarchy of norms within the EU legal system, are sufficient to conclude that Article 102 TFEU *can* be applicable to concentrations and cannot be excluded under EUMR.²⁰⁹ The French NCA held that EUMR has within the EU legal framework the status of *lex specialis*, which, according to Kokott, cannot definitely be the case.²¹⁰ Article 22 EUMR and the referral system within the provision does not preclude the justification of Article 102 TFEU being applicable either due to its supplementary application along with EUMR.

3.5.3.2 Article 102 TFEU to address Killer Acquisitions?

The shortcomings of the EUMR in certain situations such as with killer acquisitions was acknowledged in AG Kokott's arguments within the Opinion.²¹¹ The supplementary application of Article 102 TFEU alongside EUMR contributes to the protection of effective competition within the internal market as concentrations under the thresholds can be examined when EUMR falls short. Article 22 EUMR and the referral system offers a safety net, but not without limits. Even if Article 22 EUMR is applicable it is applicable ex-ante and not ex-post. Could Article 102 TFEU and the ex-post control mechanism be applicable to killer acquisitions in the digital sector?

The acquisition of innovative start-ups in the digital sector was included in Kokott's Opinion due to the concern of these types of transactions from NCA's and the Commission. AG Kokott concluded the following:

²⁰⁶ Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, para. 5.

²⁰⁷ Case C-449/21, *Tonervest v Autorité de la concurrence and Ministère de l'Économie*, Opinion of Advocate General Kokott, para. 31.

²⁰⁸ *Ibid.*, para. 38.

²⁰⁹ *Ibid.*, para. 39.

²¹⁰ *Ibid.*, para. 42.

²¹¹ *Ibid.*, para. 48.

“In order to ensure effective protection of competition in that respect also, it should therefore be possible for a national competition authority to resort at least to the ‘weaker’ instrument of punitive *ex post* control under Article 102 TFEU, provided that the conditions for it are met. Such a need may also exist in the case of acquisitions in highly concentrated markets, such as that in the present case, where the aim of such acquisitions is to eliminate competitive pressure from an emerging competitor.”²¹²

This extended view and interpretation of merger control within the EU could have impacts on the merging parties’ legal certainty while being positive for catching killer acquisitions. Legal certainty is, as already discussed, one of the key principles in the EUMR and an important aspect of the EU legal framework for merger control.²¹³ EUMR is the main legal framework for the appraisal of concentrations with EU dimension, however, as already stated in the *Continental Can* judgment, concentrations can be examined in the light of Article 102 TFEU ‘in the absence of explicit provisions’.²¹⁴ As identified by AG Kokott, Article 102 TFEU was used, at the time, to bridge a regulatory gap in order to ensure effective competition on the internal market. Furthermore, Kokott argues that EUMR has not eradicated the purpose of this ex-post appraisal of concentrations according to settled case law and recital 7 EUMR and the objectives of the Treaties, to maintain and protect effective competition on the internal market.²¹⁵

Considering the above, Article 102 TFEU can be a viable tool for merger control and to catch killer acquisitions in the digital sector due to the provisions direct applicability and potential to review a concentration which is not caught by the rules in EUMR. In other words, a company within Big Tech or any other emerging firm which will or could be dominant in the future, could be subject to an infringement of Article 102 TFEU when acquiring an important nascent competitor with the potential to be a strong competitor in the future.²¹⁶

The above Opinion by AG Kokott is an in-depth analysis which is important for the outcome in the case tried by the CJEU. Many aspects of Kokott’s arguments are present in the ruling, which is covered below.

3.5.3.3 Conclusion by the CJEU and the ‘Towercast option’

The CJEU confirmed the reasoning conducted by Kokott, that is, the scheme of EUMR in light of the recitals and objectives of the regulation, does not preclude an ex-post control of concentrations which do not meet the thresholds set out in EUMR. The ex-ante control system in place through EUMR is only applicable for *concentrations with EU dimension* which means that concentrations without EU

²¹² Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, Opinion of Advocate General Kokott, para. 48.

²¹³ See recitals 11, 25 and 34 EUMR.

²¹⁴ Case 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, para. 25.

²¹⁵ Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, Opinion of Advocate General Kokott, para. 54.

²¹⁶ See Chapter 4.2.3 for further analysis.

dimension can be examined ex-post, according to the reasoning of the court.²¹⁷ As for direct applicability and direct effect of Article 102 TFEU, the court held that the provision is sufficiently clear, precise, and unconditional, which means legal or natural persons can claim their rights accordingly. A concentration which falls below the thresholds in Article 1 EUMR can be subject to control by NCA's and national courts according to the Member States' own procedures.²¹⁸

The main conclusion by the CJEU is that a concentration can, in fact, be subject to an ex-post review under Article 102 TFEU, if it has been established that an undertaking has abused its dominant position on the relevant market. In the digital sector, this comes with difficulties. The NCA in question will have the burden of proof of the following. It needs to be verified that the dominant firm has through its conduct of acquiring another undertaking substantially impeded competition on that specific market. It is not satisfactory, according to the CJEU, to conclude that an undertaking has strengthened its dominant position and that the acquisition then mounts up to an abuse of said position. It must be established that the dominant firm has, through the acquisition or merger, reached such a degree of dominance which would substantially impede competition and leaving the remaining competitors on the relevant market depending on the dominant firms' behaviour.²¹⁹ The *Towervcast* judgment means that Article 102 TFEU can be used for merger control in certain cases as a supplementary legal instrument, in addition to EUMR.

3.6 Chapter Summary

This chapter has focused on merger control within the EU legal framework and mainly the provisions relevant for concentrations below the thresholds in Article 1 EUMR, in other words, the concentrations without EU dimension. The structure of EUMR is based almost solely around turnover thresholds in order for the Commission to gain jurisdiction over a transaction. However, Article 22 EUMR and the referral system, the 'Dutch Clause', makes it possible for NCA's to refer transactions of concern to the Commission, as long as the Member State itself has jurisdiction to examine the concentration according to its own merger control laws. The previous broader interpretation of Article 22 EUMR was found to be incompatible with the goals and objectives of EUMR and the merging parties' legal certainty in the *Illumina/Grail* judgment. The Commission's system with Article 22 referrals and the Gatekeepers obligation to inform the Commission of any upcoming merger (Article 14 DMA) is now of uncertain scope. The judgment leaves the Commission back at square one and the enhanced efforts to capture killer acquisitions in the digital sector have been pushed back by the CJEU.

²¹⁷ Case C-449/21, *Towervcast v Autorité de la concurrence and Ministère de l'Économie*, CJEU, para. 41.

²¹⁸ *Ibid.*, paras. 50-51.

²¹⁹ *Ibid.*, para. 52.

Article 102 TFEU and the so called ‘Towercast option’ of ex-post merger control means that any merger without EU dimension, in other words and for example, killer acquisitions, can be examined by a NCA due to the provision’s direct applicability and direct effect. The outcome in the *Towecast* judgment is a confirmation of the outcome in *Continental Can* and that this is still to this day a viable option for merger control if all the criteria in Article 102 TFEU are met. The ex-post-merger regime is meant to be of supplementary nature to the ex-ante merger regime in EUMR.

4 Legal Analysis: A Critical Perspective

4.1 Killer Acquisitions and Kill Zones within EU Competition Law

Research question 1 is analysed in this section based on the research and findings of the previous chapters.

Critics have challenged the reach of the killer acquisition theory and found it to be implausible, although not non-existent.²²⁰ The economists found, after studying a number of transactions in the information and communication technology industries reviewed by the Commission, that the killer acquisition theory had *insignificant bearings* in the digital sector. Mainly because none of the transactions analysed led to the ‘killing’ of the target’s products, weakened competing firms or absence of innovation.²²¹ However, as the conducted study was focused primarily on the economic aspects of the theory, the scholars also found in their conclusion that their findings still may have policy implications of legal nature. Although not claiming to be a legal analysis, the scholars suggested that the restrictive approach on mergers in digital markets may be based on belief rather than of actual evidence through empirical data.²²² As the study focused primarily on mergers which were controllable through jurisdictional thresholds, below-threshold transactions are left without any conclusion. The conclusion is therefore founded on limited data even though based on relevant mergers within GAFAM.²²³

One of the central issues with killer acquisitions in digital markets is the difficulties in determining the potential future competition by the target. The SIEC-test in Article 2(3) EUMR is a broadly worded test but not without limitations, and only applicable if the jurisdictional thresholds are met according to Article 1 EUMR or if it has come to the attention of the Commission through Article 4(5) or 22 EUMR. According to recitals 25 and 26 of EUMR, which are focused on the SIEC test, it is clear that the creation or strengthening of a dominant position is not the only way to meet the requirements of the test. A reduction of

²²⁰ Ivaldi et al., pp. 37–38.

²²¹ Ibid., p. 1.

²²² Ibid., p. 38.

²²³ Ibid., p. 14. See Microsoft/LinkedIn, Microsoft/Skype, Facebook/WhatsApp, Apple/Shazam and other cited merger cases.

competitive pressure and elimination of important competitive constraints in oligopolistic markets can also result in a significant impediment to effective competition.²²⁴ In other words, the legal text of EUMR is through its wording in conjunction with the recitals not casuistic law but rather a tool with broader possibilities for merger examination. It is also important to remember that the SIEC test must be performed while observing the goals and objectives of EU competition law in a broader spirit with the aim to prohibit mergers and acquisitions which are proven to be incompatible with the internal market.²²⁵ However, the burden of proof lies on the Commission according to Article 6 and 8 EUMR. Even if a concentration ends up at the Commissions table through either Article 4(5) or 22 or if it has EU dimension, it is a complicated task to prove that a proposed merger by an incumbent with a target in the shape of an innovative start-up will have anti-competitive effects prior or after due to market complexities. This is due to the fact that it is difficult to prove that a merger would lead to a significant impediment of effective *potential* competition, and not existing competition.²²⁶ The assessment may be affected by the manufactured hypothetical situation where it is uncertain as to what extent the target may be an important player for future competition.

The primary concern with these types of mergers in the digital sector by incumbents acquiring innovative targets at an early stage is reduced innovation, which in the long run can lead to reduced consumer choice²²⁷ and be harmful to consumer welfare.²²⁸ Consumer welfare, often consumer surplus in competition law and policy, is complicated to measure in digital markets. Due to strong network effects and economies of scale, users tend to attract other users to certain platforms and services, which over time could lead to a better service and user experience through an increased demand. Is a strong service which is well-functioning harmful to consumers per se? Not necessarily. With the creation of digital ecosystems and digital platforms offering multiple services it is often beneficial for a user to stay on the same platform instead of switching to a different platform for various reasons. To give a different view on a complicated matter, consumer welfare in the digital sector is not always clear and mergers with increased efficiencies can be beneficial to the consumer. However, the objectives of EU competition law extends further than the consumer experience and network effects. What about *innovation*?

4.1.1 The Effect on Innovation and Further Empirical Data

The killer acquisition theory is primarily focused on the elimination of a potential future *innovative* threat. The innovation theory of harm established in *Dow/DuPont* by the Commission is clearly centered around the importance of innovation in

²²⁴ See recital 25 EUMR.

²²⁵ See Jones & Sufrin, p. 1128.

²²⁶ Holmström et al., p. 16.

²²⁷ Article 2(1)(b) EUMR.

²²⁸ Jones & Sufrin, p. 16.

certain markets, especially where innovation is a driving factor in that industry.²²⁹ It remains to be seen whether this particular theory of harm is invoked in future merger decisions and whether the theory itself could be applicable through potential analogy. Digital markets and digital platforms are constantly evolving and developing, and future assessments may require a similar analysis focused on the importance of innovation as a vital element of these markets and it remains to be seen whether an innovation theory of harm will be the benchmark for the competitive assessment or not.

M&A in the digital economy has the potential to reduce innovation through reduced competitive pressure, decreased incentive and ability for rivals to innovate or by removing a start-up and therefore eliminating the young firm from competing in the future.²³⁰ As discussed above, proving this is complicated and requires a forward-looking approach. Economists specialised in M&A in the digital economy, PhD candidate Laureen de Barsy and Professor Axel Gautier at University of Liège, conducted a study and gathered empirical data on acquisitions by Big Tech and the impact on innovation to determine whether acquisitions by dominant tech firms would hamper innovation or not. The scholars found, when analysing a complete list of acquisitions of patent protected technology, available to the public²³¹, by the GAFAM companies within Big Tech, that there was a *positive effect* on innovation just after acquiring said technology. Put differently, the acquired technology was further developed and improved after acquisition. However, this demonstrated positive effect only lasted for approximately 1.5 years before developments started to slow down.²³² The findings could either be an explanation of outdated technology or that it had reached its full innovative potential through the implemented further developments.

When studying other firms operating in the same sector, the economists found no evidence of stagnant innovation in regards to the acquired technology, which gave rise to the conclusion of acquisitions with a strategic competitive motive in mind. The results led to the conclusion that the acquisitions in question could only be justified through the want to protect the firm from a potential competitive threat from the target company's innovation. However, the scholars acknowledge the difficulties in analysing the phenomenon and their research was rather aimed at contributing to the understanding of the impacts of M&A in the digital sector.²³³ Due to the conclusion and the difficulties to draw certain conclusions based on the findings, the study serves primarily as support for an indicator of a phenomenon or a potential trend. Yet, the findings are supported by thorough analysis of relevant data which further adds to the academic discourse which is valuable to both policymakers, enforcers or further research in the field.

Further empirical studies have been conducted by economists Joe Lamesch and Gautier suggesting that acquired products by Big Tech have been

²²⁹ Case M.7932, *Dow/DuPont*, para 2000.

²³⁰ Jones & Sufrin, p. 1149.

²³¹ A total of 859 acquisitions. See De Barsy, Laureen, Gautier, Axel, *Big Tech Acquisitions and Innovation: An Empirical Assessment*, CESifo Working Paper No. 11025, pp. 9-10.

²³² *Ibid.*, p. 29.

²³³ *Ibid.*

discontinued post-acquisition. The scholars found that many acquisition by the GAFAM firms are driven by the incentive to acquire the technology and innovation by the targets. They found that approximately 60% of the acquired technology are discontinued or shut down after acquisition.²³⁴ These acquisitions could be to either increase market power or realise synergies and the study suggests that a case-by-case study would be required to come to an even more detailed and certain conclusion. There is, according to the study, strong indications for the GAFAM companies to acquire valuable assets and innovation to further strengthen their market power.²³⁵

In light of the somewhat recent transactions of both GRAIL by Illumina Inc. and GIPHY²³⁶ by Facebook Inc. (now Meta), acquisitions of two firms of lower turnover at a significant purchase price, 7.1 billion USD for GRAIL and 315 million USD for GIPHY, indicate, or at least suggest, that the purchase price may have been set due to future anticipated return of scale or to eliminate future competitors.²³⁷ The Competition & Markets Authority in the UK (CMA) reviewed Meta's acquisition of GIPHY and found that a full divestiture of GIPHY was required in order to remedy the anti-competitive concerns post-acquisition.²³⁸

From an EU competition law and policy standpoint, these acquisitions, whether they go by the name of killer acquisitions or an acquisition of a nascent competitor²³⁹, can have a significant effect on market structures, competition, and innovation.²⁴⁰ A start-up can also have a bias towards the incumbent market leader and then innovate for the dominant firm.²⁴¹ Increased market consolidation in the digital sector as well as attempts from legislators, not only in the EU, to address the issue through a shift in policy which have resulted in multiple new legal instruments and interpretations of said legal instruments to catch these transactions. The findings from above studies show strong indications and a pattern to these acquisitions in the digital economy.

4.1.2 Kill Zones: A Concern for EU Competition Law?

As the kill zone theory is closely linked and related to the killer acquisition theory it is particularly relevant to analyse these together as the theories overlap through

²³⁴ Gautier & Lamesch, pp. 27-28.

²³⁵ Ibid., p. 27.

²³⁶ Company distributing images in the format Graphics Interchange Format (GIF).

²³⁷ European Commission, Directorate-General for Competition, Lear, *Ex-post evaluation, EU competition enforcement and acquisitions of innovative competitors in the pharma sector leading to the discontinuation of overlapping drug research and development projects*, Final Report and appendices, Publications Office of the European Union, 2024, p. 242. (*Ex-post Evaluation Report*).

²³⁸ Competition & Markets Authority, *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc.*, Final report on the case remitted to the CMA by the Competition Appeal Tribunal, 18 October 2022, pp. 359 and 432.

²³⁹ See Chapter 2.2 for comparison and theories of harm.

²⁴⁰ Bryan, Kevin A., Hovenkamp, Erik, *Antitrust Limits on Startup Acquisitions*, Review of Industrial Organization, Volume 56, 2020, p. 615.

²⁴¹ Ibid.

connection and effects. A dominant firm in the digital sector can, as outlined above, acquire a start-up firm at the early stage of developments of a certain type of technology to eliminate potential future competition or to replicate a competitor's innovation.

The theory found evidence for a reduced incentive to innovate in these kill zones, mainly due to the challenge to encourage the early adopters due to reduced benefits and increased switching costs.²⁴² This leads to significant difficulties to expand and generate a customer base which in turn leads to a decreased incentive for venture capitalists to invest in these start-ups. Is this a concern for EU competition law, and if so, how is this addressed effectively?²⁴³ It would be disproportionate to conclude all concentrations between innovative start-ups with no turnover and dominant firms within Big Tech to be anti-competitive and incompatible with the internal market. In fact, many of these mergers lead to increased efficiencies, both static and dynamic, and increased consumer welfare. Zingales et al. argue that there needs to be balance between these static efficiencies and dynamic efficiencies²⁴⁴ and that interoperability serves this purpose.²⁴⁵

Another important aspect on the matter is the entrepreneurial exit-strategy, which is common in the digital sector. Many nascent competitors with a successful innovative product or service are likely to be approached by an incumbent with a purchase offer. The de facto value of the potential target, however, can be very low at early stages of development on the one hand. On the other hand, the future potential value, which often is difficult to predict, can be significantly higher. This is a risk for both the potential target and the incumbent. The potential target could through an early acquisition secure a significant return on their early, often low-cost investments, but at the same time lose control over the innovation's future and potential future worth. The incumbent benefits from an early acquisition, according to the same reasons.²⁴⁶ There is an incentive to 'innovate for sale' through an exit-strategy which cannot be ignored in this aspect.²⁴⁷ Furthermore, this incentive itself can diminish if the acquisitions are limited to one potential purchaser, i.e., a super-dominant firm.²⁴⁸

An overenforcement of competition law in this area of merger control in the EU could frankly lead to a *reduction in innovation* with less possibilities for nascent firms to be acquired and therefore reduce the incentive to innovate, which could

²⁴² Zingales et al., p. 35.

²⁴³ Cf. Bryan & Hovenkamp, p. 631. The scholars argue some limited restrictions on super dominant incumbents and start-up acquisitions would be socially beneficial and maintain a stronger incentive to innovate.

²⁴⁴ See DG COMP's recent call for tender for economic studies on dynamic effect on mergers. European Commission, Competition Policy, DG Competition launches a call for tender for an economic study on the dynamic effect of mergers, 25 March 2025. Available at: (https://competition-policy.ec.europa.eu/about/news/dg-competition-launches-call-tender-economic-study-dynamic-effects-mergers-2025-03-25_en). Last visited: 6 May 2025.

²⁴⁵ Zingales et al., p. 35.

²⁴⁶ Norbäck et al., *Verifying High Quality: Entry for Sale*, pp. 40-41.

²⁴⁷ Lundqvist, *Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System*, pp. 356-357.

²⁴⁸ Ibid.

lead to decreased consumer welfare in a Catch-22 situation. A nuanced approach to kill zones are therefore required as there are multiple scenarios to consider when assessing the competitive effects of this phenomenon.

One risk with increased public interest in the digital sector and the market concentration is *ad hoc solutions* to situations which are very complex and multi-faceted. The increased political pressure on both the Commission and other enforcing authorities, both in the Member States and outside of the EU, leads to active and far-reaching sector specific regulation. It is a complicated task for the EU legislative process and for EU competition law and policy to address, mainly because the motivation behind an acquisition by a dominant firm often can be difficult to prove, both as a concept and in the individual case, as we have seen in the decisions from the Commission and the relevant studies with the empirical data, which suggests a potential pattern or indications of such conduct. As for the intent behind the transaction, it could be either to widen the incumbent's technology or to expand or if the acquired technology is of no use to the incumbent, 'kill' it.²⁴⁹ The start-ups with the intention to either merge or be acquired must have the option to do so as well as the continued incentive to innovate for sale, without the conduct being deemed anticompetitive per se. However, with sector specific regulation developments such as the DMA, it is likely that more ex-ante obligations, without the need to define the relevant market, will follow.

4.2 The Legal Framework – Sufficient in the Digital Era?

This section focuses primarily on research question 2 as set out in the introductory chapter of this essay. Based on the outline and the findings from the research conducted in Chapters 2-3, this section critically analyses whether the current EU merger control regime is sufficient to address the issues with killer acquisitions in the digital sector as well as the creation of kill zones. The legal framework for EU merger control is complex and multi-faceted consisting of both primary law and regulations as well as case law with a variety of tools available at the disposal of the Commission, the NCA's and both authorities in conjunction as one.

The EU has adopted an active approach to address anti-competitive conduct in the digital sector and the severe market concentration within it. The Commission had this area of competition law as a main point of focus, certainly under the last European Commissioner for Competition Margrethe Vestager. One of the main concerns with killer acquisitions in the digital sector is the risk of stifled innovation and further entrenchment of the dominant firms within Big Tech. Market disruptors, both actual and potential, are vital in markets driven by innovation. This rivalry between firms increases the pressure to innovate. Minor the disruption in these markets within the digital sector would be harmful to effective competition and a well-functioning internal market, according to the aims in Article 3 TEU.

²⁴⁹ Bryan & Hovenkamp, p. 627.

Market disruptors make markets contestable, which was one of the main goals of the DMA, along with the goal to promote innovation and fair markets in the digital sector.²⁵⁰ With or without market disruptors, digital markets are prone to ‘tipping’²⁵¹, which is not anti-competitive per se. However, market intervention could be necessary to ensure the goals and aims of EU competition law are upheld in the specific sector and market. It is near impossible to predict and preempt future developments of digital markets, but one should not undermine the potential a superior product or service can have. A well-known example of market disruption in the digital sector is when Facebook entered the market to challenge the then dominant social media provider MySpace in the early 2000s.²⁵² Swedish company Spotify entered the digital music streaming market in late 2008 and has since claimed a strong position on the market through its technology and innovation. In other words, it is possible for a nascent competitor, or a promising start-up, to displace a dominant firm enjoying significant market power with extensive market shares, even if this can be difficult due to network effects, now even more so than in the early 2000s. The entrenchment effect tends to grow stronger over time due to network effects and economies of scale which means that the incumbent firm can further solidify its position on the market before being challenged again.

The below section analyses the EUMR, the DMA and Article 102 TFEU separately from a critical legal perspective.

4.2.1 Relying on the Member States and Current Market Structures

Killer acquisitions in the digital sector have primarily been addressed through the referral system in Article 22 EUMR. These concentrations lack EU dimension (Article 1 EUMR) as the target generates no or low turnover at the time of acquisition. The jurisdictional thresholds are therefore not met, which is the main pathway to jurisdiction to examine a transaction, hence Article 22. The Commission’s extensive lexical interpretation of Article 22 EUMR was found to be unlawful by the CJEU in the *Illumina/Grail* judgment.²⁵³ The referral system cannot be invoked where the Member State in question lacks jurisdiction according to its own national legislation.²⁵⁴ The interpretation endorsed by the Commission was also found by the CJEU to undermine the balance of the objectives of EUMR.²⁵⁵

4.2.1.1 The Future of the Catchment Mechanism in Article 22 EUMR

The Commission issued a statement after the ruling confirming the *continued need* for effective tools to examine below-threshold transactions and killer acquisitions

²⁵⁰ See Article 1(1) DMA and recitals 8, 11 and 108 DMA.

²⁵¹ See Chapter 2.4.2 on the tipping phenomenon in digital markets.

²⁵² Jones & Sufrin, p. 1211.

²⁵³ See Chapter 3.3.3.

²⁵⁴ Cf. The Article 22 Guidance, para. 11 for the reasoning by the Commission. Cf. Case C-611/22 P, *Illumina, Inc. v European Commission*, para. 222 for CJEU’s ruling on the matter.

²⁵⁵ Case C-611/22 P, *Illumina, Inc. v European Commission*, CJEU, paras. 205-206.

to ensure that start-ups with significant potential as future competitors or innovators are not ‘killed’.²⁵⁶ Furthermore, the Commission will after the ruling continue to accept referrals from Member States with jurisdiction over a transaction under national merger legislation. In other words, the Commission is now *increasingly relying* on the Member States to implement or amend national competition legislation to address the issue of killer acquisition. Both Member States Germany and Austria have amended their national laws to include a jurisdictional threshold based on transaction value.²⁵⁷ These provisions are to be applied subsidiarily to the turnover-thresholds, according to a joint guidance from the NCA’s.²⁵⁸ It remains to be seen whether other Member States will enact similar legislation. However, whether this solution and way forward by the Commission is in line with the principles of legal certainty and predictability as stated in the *Illumina/Grail* judgment is not certain. If the Commission continues to use Article 22 EUMR with the same intention and purpose and as a ‘corrective mechanism’ to target certain transactions, it has to be achieved in line with the reasoning and arguments by the CJEU in the *Illumina/Grail* judgment in order to not be challenged once more.

The *Illumina/Grail* saga constitutes of two judgments where both EU courts came to entirely different conclusions regarding the interpretation of Article 22 EUMR based on the objectives, goals and aims of the regulation. The GC argued in line with the more extensive interpretation similar to the interpretation of the Commission. The consensus was that the referral system could be used as a ‘corrective mechanism’²⁵⁹, which was not the interpretation by the CJEU.²⁶⁰ The CJEU as the final interpreter of EU law (Article 19 TEU) declared both the GC’s and the Commission’s interpretation to be incorrect and invalid.

The ruling has been debated widely in articles and the legal literature where scholars and practitioners have discussed the impact and the effects of the judgment. The consensus is that the ruling by the CJEU reinstates both predictability and further enhances the principle of legal certainty for merging parties as the Commission is no longer able to claim jurisdiction through Member States which did not have jurisdiction originally. On the other hand, the process and procedures the Commission had established through the extensive interpretation was a way forward to address killer acquisitions which was also proven to be effective. This issue remains unsolved and the fact that the Commission is investigating alternative tools to address these acquisitions could hinder or potentially limit any movement on the market for these businesses.²⁶¹ These below-threshold concentrations require a legal analysis which actualises several conflicting interests, such

²⁵⁶ See Statement by Executive Vice-President Margarethe Vestager on today’s Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions, September 3 2024.

²⁵⁷ See Chapter 7 Section 35 para. 1a German Competition Act (GWB) and Part I Chapter 3 Section 9 para. 4 Federal Cartel Act (KartG).

²⁵⁸ See Bundeskartellamt, Bundeswettbewerbsbehörde, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9(4) KartG, January 2022, p. 2, paras. 7-8.

²⁵⁹ See recital 11 EUMR.

²⁶⁰ Case C-611/22 P, *Illumina, Inc. v European Commission*, CJEU, para 192.

²⁶¹ Sauter & Mulder, pp. 218-219.

as legal certainty, effective enforcement from authorities and efficiency.²⁶² As for EU competition law objectives, the interest of consumer welfare and to protect innovation are also relevant interests in the complex task of finding balance between these interests.

Potential solutions to the killer acquisition issue in the digital economy and the creation of kill zones could be to amend the EUMR and the turnover thresholds in Article 1 with the powers provided in Article 1(4) and (5) EUMR.²⁶³ In other words, the EUMR provides a legal basis for the turnover thresholds to be revised, which was also pointed out by the CJEU in the *Illumina/Grail* judgment.²⁶⁴ An amendment of the turnover-thresholds could lead to a broader debate on merger policy within the EU, which would require negotiations which could be lengthy and complicated although not impossible. Lower turnover-thresholds would also ‘catch’ transactions and concentrations outside of the intended scope which would increase the administrative burden on the Commission and the NCA’s as well as increased transaction costs for the merging parties. The experts in *The Digital Report* concluded in 2019 that it was too early to amend the jurisdictional thresholds in the EUMR, mainly due to the market need for legal certainty and to not increase the administrative burden as well as transaction costs.²⁶⁵ It is important to note, however, that the current situation leads to fragmentation in merger policy and a potential over-reliance on the Member States for the referrals according to Article 22 EUMR, which was also stated in the *The Digital Report*. The experts in the report endorsed by the Commission and DG COMP did note that: “[...] should systematic jurisdictional arise in the future, a “smart” amendment to the EUMR thresholds may be justified”²⁶⁶. This conclusion was drawn before the outcome in the CJEU’s ruling in the *Illumina/Grail* judgment and the courts findings of the Commissions extensive interpretation of Article 22 EUMR. However, in line with the statement by then Executive Vice-President Margrethe Vestager given on September 3 2024, just after the CJEU’s ruling, there was no indication of intent to launch a review of the EUMR thresholds. Instead, the Commission stated that referrals made under Article 22 EUMR would be accepted moving forward, as long as it is in compliance with the latest settled case law.

The Commission held that the scope of Article 22 EUMR is still broader than earlier, simply because of amended national legislation within the Member States. Vestager did, however, mention that the Commission will “[...] consider the next steps to ensure that the Commission is able to review those few cases where a deal would have an impact in Europe but does not otherwise meet the EU notification thresholds.”²⁶⁷

²⁶² Ibid.

²⁶³ Case C-611/22 P, *Illumina, Inc. v European Commission*, CJEU, para. 183.

²⁶⁴ Ibid., para. 184.

²⁶⁵ *The Digital Report*, pp. 10 and 124.

²⁶⁶ *The Digital Report*, p. 10.

²⁶⁷ European Commission, Statement by Executive Vice-President Margarethe Vestager on today’s Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions, Statement of

The Commission acknowledges through this statement that there are a only few transactions which are cause for concern. To change the vital part of jurisdictional thresholds and the structure of EUMR would, like mentioned above, catch several transactions which are not of concern from a competition perspective. The ruling from the CJEU in the *Illumina/Grail* judgment has already had an impact where several Member States have chosen to withdraw their referral requests regarding an acquisition of assets by Microsoft, which supports the claim of a narrower scope than earlier.²⁶⁸

As more Member States are withdrawing referral requests one can ask, is Article 22 EUMR a viable option forward to battle killer acquisitions? The way forward by the Commission is to further encourage cooperation between Member States and the EU to achieve the common objective of reviewing these transactions, mainly through the call-in powers.²⁶⁹ Is this approach more driven by a political goal rather than based in a nuanced legal analysis followed by thorough preparatory works including industry and legal experts? On the other hand, the EU is a compromise of 27 Member States, which requires flexibility and compromise in order to achieve the common objective in line with the principle of sincere cooperation according to Article 4(3) TEU. It may very well serve as an adequate solution in the interim but lacks consistency and is not sufficiently comprehensive for a thorough and comprehensive legal framework within EU competition law.²⁷⁰ This over-reliance, even with a potential satisfactory result, on the Member States amended legislation is not sufficient to address the issue with below-threshold acquisitions, killer acquisitions and to prevent market consolidation and kill zones.

In summary, the EUMR is, in its current shape and form, not sufficient to address the challenges posed by killer acquisitions in the digital sector and the further creation of kill zones surrounding Big Tech. The system is likely to catch more acquisitions over time, depending on the legislative processes in the Member States. This over-reliance on Member States to amend national legislation results in fragmentation and uncertainty as a potential consequence. However, the current solution through Article 22 EUMR could be the balanced and cautious approach forward before implementing any broader structural changes to the EUMR. As other Member States adopt laws permitting call-in provisions it could be the most comprehensive solution possible to achieve between 27 Member States in the EU legal system. After all, the recent developments do not make Article 22 EUMR and its scope more narrow or interfere with the recent ruling in the *Illumina/Grail* judgment.²⁷¹ In fact, some digital mergers of significance

September 3 2024. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525). Last visited: 5 May 2025.

²⁶⁸ European Commission, Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft, Press Release of 18 September 2024. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727). Last visited: 7 April 2025.

²⁶⁹ Ibid.

²⁷⁰ See recitals 13-14 EUMR and information sharing and most appropriate authority.

²⁷¹ *Ex-post Evaluation Report*, p. 260.

have been caught and reviewed by the Commission through the referral system in Article 22 EUMR, *Apple/Shazam* and *Facebook/WhatsApp* are two examples due to Spanish national merger control laws.²⁷² Other mergers that have flown under the Commission's radar are mergers between Facebook and Instagram and Google and Waze, but these two mergers were scrutinised by UK merger control laws.²⁷³

Based on the findings above, Article 22 EUMR remains a valuable tool for catching killer acquisitions in the digital sector. However, the regulation itself does not constitute as a comprehensive legal framework to independently address the issues arising from these transactions without risking fragmentation in the EU merger control system. The referral system is dependent on the Member States which raises questions about consistency and the overall EU-wide ambition of the issue at hand. The substantive assessment of any merger, and in this case, the acquisition of start-ups by a dominant firm, will, when caught, need to be assessed according to the SIEC test according to Article 2(3) EUMR.

4.2.1.2 Current Limitations Within the SIEC Test

As discussed in Chapter 3.2.3, the SIEC test consists of a test where a transaction is deemed to be incompatible with the internal market if the concentration in question would 'significantly impede effective competition', and in particular if the concentration creates or strengthens a dominant position. As it is the Commission appraising these concentration, the Commission's guidelines are of certain interest, as expressed in the preamble to the EUMR.²⁷⁴ Non-coordinated effects are of certain interest as these effects are more likely to be present rather than coordinated effects in the digital sector. Coordinated effects are more likely in markets where it is simple to conclude an understanding on the terms of a specific coordination, such as setting and keeping price levels above the competitive level.²⁷⁵ As for horizontal mergers, one non-coordinated effect of concern is the elimination of a competitive force through either a merger or an acquisition, which is a pressing concern in the digital sector where *innovation* is a key competitive force.²⁷⁶ This type of foreclosure through non-coordinated effects is also of concern for conglomerate mergers. Merging parties can through tying or bundling of a specific product, for example to pre-install a certain software, foreclose other competitors on that same market if one of the merging parties enjoy substantial market power.²⁷⁷ This was one primary concern raised by the Commission in the assessment of the *Microsoft/LinkedIn* merger.²⁷⁸

This means that the SIEC test consists of valuable tools to assess M&A activity in the digital sector, that is, innovation is acknowledged as an important competitive force, even with few market shares and low turnover. Furthermore, the

²⁷² *The Digital Report*, p. 115.

²⁷³ *Ibid.*

²⁷⁴ See recitals 28-29 EUMR and the powers conferred to the Commission.

²⁷⁵ Horizontal Merger Guidelines, paras. 40-41.

²⁷⁶ *Ibid.*, paras. 37-38.

²⁷⁷ Non-Horizontal Merger Guidelines, paras. 93 and 95-96.

²⁷⁸ Case M.8124, *Microsoft/LinkedIn*, para. 306.

SIEC test goes beyond the concept of dominance and is not to be interpreted as static.²⁷⁹ However, the merger between Facebook Inc. and WhatsApp, which was cleared by the Commission in 2014 after a thorough assessment according to the SIEC test, might not have been forward-looking enough even if future aspects were considered at the time.²⁸⁰ Another aspect is the fact that these types of mergers often involve undertakings not competing directly in their respective ‘core market’. Examples are WhatsApp not offering a full-scale social media service, or Instagram offering a mobile photo service, meaning that these two firms were only competing in a specific segment of the acquirer’s entire ecosystem.²⁸¹ According to the Commission’s guidelines on horizontal mergers, when merging with a potential competitor two criteria must be met, that is, firstly, the potential competitor must either already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force, and secondly, there must be a lack of other potential competitors which could maintain competitive pressure after the concentration.²⁸² The Commission found, in the *Facebook/WhatsApp* merger, that there was no indication²⁸³ that WhatsApp was planning on becoming a social network to compete with Facebook after said merger and that their services would stay on smartphones only.²⁸⁴ To assess the future potential competition of a smaller player in a certain market is a challenging and complex task, especially in the digital sector, which may result in concentrations such as these being found compatible with the internal market at the time of assessment.

With innovation being developed at a rapid speed in the digital sector, it requires NCA’s and the Commission to be more forward-looking and agile in their assessment of mergers of potential competitors to avoid elimination of innovation in these markets. As stated in the *Draghi Report*, “[...] merger evaluations in this sector must assess how the proposed concentration will affect future innovation potential, despite its uncertainty.”²⁸⁵

In summary, the substantive test for the appraisal of these mergers in the digital sector is sufficient in many ways, however, not fully comprehensive for killer acquisitions and to limit kill zones. A more forward-looking approach may be required for the competitive assessment to be sufficiently comprehensive in this aspect.

4.2.2 A Targeted Obligation to Inform as a Compromise?

The obligation in Article 14 DMA is an obligation to inform the Commission of any intended concentration in the digital sector, irrespective of whether the

²⁷⁹ See recitals 25-26 EUMR.

²⁸⁰ Case M.7217, *Facebook/WhatsApp*, Commission Decision of 3 October 2014, para. 191.

²⁸¹ *The Digital Report*, p. 118.

²⁸² Horizontal Merger Guidelines, para. 60.

²⁸³ Note the forward speculative elements in these competitive assessments.

²⁸⁴ Case M.7217, *Facebook/WhatsApp*, para. 145.

²⁸⁵ European Commission, Draghi, Mario, *The Draghi Report: The Future of European Competitiveness, Part B, In-depth analysis and recommendations*, September 2024, p. 299. (*Draghi Report*).

particular concentration is notifiable to the Commission or to a competent NCA. In other words, there is no other legal obligation for the gatekeeper other than to simply *inform*.

Why is this far-reaching ex-ante obligation to inform of importance when discussing killer acquisitions and kill zones? By analysing the provision in conjunction with the EUMR in a systematic manner, and Article 22 specifically, there is a clear and direct correlation between the two articles and regulations. As an example, the gatekeeper must inform the Commission prior to the implementation of a concentration and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest (Article 14(1) DMA). This wording is identical to the provision in Article 4(1) EUMR, which is the requirements for notification. Additionally, the information a gatekeeper must provide to the Commission should describe the undertakings concerned, EU and worldwide turnover, fields of activity, activities directly relating to the transaction, *transaction value²⁸⁶ of the agreement or an estimated amount*, summary of the concentration along with its nature and rationale as well as a list of Member States concerned by the concentration in question (Article 14(2) DMA). This obligation is broad, and its sole purpose and goal is to provide the Commission with as much information as possible to be able to determine developments and forecast trends of M&A in the digital sector. The information received is to be used by the Commission to inform *competent* authorities (Article 22(5) and (1) EUMR) of any transaction as well as to publish lists of these acquisitions (Article 14(4) DMA). And finally, this information can be used by the competent authorities to request the Commission to examine the transaction, according to Article 22 EUMR. Importantly, failure to provide this information to the Commission, intentionally or negligently, may result in a fine of 1% of total worldwide turnover in the preceding financial year, according to Article 30(3)(c) DMA.

It is clear that the ambition with Article 14 DMA is to be of complementary nature to the referral system in Article 22 EUMR. The wording of Article 14 DMA allows for the Commission to gain insight into information such as transaction value which could be useful information when using this information to notify competent NCA's with laws in place for merger control which allows to scrutinise such transactions. This obligation on the gatekeepers to notify the Commission will serve as useful information for the NCA's and their call-in powers. The provision itself can also be interpreted as an attempt through sector specific legislation to provide a tool to review certain mergers in the digital sector, or simply to make this M&A activity visible and for Member States to act accordingly.²⁸⁷ Any systematic non-compliance by the gatekeepers can also lead to a market investigation which can, in some cases, result in remedies such as a prohibition for a limited period for a gatekeeper to enter into a concentration within the meaning of Article 3 EUMR (Article 18 DMA).

²⁸⁶ Supra note 257-258.

²⁸⁷ Robertson, Viktoria H.S.E, *The future of Digital Mergers in a Post-DMA World*, European Competition Law Review, Vol. 44(10), 2023, p. 448.

The main implication and effect of the interplay between DMA and EUMR is following the ruling in *Illumina/Grail* by the CJEU. The outcome in the case means that the de facto scope of this interplay of the two provisions have been delimited as Member States now need jurisdiction over a transaction in order to submit a referral to the Commission.²⁸⁸ Scholars have argued that this mounts up to a potential enforcement gap and that there is reason to question the legal framework in the light of completeness and consistency.²⁸⁹ As the regulation entered into force on 2 May 2023 (Article 54 DMA), this makes such a conclusion premature. The efficiency and success of this legislative endeavor from the EU to combat concentrated market structures in the digital sector remains to be seen and the Commission has recently found both Apple and Meta in breach of the obligations set out in Article 5 DMA.²⁹⁰

The DMA should contribute to further making killer acquisitions possible to examine through Article 14 DMA along with the potential risk of fines in case of non-compliance. Gatekeepers not notifying the Commission of its planned M&A activities may also run the risk of being prohibited temporarily to conduct any concentration within the meaning of Article 3 EUMR, which will have a directive (or steering) effect to compliance on firms within Big Tech rather than concealing this conduct. These attempts to address growing market concentrations in the digital sector as well as shedding light on more potential anti-competitive transactions is likely to lead to further killer acquisitions being brought forward. The DMA serves as an ambitious attempt to address the kill zone problems insofar as competition law and policy can and possibly should. It also raises questions as to what extent policy makers can and should intervene in certain markets. The DMA aims to address these concerns for digital markets and market interventions of this scale was deemed to be necessary.²⁹¹ As for the transactions studied in this essay, the legal framework will increase transparency and open for NCA's to refer any potential killer acquisitions to the Commission. The ex-ante obligations and the increased transparency is likely to prevent further expansion of kill zones.

4.2.3 Ex-post Review as a Contingency Plan?

One of the main differences between merger review according to Article 102 TFEU, or the 'Towercast option', and EUMR is the possibility for merger review ex-post. EUMR is to its nature an ex-ante control system for mergers and DMA works in a similar manner, that is, imposing obligations ex-ante on gatekeepers in the digital sector.

²⁸⁸ Supra note 271. The scope of Article 22 EUMR remains unchanged. Previous interpretation allowed for broader application of the provision.

²⁸⁹ Sauter & Mulder, p. 220.

²⁹⁰ European Commission, Commission finds Apple and Meta in breach of the Digital Markets Act, Press Release of 23 April 2025. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085). Last visited: 23 May 2025.

²⁹¹ See recitals 2, 3 and 4 DMA.

For Article 102 TFEU to be applicable in a merger control setting, the main criteria of the provision will have to be met. In other words, an undertaking has to be dominant, that is, enjoy a position of economic strength to prevent effective competition being maintained on the relevant market and being able to an appreciable extent to act independently of its competitors and ultimately its consumers.²⁹² Market shares need to be analysed and generally be above 40%, however this can vary depending on the industry.²⁹³ This dominant position must be exercised on a relevant market and cannot exist in general terms.²⁹⁴ For the provision to be applicable there must, in addition to the beforementioned, be a concentration which affects trade between Member States. Furthermore, the conduct or behavior by the dominant firm must be some kind of abuse, for example anti-competitive foreclosure of a nascent competitor. The purpose of this section is not to give a comprehensive analysis of the provision in isolation, but rather how the ex-post nature of Article 102 can be used for below-threshold mergers and to address killer acquisitions and prevent kill zones. Importantly, Article 102 TFEU can only be invoked once a dominant position has been established on the relevant market.²⁹⁵ As for the digital sector, this is primarily relevant for firms within the Big Tech umbrella.

As discussed in Chapter 3.5, EUMR and its ex-ante control system does not preclude an ex-post control of a concentration for transactions below the jurisdictional thresholds.²⁹⁶ In the *Towervest* judgment, the CJEU found that Article 102 TFEU was sufficiently precise, clear and unconditional which makes the provision directly applicable in the Member States.²⁹⁷ According to the CJEU, the relevant assessment for the relevant NCA is the following:

“In particular, it is for the authority in question to verify that a purchaser who is in a dominant position on a given market and who has acquired control over another undertaking on that market has, by that conduct, substantially impeded competition on that market. In that regard, the mere finding that an undertaking’s position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market [...]”²⁹⁸

²⁹² Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, para. 65.

²⁹³ See Article 102 Guidelines, paras. 13-5. Cf. Judgment of the Court of 15 March 2007, *British Airways plc v Commission of the European Communities*, Case C-95/04 P, EU:C:2007:166, para. 76. Cf. Judgment of the Court of First Instance of 17 December 2003, *British Airways plc v Commission of the European Communities*, Case T-219/99, EU:T:2003:343, para. 211. Market shares below 40% but significantly larger than its competitors on the same market.

²⁹⁴ Case 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, para. 32.

²⁹⁵ Article 102 Guidelines, para. 4.

²⁹⁶ See Case C-449/21, *Towervest v Autorité de la concurrence and Ministère de l’Économie*, CJEU, para 41.

²⁹⁷ *Ibid*, para. 51.

²⁹⁸ Case C-449/21, *Towervest v Autorité de la concurrence and Ministère de l’Économie*, CJEU, para. 52.

The question to answer in this section is whether this approach through Article 102 TFEU can serve as a useful tool for below-threshold transactions in the digital sector. The interplay between primary EU law in the treaties (Article 101 and 102) and EUMR is clearly stated in the preamble of EUMR.²⁹⁹ It has been confirmed once again that Article 102 TFEU can be invoked to assess these types of mergers. One important difference between the EUMR and Article 102 is the ex-ante and ex-post evaluation. An ex-ante approach, as in EUMR, offers an efficient way to examine potential anti-competitive mergers or acquisitions before the concentration has been concluded fully and caused potential anti-competitive harm on the relevant market. To examine a concentration, or any transaction for that matter, in the light of Article 102 TFEU in line with the assessment provided by the CJEU in the *Towervest* judgment, a dominant position must be established, and the examination can only take place after the fact, ex-post. This means that intervention from the NCA's takes longer and may contribute to a less efficient system for merger control. Scholars have also argued that it is unclear whether the Commission itself can apply Article 102 TFEU to below-threshold concentration as well as potential efficiency problems.³⁰⁰

An expert study report published by the Commission and DG COMP shed some light on EU primary law and killer acquisition where a team of economists and pharmaceutical experts found that Article 102 is a valuable tool to address killer acquisitions which are *not deemed to be concentrations* within the meaning of Article 3 EUMR.³⁰¹ These findings were based on two case studies and the report concluded that Article 22 EUMR was a viable option for below-threshold transactions qualifying as a concentration within the meaning of Article 3 EUMR and that Article 101 and 102 TFEU are important for other types of transactions not qualifying as such.³⁰² The study report focused primarily on killer acquisitions in the pharma sector, however, the conclusions can through analogy be interpreted and useful for the digital sector, adding further support to the claims and conclusions in research question 1.³⁰³

The option to assess a transaction, which does not have to qualify as a concentration, makes for another valuable legal tool within EU merger control. Should a dominant tech firm acquire a start-up and bypass the concentration criteria in EUMR through the transaction, Article 102 TFEU could be applicable in certain circumstances and cases. However, the option through Article 102 TFEU and the outcome in the *Towervest* judgment comes not without limitations. The Article 102 appraisal can be lengthy, complex and often challenging to apply in practice in the digital sector, especially with the complexities with defining the relevant market.

²⁹⁹ See recital 7 EUMR.

³⁰⁰ Riley, Alan, Wolters Kluwer, Kluwer Competition Blog, Illumina/Grail: What is the solution for Killer Acquisitions Now?, October 15 2024. Available at: (<https://competitionlaw-blog.kluwercompetitionlaw.com/2024/10/15/illumina-grail-what-is-the-solution-for-killer-acquisitions-now/>). Last visited: 7 April 2025.

³⁰¹ *Ex-post Evaluation Report*, p. 18.

³⁰² Ibid.

³⁰³ Ibid., p. 80.

4.3 Legal Certainty and Effective Merger Control in Parallel

The principle of legal certainty against effective merger control within EU competition law can give rise to tension between these conflicting interests. Legal certainty is a vital part of the rule of law, which is a cornerstone of the EU legal system (Article 2 TEU). As stated in Article 6 TEU, the European Charter of Fundamental Rights (CFR) constitutes as primary law and has the same legal value as the Treaties. This statement is also reflected in the EUMR and the regulation must be interpreted and applied with respect to the rights in the CFR.³⁰⁴ The CJEU has consistently, in a wide body of case law spanning over several decades, held that these principles must be upheld through clear and precise provisions which promotes foreseeability and predictability.³⁰⁵ The Commission's powers have to be exercised in line with the principle of legal certainty when invoking the provisions in the EUMR.³⁰⁶

Increased public concerns have resulted in immense pressure towards both legislators and enforcers globally, and the EU has taken an active stance in this aspect from both a legislative perspective and as an active law enforcer to address killer acquisitions, other below-threshold mergers and to prevent uncontestable and unfair digital markets.

One of the main pillars of a well-functioning market economy is the freedom to conduct a business, freedom of contract and the right to buy and sell assets (Article 16-17 CFR). If the legal framework becomes unpredictable and uncertain for businesses, it is likely that this would lead to a static market with less movement and fewer “risk takers”, which in itself can stifle innovation and be harmful to consumer welfare and also prevent effective competition. It is therefore important to balance the conflicting interests which otherwise can result in an over-enforcement through expansive interpretations against the aims and goals of merger control. The Commission's interpretation of Article 22 EUMR did serve a valid purpose based in an anti-competitive concern, that is, to capture killer acquisitions effectively without amending the turnover-thresholds in EUMR. New market developments, such as the ones in the digital sector, cannot lead to undermining set legal principles within the EU legal system and the rule of law, which must be adhered to at all times by all EU institutions.³⁰⁷ The Commission's Guidance was aimed to increase transparency, predictability and legal certainty for merging parties and the applicability of Article 22 EUMR.³⁰⁸ By de-centralising the merger control system, especially when there is a viable option through EUMR to amend the thresholds as stated in Article 1(4) and (5), leads to a step away from the one-stop shop principle in EUMR. As stated by AG Emiliou in the Opinion: “It is, thus, impossible to overemphasise the importance that

³⁰⁴ See recital 36 EUMR.

³⁰⁵ Craig, Paul, *EU Administrative Law*, 3rd edition, Oxford University Press, Version: 8 November 2018, eBook (Oxford University Press), 2018, p. 601.

³⁰⁶ Whish & Bailey, p. 948.

³⁰⁷ The Article 22 Guidance, para. 9. Cf. Article 2 TFEU. Cf. Article 41 CFR.

³⁰⁸ The Article 22 Guidance, para. 12.

predictability and legal certainty have, especially for the merging parties.”³⁰⁹. The same reasoning in regards to legal certainty was echoed in the CJEU in the *Illumina/Grail* judgment. The court emphasised the need for a balanced interpretation of the objectives within EUMR to not undermine the effectiveness, predictability and legal certainty the regulation serves to guarantee.³¹⁰

A relevant aspect to this balancing act between the conflicting interests of effective enforcement while upholding and ensuring legal certainty is: To what extent can and should the principle of legal certainty apply to undertakings in M&A activity? In other words, are undertakings, i.e., corporations, subject to the same level of legal certainty and foreseeability as natural persons? By comparison, the rule of law in EU competition law differs from criminal law and administrative law, however, it is a vital component to merger control, which can limit fundamental rights and freedoms. Predictability and foreseeability in this aspect is central to the market economy as well as society as a whole. Undertakings must be able to foresee potential future risks and plan business strategies accordingly. Without this certainty, anchored in the values, objectives and the rule of law, EU competition law runs the risk of over-regulating an area of law in which other means of law may be more appropriate, however, a further analysis on this dilemma falls outside the scope of the chosen field of research.

Competition law and policy within the EU aims to protect consumers through consumer welfare and a well-functioning internal market (Article 3 TEU).³¹¹ These objectives need to be achieved through legality and legitimacy in order to avoid institutional imbalances which could result in a lack of confidence and trust for the EU as its own legal system. All institutions within the EU must act within its conferred powers, according to Article 13(2) TEU and the principle of sincere cooperation. Any ambition or policy to address killer acquisitions or prevent kill zones in the digital sector must be addressed according to set EU law according to the Treaties, first and foremost as the primary source of EU law. The EU courts are the final interpreters of EU law (Article 19 TEU) and any provisions or regulations must be interpreted accordingly.

The question whether the principle of legal certainty can be upheld whilst catching these transactions is complex and multi-faceted. Increased sector-specific regulations lead to further enforcement in the digital sector but also promotes legal certainty through the enactment of regulations, such as the DMA. Increased legal certainty may however result in increased transaction costs for the undertakings. An increased enforcement under primary law ex-post could lead to legal uncertainty for merging parties on the one hand. As stated by AG Kokott in the *Towercast* judgment, potential double assessment both ex-ante and ex-post could be possible.³¹² This is only possible whether the conduct at a later stage mounts up to an assessment according to Article 102 TFEU. The *Towercast*

³⁰⁹ Joined Cases C-611/22 P and C-625/22 P, *Illumina, Inc. and Grail LLC v European Commission*, Opinion of Advocate General Emiliou, para. 194.

³¹⁰ See Case C-611/22 P, *Illumina, Inc. v European Commission*, CJEU, paras. 205-206.

³¹¹ See Protocol (No. 27) on the internal market and competition, TEU.

³¹² Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, Opinion of Advocate General Kokott, paras. 57-59.

judgment clarified what has been possible for enforcers even before the enactment of the EUMR. It may however require undertakings to take account to EU primary law in more detail and potentially carry out prior assessments before expanding or acquiring firms or assets to avoid a potential breach.

In the interest of legal certainty, it is preferable to have a transaction assessed by one authority to avoid different interpretations, assessments, and outcomes. A referral system must therefore be comprehensive if there is an objective and ambition to review transactions which are not notifiable due to the turnover-thresholds in EUMR.³¹³

In summary, EUMR and the turnover thresholds in Article 1 EUMR serves as a cornerstone of the EU merger control system and a primary indicator for the parties of a concentration whether to notify the Commission of upcoming concentrations. An overenforcement through extensive interpretation of the referral system in Article 22 EUMR undermines the aim, purpose and objective of the regulation which may prove effective to catch killer acquisitions at the detriment of effective and efficient M&A activity in digital markets. Any referral according to Article 22 must now comply with the outcome in *Illumina/Grail*, which in a way has led to some legal certainty being regained for merging parties. The developments may lead to fragmentation in the merger control system and undermine the purpose for EU-wide merger control and the one-stop-shop system through an over-reliance on the Member States to address the market failures in the digital sector.

With the recent developments within the EUMR, the DMA and the increased use of primary law for merger control, the system is moving towards a more comprehensive framework for killer acquisitions in the digital sector as well as ensuring contestability as well as innovation in these markets.

4.4 A De Lege Ferenda Discussion

Any changes, amendments or clarifications within the EU merger control legal framework must be achieved within the EU legislative process.³¹⁴ The CJEU stated clearly in the *Illumina/Grail* judgment that an extensive approach from the Commission in this aspect and to *target specific transactions* through expansive interpretation could lead to institutional imbalances within the Union and undermine the legal system as a result.³¹⁵ The EUMR provides a ‘simplified procedure’ for the European Council to revise the jurisdictional thresholds with a proposal from the Commission, and if the jurisdictional turnover thresholds are the main hindrance to review below-threshold transactions, Article 1(4) and (5) EUMR should be invoked in line with the letter of the law, systematics and a purpose-driven interpretation of EU legislation.

³¹³ See recital 12 EUMR.

³¹⁴ See recital 9 and Article 1 (4) and (5) EUMR for the procedure of revising the jurisdictional thresholds within the EUMR.

³¹⁵ Case C-611/22 P, *Illumina, Inc. v European Commission*, CJEU, para. 215.

Mergers in the digital sector and killer acquisitions have been, and still is, subject of significant public interest concerns, which has led to increased pressure on NCA's as well as the Commission to act swiftly and accordingly. The 'big is bad' sentiment has reached the digital markets in the last two decades, not just in the EU but across the globe.³¹⁶ At the same time, when digital solutions and innovation is being developed at a rapid pace, the EU does not want to fall behind in the innovative race to the top. As stated in *the Draghi Report*, the EU should strive forward with the ambition to be a leader in developing AI amongst other things.³¹⁷ The ambition to build, or rather to encourage, so-called 'EU Champions' is currently on the agenda within the EU to be able to effectively compete with other big players in countries such as China and the USA.³¹⁸ A balanced approach within EU competition law moving forward is therefore required to avoid overenforcement while ensuring the vital objectives are protected simultaneously. Previous Competition Commissioner Vestager did conclude, however, that current merger laws within the EU is not prohibiting this goal and that most concentrations are greenlit and that the red rape is used sparingly.³¹⁹ One can in light of the above conclude that there are two conflicting interests in merger control at the moment. Firstly, there is an ambition to address potential anti-competitive below-threshold transactions in the digital sector with the potential to hamper future innovation and lead to further market consolidation. Secondly, to be able to compete with countries at the forefront of technological development the EU is looking for ways to build EU Champions. Due the geopolitical climate, where we can see a decline in international cooperation regarding trade, innovation, and development, it appears as if the EU is going towards a more protectionist approach in the coming years. Another possibility could be that the EU sees an opportunity through AI, which will continue to grow and expand, to further foster European innovation to grow to its full potential and gain competitive advantages on the international arena.

While navigating the changing nature of digital markets and the challenges these markets present for merger control it is, however, important to ensure any tool, interpretation of law or amendments are made based on a thorough legal investigation while balancing the conflicting interests.

4.4.1 Alternative New Pathways Within the EUMR

If the turnover thresholds are the main concern for a set of transactions or concentrations, the EUMR offers a solution to revise these thresholds according to Article 1(4) and (5). However, it is uncertain whether these turnover thresholds will be subject for review solely to address killer acquisitions in the digital economy. To reach a common understanding on merger thresholds would entail a

³¹⁶ Jones & Sufrin, pp. 1076-1077.

³¹⁷ *Draghi Report*, Part B, p. 82.

³¹⁸ Jones & Sufrin, p. 1078.

³¹⁹ European Commission, Speech by EVP Margrethe Vestager at the Merger Regulation 20th Anniversary Conference, Speech of 18 April 2024. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/speech_24_2141). Last visited: 10 April 2025.

potentially complex political compromise with all 27 Member States. It is therefore more likely that alternative options are more suitable to catch these transactions on EU level which are presented below separately with examples to follow.

4.4.1.1 Transaction Value and Reversed Burden of Proof

A different non-turnover-based threshold for jurisdiction would need to be crafted in line with the objectives and purposes of the EUMR, such as legal certainty, consistency, efficiency and consumer welfare. To introduce a system based not on turnover could also interfere with national legislation within the Member States where this system already has been introduced and lead to norm collision in law. A test based on *transaction value* could potentially present the same concerns from a transaction cost and administrative burden perspective, that is, if it is too high it will not serve the designated purpose. On the contrary, setting it too low would lead to a severe number of concentrations being notifiable.³²⁰ The idea behind jurisdiction through transaction value is that this might better reflect the competitive potential of the target in industries driven by innovation. In other words, the turnover generated, which is often at zero, might not be as effective as the price tag on the firm.³²¹

A variation of this transaction value test is to compare the objective value of a target versus the price offered by an incumbent. The argument behind this proposal is based on the fact that only an incumbent who is concerned about losing potential future market shares would justify a purchase price which included a significant premium of the objective value of the target.³²²

As discussed in Chapter 4.2.1.1, a subsidiary transaction value threshold has been introduced in Germany in Chapter 7 Section 35 para. 1a GWB. This was recently tried in the Higher Regional Court of Düsseldorf where the Federal Cartel Office (Bundeskartellamt) found Adobe's acquisitions of two software companies to be notifiable due to the transaction value. However, in a press release from the Higher Regional Court of Düsseldorf the court stated that transaction value thresholds were in fact not met as the sales generated in Germany did not accurately reflect their market position and competitive potential in the Member State. The target companies had been operating and distributing the software on the market for approximately ten years, which indicates a mature market where *revenue* should be the primary indicator of the competitive potential instead.³²³ The outcome in the judgment provides further clarifications on transaction value as a jurisdictional threshold for merger control and that it does not come without difficulties in its applicability and enforcement.

³²⁰ Cf. *The Digital Report*, p. 114.

³²¹ Kuhn, Tilman, *The 16th Anniversary of the SIEC test under the EU Merger Regulation – Where do we stand?*, Journal for Competition Law (Zeitschrift für Wettbewerbsrecht, ZWER), p. 35. Available at SSRN: (<https://ssrn.com/abstract=3635289>). Last visited: 22 May 2025.

³²² Ibid.

³²³ See Press Release of Higher Regional Court of Düsseldorf, Entscheidungen des 1. Kartellsenats zur Transaktionswertschwelle des § 35 Abs. 1a GWB a.F., Pressemitteilung Nr. 8/2025, 26 February 2025. German version. Available at: (https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20250226_PM_Beschluesse-VI-Kart-2_3_24_V_/index.php). Last visited: 24 May 2025.

The concept of solely focusing on turnover and its limits in digital markets and merger control was discussed by economists in the *Stigler Report*.³²⁴ The study was conducted by well-renowned academics within both law and economics and focused on Big Tech's impact on competition law and digital platforms. As for merger control, the scholars found that transaction value certainly is a useful tool to review mergers and acquisitions where digital platforms operate to fill in the gap that presents itself with turnover-thresholds.³²⁵ In addition to the transaction value option, the *Stigler Report* suggests that a potential shift in the burden of proof is necessary when the transaction involves a dominant firm in the digital platform market. This means that the incumbent would need to prove to the NCA or the Commission that the concentration in question would not be harmful to competition in line with the SIEC test. This suggestion of shifting the burden of proof is specifically aimed at addressing the kill zone theory by Zingales et al. to address network effects and switching costs. The study also points out the issue with incumbents in the digital sector acquiring or merging with a nascent competitor or a start-up. As the incumbent acquires new technology and becomes further entrenched, it is unlikely for users to switch to a new entrant even if this new player boasts with superior technology and a more user-friendly service. The follow up effect becomes, as discussed earlier, a reduced future valuation on startups which may lead to fewer players and hampered innovation and less consumer choice.³²⁶

A shift in the burden of proof as a sector specific obligation for dominant firms the digital sector is far-reaching and would mount up to extensive transaction costs for the incumbents. This solution would not be in line with the systematics and objectives of the EUMR, however, it could be justified in certain aspects. The risk of this shift could be that firms would remain more static and less inclined to acquire new technology, which in itself can lead to a lessened incentive to innovate for entrepreneurs looking for a potential exit-strategy in the future. The EU's answer in this aspect is the DMA and the obligations gatekeepers must adhere to. The obligation to inform in Article 14 DMA sheds light on the acquisition and can, in theory, make relevant NCA's aware of the transactions and it can be examined by the Commission through Article 22 EUMR, even with its now narrower scope. However, the test based on transaction value could be implemented within the EUMR, either as a sub paragraph in the provision under Article 1 or through a separate Article with subsidiary applicability. This provision would need to be crafted in a way to be applicable mainly where there is reason to believe that the target's true value is not reflected in its generated turnover, currently or in the future. This would then be at the discretion of the Commission to conduct an analysis on a case-by-case basis and determine the provisions applicability in each case. This solution, with a provision or sub-paragraph allowing the Commission to invoke a jurisdictional threshold based on transaction value could lead to conflicts with the principle of legal certainty and the

³²⁴ *Stigler Report*, p. 16.

³²⁵ *Ibid.*

³²⁶ *Ibid.*, p. 17.

principle of freedom of contract. It may present challenges to be acceptable as EU legislation within competition law and policy, that is, setting a limit on what the purchaser can buy a company for without risking the processes of merger review by the Commission. It is therefore more likely that the Commission will continue to rely on the Member States to address the issue on national level and to encourage further cooperation to refer these below-threshold transactions to the Commission through the Dutch clause in Article 22 EUMR.³²⁷ However, future market developments of anti-competitive nature may suggest otherwise in the future which remains to be seen.

4.4.1.2 Future Market Projections within the SIEC test

The ex-ante nature of EUMR requires the Commission to assess the complexities of the future impact of a concentration. With the digital sector evolving and developing at a rapid pace it may require statements or analysis performed by industry and market experts who can with some qualified certainty project future market trends. Market trends can shift faster than in traditional sectors and it is a complicated task to predict what the future of the tech sector holds. In other words, a merger which at the time did not raise any concerns at the time of the merger may give rise to concerns later.

An example of this situation of forward projection, which has been widely discussed in the literature, is the *Facebook/WhatsApp* merger as well as Facebook's acquisition of Instagram.³²⁸ The former merger was approved by the Commission.³²⁹ Facebook's acquisition of Instagram flew under the Commission's radar due to the legal framework but was scrutinised by the Office of Fair Trading³³⁰ (OFT) in the UK.³³¹ The SIEC test was used in both cases, which were both given the green light by the relevant authority. M&A activity in these areas involving digital platforms often require a complex assessment due to the platform's multi-sidedness, which means that merging parties often are or may be competing in one market while possible mainly operating in another. Add network effects, technology and market developments over a decade and a half. Enforcers could not foresee these changes when assessing these transactions. In other words, it is an impossible task to presume how Instagram as a digital platform could and would have developed if not acquired by Facebook at the time. Hypotheticals are difficult to justify and substantiate in this area of law but necessary, nevertheless. This sentiment is also echoed in the *Draghi report*.

As for potential amendments or further clarifications to the SIEC test to be suitable in the digital sector the following can be said. Economists have suggested a 'sliding scale'-test to address this market uncertainty in the digital sector, that is, the more market power a dominant firm in the digital sector has, the more valuable are market disruptors for consumers as it generates more innovation

³²⁷ See recitals 12-14 EUMR for cooperation and the most competent authority.

³²⁸ See Case M.7217, *Facebook/WhatsApp* and the UK's Office of Fair Trading (OFT) merger case in Case ME/5525/12, *Anticipated acquisition by Facebook Inc of Instagram Inc*, 14 August 2012.

³²⁹ Case M7217, *Facebook/WhatsApp*, para. 191.

³³⁰ Now the Competition and Markets Authority, CMA.

³³¹ See *The Digital Report*, p. 115.

which in the long run is beneficial to consumers and consumer welfare.³³² However, a policy which is too far-reaching in this aspect could also hamper innovation and reduce the incentive to ‘innovate for sale’.³³³

Merger control, not just in the EU but also in other jurisdictions, has led to many mergers in the digital sector being approved in the last two decades. The reason for this could be due to many factors such as legal frameworks not being sufficient for antitrust and competition law enforcement in the digital sector. This, however, is not a unique factor for competition law and antitrust as technical development tends to move faster than the law in general. Many mergers and acquisitions in the digital sector may also have improved consumer welfare through synergies and efficiencies which very well could have been beneficial to the end-user.³³⁴ It has become apparent that there is a need to ensure *competition in innovation*, as it is likely that a lack of enforcement in this area has led to reduced innovation and less market disruptors which are key components in a healthy contestable market.³³⁵

4.4.2 Maintained Transparency Through the DMA

The DMA is largely self-executing in which gatekeepers are obligated to comply with the requirements set out in Articles 5-7 DMA. The designated gatekeeper has an obligation to demonstrate ongoing compliance according to Article 8(1) DMA. The objective of this function is to supervise the gatekeeper’s activities and provide the Commission with relevant information in regards to compliance with relevant articles in the regulation, according to Article 11(1) DMA.³³⁶ Many scholars have argued that the main objective of the DMA, other than making digital markets fair, open and contestable, is to make the transactions of designated gatekeepers visible. For the purpose of this essay, this does in fact address the killer acquisition and kill zone problems. Article 14 DMA allows for the Commission to gain information about upcoming transactions by dominant tech firms. Federico, Scott Morton and Shapiro argue that this type of data is a useful tool when examining the effects of this type of M&A activity when an incumbent acquires a nascent competitor to investigate and establish potential patterns of acquiring rivals in the digital sector.³³⁷ One could say that DMA is aiming to do exactly this. Provide transparency in concentrated digital markets dominated by a small number of players in order to further understand and develop these markets in line with the objectives of EU competition law and policy. Scholars have

³³² Federico, Giulio, Scott Morton, Fiona, Shapiro, Carl, *Innovation Policy and the Economy*, Volume 20, Issue 1, *Antitrust and Innovation: Welcoming and Protecting Disruption*, The University of Chicago Press, 2020, pp. 150-151.

³³³ *Ibid.*, pp. 152-153.

³³⁴ The ‘free to use’ services are usually driven by advertising sales and data which is not further analysed within the scope of this essay.

³³⁵ Lundqvist, *Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System*, pp. 359-360.

³³⁶ Jones & Sufrin, pp. 1238-1239.

³³⁷ See *supra* note 332.

on the other hand also pointed out that the DMA may be too far-reaching and also potentially understating the complexities of ensuring a competitive environment in digital markets, many already possible to address under ordinary competition law.³³⁸ A list of obligations to gatekeepers may not achieve competitive markets in the digital sector per se.³³⁹ However, any systematic non-compliance by a designated gatekeeper may lead to a market investigation led by the Commission according to Article 18(1) DMA. A market investigation can also be launched to investigate new services and new practices and whether these new services and practices should be added to the list of core platform services in Article 2 (Article 19(1) DMA). This is a way for the regulation to be somewhat future-proof and flexible in the ever-changing digital landscape. Digital markets are complex, and we can already see new technology developing at a rapid pace such as AI, which may not be possible to address under the DMA's scope.³⁴⁰

One way to balance out the risk of overenforcement and to decrease the heavy burden on the gatekeepers could be to introduce an efficiency defense which could be invoked by the gatekeeper as an objective justification for certain conduct. However, as for merger control and Article 14 DMA, which poses no other obligation on the gatekeeper other than to inform the Commission of intended transactions, this should be sufficient to address kill zones and killer acquisitions with support in both economic and legal theory and reasoning.

The DMA is still considered as new legislation which we have not fully seen the capabilities of.³⁴¹ It is far-reaching and sets out a comprehensive list of obligations for gatekeepers to comply with limited exceptions. Some have called the legislation a blanket regulation to address the ongoing concerns in digital markets which previous legislation could not address in a satisfying manner. As for killer acquisitions and the prevention of further kill zones it proves to be a useful tool to shed light on these transactions and to set out obligations for gatekeepers which, ideally, should lead to a less concentrated digital market through this market intervention that is called the DMA. Killer acquisitions and kill zones are not just a concern for the EU but also legislators worldwide. The DMA is a contribution from the EU to make digital markets contestable, which is a vital goal of EU competition law and policy. The system within DMA is likely to continue developing further in conjunction with Article 22 EUMR, even post-*Illumina/Grail*.

4.4.3 Increased Enforcement Ex-post – New Developments

To invoke Article 102 TFEU to review potential anti-competitive M&A activity ex-post will serve as a useful tool to address transactions which do not qualify as concentrations within the meaning of EUMR. As Article 102 TFEU and the

³³⁸ Nowag, Julian, *When the DMA's ambitious intentions interact with the EU's constitutional set-up: A future drama in three acts*, Journal of Antitrust Enforcement, Volume 12, Issue 2, Oxford University Press, 2024, p. 307.

³³⁹ Jones & Sufrin, p. 1245.

³⁴⁰ Ibid.

³⁴¹ Nowag, pp. 307-308.

‘Towercast’ option constitutes of primary EU law. Therefore, this section constitutes as a *de lege ferenda* analysis and discussion with a focus primarily on potential future developments of using the Treaties and primary EU law to capture killer acquisitions and to prevent kill zones.

As stated in AG Kokott’s Opinion, the supplementary nature of Article 102 TFEU, and the possibility to review mergers ex-post through the abuse of dominant position prohibition, is likely to “[...] contribute to the effective protection of competition in the internal market [...]”³⁴². More specifically, Kokott pointed out that ‘problematic concentrations’, which are not subject to merger control ex-ante, such as killer acquisitions, will be a *likely target* for merger control under Article 102 TFEU. Furthermore, the apparent regulatory gap which has emerged in the digital sector due to rapid market developments leads to an increased need for further tools within the EU legal framework of merger control. This ex-post control of Article 102 TFEU, which has now been confirmed in the Towercast ruling, should be possible to invoke for NCA’s to review potential mergers or acquisitions in highly concentrated markets, such as present in the digital sector.³⁴³ In other words, Article 102 TFEU should be applicable in cases where undertakings with significant market shares and market power acquire targets with low turnover with the intent to eliminate future competitive pressure from the target.

AG Kokott’s Opinion preceding the Towercast ruling by the CJEU serves as a valuable source of law in this case even though the Opinion itself is not legally binding, according to Article 288 TFEU. This conclusion is primarily based on the fact that the Opinion was widely accepted by the CJEU as the final interpreter of EU law in its ruling in the case.³⁴⁴ In conclusion, Article 102 TFEU will, in light of the outcome in the *Towercast* ruling, likely be invoked by NCA’s in the future if a concentration without EU dimension also constitutes an abuse of a dominant position.³⁴⁵ The direct applicability and direct effect of Article 102 TFEU based on the *Towercast* ruling will likely encourage other Member States to view the provision as a viable option to review mergers or acquisitions ex-post, which could not have been reviewed under EUMR. This conclusion by the CJEU confirms that primary EU law can be invoked for merger control, which is also clearly stated in the EUMR recitals.³⁴⁶ These developments are beneficial to the objective of protecting effective competition on the internal market and ultimately consumer welfare. As for legal certainty for the merging parties, EUMR should be applied as a priority for merger control ex-ante.³⁴⁷ However, a concentration which is not subject to EUMR due to a lack of EU dimension may still be subject to examination ex-post according to Article 102 TFEU. This conclusion resonates and aligns with the systematics and objectives of merger control.

³⁴² Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, Opinion of Advocate General Kokott, p. 48.

³⁴³ Ibid.

³⁴⁴ Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, CJEU, paras. 39-41.

³⁴⁵ Ibid., para. 41.

³⁴⁶ Recital 7 EUMR.

³⁴⁷ Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l’Économie*, CJEU, para. 40.

These two legal frameworks supplement one another. To avoid a collision of legal norms, it is vital that these systematic structures are considered by both the NCA's and the EU courts. To avoid double assessment, which would further decrease legal certainty, a merger or an acquisition which has been approved after an assessment *ex ante* should not be subject to an assessment *ex post*.³⁴⁸ AG Kokott argued that the intended purpose of EUMR and merger control is to avoid double assessment of any concentration. The legal principle *lex specialis derogate legi generali*, should therefore be applicable in such cases, even if Article 102 TFEU has direct effect and is directly applicable. As for killer acquisitions, which often escape merger control due to the low turnover thresholds, Article 102 TFEU would not contribute to this double assessment. However, if a concentration has been found to be compatible with the internal market, it cannot at a later stage be subject to *ex-post* review, unless the conduct by the undertaking in question goes beyond the initial approval and which constitutes as an abuse of dominant position.³⁴⁹ Therefore, in order to avoid such an outcome, which would create uncertainty and potentially hinder M&A activity which ultimately could affect society and the economy, undertakings will need to prepare for potential review both *ex-ante* and *ex-post* due to the recent developments within primary EU law and merger control. To shed some light on the situation, an example of this is included in the below section to illustrate future developments of *ex-post* enforcements in merger control in digital markets.

The FTC has brought forward antitrust case proceedings against Meta which is currently pending.³⁵⁰ The case is focusing on the alleged systematic strategy to acquire competitors to eliminate potential future threats, according to the FTC. The main acquisitions of concern are WhatsApp and Instagram, both of which were approved previously.³⁵¹ The FTC as the plaintiff in the case argues that Meta's growth through acquisitions is similar to a monopoly which hinders innovation and is harmful to consumers. The defendant, Meta, argues on the other hand that these acquisitions had been reviewed and cleared a decade ago and that those decisions should be final.³⁵²

The above example of an ongoing case demonstrates this continued delicate balance of clearing M&A activity which could be scrutinised at a later stage *ex-post*. Furthermore, the issue of killer acquisitions and kill zones is still relevant and present in the digital sector. To refer this back to EU competition law the following can be said. In summary, any transaction previously approved by the Commission through the EUMR *ex-ante* could, at least in theory, be reviewed again at a later stage if the conduct constitutes as an abuse of a dominant position

³⁴⁸ Case C-449/21, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, Opinion of Advocate General Kokott, paras. 57-59.

³⁴⁹ *Ibid.*, para. 60.

³⁵⁰ As of April 2025.

³⁵¹ Pending case in the District of Columbia, United States, *FTC v. Meta Platforms, Inc.*

³⁵² Newstead, Jennifer, Meta, The FTC's Weak Case Against Meta Ignores Reality, April 13 2025. Available at: (<https://about.fb.com/news/2025/04/ftcs-weak-case-against-meta-ignores-reality/>). Last visited: 24 April 2025.

according to Article 102 TFEU, which the FTC argues in the case brought forward against Meta in the United States.

The *Tovercast* doctrine is likely to continue being applicable in different cases and scenarios with NCA's invoking primary law for potential infringements. The Belgian Competition Authority has opened ex-ante proceedings against a possible anti-competitive acquisition in the flour market in Belgium by invoking Article 101 TFEU. The target company generated turnover below the relevant thresholds and the domestic merger control system lacked call-in powers.³⁵³

4.4.4 Opportunities and Obstacles for the Commission

The above section consists of potential future developments and adjustments necessary to address potential anti-competitive conduct such as killer acquisitions and the creation of kill zones around dominant firms. The jurisdictional thresholds within the EUMR remain turnover-based as of now. Other value-based tests such as transaction value has been discussed as a potential option by both legal scholars and practitioners as a test which would sufficiently address these types of transactions in the digital sector. Prominent economists have concluded that a sole focus on turnover thresholds is not suitable for mergers in the digital economy and a shift in burden of proof could be a viable option. Furthermore, a more forward-looking SIEC test could also be beneficial to determine the true competitive effects of a merger or an acquisition. In order to be as precise as possible in the competitive assessment, expert knowledge in digital markets and market trends may be necessary to complement the economic and legal analysis. This could promote precision in terms of detecting potential anti-competitive mergers but also uncertainty for the parties.

As for the DMA, the challenge ahead is to balance the risk of overenforcement against the pro-competitive effects from the gatekeeper's far-reaching obligations. The regulation is likely to continue making M&A activity visible and further contribute to referrals to the Commission which in turn could lead to more concentrations being scrutinised under merger control laws.

Article 102 TFEU and the *Tovercast* doctrine is currently a vital supplement to merger control and will continue to be developed in the Member States. However, there may be a risk of double assessment of mergers which leads to legal uncertainty.

The EU merger control system is not fully harmonised which creates a demand for understanding of the systematic structures of the different regulations and how they relate to EU primary law. NCA's are likely to challenge different transactions based on these legal tools which could result in further case law from the EU courts which will in turn provide clarity and legal certainty for below-threshold mergers and acquisitions.

³⁵³ Belgian Competition Authority, The Belgian Competition Authority opens ex-ante proceedings into the possible anti-competitive effects of Dossche Mills' proposed takeover of Ceres' artisan flour business, Press Release, No. 3/2025, 22 January 2025. Available at: (<https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-3-2025>). Last visited: 24 May 2025.

Any future amendment, reinterpretation or clarification of EU competition law and policy, or more specifically, EU merger control, is still a pressing challenge for the Commission to address.³⁵⁴ The torch has now been passed to new Commissioner Teresa Ribera. The mission letter from president of the European Commission, Ursula von der Leyen, outlines the coming approach and focus for the coming years for Ribera.³⁵⁵ One of Ribera's responsibilities will be to oversee the Horizontal Merger Guidelines with a focus on both innovation and efficiencies in M&A activity. Killer acquisitions are mentioned specifically as a 'particular challenge', which proves that these transactions are still a vital focus point for the Commission due to their impact on competition, innovation, the economy, and society as a whole. Furthermore, digital markets, their dynamics, and the challenges they present will be addressed as well as 'rapid and effective enforcements' under the DMA.³⁵⁶ On the other hand, there is an ambition within competition policy in the EU to allow for EU companies to scale up for the global markets through an increased incentive to invest, innovate and grow.³⁵⁷ Stricter merger policies could effectively hinder this very objective, however, as stated in the *Draghi report*, a new approach could be on the horizon. The new merger guidelines could include an 'innovation defense' where merging parties can present evidence showing that a merger does not decrease the ability or incentive to innovate post-merger.³⁵⁸ It remains to be seen whether a new approach will be adopted.

The Commission has on 8 May 2025 launched a public consultation during the ongoing review on the upcoming merger guidelines. The new guidelines will emphasise the need for both the incentive to innovate and to invest. In a post-*Illumina/Grail* world, the guidelines may include new tools to properly address below-threshold transactions and killer acquisitions in digital markets to ensure dynamic competition for innovation to thrive. With the need for sector specific expertise, it is necessary for scholars and practitioners to be involved in the process of addressing these gaps in EU merger control.³⁵⁹ Ribera mentioned that the merger guidelines will address changes in market structures, such as digitalisation, as well as ensuring further innovation and strengthened positions for European companies, which is clearly in line with the recommendations stated in the *Draghi report*.³⁶⁰

³⁵⁴ As of May 2025.

³⁵⁵ European Commission, *Mission Letter: Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean Just and Competitive Transition*, Ursula von der Leyen, President of the European Commission, Brussels, 17 September 2024.

³⁵⁶ *Ibid.*, p. 7.

³⁵⁷ *Ibid.*, p. 5.

³⁵⁸ *Draghi Report*, Part B, p. 299.

³⁵⁹ European Commission, Commission seeks feedback on the review of EU merger guidelines, Press Release of 8 May 2025. Available at: (https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1141). Last visited: 9 May 2025.

³⁶⁰ *Ibid.*

5 Summary and Concluding Remarks

One of the reasons behind the market concentration in digital markets over the previous two decades is due to underenforcement and a legal framework which has been unable to ‘catch’ certain transactions which do not qualify as concentrations within the meaning of Article 3 EUMR or without EU dimension according to Article 1 EUMR. These transactions have escaped merger review as many start-ups in the digital sector generate no turnover or turnover below the set-out thresholds in EUMR. The young innovative firm’s primary goal may not be to generate maximum turnover in a traditional sense due to lower operational costs. Other valuable assets are pursued in the initial stages, such as growing the customer base or perfecting the software to further enhance the user experience. This has led to firms within Big Tech growing and expanding at a rapid pace through multiple acquisitions over time which have flown under the Commission’s radar as the jurisdictional thresholds are not met. Cunningham et al. published the phenomenon of killer acquisitions present in the pharma sector and this essay has investigated this phenomenon in the digital sector from an EU merger control perspective. This essay demonstrates support of the theory’s bearings in the digital economy through analogy. The issue of killer acquisitions is present in the digital economy, and it presents itself as a challenge for NCA’s, the Commission and policymakers, both in the Member States and the EU. The closely related phenomenon of kill zones studied by Zingales et al. in the area surrounding Big Tech has in this essay shown to have an impact on both the incentive to innovate and incentive to invest in promising undertakings in the early stages of development which has the potential of further entrenchment and consolidation in digital markets.

This essay has aimed to analyse and investigate the legal framework of merger control within EU competition law and policy in relation to both killer acquisitions and the creation of kill zones in the digital economy, with a focus on the markets surrounding Big Tech. The EUMR, the DMA and Article 102 TFEU have been analysed thoroughly in light of the economic theories as well as the relationship between potential overenforcement and its impact on legal certainty for merging parties. The research questions are answered below and summarised based on the findings in Chapters 2-4.

1) *How do the economic theories of ‘killer acquisitions’ and ‘kill zones’ relate to the EU merger control policy and objectives?* The first research question focused primarily on establishing the bearings of the killer acquisition theory in digital markets and how the theory relates to the objectives of EU merger control. The theory originates from an empirical economic study in the pharma sector where Cunningham

et al. found that incumbents through acquisitions sought to eliminate promising innovative projects before these entered the market. The scholars stated in their conclusion that the theory could be relevant even in other sectors where firms acquire technologies from nascent firms, even if it from an external point of view appears as if the incumbent integrates the innovation rather than discontinuing it.³⁶¹

As for the digital sector, it has been argued and debated whether and to what extent this phenomenon occurs. Are these acquisitions aimed at incorporation and integration rather than elimination? Empirical studies and data available support both claims to varying degrees. De Bary & Gautier found positive effects on innovation post-acquisition which slowed down after approximately 1.5 years. However, the findings suggest that acquisitions could only be justified with a strategic competitive motive in mind to eliminate potential competitive threats from the target's innovation.³⁶² Gautier & Lamesch concluded that approximately 60% of acquisitions by GAFAM were discontinued or shut down after acquisition.³⁶³ On the contrary, Ivaldi et al. found that the theory had minimal bearings in the digital sector after studying digital merger cases within the EU. Ivaldi et al. did not reject the theory in its entirety but concluded that any stricter policy must be based on verifiable evidence rather than indications.³⁶⁴

M&A activity regarding innovative start-ups can both lead to pro-competitive effects such as efficiencies, synergies and further innovation which can benefit consumers, and anti-competitive effects such as stifled innovation, foreclosure, higher barriers to entry through immense market consolidation which can be harmful to consumers. Any merger or acquisition could lead to efficiencies and superior products or services, however, if there is systematic conduct present to eliminate a future competitive threat or swiftly discontinue a certain technology post-acquisition, this would ultimately reduce the competitive pressure in these markets which is not in line with the objectives for EU competition law and policy, according to Article 3 TEU and Protocol No. 27 on the internal market and competition. Further measures to address these transactions are therefore justified and encouraged.

The closely related kill zone theory investigated by Zingales et al. indicates difficulties for new innovative technology to enter the market to compete where Big Tech is present. The research suggests that these types of mergers or acquisitions tend to make cutting-edge technology available to the wider public immediately, which reduces the incentive for the early adopters to switch to the nascent competitor, the start-up. This, in turn, reduces the incentive to innovate as the start-ups are unable to gain a customer base which will decrease both the current and future potential valuation of the product or service which could lead to a decreased incentive to invest.³⁶⁵ However, the balancing act between the relevant interests in this aspect is complex and may ultimately be out of reach for EU

³⁶¹ Cunningham et al., p. 696.

³⁶² *Supra* note 231-233.

³⁶³ *Supra* note 234-235.

³⁶⁴ *Supra* note 220-222.

³⁶⁵ Zingales et al., p. 35.

competition law. One driving factor for many entrepreneurs is to innovate, merge or be acquired and then exit, a so-called ‘innovate for sale’. These acquisitions and the creation of kill zones are not anti-competitive conduct per se, and the assessment requires a nuanced analysis considering all relevant factors. The phenomenon is empirically proven to exist in digital markets and could lead to further entrenchment, reduced incentive to innovate and expand these kill zones by eliminating future competitive threats and potentially distort competition on the internal market as well as reduce consumer welfare. Questions arise as to whether EU competition law is the most suitable avenue to address this phenomenon. The DMA may serve as a future useful tool in this aspect to avoid further entrenchment and to promote contestability. The overhanging risk of overenforcement through targeted sector-specific legislation may achieve contestability, fairness, and openness. However, this needs to be balanced against the other conflicting interests to ensure further efficiencies and synergies in digital markets.

2) *Is the legal framework sufficiently comprehensive or are clarifications or amendments required to address killer acquisitions and kill zones?* The main legal instruments examined and analysed in this essay are the EUMR, the DMA and Article 102 TFEU. Scholars, practitioners, legislators, and policymakers have analysed EUMR and the tools within the regulation to catch killer acquisitions after the CJEU’s ruling in *Illumina/Grail*. The extensive interpretation of Article 22 EUMR by the Commission was found to be against the aims and objectives of the EUMR and put the ex-ante system for merger control at risk. The Commission will continue to accept referrals under Article 22 EUMR and has now encouraged the Member States to revise national merger laws to address this M&A activity in the digital sector. Germany and Austria are examples of Member States introducing alternatives not based solely on generated turnover. The interplay between Article 22 EUMR and Article 14 DMA is still a viable legal option to make these transactions visible and then for the relevant Member State to refer any transaction to the Commission. This system has the potential to catch these killer acquisitions, even after the recent ruling in *Illumina/Grail*. This result leads to a scattered legal system for merger control in the EU where the Commission relies on the Member State’s cooperation in order to address an ongoing concern. However, cooperation in a wider network of public authorities is a vital part of the EUMR with the aim of having the case in question reviewed by the most appropriate authority, according to recitals 12-14 EUMR. A system based on an over-reliance on the Member States to enact legislation with alternative thresholds for jurisdiction may lead to fragmentation, inconsistencies, and unpredictability for merging parties and counteract the one stop shop principle of the EUMR. An amendment to include a test based on other criteria than generated turnover, such as transaction value is possible as well as the other suggestions discussed in the de lege ferenda section above. Examples and suggestions include a reversed burden of proof and amended turnover thresholds according to Article 1 (4) and (5) EUMR. However, this is a political challenge within the EU, and it is more likely that Ribera will either accept the EUMR in its current wording or issue a new updated guidance paper with new guidelines to the referral mechanism. The new

Horizontal Merger Guidelines are also likely to include further tools to address killer acquisitions.

The SIEC test as stated in Article 2(3) EUMR needs to be more forward-looking than before to address these transactions. The *Facebook/WhatsApp* merger forced the Commission to assess the markets both firms were operating in at the time of the merger and hypothetical future developments. The concentration was found to be compatible with the internal market at the time. As stated in the *Draghi Report*, there is no need to amend the SIEC test, the broad wording of the provision allows for a more agile forward-looking approach, which must be adopted to address the potential reduced innovation through these transactions. Industry experts may prove to be a useful addition to utilise further in the competitive assessment. Interdisciplinary cooperation through further inclusion of market and industry experts conducting future market projections could serve as a useful addition in this aspect.

As for Article 102 TFEU and the ‘Towercast option’, which allows for ex-post review of mergers, these will serve as a vital supplement to merger control in the future. The *Towercast* judgment allows for a merger to be reviewed ex-post, should the conduct amount to abuse of a dominant position. This means that a merger which was found to be compatible with the internal market, according to Article 2(2) EUMR, can at a later stage be found to be *incompatible* with the internal market through application of Article 102 TFEU. In other words, a concentration can be examined at a later stage. The risk of double enforcement is present and an example of this is the case against Meta brought forward by the FTC in the USA. The use of primary EU law and the Treaties will be of supplementary nature to the EUMR, and we are likely to see more case law brought forward by the Member States in regards to both Article 101 and 102 TFEU. Another relevant difference in regards to Article 102 TFEU is the fact that the provision is not solely limited to just scrutinise *concentrations*, which is the case with the EUMR (Article 3 EUMR).

A widened scope of the referral system, alternative jurisdictional thresholds, a reversed burden of proof and a forward-looking approach within the SIEC test should address killer acquisitions. Kill zones can be prevented through the ex-ante obligations in the DMA and the DMA in conjunction with the EUMR as well as the opportunity to invoke Article 102 TFEU ex-post to a further extent.

3) *How can killer acquisitions be reviewed effectively without undermining the principle of legal certainty?* Legal certainty for merging parties is one of the primary objectives of the EUMR. When a firm is looking to merge or acquire a promising start-up, it must be possible for said firm to predict jurisdiction over a concentration. The one-stop shop principle in Article 21 EUMR as well as the turnover-based nature of the EUMR aims to provide merging parties with legal certainty. That is, are the relevant thresholds met in Article 1 EUMR and if the transaction in question qualifies as a concentration according to Article 3 EUMR, then the Commission has sole jurisdiction of the concentration according to Article 21 EUMR. If a concentration is examined according to the above scheme, then the principle of legal certainty is unlikely to be undermined. The relevant parties can in these typical situations foresee and predict when and where a potential concentration

will need to be notified. However, killer acquisitions and the reviewing process of these transactions are more complex.

Killer acquisitions fall outside the scope of the EUMR in most situations. These transactions are then presumed to not contribute to significant structural changes and go beyond national borders of any Member State, according to recital 7 EUMR. In other words, the EU legislator has deemed these transactions being more suitable to be reviewed in the relevant Member State according to that Member State's national legislation. As for killer acquisitions, which are below-threshold transactions, these may still have an impact on effective competition and may therefore be relevant to examine on EU level rather than on national level. Article 22 EUMR and the referral system has been, and still is, the main gateway for the Commission to review these killer acquisitions in the digital sector. The CJEU's ruling in *Illumina/Grail* has made the previous extensive interpretation of the Dutch Clause invalid. AG Kokott and the CJEU emphasised the importance of legal certainty for merger control. Any new approach or revision of policy to catch killer acquisitions *must* adhere to the outcome in *Illumina/Grail*. If the primary issue at hand is linked to the turnover-thresholds, these can be revised according to Article 1(4) and (5) EUMR. Any other strategy to target this specific issue must be in line with the purposes and objectives of EU competition law and policy and merger control, which was also argued by both AG Kokott and the CJEU. If Commissioner Ribera should choose to issue a new guidance paper on the referral mechanism in Article 22 EUMR it is vital that it does not undermine the outcome in recent case law. The current approach of encouraging Member States to refer transactions to the Commission may be the only adequate alternative at the moment, however, it may further fragment merger control and increase legal uncertainty which is why increased transparency from the Commission when cooperating with the NCA's is required to uphold the vital legal principle and the rule of law.

The rule of law (Article 2 TEU) must be adhered to when addressing complex transactions such as killer acquisitions to ensure vital principles are upheld. According to recital 11 EUMR, legal certainty must be ensured when invoking Article 22 EUMR. Furthermore, EUMR must be interpreted and applied in accordance with the rights and principles in the CFR, as stated in recital 36 EUMR. Settled case law strives for consistency and foreseeability in merger control as vital interests which cannot be overlooked in any endeavor to catch killer acquisitions.

With the potential to review transactions both ex-ante and ex-post should merging parties expect further and more rigorous enforcement, as seen in the ongoing case against Meta brought forward by the FTC. It remains to be seen if a similar development with increased enforcement in the digital sector is likely to occur in the EU. Any amendment, new approach or interpretation must be in line with the relevant objectives and aims. Policymakers and enforcers must go beyond the letter of the law in isolation and weigh the different interests against each other in a nuanced analysis.

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