Merger control beyond merger thresholds and the multiplication of ex ante merger notification obligations

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☞ EU dimension; EU law; Foreign investment; Merger control

1. Introduction.

1.1 The broad picture

Historical events often follow apparently circular, recurrent, even repetitive patterns. Those cyclical patterns reflect tensions between opposed ideological and political positions, with one or other position or option prevailing at one or another point in time and vice versa. The last few decades have witnessed those tensions vividly in the economic policy and legislative fronts. The 1990s and run-up to the 2008 financial crisis witnessed the apotheosis of globalisation, free trade and economic freedom with events such as de-regulation in many industries in the United States (US) since the Reagan administration or the access of China to the World Trade Organization in 2001;[1] and in the European Union (EU) with various liberalisation processes in network industries and a push towards increased regional integration, including the birth of the single currency, the euro,[2] and the accession of many former Eastern bloc states.[3]

The phase of marked liberal economic policies in the international order seems to have lost momentum in the second decade of this century, to be at least partially replaced by a phase of economic nationalism due to various concerns, including the economic power of technology platforms; the apparent deficiencies in the far-stretched supply chains originating in Asia after the Covid-19 crisis; and the rift caused by increasing geopolitical distrust between blocs.

This dynamic can easily be identified in the area of regulatory permits associated to mergers and acquisitions, where the desire for open and free trade and removal of barriers to competition and free flow of international investments seems to have moved into reverse gear. In the EU, a reinterpretation of existing competition law provisions and the approval of new internal market-based tools are the measures chosen to tackle "killer acquisitions" and market distorting foreign subsidies.

1.2 Foreign direct investment screening as quintessential example of national interest protection impacting international investment. The potential clash with the EUMR

The proliferation at national level of foreign direct investment (FDI) screening regimes,[4] marks an increase in the general pulsion by national governments to interfere in cross-border mergers and acquisitions. In turn, this further scope for national intervention in mergers and acquisitions is also likely to result in a reawakening of the disputes between the European Commission and Member States under art.21 EU Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings[5] (EUMR). The potential for clash is embedded in the wording of art.21 EUMR itself, which states that legitimate grounds under that provision are not a *numerus clausus* (provided that legitimate grounds distinct from those included in art.21.4 EUMR are duly notified on a case-by-case basis to the European Commission).

An example of the above is the *VIG* case.[6] Back in 2021, Vienna Insurance Group AG Wiener Versicherung Gruppe sought to acquire AEGON Group's subsidiaries in Hungary. The acquisition was prohibited by Hungary on the grounds that it threatened Hungary's legitimate interests and on the basis of Hungary's new emergency FDI screening urgency legislation enacted during the pandemic. However, the European Commission cleared the acquisition on 12 August 2021. The acquisition was part of a plan of VIG to acquire some businesses from AEGON Group in several European countries (i.e., Hungary, Poland, Romania, and Turkey). Following its investigation, the European Commission had doubts as to whether the veto genuinely aimed to protect Hungary's legitimate interest within the meaning of art.21 EUMR, since the Hungarian authorities failed to show that the measure was justified, suitable and proportionate. The Commission ordered Hungary to withdraw its veto.

[1] World Trade Organization, "China and the WTO", available at: *https://www.wto.org/english/thewto_e/countries_e/china_e.htm*.
[2] The euro was fully effective after a transition period ending 31 January 2001: Banco de España, "The introduction of the euro", available at: *https://www.bde.es/bde/en/secciones/eurosistema/uem/el-euro/la-introduccion-/*.
[3] In a process of successive successions between 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia) and 2013 (Croatia): European Parliament, "The Enlargement of the Union", available at: *https://www.europarl.europa.eu/factsheets/en/sheet/167/the-enlargement-of-the-union*.
[4] Under the EU coordination mechanism put in place by EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79/1.
[5] Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.
[6] Commission Press Release, "Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation IP/22/1258" (21 February 2022).

This matter is a continuation of the art.21 EUMR case law where the Commission has in the past had to intervene to oppose (not always successfully) Member State intervention in mergers with European dimension on the basis of an alleged legitimate interest. The specialty is that the "legitimate interest" invoked by the Member State in the *VIG* case is specifically the national FDI investment regime, an area of Member State competence. From a formal standpoint it appears clear that, whenever the national interest invoked is not one of those listed in art.21 EUMR, Member States would have to notify the Commission prior to taking action. The argument arises around the proportionality of any Member State measures seeking to protect national interest by means of FDI screening: sooner or later the Community courts will have to decide on the actual capacity of the European Commission to oppose the merits of national action in this area of national sovereignty.

1.3 The latest developments in merger control law have a potentially additional chilling effect on international investment

The expansive view of the streamline referral system foreseen in the EUMR will enable the national competition authorities (NCAs) to activate the mechanism of merger review by the European Commission not only in connection with concentrations that do not have Community dimension, but also in connection with concentrations which do not meet any merger threshold whatsoever (either at EU or national level).

The interplay of competition law and internal market tools, i.e., *(i)* art.22 EUMR as recently interpreted; *(ii)* the residual application of art.102 Treaty on the Functioning of the European Union (TFEU); coupled with the *(iii)* merger enforcement powers by NCAs acting in co-ordination in the framework of the European Competition Network; *(iv)* the merger reporting obligations under the Digital Markets Act (see discussion under section 4, below); and *(v)* the new system of control of foreign subsidies, will surely enable a much wider fishing net to capture more potentially harmful mergers. But there is also a risk of false positives in the form of less harmful or even harmless mergers being caught, or discouraged overall.

2. Merger control beyond merger thresholds. The re-interpretation (or revival) of article 22 EUMR

2.1 Can or should mergers that do not meet any merger control thresholds be subject to merger review?

Barely 30 years ago (pre-1989) there was no administrative merger control regime under Community law; in many Member States, merger control requirements were either non-existent or were merely voluntary, as was the case in much of the rest of the world.

The EUMR put in place a co-ordinated system for merger review in the EU. Under art.21 EUMR the "one-stop shop" was instituted as a framework of business certainty, where reportable concentrations could be closed either because clearance was gained under the EUMR, or under the applicable national merger control regimes. It is to be recalled in this regard that the "one-stop shop" principle is expressly mentioned in the EUMR,[7] which also refers to the *legal uncertainty, effort and cost of undertakings of carrying out multiple notifications for the same transaction*.[8] In contrast, as it is discussed below, the current interpretation of the General Court casts doubts on those principles.

The re-interpretation (or arguably, revival, since the European Commission seems to have changed course at some point in time) of art.22 EUMR by judgment of the EU Court of First Instance in the *Illumina/Grail* case[9] to cover also concentrations not meeting any merger thresholds seems to have upset that perceived balance, adding to the complexity of the whole system.

Illumina is a US company active in the area of genetic analysis and editing, including sequencing technology used in cancer screening tests, where Grail, Illumina's target, was also active. The acquisition was publicly announced on 21 September 2020 and it did not meet either the EUMR, nor any national merger control law thresholds within the EU. However, the transaction had several ingredients to make it attractive to competition authorities, and arguably problematic, i.e., the nature of the industry (genetic engineering, biotech) coupled with apparently substantial competitive overlaps (though this is a vertical merger, so the matter seems to reflect a larger trend also visible in the United States to subject vertical mergers to close scrutiny and even prohibition, but this is not the object of analysis of this article).

In those circumstances, a complaint to the European Commission on 7 December 2020 triggered an invitation by the latter to Member States to initiate the art.22 EUMR process. The French NCA, followed by those of Belgium, Greece, Iceland, the Netherlands and Norway sent referral requests to the Commission under art.22 EUMR with the Commission accepting the request.

[7] Recital 11 EUMR.
[8] Recital 12 EUMR.
[9] *Illumina v Commission* (T-227/21) EU:T:2022:447.

2.2 The reasoning of the General Court in the Illumina/Grail judgment

The merging parties filed an action before the General Court to oppose the Commission taking jurisdiction to review the merger under the EUMR. The object of the appeal was the annulment of the respective Commission Decisions to accept the referral requests by the initial, and subsequent, referring Member States. The action was held admissible because the Commission decision to take jurisdiction, even if arguably not a final agency or administrative act, had by itself legal effects such as the standstill or legal obligation not to implement the merger prior to gaining clearance (art.7 EUMR).[10]

The central provision in the dispute is art.22.1 EUMR, which states that:

> "1. One or more *Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension* within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.
>
> Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned." (The emphasis is ours).

The court unfolded its construction tools considering art.22.1 EUMR under its literal, historical, contextual and teleological interpretation, to conclude that the position taken by the European Commission is well grounded in the mandate of art.22.1 EUMR, based amongst other things on the literal wording (emphasised above) that *Member States can request the Commission to examine any concentration*. Also, precedent favours the interpretation that, when faced with an art.22 EUMR request, the Commission is solely obliged to verify whether that request is coming from a Member State.[11] There is no obligation on the Commission to verify that the relevant concentration did not meet the merger thresholds under the national merger control law of the referring state.[12]

One aspect of art.22 EUMR to which the court maybe does not devote enough attention or does not cover all possible interpretations is the mandate that art.22 EUMR applies to *any* concentration (art.22.1 EUMR first paragraph). In spite of the court's finding in this regard, it is pertinent to note that the literal wording of the second paragraph of art.22.1 EUMR refers to a category of situations where "no notification is required". Article 22.1 EUMR is read by the Commission and some Member States (France) as unequivocally implying that the mechanism of art.22 EUMR must also apply to concentrations that are not reportable because they do not reach the relevant national merger control law thresholds.[13] However, the wording "if no notification is required" could also have been meant to apply solely to countries having a voluntary regime (United Kingdom (UK), which is no longer an EU Member State, but crucially it was, at the time the EUMR was enacted) or not having a merger control regime in place. This implies that it cannot be ruled out that the legislature was contemplating the extension of the art.22 EUMR referral regime to countries arguably lacking protection because of a gap caused by the absence of a merger control system or with merely voluntary notification; but that allowing the use of art.22 EUMR by Member States already possessing their own compulsory merger notification rules would simply go too far in detriment of legal certainty and would be contrary to the "one-stop shop" principle expressly contemplated by the EUMR. Such interpretation would enable one to reconcile the wording of art.22.1 EUMR with the preservation of a combined EU/national merger control law system working under the one-stop shop principle. This would also enable the EUMR to remain a completely compulsory notification system.

Further to the above, if NCAs wanted to challenge concentrations not meeting either the EUMR or national thresholds, they would still be able to do so under art.102 EUMR, in consistency with the latest opinion expressed by AG Kokott on this point (see discussion under section 3, below). The *Illumina/Grail* judgment makes only a tangential reference to the point.[14]

However, regarding the possible breach by the Commission of the principle of legal certainty, the court dismisses it by reminding that such principle requires that the applicable law "enables those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly".[15] The court further reasoned that "the interpretation advocated by the applicant and by Grail, which makes the application of Article 22 of Regulation No 139/2004 conditional on the requirements of a national merger control system, while providing for a sort of exception for Member States which do not have such a system, would lead to uncertainty concerning the concentrations that fall within the scope of that provision".[16] The court further dismissed Grail's interpretation as incompatible with legal certainty

[10] At [75] of *Illumina/Grail* judgment, cited.
[11] *Kesko Oy v Commission of the European Communities* (T-22/97) EU:T:1999:327; [2000] 4 C.M.L.R. 335, cited in the *Illumina* judgment at [110].
[12] At [156] of the *Illumina/Grail* judgment.
[13] *Illumina/Grail* judgment at [130].
[14] *Illumina/Grail* judgment at [119].
[15] *Illumina/Grail* judgment at [173].
[16] *Illumina/Grail* judgment at [177].

inasmuch as art.22 EUMR is made dependent on factors external to art.22 EUMR itself and also incompatible with the *Kesko* case law, cited, because the Commission should not have a say on the power of NCAs to make referrals under art.22 EUMR. Second, predictability is also higher according to the court because under the Commission's interpretation a Member State could make an upwards request regardless of whether or not that Member State has a merger control system.

There are at least some indications that, admittedly, the European Commission altered its administrative stance towards art.22 EUMR because in the past the Commission "discouraged" use of art.22 EUMR by NCAs regarding mergers which those NCAs did not have power to review themselves. However, this was not considered material for the court.[17]

The court touched upon what could likely be the most obvious objection to the Commission's interpretation of art.22 EUMR when it states that such interpretation does not alter the clear allocation of competences vis-à-vis NCAs based on the thresholds of art.1 EUMR: if those thresholds are not exceeded, original competence falls on the NCAs to request a referral under art.22 EUMR. The court clarified that:

> "The *parties to such a concentration are therefore not required to notify that concentration to the Commission or to assess whether the conditions laid down in Article 22(1) of that regulation have been met*. In addition, *they are not likely to be subject to penalties in the event that the concentration is not actively 'made known'*, within the meaning of the second subparagraph of Article 22(1) of that regulation. Accordingly, the competent authority can be identified in a way that is foreseeable."[18] (The emphasis is ours).

Such clarification cannot hide the fact, however, that with the European Commission's interpretation, the combined EU/national law system of merger notification ceases to be a purely thresholds or ex ante notification-based system, where companies had the certainty that if a given projected concentration did not meet either the EUMR thresholds, nor any EU Member States' national thresholds, such concentration would not have to endure any administrative merger control review. Conversely, there is now a margin of uncertainty that some projected concentrations, even if they do not meet either the EUMR or any national law thresholds for merger review, might still be subject to such a review under the prevailing interpretation of art.22 EUMR.

Another important point in the court's reasoning is that of time lapsing and the uncertainty caused by the fact that the Commission might potentially examine a concentration long after its implementation.[19] The court dealt with this by stating that a referral request under art.22 EUMR must "be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned". However, again, there is arguably a loophole in the court's reasoning: in the framework that results from the court's construction (art.22 EUMR applies also to Member States whose national merger thresholds are not reached) concentrations might go unnoticed for a potentially indefinite amount of time by the Member States responsible for triggering the mechanism of art.22 EUMR. Some (limited) safeguard in this regard is provided by the Commission itself which declares that it will *generally not consider a referral appropriate* if it takes place more than six months after implementation of the concentration (Communication from the Commission Guidance on the application of the referral mechanism set out in art.22 EUMR[20] (art.22 EUMR Referral Notice)).

The latter point takes us to the interpretation of the notion "made known to the Member State concerned" as *dies a quo* for the 15-day period envisaged under art.22.1 EUMR. Should the "made known" be construed as an active facilitation to the relevant NCA of information about the concentration, or is just any passive knowledge sufficient. The court concluded that mere knowledge of the concentration is not enough to enable a NCA to carry out a preliminary assessment of the conditions triggering application of art.22 EUMR so that, for precaution, Member States if such interpretation were to prevail would have to trigger art.22 EUMR even if uncertain of whether the conditions for the application of such provision are met, but merely to avoid the risk of missing the 15-day deadline foreseen in art.22 EUMR. In the court's words:

> "the concept of a concentration's being 'made known' within the meaning of the second subparagraph of Article 22(1) of Regulation No 139/2004 must, as regards its form, consist of the *active transmission of relevant information to the Member State concerned and, as regards its content, contain sufficient information to enable that Member State to carry out a preliminary assessment of the conditions laid down in the first subparagraph of Article 22(1)*."[21] (The emphasis is ours).

[17] *Illumina/Grail* judgment at [261], [262].
[18] *Illumina/Grail* judgment at [180].
[19] *Illumina/Grail* judgment at [181].
[20] Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C113/01 at [21].
[21] *Illumina/Grail* judgment at [204]. See also [211]. This is in line with the European Commission's criterion as expressed at point 28 of the Commission Article 22 EUMR Referral Notice.

The court considered that in the case before it, the invitation letters sent by the Commission to Member States to refer pursuant to art.22 EUMR was the "make known" requirement triggering the start of the art.22 EUMR 15-day period.[22]

2.3 Practical lessons from the Illumina/Grail judgment.

Illumina's sin on the facts of the case seems to have been not to have actively passed information concerning Grail's acquisition to the relevant Member States. Importantly, these notifications by Illumina to ensure that Member States are "made known" or informed of the transaction for the purposes of the 15-day period should have been delivered to all pertinent Member States. In practice, to avoid or minimise regulatory uncertainty, notification should be served on *all* 27 Member States in international or global markets where potential to affect competition could be anywhere. A lesson from the *Illumina* matter, therefore, is that notifications to the various NCAs reporting on the proposed merger for the purposes of kickstarting the 15-day period is advised in connection with potentially problematic concentrations. Furthermore, notification to the European Commission might also be a safeguard, and the Commission itself recommends such a path in potentially problematic transactions.[23]

The General Court did declare that 47 days is too long a period for the Commission to contact Member States under the last paragraph of art.22 EUMR in view of the objectives and inherent speed of the merger review process, though this is of no practical consequence to Illumina, who still had the opportunity to be heard.[24]

The substantive safeguard inherent to the system seems to rely on the restrictive nature of art.22 EUMR which enables such referrals only in connection with concentrations affecting trade between Member States and affecting competition within the territory of the Member State or States requesting the referral. More specifically, categories of transactions normally appropriate for art.22 EUMR referral include transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This would include cases where:

- the target is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues;
- the target is an important innovator or is conducting potentially important research;
- the target is an actual or potential important competitive force;
- the target has access to competitively significant assets (such as, for instance, raw materials, infrastructure, data or intellectual property rights); and/or
- provides products or services that are key inputs/components for other industries.[25]

Interestingly, the Commission states in its Notice that it may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target, a point that could be brought under the umbrella of the discussion regarding appropriate merger control thresholds.

One sees in all of the above the recurrent theme of tackling "killer acquisitions".

2.4 Follow on to the Illumina/Grail General Court judgment

The *Illumina/Grail* case is far from over. The following events and developments are to be noted in this regard:

(a) On 6 September 2022 the European Commission prohibited the acquisition of Grail by Illumina on the grounds of feared foreclosure by Illumina of Grail's rivals, all of whom rely on Illumina's NGS testing system, required for early cancer detection tests.[26]

(b) Illumina is currently being investigated for having "jumped the gun" or closing the transaction during the Commission's review and prior to the merger Decision.[27]

(c) Interestingly, the Commission also issued an interim measures decision aimed at restoring competition to the state of affairs prior to the illegal closing of the concentration by Illumina and Grail.[28] This has been the first interim measures Decision of this type according to the Commission itself. Specific interim measures include:

    (i) a "hold separate" order that Grail's operations be kept separate and independent from Illumina and be run by an in dependent hold separate manager exclusively in the interest of Grail (not Illumina);

    (ii) an obligation on the parties not to share any confidential business information, except as required by

[22] At [214].

[23] According to the Commission, "merging parties may voluntarily come forward with information about their intended transactions. Where appropriate, the Commission may in such cases give them an early indication that it does not consider that their concentration would constitute a good candidate for a referral under Article 22 of the Merger Regulation, if sufficient information to make such a preliminary assessment has been submitted" (Article 22 EUMR Referral Notice, at [24]).

[24] At [240].

[25] Commission Guidance on the application of the referral mechanism set out in Article 22 of the EUMR (2021/C113/01) at [19].

[26] Commission Decision of 6 September 2022, Case COMP/M.10188—*Illumina/Grail*.

[27] Commission Press Release, "Mergers: Commission alleges Illumina and Grail breached EU merger rules by early implementation of their acquisition" (19 July 2022), available at: *https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_10483*.

[28] Commission Press Release, "Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of Grail" (29 October 2021), available at: *https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5661*.

law or as required in the ordinary course of business between a supplier and a customer;

(iii) an obligation on Illumina to provide additional funds necessary for the operation and development of Grail;

(iv) business interaction between the parties must be at arm's length in line with industry practice and avoiding favouring Grail vis-à-vis other competitors;

(v) Grail must work on options to prepare for the possible unwinding of the transaction by the Commission.

The above interim measures applied during the merger review of the underlying transaction, which is now concluded, so that the transaction should now be unwind (see point (a)).

(d) Finally, the judgment of the General Court has been appealed before the Court of Justice,[29] where it is to be hoped that some grey areas are clarified, and a reversal of the first instance decision should not be ruled out. Should the challenge before the court succeed, the entire bundle of Commission Decisions and prohibitions set out above should be expected to fail completely for lack of competence of the European Commission.

3. (More) merger control beyond merger thresholds: AG Kokott's Opinion in the Towercast case[30] and the recycling of the old Continental Can case law

French company TDF (former monopolist television signal carrier in France) acquired Itas SAS in October 2016. That acquisition met neither the EUMR thresholds, nor those under French competition law. A third party, Towercast, filed a complaint with the French Autorité de la Concurrence arguing that the concentration reinforced TDF's already strong position and it amounted to an abuse of dominant position. The French Competition Authority dismissed the complaint on the grounds that under the logic of the EUMR, concentrations were governed by the ad hoc merger control instruments and art.102 EUMR does not apply to concentrations.

It is relevant to recall here the wording of art.21.1 EUMR:

> "[The EUMR] alone shall apply to concentrations as defined in Article 3, and Council Regulations (EC) No 1/2003, (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall not apply."

When one looks closely at the literal wording of this provision it is understandable why the *Conseil d'Etat*, in the appeal reviewing the Competition Authority's dismissal decision, entertained doubts: the exclusion of EU Regulation 1/2003 would seem to also exclude the application to concentrations of arts 101 and 102 TFEU. Such interpretation would arguably render impossible the review under art.102 TFEU of any transaction not caught on the radar of either the EUMR or the national merger control laws; but that would in turn potentially violate the scope and reach of art.102 EUMR as a key or "constitutional" provision.

The opposite interpretation (that art.102 TFEU can apply to concentrations not subject to merger review), would prevail if one considers that the EUMR excludes the application of EU Regulation 1/2003 to concentrations, but it does not expressly mention art.102 TFEU. Though exclusion of EU Regulation 1/2003 may seem to functionally encompass exclusion of art.102 TFEU, it would be bold for a Regulation, even a Council Regulation of the importance of the EUMR to completely exclude the application of art.102 TFEU, a directly applicable, clear and precise Treaty provision. Perhaps this is the reason why such exclusion is not expressly contemplated. This is, ultimately, AG Kokott's position, making it clear that art.21.1 EUMR is secondary law which cannot block or limit the application of art.102 TFEU—hence the exclusion by the EUMR of EU Regulation 1/2003 does not preclude the application of art.102 TFEU.[31]

It is to be hoped that the upcoming CJEU judgment in the *Towercase* matter clarifies that art.21.1 EUMR is illegal in as far as it excludes EU Regulation 1/2003 from applying to concentrations caught by art.102 TFEU. Otherwise, concentrations to which art.102 TFEU applies would be deprived of the administrative enforcement framework of EU Regulation 1/2003—which would not make sense.

A similar reasoning (that secondary law such as the EUMR cannot limit the scope of application of art.102 TFEU) enables AG Kokott to rule out the argument that concentrations falling below the thresholds of art.1 EUMR can no longer be questioned under art.102 TFEU.

Kokott's Opinion comes after the *Illumina* judgment commented on above, hence it is not surprising that Kokott further justifies the possible review of concentrations under art.102 TFEU as an additional safeguard on top of art.22 EUMR, to cope with the issue perceived as urgent from a public policy perspective of dealing with "killer acquisitions":

> "as the Italian Government and the Commission point out, a gap in protection has emerged in recent years in the coverage and control, under competition law, of acquisitions of innovative start-ups, for example in the fields of internet services,

[29] Pending appeal *Illumina v Commission* (C-611/22 P).
[30] Opinion of Advocate General Kokott in *Towercast v Autorité de la Concurrence* (C-449/21) EU:C:2022:777.
[31] Opinion of AG Kokott in *Towercast* EU:C:2022:777 at [31] and following.

> pharmaceuticals or medical technology ('killer acquisitions'). This concerns situations in which established and powerful undertakings acquire emerging undertakings which do not yet have a large turnover and which operate in the same, neighbouring, upstream or downstream markets, at an early stage of their development in order to eliminate them as competitors and consolidate their own market position. In order to ensure effective protection of competition in that respect also, it should therefore be possible for a national competition authority to resort at least to the 'weaker' instrument of punitive ex post control under Article 102 TFEU, provided that the conditions for it are met. Such a need may also exist in the case of acquisitions in highly concentrated markets, such as that in the present case, where the aim of such acquisitions is to eliminate competitive pressure from an emerging competitor."[32]

Not only "killer acquisitions" but also mergers in highly concentrated markets are examples justifying an ex post control under art.102 TFEU.

The discussion around suitability of the merger control system to discipline "killer acquisitions" by well-established players has also sparked a consideration in recent years around the quality and nature of merger thresholds, with new "transaction value" thresholds introduced in countries such as Germany and Austria seeking to capture acquisitions of innovative companies with still small turnover. Yet, even those transaction value thresholds require some minimum turnover, which may not be met in transactions taking place in nascent or highly specialised markets. Perhaps market share or share of supply thresholds, such as those of Spain and the UK respectively are better fit to capture these situations.

A final step in AG Kokott's reasoning refers to the old *Continental Can*[33] case law, which stated the principle that company acquisitions could qualify as abuse of dominant position forbidden by art.102 TFEU under the right circumstances. At this point, the clarification by AG Kokott that the system instituted by art.21 EUMR seeks to avoid a double assessment of mergers is welcome: a possible ex post review of mergers under art.102 TFEU would be limited to those mergers which have not been reviewed either under the EUMR or the national laws of a Member State as the case may be.

Arguably, the number of concentrations considered under art.102 TFEU should be small (no double review, hence mergers not meeting any thresholds, and mergers qualifying as abuse of dominant position). Yet, that outcome must be aggregated to the possibility of art.22 EUMR referral in case of unreportable mergers, thus adding to the realm of the uncertain (or, rather, as an additional factor to be taken into account when looking at prospective mergers). On balance, the European Commission seems more likely to make use of the referral system under art.22 EUMR than under art.102 TFEU, even resorting to informally asking relevant Member States to initiate the art.22 EUMR procedure. There are some circumstances where art.102 TFEU might be a preferrable device, such as when more than six months have passed after the implementation of the problematic concentration: under the art.22 Communication, the Commission considers a referral generally inappropriate beyond that deadline (see discussion under section 2 above). However, the statute of limitations under EU law for breaches of art.102 TFEU is five years.[34] This implies that mergers not having been reviewed under the merger control rules by the Commission or the NCAs and where a referral under art.22 EUMR is not appropriate for being beyond six months since implementation, might still be challenged under art.102 TFEU up to five years after implementation.

Finally, art.102 TFEU might be a means for NCAs who wish to challenge themselves mergers not meeting any merger thresholds, not willing to relinquish jurisdiction to the European Commission under art.22 EUMR.

Consequently, the challenge of anti-competitive mergers under art.102 TFEU is likely to be a residual device, though one to be taken into account when considering non-reportable, albeit potentially problematic mergers.

4. Closing the article 22 EUMR loop: reporting obligations of technology mergers under the Digital Markets Act

The Digital Markets Act[35] (DMA) is an ambitious piece of legislation which seeks to rein in the enormous power of some electronic platforms, in particular those designated as "gatekeepers" under art.3 thereof. The DMA seeks to keep the integrity of the internal market, but it also aims to complement the enforcement of competition law.[36]

Acquisitions of technology companies can be sensitive because of their strategic character for national (or European) economies. Such sensitiveness is tackled by the various FDI screening regimes which protect artificial intelligence, robotics, technology linked to sensitive industries or dual-use technologies amongst others.

Technology mergers and acquisitions are also sensitive from an internal market or competition standpoint when they are carried out by gatekeepers, in an area where transactions can target innovative startups which can be removed from the market as alternative competitors.

[32] Opinion of AG Kokott in *Towercast* EU:C:2022:777 at [48].
[33] *Europemballage Corp and Continental Can Co Inc v Commission* (6/72) EU:C:1973:22; [1973] C.M.L.R. 199.
[34] Article 25 of Council Regulation 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 1/1.
[35] Regulation 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 [2022] OJ 265/1.
[36] DMA recital 10.

"Killer acquisitions" are (again) at the heart of the DMA provisions applicable to concentrations, there being at least some evidence of past mergers in the digital space that might have merited merger review.[37] Consistently with those concerns, art.14 DMA obliges gatekeepers to inform the European Commission of any intended concentration (within the meaning of art.3 EUMR) where the merging parties, or the target alone, "provide core platform services or any other services in the digital sector or enable the collection of data".

As an initial note, it is hard to understand from a legislative drafting standpoint the inclusion of the words "*core platform services or any other*" if "core platform services" are already "services in the digital sector" (and they must be or otherwise the provision would not talk about "or any other services"). More substantively, the obligation to "inform" the Commission is notwithstanding any arising notification requirements under the EUMR and it must be carried out

> "prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest."

In other words, this "information" or notification requirement under the DMA has a standstill effect like that in place under the EUMR, but independent therefrom.

The "information" to the European Commission must contain, amongst other things, the details related to the parties to the transaction and their size, the fields of activity of the parties and business object of the concentration, transaction value and a summary of the concentration, including rationale and Member States concerned.

The purpose of the "information" system under the DMA is to:

- ensure the effectiveness of the review of gatekeeper status;
- monitor broader contestability trends in the digital sector; and
- enable NCAs to refer acquisitions to the Commission.

The Commission must publish an annual list of acquisitions reported to it under the DMA.[38]

Indeed, art.14.4 DMA orders the Commission to inform Member States about concentrations notified under such provision. This, in turn, would enable Member States to trigger the mechanism of art.22 EUMR, as it is understood that the information contained in this notification would suffice for those purposes under the *Illumina/Grail* case criteria discussed above.

Consequently, in the case of technology mergers having a gatekeeper as a party, the DMA acts as an additional barrier which should avoid or minimise the risk of *Illumina/Grail* type situations by automatically enabling Member States to activate the art.22 EUMR mechanism. Yet, an additional merger notification requirement is introduced (yet another one).

Again, the entire discussion may be one of merger thresholds. If appropriate thresholds were in place, there would be no need for (controversial) referrals or unspecified notification requirements as a solution to dispel uncertainty. Turnover thresholds are far too often not indicative of anything (at least in terms of market power).[39] The Commission itself considered, and dismissed, a transaction-value threshold. Market share thresholds existing in some jurisdictions (e.g., Spain, Portugal) have often been dismissed as not straightforward, even if admittedly those thresholds have enabled the capture of digital mergers that would otherwise have gone unnoticed.[40]

Yet, if considered carefully, the interplay of arts 3 and 14 DMA is equivalent to a new set of thresholds (arguably less straightforward than any merger threshold existing under the EUMR or national merger control laws) which, if met, compel companies to "inform" the European Commission of the intended transaction, subject to a standstill obligation. This "information", however, seems in substance quite close to a merger notification, at least as far as it is subject to a standstill obligation (the most clearcut effect of the merger notification under the EUMR).

The relatively recent discussion on merger thresholds at EUMR level concluded without reform; and perhaps rightly so, as any legislative reform should be well weighed to avoid detrimental effects. Furthermore, the majority of respondents to the European Commission's consultations have considered that the mechanisms in arts 4.5 and 22 EUMR combined with national merger review systems sufficiently ensure that the relevant cases without EU dimension are reviewed.[41] The safeguards of the DMA and residual application of art.102 EUMR depicted in this article must be added to the mix.

[37] See for instance at [89] (and transactions cited there) of the Commission Staff Working Document—Evaluation of Procedural and Jurisdictional Aspects of EU merger control SWD(2021) 66 final.
[38] DMA recital 71.
[39] Even if at times the Commission has in the past enquired on the point fairly extensively and has expressed satisfaction with the turnover thresholds, the evolution of the policy on art.22 EUMR and the merger provisions in the DMA are good proxies that the turnover thresholds alone are not entirely satisfactory (see discussion at the Commission Staff Working Document—Evaluation of Procedural and Jurisdictional Aspects of EU merger control SWD(2021) 66 final).
[40] Commission Staff Working Document—Evaluation of Procedural and Jurisdictional Aspects of EU merger control SWD(2021) 66 final at [97].
[41] Commission Staff Working Document—Evaluation of Procedural and Jurisdictional Aspects of EU merger control SWD(2021) 66 final at [90], [92].

5. Merger related controls in the new EU Regulation on foreign subsidies distorting the internal market

The EU Regulation on foreign subsidies distorting the internal market (RFS) has just been approved after a long process on 28 November 2022.[42]

The RFS has a potentially very wide scope. Its goal is to screen foreign subsidies impacting the functioning of the internal market, an area for which hitherto there was no legislation in place (for instance, state aid law requires that any aid is coming from Member States, whereas foreign subsidies were not covered), particularly in connection with concentrations and public procurement procedures. The RFS is not conceived as a competition law tool but, rather, as a tool to remedy distortions to the internal market caused by foreign subsidies—though the RFS makes considerable recourse to merger control law procedures and concepts. The mechanisms and substantive implications in the RFS will undoubtedly spark considerable debate in the political, administrative and judicial arenas (as well as academic circles). Here, we are limited to outlining the general principles of the RFS applicable to mergers and acquisitions and summarising the RFS provisions applicable to mergers and acquisitions specifically.

In summary of the general principles in the RFS applicable to concentrations:

(1) a foreign subsidy arises when a third country provides a financial contribution conferring an advantage to a company or limited category of companies. The concept of financial contribution is a wide one, in line with the concept of advantage under state aid law, comprising any transfer of funds or liabilities, or the foregoing of existing debts, for example, provided directly or indirectly (even via a private entity) by a foreign government and authorities at all levels (art.3 RFS).

(2) The substantive test of "distortion in the internal market" refers to an improvement in the competitive position of a company in the internal market and, by doing so, the foreign subsidy actually or potentially negatively affects competition in the internal market. The distortion in the internal market is to be assessed on the basis of circumstances such as the amount, nature or goals of the subsidy and the relative situation of the beneficiary. Foreign subsidies considered *de minimis* and therefore not distorting the internal market are the same as under state aid law (generally, €200,000 in three years); and subsidies not exceeding €4 million in three consecutive years are considered unlikely to distort the internal market (art.4 RFS).

(3) A foreign subsidy directly facilitating a concentration is considered most likely to distort the internal market (art.5.1(d) RFS).

(4) The Commission makes use of a "balancing test" enabling it to weigh the negative effects of a foreign subsidy against the positive effects on the development of a subsidised activity in the internal market (art.6 RFS). This provision outlines the contrast with the EUMR and the conceptually different framework put in place by the RFS.

(5) Commission authorisations can be conditioned to remedies which may include, amongst others, access on FRAND terms to infrastructures and key facilities; reduction of capacity or market presence, including temporary restrictions on commercial activities; divestitures; refraining from certain investments; unwinding of concentrations; repayment of foreign subsidies or adapting the concerned undertakings corporate governance structure (art.7 RFS).

(6) From a procedural standpoint, the RFS regulates powers which largely resemble those in the competition law landscape. The Commission can start reviews based on its own information sources or complaints; it can issue information requests and can conduct dawn raids (arts 13, 14 RFS). If the Commission has sufficient indications that an undertaken has received a foreign subsidy which distorts the internal market it shall open an in-depth investigation.

(7) The Commission is empowered to issue interim measures decisions (art.12 RFS) which may include ordering an investment not to be implemented on the basis of *(i)* sufficient indications of foreign subsidies distorting the internal market (*fumus boni iuris*); and *(ii)* risk of serious and irreparable damage to competition on the internal market (*periculum in mora*).

Concentrations are regulated in chapter 3 of the RFS. In summary of the RFS provisions specific to concentrations:

(1) The assessment of a given subsidy in connection with a concentration is limited to the specific concentration concerned.

[42] The new Regulation has not yet been published in the Official Journal as of the time of delivery of this document. See status here: Council of the EU Press release, "Council gives final approval to tackling distortive foreign subsidies on the internal market" (28 November 2022), available at: *https://www.consilium.europa.eu/en/press/press-releases/2022/11/28/council-gives-final-approval-to-tackling-distortive-foreign-subsidies-on-the-internal-market/*.

The assessment is limited in time to subsidies granted in the three years prior to the concentration (art.19 RFS).

(2) The RFS is activated in the presence of concentrations (concept is equivalent to that under art.3 EUMR, requiring change of control on a lasting basis) fulfilling the following thresholds (art.20 RFS):

  (a) At least one of the parties to the concentration generates €500 million turnover in the EU (turnover threshold); and

  (b) A financial contribution in excess of €50 million in the three years prior to the conclusion of the agreement, public bid or acquisition of a controlling interest having been received by *(i)* the acquirer; *(ii)* the merging undertakings in case of a merger; *(iii)* in the case of a joint venture, the parties creating the joint venture and the joint venture.

(3) Reportable concentrations must be notified to the Commission and approved prior to their implementation. There is a deemed authorisation regime subject to defined timelines mirroring that in the EUMR (art.24 RFS).

(4) Gun-jumping is subject to fines of up to 10% of the concerned companies' turnover (art.26 RFS)

The RFS introduces yet another layer of controls in connection with the categories of concentrations envisaged by it. Even if the substantive criteria are distinct from those of the EUMR, the RFS introduces an additional set of thresholds to be checked and an additional review, potentially concurrent with the merger control review and potentially with that under the DMA in the relevant technology mergers. Think, for instance, of acquisitions by the GAFA (Google, Amazon, Facebook (now Meta) and Apple) platforms or other large platforms (Microsoft), which would have to endure review under the RFS, the DMA and likely under the merger control laws, either because they meet the thresholds or because of art.22 EUMR referral.

The Commission will more likely have notice of mergers that would otherwise have gone unnoticed. Based on the logic of art.22 EUMR and the *Illumina/Grail* experience, the Commission may use the information derived from the RFS to invite NCAs to initiate the art.22 EUMR referral procedure. In that regard, the RFS amplifies the fishing net and may also have the effect of bringing additional concentrations within the merger control radar.

6. Conclusion

Legal practitioners and academics, or some of them at least, may have always thought that the predictability of a compulsory merger control system based on thresholds was broadly preferrable to voluntary notification systems, where transactions could potentially be called into question after implementation, leading to de-merger orders in extreme cases.

Under the latest developments, it has become apparent that some concentrations, even if they do not meet any merger thresholds, can be called into question by competition authorities after the fact (even after closing), therefore raising the incentives to pre-emptively brief competition authorities about prospective mergers, even if such mergers do not meet any merger control thresholds. The obvious consequence is a decrease in certainty for dealmakers, as prospective mergers and acquisitions will have to be viewed cautiously to scrutinise potential anti-competitive effects, even in seemingly small transactions which do not meet any merger control thresholds. The approval of the DMA and RFS prior merger filing regimes is not likely to make things better regarding the possibility of unreportable mergers ending up in the European Commission's plate: rather on the contrary, these regimes increase the likelihood of art.22 EUMR referrals.

The mentioned developments may have the effect of taking the EU merger control system a bit closer to a voluntary notification system: in some circumstances voluntary notification is likely to become a preferred strategy. Fear of ex post action by competition authorities in those circumstances will lead to an increase of *ad cautelam* filings, or resort to the technique of the briefing memorandum informing competition authorities of intended, even if prima facie non-reportable, concentrations in order to manage regulatory risk.

At the time of delivery of this article to press, the final judgment related to the *Illumina/Grail* case by the Court of Justice is pending, as is the judgment in the *Towercast* matter discussed above. Particularly the judgment in the *Illumina/Grail* matter may change the landscape if it reverses the prior first instance judgment.

Finally, the new merger notification requirements introduced by the DMA and the RFS determine additional standstill obligations to the ones already in place under the EUMR, national merger control and FDI regimes. One can already see that corporations will need very comprehensive advice to plan well in advance of future mergers and acquisitions and it can be anticipated that some transactions may not happen at all for fear of failing to pass the test of either one or another regulatory scheme. Being conscious of this, all public authorities concerned should exert their powers with restraint; and in the longer term it is likely that co-ordination efforts both at the administrative and legislative level will have to be undertaken.