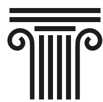
LUISS 

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Executive summary

In recent years, mergers and acquisitions between firms have become prevalent in the economic, political, and legislative debate, headlining the financial press and breaking the news, because of the impact that some of these operations can have on consumers, markets, and countries.

However, among these, there are some transactions that do not headline the press, and do not break the news. These are silent, stealth deals, often dismissed as irrelevant and not concerning in the past, due to the small size of the target company, which are now under scrutiny by scholars and lawmakers.

Therefore, the aim of the present work is to assess and analyze whether current legislations are prepared and well-designed to deal with the upcoming and relevant phenomenon of the so-called Killer Acquisitions, which solutions are being implemented, and which are available.

The first chapter summarizes the origins of Antitrust Law, how and when it became a key feature to protect the interests of customers and businesses, and to prevent the full exploitation of the consumers' welfare by colluding enterprises; how Antitrust Law had to change and adapt to address the new strategies with which companies came up to elude the first provisions, and how it became a pivotal field of legislation in the early stages of the newborn European Economic Community.

After that, the analysis shifts toward the evolution in the European Union of the so-called third pillar of Antitrust Law, which is the control of concentrations between companies, from its starting point, marked by the introduction of EEC Regulation 4064/1989, up until the latest definitions, provisions, and interpretations of the EU Regulation 139/2004, which relies on turnover thresholds and referral mechanisms to ensure that the most appropriate Authority reviews the most relevant transactions in the European Union, and sets the common ground for the discussion presented in the core sections of this research.

Before launching in the analysis of killer acquisitions, though, the first chapter concludes with some data and economic aspects of mergers and acquisitions, which help to clarify why the phenomenon under scrutiny in this work might be relevant not only from a legal perspective, but also because it drifts from the traditional economic theories.

The second chapter focuses on the discussion of Killer Acquisitions, and it is divided into three sections. The first section describes how the term was introduced in the academic literature through a breakthrough paper issued by Cunningham, Ederer, and Ma, in which acquisitions in the pharmaceutical industries carried out with the sole purpose to discontinue innovation projects and preempt future competition were labeled for the first time as "killer".

It is then explained how this intuition led to more research, pushed by the need to evaluate whether this phenomenon had a broader scope and an impact across different industries, such as Digital and Biotech, and which would be their common characteristics, in order to identify a pattern that could clarify were the most severe risks were hidden.

In doing so, the first definition of killer acquisitions becomes too narrow, hence the term will be used to describe also those transactions that usually have as target companies with potential huge competitive impact, but low turnover, which might lead to a lack of enforcement of Antitrust Law.

This analysis raised questions concerning the appropriateness of the tools that Antitrust Authorities currently can deploy to prevent anticompetitive conducts carried out by leading companies toward small businesses, and therefore the second section of the chapter surveys, from a comparative perspective, the legal framework on the subject in a set of countries which may differ for legal tradition, economic drivers or solution studied and introduced to address the issue.

The main findings are that in the United States the system is well-balanced and allows to review the most significant transactions; nonetheless, in the past acquisitions of emerging competitors have fallen under the radar, and this is leading to greater scrutiny of acquisitions of nascent competitors by dominant digital platforms which might lead to an undue market concentration.

In the United Kingdom, the Government is looking forward to rebalancing the overall merger control system, in order to introduce a mandatory notification system for digital companies that hold a strategic market status and an "Acquirer only" Test applicable across all industries which would allow the Competition and Market Authority to review potential killer acquisitions with UK nexus.

In Canada, where the Antitrust enforcement system relies on a mandatory pre-merger notification for acquisitions that meet Size-of-Parties or Size-of-Transaction thresholds, the Commissioner has a one-year period of time, which serves as a corrective mechanism, after the closing of a deal to file a case in Court against under-thresholds transactions, and a Merger Intelligence and Notification Unit has been established to detect and investigate otherwise non-reportable operations. Furthermore, Canada is evaluating the introduction of structural presumptions, switches in the burden of proof, and the extension of the ex-post review period up to three years to update its antitrust law to the new economic and industrial landscape.

In Australia, where the legal framework for mergers is designed around a voluntary, non-suspensory, Court-based notification system, has become clear that the current merger control regime leads to under-enforcement, and a relevant amendment to its Competition and Consumer Act is needed to deal with digital platforms and their anticompetitive acquisitions.

The third and final section of Chapter 2 describes the solutions that the European Union has introduced to strengthen its merger control tools. The first step was the introduction of the Digital Markets Act, which now requires gatekeepers, i.e., leading digital platforms, to inform the Commission of any intended concentration.

This provision is complementary to the new approach that will be followed by the Commission on the interpretation of Article 22 of EU Merger Regulation 139/2004, which now will accept referrals also from Member States that do not have initial jurisdiction over a case. The new provisions combined will generate a flow of information between the Commission and the National Competition Authorities, which in turn will trigger the corrective mechanism set out in Article 22 and allow the review of all relevant transactions, including those that do not meet the thresholds provided by the Regulation.

After a discussion of the potential drawbacks of this amendment, namely the timeframe of these referrals, the ex-post review, and the potential end of the "one-stop-shop" principle, Chapter 3 will dive into the analysis of the leading case on the subject of killer acquisitions in both the European Union and in the United States, which is the attempted merger between Illumina and GRAIL, a foreign-to-foreign acquisition, with no EU nexus, that still allows discussing all the major issues related to the new approach.

Chapter 3 can also be summarized into three sections. The first one describes the companies, the nature of the transaction, how it became relevant for Antitrust purposes, and its judicial process.

Illumina is a US Biotech company, focused on the discovery, detection, and treatment of diseases and on innovation, while GRAIL is a US company focused on the development of new technologies that complement the tools applied by Illumina in its studies and products. The transaction was subject to the scrutiny of the US Antitrust Authority but, since GRAIL was not generating any revenue at the time of the agreement, it was not notified to the European Commission.

However, the Commission reached the conclusion that the transaction was appropriate for a referral under Article 22 of the Merger Regulation, claiming that GRAIL's importance for competition in the EEA was not reflected by its turnover.

After the referral request issued by the French Competition Authority, the legal battle began with appeals brought by Illumina toward the French Conseil d'État and the Dutch District Court of The Hague, which dismissed the appeals basing their decisions respectively on procedural and substantive matters, clearing the way for the Commission to accept the referral request.

Illumina and GRAIL, pending the decision of the Commission on the admissibility of the transaction, appealed the Commission's decision to accept the referral request, which established its jurisdiction, in front of the General Court of the European Union Court of Justice.
In a long and harsh legal procedure, which saw also the introduction of side proceedings concerning proposed remedies and the violation of the stand-still obligation by the two companies, the ECJ rejected the pleas in law introduced by Illumina concerning the timing of the referral request, the breaching of principles of legal certainty and protection of legitimate expectations and the lack of competence of the Commission, which, in the meanwhile, had opened a deeper investigation into the acquisition.
The second section of the chapter focuses on how the Commission found that the acquisition would have had anticompetitive effects, that the remedies proposed by Illumina were not sufficient to prevent harm to innovation, and how with the favorable verdict of the ECJ decided that the transaction had to be prohibited to protect innovation, competitive prices and preserve consumers' welfare.
To add complexity to the case, it is then explained how the FTC, the American counterpart of the European Commission, failed to prove in Court that Illumina, after the acquisition, would have had the ability to cause a substantial lessening of competition, generating further uncertainty.
Finally, the third section presents an updated list of all the proposed tools that have been discussed in the academic literature to deal with Killer Acquisitions, with the purpose to highlight their strengths and weaknesses. The list includes the introduction of transaction, rather than turnover, value-based thresholds, the possibility of ex-post reviews, a regime of special responsibility for selected companies, or the reversal of the burden of proof, or a combination thereof.
However, concluding both chapter 3 and the whole research, a question is raised: given that M&A deals have become vital for the growth of companies and, in turn, national economies, innovation, and productivity, how far are we willing to go to tackle Killer Acquisitions? While the answer, as usually happens when a legal and economic issue arises, could lie in a compromise solution, a warning is necessary: in an increasingly connected world, in which money, data, and information flow everywhere, at any time, providing the most appropriate, clear and certain legal framework will be essential for the European Union, so that it will attract investments and businesses, while protecting its internal market and determining its international success.

Introduzione

Negli ultimi anni, il tema delle fusioni e acquisizioni (*mergers and acquisitions, M&A*) tra società è diventato centrale nel dibattito economico, politico e legislativo, riempiendo i titoli della stampa finanziaria e le notizie di attualità, a causa dell'impatto che queste operazioni possono avere sui consumatori, sui mercati e sui Paesi coinvolti.

Tuttavia, tra queste operazioni, alcune non hanno avuto lo stesso risalto. Si tratta di transazioni "silenziose", in passato spesso ritenute irrilevanti e non allarmanti a causa delle ridotte dimensioni della società acquisita, che ora sono sotto l'attenzione e lo scrutinio di accademici e legislatori.

Di conseguenza, l'obiettivo del presente lavoro è quello di valutare e analizzare se le legislazioni attuali sono predisposte e designate in modo tale da intercettare il fenomeno nascente e sempre più rilevante delle cosiddette "*Killer Acquisitions*", quali soluzioni sono disponibili, e quali stanno progressivamente venendo implementate.

Il primo capitolo sintetizza le origini del Diritto Antitrust, come e quando è diventato un elemento normativo fondamentale per proteggere gli interessi dei consumatori e delle imprese, e per prevenire il pieno sfruttamento del "benessere dei consumatori" da parte di imprese colludenti; come il Diritto Antitrust è cambiato e si è evoluto per far fronte alle strategie messe in campo dalle società per eludere i divieti di legge, e come è diventato un perno della legislazione nelle prime fasi della nascente Comunità Economica Europea.

Di seguito, l'analisi si sposta verso l'evoluzione, nell'Unione Europea, del cosiddetto terzo pilastro del Diritto Antitrust, rappresentato dal controllo sulle concentrazioni tra società, dal suo punto di partenza, segnato dall'introduzione del Regolamento CEE 4064/1989, fino alle ultime definizioni, interpretazioni e disposizioni del Regolamento UE 139/2004, che si basa su soglie di fatturato e meccanismi di rinvio per assicurare che la migliore Autorità, tra la Commissione e quella dei singoli Stati Membri, eserciti il controllo sulle transazioni rilevanti all'interno dell'Unione Europea, e stabilisce la base per la discussione presentata nella sezioni centrali di questa ricerca.

Prima di affrontare l'analisi delle *Killer Acquisitions*, tuttavia, il primo capitolo si conclude con alcuni dati e aspetti economici relativi al tema delle fusioni e acquisizioni, che aiutano a chiarire perché il fenomeno sotto osservazione in questo lavoro possa essere rilevante non solo da un punto di vista meramente legale, ma anche perché devia dalle tradizionali teorie economiche.

Il secondo capitolo si focalizza sulla discussione sulle *Killer Acquisitions*, e si divide in tre sezioni. La prima descrive come tale espressione è stata introdotta nella letteratura accademica da un rivoluzionario studio pubblicato da Cunningham, Ederer e Ma, nel quale le acquisizioni concluse nel

settore farmaceutico con il solo scopo di interrompere lo sviluppo di progetti innovativi e di prevenire una potenziale concorrenza futura furono etichettate per la prima volta come "*Killer*".
Viene poi spiegato come questa intuizione abbia condotto ad ulteriori studi, spinti dalla necessità di valutare se questo fenomeno avesse un ambito di applicazione più ampio e un impatto in altre industrie, tra cui quella Digitale e quella delle Biotecnologie, e quali fossero le caratteristiche comuni tra queste, per identificare uno schema di azione e chiarire quali fossero i rischi nascosti dietro queste operazioni.
Per fare questo, la prima definizione di *Killer Acquisitions* diventa però troppo ristretta; pertanto, il termine verrà usato anche per descrivere le transazioni che hanno come *target* società con un grande impatto competitivo potenziale, che non si riflette nel fatturato generato dalla società, con il rischio di un mancato, o inefficiente, intervento Antitrust.
Questa analisi solleva dubbi circa l'adeguatezza degli strumenti che possono essere impiegati dalle Autorità Antitrust per prevenire condotte anticoncorrenziali da parte di imprese *leader* nei confronti di piccole società; di conseguenza, la seconda sezione del capitolo esamina, in una prospettiva comparatistica, il quadro normativo sulla materia in un insieme di Paesi, che possono differire per tradizione giuridica, fattori economici o soluzioni implementate per contrastare il problema in questione.
I risultati principali mostrano che, negli Stati Uniti, il sistema è bilanciato e permette di valutare le transazioni più rilevanti; tuttavia, in passato le acquisizioni di concorrenti emergenti sono passate inosservate e questo ha portato a un maggiore controllo su tali operazioni, soprattutto su quelle concluse da parte di piattaforme digitali dominanti, che potrebbero portare ad una eccessiva ed inopportuna concentrazione nel mercato.
Nel Regno Unito, il Governo intende riequilibrare il sistema complessivo di controllo delle fusioni, introducendo un sistema di notifica obbligatoria per le imprese digitali che detengono uno *status* di mercato strategico e un test "solo per l'acquirente" applicabile a tutti i settori, che consentirebbe alla "Competition and Market Authority" di esaminare le potenziali acquisizioni *Killer* che abbiano collegamenti con il Regno Unito.
In Canada, dove il sistema Antitrust si basa su un sistema di notifiche obbligatorie *ex ante*, applicabile alle transazioni più rilevanti, l'Autorità ha a disposizione un meccanismo correttivo che le consente, nel periodo di un anno dopo la chiusura dell'operazione, di chiedere l'intervento del Tribunale per valutare le operazioni sottosoglia.

Inoltre, il Canada sta valutando l'introduzione di presunzioni strutturali, l'inversione dell'onere della prova e l'estensione del periodo per la valutazione *ex post* delle operazioni fino a tre anni, per adattare il suo Diritto Antitrust al nuovo panorama economico e industriale.

Anche in Australia, dove il quadro normativo per le fusioni è costruito su un sistema di notifiche volontarie, non sospensive, sotto il giudizio del Tribunale, è diventato chiaro come un tale sistema di controllo di queste operazioni abbia condotto ad un'applicazione inefficiente delle regole, ed è dunque necessaria una significativa modifica al "Competition and Consumer Act" per affrontare le potenzialmente anticompetitive acquisizioni concluse da parte delle piattaforme digitali.

La terza, e ultima, sezione del secondo capitolo descrive le soluzioni che l'Unione Europea ha introdotto per rinforzare i propri strumenti di intervento nel controllo delle concentrazioni.

Il primo passo è stato l'introduzione del "Digital Markets Act", che richiede alle piattaforme digitali dominanti, definite come *gatekeepers*, di informare la Commissione Europea circa ogni operazione di fusione o acquisizione che intendono concludere. Questa disposizione è complementare al nuovo approccio che la Commissione ha annunciato di voler seguire nell'interpretazione dell'Articolo 22 del Regolamento 139/2004, in base al quale la Commissione accetterà il rinvio di operazioni anche da parte di Stati Membri che non hanno giurisdizione sull'operazione.

Le due disposizioni, combinate, genereranno un flusso di informazioni tra la Commissione e le Autorità Antitrust nazionali, che porterà all'applicazione del meccanismo correttivo dettato dall'Articolo 22, consentendo il controllo su tutte le concentrazioni rilevanti, comprese quelle che non rientrano nelle soglie previste dal Regolamento.

Dopo una discussione circa i potenziali inconvenienti di questa modifica, tra cui le tempistiche, il controllo *ex post*, e la potenziale fine del principio del "*one-stop-shop*", il terzo capitolo analizzerà il principale caso giuridico in materia di *Killer Acquisitions*, ovvero la tentata fusione tra Illumina e GRAIL che, pur essendo una concentrazione tra due società non europee e senza attività condotte nell'UE, consente di discutere di tutti i punti salienti e dei principali problemi giuridici connessi al nuovo approccio introdotto dalla Commissione.

Anche il terzo capitolo può essere diviso in tre sezioni: la prima descrive le società, la natura della transazione, la sua rilevanza ai fini Antitrust e le sue dinamiche giudiziarie. L'operazione era soggetta inizialmente allo scrutinio dell'Autorità Antitrust statunitense, e non fu notificata alla Commissione Europea in quanto GRAIL non generava alcun ricavo al momento dell'accordo.

Tuttavia, la Commissione Europea ha raggiunto la conclusione che la transazione potesse essere soggetta al meccanismo di rinvio previsto dall'Articolo 22 del Regolamento 139/2004, affermando che l'importanza di GRAIL per il mercato e la concorrenza nell'UE non fosse riflessa dal suo fatturato. Illumina e GRAIL, nell'attesa di una decisione della Commissione circa l'ammissibilità della transazione, hanno impugnato presso la Corte di Giustizia dell'Unione Europea la decisione della Commissione di accettare la richiesta di rinvio, possibile sotto la nuova interpretazione dell'Articolo 22, che ne stabiliva la giurisdizione sul caso.

Al termine di una lunga e dura battaglia legale, che ha visto anche l'apertura di procedimenti paralleli riguardanti la violazione dell'obbligo di *stand-still* e la proposta di rimedi per favorire un esito positivo dell'operazione, la Corte di Giustizia ha rigettato i motivi di appello di Illumina circa le tempistiche del rinvio, la violazione dei principi di certezza del diritto e di protezione delle aspettative, e la mancanza di competenza della Commissione.

La seconda sezione del capitolo si concentra sull'investigazione condotta dalla Commissione sull'operazione, e sugli elementi che hanno portato a bloccare l'acquisizione, nonostante i rimedi proposti da Illumina, per proteggere l'innovazione, la competizione e i consumatori.

Per concludere, la terza sezione presenta un elenco aggiornato degli strumenti e dei rimedi che sono stati discussi nella letteratura accademica per affrontare il tema delle *Killer Acquisitions*, con l'obiettivo di evidenziarne pregi e svantaggi. L'elenco include l'introduzione di soglie basate non più sul fatturato, ma sul valore complessivo dell'operazione, la possibilità di effettuare sistematicamente controlli *ex post*, l'introduzione di un regime di speciale responsabilità per determinate società, individuate con criteri oggettivi, l'inversione dell'onere della prova, o varie combinazioni di tali possibilità.

Infine, per concludere il terzo capitolo e il presente lavoro, si pone una domanda: dal momento che le operazioni di *M&A* sono diventate vitali per la crescita delle società, e quindi di intere economie nazionali, per lo sviluppo dell'innovazione e l'aumento della produttività, fino a che punto siamo disposti ad intervenire per intercettare le *Killer Acquisitions*? Mentre la risposta, come spesso accade quando si solleva un problema giuridico ed economico, potrebbe essere rappresentata da una soluzione di compromesso, un avvertimento è necessario: in un mondo sempre più connesso, nel quale dati, informazioni e risorse economiche si spostano incessantemente in ogni direzione, sarà fondamentale, per l'Unione Europea, predisporre un sistema normativo adatto, chiaro e certo, cosi da poter attrarre investimenti, capitali e imprese, determinando il suo successo internazionale e continuando a proteggere gli interessi dei suoi cittadini e del suo mercato interno.

Chapter 1 – The evolution of Merger Control

1. The Origins of Antitrust Law in the US

In the aftermath of the Second Industrial Revolution, the American economy went through a process of restructuring, with the rise of energy, transport, and communication industries, and an unprecedented market expansion toward the West Coast. These factors, as well as the achievement of economies of scale, led to a general reduction in prices, which was so steep that the major players in the US economy started to collude, to artificially set a level of prices that were sufficiently high to provide high return rates[1].

The best-known example of this practice was the creation of the Standard Oil Trust[2], which was joined by the major petrol businesses of the time and allowed them to collude and control each other's market behavior through the trustee, reducing the market power of small businesses and farmers, as well as the consumers' welfare.

To discourage this practice, in 1890 the US Congress passed the Sherman Act[3], which in Section 1 prohibited (and still prohibits) agreements, contracts, trusts, or conspiracy in restraint of trade, while Section 2 made illegal the attempts to monopolize the market through improper means.

Both Section 1 and Section 2 provided criminal and civil penalties, and deemed the conducts as a felony, to underline the seriousness of the violations.

1.1. From the Sherman Act to the Clayton Antitrust Act: the third pillar of Antitrust Law.

However, the Sherman Act did not address the possibility for companies to achieve the same anticompetitive effects on the market by merging with each other. This led to the first "merger wave", at the end of the XIX century and, before the adoption of a legislation that was specifically intended to regulate mergers and concentrations, the Supreme Court of the United States found that the acquisitions of minor competitors by Standard Oil were an unduly attempt to monopolize the market, and imposed the breakup of the company in several businesses[4],[5].

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[1] GHEZZI F., OLIVIERI G., *Diritto Antitrust*, 4.

[2] The Trust is a fiduciary arrangement through which one or more settlors allow a trustee to hold and manages assets on behalf of a beneficiary or for a specified purpose.

[3] SHERMAN ANTI-TRUST ACT, 15 U.S.C. §§ 1-7, (1890).

[4] GHEZZI F., OLIVIERI G., *Diritto Antitrust*, 5.

[5] SUPREME COURT OF THE UNITED STATES, *Standard Oil Co. vs US 221 U.S. 1 (1911)*.

In 1914, the US Congress passed the Clayton Act, which in Section 7 prohibited mergers and acquisitions that might substantially lessen competition, introducing, alongside the prohibition of anticompetitive agreements and of abuse of a dominant position, the third pillar of Antitrust law.

2. The implementation of Antitrust Law in Europe

During the same time, in Europe the situation was different: between the two World Wars, many States did not pursue the elimination of cartels and unlawful agreements; rather, they tried to govern and use them to regulate the economy, to increase the international strength and competitiveness of their businesses and to intersect political and economic power[6].
Therefore, it should not come as a surprise the fact that, after World War II, the United States conditioned the realization of their European Recovery Program on the implementation of antitrust legislation in continental Europe, not only to promote a sustainable and organic economic growth, but also to prevent the possible competitive pressure on US companies by the European ones.
Consequently, the Antitrust legislation was also implemented in the ECSC and in the EEC Treaties, which pursued the creation of a common, competitive market, freed from distorted competition and unlawful practices, which was seen as the path to economic growth and wealth.
The difference between the two Treaties, in addition to their scope, was that the EEC Treaty prohibited in Article 85 and Article 86 the agreements and cartels in restraint of trade, and the abuse of dominant position, while the ECSC Treaty also prohibited concentrations, in the steel and coal industries, that could alter trade and competition among Member States[7].

2.1. The adoption of EEC Reg. 4064/89

The decision to not implement in the EEC Treaty a set of dispositions concerning concentrations among firms was the result of the different views on the scope, objective, and process of assessment of operations by the Member States, and of the trade-off between allowing the growth of European companies through external acquisitions, to strengthen their positioning on the international market and hence reinforcing the overall European economy, and the need to avoid the creation or strengthening of dominant positions.

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[6] GHEZZI F., OLIVIERI G., *Diritto Antitrust,* 9.
[7] GHEZZI F., OLIVIERI G., *Diritto Antitrust*, 11.

On top of that, the Member States that already had a system of merger control feared that the introduction of European control on concentrations would have disempowered their national authorities and hence their power to use merger control as an instrument of political economics[8].
However, when the Court of Justice started to hint at the possibility to apply to concentrations the provisions stated in Articles 85 and 86 of the EEC Treaty, the European legislator introduced the first Merger Regulation, 4064/89, which in its preamble recalls the need of a system that protects competition in the common market, the increasing number of major corporate restructuring through concentrations, resulting from the dismantling of internal frontiers, that should be welcomed unless they impede competition in the internal market, and the inefficiency of Articles 85 and 86 to cover all operations which may be incompatible with the objective to preserve competition as defined in Article 3, EEC Treaty[9].
As said, the Regulation had to balance different views and interests, and as a consequence was applicable to few, large operations, with the objective the prevent only those concentrations that would have resulted in the creation or strengthening of a dominant position in the internal market or in a relevant part thereof.

3. EU reg. 139/2004: scope and definitions

After the adoption of Regulation 4064/89, it was substantially amended by Regulation 1310/97, and recast by the current Regulation 139/2004, also known as EUMR, since it needed further amendments in order to "meet the challenges of a more integrated market and the future enlargement of the European Union"[10].
Therefore, before discussing the "killer acquisitions" issue, which is the core topic of the present research, it seems appropriate to set a common ground of definitions and illustrate when the European Commission has the power and the right to challenge a proposed acquisition.
According to Article 1, EUMR, the EU merger control system shall be applied to all concentrations between undertakings with a Community (or Union, after the 2007 Treaty of Lisbon) dimension and, following the mandatory notification to the Commission, only the concentrations that will be deemed to be compatible with the common market will be allowed.

[8] GHEZZI F., OLIVIERI G., *Diritto Antitrust*, 243-244.
[9] REGULATION 4064/1989, Recitals 1-6.
[10] REGULATION 139/2004, Recital 6.

3.1. Undertaking

The first definition that needs to be settled is the one concerning the notion of "undertaking" in European competition law, which is not defined by the Regulation or the TFEU. Consequently, the Court of Justice had the duty to clarify the scope of the notion and, in a famous sentence[11], stated that "in the context of competition law, the concept of undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity", untying the notion from the different national definitions and adopting a functional approach under which the Commission has a broad reach to manage and control the efficiency of the internal market.

However, under the EUMR the notion of undertaking concerned by the merger is mostly relevant when it comes to identifying the turnover of the merging entities, and hence determining whether the concentration has a Union dimension and should consequently be reviewed by the Commission.

3.2. Concentration

The second issue that needs to be clarified is the notion of concentration. In the business community, the expression "mergers and acquisitions" encompasses not only a wide variety of transactions that allow the acquiring company to get control over a target company, but also those operations that come into place when a corporate restructuring is needed[12].

This set of possible transactions makes it difficult for the legislator to list all of them without risking leaving some outside the Regulation's scope, as was the case under Regulation 4064/89. Therefore, to solve this issue, the new Article 3(1) of the EUMR states that "a concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings".

While the independence requirement is met when the undertakings concerned are not already part of the same corporate group, the concept of control is further detailed under Article 3(2), which states that "control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer

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[11] ECJ, C-41/90, *Hofner and Elser/Macrotron GmbH*.

[12] DALLOCCHIO M, LUCCHINI G., SCARPELLI M., *Mergers & Acquisitions*, 3. The main M&A operations include mergers, acquisitions, LBOs, joint ventures, spin-offs, split-offs, tender offers, turnarounds, equity carve-outs, sale of business units.

the possibility of exercising decisive influence on an undertaking, in particular by: (a) ownership or the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking".
Independently of how the control is acquired, and provided that the shift of control is on a lasting basis, "the essential question is whether previously independent businesses have come or will come under common control with the consequence that, in the future, the market will be less competitive than before the merger"[13].
If the requirement for the transaction to be reviewed is that it has to generate a lasting change of control that alters the structure of the market, then also "all joint ventures performing on a lasting basis all the functions of an autonomous economic entity" and "transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time"[14] shall fulfill the notion of concentration.

3.3. EU dimension

Once the undertakings are involved in a concentration accordingly to Article 3, EUMR, then the jurisdiction of the European Commission is triggered provided that the concentration has a Union dimension. Following the principle of subsidiarity[15], the allocation of jurisdiction between the Commission and the National Competition Authorities is based on the turnover of the undertakings concerned. The turnover thresholds are a "relatively simple and objective mechanism"[16] that allows identifying the concentrations that are most likely to alter the competitive dynamics of the internal market, so that the Commission has to deal only with the transactions that might result in a significant impediment to effective competition.

[13] WHISH R., BAILEY D., *Competition Law*, 853.
[14] REGULATION 139/2004, Recital 20.
[15] REGULATION 139/2004, Recital 8.
[16] WHISH R., BAILEY D., *Competition Law*, 883.

Turnover is hence used as an early indicator of the resources that would be combined as a result of the concentration, and the thresholds, as defined in Article 1(2) and 1(3)[17], do not require that the undertakings are incorporated in the EU, nor that the transaction takes place in the EU[18].

Given that, as anticipated, it is not always straightforward to determine whether a transaction between undertakings is indeed a concentration within the meaning of the EUMR, the Commission has also issued a Jurisdictional Notice which gives help in determining which are the undertakings concerned and hence whose turnover shall be taken into account to establish the dimension of the transaction: in the acquisition of sole control of a whole undertaking, the undertakings concerned will be the acquiring and the target; if the transaction concerns the acquisition of parts of one undertaking, the undertakings concerned will be the acquirer and the acquired parts of the target; if the acquisition of control occurs by a change from joint control to sole control, then the undertakings concerned are the acquiring shareholder and the joint venture; if two undertakings establish a new-co, then the undertakings concerned are each of the companies acquiring control of the newly set-up joint venture; on the contrary, if two undertakings acquire control of an already existing business, then the undertakings concerned by the transaction are all the three undertakings involved. Finally, when an undertaking concerned belongs to a group, the Merger Regulation requires to take into account the turnover of other undertakings within the same group "to capture the total volume of the economic resources that are being combined through the operation irrespective of whether the economic activities are carried out directly by the undertaking

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[17] REGULATION 139/2004, Article 1: "2. A concentration has a Community dimension 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,
unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.
3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension 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,
unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."

[18] WHISH R., BAILEY D., *Competition Law*, 883.

concerned or whether they are undertaken indirectly via undertakings with which the undertaking concerned possesses the links described in Article 5(4)[19,20]".

3.4. Prior notification of concentrations

When a concentration within the meaning of EUMR has a Union dimension, Article 4(1) states that they "shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest". The notification to the Commission is a duty of the undertakings concerned, which must submit correct and complete information, or they might be subject to hefty fines pursuant to Article 14(1).

Before the transaction is notified, and until it is declared to be compatible with the internal market, the stand-still obligation applies, which means that the concentration shall not be implemented; the reason is that, pending a decision, the merging entities might become so close and related that a demerger, which is the most radical remedy that could be enforced by the Commission, might be too expensive or even impossible to achieve. Therefore, also for the gun-jumping violation, Article 14(2) provides fines of up to 10% of the worldwide turnover of the undertakings concerned.

Once the Commission receives the notification, it should be examined without delay. The timetable for the final decision is relatively short, with a 25 working days period (so-called Phase I) in which the Commission can decide whether the concentration does not fall within the scope of the Regulation or if it does fall in its scope but does not raise serious doubts as to its compatibility with the common market. On the contrary, when it is apparent that the concentration might impact on competition, the Commission has a period of 90 working days to conduct an in-depth review (Phase

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[19] EUROPEAN COMMISSION, *Commission Consolidated Jurisdictional Notice under Council Regulation* (EC) No 139/2004 *on the control of concentrations between undertakings*, paragraph 175.

[20] REGULATION 139/2004, Article 5(4): "4. Without prejudice to paragraph 2, the aggregate turnover of an undertaking concerned within the meaning of this Regulation shall be calculated by adding together the respective turnovers of the following:
(a) the undertaking concerned;
(b) those undertakings in which the undertaking concerned, directly or indirectly:
(i) owns more than half the capital or business assets, or
(ii) has the power to exercise more than half the voting rights, or
(iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
(iv) has the right to manage the undertakings' affairs;
(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b)."

II), without prejudice to the possibility of extending such terms in case the undertakings concerned offer commitments to render the concentration compatible with the internal market.

3.5. Significant impediment to effective competition

Once the Commission has jurisdiction to review the transaction, it can carry out its substantive assessment. Compared to the first version of the 4064/89 Regulation, the current version of the EUMR introduces a different test, in that it states that "a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market." On the contrary, the former version of the Regulation would only be effective in prohibiting those mergers that would create or strengthen a dominant position.

The 2004 Regulation acknowledged that a concentration could have negative effects on competition despite not creating a dominant position, in particular after the *Airtours/First Choice* case[21,22]. Therefore, currently the creation or strengthening of a dominant position is one of the symptoms of an unlawful transaction, rather than a necessary consequence.

The new SIEC (significant impediment to effective competition) test allows to review and control transactions also in oligopolistic markets, broadening the scope of the Regulation to include also "the anti-competitive effects of a concentration resulting from the non-coordinated behavior of undertakings which would not have a dominant position on the market concerned"[23]. In its evaluation, the Commission follows Article 2(1), which means that it will take into account "(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and

[21] WHISH R., BAILEY D., *Competition Law*, 910: "Airtours' proposed acquisition of First Choice would reduce the number of major tour operators in the UK from four to three. No firm would be individually dominant after the merger. The Commission prohibited the transaction on the basis that it would create a collective dominant position, but on appeal the General Court annulled the decision and equated collective dominance with coordinated effects", exposing a gap in the EUMR's coverage "because of the word 'dominance', which did not cover all unilateral effects.

[22] COMMISSION DECISION of 22/9/1999, declaring a concentration to be incompatible with the common market and the EEA Agreement, C(1999) 3022 Final – Case IV/M.1524 – Airtours/First Choice.

[23] REGULATION 139/2004, Recital 25.

ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition."

To provide a greater degree of legal certainty to law practitioners and to businesses, the Commission has issued merger guidelines, in which it declines the general provision in more quantitative and economic terms: for example, the Horizontal Merger Guidelines state that "the Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1000 [… and] is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:

(a) a merger involves a potential entrant or a recent entrant with a small market share.

(b) one or more merging parties are important innovators in ways not reflected in market shares.

(c) there are significant cross-shareholdings among the market participants.

(d) one of the merging firms is a maverick firm with a high likelihood of disrupting coordinated conduct.

(e) indications of past or ongoing coordination, or facilitating practices, are present.

(f) one of the merging parties has a pre-merger market share of 50 % or more"[24].

The Guidance also clarifies that HHI levels can be used as early indicators, but should not be interpreted as presumptions of either the existence or absence of competition concerns[25].

As far as vertical and conglomerate mergers are concerned, these usually do not generate competition concerns, but it cannot be ruled out that the concentration will result in a significant impediment to effective competition, mainly due to the portfolio effect (i.e., the broadening of the products that the combined entity can offer on the relevant market) and the ability or incentive to foreclose access to inputs, products or services to competitors in a downstream or adjacent market. As will be further discussed in the following chapters, so far we have already mentioned the most critical points of the current European merger control system: a simple, rigid mechanism to allocate jurisdiction based on turnover thresholds, a substantial analysis based mostly on market shares, a lower concern about vertical and conglomerate mergers compared to horizontal mergers are all issues that have been exposed by the growing phenomenon of the "killer acquisitions".

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[24] EUROPEAN COMMISSION, Horizontal Merger Guidelines, paragraphs (19)-(20).

[25] EUROPEAN COMMISSION, Horizontal Merger Guidelines, paragraph (21).

3.6. Article 22 and other corrective mechanisms

In compliance with the principle of subsidiarity, the EUMR provides that concentration with a Union dimension shall be reviewed only by the Commission, in accordance with the one-stop-shop system[26]. The concentrations that do not meet the turnover thresholds, therefore, will eventually be reviewed by the Competition Authority of the Member States that have jurisdiction over them accordingly to their own national law.

However, the Regulation provides a set of corrective mechanisms that allow the referral of a concentration from the Commission to the Member States and vice versa, making sure that the appropriate Authority has jurisdiction over the transaction when specific national or Union interests arise.

According to the EUMR and the Commission's Notice on case referral, referrals can occur before or after the notification. Pre-notification referrals require an early submission by the merging parties which believe that the concentration, despite having a Union dimension, should be referred by the Commission to one or more Member States; Article 4(4) requires that there must be indications that the concentration may significantly affect competition in a market or markets, and the markets in question must be within a Member State and present all the characteristics of a distinct market.

Article 4(5) allows the pre-notification request of referral from Member States to the Commission, provided that the transaction is a concentration within the meaning of Article 3 of the Merger Regulation, and the concentration is capable of being reviewed under the national competition laws for the control of mergers of at least three Member States.

Post-notification referrals can occur either under Article 9 or under Article 22. Articles 9(2)(a) and 9(2)(b) allow a Member State to request the referral of a case from the Commission when, respectively, the concentration threatens to affect significantly competition in a market which is within the requesting Member State and presents all the characteristics of a distinct market, or when the concentration affects competition in a market which is within the requesting Member States, presents all the characteristics of a distinct market and does not constitute a substantial part of the common market.

On the contrary, Article 22 allows the referral from Member States to the Commission, when the concentration affects trade between Member States, and it threatens to significantly affect competition within the territory of the Member State or States making the request.

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[26] REGULATION 139/2004, Recital 8.

This provision was originally introduced in the 4064/89 Merger Regulation at the request of the Netherlands, and since then it has also been known as the *Dutch clause*. At that time, the Netherlands (as well as Italy and other Member States) lacked a national merger control system, and therefore it seemed appropriate to grant those States a corrective mechanism that allowed them to refer concentrations that could harm competition and have negative effects on trade between the Member States. As will be further discussed in the following sections, the application of the Dutch clause did not generate disputes for years, until when the Commission designed Article 22 as the go-to provision to address the killer acquisitions.

4. Data, economics, and trends of the M&A industry

At this point, before moving forward to the killer acquisitions topic and to the discussion of the Illumina/Grail case, it might be appropriate to discuss some economic principles behind the M&A industry, that will explain why firms decide to merge, why they merge so frequently and why this field requires continuous and updated scrutiny.

We have already mentioned that the M&A acronym encompasses a wide range of operations; if that holds under competition law, it is also true when we look at those operations through the lens of economics. According to Bower[27], acquisitions occur for five reasons:

- The "Overcapacity M&As" are common in the automotive, steel, and petrochemical industries, in which the acquirer buys a competitor with the purpose to increase the efficiency of the productive process and reduce the overall production of the industry, while increasing its own market shares.
- The "Geographic roll-up M&As" occur at the early stages of an industry's life cycle, and usually involve a big firm that becomes successful on a local dimension and then decides to buy small businesses in adjacent territories to bring lower costs and greater value to its customers.
- The "Product or market extension M&As" have the purpose of improving the product line of the acquiring company or to expand its geographic market; usually, these operations pursue diversification policies and thus tend to be conglomerate mergers.
- The "M&A as R&D" deals act as substitutes for in-house R&D and are mostly common in the IT and bio-tech industries, where companies use acquisitions to shorten the time

[27] BOWER J.L., *Not All M&As are alike – and That Matters*, in 79, *Harvard Business Review*, 92-101, (2001).

that is needed to implement and market new products in response to the high degree of innovation and hence short life cycles of the products.

- The "Industry convergence M&As" occur when the deal is intended to create a new industry under the assumption that relevant synergies can be achieved through the convergence of two distinct sectors.

Whichever the strategic intent behind the operation, it is now common knowledge that these deals are one way through which companies can grow. Firms can either grow internally, by reinvesting (part of) their profits, or externally by buying the inputs that they need from other businesses.
Xu[28] finds that in the US M&A has become an important and common strategy to achieve growth, with 30% of businesses being involved in M&A activities in the past decades and with M&A deals leading to higher firm growth achieved at lower costs compared to the organic, internal growth.
This explains why the M&A industry presents periods of "merger mania" or "merger waves"[29], during which the number of mergers is very high. Usually, these mergers can be explained by external shocks, such as deregulation, new technologies and new products, but can also be explained by the overpricing of the shares that managers trade to acquire other firms, by the fear of missing out a market trend or even by the vanity of managers[30].
Since the fifth merger wave, the focus of the M&A activity has shifted toward the realization of synergies, which are the added value that the transaction generates compared to the counterfactual scenario in which they remain separate.
If we call V_{AB} the value of the merged entity resulting from the merge of two firms, A and B, which respectively have a stand-alone value of V_A and V_B, then a merger is said to generate synergies if:

$$\Delta V = V_{AB} - (V_A + V_B)$$

is positive[31].
The nature of the synergies generated by the merger will depend on the kind of transaction that is carried out, but usually efficiencies can be achieved through the realization of economies of scale,

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[28] XU J., *Growing through the merger and acquisition,* in Vol. 80, *Journal of Economic Dynamics and Control*, 54-74, 55, (2017).
[29] DALLOCCHIO M., LUCCHINI G, SCARPELLI M., *Mergers & Acquisitions*,11. The first merger wave in the US occurred between 1897 and 1904, with a prevalence of horizontal mergers; the second wave took place before the 1929's crisis, and vertical mergers were the most common; the third wave occurred between 1965 and 1969, pushed by a rising economy, during which mergers had mostly conglomerate nature with the purpose to diversify the products' portfolio; with the fourth, fifth and sixth merger waves (respectively occurred in the 80s, 90s, and 00s before the 2008 crisis), mergers started to resort increasingly to financial leverage, to realize megamergers or cross border mergers. After the 2008 crisis, the correlation between M&A global volumes and the S&P 500 index performance has diminished.
[30] DALLOCCHIO M., LUCCHINI G, SCARPELLI M., *Mergers & Acquisitions*, 11.
[31] HILLIER D., CLACHER I., ROSS S., WESTERFIELD R., JORDAN B., *Fundamentals of Corporate Finance*, 660.

marketing gains, enhanced market and bargaining power, economies of vertical integration, and fiscal or capital optimization[32].

However, this assumption might not be relevant today in the case of killer acquisitions, where it is hard to imagine the creation of synergies, given that the transaction is carried out with the purpose to prevent future competition, and a complete evaluation from an economic perspective of this kind of operations will need to consider the costs of the deal compared to the potential future loss of market shares and associated revenues.

Finally, to conclude the present section, a look at the market trends in the M&A industry. 2021 was a record-breaking year for the M&A market, with over 60 thousand worldwide transactions[33] driven by the upturn in the global economy following the COVID-19 pandemic.

However, according to a report issued by PwC[34], as a result of the war in Ukraine, the rising costs of raw materials, inflation, and the rising cost of debt, 2022 has been a year of cooling down for the industry, which is likely to continue also in the first half of 2023 before bouncing back.

[32] DALLOCCHIO M., LUCCHINI G, SCARPELLI M., *Mergers & Acquisitions*, 113.
[33] STATISTA, Number of M&A transactions worldwide from 2010 to 2021, (2022).
[34] PWC, *M&A Trends 9M22, Italia & Mondo*, (2022).

Chapter 2 – Killer Acquisitions: a threat to effective competition?

1. Definition

In a speech held at International Bar Association 24th Annual Competition Conference on September 2020[1], remarkably thirty years after the entry into force of the first Merger Regulation, EC's Executive Vice-President and Commissioner for Competition Margrethe Vestager stressed the importance of keeping the rules up to date, so that the issues arising from a fast-changing economy can be dealt with. Among other things, the primary point addressed by the speech was that "the existing thresholds work well. But there are a handful of mergers each year that could seriously affect competition, but which we do not get to see because the companies' turnover does not meet our thresholds"[2]. This circumstance is not new, since we have witnessed to a variety of M&A deals[3], in recent years, in which the value of the transaction was largely disproportioned compared to the turnover of the acquired company.

Yet, it was only in 2019 that a breakthrough paper by Cunningham, Ederer, and Ma[4] was published, in which the authors labeled as "killer acquisitions" the acquisition of innovative targets in order to "discontinue [its] innovation projects and preempt future competition"[5]. One of the findings of their analysis shows also that these transactions usually target companies that fall just below the notification thresholds, which allows them to avoid evaluation by the Antitrust Authorities. In the aftermath of the release, though, that same label started to encompass a wide range of transactions[6]: not only those resulting in the termination of the projects or products, but also those that have as targets firms that have the potential to become a competitor of the incumbent, which implies that "controlling that product (but not killing it) removes the competitive threat that it poses"[7]. As we will discuss in the following section, the industries in which these transactions seem to occur at a higher frequency are the digital and pharmaceutical ones, which have in common that start-ups or young firms usually have high R&D expenses and low turnovers in their first years of life, which in turn resolves in high-value transactions with possible anti-competitive effects that fly under the radar of the Competition Authorities[8].

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[1] VESTAGER M., *The future of EU merger control*, IBA 24th Annual Competition Conference, (2020).
[2] VESTAGER M., *The future of EU merger control*.
[3] Facebook/Whatsapp, Facebook/Instagram, Google/Waze, among others.
[4] CUNNINGHAM C., EDERER F., MA S., *Killer Acquisitions*, in Vol. 129, No. 3, Journal of Political Economy, 649-702, (2021).
[5] CUNNINGHAM C., EDERER F., MA S., *Killer Acquisitions,* 649.
[6] PÉREZ DE LAMO D., *Assessing Killer Acquisitions: an assets and capabilities-based view of the start-up*, in Spring Vol. 2, No. 2, *CPI Antitrust Chronicle*, 50-59, (2020).
[7] OECD, *Start-ups, Killer Acquisitions and Merger Control*, (2020).
[8] OECD, *Start-ups, Killer Acquisitions and Merger Control*.

Therefore, we will also follow the broad definition of “killer acquisitions”, with a particular focus on the transactions that fall below the turnover thresholds set by the EU Merger Regulation 139/2004 to establish the jurisdiction of the European Commission.
Before that, as anticipated we shall discuss deeper why the digital and pharma industries are more likely to experience “killer acquisitions”.

2. Concentrations in the Pharma and Digital industries

2.1. The Pharmaceutical Industry

Since the first empirical study that detected “killer acquisitions” was focused on the pharmaceutical industry[9], it is worth starting from this sector in order to identify some key characteristics that can also be found across other industries.
The authors of that paper chose to analyze this industry for three main reasons: (1) the availability of data; (2) the potential social value of drugs development; and (3) the possibility for them to follow the drug development process independently of project ownership and to monitor the overlap between the acquiring firm’s projects and the target’s ones.
These features alone, though, would not be enough to explain the success of their study and the widespread use of the label “killer acquisitions” in the Competition Law field. This means that the reason for its relevance can be found somewhere else, i.e., in the intrinsic characteristics of the pharmaceutical industry.
As noted by Lundqvist[10], the “enduring and relevant trend in the pharmaceutical sector is that R&D-intensive start-up firms […] conduct much research that they later patent and license, trade or co-develop with larger pharmaceutical firms”, while large “Big Pharma” companies are focusing on the administration of the regulator process and on the distribution and marketing of the drugs, realizing synergies and exploiting their know-how at different stages of the value chain. On the other end, it should be noted and recalled that developing innovative products and selling them to a well-established company before the commercialization stage is in itself a business model run by start-ups[11], which means that they count on the possibility of being acquired when deciding when, where and how much to invest in each project.

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[9] Cunningham C., Ederer F., Ma S., *Killer Acquisitions*.
[10] Lundqvist B., *Killer acquisitions and other forms of anticompetitive collaborations* (Part 1), in Vol. 5, Issue 3, *European Competition and Regulatory Law Review*, 186-199, (2021).
[11] Grise J., Burns D. and Giordano E., *The No Kill Zone: The other side of pharma acquisitions*, in Spring Vol. 2, No. 2, *CPI Antitrust Chronicle*, 19-25, (2020).

In their article, Cunningham, Ederer, and Ma conduct an *ex-post* assessment on more than 16000 US drug development projects, and find out that a conservative percentage, estimated between 5.3% and 7.4% (i.e., 50 per year), of all the acquisitions, were indeed "killer acquisitions". On top of that, their results show that the transactions closed slightly below the FTC's thresholds were 11.3% more likely to result in a termination of the development.

This could be explained with economic reasoning, in that the parties of the transaction decide to settle at a lower, below-threshold, price by "discounting" the risks of delay and deal rejection[12].

Another study, conducted in the similar US dialysis industry[13], demonstrates that the exemptions provided by the US premerger notification system lead to a lack of antitrust enforcement, this time labeled as "stealth consolidation" to signal that the market becomes less competitive due to individual deals that occur without any notice to the antitrust authorities but whose cumulative effect is large, in a sensitive industry where the harm that is suffered by customers is not limited to the price, the quality or the variety of products, but also affects their health.

Even if the pharma industry is under more scrutiny than ever, with FTC's Commissioner R.K. Slaughter opening her speech at the FTC/DOJ Pharmaceutical Task Force Workshop by saying that "pharma merger matters because pharmaceuticals matter [… and] mergers that reduce drug research and development can diminish the innovation competition that fuels scientific progress"[14], the overall results about whether such transactions are harmful are inconclusive. While Cunningham[15], and her co-authors, and Lundqvist[16] conclude that there have been mergers in the pharma industry that should have been reviewed and not approved because they have not been beneficial for innovation, others[17] conclude that these acquisitions may also generate pro-competitive benefits (such as combining R&D capabilities, leveraging regulatory expertise, generating efficiencies in the commercialization process), also acknowledged by Cunningham's paper, which cannot be ignored and should be balanced against the potential harm to competition.

Finally, Cunningham and her co-authors conclude that their results extend beyond the pharmaceutical industry, and that "the large number of acquisitions of small entrepreneurial start-

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[12] MADL A., *Killing Innovation? Antitrust implications of Killer acquisitions*, in Vol. 38, *Yale Journal on Regulation*, 28-52, (2020).

[13] WOLLMAN T.G., *How to get away with merger: stealth consolidation and its effects on US healthcare*, in NBER Working Papers 27274, *National Bureau of Economic Research*, (2020).

[14] FEDERAL TRADE COMMISSION, *Keynote Remarks of Commissioner Rebecca Kelly Slaughter at the FTC/DOJ Pharmaceutical Task Force Workshop*, (2022).

[15] CUNNINGHAM C., EDERER F., MA S., *Killer Acquisitions*, 692.

[16] LUNDQVIST B., *Killer acquisitions and other forms of anticompetitive collaborations*.

[17] E.g.: MADL A., at 52; GRISE J., BURNS D. and GIORDANO E., at 7.

ups by large incumbents in the tech sector would suggest a fruitful opportunity for investigating whether killer acquisitions extend beyond the pharmaceutical industry"[18].

To summarize, some of the main characteristics of the pharmaceutical industry that may lead to killer acquisitions include: (1) high R&D investments, with small companies leading the path to innovation; (2) "big" incumbent companies, with strong market positions and an incentive to avoid disruptive competition; (3) "entry-to-buyout" as an exit strategy pursued by small companies; (4) high-value transactions that do not reflect the competitive threat posed by the target company, with deals usually closing just below the thresholds that trigger merger control.

At first sight, these may seem similar to the dynamics that govern the digital industry, but is this actually the case? And if so, are there shreds of evidence of killer acquisitions in the digital market?

2.2. Killer acquisitions in the Digital Industry

In recent years, we have witnessed a wave of M&A deals in the tech/digital industry, with some acquisitions "breaking the news" for their relevance in terms of high value, such as the acquisitions of Whatsapp by Facebook for USD 19 billion in 2014, the acquisitions of LinkedIn by Microsoft for USD 26 billion in 2016 or the acquisitions of Motorola by Google for USD 12.5 billion in 2014. Yet, most of the transactions completed by GAFAM[19] went under the radar, with 175 acquisitions over the period 2015-2017[20], and a cumulative total of 825 transactions completed from 1987 (year of the first acquisition by Microsoft) to 2020[21].

Most of these acquisitions were never reviewed, though, and the few that went under the scrutiny of the Antitrust Authorities were cleared without conditions[22].

Given the relevance of the digital markets in today's economy, the concerns raised by the "Killer acquisitions" paper extended quickly to the tech industry, on the assumption that the potential harm to competition and to consumers' welfare might be greater than it was originally thought.

When asked about the harm from killer acquisitions in tech[23], Florian Ederer stated that adverse effects might come from: (1) higher prices to consumers, which in multi-sided markets can be not only the (free) users, but also the advertisers; (2) reduction in product variety, quality, and

[18] CUNNINGHAM C., EDERER F., MA S., *Killer Acquisitions*, 693.
[19] Acronym that includes Google, Amazon, Facebook, Apple and Microsoft.
[20] GAUTIER A., LAMESCH J., *Mergers in the digital economy*, in CESifo Working Paper No. 8056, (2020).
[21] PARKER G., PETROPOULOS G. AND VAN ALSTYNE M., *Platform Merger and Antitrust*, in Vol. 30, Issue 5, *Industrial and Corporate Change*, 1307-1336, 1329, (2021).
[22] BOURREAU M, DE STREEL A., *Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control*, in CERRE, 5, (2020).
[23] EDERER F., *Does Big Tech Gobble Up Competitors?, (*2021).

innovation; (3) deterioration of privacy standards, with critics starting to wonder whether there could be antitrust cases on the ground of privacy abuses. For example, it has been noted that Facebook has used its monopoly power to degrade the quality of its service, with regard to the degree of privacy protection, below what a competitive marketplace would allow[24].

Still, this is not enough to directly transpose the findings of Cunningham *et al*.'s paper into the digital industry, which has its own peculiar, intrinsic characteristics that differ from the ones in the pharmaceutical industry:

- Conglomerate concentrations and network effects: the empirical study conducted by Cunningham *et al.* had as primary focus the analysis of acquisitions of companies that were developing pipeline products that, once on the market, would have been substitutes to the incumbent's drugs, with clearly defined markets for each one of them as determined by customers' health necessities. On the contrary, in the digital industry there are transactions that target complementary products or technologies, which have the purpose to leverage on network effects (i.e., the circumstance that customers' benefit increases when the number of users increases; this also means that a small company with a large user base may turn into a competitor even if there is no product overlap[25]) and "ecosystem" effects (i.e., the circumstance that the consumers' experience and overall satisfaction improves with the integration of a wide range of products and services, to the extent that adding new products is part of the competitive process[26]). Hence, "competition tends to be for the market rather than in the market"[27].
- IP protection: while the development of a new drug requires years of tests, trials and regulatory approvals, once the product is launched on the market it is protected with a patent, which means that its manufacturer will be the only one able to exploit its sales; therefore, incumbents have the incentive to preempt competition by acquiring the nascent competitor, and pay for the deal as much as the future loss on profits is expected to be. On the contrary, in digital markets and especially in software engineering, IPR protection is

[24] SRINIVASAN D., *Why Privacy is an Antitrust Issue*, (2019).

[25] GAUTIER A., LAMESCH J., *Mergers in the digital economy*, 4, quoting Cremer et al.

[26] Id.

[27] LATHAM O., TECU I., BAGARIA N., *Beyond Killer Acquisitions: are there more common potential competition issues in tech deals and how can these be assessed?*, in Spring Vol. 2, No. 2, *CPI Antitrust Chronicle*, 26-37, (2020).

usually granted by copyright, not patents, and this implies that "the core concepts in technology services can often be easily replicated by competitors"[28].

- R&D, innovation, and uncertainty: while it is true that both the pharmaceutical and the technology industries are R&D intensive, with pharma companies spending 10-20% of their revenues on R&D[29], and GAFAM spending respectively USD 27.5, 42.7, 18.5, 18.7, 19.3 billion in R&D projects in 2020[30] alone, innovation in the digital market can be disruptive and abrupt, with a high rate of obsolescence for technological products and services[31] and no guarantee that a product that requires time and resources to develop will be successful and remunerative. This may lead to a corporate strategy of acquiring the projects that seem to have the highest market value and, hence, the highest potential of being a competitive force.

After this analysis, it is evident that there are important differences between the two industries, so that it is not straightforward to derive the same results from different premises without industry-specific research.

Such a refined analysis was conducted by Latham, Tecu, and Bagaria[32]: they factor in some filters in order to identify the acquisitions that might have "killer" characteristics; filters include focusing attention on the acquirer's market power, to identify nascent competitors that could pose a competitive threat; screening for plausible economic mechanisms that may explain how the target could become a competitor; looking at deal valuation: is this justifiable with the traditional corporate evaluation tools, or the consideration that the acquirer is willing to pay is disproportionate and perhaps including a premium to preempt future competition?

They perform their research without considering Microsoft's M&A deals, thus analyzing the 409 transactions completed by GAFA between 2009 and 2020. Their findings show that just 8% (33) of the transactions were within the acquirer's core business or vertically related to it. When they factor in the value of the transactions, they see that only 11 (at USD 100 million) or 16 (at USD 50 million) transactions also meet the core business filter, i.e., 4% of their sample. However, they note that meeting the filters does not imply automatically that a killer acquisition occurred, as the filters are the necessary, not sufficient conditions.

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[28] Holmstrom M., Padilla J., Stitzing R., Saakilahti P., *Killer Acquisitions? The Debate on Merger control for digital markets,* in *2018 Yearbook Finnish Competition Law Association*, (2018).
[29] Holmstrom M., Padilla J., Stitzing R., Saakilahti P., *Killer Acquisitions? The Debate on Merger control*.
[30] Statista, *Ranking of the companies with the highest spending on R&D worldwide in 2020,* (2022).
[31] Gautier A., Lamesch J., *Mergers in the digital economy*.
[32] Latham O., Tecu I., Bagaria N., *Beyond Killer Acquisitions*.

They conclude killer acquisitions in tech are “likely rare”, but they also admit that “rare events with large negative welfare effects need to be guarded against”[33].

At present, the most in-depth research about mergers in the digital economy is the paper by Gautier and Lamesch[34]. Despite the small timeframe of their analysis, which covers only from 2015 to 2017, they collect data from 175 M&A deals closed by GAFAM to determine if there is room for killer acquisitions in the digital economy.

Their main findings reveal that around 36% of the acquisitions were in the acquiring firm’s main business segment and 82% in segments in which they were already active, suggesting that their main strategy might be to strengthen their position rather than to increase competition in other markets. Then, they remark on the importance of a large user base in the digital economy and conclude that the acquiring firm will likely continue to use the initial brand name, to preserve the user base while integrating the product into its ecosystem. Therefore, the termination of the product is not the natural landing of a killer acquisition. Therefore, they also implement three filters to identify potential killer acquisitions: (1) the deal was in the core segment of the acquirer; (2) the original brand name was not discontinued; (3) the target had a large user base at the time of the transaction. On this basis, they found three cases that met all three criteria: Amazon/Souq, Microsoft/LinkedIn, and Facebook/Masquerade. Amazon’s deal was not reviewed by competition authorities, despite being a horizontal merger pursued to enter the Arabic market, and Microsoft’s acquisition was cleared with commitments by the European Commission: these two deals were not considered to be killer acquisitions. The authors conclude that there was just one potential killer acquisition, that being Facebook’s acquisition in 2016 of Masquerade, a young start-up that had developed a photo filter app and experienced a sharp increase in its user base.

They conclude that GAFAM use M&A deals as a strategy to reinforce their market position in their core segments or to purchase valuable R&D inputs (Technologies, IPR, people). Given the characteristics of the digital markets, though, this means that they create a “bottleneck”, making it hard, if not impossible, to compete in those markets. For this reason, start-ups try to compete in adjacent markets, developing products that do not overlap directly with the market in which a tech giant has a dominant position, while aiming at creating a large user base to then become a competitor. The issue is that most of these acquisitions escape antitrust review, mainly due to the turnover thresholds that establish jurisdiction, but do not ensure that all relevant cases are

[33] LATHAM O., TECU I., BAGARIA N., *Beyond Killer Acquisitions,* 11.
[34] GAUTIER A., LAMESCH J., *Mergers in the digital economy*.

scrutinized; this also means that in the few cases that a tech merger is reviewed, competition authorities tend to evaluate them as conglomerate mergers, which have usually generated less competitive concerns. As they suggest, it may be the appropriate time to give more importance to the potential competitive effect that the target might have on the acquirer, rather than to the efficiency effects[35].

3. How are regulators addressing these challenges? A comparative perspective

The issues raised by Cunningham, Ederer, and Ma's paper have been taken into account by regulators and policymakers all around the world, concerned that dominant, well-established, and incumbent companies could prevent emerging competition through a systematic and strategic use of non-reportable transactions, which may lead to a silent consolidation of their market positions. Concerns also raise around the adequacy of the thresholds, the efficiency of an *ex-ante* merger control, and the definition of markets in the digital industry. Hence, before addressing the European proposed solution, a round-up of merger control systems, research results of the NCAs, and policy developments that are being implemented by regulators around the world seems appropriate.

3.1. The U.S.

The US Merger Control system has been briefly discussed in Chapter 1[36]. In this section, we also recall that, under the HSR Act, premerger notification is mandatory if the transaction value is over $92 million or over $368 million if the Size-of-Person test is not met. Even if both tests are met, the mandatory notification is not required if an exemption (e.g., regarding the geographic nexus) applies.

Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition, including acquisitions of innovative firms and nascent competitors, "especially when an industry leader seeks to acquire an up-and-coming competitor that is changing customer expectations and gaining sales"[37], irrespectively of a premerger notification under the HSR Act and even after closing.

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[35] PÉREZ DE LAMO D., *Assessing Killer Acquisitions*. The author claims that "when an acquirer purchases a complementary technology, the merger will generally increase the innovation performance of the resulting undertaking, so long as it is carefully integrated", hence pro-innovative or at least neutral to competition.
[36] Chapter 1, paragraph 1 and 1.1.
[37] OECD, *Start-ups, killer acquisitions and merger control – Note by the United States*, 3, (2020).

Commentators in the U.S. have also noted that "if a start-up is not acquired, it might instead grow into an independent, full-fledged competitor [and] some acquisitions may occur precisely to prevent such competition"[38].

The consensus in the U.S. is that current antitrust laws are effective and provide "powerful tools" to address the issues brought by digital markets[39], but the Agencies acknowledge that the landscape is changing and needs to be monitored[40]. As a first step, in February 2020 the FTC issued Special Orders to GAFAM, requiring them to provide information about prior acquisitions not reported under the HSR Act to help the FTC to better understand acquisitions activities, strategies, and trends[41]. The report analyzes 819 total non-HSR reportable transactions over the 2010-2019 period, and finds that 94 (out of 616, excluding Hiring Events and Patent Acquisitions, or 15.26%) were above the HSR size of transaction threshold. One critical policy issue that the report may have found out is that 3 additional transactions would have exceeded the thresholds if the acquirer had paid full price, instead of assuming the target's debt on its own balance sheet, and an additional 9 when adding to the purchase price the fraction of the consideration that was deferred: these are "avoidance devices" that buyers use not to trigger the HSR thresholds[42], which are prohibited by implementing regulations of the HSR Act that are not meaningfully enforced. Finally, most of the transactions (295 out of 616) targeted companies that were less than five years old.

The report refrains from providing suggestions, proposals, or considerations about the nature of such transactions, as its purpose was to inform the ongoing discussion on the topics that it deals with, but the results are in line with the existing literature in the field.

It is no surprise, hence, that President Biden issued an Executive Order on July 9th, 2021, in which the President announces[43] "greater scrutiny of mergers, including by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by "free" products, and the effect on user privacy", since too often Federal Agencies have not blocked or examined alleged killer acquisitions.

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[38] OECD, *Start-ups, killer acquisitions and merger control – Note by the United States,* 10.

[39] For further reference, see MARTY F., WARIN T., *Visa's abandoned plan to acquire Plaid: what could have been a textbook case of a Killer Acquisition*, in 2021S-39, *CIRANO Working Papers*, (2021). Before the dismissal of the transaction, the case made by the DoJ "appeared to be the consecration by the antitrust authorities of the notion of killer acquisitions".

[40] OECD, *Start-ups, killer acquisitions and merger control – Note by the United States*, 14.

[41] FEDERAL TRADE COMMISSION, *Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study*, (2021).

[42] FEDERAL TRADE COMMISSION, *Remarks of Commissioner Rohit Chopra regarding Non-HSR Reported Acquisitions by Big Tech Platforms*, (2021).

[43] THE WHITE HOUSE, *Fact Sheet: Executive Order on Promoting Competition in the American Economy*, (2021).

Particular emphasis is also put on privacy and personal data and the use of such data to create, protect or exploit a monopolistic position on the market, confirming the existing connection between antitrust laws, killer acquisitions, privacy and data[44]. This issue is also addressed by the "Competition and Antitrust Law Enforcement Reform Act of 2021" (also, 'CALERA'), a proposed bill to reform antitrust laws, which finds that the presence and exercise of market power in the U.S. is substantial and growing, and "undue market concentration contributes to the consolidation of political power, undermining the health of democracy in the U.S."[45]. The bill also acknowledges that "the acquisition of nascent or potential rivals by dominant firms can present significant long-term threats to competition and innovation", as well as the acquisition of a maverick firm that plays a disruptive role in the market[46]. The proposed changes include, among others, (1) lowering the quantitative threshold necessary to deem a transaction as unlawful, switching from the "substantially lessening of competition" test to an "appreciable risk of materially lessening competition" standard; and (2) shifting the burden of the proof on the acquiring company, that would be required to demonstrate that the acquisition will not be to create an appreciable risk of materially lessening competition, when certain presumptions regarding the resulting market power or capitalization are met[47].

Finally, in January 2022, the FTC and the DOJ jointly launched a public consultation with the purpose of reviewing the Merger Guidelines[48], in particular with regard to threats to potential and nascent competition, definitions of relevant markets, presumptions, and characteristics of digital markets, to ensure that the legislative framework is up to date. In two separate occasions in May 2022, FTC's Chair Lina M. Khan expressed concerns regarding the transfer of sensitive data after a merger and the threat posed by acquisitions of emerging competitors, which have "historically fallen under the radar"[49], "missing too many transactions that ultimately did substantially lessen competition and spur undue consolidation"[50]. Both the legislative changes and the updates to the Merger Guidelines need time to develop before eventually coming into force, and it is unlikely that this will happen before U.S. mid-term elections and, hence, before 2023.

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[44] For further reference, see: *FTC sues Facebook for illegal monopolization*, available at https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization; See also: DENIS L., NIELSON N., GUITTARD I., *Facebook VS FTC, a highly political case under the guise of a legal case*, (2022).

[45] CALERA, finding (6).

[46] CALERA, findings (12) and (13).

[47] CALERA, § 4 (b).

[48] FEDERAL TRADE COMMISSION, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers, Press release,* (2022).

[49] FEDERAL TRADE COMMISSION, *FTC and DoJ Listening Forum on Firsthand effects of M&A - Technology*, (2022).

[50] FEDERAL TRADE COMMISSION, *Keynote remarks of Lina M. Khan*, International Competition Network, Berlin, (2022).

Nonetheless, there has already been criticism of the legislative proposal, which might generate legal confusion and be an impediment to pro-competitive and pro-innovation mergers, since the combined effect of shifting the burden of proof and lowering the qualitative test would deem as unlawful (and before that, discourage) all acquisitions by large companies[51]. Only time will tell if changes to the already efficient U.S. merger system will be implemented, but the circumstance that even such an efficient, flexible, and adequate[52] architecture is under review signals the relevance and the potential impact of killer acquisitions and mergers in digital markets.

3.2. The U.K.

The debate around competition in digital markets, and the potential impact of killer acquisitions in this field, soon also reached the UK. The House of Lords published a report in 2019[53] to address the challenges posed by the digital world, stating that "the largest tech companies can buy start-up companies before they can become competitive" and that competition law struggles to offer adequate answers to the arising issues. Shortly after, the UK's Government released the so-called Furman Report[54], in which the experts recall that digital markets tend to be concentrated, with limited in-market competition and high barriers to entry, which means that rapid interventions are needed to prevent harmful behaviors[55].

In particular, the report finds that GAFAM have closed 400 acquisitions in the last decade, none of which were notified to the CMA, nor were called in for investigation, and this raises concerns that large digital companies have acquired smaller companies in adjacent or overlapping markets to eliminate potential future rivals, specifically mentioning the "killer acquisitions" strategy[56].

The panel recommends deeper scrutiny of mergers in digital markets, both in the selection and the assessment of cases[57], and the introduction of a mandatory notification system for digital companies that hold a "strategic market status"[58,59] so that the Competition and Markets Authority (CMA) will be aware of their intended transactions and hence will be able to determine which cases need detailed scrutiny.

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[51] PORTUESE A., *Reforming Merger reviews to preserve creative destruction*, in *ITIF Report*, (2021).
[52] PORTUESE A., *Reforming Merger reviews*.
[53] HOUSE OF LORDS – SELECT COMMITTEE ON COMMUNICATIONS, *Regulating in the digital world*, (2019).
[54] DIGITAL COMPETITION EXPERT PANEL, *Unlocking Digital Competition Report*, (2019).
[55] DIGITAL COMPETITION EXPERT PANEL, *Unlocking Digital Competition,* 88.
[56] DIGITAL COMPETITION EXPERT PANEL, *Unlocking Digital Competition,* 92.
[57] DIGITAL COMPETITION EXPERT PANEL, *Unlocking Digital Competition, r*ecommendation 7.
[58] DIGITAL COMPETITION EXPERT PANEL, *Unlocking Digital Competition, recommendation 8*.
[59] DIGITAL COMPETITION EXPERT PANEL, *Unlocking Digital Competition*, at 59, Strategic Market Status is defined as a position of control over other parties' market access.

These proposals, along with the many others included in the report, are addressed at solving the weaknesses of the merger control system in the UK. The 2002 Enterprise Act[60] sets a voluntary notification system, and allows the CMA to review any non-notified case that may result in a substantial lessening of competition, provided that it has jurisdiction, i.e.: (1) the UK turnover associated with the enterprise which is being acquired exceeds £70 million (this is referred to as "the turnover test"); (2) the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (this is referred to as "the share of supply test"); and (3) the merger must not have taken place or no more than four months have passed since the merger was made public or the CMA was informed[61].

After a long period of public consultations, the UK Government is now looking forward to implementing a package of reforms that include a rebalancing of the overall merger control system, with the turnover thresholds raised at £100 million, the introduction of a "safe harbor" where the UK turnover of each of the merging parties is less than £10 million, and the introduction of a new "Acquirer only" Test, applicable across all industries and specifically designed to provide the CMA with a jurisdictional basis to review vertical and conglomerate mergers that may actually be killer acquisitions[62]; such a test will apply where the acquirer has both (1) an existing share of supply of goods or services of 33% in the UK or a substantial part of the UK, and (2) a UK turnover of at least £350 million[63]; a UK nexus is still to be determined. Furthermore, a parallel consultation on a new pro-competition regime for digital markets[64] indicates an additional reform that will require digital firms with a Strategic Market Status to notify their most significant transactions[65] prior to completion, where the SMS firm acquires over a 15% equity or voting share after the transaction, the value of the SMS firm's holding is over £25 million and the transaction meets a UK nexus, still to be determined.

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[60] UK Enterprise Act, 2002.
[61] COMPETITION AND MARKETS AUTHORITY, *Merger Guidance on the CMA's Jurisdiction and procedure*, (2022).
[62] The Share of Supply Test requires a horizontal overlap.
[63] U.K. GOVERNMENT, *Reforming Competition and Consumer Policy*, *Government Response to Consultation*, presented to Parliament by the Secretary of State for Business, Energy and Industrial Strategy, (2022).
[64] U.K. GOVERNMENT*, Government Response to the consultation on a new pro-competition regime for digital markets*, presented to Parliament by the Secretary of State for Digital, Culture, Media and Sport and the Secretary of State for Business, Energy and Industrial Strategy, (2022).
[65] Hence, not all of them, as suggested by the Furman report, since the public consultation raised concerns with regard to the excessive burden that would have been on digital firms and the possible discouraging effect on beneficial mergers.

This new provision does not affect the jurisdictional criteria but will allow the CMA to be aware of potentially anticompetitive transactions and to eventually undertake a thorough assessment.

Even if these are only early-stage proposals, the direction is clear: traditional merger rules appear increasingly inefficient and need reforms to deal with digital markets; when a change in the Guidelines is not sufficient, structural changes or even specific requirements for the digital industry may be required, but these need to be carefully assessed to avoid sudden legislative complications and counterproductive effects on innovation and merging activities.

3.3. Canada

The Canadian Competition Act imposes a mandatory pre-merger notification burden on transactions that, according to § 109 (1)[66], involve parties that meet the Size-of-Parties thresholds, i.e., "have assets in Canada that exceed four hundred million dollars in aggregate value, determined as of such time and in such manner as may be prescribed, or such greater amount as may be prescribed; or had gross revenues from sales in, from or into Canada, determined for such annual period and in such manner as may be prescribed, that exceed four hundred million dollars in aggregate value, or such greater amount as may be prescribed". There is also a Size-of-Transaction criterion set by § 110, that is met when the value of the assets, or the revenues generated in or from Canada from those assets, of the target company, the amalgamated entity, or the combination exceeds CAD 70 million, subject to indexing to Canadian GDP[67] and currently set at CAD 93 million[68]. The Competition Act also allows the Commissioner to file a case to the Competition Tribunal to challenge any merger that is likely to prevent or lessen competition[69], irrespective of whether the SOP or SOT criteria are met. The only limitation is that the Act imposes a one-year period after the

[66] *Competition Act* (RSC 1985), § 109 and ff.

[67] *Competition Act*, § 110 (7) and (8): Amount for notification (7) The amount for the purposes of subsections (2) to (6) is $70,000,000. (8) In any year following the year in which subsection (7) comes into force, the amount for the purposes of any of subsections (2) to (6) is

- (a) any amount that is prescribed for that subsection; or (b) if no amount has been prescribed for that subsection, (i) the amount determined by the Minister by using the formula A × (B / C) where, A is the amount for the previous year, B is the average of the Nominal GDP at market prices for the most recent four consecutive quarters, and C is the average of the Nominal GDP at market prices for the four consecutive quarters for the comparable period in the year preceding the year used in calculating B, or
- (ii) until the Minister has published under subsection (9) an amount for that year determined under subparagraph (i), if the Minister does so at all, the amount for that subsection for the previous year.

[68] COMPETITION BUREAU CANADA, *Pre-merger notification transaction-size threshold to remain at $93M in 2023, News Release*, (2023).

[69] BESTER K., BYERS J., *Emerging questions about merger notification and the Canadian response*, in Vol. 8, *Journal of Antitrust Enforcement*, 1-9, 8, (2020).

completion of the transaction to file the case in Court[70], a compromise between the principle of legal certainty and the flexibility granted to the Bureau to review potentially anti-competitive mergers. Thus, it appears that Canada also faces the issue of non-notifiable, under-thresholds mergers that escape merger control while potentially preempting competition, since the mere circumstance that an *ex-post* review is allowed does not imply that the Competition Authority will be aware of these mergers. Moreover, it has been noted[71] that the extreme remedy of a corporate split-up has never been imposed, since the Bureau would have to prove that all other remedies would be ineffective, thus constraining the overall impact of the provision.

However, as mentioned, the Bureau needs to be aware of a completed transaction in order to decide whether a competition case can be filed; to increase the detection of non-notifiable mergers, the Bureau has established the "Merger Intelligence and Notification Unit" (hereinafter, MINU) in 2019, with the purpose to detect such transactions and engage in information disclosure activities with the parties, when a potential competition issue is apparent.

Once sufficient information is collected, the Bureau can employ all the tools that are available under the Competition Act, including starting a formal proceeding, imposing a stand-still obligation, and evaluating it under the same substantive test established for notifiable transactions. The first results seem promising, as not only multiple potentially anti-competitive transactions have been identified, but the MINU has also noted a spontaneous engagement by parties of transactions willing to avoid *ex-post* scrutiny[72].

In the last months, the Canadian Minister of Innovation, Science, and Industry, announced an evaluation of the Competition Act, with one of the purposes being that of adapting the law to today's digital reality and better tackle emerging forms of harmful behaviors in the digital economy[73]. The Competition Bureau submitted[74] a series of recommendations, suggesting, among other things, shifting the burden of proof on the merging parties, defining new standards for assessing acquisitions of emerging competitors in the digital economy, closing loopholes in the existing pre-merger notification system (which allowed parties to structure deals in such a way to avoid review) and extending the *ex-post* control period up to three years. The latter suggestion might appear controversial, given that in 2009 the Act was amended to reduce the "limitation

[70] BESTER K., BYERS J., *Emerging questions about merger notification*, 3.
[71] BESTER K., BYERS J., *Emerging questions about merger notification*, 5.
[72] BESTER K., BYERS J., *Emerging questions about merger notification,* 9.
[73] COMPETITION BUREAU CANADA, *Pre-merger notification transaction-size threshold to remain at CAD 93M and Canada's competition law to be examined*, *News release*, (2022).
[74] COMPETITION BUREAU CANADA, *Examining the Canadian Competition Act in the Digital Era*, (2022).

period" from three years to one in order to increase predictability, efficiency, and effectiveness for both businesses and the Bureau[75], but it is also supported by recent research[76] calling for a longer period of time to allow review of mergers that are likely to undermine potential competition and to align the provision with the US system.

On June 23rd, 2022, the amendments to the Competition Act were approved[77], but as per the object of the present research, were limited to an expansion of factors to be considered in the evaluation of a merger (namely network effects, the market position of leading incumbents, and the effect on price or non-price effects, including privacy), and to a new anti-avoidance provision for transactions designed to avoid the pre-merger notification system[78].

Perhaps unsatisfying and inadequate to tackle the new challenges posed by the digital economy, these amendments are deemed to be the first part of a package that could include, in the near future, changes to the purpose clause of the Act, a strengthening of the merger review process with the introduction of structural presumptions, and switches in the burden of proof with respect to the acquisitions of emerging competitors in the digital economy[79].

3.4. Australia

Australia's merger control rules are set by § 50 of the Competition and Consumer Act[80], which prohibits acquisitions that have the effect of substantially lessening competition in any relevant market in Australia. The system is built around a voluntary, non-suspensory notification regime, which does not grant the ACCC[81] the power to clear such transactions, but only the right to open a case in Court where it will have to prove the alleged substantial lessening of competition.

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[75] MARGISON C., REISLER J., WONG R., DI DOMENICO T. AND SPILLETTE R., *Competition Bureau Recommendations regarding Merger Review in Canada*, (2022).

[76] BEDNAR V., QARRI A., SHABAN R., *Study of Competition Issues in Data-Driven Markets in Canada*, *Prepared for the Ministry of Innovation, Science and Economic Development*, via *Vivic Research*, (2022).

[77] Bill C-19, Budget Implementation Act, S.C. 2022, No. 1, (2022).

[78] DI DOMENICO T., MARGISON C., SPILLETTE R., AND YAO K., *Significant Amendments to Canada's Competition Act Are Now Law: What You Need to Know*, (2022).

[79] SPILLETTE R., MARGISON C., AND MANGALY P., *Potential impacts of New SLPC Factors in the Competition Act*, (2022)

[80] Competition and Consumer Act, (2010).

[81] Australian Competition and Consumer Commission.

After a series of high-profile losses in front of the Federal Court[82,83], and with the results of the Digital Platform Inquiry Report[84] in hand, ACCC's Chairman Rod Sims has started to question the effectiveness of Australia Merger Control rules and has been asking for changes to detect and catch anti-competitive transactions. In particular, the DPI Report finds that "numerous strategic acquisitions by Google and Facebook have led or contributed to their respective market power in relevant markets and have had a sizeable effect on competition"[85] (including Google acquisitions of DoubleClick, Admob, YouTube, and Facebook acquisitions of Whatsapp and Instagram), and suggests amendments to § 50 of the CCA that would include the evaluation of (1) the likelihood that the acquisition would result in the removal from the market of a potential competitor, and (2) the nature and significance of assets, including data and technology acquired[86].

Another recommendation[87] calls for a notification protocol to be followed by large digital platforms that would require the notification of any proposed acquisition with potential effects on competition in Australia, similar to the new disposition implemented by the European DMA (see *infra*). With this evidence, Chairman Rod Sims, during the 2021 Competition and Consumer Workshop Conference[88] asked for relevant changes in merger control rules, stating that there are "key reasons why our current merger control regime in Australia is not fit for purpose: the requirement that, to prevent an anti-competitive merger, the ACCC must go to court and prove that future anti-competitive effects of an acquisition are 'likely'; there is insufficient focus on the structural conditions for competition; there is a gap in our law in relation to acquisitions by digital platforms", and that GAFAM are "serial acquirer" and, even if one could debate which of the 500 acquisitions completed between 2010 and 2020 by GAFAM were actually "killer acquisitions", it is without doubt that strategic acquisitions have contributed to the substantial market power of the digital platforms and GAFAM should not have been allowed to proceed without any review.

The proposals illustrated during the Conference to modify current merger control rules, that build on the findings of the DPI Report, include among others[89]: (1) changing the voluntary merger review

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[82] GRIME M., PODDAR D., *The jury is out: an assessment of proposed reforms to Australia's merger control regime for addressing competitive harm in the (digital) economy*, in Spring Vol. 2, No. 2, *CPI Antitrust Chronicle*, 43-49, (2020). E.g., Vodafone Hutchison Australia Pty Ltd proposed acquisition of TPG Telecom Ltd cleared by the Federal Court.

[83] ZUK T., MCKELLAR J., SATILL L., AND DUCE O., *ACCC unveils proposal for major overhaul of Australia's merger control regime,* (2021). The ACCC has contested 10 merger cases in Court and won only 3, with the last win being in 1993.

[84] AUSTRALIAN COMPETITION & CONSUMER COMMISSION, *Digital Platforms Inquiry – Final Report*, (2019).

[85] GRIME M., PODDAR D., *The jury is*, and DPI Report at 110.

[86] ACCC, *Digital Platforms Inquiry*, 105.

[87] ACCC, *Digital Platforms Inquiry*, at 109.

[88] ACCC CHAIR, SIMS R., *Protecting and promoting competition in Australia*, (2021).

[89] SIMS, *Protecting and promoting competition in Australia*.

system to a mandatory regime with thresholds and a stand-still obligation, pending approval; (2) allowing the ACCC to "call in" mergers that do not meet the thresholds but are deemed to rise competition concerns; (3) changing and re-defining the merger test, recalling recommendation 1 of the DPI Report and defining what is 'likely'; (4) tailoring the test for acquisitions by certain digital platforms that might buy out possible competitive threats before they have a chance to develop into competitors; such special regime would include lower thresholds for establishing the probability of competitive harm, lower quantitative thresholds for notification, and also a prohibition for digital platforms to acquire businesses operating in the same or adjacent markets, or that may allow an expansion of its market power[90].

It looks like the ACCC abandoned the "notification protocol" proposal, as it had been noted that such a measure would pose a disproportionate burden on digital platforms, but the measures demanded (still to be discussed and implemented by the Government) prove the willingness of the ACCC to change its approach and its relevance within merger control, especially in the digital industry where the risk of under-enforcement is associated with the acquisition of nascent competitors in adjacent markets[91].

3.5. South Korea

In his message[92] to explain the purpose and direction of the "Act on Fair Intermediate Transactions on Online Platforms", Sungwook Joh, Chairperson of the Korea Fair Trade Commission (hereinafter, KFTC), expressed his concerns regarding "monopolistic platforms [that] are preventing new entrants from entering the market while removing potential competitors by acquiring them".
Despite the bill's purpose falling outside the field of competition law, the Korean authorities went on to also amend the Monopoly Regulation and the Fair Trade Act (hereinafter, MRFTA).
The amendments to the MRFTA entered into effect on December 30, 2021, and require companies to report "business combination" (i.e., M&A deals) when the transaction amount exceeds KRW 600 billion, and when the acquiree sells or provides products and services in the Korean market to more than 1 million people per month during the preceding three years, or when the domestic R&D

[90] ACCC, *Digital Platform Services Inquiry*, *Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*, (2022).
[91] WISKING S., FOUNTOUKAKOS K., NUYS M., *Competition in Digital Markets: Australia 2023*, (2022).
[92] KOREA FAIR TRADE COMMISSION, SUNGWOOK J. *message*, Available at: [https://www.ftc.go.kr/solution/skin/doc.html?fn=a96717a996e790c90b01a7bc4c1f77d946be46d29989d2d5c23b7f464793dfba&rs=/fileupload/data/result/BBSMSTR_000000002401/].

expenditure exceeds KRW 30 billion per year during the same period, irrespective of product overlap.[93]

With these new requirements, a business that wants to combine with another business with high growth potential must report the merger even if the target company has a low turnover.

Previously, the merger control system was only built around a set of "Size-of-Parties thresholds", which require notification when the acquiring company has worldwide assets or turnover above KRW 300 billion and KRW 30 billion for the target company, hence allowing under-threshold acquisitions to unwind. Moreover, a Korean nexus test, which requires a domestic turnover of at least KWR 30 billion per year in case of transactions involving foreign companies, only applies to the SOP test. However, pre-merger notification is only required for transactions that involve a large company with assets or annual turnover above KRW 2 trillion; otherwise, notification can be filed within 30 days from the closing date[94]. It is way too early to evaluate how these amendments will be enforced and how big of an impact they will have, but the direction is clear: killer acquisitions need to be addressed and reviewed.

3.6. EU Member States

Before analyzing the solutions implemented by the European Union, it is worth mentioning the main proposals that have been discussed at the national level in some Member States.

In 2017, in Germany – and very similarly in Austria – was introduced a transaction value threshold, respectively set at €400 million and €200 million, applicable on a subsidiary basis when the target company has substantial domestic operations[95], since there was a growing concern that the high consideration paid for some transactions was "an indication of the existence of innovative business ideas with high competitive potential [and that] the aim of such takeovers can also be not to exploit the innovation potential, but to remove competing business models or product from the market"[96].

As will be discussed later, while the additional notifications have been modest so far, Germany is confident that this provision allows closing an enforcement gap with regard to acquisitions detrimental to competition[97].

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[93] OECD, *Annual Report on Competition Policy Developments in Korea*, (2022).

[94] RHEE P.S., RYU S., PARK Y.J., *Merger Control in South Korea: Overview*, (2022).

[95] GERMAN COMPETITION ACT (GWB), *Section 35(1a)*.

[96] FRANCK J., MONTI G., DE STREEL A., *Legal Opinion concerning Article 114 TFEU as a Legal basis for strengthened control of acquisitions by digital gatekeepers*, commissioned by the German *Federal Ministry for Economic Affairs and Energy*, 12, (2021).

[97] OECD, *Start-ups, Killer Acquisitions and merger control – Note by Germany*, (2020).

Other solutions that have been discussed in some Member States include: the introduction of a notification obligation for designated gatekeepers in France, similar to the proposal approved in the Digital Markets Act[98]; the reduction of turnover thresholds for specific sectors in the Netherlands; and a case-by-case power to require notification when a company acquires multiple smaller competitors, or a single, nascent firm that could challenge the incumbent, in Sweden[99].

More recently, in a recommendation[100] to the Government issued on March 21st, 2021, the Italian Competition Authority (AGCM) acknowledged that the mandatory obligation to notify those mergers that meet the turnover thresholds, as defined in the Italian Law n. 287/1990, might be "inadequate in capturing the prospective development of companies involved in the transaction as well as in preventing the formation of local monopolies", due to the challenge posed by both the digital economy, in which there is a growing practice of acquisitions of potential future competitors by large players, and some traditional industries in which mergers might have a significant impact on local markets, despite not meeting the turnover thresholds.

The Italian Authority called for the strengthening of the merger control system, suggesting the introduction of the power, for the Authority, to request the notification of below-threshold transactions once they are known.

The Annual Competition Law issued on August 5th, 2022, introduced the above-mentioned power, which allows the Authority to review below-thresholds mergers, provided that: 1) at least one of the thresholds is met (i.e., €517 million for the turnover realized in Italy by all the undertakings and €31 million for the total turnover realized individually at national level by at least two of the undertakings concerned) or the joint worldwide turnover of the merging parties is above €5 billion; 2) the merger raises risks for the competition in the national market, or in a relevant part thereof, including the possible detrimental effects on the development of small companies with innovative strategies; and 3) no more than 6 months have passed since the closing of the transaction.

This is an example of a targeted, ex-post approach, which will be further discussed in Chapter 3, but it is worth noting that such a power might bring legal uncertainty, and therefore its effectiveness will largely depend on how the AGCM will enforce the provision.

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[98] See Chapter 2, 4.1.

[99] FRANCK J., MONTI G., DE STREEL A., *Legal Opinion concerning Article 114 TFEU as a Legal basis for strengthened control of acquisitions*, 13-15.

[100] AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza,* (2021).

4. EU: the DMA and EUMR Article 22 New Guidelines

It should be no surprise, therefore, that the competition issues arising from this era of technology changes are also under the lens of EU regulators.

In particular, the European Commission President von der Leyen has stressed in her political guidelines the need for Europe to lead the transition to a new digital world[101]. To pursue this goal, the European Commission has proposed a package of measures (DSA and DMA) that are intended to reinforce and improve its tools to regulate the digital economy and the activity of leading online platforms.

Yet, as far as merger control across all industries is considered, the most important novelty is not a new piece of regulation; rather, it is a change in the way the existing Merger Regulation 139/2004 will be used to tackle killer acquisitions.

4.1. DMA

On December 15th, 2020, the European Commission issued a Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), that has been approved by the EU Parliament on July 5th, 2022[102].

Ex Article 2, the DMA will apply to gatekeepers (i.e., undertakings offering core platform services[103]), as designated according to Article 3[104].

In recital 11, it is stated that "Art. 101 and Art. 102 TFUE and […] merger control have as their objective the protection of undistorted competition on the market.

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[101] PUBLICATIONS OFFICE OF THE EUROPEAN UNION, *Shaping Europe's digital future*, (2020).

[102] EU Parliament Legislative resolution of July 5th, 2022, on the proposal of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).

[103] DMA Art. 2 (2): core platform services include online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communications services; operating systems; web browsers; virtual assistants; cloud computing services; online advertising services.

[104] DMA Art. 3 (1): 1. An undertaking shall be designated as a gatekeeper if:
(a) it has a significant impact on the internal market;
(b) it provides a core platform service which is an important gateway for business users to reach end users; and
(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.
2. An undertaking shall be presumed to satisfy the respective requirements in paragraph 1:
(a) as regards paragraph 1, point (a), where it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalization or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides *the same* core platform service in at least three Member States;
(b) as regards paragraph 1, point (b), where it provides a core platform service that in the last financial year has *at least* 45 million monthly active end users established or located in the Union and *at least* 10 000 yearly active business users established in the Union, identified, and calculated in accordance with the methodology and indicators set out in the Annex.

This Regulation pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair"[105].

Among others, under Article 14 (1) DMA, one of the obligations to which gatekeepers will be subject is to inform the Commission of any intended concentration within the meaning of Article 2, EUMR, irrespective of whether they are notifiable to the Commission under that Regulation or to a competent National Competition Authority under national merger rules[106].

The following paragraph then describes the minimum content that the gatekeepers must provide, which includes the description of the "undertakings concerned by the concentration, their Union and worldwide turnover, their fields of activity, and the transaction value of the agreement or an estimation thereof, along with a summary of the concentration, including its rationale and a list of Member State concerned by the concentration"[107].

It goes without saying that the information provided by the gatekeepers should be full, complete, and clear, but regulators have in mind that the parties of a transaction know every detail of it, while Authorities can only investigate what is delivered to them; therefore, to discourage and prevent an asymmetric information problem from arising, Article 30 (3) of the DMA allows the Commission to impose on gatekeepers fines not exceeding 1% of their total worldwide turnover in the preceding financial year, where they intentionally or negligently fail to notify information or supply incorrect, incomplete or misleading information that is required pursuant to Article 14[108].

4.2. EUMR Article 22 New Guidelines

Having said that the measures introduced by the DMA are complementary to the already existing tools that the European Commission can enforce to protect competition in the internal market, we shall now discuss how they will combine with the new "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation"[109], issued by the Commission on March 26th, 2021.

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[105] DMA, recital (11).
[106] DMA, art. 14 (1).
[107] DMA, Art. 14 (2).
[108] DMA, Art. 30 (3) c).
[109] EUROPEAN COMMISSION, *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*, C(2021) 1959 final, Brussels, 26/3/2021. Hereinafter, *Commission Guidance.*

In its periodic "Evaluation of procedural and jurisdictional aspects of EU merger control"[110], published on the same day, the Commission findings show that, despite the effectiveness of the referral mechanisms as a corrective tool[111], the current practice of discouraging referral requests *ex* Article 22 from the Member States that do not have jurisdiction over the transaction limits the overall effectiveness of the Regulation, given that, under this approach, only transactions that are notifiable in at least one Member State can potentially be referred under Article 22; the Evaluation also shows that a number of transactions are not caught by national, turnover-based transactions[112], which means that not only referrals are discouraged, but they are also limited by such thresholds.
The report also finds that 87 transactions sealed over the years 2015-2019, not notified since they did not meet the EU jurisdictional thresholds, were cases that might have potentially merited an EU review, due to a local nexus with the EEA or to the overlap of the activities of the merging parties. Of these transactions, 66 (i.e., slightly more than 75%) were transactions in the digital or pharma industries[113].
Other findings show that, when the value-to-turnover ratio is considered, 27 out of 45 transactions with a ratio > 10, a local nexus with the EEA and a cross-border dimension, might have potentially merited a review, and 46 out of 90 when a ratio of 5 was considered. Of these transactions, respectively 63% and 50% were deals in the digital or pharma industries[114].
These findings match well with the current global trend inspired by Cunningham's paper about "killer acquisitions", and the new guidelines on the application of Article 22 reflect the willingness to catch these deals, in particular in the digital and pharma sectors, where innovation, IPR, and data are valuable assets that may have not yet been exploited by the acquired companies[115].
Therefore, "the Commission considers that a reappraisal of the application of Art 22 of the Merger Regulation can contribute to addressing this issue, [… and] intends to encourage and accept referrals in cases where the referring Member State does not have initial jurisdiction over the case"[116].
Basically, the Commission's reasoning is that, if the EU turnover-based thresholds and the national merger control rules combined with the referral mechanism provide an effective regime, then

[110] EUROPEAN COMMISSION, *Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control*, SWD (2021) 66 final, Brussels, 26/3/2021, (2021).
[111] EUROPEAN COMMISSION, *Commission Staff Working Document*, paragraph (150).
[112] EUROPEAN COMMISSION, *Commission Staff Working Document*, paragraph (267) and (268).
[113] EUROPEAN COMMISSION, *Commission Staff Working Document*, paragraph (105).
[114] EUROPEAN COMMISSION, *Commission Staff Working Document*, paragraph (107).
[115] EUROPEAN COMMISSION, *Commission Guidance*, paragraphs (9) and (10).
[116] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (11).

encouraging and, hopefully, increasing the number of referrals will also improve the overall effectiveness of the system.

4.2.1. Substantive aspects

As we have already discussed in Chapter 1[117], Article 22 requires that the transaction must (1) affect trade between Member States; and (2) threaten to significantly affect competition within the territory of the Member State (or States) making the request[118].

The previous approach was based on the reasonable assumption that transactions that do not trigger jurisdiction in a Member State are unlikely to fulfill the above-mentioned requirements.

While for the first criterion there are no notable changes[119], for the second one, the New Guidance, in its attempt to catch otherwise non-reportable transactions, especially in the pharma and digital sector, states that "relevant considerations for deciding whether the transaction threatens to significantly affect competition may include […] the elimination of an important competitive force, including the elimination of a recent or future entrant"[120].

In order to increase legal certainty and predictability[121], the Commission specifies that "the categories of cases that will normally be appropriate for a referral under Article 22, where the merger is not notifiable in the referring Member State consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential"[122], including, among others, cases in which the undertaking: is a start-up or recent entrant with significant competitive potential, that has yet to implement a business model generating significant revenues; is an important innovator or is conducting important research; is an actual or potential important competitive force; has access to valuable assets, including IPR and data[123]. It is made clear that the Commission may also take into account the ratio between the value of the transaction and the turnover of the target[124]. These provisions address both the issue noted in the periodic evaluation, concerning transactions' values being disproportionate compared to the turnover generated by the target firms, and the circumstance that potential competitors might be

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[117] See Chapter 1, 3.6.
[118] Art. 22, EUMR.
[119] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (14) recalling the "Commission Notice on Case referral in respect of concentrations" C 56/2, Official Journal of the European Union, 5/3/2005, paragraph (43).
[120] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (15).
[121] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (12).
[122] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (19).
[123] Id.
[124] Id.

shut down before they become an effective competitive threat, but also the growing attention posed by regulators on data and the possibility that the Big Tech firms acquire companies to integrate their data into their own business model, strengthening their position in the market.

4.2.2. Procedural aspects

As far as the procedural aspects of the new referral mechanisms are concerned, the Commission wants to establish a sound cooperation with the NCAs of the Member States, in order to "identify concentrations that may constitute potential candidates for a referral under Article 22 of the Merger Regulation but do not meet the jurisdictional criteria relevant under the respective national laws"[125]. This guideline goes along with the possibility for the Commission, when it becomes aware of a transaction that is considered to meet the relevant criteria for the referral[126], to inform the Member State, and, consequentially, to invite the State to make a referral request.

Now, it is clear the complementary role of the provision under Article 14 of the DMA: given that the designated gatekeepers will have to inform the Commission of any transaction intended, under the new approach to the application of Article 22, the Commission will exchange information with the NCAs concerned, making sure that no relevant transaction escapes the system.

This is also made sure by the provision in Article 14 (5), DMA, which allows the NCAs of the Member States to use the information received under paragraph (1) of the same Article to request the Commission to examine the concentration pursuant to Article 22, EUMR[127].

It is true that the Member States retain "a considerable margin of discretion"[128] in deciding about a referral request, but it is hard to imagine that a Member State, invited to make a referral request, will not accept such an invitation, and the reason why is easy to explain: the EU Commission Guidelines are so-called soft law instruments[129], and the legal community has already dealt with the controversial nature of these instruments, "*de jure* non-binding, but *de facto* they arguably often look and act like a quasi-binding act"[130]. And, despite the statement that this change in the

[125] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (23).
[126] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (26).
[127] Art. 14 (5), DMA.
[128] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (3).
[129] With the notion of soft law, we refer to EU instruments such as guidelines, recommendations, and opinions that "*shall have no binding force*" *ex* Art. 288 TFEU, as opposed to regulations, directives, and decisions that, each in their own way, are binding, i.e., have mandatory legal effects.
[130] ANDONE C., COMAND-KUND F., *Persuasive rather than binding EU soft law? An argumentative perspective on the European Commission's soft law instruments in time of crisis*, in Vol. 10, Issue 1, *The Theory and Practice of Legislation,* 22-47, (2022).

enforcement of Article 22 does not require an amendment of the Merger Regulation[131], has already been noted that "this is soft law that effectively amends the Regulation or at least the spirit of the Regulation"[132].

4.3. Concerns raised by the new approach

EUMR have conceived a legislation which appears to be lucid and effective, thanks to its core principles: revenue-based thresholds; EU nexus; a clear division of powers between EC and NCAs (i.e., one-stop-shop principle); and *ex-ante* review of reportable mergers[133].

Under this new approach, merger control rules will allow the EC to review not only the so-called killer acquisitions, but also transactions between companies that do not have a nexus with the EU and deals that have already been signed and closed[134]. Moreover, it will not be easy for companies to determine whether a referral will be made, how long will it take, and how consistent the evaluation made by the EC or the NCAs will be.

4.3.1. One-stop-shop

As we have discussed[135], the one-stop-shop principle is a cornerstone of the EU Merger Control system. Yet, it had already been noted[136] that when the referral mechanism ex Article 22 is triggered, the Commission is entitled with the jurisdiction to review transactions only on behalf and within the territory of the Member States that have requested the referral or joined it, and cannot examine the effects of the merger for the Entire EEA. This was (and still is) perceived as "suboptimal […] and may lead to parallel investigations"[137], which are inefficient, time-consuming, unpredictable, and contrary to any principle of procedural economy.

Per se, this would not be a huge issue, given that from the implementation of the first Merger Regulation in 1989 (entered into force in September 1990) up to September 2022, there have been

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[131] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (11).

[132] FRANCK J., MONTI G., DE STREEL A., *Legal Opinion concerning Article 114 TFEU as a Legal basis for strengthened control of acquisitions,* 27.

[133] LEVY N., RIMSA A. AND BUZATU B., *The European Commission's New Merger Referral Policy*, in Vol. 5, Issue 4, *European Competition and Regulatory Law Review*, 364-379, (2021).

[134] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (21).

[135] Chapter 1, 3.6.

[136] EUROPEAN COMMISSION, *Commission Staff Working Document Accompanying the White Paper Toward more effective merger control, SWD (2014) 221 final, Brussels 9/7/2014*, paragraph 145.

[137] Ibid., paragraph 146.

only 44 referral requests under Article 22[138], which shows how the mechanism is perceived as an "exceptional regime".

Under the new approach, though, it is likely that the number of requests will rise, as we have already started to see with the referral requests of the Meta/Kustomer[139] and Illumina/Grail[140] cases.

On top of that, some NCAs, led by the German *Bundeskartellamt*[141], may not follow the EC's new policy, assuming that they are not empowered to refer transactions that are not reportable under national merger rules[142].

Therefore, it is likely that not only there will be an increase in the number of referral requests, but also a divergent enforcement of the new Guidance, which in turn will determine a greater risk of referral only for the transactions that involve the Member States that will comply to the Guidance[143].

The Guidance also considers this potential issue and states that "a circumstance where the transaction has already been notified in one or several Member States that did not request a referral or join such a referral request may constitute a factor against accepting the referral"[144]. This wording, though, is not decisive, and the second part of the paragraph also clarifies that the Commission "will make its decision based on all relevant circumstances", such as "the potential harm and also the geographic scope" of the transaction[145].

Furthermore, this provision does not take into account the circumstance that emerged from the Meta/Kustomer case, which had already been referred from Austria to the EC and cleared by the Commission, when the *Bundeskartellamt* decided to review and approve the transaction, saving, at least under a substantive point of view, the credibility of the one-stop-shop principle.

4.3.2. Ex-post review

As said, the ex-ante review of reportable mergers is a cornerstone of the Merger Regulation, also supported by the standstill obligation, i.e., the provision set by Article 7, EUMR, that forbids the

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[138] EUROPEAN COMMISSION, Merger Cases Statistics, (2021).
[139] See Chapter 3, paragraph (1).
[140] See Chapter 3, paragraph (2-4).
[141] BUNDESKARTELLAMT, *Bundeskartellamt examines whether Meta/Kustomer merger is subject to notification*, Press release, 23/7/2021: "Germany did not join the [Austrian] application for referral to the EU Commission because in the Bundeskartellamt's general practice a referral requires a merger to be subject to notification based on national competition law, which still has to be clarified in the present case".
[142] LEVY N., RIMSA A. AND BUZATU B., *The European Commission's New Merger Referral Policy*.
[143] LEVY N., RIMSA A. AND BUZATU B., *The European Commission's New Merger Referral Policy*.
[144] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (22).
[145] Id.

implementation of the deal before the decision of the European Commission, and by the fines that may be imposed in case of "gun-jumping".

Now, the Guidance makes clear that "while the referral is subject to the deadlines set out in Article 22, the fact that a transaction has already been closed does not preclude a Member State from requesting a referral"[146].

This was not an issue under the previous approach, in which Member States were referring transactions that did meet their national jurisdictional criteria and hence had already been notified to their NCAs.

The new indications, on the contrary, are set out to catch not reportable transactions and hence may allow referral requests of already closed deals. However, the Commission is well aware of the legal and economic consequences of this provision, and states that "the Commission would generally not consider a referral appropriate where more than 6 months have passed after the implementation of the concentration. If the implementation of the concentration was not in the public domain, this period […] runs from the moment when material facts about the concentration have been made public in the EU"[147]. The issue that arises from this paragraph is that not only the wording "would generally not consider" allows the EC to also consider referral requests beyond the 6 months period[148], but also that "in exceptional situations, a later referral may also be appropriate, based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers"[149].

This means that the parties will need to assess whether they want to close the deal, knowing that a review by the EC is still possible, with inevitable implications on the structure of the deal (variations to the pricing structure, protection for the buyer) that would not be needed if signing and closing occurred at the same time[150].

A safety net against the possibility of an *ex-post* review is set by the following paragraph[151], which states that "where the transaction has already been notified in one or several Member States that did not request a referral or join […] may constitute a factor against accepting the referral". However, this is not a decisive argument, given that the Commission will still retain discretion

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[146] European Commission, *Commission Guidance*, paragraph (21).
[147] Id.
[148] Elkerbout R., *New guidance on Article 22 of the European Union's merger regulation: the end of legal certainty in merger control?*, (2021).
[149] European Commission, *Commission Guidance*, paragraph (21).
[150] Levy N., Dolmans M., Gonzàlez-Diaz F., Polley R., Bock. P, *European Commission Announces New policy to accept Member state referrals for Merger Review even if EC and National thresholds are not met*, Cleary Gottlieb, (2020).
[151] European Commission, *Commission Guidance*, paragraph (22).

considering and balancing all the relevant circumstances. Hence, clear and coherent enforcement of these provisions will be needed, so that the parties can evaluate their strategy, and whether they want to make public the information about the transaction.

It must be noted, though, that *ex-post* reviews are not new to EU Competition Law: both Article 101 and 102 TFEU require an evaluation of agreements between undertakings, decisions by associations of undertakings, and concerted practices, on one side, and abuses by one or more undertakings of a dominant position, on the other side, that can only have place once one of the infringements is discovered or reported. One may argue that disrupting a transaction may be inefficient, expensive, and even dangerous for the life of a firm, but EUMR already provides all the tools, from the structural ones to the behavioral ones, to tailor a solution case-by-case, and in the end, if the purpose of the regulation is to allow competition and protect consumers, then also an *ex-post* of mergers may be appropriate.

4.3.3. Timeframe for referrals: an incentive for voluntary referrals?

One more issue is raised by the provisions that frame the timeline for referrals: under Article 22 (1), the 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"[152]. As mentioned above, such provisions worked well under the previous approach, since it was much easier to determine whether an NCA had jurisdiction over a transaction. Now, the risk is that the notion of "made known", which according to the Guidance should be interpreted as "sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral"[153], might be too vague[154], leaving it to the discretion and different assessments of the NCAs, which might start asking for more detailed information until "sufficient information" is provided and, only then, request a referral.

Once the request has been made, the Commission will inform the NCAs and the undertakings without delay and Member States have 15 working days to join the referral[155].

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[152]Article 22 (1), EUMR.

[153] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (28).

[154] TURGOT C., *Killer Acquisitions in Digital Markets: evaluating the Effectiveness of the EU Merger Control Regime*, in Vol. 5, Issue 2, *European Competition and Regulatory Law Review,* 112-121, 119, (2021). The author claims that "the proposed new mechanism suffers from legal uncertainty."

[155] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (29).

At the latest 10 working days after the period to join, the Commission must decide whether it intends to examine the concentration[156], but the stand-still obligation (Article 7, EUMR) kicks in at the moment in which the undertakings get to know that a request has been made, unless the concentration has already been implemented[157].

As mentioned before, time and flexibility to exit are critical points for start-ups, innovating firms, and their investors: if the possibility of being acquired becomes less likely, more complex, and more time-consuming[158], investors will factor this in, and, if the reward is not appealing, look to invest elsewhere[159]. Under these provisions, 40 working days (i.e., two months) will be needed just to know whether the EC will review the transaction, always bearing in mind that some NCAs might not join the referral and retain their own jurisdiction in a parallel review.

One solution might be found in the possibility for merging parties to voluntary approach the Commission and disclose 'sufficient information' about an intended transaction, so that the Commission can give an 'early indication' that it does not consider the concentration suitable for a referral[160]; companies might decide to do the same with all the NCAs, to try to make the first 15 working days period expire[161].

While the latter would create an excessive burden on companies, with no guarantee that the same amount of information submitted to each NCA would be enough to make an assessment, the former solution seems to open to the possibility of a voluntary notification system, in line with other jurisdictions. It may also be a form of self-evaluation, since it is reasonable to assume that companies will look for an early indication only for those transactions that might fulfill the legal, substantial requirements set by Article 22. The problem is that, again, the Guidance is too generic, and open concepts such as 'sufficient information' and 'early indication' are likely to generate uncertainty, discourage acquisitions and hinder innovation[162].

As discussed, the new Guidance appears to be far from perfect, but it proves the sense of urgency that the European regulators feel when it comes to killer acquisitions, as it did not require to undergo the complex amendment process of a regulation.

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[156] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (30).
[157] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (31).
[158] "Time is another important factor in a field as dynamic as innovative start-ups", M. Kromayer, MP at MIG Capital AG, as reported by P. Lombardi in "*The unintended consequences of Vestager's tougher take on 'killer acquisitions'*", available at: https://www.politico.eu/article/margrethe-vestager-tougher-take-boost-small-companies/.
[159] FAYNE K., FOREMAN K., *To catch a killer: Could enhanced premerger screening for 'killer acquisitions' hurt competition?,* in Vol. 34, No. 2, *Antitrust Magazine*, (2020).
[160] EUROPEAN COMMISSION, *Commission Guidance*, paragraph (24).
[161] LEVY N., RIMSA A. AND BUZATU B., *The European Commission's New Merger Referral Policy,* 377.
[162] TURGOT C., *Killer Acquisitions in Digital Markets*, 120.

It leaves many questions unanswered and generates more pressure on transactions that do not reach the thresholds than on those that are subject *ex-ante* control[163].

The analysis of the Illumina/Grail case in the next Chapter will allow a better understanding of how the new Guidance can be effective in catching killer acquisitions, but also of how the theoretical issues arising from the new approach have turned into real, unexpected problems for the merging companies.

Then, alternative proposals and approaches to catch killer acquisitions will be discussed, trying to identify which, if any, can bring legal certainty and balance the interests of all stakeholders: policy makers, big companies, digital markets, start-ups, investors, and consumers.

[163] TURGOT C., *Killer Acquisitions in Digital Markets*, 120.

Chapter 3 – The Illumina/GRAIL case

As anticipated in Chapter 2, the first case that shows the new approach followed by the EC in the interpretation of Article 22 is the proposed acquisition of GRAIL by Illumina. The case is notably interesting because it entails a foreign-to-foreign acquisition, without any activities carried out in the EU, an acquired company not generating any turnover at the time of the proposal, and a timeline of events that exposes all the main issues raised above.

Before analyzing that case, though, it seems appropriate to shortly describe a similar case that shows the new approach followed by the European Commission, but without raising some of the issues that are feared by commentators and practitioners.

1. The Meta/Kustomer case: a hint to the new approach by the EU Commission?

The transaction consists of the acquisition of Kustomer, a US-headquartered company that offers a customer relationship management (CRM) software that helps businesses' customer service agents to manage communication with consumers, by Meta (formerly Facebook), which provides social networking and communications functionalities, including Facebook, Instagram, and Whatsapp[1].

The transaction did not meet the relevant turnover thresholds in the EEA, given that Kustomer has revenues of less than EUR 100 million in the EEA, meaning that the Commission did not have jurisdiction. The Austrian NCA received the notification under its own national competition policy on March 31st, 2021, and made the referral request under Article 22 on April 2nd, 2021[2].

Given that, in this case, a mandatory notification was required, no troubles arise concerning the notion of a transaction being "*made known*" to an NCA and the two 15 working days time periods set to, respectively, make the request and then for other NCAs to join the request (request to join that was issued by the French, Dutch, Bulgarian, Italian, Irish, Romanian, Belgian, Portuguese and Icelandic competition authorities); moreover, since the Austrian competition authority had jurisdiction to assess the merger, there was no question that the provision set out in Article 22 would have *transferred* the jurisdiction to the Commission, rather than *establishing* it.

[1] European Commission, *Commission Decision of 27.1.2022 declaring a concentration to be compatible with the internal market and the EEA agreement* – C (2022) 409 final – Case M. 10262 Meta (formerly Facebook)/Kustomer.

[2] European Commission, *Commission Decision of 27.1.2022*, paragraph (6).

The Commission then assessed whether the requirements of Article 22 were met, and considered that the transaction affected trade between Member States since many of the relevant markets implemented by the transaction are broader than national and the parties are active in several countries across the EEA, and threatened to significantly affect competition within the territory of the Member State making the request, since *prima facie*, as the Guidance requires, there was a risk that Meta might strengthen its position in the supply of online display advertising by using Kustomer's data[3].

The Commission also concluded that, despite referrals of concentrations already notified should be limited pursuant to the Referral Notice Guidance, a review of the transaction by the Commission was deemed to be more appropriate to ensure a consistent assessment, due to the expertise that the Commission has in the assessment of transactions in digital markets and also because the effects of the transaction would not be limited to Austria[4].

During its Phase II investigation, the Commission found that the transaction could have harmed competition in the market for the supply of CRM software and in the market for the supply of customer service and support CRM software, but nonetheless cleared the transaction subject to the commitments proposed by Meta.

This case shows that the new approach followed by the Commission is not intended to target specific acquisitions with the sole purpose of blocking them; rather, it is designed to get a better understanding of those transactions that may have anti-competitive effects and that used to escape antitrust scrutiny, and to allow a case-by-case analysis with the purpose to determine which ones may actually be killer acquisitions.

The only issue with the present case was the parallel review by the German Bundeskartellamt, which did not join the referral request but was also entitled to review the transaction; as explained in Chapter 2, though, the German Authority reached the same conclusion, clearing the transaction and preserving the one-stop-shop principle.

A much longer and bumpier road was in store for Illumina and GRAIL, the two companies that gave birth to what appears to be a landmark case in EU merger control and in the analysis and battle against killer acquisitions.

[3] European Commission, *Commission Decision of 12.5.2021 accepting the request for referral by the Competent Competition Authority of Austria to the Commission pursuant to Article 22* – Case M. 10262 Facebook/Kustomer – paragraphs (32) and (48).

[4] European Commission, Commission Decision of 12.5.2021 – Paragraphs (49) to (56).

2. Illumina/GRAIL: companies, products, and the structure of the transaction

Illumina is a US company, headquartered in San Diego, California; founded in 1998, currently has more than 9000 employees and in 2021 generated annual revenues of more than USD 4.5 billion. It is an applied genomics technology company, focused on the discovery, detection, and treatment of diseases and on innovating at the intersection of technology, biology, and health.
Its main products are "Next-generation sequencers" (NGS), tools that are designed to allow researchers and clinicians to progress in the field of science and medicine.

GRAIL is a US healthcare company, headquartered in Menlo Park, California, focused on the development of new technologies for early diseases detection, using NGS and data science; it was founded by Illumina itself in 2016, and was spun off to develop, among other things, "Galleri", a laboratory test for early cancer detection from blood, with the support of Illumina's NGS technology.

On September 21st, 2020, Illumina announced that the two companies had reached a definitive agreement for the acquisition of GRAIL, for a total consideration of USD 8 billion, of which 3.5 billion in cash and 4.5 billion in shares of Illumina common stock. GRAIL stockholders will also receive contingent value rights, i.e., future payments representing a pro-rata portion of certain GRAIL-related revenues, each year for a 12-year period.
The strategic benefits expected from the transaction included: 1) an increase in Illumina's Total Addressable Market, the addition to Illumina's portfolio of cancer screening, diagnosis and cancer monitoring; 2) a faster adoption of NGS-based Early Multi-Cancer Detection Test to reach more patients faster, thanks to Illumina's capabilities and economies to support GRAIL's commercialization plans; 3) enhance and strengthen Illumina's position in the clinical genomics market, as a leading sequencing innovator and test provider[5].
As one could expect, the closing of the transaction was subject to the applicable regulatory approvals, including the US antitrust scrutiny; much less foreseeable was the intervention of the European Commission, given that the transaction appeared to be not reportable at EU or at any of the Member State level.

3. Referral to the Commission under EUMR Article 22

Since the turnover of the two companies did not meet the relevant thresholds set in the Merger Regulation, the concentration did not have a European dimension and, therefore, was not

[5] ILLUMINA AND GRAIL, *Illumina to acquire Grail to launch new era of cancer detection*, *Joint press release of* September 21st, (2020).

notified to the Commission. In particular, GRAIL was not generating any revenues, neither in the EU nor elsewhere in the world.

On December 17th, 2020, the Commission had a meeting with a complainant concerned about the transaction; after that, the Commission had exchanges with the complainant and some NCAs, namely the German, Austrian, Slovenian, and Swedish ones, to clarify their potential competence to review the transaction.

3.1. Commission's invitation to refer

After these exchanges, the Commission reached the conclusion that the transaction could be appropriate for a referral under Article 22 of the Merger Regulation, under the circumstance that GRAIL's importance for the competition in the EEA was not reflected by its turnover, and on February 19th, 2021, the Commission officially informed the Member States of the transaction with an invitation letter. The letter contains preliminary remarks about the concentration, the reasons why the conditions of Article 22 are met, and the invitation to submit a referral request.

This was one month before the Commission's issuance of the new Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation.

On March 9th, 2021, the French Competition Authority (FCA) requested the referral to the Commission, which in turn informed on March 10th, 2021, the NCAs of the other Member States and, on March 11th, 2021, the undertakings concerned about the existence of the referral request. With this "information letter", the companies were also reminded that, pursuant to Article 22 (4), once the companies are informed about the referral request, the stand-still obligation set out in Article 7 of the Merger Regulation applies.

By the end of March, the Belgian, Greek, Icelandic, Dutch, and Norwegian competition authorities requested to join the referral request, and the legal battle between Illumina and GRAIL on one side and the EC and the NCAs on the other side was just starting[6].

3.2. Appeals to French and Dutch Courts

The first step taken by Illumina was to appeal the French and Dutch national competition authorities' decisions to request the referral and to join such a request before their national courts, despite the lack of competence to review the transaction accordingly to their national merger rules.

[6] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, Third Chamber, Extended Composition, Judgement of 13.7.2022, in case T-227/21.

In France, Illumina appealed the decision on the basis that: it was late, considering that the 15 days period set out in Article 22 had started to run on the day of the public announcement of the transaction, i.e., on September 21st, 2020; the FCA violated the law and disregarded the principle of legal certainty, by requesting the examination of an operation that did not reach the turnover thresholds on the sole ground that the operation could likely produce anti-competitive effects.

The Conseil d'État stated that the referral request from the FCA to the EC is inseparable from the procedure of reviewing the transaction, conducted by the Commission under the jurisdictional control of the EU Court of Justice. Therefore, the appeal was rejected because the French Court lacked the competence to judge[7].

Illumina and GRAIL also appealed to the Hague District Court in order to challenge the request to join France's referral issued by the Dutch Authority for Consumers and Markets, claiming that France was not allowed to make such a referral request under Article 22 EUMR, and the Netherlands cannot join it because they do not have jurisdiction to examine the transaction under their national merger control rules; the companies also alleged that the French request was made out of time; the ACM had established that it would generally be reluctant to make an Article 22 request; the concentration did not meet the requirements for joining the referral request, because it did not threaten to significantly affect competition in the Dutch territory.

The District Court reviewed the case on merit and concluded that Article 22 of the Merger Regulation does not limit referral and the possibility to join the referral request to nationally competent Member States, since such a requirement did not exist under the first Merger Regulation and there would have had to be a deliberate choice by the EU lawmakers to regulate that point differently. Moreover, the circumstance that a non-nationally competent authority refers to the non-competent European Commission, de facto *establishing* its jurisdiction, is also not incompatible with the subsidiarity principle, since the strict division of jurisdiction is preserved.

Regarding the date of referral, while the District Court is not competent since it is an issue for the French Conseil d'État, it still underlines that media reports do not have the effect to trigger the 15 working days period of Article 22, since they do not constitute "sufficient information".

Finally, the Court concludes that the question concerning the applicability of the new Guidance on Article 22 is an issue for the ECJ, which will have to assess whether the conduct previously followed

[7] CONSEIL D'ÉTAT, *Illumina-Grail v. Autoritè de la concurrence*, Order 450878 of April 1, 2021.

by the Commission means that the French referral request and the Dutch request to join should be rejected or not. Overall, all the claims made have been dismissed by the Court[8].

After the two unsuccessful appeals in front of the French and Dutch Courts, the European Commission accepted the referral request on April 19th, 2021, and the requests to join the procedure made by the Belgian, Greek, Icelandic, Dutch, and Norwegian authorities[9].

Illumina's first reaction, obviously supported by GRAIL, was to appeal these decisions in front of the General Court of the European Union Court of Justice, with an application under Article 263 TFEU[10] seeking the annulment of the decision to accept the referral request, the decisions to accepts the requests to join the procedure, and the information letter informing the companies of the pending referral request.

Before the judgment of the General Court, which was only issued in July 2022, though, the dispute between the two companies and the European Commission was enriched by other events, mainly regarding the violation of the stand-still obligation and the remedies proposed by Illumina to remove the anti-competitive issue noted by the Commission, which will be shortly detailed.

3.3. The investigation and Illumina's proposed remedies

After accepting the referral request and thus establishing the competence of the Commission to review the deal, the proposed transaction was notified by the merging companies to the EC on June 16th, 2021. After a preliminary (Phase I) scrutiny, the Commission found that the transaction could pose competitive threats in the market for the development and supply of NGS-based cancer detection tests. In particular, the Commission's worries concern a possible strategy of vertical inputs foreclosure, given its leading position in NGS systems, which could have anti-competitive effects on GRAIL's rivals and hurt European patients, reducing competition, innovation, quality, and quantity of products available to patients and health systems.

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[8] DISTRICT COURT THE HAGUE, *Illumina/Grail v. State of Netherlands*, Judgement of 31.3.2021 on Case number C/09/609526/KG ZA 21-284.

[9] EUROPEAN COMMISSION, *Commission to assess proposed acquisition of GRAIL by Illumina*, Press Release of 20.4.2021, (2021).

[10] Art. 263 (1) TFEU: "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties."

These concerns led the Commission to open an in-depth (Phase II) investigation[11] on July 22nd, 2021, to determine whether the result of the transaction was compatible with the internal market, which at the time was supposed to end by November 29th, 2021. The deadline was suspended after the companies' lack of collaboration in providing information for the evaluation.

With the deadline suspended, and with the Commission's review still pending, on August 18th, 2021, Illumina and GRAIL announced that the transaction was completed[12].

This was due to the circumstance that, had Illumina failed to close the transaction before December 22nd, 2021, it would have had to pay a USD 300 million termination fee and made a USD 300 million investment in GRAIL. Illumina had to choose between paying a USD 600 million fee to GRAIL or facing a parallel investigation by the European Commission for the violation of the stand-still obligation, which could result in a fine of up to the 10% of its annual turnover; a risk that Illumina's CEO Francis deSouza appeared willing to take, in an effort to accelerate the commercialization of the Galleri test and save lives[13].

Despite good intentions, the European Commission could not back off from opening an investigation to assess whether Illumina's decision to complete the deal was a violation of the stand-still obligation under Article 7 of the merger regulation, and on August 20th, 2021, announced the opening of this parallel case. Executive Vice-President Vestager stressed once again that the stand-still obligation is a cornerstone of the EU merger control system, and companies must wait for approval before closing the transaction[14]; moreover, this was the first time that companies openly implement the deal during an in-depth investigation.

On September 20th, 2021, the Commission adopted a Statement of Objections, in which it took the preliminary assessment that there was indeed a violation of the stand-still obligation, and that it intended to impose interim measures to make sure that effective competition is preserved, preventing the irreparable effects that might derive from the integration of the companies[15].

The interim measures were adopted on October 29th, 2021, by the Commission under Article 8, EUMR, and are tailored to ensure that: GRAIL is kept separate from Illumina and run by independent

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[11] EUROPEAN COMMISSION, Press Release of 22.7.2021, *Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*, (2021).

[12] ILLUMINA, *Press Release of 18.8.2021, Illumina acquires GRAIL to accelerate patient access to life-saving multi cancer early-detection test,* (2021).

[13] TAYLOR N.P., *EU launches probe of Illumina decision to close GRAIL deal despite ongoing investigation*, (2021).

[14] EUROPEAN COMMISSION, *Press Release of 20.8.2021*, *Commission starts investigation for possible breach of the standstill obligation in Illumina/GRAIL transaction*, (2021).

[15] EUROPEAN COMMISSION, *Press Release of 20.9.2021*, *The Commission adopts a Statement of Objections in view of adopting interim measures following Illumina's early acquisition of GRAIL,* (2021).

Hold Separate Managers, exclusively in the interest of GRAIL; Illumina and Grail are prohibited from sharing confidential business information, except where the disclosure is required to comply with the law or in line with the ordinary course of their supplier-customer relationship; Illumina has the obligation to finance additional funds necessary for the operation and development of GRAIL; the business interactions between the parties shall be undertaken at arm's length, in line with industry practice, without unduly favoring GRAIL to the detriment of its competitors; GRAIL shall actively work on alternative options to the transaction to prepare for the possible scenario in which the deal would have to be undone in case the Commission were to declare the transaction incompatible with the internal market.

These measures are legally binding, and their enforcement is ensured by an independent Monitoring Trustee chosen by the Commission[16].

While a second Statement of Objections has been sent by the Commission to the parties on July 19th, 2022, this time assuming the view that the companies indeed breached the stand-still obligation and anticipating hefty fines, a final decision has not been taken at the present date.

Yet, during the second quarter of 2022, Illumina reportedly set aside an accrual of USD 453 million, exactly 10% of its annual turnover, for the potential fine that the European Commission may impose[17].

Meanwhile, the legal battle was also being fought in front of the ECJ, where the General Court had to rule on the validity of the renewed interpretation of the referral mechanism set out in Article 22.

3.4. EU General Court ruling on the Commission's jurisdiction

As anticipated, on April 19th, 2021, the Commission accepted the referral request to assess the Illumina/GRAIL transaction, as well as the requests to join this procedure issued by the Belgian, Greek, Icelandic, Dutch, and Norwegian competition authorities.

With an action brought to the General Court of the EU on April 28th, 2021, Illumina challenged both the validity of the above-mentioned decision and that of the information letter. In doing so, Illumina put forward three pleas in law: the first plea challenges the alleged competence of the Commission to review, under Article 22 EUMR, a transaction which is referred to the Commission by a National Authority that lacks the competence to review the transaction under its own national merger

[16] EUROPEAN COMMISSION, *Press Release of 29.10.2021, Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL*, (2021).

[17] ILLUMINA, *Reports of Financial Results for Second Quarter of Fiscal Year 2022*.

control rules; the second plea concerns the timing of the referral request and the Commission's delay in sending the invitation letter, which would undermine the principles of legal certainty and good administration; the third plea claims that the Commission infringed the principles of legal certainty and legitimate expectations by changing the policy related to the application of the Article 22.

On the other side, the Commission, supported by the Hellenic Republic, the French Republic, and the Kingdom of the Netherlands, asked to dismiss the action as inadmissible or, in the alternative, to dismiss the action as partly inadmissible and partly unfounded.

Therefore, the first point addressed by the General Court concerns the admissibility of the action, followed by the analysis of the pleas in law[18].

3.4.1. Admissibility

The Commission challenged the admissibility of the action on the basis that: the referral request is not an act of the Commission; that the contested decisions are preparatory acts whose validity could be challenged only in an action against the final decision of the proceeding; and that the information letter was replaced by the (contested) decision to review the merger.

The first claim was dismissed by the Court since the referral request was not the subject of the action. The second claim was dismissed, thus granting admissibility to Illumina's action in so far as it was directed against the contested decisions, the Court recalls that "according to the settled case-law of the Court of Justice, any measure adopted by the institutions of the European Union, whatever their form, which are intended to have binding legal effects are challengeable acts for the purposes of Article 263 TFUE"[19].

The binding legal effects must be capable of affecting the interest of the applicant by bringing a distinct change in its legal position.

The Court stated that the contested decisions not only established the position of the Commission on the referral request, closing that sub-procedure, but also produced binding legal effects as described above because, without them, the concentration would not have been reviewed by the Commission, and the provisions of the regulation (fines, penalties, stand-still obligation) would not have applied to the companies.

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[18] General Court of the European Court of Justice, *Judgement of 13.7.2022*, *in case T-227/21*.

[19] General Court of the European Court of Justice, *Judgement of 13.7.2022, in case T-227/21*, paragraph (63). Case-law refers to judgements of 11.11.1981 *IBM v. Commission* C60/81, paragraph 9; more recently, judgement of 25.10.2017 *Romania v Commission*, C-599/15 P paragraph 47.

Therefore, the contested decisions were deemed to be challengeable acts, and the action was declared admissible.

On the contrary, the information letter was considered to be an intermediate step toward the final decisions, not producing independent legal effects; consequently, the action directed to contest the validity of the information letter was declared inadmissible[20].

3.4.2. First plea: lack of competence

The first plea submitted by Illumina is the pivotal point of the whole discussion: the Court is asked to rule whether the Commission is allowed to review a transaction that is not of European dimension, but is referred by a Member State that, despite having its own national merger rules, lacks the competence to review the transaction.

The Court rejected this plea, thus confirming the competence of the Commission, after carrying out a literal, contextual, teleological, and historical interpretation.

First, the Court notes that Article 22 sets out four conditions for a referral request: 1) the request by a Member State; 2) the concentration meets the requirement of Article 3; 3) the concentration affects trade between Member States; and 4) threatens to significantly affect competition within the territory of the Member State making the request. Therefore, there is not a fifth requirement that requires the Member State to be competent under its own merger rules[21].

Moreover, Article 22 concerns "any concentration" that fulfills the requirements, and does not mention national merger control rules; as a matter of fact, Article 22 was introduced to allow Member States without a merger control system to refer transactions, so that concentrations which could have had effects on competition were reviewed[22]. It would be inconsistent and illogic to allow the referral to those States that lack a merger control system (even if, since the introduction of Article 22, all Member States have adopted such a system, except for Luxembourg), and not to those who have a system but lack the power to review a specific transaction.

Furthermore, the Court finds that the Commission's competence to examine concentrations depends primarily on the thresholds, but Article 22 contributes to the attribution of competence to the Commission, allowing the review of transactions that do not have European dimension.

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[20] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (82).
[21] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (90).
[22] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraphs (91)-(94).

Therefore, Article 22 acts as a corrective mechanism that allows a review at EU level of transactions that do not meet the thresholds but are still capable of affecting competition in the internal market, and that would otherwise escape scrutiny from both the EU and the Member States[23].

Finally, the Court notes that Article 4 (5) mentions "Any Member State competent to examine the concentration under its national competition law"; therefore, it was a choice of the European legislator to adopt a different approach in Article 22.

For all the reasons above, the General Court concludes that the interpretation of Article 22 pursued by the Commission, which led to declaring its competence, was correct, and did not require an amendment to the merger regulation to be implemented[24].

3.4.3. Second plea: the timing of the referral request

The second plea concerned the timeline of the events, with Illumina alleging that the referral request was made out of time and, alternatively, that the principles of legal certainty and good administration were violated.

Illumina claims that the press release issued on September 21st, 2020, in which the merger was announced was sufficient to inform the Member States about the transaction and to allow a preliminary analysis of the concentration.

The Commission's defense relies on the notion of "made known" pursuant to Article 22, which in its interpretation would not imply a piece of generic information sent to the Member State, but rather a "set" of information sufficient to carry out a preliminary assessment about the requirements contained in Article 22; therefore, that generic press release could not trigger the 15 days time limit.

The Court notes that Article 22 lists as alternatives, for the trigger event, the notification to the Member State and the notion of "made known"; this would suggest that the content of the two sets of information should be comparable. The information, continues the Court, should come to the Commission from an active transmission of information, and must contain enough elements to allow the Member State concerned to carry out a preliminary evaluation on the presence of the requirements set out in Article 22[25]; otherwise, Member States would have to request a referral within the 15 days time limit just to comply with it, without assessing the conditions.

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[23] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraphs (142)-(144).
[24] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraphs (183)-(185).
[25] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (204).

Moreover, the Court states that also the request to join a referral procedure already in place issued by the other Member States requires a 15 working days time limit, starting from the day in which the Commission informs the other member States of the initial request; thus, also in this case the trigger event is an active act of transmission of information which allows the evaluation of the appropriateness of joining the procedure.
The notion of active transmission of sufficient information, contrarily to what is claimed by Illumina, reinforces the principle of legal certainty, because it "prevents the starting point of the time limit from being dependent on unforeseeable and uncertain circumstances, such as the extent of media coverage or the level of detail in press releases"[26].
For these reasons, the Court rejected the first part of the second plea.
As far as the second part of the second plea is concerned, Illumina claims that the Commission took an excessive amount of time before sending the invitation letter to the French Authority, breaching the principles of legal certainty and good administration and preventing the companies from knowing in due time the competent authority.
The Court rules that the Commission indeed waited too long, and the time period of 47 working days between the first complaint on December 7th, 2020, and the invitation letter sent on February 19th, 2021, was not justified[27]; in merger control, all the procedures must be rapid and effective (as shown by the 25 working days period that closes Phase I), and the competent authority must be identified at the earliest possible moment[28].
However, since this circumstance did not damage the ability of the undertakings to defend themselves effectively, the annulment of the decisions could not be granted[29].
Therefore, also the second part of the plea was rejected, and with it the plea in its entirety.

3.4.4. Third plea: breach of principles of legal certainty and protection of legitimate expectations

With its last plea, Illumina claims that the Commission's policy at the time of the transaction was to not accept referral requests by Member States of the transactions that they lacked the competence to review, and that the change brought by the new Guidance was introduced after the

[26] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (207).
[27] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (233).
[28] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (226).
[29] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (240).

invitation letter, thus violating the principles of legal certainty and protection of legitimate expectations.

The Court finds, in the first place, that the alleged breach of the principle of legal certainty is not sufficiently substantiated, and rejects the plea for that part. Then, the Court rules on the alleged violation of the principle of protection of legitimate expectations and recalls that, according to settled case law, this principle is established when "precise, unconditional and consistent assurances originating from authorized, reliable sources have been given to the person concerned by the competent authorities of the European Union"[30].

The Court notes that the 2005 Notice on Case Referral already stated, in paragraph 7, that "the Commission and the Member States retain a considerable margin of discretion in deciding whether to refer cases falling within their original jurisdiction, or whether to accept to deal with cases not falling within their original jurisdiction". Moreover, the fact that Commission's practice to discourage referral requests from Member States without national jurisdiction was never intended to prevent the Commission from reviewing cases that could affect competition in the EEA[31]; noticeably, one can only discourage something that is allowed.

Therefore, the Court held that Illumina failed to provide evidence of precise, unconditional, and consistent assurances, and rejected the plea as unfounded.

Since the three pleas in law introduced by Illumina were rejected, the Court declared the action dismissed in its entirety, thus establishing the competence of the Commission to review mergers that do not have European dimension nor fall within the scope of the national merger rules of the Member State that requests a referral under Article 22, EUMR.

4. The Commission's Decision

With the favorable ruling of the General Court on its side, the European Commission finally had all the grounds to conclude the evaluation of the proposed, and by then concluded, acquisition of GRAIL by Illumina.

During the Phase II investigation[32], the Commission exchanged opinions and received feedback by customers, competitors, and experts in the field of NGS-based cancer detection tests, from which emerged that, as a result of the transaction, Illumina could cut access to its NGS technology to

[30] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraph (254).
[31] GENERAL COURT OF THE EUROPEAN COURT OF JUSTICE, *Judgement of 13.7.2022*, paragraphs (258) and (261).
[32] EUROPEAN COMMISSION, *Press Release of 6.9.2022*, *Commission prohibits acquisition of GRAIL by Illumina*, (2022).

GRAIL's competitors, to acquire a leading position in the promising early cancer-detection testing market. In fact, all of GRAIL's rivals are dependent on Illumina's technology, which is an essential input in their R&D projects, in an innovation race to develop and market early cancer detection tests. The Commission finds that Illumina would have not only the ability to foreclose GRAIL's competitors, but also clear incentives from such a strategy (or strategies: Illumina may refuse to supply its NGS systems, increase the prices, lower quality standards or post-sale support).

To avoid such a conclusion, Illumina had proposed some remedies, including: a license open to NGS suppliers to some of Illumina's NGS patents; a commitment to stop patent lawsuits in the US and Europe against the NGS supplier BGI Genomics for three years, aimed at reducing IP barriers to entry and thereby making it easier for NGS suppliers to bring their products to the market; a commitment to conclude agreements with GRAIL's rivals under the conditions set out in a standard contract, applicable until 2023, aimed at ensuring that GRAIL's rivals enjoy continued access to Illumina's NGS systems. The Commission examined the proposed remedies, but concluded that they were insufficient to address all the anti-competitive effects, among which a harm to innovation in the area of NGS-based cancer detection tests and a lower competition in blood-based early cancer detection tests. In particular, the commitments were deemed to be not sufficient to ensure the emergence of a credible alternative, given the high switching costs, the difficulty in monitoring their implementation due to their complexity and the circumstance that they could not and did not address all the potential foreclosure strategies that Illumina could implement.

Furthermore, the Commission's economic analysis finds that the market for NGS-based early cancer detection testing is expected to become highly remunerative, up to EUR 40 billion per year by 2035, a figure that supports the idea that Illumina could engage today in foreclosure strategies with the purpose to exploit its market position in the next decade.

For all the reasons above, the decision was to prohibit the already implemented acquisition. A decision concerning the infringement of the stand-still obligation is still to be issued, and it is likely that the Commission will also consider whether a demerger is appropriate.

In her remarks[33] on the Commission's decision to block the deal, Vice-President Vestager concluded that "the innovation race between developers of NGS-based cancer detection tests will continue. In the future, Europeans will be able to access this promising technology at competitive prices and have a choice of suppliers". Innovation, competitive prices, choice of suppliers: the objectives of

[33] EUROPEAN COMMISSION, *Speech of 6.9.2022*, *Remarks by Executive Vice-President Vestager on the Commission decision to prohibit the acquisition of GRAIL by Illumina*, (2022).

every competition law system seem to be reached, even if the price to be paid is a delay in the commercialization and availability of potentially life-saving products.
When asked about the general, beyond-the-case, picture related to killer acquisitions, VP Vestager confirmed the importance of the General Court ruling on the Commission's power to review cases thanks to the referral mechanism set out in Article 22, and its relevance when it is combined with the DMA's new obligation for gatekeepers to inform the Commission of all the transactions they engage in.

5. FTC's Decision

Adding complexity to the case, on March 2021 the US Federal Trade Commission contested the legitimacy of the transaction, claiming that the proposed acquisition would have diminished innovation in the US market for multi-cancer early detection tests (MCED), violating Section 7 of the Clayton Act. Like the EC, the FTC also recognizes that Illumina's NGS platforms are an essential input for the development and commercialization of these tests, and that GRAIL's rivals have no substitutes for Illumina's NGS platform and the data that they produce, and cannot use any other product to develop a test capable of competing with Galleri[34]. Therefore, it is feared that Illumina might raise the prices for NGS products or reduce the levels of its technical assistance, since the incentive to foreclose firms that pose a significant competitive threat to GRAIL is obtaining a leading position in a projected market with estimated sales of tens of billions of dollars by 2035.
The solution to the case was announced on September 1st, 2022, by Chief Administrative Law Judge D.M. Chappell, who dismissed the action since the FTC "has failed to prove its asserted *prima facie* case that Illumina's post-acquisition ability and incentive to foreclose or disadvantage GRAIL's alleged rivals is likely to result in a substantial lessening of competition in the relevant market for the research, development, and commercialization of MCED tests"[35].
Other relevant findings include that the evidence proves that whatever ability Illumina has to harm GRAIL's rivals existed prior to the acquisition and is not a result of it, and fails to demonstrate that the acquisition gives Illumina a strong incentive to harm GRAIL's alleged rivals post-acquisition, due to a lack of proof of interchangeability between Galleri and other MCED tests under development.

[34] FEDERAL TRADE COMMISSION, *Complaint of 30.3.2021*, paragraph (6).
[35] UNITED STATES OF AMERICA, FEDERAL TRADE COMMISSION, *Office of Administrative Law Judges, Initial decision by Chief Administrative Law Judge D.M. Chappell of 9.9.2022, Docket no. 9401.*

The fact that two proceedings end up in opposite ways, albeit rare, should not be a surprise, since every authority or judge follows its own rules, case law, guidelines, and theories, as shown by the merger between GE and Honeywell in 2001[36]. In this case, though, this situation risks to generate further uncertainty, since the two companies breached the EU's stand-still obligation and might be required to unwind the transaction, with all the costs associated to this kind of event, not only the monetary ones but also those connected to a delayed and likely less effective development and commercialization of GRAIL's test without Illumina's support, not to mention that biotech, pharma, and tech companies might start to refrain from concluding some transactions in order to avoid to find themselves in this scenario.

Therefore, the policy changes that are being implemented across the world to deal with killer acquisitions might be the right moment to implement and reinforce the long-awaited convergence[37] between the US and EU merger control system.

In a recent paper[38], Halperin & Ahuja argue that the "challenges brought by big-tech's growing market power create a unique opportunity to converge competition policy in Europe and the US", since they can affect privacy, freedom of speech, consumer protection, and so forth. In their view, convergence will lead to better solutions, allow authorities to make the best use of their limited resources, and, as anticipated, lead to a business scenario in which companies can rely on standard rules and on a uniform approach that generates legal certainty.

Despite the differences between the two systems, among which the authors include a more active role of the courts in the US, a different approach to regulation and commercial freedom, and a different industrial structure, with big-tech (but also big-pharma and biotech) companies being American "champions", they claim that there are tools that would give better and more effective solutions to this up-coming issue.

The authors suggest working together and piggybacking, sharing evidence and information, regular staff secondment programs, and the implementation of best practices and templates for legislation and regulation, but for what is relevant in the present research, they suggest that the introduction of joint policies and principles of analysis in mergers should be the starting point to grasp this opportunity and achieve convergence.

[36] GRANT J., NEVEN D.J., *The Attempted merger between General Electric and Honeywell. A case study of transatlantic conflict*, in Vol. 1, Issue 3, *Journal of Competition Law & Economics*, 595-633, 596 (2005).

[37] LEVY N., *Mario Monti's Legacy in EC Merger Control*, in Vol.1, No. 1, *Competition Policy International*, 99-132, 127 (2005).

[38] HALPERIN M., AHUJA K., *The case for convergence between American and European Regulation of Big-Tech*, (2022).

They also reckon that there is growing attention toward killer acquisitions (they even mention the Illumina/GRAIL acquisition as a tech deal) and the use of acquisitions as a tool to achieve a leading market position or strengthen their position in markets adjacent to their ecosystems[39], but agencies do not have sufficient tools to face this fast-changing scenario.
Therefore, they conclude that it is time to create joint principles of analysis for mergers in tech markets, which would be easier to achieve than joint merger guidelines, but would still allow a better and more certain enforcement of merger rules across the EU and the US.

6. Proposed tools

We have discussed the evolution of competition law in some countries in Chapter 2, and the solutions that are being implemented to address the killer acquisitions phenomenon.
It seems appropriate, to conclude the present research, to sum them up, and discuss how killer acquisitions can be put under scrutiny and how, once their analysis is in place, such review should be conducted so that all the effects that the transaction produces are balanced before deciding whether it needs to be blocked or not.
Therefore, some of these proposals would require an amendment to the European legislation, while others may require an easier and faster change to the merger guidelines.

6.1. Transaction value thresholds

It should be clear by now that a merger control system that relies only on turnover thresholds has the drawback that it does not catch the transactions in which one of the companies, namely the target, has little or no turnover but a highly competitive potential which is not yet reflected into its turnover.
One of the solutions that have been discussed the most is the introduction of a transaction value threshold, possibly as a complementary or additional threshold and not as a substitute for the turnover thresholds. The adoption of this threshold relies on the assumption that the turnover reflects the current competition strength of the companies, and it is an appropriate metric in developed, stable markets, while the transaction value would represent the potential competitive

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[39] HALPERIN M, AHUJA K., *The case for convergence*, 13.

force[40] and is more appropriate for those industries in which a new company may disrupt the competitive dynamics.

As discussed in Chapter 2[41], this solution has been implemented in Germany and Austria in 2017, but it has not resulted in a significant increase in the number of transactions notified, with only 18 out of a grand total of 2868 transactions notified under the new provision in 2017 and 2018 combined[42]. This solution is not flawless and introduces issues that suggest caution and need to be discussed before implementing it.

The first issue is that, as noted by Commissioner Vestager, "it's not easy to set a threshold like that at the right level. If it is too high, it doesn't really help – you still end up missing a lot of the cases that matter. On the other hand, if you set it low enough to make sure that you see all those mergers, you risk making companies file a lot of cases that simply aren't relevant"[43].

Secondly, the evaluation of a company is far from being an easy task, especially when the company is a start-up or a young company with no turnover: whether the evaluation is carried out under the discounted cash flow method, which relies on the assumption that the present value of the company is made up by the present value of the cash flows that the company will generate over the following years, discounted at the weighted average cost of capital, or under a comparative method using multiples, a small change in the assumptions of the method can lead to big changes in the transaction value, which may or may not reflect the "killer" intention of the acquiring firm.

Another issue related to the value of the transaction concerns the possibility of changing the payment structure: the consideration paid might include not only upfront cash payments, but also all assets and benefits like voting rights, option-rights or other forms of consideration that are deferred or conditional upon the future profitability of the target[44]; even completing an acquisition by hiring the workforce of the target company, which in start-ups may be the same as the owners of the company, and reflecting in the salary part of the consideration for the acquisition of the company might be a solution to lower the total consideration and escape the value threshold.

Furthermore, one criticism focuses on the difficulty of determining the value of the transaction at the time of the filing[45], meaning that from the announcement of the transaction to the closing the

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[40] TURGOT C., *Killer Acquisitions in Digital Markets: evaluating the Effectiveness of the EU Merger Control Regime*, in Vol. 5, Issue 2, *European Competition and Regulatory Law Review,* 112-121, 118, (2021).
[41] See Chapter 2, 3.6.
[42] OECD, *Start-ups, Killer Acquisitions and Merger Control*, 44.
[43] VESTAGER M., *The Future of EU Merger Control*, Speech at the International Bar Association 24th Annual Competition Conference, 11/9/2020,
[44] ZHOU S., *Merger control in Digital Era*, at *International Federation of European Law Congress*, 8, (2021).
[45] OECD, 43.

consideration price might fluctuate due to changes in share prices or exchange rates, which would require the setting of a relevant date for the valuation, so that volatility is taken into account.

A different drawback concerns the criterion of the local connection between the companies, and their activity, and the authority that has the power to review the transaction: while turnover can easily be linked and connected to a local market, the value of the transaction alone would not give an indication of which authority is in charge of controlling the transaction or, worse, would lead to multiple reviews by authorities that regulate a market in which the companies do not operate[46]. Without a local nexus, companies from anywhere would need to notify the Commission of any transaction that triggers the transaction value threshold, generating an unbearable administrative burden on both the companies and the Commission.

The issue is that, especially in digital markets, the geographical allocation of the transaction value is complicated, and this means that the local nexus would be ensured by applying, again, turnover thresholds or, as in the case of Germany, requiring that the target conducts "substantial operations" in the domestic market; while such a provision excludes companies with no local nexus, it is too generic and, ultimately, only generates legal uncertainty.

Lastly, if the purpose of any amendment is to catch killer acquisitions, and these usually take place in the tech, digital, or pharma industries, then a transaction value threshold without additional criteria may also capture transactions in traditional industries, thus increasing the administrative burden of the competition authorities[47].

The first results from the German and Austrian experiences show that, although a small number of cases have been notified under the new transaction value thresholds provision, and a large part of these happened in the pharma or IT industries, they have all been withdrawn or cleared[48]. This could mean that the thresholds were useful in catching transactions that otherwise would not have been reviewed, but ultimately did not threaten effective competition in those markets; or it could mean that this solution needs to be fine-tuned and improved to capture those transactions that are actually anti-competitive, without placing an additional administrative burden on the authorities in the process.

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[46] OECD, 44.

[47] ZHOU S., *Merger control in Digital Era*, 8.

[48] ZHOU S., *Merger control in Digital Era*, 9.

6.2. Ex-post review

A different solution that has been discussed concerns the introduction in the European merger control system of an ex-post review of the transactions. The current system is based on a prospective, ex-ante analysis of those mergers that trigger the turnover thresholds. With the introduction of an ex-post control, the European Commission would be allowed to pick the transactions that show potential anti-competitive effects after the closing, including among these the shutdown of the target company or the stop to the development of its products, and then carry out the assessment.

The pros of this system are that the Commission would have the possibility to "wait and see"[49], and that implies that it would be able to see how the companies integrate and only then assess the real competitive effects of the acquisition, a task that seems much easier than a prospective analysis.

This solution is intriguing, given that ex-post controls are already in place in numerous, and relevant, jurisdictions, such as the US, the UK, but also Ireland, Sweden, and Japan, which would suggest that big companies are already prepared to deal with this kind of provision.

However, this does not change the fact that an ex-post control presents several issues: first, one question is whether to apply it as a safety net, i.e., only to cases where an ex-ante control has not been carried out at all due to non-exceeding the turnover thresholds[50] or there is a discrepancy between the high value of the transaction and the low turnover of the target company. Secondly, while when a start-up is acquired its assets are few and can be easily separated from the merged entity if the authority decides to unwind the transaction, there are still many cases in which imposing a demerge may generate high costs or would not be feasible, such as when the companies are fully integrated or in know-how or data-based acquisitions[51].

Lastly, it is worth recalling that where this system is in place, there is a time limit in which the review mechanism can be triggered, except in the US. The time limit usually ranges between 4 months, as in the UK, and 12 months, as in Canada (despite the proposed extension of the period up to 36 months[52]).

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[49] COSNITA-LANGLAIS A., *Enforcement of Merger Control: Theoretical Insights for its Procedural Design*, in Vol. 67, *Revue Économique,* 39-51, 45, (2016).

[50] ŠMEJKAL V., *Concentrations in Digital Sector – A New EU Antitrust Standard for Killer Acquisitions needed?,* in Vol. VII, No. 2, *Journal for the international and European Law, Economics and Market Integrations,* 1-16, 8, (2020).

[51] PÉREZ DE LAMO D., *Killer Acquisitions in the Digital Sector: A Framework to Preserve Innovation Competition*, at *International Federation of European Law Congress,* 15, (2021).

[52] CHAPTER 2, 3.3.

In the new Guidance on the application of the referral mechanism in Article 22 of the merger regulation, the Commission introduced the possibility of an ex-post analysis of transactions referred within 6 months from the implementation of the concentration (and without ruling out a review beyond this time limit), which may be a hint on the introduction of an ad-hoc provision. Still, the same issues arise, and an ex-post control mechanism, even with a time limit provision, would need to be well calibrated, in order to not generate legal uncertainty for companies and not discourage and cool down the market for corporate control.

6.3. Special Responsibility of strategic companies

As of today, the solution that seems to be the most appreciated relies on a targeted approach, with the introduction of a regime of special responsibility for specific undertakings.

As anticipated in Chapter 2, this solution has been proposed, or implemented, in several jurisdictions.

In the EU, the Digital Markets Act introduces an obligation for gatekeepers to inform the Commission of any intended concentration, irrespective of whether they are notifiable to the Commission or to any competent National Competition Authority.

In the UK, the Furman report suggests the introduction of a mandatory notification system only for digital companies that hold a "Strategic Market Status" to allow the CMA to determine which cases require more detailed scrutiny.

In Australia, the ACCC Report calls for the introduction of a notification protocol under which large digital platforms would need to notify any intended acquisition with potential effects on competition in Australia.

In the US, the Stigler Report[53] recommends the creation of a "Digital Authority" which would have the power to review transactions without thresholds limitations and to require mandatory filings of transactions from firms that are deemed to have a "bottleneck power"; the report notes that it would not be appropriate to overturn the whole merger control system to deal with the specific needs of one sector, and that giving power to a sectorial authority would be an efficient solution to review even the smallest transactions involving digital businesses.

According to Pérez de Lamo, this solution should be implemented in a way that minimizes the administrative burden for both the companies and the authority, requiring not a traditional notification but rather a basic communication of information about their planned transactions, with

[53] STIGLER COMMITTEE ON DIGITAL PLATFORMS, *Final Report*, 105, (2019).

the elements that would be necessary to carry out a preliminary assessment, such as the key assets and capabilities of the target, the rationale of the acquisition and its pro-competitive effects[54].

This kind of targeted approach requires identifying a list of companies that would be subject to the special responsibility regime, and this list would need to be checked periodically, to ensure that once the status of a company changes, it can either enter or exit the list. Another question could be how the list is made, i.e., if it should be confined to defined sectors (pharma, digital, tech), excluding markets in which the phenomenon of killer acquisitions might arise in the future, or if it should be made on a case-by-case relying on some kind of thresholds to identify "large", "strategic" companies.

In the EU, this provision should not (and does not, given that has already been introduced for digital gatekeepers) generate legal embarrassment or be deemed to be disproportionate, since a special responsibility regime is already in place for those undertakings that hold a dominant position, with regard to the enforcement of Article 102 TFEU[55].

However, that special responsibility applies in case of alleged abusive conduct by a dominant undertaking in the relevant market, and it would be hard to use it as a ground to justify a different merger control regime without the companies challenging their status in every possible occasion, given that precedent EU case law upholds that no individual finding of dominance shall be binding for the future[56].

This solution seems to be the easiest to implement and the one with fewer drawbacks, and it is not by chance that has been proposed across different jurisdictions and has already been implemented in Europe. However, as will be discussed at the end of this section, the most efficient solution might be to update the traditional enforcement tools and combine them with (some of) the new proposals.

6.4. Reversing the burden of proof

Whatever method is chosen to get killer acquisitions under the scrutiny of antitrust authorities, once they are detected the question shifts to whether the substantive assessment that is currently carried out needs to be redefined to deal with the specificities of this phenomenon.

[54] PÉREZ DE LAMO D., *Killer Acquisitions in the Digital Sector*, 13.

[55] ECJ, C-322/81, *Michelin I*.

[56] ALEXIADIS P., BOBOWIEC Z., *EU Merger Review of "Killer Acquisitions" in digital markets – Threshold issues governing jurisdictional and substantive standards of review*, in Vol. 16, *The Indian journal of law and technology*, 64-102, (2020).

Currently, the standard of proof is the same for the European Commission when it comes to clearing or blocking a merger, and it is based on the most likely scenario: the Commission should authorize a merger when it is more probable that not that such concentration is pro-competitive, and prohibit it or impose remedies when it is more probable than not that the concentration is anti-competitive[57].

Due to the nature of killer acquisitions, this exercise can be very challenging, since it entails a prospective analysis in which the Commission suffers inevitably from an asymmetric information issue compared to the merging parties. Therefore, many authors have proposed the possibility of reversing the burden of proof by introducing a "rebuttable structural presumption", under which acquisitions of nascent competitors by "super-big in size, systemic importance or economic power" companies would be presumed to be anticompetitive, unless the merging parties prove that the merger will benefit consumers and it is the only way to attain those benefits[58].

Criticisms of this solution are based on the fact that in order to introduce a reverse of the burden of proof there would need to be evidence that acquisitions by large digital platforms are actually anti-competitive and are systematically being underenforced under the current legal approach, and there is no consensus on this yet[59].

However, rebuttable presumptions are not new to competition law, since in the US there is such a presumption in certain circumstances, such as when the merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market that is inherently likely to lessen competition substantially, that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects"[60]. The 2010 US Merger Guidelines raised the threshold for triggering the rebuttable presumption up to a post-merger HHI[61] level of 2500, and an increase in the index of 200, compared to the previous level of 2000[62], but this is meaningless to the present

[57] BOURREAU M, DE STREEL A., *Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control*, in CERRE, 19, (2020).

[58] VALLETTI T., *How to Tame the Tech Giants: Reverse the Burden of Proof in Merger Reviews*, in *ProMarket*, 3, (2021).

[59] YUN J.M.*, Potential Competition, Nascent Competition, and Killer Acquisitions,* in *Global Antitrust Institute Report on the Digital Economy 18*, 652-678, 671, (2020).

[60] HOVENKAMP H., SHAPIRO C., *Horizontal Mergers, Market Structure, and Burden of Proofs,* in Vol. 127. No. 7, 1996-2025, (2018), quoting *United States v. Philadelphia National Bank*.

[61] The HHI, or Herfindahl-Hirschman Index is an index of market concentration, measured by squaring the market share, expressed as an integer number, of each firm competing in a market and summing the results: it ranges from 0 to 10000, and a market with a level of 2500 or above is generally considered to be highly concentrated.

[62] OECD, 38.

research given that a presumption based on the HH index, and hence on market shares, would be of little, if any, application for killer acquisitions.

Therefore, rather than a structural presumption based on market share, reversing the burden of proof requires a careful analysis of how to implement this provision so that it is efficient in the enforcement of merger rules when it comes to killer acquisitions, and there are numerous ideas to achieve this goal.

Shapiro and Hovenkamp call for the introduction of a presumption that would require "clear and convincing evidence" to be rebutted, and the Australian ACCC Report suggests the same approach[63].

In the US, the Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on Judiciary suggested that Congress should consider shifting presumption for future acquisitions by dominant platforms, which would be presumed to be anticompetitive unless the parties show that the transactions are necessary to achieve benefits that would not be achieved through internal growth and expansion; the report suggests that this provision should be implemented outside the current HSR Act, so that dominant platforms would be required to report all transactions[64].

Valletti[65] suggests starting with a list of firms to which the reversing of the burden of proof would apply, and revise the list every five years.

Parker and *al.*[66] suggest that reversing the burden of proof should be an option only for horizontal or conglomerate mergers, in particular in those cases in which the merged entity has a significant turnover or user base, so that the parties would be required to show that the efficiency benefits from data aggregation, economies of scale and internalization of externalities exceed the harm from the reduced competition.

Alexiadis and Bobowiec[67] note that not relying merely on increments in market concentration, but considering also factors such as a history or a strategy of acquisitions completed to remove start-ups by a dominant platform would help to better evaluate transactions in the digital environment and to reduce the cost of under-enforcement in relation to acquisitions of nascent firms.

The main advantages that reversing the burden of proof would provide are that there would be a lessening of the administrative burden on the European Commission, which would in turn

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[63] HOVENKAMP H, SHAPIRO C., *Horizontal Mergers, Market Structure, and Burden of Proofs,* 2023.

[64] SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, *Investigation of Competition in Digital Markets – Part I*, 328, (2022).

[65] VALLETTI T., *How to Tame the Tech Giants*, 3.

[66] PARKER G., PETROPOULOS G. AND VAN ALSTYNE M., *Platform Merger and Antitrust*, in Vol. 30, Issue 5, *Industrial and Corporate Change*, 1307-1336, 1329, (2021).

[67] ALEXIADIS P., BOBOWIEC Z., *EU Merger Review of "Killer Acquisitions" in digital markets,* 96.

better allocate its resources to deal with relevant cases; furthermore, merging parties would have to disclose all the relevant information, instead of not disclosing it or providing only a minimum set of information when they are required to, reducing the problem of asymmetric information. Nonetheless, other authors claim that the merging parties will be able to pinpoint some efficiency gains, thus satisfying the presumption and passing the ball back to the Commission, which would then have to investigate the justification brought by the companies, meaning that resources would still be consumed[68].

6.5. Balancing harm and innovation

In the process of reviewing a transaction, the EU Commission has to develop a theory of harm, which means that it has to identify why the deal would generate competitive harm, and then has to find the efficiencies that result from the transaction and assess whether they balance, and overcome, the harm to competition.

Killer acquisitions raise concerns in relation to the potential harm to competition and to innovation that they might cause, but traditionally the analysis of the potential loss competition focuses mainly on the existing market structure rather than on future competition, and the assessment only considers which are the chances that the transaction is anti-competitive, while only in a limited number of cases[69] the Commission has grounded its decision on harm to innovation[70].

The first issue could be dealt with by shifting the substantive assessment from the "balance of probabilities" or "more likely than not" approach to the "balance of harms" approach suggested by the Furman report[71], under which the assessment would look not only at the likelihood of the two future scenarios (i.e., the one in which the transaction is pro-competitive and the one in which it is anti-competitive), but also at the scale of the anticompetitive effects, allowing to intervene with remedies or by blocking a merger when the risk of harm is low, but the magnitude of damages to consumer's welfare and to competition is high[72].

The issue is that the traditional balance of probabilities test remains clearer and more predictable, since under the balance of harm test the authorities would have to calculate the expected value of

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[68] PARKER, PETROPOULOS, VAN ALSTYNE, *Platform Merger and Antitrust*, 1329.
[69] E.g.: Dow/DuPont (Case M. 7932/2017 OJ C353/9), Bayer/Monsanto (Case M. 8084/2018 OJ C459/10).
[70] TURGOT C., *Killer Acquisitions in Digital Markets*, 114.
[71] OECD, 42.
[72] YUN makes the following example: if there is a 20 % chance that an acquisition would result in $250 million in anticompetitive harm and an 80 % chance that the acquisition will result in net efficiencies of $50 million, then the deal should be blocked because the expected value would be negative (-$10 million).

a merger, and that would require to identify all the possible counterfactual scenarios and the welfare gains and losses, and then assign a probability to each scenario; while this is appealing because it better takes into account uncertainty in making predictions, "it assumes that agencies have good estimates of these various probabilities and welfare outcomes. This is unlikely to be for most investigations, and it would make assessments highly sensitive to small changes in probability estimates"[73].

Since the predictability of merger control is crucial for firms, the OECD notes that the clarity of the balance of harm test could be improved by requiring authorities to set out transparently the probabilities that they attach to each scenario and allowing stakeholders to challenge those probabilities[74]. However, given the high degree of uncertainty that surrounds the assessment of killer acquisitions, it would still be hard to make prospective predictions and reflect this uncertainty into a sound decision, given that the burden of proof of demonstrating the scenarios, their likelihood, and the welfare gains and losses would be borne by the Commission, and European Courts seem to not be inclined to allow the Commission unlimited discretion in its choice of counterfactual scenarios[75].

As far as the harm to innovation is concerned, in the evaluation of mergers the assessment of the effects on innovation has often been overlooked[76]. As mentioned above, recently the Commission has started to consider in its decisions innovation, and the incentive of the parties to innovate, which is the innovative process per se[77], as a value in itself, for example allowing the Dow/DuPont merger only after the divestment of a large part of DuPont R&D facilities and pipelines at early stages[78].

If this "innovation competition" approach were to be applied to killer acquisitions, "to block such a digital merger or impose remedies, it would be sufficient for the Commission to demonstrate that the target company pursues a discernible innovation objective, consisting in creating a product that is potentially competitive on an adjacent market, and that it has the ability and the motivation to bring it to market"[79], irrespective of any effect on competition in the market.

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[73] YUN J.M.*, Potential Competition, Nascent Competition, and Killer Acquisitions*, 665.
[74] OECD, 42.
[75] ALEXIADIS P., BOBOWIEC Z., *EU Merger Review of "Killer Acquisitions" in digital markets*, 93.
[76] BOURREAU M, DE STREEL A., *Big Tech Acquisitions*, 17.
[77] PÉREZ DE LAMO D., *Killer Acquisitions in the Digital Sector*, 22.
[78] BOURREAU M, DE STREEL A., *Big Tech Acquisitions*, 17.
[79] TURGOT C., *Killer Acquisitions in Digital Markets*, 114.

The EC report rejected the application of this approach to digital transactions, since in that market the R&D process needs not to be a structured process with identifiable research poles. However, the Commission has resorted to this approach in the New Guidance on the application of the referral mechanism set out in Article 22, when it mentions that it will consider, in accepting referrals requests, cases in which the target undertaking "has a significant competitive potential" or "is an important innovator or is conducting potentially important research".

Whether this "innovation competition" theory will consistently spill over into the substantial assessment of killer acquisitions remains to be seen.

However, it should also be noted that this approach relies on the assumption that killer acquisitions might harm competition; while this might hold true under the economic and legal principles that have been discussed throughout this research, it must be recalled that, in the European Union, the Commission has a long-lasting tradition of granting companies with a safe harbor in which their economic initiative is protected. In this process, the European Commission has issued a *De Minimis* Communication[80] on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU; and a Regulation[81] on the application of Articles 107 and 108 of the TFEU to *de minimis* State aids, which, in their own and separate ways, created a legitimate expectation in companies such that they feel free and protected when it comes to not impactful operations. And it is arguable that, under the Merger Regulation, this safe harbor was already existing and built around the turnover thresholds. Therefore, such a relevant and impactful change of approach by the Commission should not result in a completely new rule.

The Commission's task is to apply the Merge Regulation, rather than bending its interpretation to chase potentially harmful transactions. Otherwise, the risks associated with breaching the principle of legality and adopting an inconsistent method in the assessment of transactions might generate greater uncertainty and therefore deter concentrations and innovation.

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[80] EUROPEAN COMMISSION, *Communication from the Commission: Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU, (De Minimis Notice), 2014/C 291/01,* (2014). Agreements between undertakings that have as their effect the restriction of competition are safe when the aggregate market share held by the parties does not exceed 10% on any of the relevant markets affected by the agreement, when the undertakings are actual or potential competitors, or 15%, when they are not actual or potential competitors.

[81] EUROPEAN COMMISSION, *Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the TFEU to de minimis aid,* (2013). Article (3) states that aid measures granted by a Member State to a single undertaking that do not exceed EUR 200 000 over any period of three fiscal years are exempted from notification requirements.

6.6. Final remarks: a holistic approach?

The aim of this work was to assess and analyze how current legislations are dealing with killer acquisitions, which solutions are being implemented, and which are still available, in light of Illumina/GRAIL leading case.

Several tools that could be implemented in the European merger control system to better deal with killer acquisitions have been discussed, from the ones that would allow a better detection of transactions that currently escape scrutiny to those that would provide a more effective substantial assessment of this phenomenon, allowing to reduce the cases and the costs of under-enforcement. Some of these remedies would require an amendment to the merger regulation, while others could be implemented with new guidelines, but all of them seem to have pros and cons, especially when the analysis shifts from the theoretical ground to the empirical world, which is filled with long-lasting legitimate expectations, legal precedents, and best practices. This is what emerges from the Illumina/GRAIL case: the sudden change of approach put in place by the European Commission risks challenging well-established principles and generating negative externalities for the European Union in its effort to attract investments and bolster innovation, productivity, and growth.

Therefore, the best solution could be to take the best characteristics of each tool and create a set of measures specifically directed at containing killer acquisitions, for example with a combination of a special responsibility regime for large digital platforms, under which the merging parties would have to rebut the presumption that the transaction is anti-competitive, and to do so they would have to adopt a balance of harm approach; or transactions above a given value threshold would have to be cleared under the innovation competition approach; or some combination of the measures, while strengthening the ex-post evaluation and review of mergers to detect and analyze the loopholes of the system.

However, as anticipated, regulators need to bear in mind that every legal change, which creates additional costs and uncertainties for the undertakings, risks cooling down the market for acquisitions, preventing also the pro-competitive, efficient, innovative acquisitions.

At that point, the choice between imposing more burdensome measures on companies while trying to counter killer acquisitions or letting the "invisible hand" drive the market becomes a political and ideological choice: as long as it is well reasoned and implemented, and it considers all the effects not only on competition but also on innovation, it should be welcomed.

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