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European Competition Journal

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/recj20

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To cite this article: D'Amico Alessia Sophia (2024) Closing the tech acquisitions enforcement gap: from article 22 to article 102, European Competition Journal, 20:1, 193-217, DOI: 10.1080/17441056.2023.2270744

To link to this article: https://doi.org/10.1080/17441056.2023.2270744

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Published online: 18 Oct 2023.

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EUROPEAN COMPETITION JOURNAL
2024, VOL. 20, NO. 1, 193–217
https://doi.org/10.1080/17441056.2023.2270744

Closing the tech acquisitions enforcement gap: from article 22 to article 102

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ABSTRACT
Platform power poses a number of challenges for competition authorities. One concern is that big tech companies may harm competition through the acquisition of emerging companies with a high competitive potential. Such acquisitions may escape ex ante merger control if they do not reach the turnover threshold for mandatory notification. The Commission sought to bridge this enforcement gap with its Article 22 guidance and the Digital Markets Act. This paper evaluates the steps taken by the Commission to increase scrutiny of such mergers. Building on this discussion, the paper examines the AG opinion in Towercast and analyses the residual gap-closing function of Article 102 TFEU. The aim of this paper is to bring the new developments surrounding digital merger control together and assess whether they represent an adequate response to the challenges posed by the digital economy.

ARTICLE HISTORY Received 1 March 2023; Accepted 16 May 2023

KEYWORDS Tech acquisitions; EU Merger Regulation; Digital Markets Act; Article 102 TFEU; enforcement gap

1. Introduction

With digitalization and the advent of platform power, competition authorities in the EU have been grappling with the question of how to effectively protect competition in the internal market. While efforts have been made to discipline dominant companies with Article 102 TFEU,[1] increasing attention has also been paid to the ex ante path of merger control. The

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[1]Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47. See, for instance, Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)); Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the

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concern is that external growth strategies implemented by large digital platforms can have a significant impact on competition, among other things, by decreasing market contestability and harming innovation. Indeed, over recent years, a wave of mergers has taken place in the digital economy,[2] in particular, mergers involving big tech buying high-value start-ups.[3] Such acquisitions may escape ex ante merger control, if they do not reach the turnover threshold for mandatory notification.[4] This is problematic, because especially in the digital economy, firms with low turnover can be a source of competition for incumbents, making their acquisition potentially anticompetitive. Digital markets evolve rapidly and unpredictably and are characterized by a high level of (disruptive) innovation.[5] Because of the dynamic nature of these markets, by acquiring emerging undertakings, which do not yet have a large turnover, powerful companies may eliminate potential competition and consolidate their own market position.[6] With competition in digital markets taking place "for", rather than "in", the market, it is pivotal to ensure the contestability of markets and to protect potential sources of competition for today's tech giants.[7] As argued by Michael Katz, "the importance of innovative entry as a driver of market performance provides a rationale for paying increased attention to harm to emerging or potential competition when assessing acquisitions by incumbents in such markets".[8]

A number of recent developments tackle the enforcement gap in merger control in relation to the acquisition of start-ups with a high

Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 – Google Android).

[2]Motta and Peitz point out that Alphabet is reported to have made 48 acquisitions, Amazon 42, Apple 33, Facebook 21 and Microsoft 53; M. Motta and M. Peitz, 'Big Tech Mergers', Information Economics and Policy, 2021. Gautier and Lamesch count 175 acquisitions made by Alphabet, Amazon, Apple, Facebook and Microsoft during 2015–2017; A. Gautier and G. Lamesch, 'Mergers in the Digital Economy', Information Economics and Policy, 2021.

[3]OECD, 'Start-ups, Killer Acquisitions and Merger Control' Background Note, DAF/COMP(2020)5.

[4]Monokolpolisson, Competition policy: The challenge of digital markets, special report n. 68, 2015 105–106; V. E. Ocello, C. Sj?din and A. Subčs, *What's up with merger control in the digital sector? Lessons from the Facebook/Whatsapp EU merger case*, Competition merger brief, issue 1, 2015.

[5]Marc Bourreau and Alexandre de Streel, 'Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control', Cente on Regulation in Europe (CERRE), Issue Paper, February 2020.

[6]European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (OJ 2021 C 113, p. 1), paragraphs 9 and 10, and judgment of the General Court of 13 July 2022, Illumina v Commission (T–227/21, EU:T:2022:447).

[7]See Michael L. Katz, 'Big Tech mergers: Innovation, competition for the market, and the acquisition of emerging competitors' (2021) 54 Information Economics and Policy; Emilio Calvano, Michele Polo, 'Market power, competition and innovation in digital markets: A survey' (2021) 54 Information Economics and Policy; OECD (2022), 'OECD Handbook on Competition Policy in the Digital Age', available at https://www.oecd.org/daf/competition-policy-in-the-digital-age.

[8]Michael L. Katz, 'Big Tech mergers: Innovation, competition for the market, and the acquisition of emerging competitors' (2021) 54 Information Economics and Policy 13.

competitive potential. The Commission sought to bridge this gap by increasing referrals from member states and thereby mitigating the limitations of the turnover threshold, both by issuing a guidance on Article 22 of the Merger Regulation[9] and through an information obligation contained in the Digital Markets Act (DMA).[10] Additionally, the Advocate General (AG) in the *Towercast*[11] case points out the supplementary or gap-closing function of Article 102 TFEU, when a merger is not notifiable in a member state and a referral under Article 22 did not occur. This paper brings the new developments surrounding merger review in digital markets together and assesses whether they represent an adequate approach for facing the challenges to effective merger review in the digital world. The paper starts by introducing the notification and referral system under the EU Merger Regulation (EUMR)[12] and identifying the enforcement gap when it comes to tech acquisitions. It then evaluates the steps taken by the Commission to increase scrutiny of such mergers, its Article 22 guidance and the DMA. Building on this discussion, the paper examines the opinion in the *Towercast* case and discusses what the additional value of using Article 102 TFEU is.

2. The enforcement gap

The EUMR establishes a mandatory notification system for mergers, based on turnover thresholds. With the European Commission being a super-national competition authority, the turnover threshold has the additional role of allocating cases between the Commission and national competition authorities. If a merger meets one of the thresholds of the EUMR and therefore has a "community dimension", it is reviewed by the Commission. Otherwise it may face review in one or more member states. The turnover thresholds are therefore "designed to govern jurisdiction and not to assess the market position of the parties to the concentration nor the impact of the operation".[13]

[9]Communication from the Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases', Brussels, 26.3.2021 C (2021) 1959 final ('Commission Guidance on Article 22 EUMR').

[10]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).

[11]AG Opinion in Case C-449/21.

[12]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004) OJ L 24/1.

[13]Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/1, para. 127.

The EUMR foresees two alternative ways to reach the threshold, both of which are based on the undertakings' monetary turnover.[14] This creates a blind spot for big tech companies' acquisitions of start-ups and other firms whose monetary turnover is small or non-existent. Often these acquisitions are carried out early in the firms' development, when digital firms work on creating a successful product, building a large customer base, collecting and analysing data and conducting research, rather than focusing on the growth of their turnover and profit.[15] They frequently start to monetize their user base at a later stage or hope to be acquired. As a consequence, start-ups' turnover might not reflect their competitive potential, which "runs counter to the assumption underlying the jurisdictional test of the EUMR that the 'Community dimension' of a merger, i.e. its potential competitive significance for the internal market, is roughly related to the turnover of both the acquirer and the target".[16] For instance, the Commission did not review the acquisition by Facebook of Instagram, since at the time Instagram did not generate any revenue. When WhatsApp was acquired by Facebook in 2014 for $19 billion, it had over 600 million users worldwide and up to 150 million users in the EEA. The acquisition did not reach the EU turnover thresholds either and could only be reviewed by the Commission by means of a referral.[17]

The referral mechanism is the alternative way in which the Commission can gain jurisdiction to review a merger. Under Article 4(5), if a concentration does not have a community dimension, the Commission is able to review it, at the request of the parties,[18] if the acquisition is

[14]The main threshold is met where "(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million". The alternative threshold is reached where "(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million". In both cases " … unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State", EUMR Article 1(3).

[15]Jens-Uwe Franck, Giorgio Monti, and Alexandre de Streel, 'Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law', TILEC Discussion Paper DP 2021-016, October 11, 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966244.

[16]Crémer, J., Y. de Montjoye and H. Schweitzer, 'Competition Policy for the Digital Era' (2019) Report for the European Commission, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[17]Commission decision of 3 October 2014 in Case M.7217 – *Facebook/WhatsApp*

[18]The member states competent to review the merger have the power to veto the referral request, Article 4(5) EUMR.

notifiable under the national competition law of at least three member states. The existence of the referral mechanism provides a level of flexibility that to some extent compensates for the rigid turnover thresholds. In addition to Article 4(5), Article 22 entitles member states to request the referral of concentrations to the Commission that do not meet the EU thresholds but which affect trade between EU member states and threaten to significantly affect competition within the territory of the requesting member state.[19] The *Apple/Shazam* merger, for instance, which had first been notified in Austria, was referred to the Commission after an Article 22 request by several member states.[20] The Commission's research showed that referrals have resulted in the Commission acquiring jurisdiction over significant concentrations; more precisely, "between 2004 and 2020, the Commission received a total of 384 requests on the basis of Article 4(5) and 34 requests on the basis of Article 22. Among those cases, there were around 30 particularly significant transactions in the digital and pharmaceutical sectors".[21]

The ability of the referral mechanism to catch mergers involving firms with low turnovers that are potentially anticompetitive used to depend on the existence of adequate notification thresholds in sufficient members states. The reason for this is that, up until recently, the Commission's practice was to only encourage Article 22 referrals when the merger was notifiable at member state level.[22] Since many national jurisdictions also rely on turnover-based thresholds, the member states that could refer a merger were limited, making reliance on referrals problematic.[23] Although some member states have introduced additional jurisdictional thresholds, for instance based on transaction value in Germany and Austria[24] and on

[19]EUMR, Article 22(1).

[20]Including Austria, Iceland, Italy, France, Norway, Spain and Sweden; Commission decision of 6 September 2018 in Case M.8788 – *Apple/Shazam*.

[21]"Notable transactions referred to the Commission included, in the digital area, the following cases: M.9424 – Nvidia/Mellanox (2019), M.8994 – Microsoft/GitHub (2018), M.7217 – Facebook/WhatsApp (2014), M.4731 – Google/DoubleClick (2008), M.4854 – TomTom/Tele Atlas (2008) and M.4942 – Nokia/Navteq (2008). In the pharmaceutical sector, examples include M.5555 – Novartis/EBEWE Pharma (2009) and M.5530 – GSK/ Stiefel (2009). The transaction value in all of these cases exceeded EUR 1 billion", Commission Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control' 37.

[22]Under Article 4(5) EUMR a referral is only possible when the transaction is notifiable in at least three member states.

[23]Crémer, J., Y. de Montjoye and H. Schweitzer, 'Competition Policy for the Digital Era' (2019) Report for the European Commission, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[24]In Germany, under the new jurisdictional threshold, mergers are notifiable if: (i) the combined worldwide turnover of all the participating undertakings exceeds EUR 500 million; (ii) one participating undertaking achieves a Germany-wide turnover of more than EUR 25 million, but neither the target nor any other participating undertaking achieved a Germany-wide turnover of more than EUR 5 million; (iii) the consideration for the transaction exceeds EUR 400 million; and (iv) the target

market shares in Spain and Portugal,[25] this could not guarantee the referral of all problematic mergers.

In its "Evaluation of procedural and jurisdictional aspects of EU merger control"[26] the Commission looked at "the possible existence of an enforcement gap concerning acquisitions of (notably high-value) targets with no or limited turnover".[27] In responses to the public consultation, the digital sector was the one most often mentioned as the sector where competitively significant mergers might not be caught by the EUMR.[28] The responses also cited numerous acquisitions by large internet companies that escaped merger control scrutiny at EU level.[29] Commissioner Vestager acknowledged that while the existing thresholds are adequate overall, there are some potentially anticompetitive mergers which do not meet the threshold and the Commission does not get to review. However, she also pointed out the difficulty of setting a new threshold based on the value of the mergers to catch these additional cases and did not consider it the most "proportionate" solution.[30] In their report for the Commission, Crémer et al. also highlight the complexity connected with the introduction of a new threshold that meets the requirements for legal certainty. They argue that amending the threshold should only be considered if the current regime has serious gaps, which also depends on the possibility to bring mergers under the Commission's jurisdiction by means of referrals.[31]

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company is active in Germany to a considerable extent. The new threshold came into force on 9 June 2017. In Austria, under the new jurisdictional threshold, mergers are notifiable if: (i) the combined worldwide turnover of all the participating undertakings exceeds EUR 300 million; (ii) the combined national turnover of the participating undertakings exceeds EUR 15 million; (iii) the consideration for the transaction exceeds EUR 200 million; and (iv) the target company is active in Austria to a considerable extent. The new threshold came into force on 1 November 2017. (Commission Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control', Brussels, 26.3.2021 SWD(2021) 66 final, footnotes 155 and 156, p. 40)

[25]The market share threshold is 30% in Spain (Spanish Competition Act 2007) and 50% in Portugal (the Portuguese Competition Act 2012, art 37(1)).

[26]Commission Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control'.

[27]Ibid 27.

[28]Ibid.

[29]"The respondents listed acquisitions by Google of DailyDeal (2011 – USD 114 million transaction value), Waze (2013 – USD 1.1 billion), Nest Labs (2014 – USD 3.2 billion), Dropcam (2014 – USD 555 million), DeepMind Technologies (2014 – USD 600 million), Dark Blue Labs and Visual Factory (2014 – USD 50 million); Skybox (2014 – USD 500 million) and Moodstock (2016); in addition, they mentioned the acquisition by Microsoft of Mojan AS (2014 – USD 2.5 billion) and the acquisition by Facebook of Oculus VR (2014 – USD 2 billion)". Ibid, footnote 115 28.

[30]Margrethe Vestager, 'The future of EU merger control', International Bar Association 24th Annual Competition Conference, 11 September 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

[31]Crémer, J., Y. de Montjoye and H. Schweitzer, 'Competition Policy for the Digital Era' (2019) Report for the European Commission, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

Enhancing the referral system is evidently the low-hanging fruit in increasing the jurisdiction of the Commission. As argued by Looijestijn-Clearie et al., "tackling these jurisdictional matters by soft law means is less cumbersome than revising the EU Merger Regulation's text, a route which might come with the political complications attached to the requirement of unanimity in the Council".[32] More concretely, the Commission's staff working document indicated that the approach of accepting Article 22 referrals only when they are notifiable in the member state making the referral reduces the effectiveness of the referral system.[33] Hence, the Commission recommended that the scope be widened to give more flexibility to member states and the Commission to review relevant transactions.[34]

3. Revision of the referral system

3.1. Guidance on Article 22

Following its evaluation of EU merger control, the Commission published a new Guidance on Article 22 of the EUMR.[35] The Guidance encourages referrals in situations in which a transaction is not notifiable under the laws of the referring member state, representing a fundamental shift from its earlier policy. The Commissions justified this shift in the following way: "It is clear from the wording, the legislative history and the purpose of Article 22 of the Merger Regulation, as well as from the Commission´s enforcement practice, that Article 22 is applicable to all concentrations, not only those that meet the respective jurisdictional criteria of the referring Member States".[36] Further, it explained that this change is driven by market developments, especially in the digital economy, which have resulted in more mergers involving firms with low turnovers but the potential to play a significant competitive role in the future.[37] By encouraging and accepting referrals in cases where the referring member state does not have initial jurisdiction over the case,

[32]Anne Looijestijn-Clearie, Catalin S. Rusu, and Marc J.M. Veenbrink, 'In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation', (2022) 29(5) Maastricht Journal of European and Comparative Law 560.

[33]Commission Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control' 48.

[34]Ibid 74.

[35]Communication from the Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases', Brussels, 26.3.2021 C (2021) 1959 final ('Commission Guidance on Article 22 EUMR').

[36]Commission Guidance on Article 22 EUMR, para. 6.

[37]Ibid, para. 9.

additional transactions can be examined by the Commission without amending the EUMR and imposing further notification obligations.[38]

The new guidance repeats the legal requirements of Article 22 EUMR, previously spelled out in the Notice on Case Referral,[39] one of which is that the concentration must "threaten to significantly affect competition within the territory of the Member State or States making the request".[40] For this criterion to be met, a member state must show that there is prima facie evidence of a possible significant adverse impact on competition, which could include the creation or strengthening of a dominant position, the elimination of an important competitive force, or the reduction of competitors' ability and/or incentive to compete.[41] In the Article 22 Guidance, the Commission specifically mentions transactions in which "the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential" as cases that would usually be appropriate for a referral.[42] Crucially, Article 22 EUMR permits member states to refer mergers that have already been implemented. However, the Guidance mentions that the Commission "would generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration".[43]

In *Illumina v Commission*[44] the General Court (GC) ruled for the first time on a referral under Article 22 for a concentration that was not notifiable in the member state making the request. The case concerned the pharma acquisition of GRAIL by Illumina, which did not meet the EU or national notification thresholds. The French competition authority referred the merger to the Commission, which accepted the referral,[45] arguing that it is "appropriate because Grail's competitive significance is not reflected in its turnover, as notably evidenced by the USD 7.1 billion-dollar deal value".[46] The Commission conducted an in-depth

[38]Ibid, para. 11.
[39]Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2.
[40]EUMR, Article 22(1).
[41]Commission Guidance on Article 22 EUMR, para. 15.
[42]Commission Guidance on Article 22 EUMR, para. 19; examples provided by the Commission are cases in which the undertaking: "is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenue"; "is an important innovator or is conducting potentially important research"; "is an actual or potential important competitive force"; "has access to competitively significant assets". The Commission may also take into consideration the value of the transaction.
[43]Commission Guidance on Article 22 EUMR, para. 21.
[44]Case T-227/21, *Illumina v Commission*, ECLI:EU:T:2022:447.
[45]Commission Decision C(2021) 2847 final of 19 April 2021, Case M.10188 – Illumina/GRAIL.
[46]Press release, Mergers: Commission to assess proposed acquisition of GRAIL by Illumina, 20 April 2021, https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_1846. In its decision in the case (Case M.10188 – *Illumina/GRAIL*) the Commission noted the following: "the concentration threatened to significantly affect competition in markets that were likely wider than national" (para. 83); "while the

investigation and issued a decision prohibiting the acquisition of Grail by Illumina.[47] Illumina initiated proceedings challenging the Article 22(3) Commission decision to accept the referral before the GC.[48] It claimed, among other things, that the Commission's interpretation of Article 22 was not correct and that it did not have jurisdiction to review the merger.

The GC upheld the decision of the Commission to accept the referral request by France. It confirmed that under Article 22 EUMR national competition authorities may request a referral to the Commission "regardless of the existence or scope of national merger control rules, provided that the cumulative conditions referred to in paragraph 89 above are satisfied".[49] The Court distinguished a referral under Article 22 from one under Article 4(5), explaining that the former does not refer to the competence of the member states, meaning that "the legislature did not intend to restrict the right of that Member State to request the referral of 'any concentration' to the Commission".[50] The GC recalled that the objective of the EUMR is to effectively control concentrations with significant effects on the structure of competition in the EU.[51] It argued that the referral mechanism is meant to remedy the shortcomings deriving from the inflexibility of the turnover threshold, thereby allowing to review mergers "likely significantly to impede effective competition in the internal market".[52]

Illumina has appealed the GC's judgment on the 28 October 2022;[53] unless the Court of Justice reverses the GC's judgment on this point, member states are able to use Article 22 to refer mergers that are not notifiable under their own merger regime to the Commission.

target did not generate revenues from the sale of products, one of its products in development was expected to capture a significant share of the addressable market" (para. 87(a)); "the target had raised significant amounts in equity financing by investors (para. 87(a)); "the value of the deal was particularly high compared to the turnover of the target at the time of the transaction"(para. 87(b)).

[47]Press release, Mergers: Commission prohibits acquisition of Grail by Illumina, 6 September 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[48]Case T-227/21, *Illumina v Commission*; Illumina also started (unsuccessful) proceedings in France and in the Netherlands against the referral decisions.

[49]Case T-227/21, *Illumina v Commission*, para. 90 and 91. The conditions referred to in para. 89 of the judgment are the following: "First, the referral request must be made by one or more Member States; second, the transaction which is the subject of that request must satisfy the definition of concentration set out in Article 3 of that regulation without meeting the thresholds for a European dimension laid down in Article 1 of that regulation; third, the concentration must affect trade between Member States; and, fourth, the concentration must threaten to significantly affect competition within the territory of the Member State or States which made the referral request".

[50]Case T-227/21, *Illumina v Commission,* para. 107.

[51]Ibid*,* para. 140.

[52]Ibid*,* para. 142.

[53]Case C-611/22 P, *Illumina v Commission*.

3.2. The Digital Markets Act

The Digital Markets Act is considered one of the centrepieces of the European digital strategy and aims to ensure that platforms that act as gatekeepers in digital markets behave fairly.[54] It is designed to complement competition law, recognizing that "existing Union law does not address, or does not address effectively, the challenges to the effective functioning of the internal market posed by the conduct of gatekeepers that are not necessarily dominant in competition-law terms".[55] The DMA formulates a set of criteria for determining gatekeeping status. It foresees that an undertaking is a gatekeeper if:[56]

a) it has a significant impact on the internal market;[57]
b) it provides a core platform service, which is an important gateway for business users to reach end users;[58] 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.[59]

The DMA lays down obligations for gatekeepers, including the following rule concerning mergers:

> "A gatekeeper shall inform the Commission of any intended concentration … irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules. A gatekeeper shall inform the Commission of such a concentration prior to its implementation … ".[60]

The information provided to the Commission must include a description of the undertakings concerned, their turnovers, the transaction value, the nature and rationale of the mergers and the member states affected by it. Furthermore, for any relevant core platform service, information needs to be provided concerning the yearly active business users and monthly active end users.[61] While the Commission is not able to review these

[54]Commission website, The Digital Markets Act: ensuring fair and open digital markets, available at https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.
[55]Digital Markets Act, recital 5.
[56]Digital Markets Act, Articles 3(1) and 3(2).
[57]Defined as €7,5 billion annual Union turnover or €75 billion market valuation and it provides the same core platform service in at least three MSs.
[58]Defined as 45 million monthly active end users in the Union and 10 000 yearly active business users.
[59]The thresholds must be met in the previous three financial years.
[60]DMA, Article 14(1).
[61]DMA, Article 14(2).

mergers directly under the EUMR, it needs to communicate the information received to the relevant national authorities, which may use this information to make an Article 22 referral request to the Commission.[62] Furthermore, under Article 22(5) EUMR the Commission may inform member states that a merger meets the criteria set out in Article 22(1) and invite them to make a referral request. The Commission has claimed that this DMA provision is aimed at ensuring "the effectiveness of the review of gatekeeper status as well as the possibility to adjust the list of core platform services provided by a gatekeeper",[63] however, this is clearly also a way to monitor acquisitions by tech giants that may otherwise not have been in the public domain.

An additional provision related to mergers in the DMA establishes that when a market investigation carried out by the Commission shows that a gatekeeper has infringed its obligations and has maintained or strengthened its gatekeeper position, the Commission can impose a temporary prohibition to enter into concentrations.[64] While it is early to say to what extent the Commission will make use of this provision, it is limited to very specific circumstances, also due to its sweeping nature, and has thus a limited role in closing the wider enforcement gap in tech mergers in a structural manner.

3.3. Assessment of the revised referral system

Arguably, the new Article 22 referral policy taken together with the information obligation under the DMA makes it "very unlikely that any potentially problematic transaction would go unnoticed by the Commission, at least as far as digital markets are concerned".[65] Gatekeepers need to bring their acquisitions to the attention of the Commission even if their target has no or a low turnover. If the Commission considers the merger to be problematic, it can inform member states, which can make a referral request under Article 22, bringing the merger within the Commission's jurisdiction, if the latter chooses to accept the request.

Relying on referrals to close the enforcement gap, instead of modifying the notification threshold, is attractive, because it gives the Commission

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[62] DMA, Article 14(4) and (5).

[63] European Commission, Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, para. 31.

[64] DMA, Article 18(2).

[65] Salome Cisnal de Ugarte, Melanie Perez & Ivan Pico, 'A New Era for European Merger Control: An Increasingly Fragmented and Uncertain Regulatory Landscape' (2022) 6 Eur Competition & Reg L Rev 17 20.

the possibility to determine, on a case-by-case basis, if a merger threatens to significantly affect competition. However, the Article 22 referral mechanism has some fundamental limitations, which cast doubt on whether it can really represent a long-term solution. Firstly, a merger might not always be detected in a timely manner and there is no standstill obligation before a referral is made, which potentially leads to transactions being implemented before they can be scrutinized. Secondly, member states and the Commission have discretion on whether to make and accept referrals and the one-stop-shop principle does not apply.

3.3.1. Detection and no standstill obligation

The notification obligations under the EU's ex ante merger control is important, because it guarantees that the Commission is made aware of concentrations and has the opportunity to investigate them.[66] The new interpretation of Article 22 is meant to cover transactions which are not notifiable and which might not be in the public domain. Unless "third parties" contact the Commission or national authorities, if they believe that a merger should be referred under Article 22,[67] national competition authorities need to uncover these transactions themselves. This might entail acting as "watchdogs" and monitoring markets for such transactions, which raises the question where the resources for this monitoring come from and what encouragement national authorities have to do so.[68]

In digital markets, the issue of bringing relevant mergers to the authorities' attention is attenuated by the information obligation of the DMA. The relevant provision of the DMA will ensure that the mergers involving gatekeepers in the digital market will be brought to the Commission's attention, which can then invite member states to make a request.[69] However, the information obligation under the DMA is limited to the Commission and to situations in which "merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data".[70] It has been argued, in this respect, that referrals would be facilitated if "the designated

[66]OECD, Suspensory Effects of Merger Notifications and Gun Jumping - Note by the European Union, 27 November 2018, DAF/COMP/WD(2018)95 3.
[67]Commission Guidance on Article 22 EUMR, para. 25.
[68]Catalin S. Rusu, 'The Dutch Clause Revisited: New Commission Guidelines on Case Referrals Based on Article 22 of the EU Merger Control Regulation', Radboud Economic Law Blog, 5 April 2021, available at https://www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2021/dutch-clause-revisited-new-commission-guidelines/.
[69]EUMR, Article 22(5).
[70]DMA, Article 14(1).

gatekeeper would have to inform not only the Commission but also the 'competent national authorities', and if the information obligation were to apply to all acquisitions made by the digital gatekeeper and not just those in the digital sector".[71]

In addition to the notification obligation, the EUMR standstill obligation plays an important role in preventing harm to competition, since they prevent that anticompetitive effects of a concentration "materialize before the Commission had a chance to prohibit the concentration or clear it with remedies".[72] With the absence of a notification, and accordingly, a standstill obligations, timing is of the essence for successful Article 22 referrals, since once a merger is implemented, intervention comes more cumbersome and it might be too late to remedy its anticompetitive effects. Article 22 EUMR lays down a 15 working day limit for referral requests from the date on which the concentration was "made known" to a member state.[73] The notion of "made known" implies that the authorities have "sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral"[74] and that the information is actively transmitted to the member state.[75] After having received a request, the Commission informs other national authorities, which have 15 working days to join the initial request,[76] after which the Commission has another 10 working days to decide whether to accept the referral.[77]

The guidance clarifies that when a referral request is being considered, the Commission informs the parties to the transaction in a timely manner.[78] While merging parties do not have a standstill obligation before a request is made, the Commission hopes that parties will refrain from implementing the deal. Once a referral request is communicated to the parties, the standstill obligations under Article 7 EUMR applies (if the transaction has not yet been implemented).[79] If the parties implement the transaction at this point, breaching Article 7, the

[71] Jens-Uwe Franck, Giorgio Monti, and Alexandre de Streel, 'Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law', TILEC Discussion Paper DP 2021-016, October 11, 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966244 20.
[72] OECD, Suspensory Effects of Merger Notifications and Gun Jumping – Note by the European Union, 27 November 2018, DAF/COMP/WD(2018)95 3.
[73] EUMR, Article 22.
[74] Commission Guidance on Article 22 EUMR, para. 28.
[75] Case T-227/21, *Illumina v Commission*, para. 211.
[76] Commission Guidance on Article 22 EUMR, para. 29.
[77] Ibid, para. 30.
[78] Ibid, para. 27.
[79] EUMR, Article 22(4).

Commission may implement fines[80] or adopt interim measures appropriate to restore and maintain effective competition.[81] In *Illumina/Grail,* around one month after the Commission announced that it had opened an in-depth investigation,[82] Illumina publicized that it had completed the acquisition. In response to this, the Commission adopted binding interim measures, "to prevent the potentially irreparable detrimental impact of the transaction on competition as well as possible irreversible integration of the merging parties, pending the outcome of the Commission's merger investigation".[83]

If the parties have already implemented the transaction before a referral is made, member states can still make a request, but the time passed since the implementation is taken into account by the Commission when considering whether to accept the referral.[84] In its guidance on Article 22, the Commission says that besides in exceptional circumstances[85] it "would generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration".[86] In order to avoid the uncertainty surrounding a potential referral, merging parties can inform the Commission about their intention to merge, and the Commission can make a preliminary assessment and give them an early indication on whether their transaction would be a good candidate for a referral or not.[87] Despite the existence of strict time limits for referrals, the lack of a notification and standstill obligation means that problematic transactions might be implemented before authorities have a chance to review them, making it more difficult or impossible to remedy potential anticompetitive effects.

3.3.2. Discretion and no one-stop-shop principle

When facing an impending transaction, both member states and the Commission have a significant margin of discretion in deciding, respectively, whether to make a referral and whether to accept it.[88] As a result, it

[80]EUMR, Article 14(2)(b).
[81]EUMR, Article 8(5)(a).
[82]Press release, 22 July 2021, Brussels Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina; available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3844.
[83]Press release29 October 2021Brussels Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL; available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5661.
[84]Commission Guidance on Article 22 EUMR, para. 21.
[85]" … based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers", Commission Guidance on Article 22 EUMR, para. 21.
[86]Commission Guidance on Article 22 EUMR, para. 21.
[87]Ibid, para. 24.
[88]Ibid, para. 3, restating point 7 of Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2.

is not guaranteed that the Commission will review every transaction that may have anticompetitive implications.[89] This risk is exacerbated by the creation, at member state level, of rules designed to deal with mergers involving start-ups and companies with low turnovers. These member states might be less likely to refer a merger, if they can review it themselves, and may even decide cases in ways which are not desirable for other member states. As explained by Franck, Monti and de Streel:

> "This is because, when making their decision, national competition authorities will not take into account effects, especially potential ones, on the competitiveness of markets in other Member States. Undesirable side effects on other Member States' markets may occur whether a merger is prohibited or allowed: the prohibition of an acquisition may prevent or delay the scaling up of a new business model that could increase competitiveness especially in the markets of another Member State. On the contrary, allowing an acquisition may precisely prevent a new independent competitor from entering the market of another Member State".[90]

As claimed by Rusu, "this new approach indeed says plenty about the Commission's willingness to exercise its discretion. Still, it says nothing about the Member States' willingness to refer. Closing the enforcement gap … requires however that the Member States are willing and able to cooperate on this front".[91] Indeed, not all national competition authorities will necessarily want to participate in this referral approach.[92] If a transaction has been notified in a member state that decides to review it rather than refer it to the Commission, the Commission might treat this is an element against accepting referrals from other member states.[93] This might reduce the potential complexities and inefficiencies resulting from parallel investigations, but at the same time also reduces successful referrals and might leave anticompetitive effects in other parts of the EU unaddressed.

On the other hand, if the Commission decides to accept a referral under Article 22, the referring member states can no longer examine the merger, but other member states remain competent to review the

[89]Jens-Uwe Franck, Giorgio Monti, and Alexandre de Streel, 'Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law', TILEC Discussion Paper DP 2021-016, October 11, 2021.
[90]Ibid.
[91]Catalin S. Rusu, 'The Dutch Clause Revisited: New Commission Guidelines on Case Referrals Based on Article 22 of the EU Merger Control Regulation', Radboud Economic Law Blog, 5 April 2021, available at https://www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2021/dutch-clause-revisited-new-commission-guidelines/.
[92]Thorsten Käseberg, 'The DMA – Taking Stock and Looking Ahead' (2022) 13(1) Journal of European Competition Law & Practice 2.
[93]Commission Guidance on Article 22 EUMR, para. 22.

effects of the merger in their own territories. Correspondingly, the Commission's jurisdiction is limited to the territories of member states that have made (or joined) a referral request.[94] For instance, the *Meta/Kustomer* merger,[95] which was referred to the Commission under Article 22 by Austria,[96] was reviewed by Germany in parallel. Germany did not join in time, because it first had to assess whether the merger met its transaction value threshold, which it did.[97] In the end, the German competition authority cleared the merger unconditionally, while the Commission made the clearance subject to commitments.[98]

In a 2014 Commission Staff Working document on increasing the effectiveness of EU merger control, the Commission stated: "NCAs and the majority of replies to the Staff Working Document support the view that the current Article 22 referral system is suboptimal because it does not give the Commission competence for the entire EEA and may lead to parallel investigations contrary to the 'one-stop-shop' principle". The *Syngenta/Monsanto*[99] merger is given as an example to show why it is necessary to move towards a "one-stop-shop" system. In that case the referral was made by Spain and joined by Hungary; the Commission regretted not being able to look into the French market, which it claims "might have raised equally serious competition concerns".[100]

3.3.3. Synopsis

The revised referral system gives the Commission the possibility to review mergers that it would otherwise not have been able to review, especially ones involving competitively significant firms with low turnovers being acquired by gatekeepers. While increasing reliance on referrals was an easy and quick way to tackle the enforcement gap, this

[94]Unless the geographic market extends beyond the borders of these member states. Staff Working Document 2021, para. 57.
[95]Case M.10262 *Meta/Kustomer*, [2022] OJ C228.
[96]And joined by Belgium, Bulgaria, France, Iceland, Ireland, Italy, the Netherlands, Portugal and Romania.
[97]In Germany mergers notified under Article 22 must be notifiable under national law. Bundeskartellamt press release: Bundeskartellamt considers Meta/Kustomer merger to be subject to notification, 9 December 2021, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/09_12_2021_Meta_Kustomer.html;jsessionid=E7FFADA52D4AE28D55AFC1CC7D9B9D2B.1_cid362?nn=3591568.
[98]Bundeskartellamt press release: Bundeskartellamt clears acquisition of Kustomer by Meta, 11 February 2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.htmlPress release, Mergers: Commission clears acquisition of Kustomer by Meta, subject to conditions, 27 January 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652.
[99]Case COMP/M.5675 *Syngenta/Monsanto* C(2010) 7929 final.
[100]Commission Staff Working Document Accompanying the document WHITE PAPER Towards more effective EU merger control, SWD/2014/0221 final, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014SC0221, para. 147.

approach does have shortcomings that could undermine its effectiveness. A limitation of the referral path is rooted in the absence of a notification and standstill obligation, which means that if a transaction has already been implemented before a referral is made, it might be too late to intervene (effectively). Furthermore, the system relies on member states' discretion to refer a case and the Commission's discretion to accept it. The absence of a one-stop-shop system can result in member states opting to conduct their own assessments, and the Commission being reluctant to accept referrals when parallel investigations are ongoing. The limitations of the revised referral system cast doubt on whether this approach can represent a long-term solution to the enforcement gap in big tech's acquisitions. In particular, it creates uncertainty and unpredictability as to whether a referral will take place, it can lead to different and potentially conflicting outcomes in different jurisdictions, and it might come too late. In the last part of the paper, I look at the AG opinion in *Towercast* and assess to what extent Article 102 TFEU can close the remaining gaps in the revised referral system.

4. *Towercast* and the role of Article 102 TFEU

4.1. Case overview and the AG opinion

The request for a preliminary ruling in *Towercast*[101] resulted from an action brought by the French company Towercast against the decision of the French competition authority, dismissing its complaint alleging that the company TDF had abused its dominant position. The complaint had been filed in relation to the merger between TDF and Itas, which, according to Towercast, significantly strengthened TDF's dominant position and hindered competition in the market for terrestrial television broadcasting. The merger did not reach the EU and French notification thresholds, nor was it referred under Article 22, and was thus not subject to ex ante scrutiny. The French competition authority rejected Towercast's complaint arguing that when a merger does not fall under the EUMR, "Article 102 TFEU is no longer applicable where no anticompetitive conduct distinct from the concentration is manifested".[102] Towercast lodged an appeal against this decision before the Paris Court of Appeal, which in turn referred the following question to the Court of Justice for a preliminary ruling:

[101]Case C-449/21, *Towercast*.
[102]AG Opinion in Case C-449/21, para. 21.

> "Is Article 21(1) of [the EUMR] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that regulation, is below the thresholds for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 … , as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in the light of the structure of competition on a market which is national in scope?"[103]

The Court of Justice has not yet ruled on this matter, but the opinion of AG Kokott provides some indication on how the Court might rule. AG Kokott started by clarifying that the main issue in the proceedings concerns the "supplementary or gap-closing application of Article 102 TFEU in relation to the national rules on merger control".[104] The AG explains that Article 21(1), which states that the EUMR "alone shall apply to concentrations as defined in Article 3", does not answer the question whether the application of Article 102 is precluded.[105] She emphasizes that answering this question is particularly important when the merger is not assessed ex ante under merger control law, as in this case, because it does not meet EU or national thresholds and no Article 22 referral has occurred.[106] AG Kokott highlights that Article 102 TFEU is a provision of primary law that is directly applicable and that its application cannot be precluded by a provision of secondary law such as Article 21(1) EUMR, due to the hierarchy of norms and the principle *lex superior derogat legi inferiori*.[107]

The AG states that case-law demonstrates that Article 102 TFEU is widely applicable and can cover the acquisition of competitors by dominant undertakings, recalling that "the abusive exclusion of a competitor from the market can take a variety of forms and a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market".[108] She also points out that while the turnover threshold under the EUMR determines

[103]Ibid, para. 23.
[104]Ibid, para. 2.
[105]Ibid, para. 27.
[106]Ibid, para. 27.
[107]Ibid, para. 30. But she explains that when an ex ante assessment *has* taken place, *lex specialis derogat legi generali* applies, albeit Article 102 TFEU has the status of primary law and remains applicable in principle (para. 59), because "a concentration which has been approved under the more specific rules of merger control, and the effects of which on market structure and competition conditions have been declared to be compatible with the internal market, could not as such be qualified (any longer) as an abuse of a dominant position within the meaning of Article 102 TFEU, unless the undertaking concerned has engaged in conduct which goes beyond that and could be found to constitute such an abuse" (para. 60).
[108]Ibid, para. 45.

whether a concentration warrants ex ante control, it is not relevant in establishing whether the conduct of a dominant undertaking can be scrutinized ex post under Article 102, even if it relates to a concentration.[109]

Interestingly, AG Kokott raises the issue of the gap in merger control that arises when powerful undertakings acquire emerging undertakings at an early stage of their development, to eliminate them as competitors and protect their market position.[110] She argues that, in order to protect competition, national authorities should be able 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".[111] AG Kokott concludes that Article 21(1) EUMR must be interpreted as not prohibiting a national competition authority from reviewing a concentration under Article 102 TFEU, if it does not meet the EU and national notification thresholds for ex ante merger review, and has not been referred to the Commission under Article 22 EUMR.[112]

While *Towercast* concerned national competition authorities, the same reasoning is applicable to the Commission, in line with the judgment in *Continental Can*[113] and *Tetra Pak*,[114] in which the Court confirmed the ability of the Commission to look at mergers through the lenses of an abuse of dominance.[115] If the Court of Justice follows the AG's opinion, competition authorities will be able to bring Article 102 cases to address anticompetitive concerns that result from mergers, if they are not able to review the mergers under merger regulation. While the potential gap-filling role of Article 102 in these cases is evident, its practical significance after the revision of the referral system has not been addressed yet. Accordingly, the next section will look at the limitations of the revised referral system, identified above, and discuss in which cases Article 102 can play a residual gap-filling role.

[109]Ibid, para. 38.
[110]Ibid, para. 48.
[111]Ibid, para. 48.
[112]Ibid, para. 68.
[113]Case 6-72, *Europemballage Corporation and Continental Can Company* v *Commission*, ECLI:EU:C:1973:22. This was, however, before the introduction of the EU Merger Regulation.
[114]Case T-51/89 *Tetra Pak v Commission* [1990] ECR II-41. At para. 1, the Court of First Instance stated that "the acquisition by an undertaking in a dominant position of an exclusive patent license for a new industrial process constitutes an abuse of a dominant position where it has the effect of strengthening the undertaking's already very considerable dominance of a market where very little competition is found and or preventing, or at least considerably delaying, the entry of a new competitor in that market, since it has the practical effect of precluding all competition in the relevant market".
[115]Also the Monopolkommission argued that "it is possible to prohibit concentrations under EU law which constitute a structural abuse of market power because of old but presumably still applicable case-law", Monokolpolisson, Competition policy: The challenge of digital markets, special report n. 68, 2015 106, referring to Case 6/72, *Continental Can*, ECR 1973, 215, para. 26 and Case T-51/89, *Tetra Pak*, ECR 1990, II-309, para. 23.

4.2. Assessment of the gap-closing function of Article 102 TFEU

With Article 22 EUMR, a merger that does not reach the EU (and national) notification thresholds can be scrutinized by the Commission, if a referral takes place. However, as pointed out earlier, there is no guarantee of a referral in problematic cases. Furthermore, even when a referral takes place, the Commission can only consider the effect of the transaction on the territories of member states that have joined the referral, which might exclude the consideration of some negative effects in the EU. As argued by AG Kokott, in light of the enforcement gap in merger control, Article 102 may play a "supplementary or gap-closing" function. This is particularly relevant in digital markets in which, by acquiring start-ups, incumbents can prevent future competition and consolidate their position of power in the market.[116]

In light of the dynamic nature of digital markets and the increased risk of type II errors, it is sensible to have Article 102 as a safety net, in case harmful mergers escape the authorities' scrutiny. However, since the enforcement gap in regard to tech acquisitions has already been addressed by the revised referral system, a closer look at Article 102 is needed to understand what residual role it may still play in practice. This section will explore to what extent Article 102 can mitigate the two limitations of the revised referral system identified above. This analysis is meant to shed light on whether the revised referral system in combination with Article 102 can effectively close the enforcement gap, or if more needs to be done for foolproof merger control in digital markets.

As a general remark, the substantive differences between merger review under the EUMR and an abuse of dominance case under Article 102 are beyond the scope of this paper.Suffice to say, the application of Article 102 is limited to dominant companies, imposing the onus on competition authorities to prove dominance. In terms of remedies, under merger control structural remedies are the norm; the notice on remedies specifies that "divestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps and may also be the best means of resolving problems resulting from vertical or conglomerate concerns".[117] Non-divestiture remedies can only be imposed if they are at least as effective as a divestiture.[118] The reverse

[116]See John Kwoka and Tommaso Valletti, 'Unscrambling the eggs: breaking up consummated mergers and dominant firms', Industrial and Corporate Change, 2021, 30, 1286–1306 1292.
[117]Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004, paras 17, 61.
[118]Ibid.

applies in abuse cases, where behavioural remedies are generally preferred; in these cases, "structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy".[119]

4.2.1. Detection and no standstill obligation

The first issue identified above relates to the timely detection and referral of a merger. In cases of non-notifiable mergers, authorities might not always be aware of them, especially if they are not in the public domain. It might follow that some transactions are executed before member states can make a referral request to the Commission. If the Commission rejects a referral, due to the time elapsed since the transaction has been implemented,[120] the potential anticompetitive effects of a merger can be scrutinized under Article 102, if the acquiring firm is dominant. Nonetheless, the DMA limits the instances in which intervening with Article 102 in these cases will be called for. With the DMA in place, gatekeepers will have to inform the Commission about their intention to merge, giving the Commission the possibility to carry out a preliminary assessment and ask national competition authorities to refer a transaction under Article 22, if they deem it problematic. Although not all dominant companies are also gatekeepers, thanks to the DMA the Commission will be informed of most of the mergers of big tech companies, meaning that the chances that mergers that could also be addressed by Article 102 will go unnoticed is small.

The advantage of ex ante merger review is that a transaction that could have anticompetitive effects is prevented before these effects materialize on the market. Any form of ex post intervention entails that competition authorities face a situation in which assets might have already been combined. In this case it might be extremely challenging or impossible to "unscramble the eggs", because, for instance, the merging firms have already shared "business secrets, strategic information, personnel, assets or customers".[121] Since under Article 22 a referral may be accepted also after a merger has been completed, Article 102 does not significantly supplement merger control in this respect. Both forms of interventions

[119]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, Article 7(1).
[120]Commission Guidance on Article 22 EUMR, para. 21.
[121]OECD, Suspensory Effects of Merger Notifications and Gun Jumping – Note by the European Union, 27 November 2018, DAF/COMP/WD(2018)95 3.

would be ex post, but intervening with the EUMR might still be preferable, because dominance does not need to be established and because the remedies available under the EUMR might be more suitable. Indeed structural remedies can be imposed on consummated mergers; as explained by Kwoka and Valletti, "in this case, the necessary action might consist of reversing the merger … by separating it according to the "fault lines" defining its constituent parts. This solution would effectively represent the same policy of targeted divestiture that could have, and arguably should have, been employed at the outset".[122] Furthermore, if a merger can constitute an abuse of dominance, it can be assumed that "the magnitude of the potential competition concerns and of the potential detrimental effect on consumers"[123] make it an exceptional circumstance that warrants an Article 22 referral even (significantly) after the transaction has been executed.

One thing to keep in mind is that Article 102 may still have some relevance if a member state was notified about a transaction but failed to refer it within the 15-day time limit. In situations in which the anticompetitive nature of a concentration only becomes manifest after a period of time, Article 102 may be the only path available for competition authorities to tackle the transaction. Nonetheless, strictly speaking, this does not concern a gap of the referral system, since in this case the residual role of Article 102 results from the risks inherent in the predictive nature of merger review in general.

4.2.2. Discretion and no one-stop-shop principle

Without a one-stop-shop mechanism, in case a potentially anticompetitive concentration does not meet the EU threshold, some member states may decide not to make a referral under Article 22, but instead to carry out their own merger assessment. If other member states refer the merger, because, for instance, they are not able to review it themselves, the Commission may be reluctant to accept the referral and conduct a parallel assessment.[124] Furthermore, the Commission may reject a referral, if it does not believe that there is a demonstrable "real risk that the transaction may have a significant adverse impact on competition".[125] In these cases, member states which are not able to review the merger

[122]John Kwoka and Tommaso Valletti, 'Unscrambling the eggs: breaking up consummated mergers and dominant firms', Industrial and Corporate Change, 2021, 30, 1286–1306 1292.
[123]Commission Guidance on Article 22 EUMR, para. 21.
[124]Ibid, para. 22.
[125]Ibid, para. 15; see also EUMR, Article 22(3).

under national law could bring their own Article 102 cases. In this way they do not run the risk that harmful effects on their territories go unchallenged. From this perspective, the significance of Article 102's gap-closing function hinges on how member states are going to respond to the merger enforcement gap. If more countries introduce additional thresholds, reliance on Article 102 in these countries will decrease.[126] Alexiadis and Bobowiec argue that "while the use of Article 102 route may not be without merit if the merger has not been subject to any form of effective merger review scrutiny in the past, that is an unlikely scenario for any deal with a major impact on an economy, given the range of national merger control rules now in place".[127] However, if more member states rely on their national merger review system instead of joining referrals, member states without alternative notification thresholds may face more rejections of their Article 22 referrals. As a result, these member states may start relying more on Article 102 to tackle harmful concentrations.

The Commission might not want to assess a merger that is being reviewed in parallel in member states, since its assessment would be limited to the territories of the member states that made the referral. Furthermore, parallel investigations might be inefficient and could give rise to conflicting outcomes.[128] If the Commission considers a merger to be problematic, it could opt to bring an abuse case under Article 102 TFEU, which would give it the ability to assess the anticompetitive effects in the entire EU. This could lead to a situation in which the Commission brings an EU-wide abuse case, while the same conduct is scrutinized under national merger control rules in member states. In a purely national context, AG Kokott argued that:

> "a concentration which has been approved under the more specific rules of merger control, and the effects of which on market structure and competition conditions have been declared to be compatible with the internal market, could not as such be qualified (any longer) as an abuse of a dominant position within the meaning of Article 102 TFEU".[129]

It is not entirely clear what this would mean for a situation in which a merger has been reviewed at member state level and the Commission

[126]For instance, Italy has introduced a level of flexibility in reviewing below-the-threshold transactions in Law No. 118/2022, entered into force on 27 August 2022.
[127]Peter Alexiadis and Zuzanna Bobowiec, 'EU Merger Review of 'Killer Acquisitions' in Digital Markets – Threshold Issues Governing Jurisdictional and Substantive Standards of Review' (2020) 16(2) Indian Journal of Law and Technology, available at https://repository.nls.ac.in/ijlt/vol16/iss2/4 87.
[128]Commission Guidance on Article 22 EUMR, para. 22.
[129]AG Opinion in Case C-449/21, para. 60.

wants to bring an Article 102 case. However, it seems reasonable to infer that on the territory that has already cleared a merger, an abuse of Article 102 cannot be found. Furthermore, a rule regarding cooperation between the Commission and national competition authorities in 101 and 102 TFEU cases says that "if a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority".[130] It would, thus, appear that Article 102 might not necessarily give the Commission a wider geographical scope for its investigation than what it would have by accepting an Article 22 referral.

4.2.3. Synopsis

When looking at how Article 102 TFEU can complement the revised referral system, it becomes apparent that Article 102 cannot solve the issues deriving from the absence of a one-stop-shop system and the lack of a notification and standstill obligation. Transactions might be implemented before the authorities get to review them and thus anticompetitive effects might already materialize on the market. Consummated mergers can still be referred and reviewed ex post, meaning that Article 102 does not further close the enforcement gap in these cases.

Furthermore, it has been argued that Article 102 cannot compensate for the lack of a one-stop-shop system in case of referrals. Although Article 102 gives the Commission jurisdiction over the entire EU, it does not appear to solve the problem of parallel investigations, because the Commission cannot prevent that member states carry out independent merger reviews covering the same conduct subject to an Article 102 case. An instance, however, in which Article 102 may well play a residual gap-filling role is when the Commission rejects a referral, for instance, because other member states are already conducting their own investigations. In this case, member states in which the merger is not notifiable can scrutinize the merger using Article 102.

5. Conclusion

This paper has explored the merger review enforcement gap arising in relation to big tech acquisitions. Often these mergers do not reach the EU and national notification thresholds and may avoid scrutiny despite

[130]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1(1), Article 11/6.

being potentially harmful to competition. In order to bridge this gap, the Commission has increased the use of Article 22 EUMR, allowing member states to refer mergers to the Commission, even if these do not meet national merger review thresholds. This approach introduces discretions and compensates for the rigidity of thresholds. This paper has argued that together with the DMA's obligation on gatekeepers to inform the Commission of planned mergers, the new interpretation of Article 22 closes the enforcement gap for the most part. The paper has then assessed the additional value of Article 102 in supplementing merger control, as per *Towercast,* and concluded that Article 102's gap-filling potential is manifested mainly at national level.

While this paper claims that, altogether, recent developments have largely closed the enforcement gap, it also shows that the approach taken to fill the gap is more of a patchwork than a cohesive approach. The Commission stretched existing rules to solve a problem, instead of designing an approach tailored to the new challenges, for instance, by revising thresholds or imposing a notification obligation on gatekeepers. Temporarily, this might be a sensible approach, but in the long term it needs to be determined whether this solution is adequate, or whether it is necessary to go back to the drawing board and redefine how to best tackle tech mergers.

Disclosure statement

No potential conflict of interest was reported by the author(s).