Capturing Killer Acquisitions in Digital Markets under the European Union Merger Control Rules

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Abstract: A few years ago, a novel development identified as "Killer Acquisitions" surfaced within the domain of EU Merger Control: incumbent undertakings were under suspicion of acquiring promising startups with the intent of eliminating prospective market competitors. Big Tech companies in digital markets are among the usual suspects in this kind of transaction. While this strategy can surely serve to cement incumbent platforms' dominant position in the digital markets, the issue resides in the impracticability of capturing these acquisitions within the framework of EU Merger Control regulations due to the impossibility of complying with the stipulated threshold requirements which respectively brought about the enhancement of the European Commission's toolbox. This paper will display the options to carry out those amendments and what options were opted for. It will address whether the proposed methodologies for addressing killer acquisitions represent viable solutions to the issue. This paper aims to clarify the challenges faced by digital platforms engaged in business operations and strategic merger and acquisition planning within the European Union. This work's focus is also on elucidating the challenges that digital platforms engaged in business operations and mergers and acquisitions within the EU may confront.

Keywords: Killer Acquisitions; EU Merger Control; Article 22 Referrals; EUMR; DMA.

1 Introduction

The phenomenon of "killer acquisitions" was first introduced in the doctrine in 2019[1]. The concept draws attention to the acquisitions in which incumbent undertakings acquire start-ups to discontinue the rival product, leading to the distortion of future competition. Killer acquisitions are especially significant in the markets where innovation is important, such as the pharmaceutical or digital sectors. In the latter, Big Tech[2] companies are usually suspected of being engaged in this peculiar activity, since it can be considered as a strategy to make their market power uncontestable through the acquisition of potential competitors.

When this phenomenon first emerged, the existing legal framework was not able to capture killer acquisitions within the European Union (EU). A massive boom happened in the legal doctrine on discussion[3] of the potential ways to reform the legal framework of the

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1. See Colleen Cunningham, Florian Ederer, Song Ma, Killer Acquisitions, 126(3) Journal of Political Economy, 649 (2021).

2. Big Tech, also known as the Tech Giants, refers to the most dominant companies in the information technology industry, most notably the five largest American tech companies: Google (Alphabet), Amazon, Facebook (Meta), Apple, and Microsoft. Sometimes these big five companies are called GAFAM companies.

3. See, for example Claire Turgot, Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime, 5(2), European Competition & Regulatory Law Review 112, (2021); Nicholas Levy, Andris Rimsa & Bianca Buzatu, The European Commission s New Merger Referral Policy: A Creative Reform or an Unnecessary End to Brightline Jurisdictional Rules?, 5(4) European

EU Merger Regulation (EUMR)[4]. This occurred because the merger notification thresholds did not give the European Commission (EC) the authority to intervene against potential killer acquisitions, therefore several options were brought to the table to address this gap[5].

In March 2021, the EC published a Guidance[6] encouraging National Competition Authorities (NCA) of member States (MS) to refer cases that fall below the EU and national thresholds to the EC. This served the purpose of capturing transactions, especially killer acquisitions, that might otherwise escape review under the EU and MSs merger control rules. In April 2021, the Guidance was first applied to refer Illumina/Grail transactions to the EC[7]. The EC accepted that referral and this position was upheld by the General Court (GC) as well. Such usage of Article 22 of EUMR led to huge controversies and caused wide-ranging concerns among undertakings in digital markets.

Meanwhile, the Digital Markets Act[8] (DMA) entered into force in November 2022, containing an obligation for gatekeepers[9] to notify any merger involving providers of services in the digital sector, irrespective of whether the national, or EU, merger turnover thresholds were met[10].

Competition & Regulatory Law Review 364 (2021); Nicholas Levy, Henry Mostyn & Bianca Buzatu, Reforming EU merger control to capture killer acquisitions – the case for caution, 19(2) Competition Journal Law, 51 (2020); Tânia Luísa; Martins, Margot Lopes; Nunes, Raquel Marques, New trends in merger control: capturing the so-called killer acquisitions... and everything else, 57 Actualidad Jurídica Uría Menéndez 33, (2021); Vaclav Smejkal, Concentrations in Digital Sector – A New EU Antitrust Standard for Killer Acquisitions Needed?, 7(2) InterEULawEast 1, (2020); Abhishek Tripathy & Akshita Totla, Changing contours of Merger Control: Exploring the enforcement gap in regulating nascent acquisitions, 8(2) NLUJ Law Review 74, (2021).

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

5. See infra.

6. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 31 March 2021, OJ C 113 (Communication from the Commission).

7. T-227/21, Illumina Inc v Commission, EU:T:2022:447.

8. Council Regulation on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 12 October 2012, OJ L 265.

9. It will be further provided under the second section of this paper that Big Tech companies – GAFAM, are also targeted under the term of gatekeepers .

10. Article 14, DMA 2022.

This paper intends to shed light on the attempted efforts to fill this enforcement gap. In the first section, the paper will draw a clear picture of the killer acquisitions problem, establish the need to expand the jurisdictional scope of the EUMR, depict how some MSs addressed this issue, and discuss various possible solutions that could have been adopted. The second section will discuss a new reading and usage of Article 22 of the EUMR referrals regime and, in particular, what kind of difficulties it can cause the companies planning mergers or acquisitions within the EU, and the obligation introduced by the DMA to notify the mergers. In addition, it seeks to provide answers to the concerns of whether altering the status quo in the easiest way possible is a good solution to the issue in question and, if not, what the effective options to tackle this issue are. It will also try to depict what kind of challenges digital platforms can face in the future due to the recent alterations of merger control rules. These objectives will be pursued by using and analyzing the treaty provisions of EU law, the CJEU case law, the EC's decision-making practice, the EC's soft law, and the different views of scholars in the legal doctrine.

2 Capturing killer acquisitions in digital markets under EU Merger Control; Difficulties and possibilities

2.1 The enforcement gap in the EU Merger Control

The EUMR applies to concentrations with an EU dimension[11]. In particular, Article 1 of the EUMR requires that certain turnover thresholds have to be met to do so[12].

11. See Alison Jones and Brenda Sufrin, EU competition law: text, cases, and materials, at chapter 15 p.12 (Oxford University Press) (7th ed. 2019) (1st ed. 2010).

12. According to articles 1(2) and 1(3) of EUMR, concentrations are deemed to have an EU dimension where: (i) the combined worldwide turnover exceeds 5 billion, at least two of the parties have EU-wide turnover exceeding 250 million, and the parties do not achieve more than two-thirds of their EU turnover in the one Member State, or (ii) the combined worldwide turnover exceeds 2.5 billion, the EU-wide turnover of at least two of the parties exceed 100 million, in each of the three member States, the combined turnover of all parties exceeds 100 million, in each of those member States, the turnover of at least two of the parties exceeds 25 million, and the

Those thresholds were designed to create "precise and objective criteria" which can lead to the straightforward application of EUMR to better reflect "the requirements of legal certainty and speed"[13] and to "make a clear allocation between the interventions to be made by the national and by the Community authorities"[14]. Therefore, EUMR can only capture "major concentrations"[15] that are deemed to have an EU dimension.

Article 21 of EUMR entails the "one-stop shop" principle[16]: this means that, if the concentration has an EU dimension, only EUMR will be applied - therefore, other EU or national competition laws are excluded -, and the EC will have sole jurisdiction over such transactions[17]. The purpose is to establish a clear division of powers between the NCAs and the EC, avoiding joint jurisdiction over one concentration[18]. Such kind of competence division between MSs and the EC is due to the principle of subsidiarity[19].

However, the concept of killer acquisitions deals with the acquisition of start-ups which, at the time of the event, have minimal or no turnover at all, leaving them out of the European Union s control. They could be referred to the EC only if they fell within the competence of the particular MS[20], which was unlikely since the MSs had similar thresholds. Furthermore, it has been established that the

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parties do not achieve more than two-thirds of their individual EU-wide turnover in one Member State .

13. T-417/05, Endesa, SA v Commission of the European Communities, EU:T:2006:219, para 209.

14. C-202/06 P, Cementbouw Handel & Industrie v. Commission, EU:T:2006:64, para 37.

15. Recitals 8 and 20, Council Regulation (EC) on the control of concentrations between undertakings (the EC Merger Regulation), 20 January 2004, 2004/139 OJ L24.

16. See Jones and Surfin, EU competition law: text, cases, and materials at 24 (cited in note 11).

17. See ibid.

18. Reading together article 1 and 21 of EUMR means that the EC has no competence to review concentrations that lack an EU dimension; such concentrations are instead subject to review by NCAs if they meet national jurisdictional thresholds.

19. See Paragraph 2, Report on the Functioning of Regulation No 139/2004, 18 June 2009, COM (2009) 281 final (Communication from the Commission to the Council).

20. Under the conditions set out in Articles 4 (5) and 22 of EUMR.

enforcement gap used to exist in EU Merger Control but it was not able to capture killer acquisitions. This brought about discussions of reforming the EU Merger Control. This paper will now turn to establish whether there was an actual need for reformation in order to capture killer acquisitions in digital markets, or not.

2.2 Need for intervention, was there a necessity to fill the enforcement gap?

Big Tech companies are usually the ones suspected of being engaged in killer acquisitions, as they use this concept as a strategy to make their market power impregnable through the acquisition of potential competitors. The main concern about killer acquisitions carried out by GAFAM is that these Big Tech companies take advantage of their scale and scope, direct and indirect network effects, and more varied data collections, thus making their offers irresistible for consumers, and constituting barriers to switching[21]. By doing so, the affected digital markets became incontestable as they tipped in favor of the serial acquiring digital platforms. Empirical evidence should be drawn to illustrate this better: between 2008 and 2018, Google acquired nearly 168 companies, Facebook purchased 71 companies, and, finally, Amazon bought 60 companies[22]. All these acquisitions had a massive impact on the growth of these Big Tech companies.

Competition law scrutinizes killer acquisitions as "a particular variation of the more general loss of potential competition through the acquisition of a nascent firm" theory of harm"[23]. These acquisitions can result in reduced competition, and in the potential loss of both product and technology itself, which in turn threatens the efficiency of innovative sectors, ultimately impacting consumer welfare.

21. See Peter Alexiadis and Zuzanna Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review, 16(2) Indian Journal of Law and Technology, 65 (2020)

22. Elena Argentesi et al, Ex-post Assessment of Merger Control Decisions in Digital Markets (Learlab, June 2019), available at https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf (last visited November 29, 2023)

23. OECD, Start-ups, Killer Acquisitions and Merger Control (OECD, June 2020), available at https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf (last visited November 29, 2023).

However, it is important to note that the acquisitions of start-ups do not always lead to such detrimental effects and it cannot be stated that all those above-mentioned acquisitions by GAFAM companies are killer acquisitions. To state that, competition law has to provide criteria under which these transactions are to be labeled potential killer acquisitions. Before such a definition, the relevant competition authorities have to first get jurisdiction over those concentrations. This means that, within the framework of merger control rules, they should be able to capture and review those acquisitions.

However, some authors consider that clear evidence should be referred to in order to establish a significant enforcement gap[24]. By referring to the Cunningham report, a distinguishing line was drawn between digital and pharmaceutical sectors: while some pharmaceutical companies may acquire nascent rivals to terminate innovation that threatens to challenge established drugs, digital platforms often acquire innovative start-ups to expand and integrate the acquired product or service[25]. According to them, these are not typical killer acquisitions as depicted in the Cunningham report, and there are even some more proponents of this line of argumentation. Certain scholars also assert that within digital markets, in contrast to the pharmaceutical industry, the desire will develop the services of start-up firms, rather than shutting them down[26]. They, therefore, believe that since product development is less structured and the pace and success of innovation are more problematic in digital markets, assessing the theory of harm will be more complex[27].

These concerns are justifiable, yet one issue must be taken into consideration: it is not just about killing the product itself, but also about the "acquisitions for the purpose of killing or taming a potential future threat to the acquirer's core business"[28]. The problem here is:

24. See Nicholas Levy, Henry Mostyn & Bianca Buzatu, Reforming EU merger control to capture killer acquisitions – the case for caution, 19(2) Competition Journal Law, 51 (2020).

25. See id, at 53.

26. See Alexiadis and Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review, at 69 (cited in note 21).

27. See ibid.

28. Gregory Crawford, Tommaso Valletti, Cristina Caffarra, How Tech Rolls: Potential Competition and Reverse Killer Acquisitions (CEPR, May 11 2020), available

"What innovation by the buyer is foregone as a result of it buying a business it could have built organically instead?"[29]. Therefore, concern about needed interventions must be addressed, given the overall intensity of innovation efforts in the economy and its impact on consumer welfare[30].

It is necessary to state, however, that strong evidence is needed to justify any legislative reform. To this end, as also emphasized by Commissioner Vestager in 2020, there is a need to be respectful and very careful in investigating the evidence before imposing wide-ranging alterations to the EUMR[31]. It is mentioned by the EC in 2021 that, between 2015 and 2019, 87 transactions (42 in digital, 24 in pharmaceutical, and 21 in the other sectors) might have possibly merited a revision because of horizontal overlaps or other commercial links. Especially in 27 of them, transaction value exceeded the target firm s turnover by a ratio of 10 or more[32]. However, before implementing any wide-ranging alterations to the EUMR, the EC should still seek to better examine those unreported transactions where it considers that they were wrongly chosen to establish stronger evidence.

Maybe that is the reason why instead of opting for any reforms which will be examined in the next subsection, the EC went on to adopt its very controversial Guidance on Article 22 of EUMR.

2.3 Different proposals to reform the enforcement gap in EU Merger Control

When the jurisdictional gap first emerged, different proposals were brought to reform enforcement rules. This paper will now turn to some of them and look at their intricacies and criticisms.

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at https://cepr.org/voxeu/blogs-and-reviews/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions (last visited November 29, 2023).

29. See ibid.

30. See ibid.

31. See Michael Acton, Vestager careful about new merger thresholds to catch killer acquisitions, MLex, April 24, 2020, available at https://mlexmarketinsight.com/news/insight/vestager-careful-about-new-merger-thresholds-to-catch-killer-acquisitions (last visited November 29, 2023).

32. See Paragraph 105, Evaluation of procedural and jurisdictional aspects of EU merger control 26 March 2021, SWD(2021) 66 final (Commission Staff Working Document).

Lowering turnover thresholds[33] was heavily faulted as being burdensome and time-consuming since it could have potentially led to capturing large numbers of unproblematic transactions. Therefore, it was rejected by the EU Special Advisors' Report[34].

It was also proposed to demand certain EU-wide turnover not from all participants in the transaction, but from only one of them, especially from the acquirer[35]. This option was also dismissed because it could have allowed, for example, a US tech giant to enter the EU market through its first acquisition outside the scope of the EU merger control.

Another highlighted possibility was the imposition of a new merger threshold for killer acquisitions based on the "transaction values"[36], as already implemented in some MSs including Germany and Austria[37].

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33. See Vaclav Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? 7 Intereulaweast 1, 4 (2020) (as a matter of fact, it is possible to lower turnover thresholds as a system for this provided with articles 1(4) and (5) of the EUMR. Following a proposal from the EC, the Council can change the size of the thresholds by a qualified majority vote. Nevertheless, the wording of these paragraphs (on the basis of statistical data that may be regularly provided by the member States) means that that kind of change can occur to reflect the graduate expansion of companies turnovers or the inflation rates).

34. See J. Crémer, Y-A de Montjoye and H. Schweitzer, Competition Policy for the digital era at 114, (March 29, 2019) (Final Report), available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf (last visited November 29, 2023).

35. This is an actually existing criteria in some jurisdictions all over the world, for example in Albania, Brazil, or Colombia.

36. J. Crémer, Y-A de Montjoye and H. Schweitzer, Competition Policy for the digital era (cited in 34) (his was among the main proposals considered in the Cremer Report. However, it is also criticized in the report itself that this can be burdensome on NCAs and the EC and its application can be resource-intensive).

37. Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9 (4) KartG), July 2018, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2 (last visited November 29, 2023) (Germany imposed transaction value based threshold, requiring mandatory notification for the transactions with consideration paid in excess of EUR 400 million, adding that the target is significantly active in the territory of Germany, also one of the parties generated a German turnover more than EUR 50 million, and the parties to the transaction have a combined global turnover of above EUR 500 million. The similar test was also introduced in Austria with lower thresholds).

This option was also heavily criticized on its own merits[38]. First of all, defining the true value of any transaction poses significant challenges and this is due to the inherent complexity of some transactions and the availability of multiple methodologies for measuring their value, as noted by Commissioner Vestager, who emphasized that "it is not easy to set a threshold like that at the right level". Furthermore, parties involved in a transaction can always artificially lower its value by splitting it up into several transactions. The value of transactions is also subject to fluctuation over time to better reflect changes in the underlying assets. Allocating transaction value by geography can be especially challenging, particularly within the EU with 27 different MSs. This complexity is further amplified when dealing with acquisitions of potential competitors that generate low revenues. The expert report by the EC, thus, recommended not to change turnover thresholds into the transaction value-based one, but to watch the experience of the member States that opted that way[39].

Introducing jurisdictional criteria for the combined market share of the merging companies was also proposed in some MSs such as Spain[40] and Portugal[41]. This alternative was not that appealing[42] since it could have also resulted in capturing a lot of transactions (again

38. See Nicholas Levy, Henry Mostyn & Bianca Buzatu, Reforming EU merger control to capture killer acquisitions – the case for caution at 59 (cited in 24).

39. See Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? at 7 (cited in 33).

40. See Tânia Luísa; Martins, Margot Lopes; Nunes, Raquel Marques, New trends in merger control: capturing the so-called killer acquisitions... and everything else, 57 Actualidad Jurídica Uría Menéndez 33, (2021) (Article 8(1), Law no. 15/2007, BOE of 4 July 2007 (Spanish Competition Act) provides two alternative criteria: as a result of the concentration, a market share equal to or greater than 30% of the relevant product or service market is acquired or increased at the national level or in a defined geographic market within the country, except if the overall turnover in Spain of the acquired company or of the assets acquired in the last period does not exceed the amount of €10 million...).

41. See id., at 35 (cited in note 40) (Article 37(1) of the Portuguese Competition Act provides three alternative criteria, two of them including market shares: the transaction leads to the acquisition, creation or reinforcement of a market share equal to or greater than 50% in the national market of a specific product or service, or in a substantial part of it (market share criterion) ...),

42. Difficulties of defining the relevant market and market power in digital markets must also be taken into account.

spending burdening resources) but failed to capture situations "where a large foreign-based company firstly enters the EU market through the acquisition of a local start-up"[43].

Another reform proposal was the burdening of large market actors in the digital space with merger filing obligations[44]. It was also included in the Stigler report and was heavily favored[45]. This approach was somewhat adopted in the DMA, which recently came into force and will be discussed in the second section.

Nevertheless, making substantive changes to the EUMR demands, under Article 352 of TFEU, a unanimous vote from all 27 MSs in the Council. As discussed in the second subsection, it is imperative to establish compelling evidence demonstrating the necessity of legislative reform in order to align with political considerations during this legislative process. As a result, it will not be easy, given all the abovementioned criticisms and difficulties with the proposed alternatives.

2.4 Potential ex-post review of killer acquisitions under Article 102 TFEU

Ex-post review of potential killer acquisitions under Article 102 of the Treaty on the Functioning of the European Union (TFEU)[46] can also be a way of capturing them. Flexible ex-post intervention powers for NCAs already exist under some MSs jurisdictions, namely Ireland, Hungary, Estonia, Lithuania, and Sweden[47].

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43. Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? at 7 (cited in 33).

44. Alexiadis, Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review at 76 (cited in note 21).

45. See Stigler Center for the Study of the Economy and the State, Stigler Committee on Digital Platforms: Final Report (2019), available at https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E (last visited December 25, 2022) (according to the report, it would not be prudent to alter the nation s antitrust laws to accommodate one difficult and fast-moving sector where false negatives are particularly costly. Therefore, this is an effective solution for the report because additional power over merger review can be useful for sectoral regulators.).

46. Article 102 TFEU is a tool to address the abuse of dominant position.

47. See Cunningham et all, Killer Acquisitions (cited in note 1).

The main benefit of capturing killer acquisitions ex-post would be the elimination of heuristic difficulties[48]. This is because, during pre-emptive assessments, it can be difficult to establish strong evidence of killer acquisitions[49] and to prove potential harm to competition[50], particularly when dealing with the swiftly evolving nature of digital markets[51]. In contrast, it is noticeably easier to evaluate the likely effects[52] of killer acquisitions in the ex-post scenario.

Nonetheless, such use of Article 102 of TFEU will not be so straightforward, since defining the relevant market and establishing the dominance and market power of incumbents is not an easy task in digital markets due to their characteristics. Some authors who oppose such usage of Article 102 of TFEU justify their opinion on the ground that Article 102 is a behavioral tool, and the EC will be reluctant to apply it to mergers that concern the acquisition of control[53]. It has to be mentioned that what is prohibited under Article 102 TFEU is the abuse of a dominant position and not the possession of a dominant position in the market in itself. Therefore, that kind of reasoning cannot be accepted taking into consideration the fact that Article 102 has already been used by the Commission to fill the enforcement gap in EU merger control rules[54].

48. See Vaclav Smejkal, Concentrations in Digital Sector - A New EU Antitrust Standard for Killer Acquisitions Needed? at 8 (cited in note 33).

49. See OECD, Start-ups, Killer Acquisitions and Merger Control (cited in note 23).

50. See ibid.

51. The European Commission, Commission Notice on the definition of relevant market for the purposes of Community competition law 9 December 1997, OJ C372, at 41.

52. For example, whether the product or technology itself was continued, or whether the market has gained anti-competitive effects from the point of the future competition, such as the strengthening of the dominant position.

53. See Alexiadis and Bobowiec, EU Merger Review of Killer Acquisitions in Digital Markets: Threshold Issues Governing Jurisdictional and Substantive Standards of Review, at 87 (cited in note 21).

54. The Tetra Pak case is a clear example that this happened before. It was deemed that the merger review was not suitable in addressing a monopoly arising from unique technological characteristics.

The concerns about legal certainty (as closed concentrations can be reviewed ex-post under article 102 TFEU) will occur[55] especially since most MSs have reformed, or are still reforming, their rules to capture killer acquisitions. Therefore, a double review of the transactions that have already undergone the scrutiny of a national merger review will lead to duplicative effects. However, following amendments at the EU and national levels, using ex-post review to assess transactions that have not been faced with merger review at the national level will elevate those concerns.

To conclude the discussion, it is theoretically possible to capture killer acquisitions ex-post under Article 102 TFEU. However, this option is not the preferred one by the EC, as it will be further depicted, maybe because the process under Article 102 takes longer and requires an extensive investigation to establish both dominance and harm to competition.

3 Preferred ways to capture killer acquisitions in digital markets under EU Merger Control

3.1 Article 22 of EUMR

The first limb of Article 22 EUMR reads that any MS can request the EC to examine any concentration that does not have an EU dimension if it affects the trade between MSs and threatens to significantly affect the competition within the territory of that MS[56]. It also sets out a deadline for the notification, which is 15 working days from the date on which the transaction was notified, or it was made known, to the MS concerned.

55. Even though the list of abusive practices is non-exhaustive under article 102 of TFEU.

56. The EC Merger Regulation, OJ L 24.

Turning to the teleological interpretation, Article 22 EUMR[57] is historically called the "Dutch Clause"[58] because some MSs, such as the Netherlands, Italy, and Luxembourg, did not have national merger control rules when the decision was made to adopt the first Merger Regulation at EU level (4064/89). However, there was a need to find a legal tool so that mergers affecting competition in those MSs could be transferred and undergo merger review by the EC. Therefore, such a legal tool was included in EUMR at the request of the Netherlands. Hence, the logic behind this provision was to allow MSs, which lacked their merger review regimes, to call on the EC for assistance to review presumably local transactions[59]. Therefore, it is not a requirement for the requesting Member State to possess the authority to assess the concentration under its national legislation, as this tool is utilized by member States without any such regulations.

Nevertheless, the EC had established a practice of discouraging referrals when they originated from member States lacking the requisite competence for review, while only accepting Article 22 referrals when a transaction exceeded the national notification thresholds in at least one Member State[60]. Consequently, Article 22 referrals have not been common and remained infrequent: since its introduction and up to the end of 2021, there have been 43 cases with requests for Article 22

57. See Miguel Poiares Maduro, Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, 1 European Journal of Legal Studies, 137 (2007) (the teleological interpretation method can be defined as the method of interpretation used by courts when they interpret legal norms in the light of their purpose, values, legal, social and economic goals these provisions aim to achieve. This interpretation is also considered to be the method utilized most by the European Court of Justice (ECJ).

58. See Jones and Sufrin, EU competition law: text, cases, and materials at 33 (cited in note 11).

59. See Jay Modrall, Illumina/Grail Prohibition: The End of the Beginning for EU Review of Killer Acquisitions ? (Kluwer Competition Law Blog, September 8, 2022), available at <http://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/> (last visited November 29, 2023).

60. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else at 40 (cited in note 40).

referrals[61] and, after the publication of the Guidance, only two additional referrals were initiated in 2022[62].

It was in 2021 that the EC abandoned its restrictive approach towards the "Dutch Clause" and accepted the Guidance to broadly interpret Article 22.

3.2 The EC's Guidance on Article 22 of EUMR

On 26 March 2021, the EC published the Guidance[63] on Article 22 referral mechanisms, bypassing any formal legislative procedure, public consultation, or implementation period[64]. The Guidance first establishes that there has been an enforcement gap about concentrations in certain sectors, particularly regarding transactions in the digital and pharmaceutical sectors[65]. It is especially focused on the transactions where "the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential"[66]; it provides five situations in which this can occur, such as start-ups, important innovators, or other recent entrants with substantial competitive potential that are about to generate significant revenues[67]. In short, the purpose of the Guidance is to enable a review of killer acquisitions.

It is stated in paragraph 12 that the Guidance aims "to increase transparency, predictability, and legal certainty concerning the wider application of Article 22 of the Merger Regulation". Firstly, this work will outline the implications brought about by the Guidance; then,

61. Some of the referrals were made during the time when the MS lacked their own merger control rules.

62. See the EC s Statistics on Merger cases <https://competition-policy.ec.europa.eu/system/files/2023-01/Merger_cases_statistics.pdf> accessed 10.01.23.

63. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

64. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else at 39-40 (cited in note 40).

65. Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases at paragraph 10, 31 March 2021, OJ C 113 (Communication from the Commission) (cited in note 6).

66. See id., at paragraph 19.

67. See ibid.

it will examine its intended objectives; and, finally, it will evaluate whether these implications are congruent with the stated purposes.

Primarily, owing to the Guidance, MSs can now refer any transactions to the EC, even if they do not meet the respective thresholds outlined by their national merger regulations[68]. Secondly, MSs can also make referrals for cases where a transaction has already been concluded[69]: the Guidance merely establishes a time frame for such referrals, which is more of a guideline rather than a strict deadline[70]. Thirdly, with regards to the notification deadline defined under Article 22 EUMR, the Guidance clarifies that the "notion of "made known" should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral"[71] to be present. These three issues will be discussed in detail later on. Nonetheless, when paragraphs 21 and 28 of the Guidance are read together, it appears unclear when the timeline for Article 22 EUMR referrals will start running, since the criteria according to which information is deemed to be sufficient remain vague[72].

The Guidance states that the EC will cooperate with NCAs to identify potential referral candidates and assess complaints from third parties[73]. Additionally, parties involved in mergers can voluntarily provide information about their intended transactions[74].

As observed, the EC expressly granted itself the authority to review any transaction, and ex-post review of closed transactions, without any legislative means. Nonetheless, according to the ECJ, the Commission s soft law - including its communication documents - is not

68. See id., at paragraph 21.

69. See ibid.

70. See ibid. (the EC provides that it will not generally accept those referrals if more than six months passed after the closing. However, if material facts were not known to the public in the EU, six months will start running after those facts are made publicly known.).

71. See id., at paragraph 28.

72. See Jay Modrall, Illumina/Grail Prohibition: The End of the Beginning for EU Review of Killer Acquisitions ? (cited in note 55).

73. Paragraph 25, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

74. See id., at paragraph 24.

capable of imposing indented obligations on the MSs and, therefore, it is not legally binding[75].

The broadening interpretation of Article 22 EUMR was first applied to Illumina's proposed acquisition of Grail a month after the publication of the Guidance. This paper will now turn to examine the Illumina/Grail case, in order to have a clear example to assess the re-interpretation of Article 22 EUMR.

3.3 Curious case of Illumina/Grail

On April 19, 2021, the EC decided to accept the referral on Illumina's[76] acquisition of Grail[77]. The 7.1 billion dollars' worth transaction was first announced in September 2020 and, in February 2021 - a month before the publication of Guidance -, the EC invited NCAs to employ Article 22 referral mechanism if they had any concerns on this transaction, which was not reportable to any NCA at that time[78]. The EC stated in its decision that the proposed transaction may have affected trade between MSs and would have threatened to significantly affect the competition in the territory of France. It is also provided that Grail's competitive significance was not reflected in its turnover. Illumina went on to appeal this decision before the GC: its first argument was based on the fact that the EC should not have accepted referrals under Article 22, since the transaction does not meet notification thresholds; the second point was that the EC's interpretation was contrary to the one-stop-shop principle, including principles of legal certainty, legitimate expectations, subsidiarity, and proportionality.

In its analysis of Article 22 EUMR, the GC rejected these arguments relying on literal, contextual, historical, and teleological interpretation; by doing so, the GC upheld the EC's position in its decision[79]. The GC provided that, based on the literal meaning of "any concentration"[80], any MS has the right to refer any concentration to

75. Case C-526/1, Tadej Kotnik and Other, EU:C:2016:570 at 44.

76. A US based pharmaceutical company.

77. A US start-up which develops multi cancer early detection tests.

78. Case T-227/21: Action brought on 28 April 2021 Illumina v Commission [2021] OJ C 252.

79. See ibid.

80. See id., at paragraphs 91-94.

the EC, not depending on whether notification thresholds are met. This has been called a "corrective mechanism" by the GC because it ensures the effective application of EUMR to the concentrations that are significantly affecting competition but escaping the merger review[81]. While assessing Illumina's plea that the referral request was submitted out of time, the GC also gave the interpretation of the terms "made known" as "the relevant information to be actively transmitted to that Member State, enabling it to assess, in a preliminary manner, whether the conditions for a referral request under that article [22 EUMR] have been satisfied"[82]. The GC also went on to state that the EC is supposed to comply with the "reasonable time principle" for merger reviews, as it is required by the principles of "legal certainty" and "good administration"[83]. Even though the GC concludes that the EC failed to act within the reasonable time limit[84], this failure should not be considered as an affecting factor of the applicant's rights of defense[85].

The GC's Illumina decision also represents the confirmation of the EC's Guidance. Thus, implications brought by the broad interpretation of article 22 EUMR will be further analyzed by bringing clear examples from the Illumina/Grail case[86].

81. See id., at paragraph 165.

82. See id., at paragraph 211.

83. See id., at paragraph 226.

84. See id, at. paragraph 239 - It follows that the invitation letter was sent within an unreasonable period of time .

85. See id., at paragraph 246.

86. See Illumina, Illumina intends to Appeal European Commission s Decision in GRAIL Deal (Press release, September 6, 2022), available at https://www.illumina.com/company/news-center/press-releases/2022/1ef95365-0ca9-4726-a683-37124b1116b5.html (last visited November 29, 2023) (Illumina has announced that it will appeal the judgment to the European Court of Justice).

3.4 Implications of Guidance and their assessment

The assessment in this subsection will be carried out by taking into consideration the legal certainty[87], legitimate expectations[88], subsidiarity, and one-stop-shop principles.

Above all, the reinterpretation of Article 22 EUMR means that the EC departed from the one-stop-shop principle, thereby triggering the subsidiarity principle. As it is clearly stated above (both in the discussions of Guidance and Illumina/Grail case), literally "any concentration" can now be referred to the EC. This is contrary to the EUMR's guiding principles and core jurisdictional rules[89] and, moreover, it brings about more uncertainty for digital platforms since this reinterpretation is based on unpredictable criteria to identify which transactions will be notified under Article 22 EUMR (basically any concentrations). Prior to the publication of the Guidance, it was at least possible to assure undertakings that their transaction would not undergo mandatory merger review when the notification thresholds were not met. However, such assurance to undertakings could not be given anymore due to the lack of any objective and precise criteria under the Guidance. Being unable to foresee the outcome, the most certain evaluation undertakings could make is to estimate whether the EC might have potential interest in reviewing the transaction, based

87. See Takis Tridimas, The General Principles of EU Law at 242 (OUP 2006) (as a general principle of EU law, the legal certainty entails legal norms to be clear and applied in a foreseeable and consistent manner. This principle contains that the precise content of law has to be known to subjects to whom it is applied, allowing them to plan their conduct accordingly). See also Case C-201/08, Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt, EU:C:2009:539, paragraph 49 (legal certainty principle is also confirmed by the ECJ as requiring rules must be clear and precise and, on the other, that their application must be foreseeable by those subject to them.).

88. See Paul Craig, EU Administrative Law at 555 (OUP 2nd ed. 2012) (legitimate expectations principle is a part of the EU constitutional and administrative law. In general, this principle applied where legal situation caused expectations on which the addressee relied, the reliance was reasonable, and the individual interest preponderates over conflicting public interests (principle of proportionality)).

89. See Nicholas Levy, Andris Rimsa & Bianca Buzatu, The European Commission s New Merger Referral Policy: A Creative Reform or an Unnecessary End to Brightline Jurisdictional Rules?, Vol. 5 European Competition and Regulatory Law Review 364, at 375 (2012).

on their subjective analysis[90]. That is why the reinterpretation of Article 22 EUMR lessens the legitimate expectations of digital platforms.

It is mentioned that the EC encourages companies to voluntarily provide information on their intended transactions. In return, the EC may guide them on whether it may consider their transaction a good candidate for referral under Article 22, depending on the amount of information that has been submitted[91]. However, this will be burdensome on digital platforms, as they have to assess the benefits of voluntarily informing the EC, not knowing what "sufficient information" is to provide, how much time it will take them to get the EC's opinion, and so many other issues. In other words, this will create more uncertainty and bureaucracy for them, rather than a useful tool to seal their transactions.

With regards to the uncertainty related to the timeline of the referrals, as the Guidance stated, NCAs will be considered informed, and thus the transaction will be "made known" if they possess sufficient information to make a preliminary assessment[92]. The uncertainty here is that this interpretation gives MSs excessive discretion to determine when they became aware of the transaction[93]. The above-mentioned Illumina/Grail case is an excellent example of this situation since France submitted its referral request in March 2021, six months after the extensive public announcement. Drastically, the GC's interpretation of the concept of "made known" does not bring any clarity on what is considered sufficient information, leaving MSs with the mentioned discretion by the Guidance. Instead, the GC states that there is an obligation on undertakings to actively transmit the relevant information to the MSs, to enable them to preliminarily assess whether the conditions to make a referral request are satisfied. More drastically, it is also not clear which conditions are intended to be mentioned here

90. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else, at 41 (cited in note 40).

91. Paragraph 24, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

92. See ibid.

93. See Tânia et al., New trends in merger control: capturing the so-called killer acquisitions... and everything else, at page 42 (cited in note 40) (it will be up to them to decide whether they are in the possession of sufficient information to be able to make preliminary assessment, since it is not provided what is sufficient information).

since, according to the Guidance, any transaction can be mentioned, and there is not an objective criterion for that. Therefore, undertakings are obliged to actively transmit sufficient information to all 27 MSs about their transaction to make sure the timeline for Article 22 referral kicks off, while the concept of "sufficient information" itself is not known. Such interpretation of EU merger rules is highly likely to raise concerns on the principles of legal certainty and legitimate expectations.

The EC has the power to review closed transactions within six months after their closing. However, this is subject to exception when the information about the transaction was not made public in the EU (again, the same issues are at stake with regards to the notion of "made known"), constituting a discretionary basis for the EC. Moreover, if the EC considers that there is a potentially detrimental effect on consumers, or that the magnitude of the potential competition is threatened, it can accept later referrals in exceptional circumstances[94]. This means that undertakings will always be under the risk of review by the EC about their completed transactions[95]. Thus, the acquirers and merging parties have to accept the unpredictable post-closing review by the EC in most cases. As a consequence, undertakings can never be assured to complete their transaction with the confidence of not being subject to merger review (e.g., Illumina) in the unknown future since it is not possible to foresee when the timeline starts, and the EC can at all times rewind the six months.

3.5 The obligation under Article 14 of DMA

The DMA contains an obligation for gatekeepers to notify any concentration "where the merging entities or the target of concentration provide core platform services or any other services in the digital

94. Paragraph 21, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, OJ C 113 (cited in note 6).

95. See Nicholas and al., The European Commission s New Merger Referral Policy: A Creative Reform or an Unnecessary End to Brightline Jurisdictional Rules?, at 377 (cited in note 89) (In previous years, since the Article 22 was generally applied to transactions that were subject to notification to one or more NCAs, there was a little risk that a reference would be made in respect of a transaction that had closed.).

sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under [EUMR] or [to NCAs] under national merger rules"[96]. This serves to capture killer acquisitions as well[97].

Article 3(1) of DMA defines a gatekeeper as a provider of core platform services if a) it has a significant impact on the internal market; b) it operates a core platform service which serves as an important gateway for business users to reach end-users; and c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future[98]. Article 3(2) of DMA adds threshold requirements to that, as an annual EEA turnover equal to or above EUR 7.5 billion in the last three financial years, or where it provides a core platform service that has more than 45 million monthly active end users in the EU and more than 10 000 business users, among other things[99]. Given this definition and established thresholds, it can be easily pointed out that it is specifically intended to bring Big Tech (GAFAM) companies under the scrutiny of Merger Control[100].

In practical terms, Article 14 DMA will allow the EC to capture all digital mergers intended by Big Tech companies. Therefore, the EC can capture potential killer acquisitions ex-ante, after the DMA. Since all intended transactions by gatekeepers will be notified to the EC for its ex-ante review, the referrals of Article 22 will now operate to enable the EC to have an ex-post review over transactions pursuant to DMA.

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96. Article 14, DMA 2022.

97. There are also critical discussions over the obligation in question under article 14 DMA but they will not be discussed in detail because of the purposes of this paper. In general, the DMA seems to achieve its stated purposes adequately without undermining any general principles of EU law.

98. Article 3(1), DMA 2022.

99. SArticle 3(2,) DMA 2022.

100. See Cabral L, Haucap J, Parker G, Petropoulos G, Valletti T, van Alstyne M, The EU Digital Markets Act a Report from a Panel of Economic Expert (Joint Research Paper) at 9 (2021) (These thresholds are designed to capture the largest online platforms, where potential harm is the greatest. Effectively, it comes down to the GAFAM tech giants (Google, Apple, Facebook, Amazon and Microsoft), possibly a few more.).

4 Conclusion

The first section of this article focused on how there used to be a gap in EUMR to capture killer acquisitions. Furthermore, the need to fill this gap was highlighted, but strong empirical evidence was needed to adopt legislative reforms. Then, it was shown that some MSs reformed their merger control rules to capture killer acquisitions and the challenging nature of making a choice between any of those discussed legislative reforms was made clear. It has also been depicted how the ex-post review of killer acquisitions is theoretically possible under article 102 TFEU, even though it has its inherent difficulties.

The second section illustrated the preferred ways to capture killer acquisitions. It was pointed out how the EC granted itself the competence to review any transaction by abandoning the one-stop-shop, and other core principles of EUMR, with its legally non-binding document bypassing legislative reforms. As presented, this competence is based on non-objective criteria which can potentially raise a lot of concerns on legal certainty and legitimate expectations principles. Moreover, the wording of the EC Guidance gives MSs the discretion to decide when they are made aware of the transaction and leaves undertakings in difficulty on what is considered sufficient information to provide to the MSs. The GC's Illumina decision fails to bring any clarity on the issue, instead imposing an extra obligation on undertakings to actively transmit sufficient information leaving unclear its exact meaning. Therefore, it will always be unknown to undertakings when the timeline starts with regard to their intended transactions. Even their completed transactions will always (due to the uncertainty of the timeline) be at the risk of being subject to ex-post-merger review by the EC. It is also established that after the DMA came into force, the EC will be able to capture potential killer acquisitions of Big Tech companies in an ex-ante way, and Article 22 referrals will be used for an ex-post review of the potential killer acquisitions pursuant to DMA.

In conclusion, it is answered that the EC abandoned the status quo in the easiest way possible with its non-binding instrument since making substantive legislative changes to EUMR was demanding. Considering the assessment of the reinterpretation of Article 22 EUMR and its implications with clear examples from the Illumina/

Grail case, it is possible to say that this is unlikely to be a good solution. Maybe ex-post review under Article 102 TFEU is no panacea in the face of all the difficulties raised but it still could be a better tool for the EC instead of using Article 22 referrals even though this could raise concerns on the general principles of EU law.