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Remedying mergers and acquisitions below the EUMR jurisdictional thresholds

The EU competition law treatment of non-reportable M&A transactions

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Summary

The European Commission has for some time perceived enforcement gaps in relation to the jurisdictional scope of EU merger control not being adequate in capturing all potentially competitively problematic mergers and acquisitions. The discussions have been both in regard to the criteria of 'Union dimension', i.e. the turnover thresholds, and to the criteria of 'concentration', i.e. the threshold of control. Even so, the jurisdictional thresholds as provided by the EUMR have been left unchanged.

Recent developments in EU competition law have nonetheless expanded the jurisdictional scope of reviewing non-reportable M&A transactions. Most notably so through the Commission in 2021 issuing its *Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases* and the 2023 judgment of the CJEU in *Towercast v Autorité de la concurrence and Ministère de l'Économie.* The latter in regard to the residual role of Article 102 TFEU in merger control.

Once jurisdiction has been established over a potentially competitively problematic merger or acquisition, EU competition law provides different ways to remedy the competitive harmfulness of the transaction. However, the aspect of remedies has been almost entirely absent in the discussions on how to bridge the perceived enforcement gaps of EU merger control.

The purpose of this thesis is to explain how mergers and acquisitions below the EUMR jurisdictional thresholds can be reviewed under EU competition law, as well as how they subsequently are to be remedied. In addition, the thesis aims to analyse how effectiveness in removing competitive harm and proportionality are balanced in these remedy assessments and whether the EU competition law treatment is coherent and equivalent when it comes to remedying mergers and acquisitions below the EUMR jurisdictional thresholds.

The conclusions are that, dependent on which jurisdictional rule that has been used to establish jurisdiction over the non-reportable M&A transaction, the merger or acquisition will either be remedied under the legal framework of merger control or of antitrust. Under these frameworks there are different primacies for which remedies that are generally considered effective. Merger control favours structural remedies, whereas antitrust favours behavioural remedies. In addition, it is currently not clear how the effectiveness in removing competitive harm and proportionality are balanced. Altogether, this seemingly creates a system that risks leading to an incoherent and inequivalent EU competition law treatment of non-reportable M&A transactions. Hence there is need for further clarification and guidance on how mergers and acquisitions below the EUMR jurisdictional thresholds are supposed to be remedied, as the jurisdictional scope to review these M&A transactions expands.

Sammanfattning

Europeiska kommissionen har sedan en tid tillbaka upplevt brister i EU:s kontroll av företagskoncentrationer. Detta eftersom EU:s koncentrationsförordning inte anses fånga alla potentiellt konkurrensrättsligt problematiska företagsförvärv. Diskussionerna har gällt både förordningens kriterier för "unionsdimension", alltså tröskelvärdena för omsättning, och "koncentration", alltså gränsen för att förvärva kontroll. Trots detta har dessa kriterier för koncentrationsförordningens tillämpning lämnats oförändrade.

Den senaste tiden har dock jurisdiktionen för att granska företagsförvärv som inte omfattas av anmälningsskyldighet utvidgats. Detta med anledning av att kommissionen 2021 utfärdade sin vägledning om tillämpningen av den mekanism för hänskjutande av ärenden som anges i artikel 22 i koncentrationsförordningen samt EU-domstolens dom från 2023 i målet *Towercast v Autorité de la concurrence och Ministère de l'Économie,* vilket behandlade vilken roll artikel 102 FEUF har vid kontrollen av företagskoncentrationer.

När jurisdiktion väl har etablerats över ett potentiellt konkurrenshämmande förvärv, föreskriver EU:s konkurrenslagstiftning olika sätt att avhjälpa transaktionens konkurrensskadliga effekter. Detta sker genom vad som kallas för korrigerande åtgärder eller frivilliga åtaganden. I arbetet med att utvidga konkurrenslagstiftningens omfattning har dock aspekten av hur transaktionernas konkurrensskadliga effekter ska avhjälpas varit nästan helt frånvarande.

Den här uppsatsen syftar till att förklara hur företagsförvärv som inte når upp till EU:s jurisdiktionströsklar ändå kan granskas enligt EU:s konkurrenslagstiftning, samt hur deras konkurrensskadliga effekter därefter kan åtgärdas. Uppsatsen ämnar också analysera hur avvägningen sker mellan dels åtgärdernas effektivitet och dels proportionalitet i dessa bedömningar samt huruvida EU:s konkurrensrätt behandlar dessa transaktioner konsekvent och likvärdigt när det gäller att åtgärda deras konkurrensskadliga effekter.

Slutsatserna är att beroende på hur jurisdiktion har fastställts över det icke anmälningspliktiga förvärvet, kommer korrigerande åtgärder och frivilliga åtaganden antingen att bedömas inom ramen för koncentrationskontroll eller missbruk av dominerande ställning. Under dessa regelverk anses olika avhjälpande åtgärder vara effektiva och därför ha företräde. Koncentrationskontrollen föredrar strukturella åtgärder, medan för missbruk av dominerande ställning föredras beteendemässiga åtgärder. Dessutom är det för närvarande oklart hur åtgärdernas effektivitet och proportionalitet ska vägas mot varandra. Detta skapar ett system som riskerar att leda till att icke anmälningspliktiga företagsförvärv behandlas på ett inkonsekvent och olikvärdigt sätt. I samband med att jurisdiktionen över dessa förvärv utvidgas finns det därför behov av klargöranden och vägledning kring hur konkurrenshämmande företagsförvärv som ligger under EU:s jurisdiktionströsklar ska åtgärdas.

Förord

När jag flyttade till Lund under sensommaren 2017 hade jag ingen aning om vad jag hade gett mig in på. Juridik var inte på något sätt ett uppenbart val av studier och dessutom hade jag knappt satt min fot på skånsk mark innan. Med andra ord var jag nervös, men också förväntansfull, inför vad som komma skulle.

Såhär sex år senare visar det sig att tiden i Lund skulle komma att överträffa alla förväntningar på ett sätt jag inte ens hade vågat drömma om. Idag är nervositet och förväntansfullhet utbytt mot känslor av glädje och tacksamhet.

Det finns så mycket att säga om allt och alla som har gjort den här tiden så fin, men det räcker nog med att helt enkelt säga tusen tack.

Lund den 24 maj 2023,

Samuel Hertsberg Åsander

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
ECA	European Competition Authorities
EU	European Union
EUMR	EU Merger Regulation
FAQ	Frequently Asked Questions
M&A	Mergers and acquisitions
NCA	National Competition Authority
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

EU competition law has provided a system for merger control since 1990 when the first EU Merger Regulation came into force.[1] The current EU Merger Regulation[2] ('EUMR') has been in place for almost 20 years. However, even before mergers and acquisitions were regulated in the way that we are familiar with today, EU competition law provided ways to address competitively concerning M&A transactions.

As early as 1971 the European Commission ('Commission') found that the acquisition of a rival by Continental Can Company Inc. constituted an abuse of dominance and hence was an infringement of what today is Article 102 of the Treaty on the Functioning of the European Union ('TFEU').[3] The principle that, in regard to dominant firms, an acquisition in itself could infringe Article 102 was subsequently supported by the European Court of Justice ('CJEU').[4] Since the adoption of the first EU Merger Regulation the need for the Commission to apply Article 102 when conducting investigations of potentially problematic mergers and acquisitions has received very little attention. This was primarily a practical consequence of the new system of notification obligations on large companies when conducting mergers and acquisitions.

The EUMR provides a system of ex ante merger control, i.e. transactions that meet certain jurisdictional thresholds must be notified to the Commission and approved before their implementation.[5] The scope of the EUMR covers concentrations with a Union[6] dimension.[7] Hence, the concepts of *concentration* and *Union dimension* constitute the two jurisdictional prerequisites for transactions to be reviewed under the EUMR. Union dimension is defined through turnover thresholds, provided by the EUMR.[8] A concentration is defined as whether a change of control on a lasting basis has resulted from the merger or acquisition.[9]

However, the issue of the residual use of Article 102 in merger control has recently become highly relevant. In March 2023 the CJEU delivered its

[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[3] Case IV/26811 – *Continental Can Company*.

[4] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, para 26.

[5] EUMR, Article 4(1).

[6] The Regulation uses the term 'Community', however 'Union' is the wording used today.

[7] EUMR, Article 1(1).

[8] EUMR, Article 1(2) and (3).

[9] EUMR, Article 3(1).

judgment in the Towercast case[10], ruling that the EUMR does not preclude the use of Article 102 to review concentrations ex post, i.e. after the implementation of the transaction, and that M&A transactions that meet neither EU nor national turnover thresholds can indeed be caught by abuse of dominance rules.

This is not the only example of how EU institutions are trying to bridge perceived enforcement gaps in EU merger control. For some time there has been a discussion on whether the jurisdictional thresholds are adequate in capturing all potentially problematic mergers and acquisitions.[11] In fact, there is an ongoing focus of the EU on the treatment of non-reportable transactions, and there are currently several uncertainties in this area of competition law.[12] In 2021 the Commission made a notable move in attempting to fill the enforcement gap relating to concentrations below the turnover thresholds, with its new Guidance on the application of the case referral mechanism set out in Article 22 EUMR[13], hereinafter Commission Guidance on Article 22 EUMR. In short, the changes entailed that certain categories of mergers and acquisitions will now be encouraged by the Commission to be referred by National Competition Authorities ('NCA') and subsequently also accepted. Thus giving the Commission jurisdiction to review the transaction in question, even if it did not meet neither the EU nor national merger control turnover thresholds.

The Commission has previously considered to also revise the second jurisdictional threshold set out by the EUMR, the threshold of control.[14] In 2014, a Commission White Paper[15] evaluating the effectiveness of the turnover based thresholds proposed expanding the Commission's jurisdiction to also include non-controlling minority share acquisitions.[16] However, the Commission eventually decided not to proceed with this proposal.[17] That being said, the Commission already has two ways to establish jurisdiction over non-controlling minority shareholdings. First, if a concentration has been notified under the EUMR, the Commission has the power to review already existing non-controlling minority shareholdings as part of the review of the notified

[10] Case 449/21, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, Judgment of 16 March 2023.

[11] Commission Staff Working Document, *Evaluation of procedural and jurisdictional aspects of EU merger control,* SWD(2021) 66 final, March 26 2021, para. 9.

[12] Henry, D. (2023), p. 4.

[13] 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, March 26 2021.

[14] Commission Guidance on Article 22 EUMR, para. 8.

[15] White Paper *Towards more effective EU merger control* (COM/2014/0449 final).

[16] White Paper *Towards more effective EU merger control* (COM/2014/0449 final), para. 79.

[17] Commission Staff Working Document, *Evaluation of procedural and jurisdictional aspects of EU merger control* SWD(2021) 66 final, para. 8.

concentration.[18] Second, the Commission can review non-controlling minority share acquisitions that are part of several transactions that together lead to a lasting change of control.[19]

These developments have led to a new regulatory landscape for mergers and acquisitions below the jurisdictional thresholds and EU competition law treatment of these otherwise non-reportable transactions under the EUMR. First, certain categories of cases can be referred to the Commission pursuant to Article 22 EUMR, and be reviewed ex ante. Second, the Towercast case provides that acquisitions that could amount to abuse of dominance according to Article 102 TFEU can be reviewed ex post. Third, the Commission can review already existing non-controlling minority shareholdings as part of a subsequent notified concentration. All this prompts the question whether reviewing M&A transactions pursuant to different legislations and during different stages of the transactions leads to a legally coherent and equivalent application of EU competition law?

As the jurisdictional scope of EU competition law expands to cover mergers and acquisitions that have previously not been subject to review, the EU institutions' perception of the potential competitive harmfulness of these M&A transactions has undoubtedly changed. But how does EU competition law address competitive harm in regard to mergers and acquisitions that previously have been considered unlikely to be competitively harmful in the first place? Is the current legal system, which has centred around mergers and acquisitions that meet the jurisdictional thresholds of the EUMR, adequate to also address the competitive harm of M&A transactions below said thresholds?

This question is put to the test as to how competitively concerning transactions are supposed to be remedied. In both merger control and antitrust[20] cases, remedies refer to the different ways of altering competitively problematic situations in order to remove the anticompetitive effects. There are, however, differences between remedies under the two regimes. For example, in a merger control context, the Commission can accept commitments modifying a notified concentration and enabling the Commission to declare the concentration compatible with the internal market.[21] In antitrust investigations on the other hand, the Commission can impose remedies to bring an infringement of Articles 101 or 102 TFEU to an end.[22]

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[18] Commission Staff Working Document Accompanying the document - White Paper, *Towards more effective merger control* SWD(2014) 221 final, para. 45.

[19] EUMR, Recital 20.

[20] Policies developed from Articles 101 and 102 TFEU.

[21] EUMR, Articles 6(2) and 8(2).

[22] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, hereinafter Regulation No 1/2003, Articles 7 and 9.

The aspect of remedies has been almost entirely absent in the discussions on bridging the enforcement gaps in EU merger control. However, in her Opinion in the Towercast case, Advocate General ('AG') Kokott touches briefly on the subject. On the consequences of a review under Article 102 ex post, she states that '(…) in view of the primacy of behavioural remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration, but rather only the imposition of a fine.'[23] This statement is not dealt with by the CJEU in their subsequent ruling, confirming the Opinion.

AG Kokott mentioning the principle of proportionality is important since the remedies imposed by the Commission in abuse of dominance cases have to be proportionate to the infringement in question.[24] This is also the case in relation to merger control remedies, since the EUMR explicitly states that that remedies accepted by the Commission should be proportionate to the competition problem and entirely eliminate it.[25] However, as a general principle of EU law, the principle of proportionality goes beyond any one regulation, and requires that the content and form of EU action must not exceed what is necessary to achieve the objectives being sought.[26] In other words, the principle of proportionality sets out limits for how burdensome and intrusive measures the Commission can take, in order to remove anticompetitive effects and eliminate competitive harm.

In light of how the jurisdictional scope to review mergers and acquisitions below the EUMR jurisdictional thresholds has recently expanded, the question of how effectiveness in removing the competitive harm and proportionality are balanced when addressing remedies appears highly relevant. Initially so because the current EU competition law treatment of mergers and acquisitions below the EUMR jurisdictional thresholds is dependent on different legislations. But also because these M&A transactions, that all have in common that they have previously not been considered likely to be competitively harmful, now could be incoherently and inequivalently remedied.

1.2 Purpose and research questions

The thesis' overarching purpose is to research how mergers and acquisitions below the EUMR jurisdictional thresholds are reviewed and remedied under EU competition law. The thesis aims to explore the legal foundations behind how these M&A transactions are supposed to be remedied in relation to on the one hand effectiveness in removing the competitive harm, and on the other hand the principle of proportionality. The thesis will also investigate whether the current legal system is adequate to coherently and equivalently remedy

[23] Opinion of AG Kokott in Case 449/21 (Towercast), para. 63.
[24] Regulation No 1/2003, Article 7(1).
[25] EUMR, Recital 30.
[26] Treaty on European Union ('TEU'), Article 5.

non-reportable M&A transactions. In order to achieve this purpose the following set of detailed questions will be researched:

i) How can mergers and acquisitions below the EUMR jurisdictional thresholds be reviewed under EU competition law?

ii) How are mergers and acquisitions below the EUMR jurisdictional thresholds remedied under EU competition law?

iii) How does EU competition law balance effectiveness in removing competitive harm and proportionality when remedying mergers and acquisitions below the EUMR jurisdictional thresholds?

iv) Is the EU competition law treatment of mergers and acquisitions below the EUMR jurisdictional thresholds coherent and equivalent, in regard to how these M&A transactions are remedied?

1.3 Delimitations

In light of the above research questions the focus will be on EU competition law and not national competition law. National law vary between Member States in regard to jurisdictional thresholds and due to the scale of this thesis national legislations would be too broad to research. In certain areas of competition law, national law is permitted to go further than EU law. That is the case with national abuse of dominance regimes. In other areas, such as merger control, there are no obligations on the Member States to implement national merger control regimes at all.[27]

The thesis focuses on mergers and acquisitions, and no other forms of commercial transactions. This limitation becomes relevant for Article 102 TFEU, since abuse of dominance covers many different commercial behaviours and measures. However, within the scope of this study the focus is solely on the residual role of Article 102 in regard to mergers and acquisitions.

Article 14 of the Digital Markets Act[28] ('DMA') provides that certain companies, so called gatekeepers, must inform the Commission of any concentrations they intend to conduct. If the concentration meets neither the EU nor national turnover thresholds, the Commission may inform the Member State in question that the case could be relevant for a referral under the Commission Guidance on Article 22. Although this is undoubtedly part of the trend of the EU institutions attempting to make sure that all potentially competitively problematic mergers and acquisitions are captured under the legal frameworks, this thesis is not concerned with how the Commission or NCAs are

[27] Regulation No 1/2003, Article 3.

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

made aware of the M&A transactions. Hence, the DMA provisions fall outside the research scope of this thesis.

Relating to non-controlling minority share acquisitions, the EUMR treats M&A transactions that are closely connected in that they are linked by condition or take the form of a series of transactions taking place within a reasonably short period of time as one concentration.[29] Hence multiple separate non-controlling minority share acquisitions in the same undertaking are considered as one concentration and therefore trigger the notification obligation if they result in a lasting change of control. Although these transactions separately would be of interest if they could be scrutinized by the Commission, the fact that this situation falls under a mandatory notification obligation under the EUMR means that it falls outside the scope of this thesis.

Finally, antitrust investigations pursuant to Article 101 TFEU will not be addressed in this thesis. This could be relevant for the study since the CJEU, albeit before the adoption of the first EU Merger Regulation, has declared that Article 101 applies to non-controlling minority shareholdings if such an acquisition likely would result in collusion between the parties. However, the Court also stated that the acquisition by one company of shares in a competitor does not in itself constitute a restriction of competition.[30] The Commission thus considers it unclear whether acquiring a minority shareholding would fall within the scope of Article 101.[31] Due to the scope of this thesis, the applicability of Article 101 will not be investigated further due to the unclarities surrounding it. Focusing solely on the residual role of Article 102 TFEU to review M&A transactions also allows a more concise and substantiated analysis, in light of the affirmed expansion of the jurisdictional scope of EU competition law that is the consequence of the Commission Guidance on Article 22 and the Towercast case.

1.4 Methodology and materials

This study is based on the legal-dogmatic method. In legal research this method aims to identify, describe and systematise the principles, rules and concepts of a particular legal field to establish the present law, in this case EU competition law. Furthermore the legal-dogmatic method includes an analysis of the relationship between these principles, rules and concepts to solve gaps and ambiguities in the existing law.[32] This method suits this thesis well, since the initial purpose of the study is to identify, describe and systematise the current EU competition law treatment of M&A transactions below the jurisdictional thresholds. Furthermore, the method is appropriate in exploring the

[29] EUMR, Recital 20.

[30] Case C-142/84, *British American Tobacco Company and R. J. Reynolds Industries v Commission*, paras. 37 and 38.

[31] White Paper *Towards more effective EU merger control* (COM/2014/0449 final), para. 40.

[32] M. Smits (2015), p. 5.

legal foundations and considerations behind establishing jurisdiction over these mergers and acquisitions, and what antitrust and merger control rules stipulate on how they are supposed to be remedied. By allowing an analysis of the relationship between legal principles, rules and concepts to solve gaps and ambiguities in the existing law, the legal-dogmatic method is also well suited to explore how EU competition law balances effectiveness in removing the competitive harm and proportionality in regard to remedies.

The legal-dogmatic method is associated not only with the reconstruction of existing law and the creation of a normative system that gives meaning to laws and judgments, but also with the constraints imposed by the exercise of power and decision-making by legislators and courts. A critical legal-dogmatic approach can be used to examine the appearance of the legal-dogmatic solution presented, the consequences it entails and the alternatives that might have been available.[33] This approach will be utilised in order to put the current EU competition law system of remedying mergers and acquisitions below the EUMR jurisdictional thresholds under scrutiny. Hence the critical legal-dogmatic method allows an analysis of whether the EU competition law treatment of non-reportable M&A transactions is coherent and equivalent.

As mentioned, the legal-dogmatic method is concerned with the generally accepted and binding sources of law. Here it is important to bear in mind the distinctive nature of EU law. The EU legislative documents follow a clear hierarchy of legal sources categorized as primary law, the general principles of EU law and secondary law.[34] Sources of primary law include e.g. the treaties establishing the EU, the amending EU treaties and the protocols annexed to the founding treaties. Sources of secondary law are legislative and non-legislative acts adopted by the EU institutions which enable the EU to exercise its powers.[35] Legislative, binding acts include e.g. regulations, directives and decisions, whereas non-legislative, non-binding acts include e.g. opinions and recommendations.[36] The non-binding sources of secondary law are sometimes referred to as "soft law". EU soft law has legal effects in terms of e.g. binding the enacting institution and creating an expectation that the enacting institution will comply with the rules it has laid down in soft law instruments.[37] The Commission Guidance on Article 22 is an example of such a soft law instrument. The Commission's decisions in merger control and abuse of dominance cases are neither primary nor secondary sources of EU law but are nevertheless of interest in the broader discussion on the EU competition law treatment of mergers and acquisitions below the EUMR jurisdictional thresholds. This thesis will explore a wide range of primary and secondary

[33] Kleineman (2018), p. 35.
[34] EUR-Lex "EU hierarchy of norms", accessed on 6 May 2023.
[35] EUR-Lex, "Sources of European Union law", accessed on 22 March 2023.
[36] TFEU, Article 288.
[37] Stefan et al. (2019), p. 24.

sources of EU law. In regard to general principles of EU law the thesis will focus on the principle of proportionality.

The CJEU is the sole actor with authority to deliver binding interpretations on EU law.[38] Accordingly, the EU law sources will be analysed in light of the interpretations laid down by the CJEU. In terms of interpretational methods, the CJEU often resorts to a teleological interpretation.[39] This suits the analysis of this thesis well, since applying the principle of proportionality is a balancing act between the means and goals of a certain legislative provision.[40]

The thesis aims to study several quite novel developments and changes in EU competition law, which affects the relevant materials for the study. The Commission Guidance on Article 22 was revised in 2021 and the first litigated case (Illumina/Grail)[41] has not been conclusively decided by the CJEU yet. The Towercast case was decided by the CJEU in March 2023. Hence the case law on these matters is practically non-existent. In addition, academic literature and commentary on the subjects are scarce. Legal practitioners have on the other hand been quick to comment on both Illumina/GRAIL and Towercast cases. To the extent these types of articles will be used it will be kept in mind that they likely are written from the perspective of businesses and clients.

Finally it is appropriate to explain the terminology that will be used throughout the study. Mergers and acquisitions, as used in company and competition law, can refer to a broad range of corporate transactions, including takeovers, and certain types of joint ventures. Simply put, a merger is the consolidation of two independent entities whereas an acquisition is when one company purchases another. In mergers there is normally an exchange of stock or consolidation into a new company while all acquisitions involve one firm purchasing another.[42] "Mergers and acquisitions" and 'M&A transactions' will be used interchangeably. As briefly touched upon above, the term 'concentration' is explicitly defined by the EUMR. In this study it is important to distinguish between mergers and acquisitions on the one hand and concentrations on the other. This is because not all mergers and acquisitions qualify as concentrations according to the definition provided by Article 3(1) EUMR.

1.5 Outline

In chapter two, the prerequisites for reviewing concentrations below the jurisdictional thresholds under EU law will be described. The focus of this chapter is the establishment of jurisdiction and how EU law provides that

[38] TEU, Article 19.
[39] Hettne (2011), p. 236.
[40] Craig & De Búrca (2020), p. 583.
[41] Appeal brought on 22 September 2022 by Illumina, Inc. Case T-227/21, *Illumina v Commission* (Case 611/22 P).
[42] Kokkoris & Shelanski (2014), p. 1.

concentrations which are not under a conventional mandatory filing obligation can nevertheless qualify for review. The chapter will also explore procedural aspects as well as how the substantive analysis is conducted. Even though the research question is not aimed at scrutinizing the jurisdictional rules per se, understanding under what circumstances mergers and acquisitions below the EUMR jurisdictional thresholds can be reviewed is fundamental to achieve the purpose of the thesis. In order to be able to draw conclusions on the effectiveness, proportionality and consistency of how these M&A transactions are remedied, it has to be established what the purposes are of reviewing them in the first place.

In chapter three the thesis will explore how, after jurisdiction has been established over mergers and acquisitions below the EUMR jurisdictional thresholds, these M&A transactions are remedied. Understanding how EU competition law addresses the competitive harmfulness of non-reportable M&A transactions is essential in achieving the thesis' purpose.

Chapter four will lay the foundation for the discussion on how effectiveness in removing competitive harm and proportionality are balanced when addressing remedies. Chapter four will provide an in depth look of the legal frameworks described in chapters two and three and will build on what has been described there in terms of theories of competitive harm and the remedies available to effectively address said harm. The general principle of proportionality in EU law will be briefly described in order to lay the theoretical foundation for the discussion.

As for the coherency and equivalency of the EU competition law treatment, chapters two, three and four will aim to lay out an overview of the EU competition law treatment of mergers and acquisitions below the EUMR jurisdictional thresholds and thus provide the relevant context to draw conclusions in this respect.

2 Reviewing mergers and acquisitions below the EUMR jurisdictional thresholds

This chapter will address the first of the detailed research questions. How mergers and acquisitions below the jurisdictional thresholds can be reviewed under EU competition law. This will bring a fundamental understanding of under what circumstances jurisdiction can be established over non-reportable M&A transactions as well as the nature of the procedure and considerations made in the substantive analysis.

2.1 The legal frameworks

To provide context to the discussion on recent changes in the establishment of jurisdiction, this section will in a brief and general manner describe the legal frameworks of reviewing mergers and acquisitions in EU competition law.

2.1.1 EU merger control

2.1.1.1 Scope

The EU system of merger control is provided by the EUMR. The objective of the Regulation is to ensure that mergers and acquisitions do not result in lasting damage to competition by significantly impeding effective competition in the internal market or in a substantial part of it.[43] To achieve this purpose, the EUMR requires concentrations with a Union[44] dimension to be notified to the Commission before implementation. There are two jurisdictional thresholds for an M&A transaction to fall within the scope of the EUMR. The first is that the transaction constitutes a concentration and the second is that it has a Union dimension.[45]

The concept of concentration covers operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market.[46] A concentration can arise when two previous independent undertakings merge or when there is a change in control over an existing undertaking.[47] Under the EUMR, there has been a change of control if a company will have 'the possibility of exercising decisive influence' over the strategic commercial behavioural of another company.[48] What this means is that

[43] EUMR, Recitals 5 and 6.

[44] The Regulation uses the term 'Community dimension', however 'Union dimension' is the wording used today.

[45] EUMR, Article 1(1) and Article 4(1).

[46] EUMR, Recital 20.

[47] EUMR, Article 3(1).

[48] Whish & Bailey (2021), p. 852.

acquiring a majority shareholding, and thus the control of the company de jure, is not necessarily central. De facto control of the company is sufficient to meet the threshold of control.

The term Union dimension is defined through the application of turnover thresholds provided by the EUMR.[49] The turnover thresholds take aim at the generated turnovers of the undertakings concerned, i.e. the acquiring and target companies. The EUMR provides two different turnover thresholds with two alternatives for when the thresholds are met, and thus establishing if there is a Union dimension or not. The turnover of the undertakings concerned on worldwide, EU and Member State levels have to be calculated in order to rule out falling within the scope of the EUMR. In addition, both the combined and individual turnovers are of relevance for the assessment.[50] Turnover is allocated geographically in order to reflect the geographical distribution of resources.[51]

2.1.1.2 Procedure

Concentrations with a Union dimension must be notified to the Commission ex ante, i.e. before their implementation.[52] In addition, concentrations with a Union dimension are automatically suspended until they are declared compatible with the internal market.[53] This is often referred to as a 'standstill obligation', and has been described by the General Court as a founding principle of the EUMR.[54] The Commission may, on request, grant a derogation from the standstill obligation.[55] Failing to notify an M&A transaction that falls within the scope of the EUMR, or implementing a notified but not yet cleared concentration, may lead to the imposition of large fines.[56]

Since the Commission has exclusive jurisdiction to review transactions that fall within the scope of the EUMR, the Regulation institutes a one-stop shop for the control of concentrations falling under its scope of application.[57] Contrarily, concentrations that are not covered by the EUMR may fall within the jurisdiction of one or multiple Member States, dependent on their respective national merger control rules.[58]

[49] EUMR, Article 1(2) and (3).
[50] EUMR, Article 1.
[51] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, para 124.
[52] EUMR, Article 4(1),
[53] EUMR, Article 7(1).
[54] Case T-411/07 *Aer Lingus Group v Commission,* Judgment of 6 July 2010, para. 80.
[55] EUMR, Article 7(3).
[56] EUMR, Article 14.
[57] EUMR, Article 21.
[58] EUMR, Recitals 8, 9 and 10.

2.1.1.3 Substantive analysis

If an M&A transaction falls within the scope of the EUMR, it is up to the Commission to determine whether it would significantly impede effective competition in the internal market[59] or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position. If that is the case, the concentration shall be prohibited. Otherwise it shall be allowed.[60] Inherently, this assessment has to be in part probabilistic, since it is about predicting a future behaviour. To challenge an M&A transaction, the Commission or an NCA must have a theory of competitive harm in regard to why the market will function worse for the consumers in the future than prior to the concentration.[61]

The CJEU has stated the following on the substantive analysis in merger control:

> A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which make it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in the future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted.[62]

Hence, merger analysis is less dependent on fact finding and more theoretically based compared to e.g. abuse of dominance investigations.[63] This will be further elaborated on below.

2.1.2 Abuse of dominance – Article 102 TFEU

Article 102 TFEU prohibits the abuse of a dominant position. Article 102 TFEU provides as follows:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

[59] The EUMR uses the term 'common market', however 'internal market' is the wording used today.

[60] EUMR, Article 2(2) and (3).

[61] Whish & Bailey, (2021), p. 860.

[62] Case C-12/03, *Commission v Tetra Laval*, para. 42.

[63] Motta et al. (2007), p. 628.

a) directly or indirectly imposing unfair purchase or selling prices or unfair;

b) limiting production, markets or technical development to the prejudice of consumers;

c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

However, there is no exhaustive list of behaviours that are deemed to be abusive and several other categories of behaviour than those mentioned have been subject to enforcement. Generally, the Commission has used Article 102 primarily to sanction dominant companies who have foreclosed rivals and, to some extent, if consumers have been exploited.[64]

The CJEU has ruled that dominant firms have a special responsibility not to allow their behaviour to impair genuine, undistorted competition on the internal market.[65] The aim of Article 102 TFEU is to set standards for the conduct of firms with a position of such economic strength that they to a degree can act independently of their competitors. Article 102 seeks to avoid the misuse of such market power and to bring about results that would occur if competition did exist. Article 102 also requires dominant firms to refrain from certain behaviour that would be lawful if it was carried out by a non-dominant firm.[66]

2.1.2.1 Scope

Article 102 applies to undertakings that hold a dominant position on one or more relevant markets. In basic terms *undertakings* mean any person engaged in economic activity.[67] The dominant position can be held by one or multiple undertakings.[68] The requirement *in the internal market or a substantial part of the common market* aims at restricting the applicability of the Article so as to not be applicable to trivial or localised matters. The CJEU has held that the requirement of an *effect on trade* between Member States is satisfied where

[64] Pepper & Botas Armero (2023), p. 20.

[65] Case C-413/14 P, *Intel v Commission*, para. 135 & Case C-680/20, *Unilever Italia Mkt.Operations Srl v Autorita Garante della Concorrenza e del Mercato,* paras. 28 and 38.

[66] O'Donoghue QC & Padilla (2020), p. 3.

[67] O'Donoghue QC & Padilla (2020), p. 4.

[68] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 4.

conduct brings about an alteration in the structure of competition in the internal market.[69]

2.1.2.2 Procedure

Article 102 is directly applicable in the Member States. However, Member States are permitted to go further in their national abuse of dominance regimes.[70] Hence the procedure emerging from applying Article 102 may vary between the Commission and the different Member States.

Regulation 1/2003[71] contains the powers of the Commission and NCAs to enforce Article 102. For the purpose of applying Article 102 in individual cases NCAs may, when acting on a complaint or on its own initiative, make decisions requiring the termination of an infringement and order interim measures, accepting commitments and imposing fines.[72] The Commission may, when acting on a complaint or on its own initiative, make decisions requiring the termination of an infringement. The Commission can also impose structural or behavioural remedies on the undertakings, which are proportionate to the infringement and necessary to bring the infringement to an end.[73] The burden of proving that an infringement of Article 102 has occurred is on the competition authority making the allegation.[74]

2.1.2.3 Substantive analysis

The analysis under Article 102 consists of two key parts. First, establishing whether the company has a dominant position and second, determining whether the dominant position has been abused.

What is to be considered a *dominant position* is a legal question that determines the point at which the unilateral behaviour of an undertaking can be scrutinized under Article 102.[75] The CJEU has laid down the following test for what constitutes a dominant position:

> The dominant position referred to by Article 102 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an

[69] Cases 6/73 and 7/73 *Commercial Solvents v Commission*, para 33. See also Commission Guidelines on the effect on trade concept contained in Articles 101 and 102 of the Treaty, para. 20.

[70] Regulation No 1/2003, Article 3.

[71] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[72] Regulation No 1/2003, Article 5.

[73] Regulation No 1/2003, Article 7(1).

[74] Regulation No 1/2003, Article 2.

[75] Whish & Bailey (2021), p. 183.

> appreciable extent independently of its competitors, customers and ultimately of its consumers.[76]

In what amounts to be considered *abuse* distinctions can be made between exclusionary, exploitative and reprisal abuses respectively. Exclusionary abuses are unlawful attempts to exclude rival firms. Exploitative abuses on the other hand are direct exploitations of consumers through, e.g., excessive prices. Reprisal abuses are when a dominant company injures or damages another company to punish it for having, e.g., had business dealings with a rival firm. Of these, the Commission has been mostly focused on exclusionary abuses and, to some extent, exploitative abuses.[77] Regarding exclusionary abuse, the concept of anti-competitive foreclosure refers not only to cases where the dominant undertaking's conduct can lead to the complete exclusion of competition, but also to cases where it is capable of resulting in the weakening of competition and thus hampering the competitive structure of the market to the advantage of the dominant firm and detriment of consumers.[78]

2.2 Referral to the Commission pursuant to Article 22 EUMR

The referral mechanism in Article 22 EUMR first appeared in the original Merger Regulation in 1989. Initially the mechanism was put in place in order to enable Member States without any domestic system of merger control to refer transactions to the Commission for review.[79]

The Article provides NCAs with the possibility to refer transactions without an EU dimension to the Commission for review. To that effect, the EUMR provides a corrective mechanism regarding the jurisdictional thresholds of turnover.[80] Referral is possible even if the transaction does not meet the notification criteria of the Member State in question, or any Member State for that matter.

Article 22(1) EUMR reads as follows:

> One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly

[76] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission*, para. 2.

[77] O'Donoghue QC & Padilla (2020), p. 4.

[78] Annex to Amendments to the Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2023/C 116/01, para. 1.

[79] Looijestijn-Clearie et al. (2021), p. 552.

[80] EUMR, Recital 11.

affect competition within the territory of the Member State or States making the request.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

The Commission examines referred cases on behalf of the requesting Member State(s) and will base their assessment on the impact of the concentration within the territory of the Member State(s) making the request.[81] In addition, if the Commission becomes aware of a concentration that it considers as meeting the criteria for referral, it may inform the Member State(s) that are potentially concerned with an invitation to make a referral request.[82] The fact that a transaction has been closed does not preclude a Member State from requesting a referral. However, the time that has expired after the implementation will be considered by the Commission when deciding whether or not to accept the referral. The Commission will generally not accept a referral if more than six months have passed since the closing of the transaction.[83]

As more and more Member States implemented national merger control regimes the Commission developed a practice of discouraging referral requests under Article 22 from Member States that did not have original jurisdiction over the transaction. The Commission based this approach on the experience that such transactions simply were not very likely to have a significant impact on the internal market.[84] However, this approach was changed in March 2021 when the Commission published its Guidance on the application of the referral mechanism set out in Article 22.[85]

2.2.1 Commission Guidance on the application of Article 22

Leading up to the publication of the Guidance, the Commission had perceived an enforcement gap in relation to the turnover thresholds provided by the EUMR. Market developments had resulted in a gradual increase of concentrations involving companies that generated little or no turnover at the moment of the concentration but yet either had, or had potential to have, a significant competitive role on the market at stake. These trends had particularly been observed in the digital and pharmaceutical sectors as well as other sectors where innovation is an important parameter of competition. These considerations apply also to companies with access to or impact on competitively

[81] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), para. 50.

[82] EUMR, Article 22(5), see also ECA Principles, para. 22.

[83] EUMR, Article 22(4), see also Commission Guidance on Article 22 EUMR, para. 21.

[84] Commission Guidance on Article 22 EUMR, para. 8.

[85] 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.

valuable assets, e.g. intellectual property rights, data, raw materials or infrastructure.[86]

In view of this, the Commission had examined whether the turnover thresholds were suitable for determining the impact that certain concentrations may have on the market in its Evaluation of procedural and jurisdictional aspects of the EU Merger Control. The final findings and considerations were summarized in a Staff Working Document.[87] The evaluation concluded that the turnover thresholds, complemented by the referral mechanisms set out in the EUMR, have generally been effective in capturing transactions with a significant impact on competition in the EU internal market. However, a number of cross-border transactions which potentially could have such an impact have escaped review by both the Commission and the Member States, particularly in the digital and pharmaceutical sectors.[88] Therefore the Commission decided to change its approach to referrals pursuant to Article 22 of the EUMR, to now encourage and accept referrals in cases where the referring Member State does not have initial jurisdiction. The criteria laid out in Article 22 still have to be met, i.e. the concentration must affect trade between Member States and threaten to significantly affect competition within the territory of the Member State(s) making the request.[89]

A concentration fulfils the first prerequisite of Article 22, affecting trade between Member States, if it is liable to have some discernible influence on the pattern of trade between Member States.[90] The Commission will assess in particular if the transaction may influence, directly or indirectly as well as actually or potentially, the pattern of trade between Member States.[91] As for the second prerequisite of Article 22, that the concentration threatens to significantly affect competition within the territory of the Member State(s), this is essentially an analysis of whether there is a real risk of the operation having a significant negative effect on competition.[92] Important to bear in mind is that this is an assessment meant to establish whether to trigger a referral and not to definitively assess the actual consequences for competition.[93] Situations that may meet this criterion include the creation or strengthening of a dominant position, the elimination of an important competitive force,

[86] Commission Guidance on Article 22, para. 9.

[87] Commission Staff Working Document: *Evaluation of procedural and jurisdictional aspects of EU merger control* (SWD(2021) 66 final.

[88] Commission Staff Working Document: *Evaluation of procedural and jurisdictional aspects of EU merger control* (SWD(2021) 66 final, para. 132.

[89] Commission Guidance on Article 22 EUMR, para. 11.

[90] Notice on Case Referral, para. 43.

[91] Commission Guidance on Article 22 EUMR, para 14.

[92] Kokkoris & Shelanski (2014), p. 166.

[93] Looijestijn-Clearie et al. (2021), p. 555.

including the elimination of a recent or future entrant or the merger between two important innovators.[94]

M&A transactions whose impact on the market is deemed to go beyond the national borders of any one Member State are considered in principle to be best dealt with by the Commission.[95] To that end, the system of Article 22 referrals aims to ensure that the authority more appropriate to carry out the merger investigations, in this case the Commission, reviews the case despite not initially having jurisdiction.[96]

2.2.2 The Illumina/GRAIL case

The 19th of April 2021, the Commission accepted the first Article 22 referral under the new Guidance. The referral was from France[97], asking the Commission to assess the acquisition of GRAIL by Illumina, both American companies.[98] The concentration did not meet the turnover thresholds of the EUMR and France did not have jurisdiction to review the transaction under their national merger control rules. However, the Commission found that the proposed transaction would affect trade within the single market and threatened to significantly affect competition within the territory of the Member States that made the referral request. In addition, the Commission found the referral appropriate since GRAIL's competitive significance was not reflected in its turnover.[99] The General Court of the EU subsequently upheld the Commission's decision to accept the referral, thereby confirming the Commission's jurisdiction in the case.[100]

The 6th of September 2022 the Commission, in an unprecedented move, prohibited Illumina's acquisition of GRAIL. The Commission concluded that Illumina was the unrivalled supplier of NGS[101] systems for genomic and genetic analysis. GRAIL, a customer of Illumina, used the NGS systems to develop cancer detection tests. The Commission determined that the tests had the potential to be a game changer in the fight against cancer, using a simple blood sample to detect different cancers in asymptomatic patients at an early stage. Since GRAIL's rivals were also dependent on Illumina's technology to develop their own tests, the Commission determined that the proposed concentration would have incentivised and enabled Illumina to foreclose GRAIL's rivals. As a result, GRAIL's competitors would be disadvantaged compared to GRAIL. The Commission did not consider that the remedies

[94] Commission Guidance on Article 22 EUMR, para 15.
[95] EUMR, Article 1.
[96] Commission Guidance on Article 22 EUMR, para. 5.
[97] Joined by Belgium, Greece, Iceland, the Netherlands and Norway.
[98] Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL*.
[99] Press release, *Commission prohibits acquisition of GRAIL by Illumina*, 6 September 2022.
[100] Judgment of the General Court (Third Chamber, extended composition), in Case T-227/21 *Illumina/GRAIL v Commission*, 13 July 2022.
[101] Next-Generation Sequencing.

offered by Illumina would adequately address the Commission's competition concerns, which will be described in chapter three.[102]

The judgment by the General Court to uphold the Commission's decision to accept the referral has been appealed by Illumina as for whether the Commission can review cases where the referring NCA does not have jurisdiction to review the transaction in the first place.[103]

2.3 The residual role of Article 102 TFEU in merger control

The previous section described under what circumstances concentrations that do not meet the turnover thresholds of the EUMR can be referred to the Commission by NCAs. However, a recent case from the CJEU has laid down that concentrations that do not meet the turnover thresholds also can be reviewed pursuant to Article 102.

2.3.1 Historical outlook

Already in 1971 the Commission found that the acquisition of a rival by Continental Can Company Inc. constituted an abuse of dominance and hence was an infringement of what today is Article 102 TFEU.[104] The principle that, in regard to dominant firms, an acquisition in itself could infringe Article 102 was subsequently supported by the CJEU. The Court stated that an acquisition by a dominant firm could be an infringement of Article 102 where it 'strengthens [the position of the dominant firm] in such a way that the degree of dominance substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.'. [105]

When the first EU Merger Regulation was adopted in 1989, a system of ex ante merger control review was introduced in the EU.[106] This was followed by national merger control regimes throughout the EU. Today Luxembourg is the only Member State without its own merger control rules. This in itself reduced the need for the Commission to utilise Article 102 to investigate potentially problematic M&A transactions because most meaningful transactions were being reviewed under merger control rules.[107] Additionally both

[102] Press release, *Commission prohibits acquisition of GRAIL by Illumina,* 6 September 2022.

[103] Appeal brought on 22 September 2022 by Illumina, Inc. Case T-227/21, Illumina v Commission (Case 611/22 P).

[104] Case IV/26811 – *Continental Can Company*.

[105] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, para 26.

[106] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

[107] Pepper & Botas Armero (2023), p. 21.

the previous as well as current versionf of the EUMR explicitly lay out that the Regulation alone is applicable to concentrations.[108]

The EUMR was in part introduced because relying exclusively on ex post control pursuant to antitrust rules was considered insufficient.[109] Furthermore, the main purpose of merger control is not to prevent future abuses but to maintain competitive markets to create better outcomes for consumers. The Commission's jurisdiction in merger control is therefore first and foremost founded on the need to avoid the establishment of market structures that may strengthen or create a dominant position, and not on the need to directly control abuses of such a position.[110] This is one of the reasons why merger control is necessary to prevent the creation or strengthening of market power before it occurs, even though there are already legal mechanisms in place to address the abuse of market power, i.e. Article 102. Other reasons are that investigations into the behaviours and measures taken by dominant firms are complex and lengthy and that competition authorities generally lack the resources to control every instance of alleged abuse of dominance.[111]

The Commission has previously been deemed highly unlikely to apply Article 102 TFEU in relation to transactions falling outside the jurisdictional scope of EUMR. This is because most meaningful transactions falling outside the EUMR will be reviewed under national merger control laws. In addition, Article 102 TFEU is not a particularly effective tool for reviewing mergers and acquisitions falling outside the EUMR since it can only be applied if the purchaser is *already* dominant on the relevant market at the date of the acquisition. It is not possible to challenge transactions that *create* dominance, which is the most common concern in merger control contexts.[112]

This being said, there has still been discussion on the residual role of Article 102 potentially filling the enforcement gap relating to competitively problematic M&A transactions that do not meet the mandatory notification thresholds in the Member States nor are eligible for referral under Article 22 EUMR.[113] This is because Article 102 could be applicable in cases that are not eligible for referral pursuant to Article 22 due to not meeting the criteria set out by the Article or the Commission Guidance on Article 22. This discussion has become highly relevant due to the recent judgment by the CJEU in the Towercast case.[114]

2.3.2 The Towercast case

[108] EUMR, Article 21, cf. previous EUMR, Article 22.
[109] EUMR, Recital 7.
[110] Case T-102/96 *Gencor v Commission*, para. 106.
[111] Whish & Bailey (2021), p. 859.
[112] O'Donoghue QC & Padilla (2020), p. 54.
[113] Pepper & Botas Armero (2023), p. 21.
[114] Case 449/21, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, Judgment of the Court (Second chamber) on 16 March 2023.

In March 2023 the CJEU delivered its judgment in *Towercast v the French Competition Authority*, answering the question of the residual role of Article 102 in relation to mergers and acquisitions. The circumstances in the case are as follows.

In 2016, TDF, a French company providing broadcasting services, acquired the sole control of Itas which is active in the same sector. The acquisition did not meet the French or EU turnover thresholds and was therefore not under a mandatory notification obligation. Neither did the acquisition give rise to a procedure for referral to the Commission under Article 22 of the EUMR. Hence, there was no ex ante assessment of the deal. In 2017, Towercast, the third competitor on the same market as TDF and Itas, filed a complaint to the French Competition Authority alleging that the acquiring of Itas by TDF constituted an abuse of a dominant position. Towercast argued that the acquisition hindered competition on the upstream and downstream wholesale markets by significantly strengthening the dominant position of TDF on those markets.[115]

In 2020 the French Competition Authority decided that it was not appropriate to continue with the procedure of the complaint filed by Towercast. In essence, the Competition Authority took the view that the EUMR applied exclusively to concentrations, thereby rendering the application of Article 102 to a concentration devoid of purpose where the undertaking concerned has not engaged in abuse which could be separated from the concentration. Towercast appealed that decision to the French Court of Appeal, referencing the Continental Can judgment and arguing that Article 102 was applicable to concentrations ex post. Towercast also argued that the EUMR would be exclusively applicable only for concentrations falling within its scope.[116]

In 2021 the French Court of Appeal requested a preliminary ruling from the CJEU referring the following question:

> Is Article 21(1) of [Regulation No 139/2004] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 [thereof], is below the thresholds for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 of [that regulation], as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in the light of the structure of competition on a market which is national in scope?[117]

[115] Case 449/21 –Towercast, Judgment of the Court on 16 March 2023.

[116] Ibid.

[117] Case 449/21 – Towercast, Request for a preliminary ruling from the Cour d'appel de Paris (France) lodged on 21 July 2021.

The CJEU delivered its judgment in the case on the 16th of March 2023. Initially the Court explains that the wording of Article 21(1) EUMR delineates the scope of the Regulation's applicability only as regards other acts of secondary EU legislation and not as regards the applicability of primary law such as Article 102 TFEU. Furthermore, the Court concluded that although the EUMR introduces an ex ante control for concentrations with a Community dimension, it does not preclude an ex post control of concentrations that do not meet that threshold. The Court continues to state that the EUMR applies only to concentrations with a Community dimension and that it is accepted that certain concentrations may escape ex ante control but be subject to ex post control.[118] In her Opinion in the same case, AG Kokott made clear that an acquisition cleared under specific merger regulations could not be found to be an abuse of dominance unless the dominant company engages in abusive conduct beyond the merger.[119] However, the CJEU did not conclusively acknowledge this.[120] It may be that this was presumed by the Court, and practitioners have commented that it seems highly unlikely that any mergers that have been cleared will be challenged under Article 102, since an M&A transaction that clears a merger review logically should exclude a finding of abuse of dominance.[121]

2.4 Review of non-controlling minority share acquisitions

In the previous section the residual role of Article 102 as merger control in cases where an acquisition does not meet the jurisdictional threshold of turnover was discussed in light of the Towercast case. However, the Commission already has the power to intervene in cases where the jurisdictional threshold of control is not met.

As an evaluation of the effectiveness of the EUMR adopted in 2004, the Commission issued their White Paper *Towards more effective EU merger control* in 2014.[122] As a point of improvement the White Paper identified the possibility of extending the Commission's jurisdiction under the EUMR to include acquisitions of minority shareholdings that do not result in an acquisition of control but still could potentially harm competition. The Commission perceived an enforcement gap in not having sufficient legal tools to tackle the harm on competition caused by acquisitions of minority shareholdings.[123] However, in 2021 the Commission chose not to proceed with the discussed

[118] Case 449/21 – Towercast, Judgment of the Court on 16 March 2023.
[119] Opinion of AG Kokott in Case 449/21 (Towercast), para. 60.
[120] Case 449/21 – Towercast, Judgment of the Court on 16 March 2023, para. 50.
[121] Hockley et al., *Doing a deal as an abuse of dominance? The ECJ's decision in Towercast*, Lexology, accessed on 4 April 2023.
[122] White Paper *Towards more effective EU merger control* (COM/2014/0449 final).
[123] Ibid, para. 55.

changes to capture these acquisitions within the jurisdictional scope of the EUMR.[124]

Minority shareholdings typically refer to when a shareholder holds less than 50 % of the voting rights in a firm. In economic literature, non-controlling minority shareholdings are often referred to as *structural links*, which can be horizontal as well as vertical.[125] The Commission has stated that also such structural links can result in significant harm to competition and consumers.[126]

Currently, only the acquisition of minority shareholdings that confers the acquirer control over the target triggers the mandatory notification obligation under the EUMR. Otherwise the transaction is not considered a concentration and hence the jurisdictional threshold is not met.[127] In other words, non-controlling minority shareholdings are not in and of themselves subject to ex ante review by the Commission.[128] However, the Commission has the possibility to, under quite specific circumstances, intervene ex post. Pursuant to merger control and antitrust rules respectively.

2.4.1 Pursuant to merger control rules

The Commission can take pre-existing minority shareholdings into account in the context of a notified merger where the Commission is competent to analyse a separate acquisition of control.[129] As such, the Commission can be said to establish indirect jurisdiction over the non-controlling minority share acquisition.[130] The Commission has intervened in these types of cases a significant number of times, and many times authorised them on the basis of remedies entailing a divestiture of such pre-existing minority shareholdings.[131] This could be relevant e.g. if the undertaking in which one party has a non-controlling minority shareholding is a competitor of the other merging undertaking. On the other hand, if the minority shareholding is acquired after the Commission's investigation, the Commission is not competent to take possible competition concerns from that transaction into account. This despite the fact that the competition concerns arising from non-controlling minority

[124] Commission Staff Working Document: *Evaluation of procedural and jurisdictional aspects of EU merger control* (SWD(2021) 66 final, para. 8.

[125] Annex I 'Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")' to Commission Staff Working Document, *Towards More Effective EU Merger Control SWD*(2013) 239 final, para. 19.

[126] Commission Staff Working Document, *Towards More Effective EU Merger Control*, SWD(2013) 239 final, p. 4.

[127] Case T-411/07, *Aer Lingus v Commission*, para. 65.

[128] White Paper *Towards more effective EU merger control* (COM/2014/0449 final), para. 25.

[129] Commission Staff Working Document, *Towards More Effective EU Merger Control*, SWD(2013) 239 final, p. 5.

[130] Tzanaki (2015), p. 868.

[131] See e.g., COMP/M.3653 – *Siemens/VA Tech* and COMP/M.5405 – *IPIC/ MAN Ferrostaal.*

shareholdings acquired after the Commission's investigation may be similar to those that arise when control is acquired.[132]

There are several types of competition concerns that can arise when a non-controlling minority shareholding is acquired. These will not be discussed in detail here.[133] What is important to note however, is that the competition concerns arising from a minority shareholding are based on similar theories of harm to those relevant for the acquisitions of control. In general, it is required that the transaction may significantly increase market power.[134]

2.4.2 Pursuant to antitrust rules

The Commission has the ability to utilise Article 102 TFEU to intervene against anticompetitive non-controlling minority shareholdings. In such cases, the applicability of Article 102 requires that the acquirer of the minority shareholding already is a dominant company at the time of the acquisition and that the acquisition constitutes an abuse of that position.[135] As for the threshold of control for minority share acquisitions the CJEU has laid out that 'An abuse of such a position can only arise where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy.'[136]

The Commission has only on one occasion sought to apply Article 102 TFEU to an acquisition of a minority interest in a competitor, in the so called Gillette case.[137] In this case, the Commission held that the minority shareholding in the competitor would result in at least some influence on commercial policy.[138] However, since this transaction took place before the EUMR had entered into force it has been deemed very unlikely that the Commission would take similar action today. Essentially for the same reasons for it being considered unlikely that the Commission would intervene against concentrations without a Community dimension, as was discussed in section 2.3.1. Most meaningful M&A transactions falling outside the EUMR will be reviewed under national merger control laws. In addition, Article 102 TFEU is not a particularly effective tool for reviewing mergers and acquisitions falling outside the EUMR since it can only be applied if the purchaser is *already* dominant on the relevant market at the date of the acquisition. It is not possible to

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[132] White Paper *Towards more effective EU merger control* (COM/2014/0449 final), para. 25.

[133] For a detailed explanation, see Tzanaki (2015), pp. 862-865.

[134] White Paper *Towards more effective EU merger control* (COM/2014/0449 final), para. 28. See also Horizontal Merger Guidelines, para. 8 and Non-horizontal Merger Guidelines, para. 10.

[135] Commission Staff Working Document, *Towards More Effective EU Merger Control,* SWD(2013) 239 final, p. 6.

[136] Case C-142/84, *British American Tobacco Company and R. J. Reynolds Industries v Commission*, Judgment of 17 November 1987, para. 65.

[137] Case No IV/33.440, *Warner-Lambert/Gillette and others.*

[138] Case No IV/33.440, *Warner-Lambert/Gillette and others*, para. 24.

challenge transactions that *create* dominance, the most common concern in merger control contexts.[139]

A key difference between the assessment of non-controlling minority share acquisitions pursuant to merger control rules and antitrust rules is the nature of the analysis. As touched upon in section 2.1, the assessment of the parties' conduct pursuant to the EUMR is forward-looking, comparing the prospective competition, whereas the assessment under Article 102 is retrospective.[140]

[139] O'Donoghue QC & Padilla (2020), p. 54.

[140] Commission Staff Working Document, *Towards More Effective EU Merger Control,* SWD(2013) 239 final, p. 6.

3 Remedying mergers and acquisitions below the EUMR jurisdictional thresholds

In chapter two the jurisdictional rules governing how non-reportable M&A transactions can be reviewed were laid out. This chapter will address how these mergers and acquisitions are supposed to be remedied once jurisdiction has been established over them. In the following, remedies will be discussed on the one hand in regard to merger control, and on the other hand in regard to antitrust investigations.

3.1 The legal frameworks

At EU level, both antitrust and merger investigations many times conclude with the Commission making a decision on remedies, i.e. the different ways of altering competitively problematic situations in order to remove the anti-competitive effects. In a merger control context, the Commission can accept commitments modifying a notified concentration and then declare the concentration compatible with the internal market.[141] In antitrust investigations on the other hand, the Commission can impose remedies to bring an infringement of Articles 102 to an end.[142] In the following, the term 'remedies' will include both modifications to notified concentrations and measures intended to bring an infringement of Article 102 to an end.

In general, the objective of the remedies is to reduce or eliminate the ability or incentives of the undertakings concerned to follow a conduct that would impede or eliminate effective competition. Remedies can also have as their objective to increase the ability of third parties to compete. In order to achieve this, remedies are often put into packages, consisting of several types of remedies that together removes the identified competition concerns.[143]

In both antitrust and merger investigations, the underlying theories of harm are often similar, if not identical. As has been touched upon, the difference lies in the prospective respectively retrospective natures of the two different regimes. Antitrust investigations are typically concerned with the actual infringements of competition law while merger investigations consider the future potential harm to competition. However, both prospective and retrospective analyses are necessary in both areas of competition enforcement. For antitrust infringements, remedies should not only cure the current or past unlawful conduct, but also prevent future unlawful conduct.[144] For merger

[141] EUMR, Articles 6(2) and 8(2).
[142] Regulation No 1/2003, Articles 7 and 9.
[143] Lörtscher & Maier-Rigaud (2020), p. 28.
[144] Ibid.

control, the remedies assessment require identifying and evaluating existing resources such as competencies, know-how, assets and personnel.[145]

That being said, measures applied to remedy concerns in merger control and antitrust cases vary substantially. Most notable is that in the Commission's decisional practice, there is a predominance of structural remedies in merger investigations, whereas antitrust cases mostly rely on behavioural remedies.[146]

Structural remedies seek to directly influence the competitive structure of the relevant market in order to improve or maintain conditions for competition.[147] This is mainly done by modifying the allocation of property rights and creating new firms through divestitures of entire ongoing businesses or partial divestitures.[148] *Behavioural remedies* seek to address the identified competition concerns by requiring certain conduct from the undertakings concerned. Also the requirement to refrain from certain conduct is covered by behavioural remedies.[149] Behavioural remedies consist mainly of commitments aimed at guaranteeing that competitors enjoy a level playing field in the purchase or use of some key assets, inputs, or technologies that are owned by the merging parties. Therefore, this situation mainly arises when the merged entity is vertically integrated.[150] Examples of behavioural remedies that have been accepted include refraining from limiting capacity of certain infrastructure available to competitors,[151], enabling customers to switch,[152] capping prices,[153] and introducing a new pricing system[154].

3.2 Merger control remedies

3.2.1 Procedure

The majority of the mergers and acquisitions notified to the Commission are cleared unconditionally and prohibitions are rare.[155] If the Commission initially identifies competition concerns, the parties may submit commitments, i.e. remedies, with a view to rendering the concentration compatible with the internal market. If the concentration, as modified, would not significantly impede effective competition in the internal market, the Commission should clear the concentration.[156] The Commission may, to that end, attach

[145] Motta et al. (2007), p. 628.
[146] Lörtscher & Maier-Rigaud (2020), p. 28.
[147] Lörtscher & Maier-Rigaud (2020), p. 30.
[148] Motta et al. (2007), p. 606.
[149] Lörtscher & Maier-Rigaud (2020), p. 30 et seq.
[150] Motta et al. (2007), p. 619.
[151] Case AT.39316 *Gaz de France.*
[152] Case AT.39654 *Reuters Instrument Codes.*
[153] Case AT.39398 *Visa MIF.*
[154] Case AT.39678 & 39731 *Deutche Bahn I & II.*
[155] Whish & Bailey (2021), p. 932.
[156] EUMR, Article 6(2) and Article 8(2).

obligations and conditions to its decision to ensure that the undertakings concerned will comply with the commitments.[157] If the competition problem is readily identifiable and can be easily remedied, the Commission may also accept remedies before the initiation of proceedings.[158] If the remedies are accepted by the Commission, they will be implemented after the Commission has cleared the transaction.[159]

The Commission is bound by the remedies offered by the parties and cannot unilaterally impose conditions for the clearance of a merger.[160] In order to allow the parties to propose appropriate and corresponding remedies, the Commission has the responsibility to first show that the concentration would significantly impede competition and then communicate these competition concerns to the parties.[161] The Commission may conclude that the remedies proposed by the parties are not enough to remove the competition concerns and declare the modified concentration incompatible with the internal market.[162] The central question is if the concentration leads to a significant impediment of effective competition.[163]

Failure to comply with the conditions and obligations attached to the Commission's decision to clear a merger may lead to several consequences. The Commission can order an implemented merger to be dissolved, take interim measures to restore or maintain conditions of effective competition or revoke the decision to accept the merger.[164] In addition, fines of up to 10 % of the aggregate turnover of the undertakings concerned can be imposed in the event of failure to comply with a condition or obligation attached to the Commission's decision.[165]

Implemented divestitures do not require any monitoring measures. However, other remedies may require effective monitoring mechanisms to ensure that their effect is not eliminated or reduced by the parties. Without monitoring mechanisms, remedies in the form of commitments would simply be considered declarations of intention by the parties, and not as binding obligations. This is because a lack of effective monitoring mechanisms would mean that

[157] Commission Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, hereinafter Notice on Remedies, para. 1.

[158] EUMR, Recital 30.

[159] Kokkoris & Shelanski (2014), p. 517.

[160] Case T-210/01 *General Electrics v Commission*, para. 52; Case T-87/05 *EDP v Commission*, para. 105.

[161] Notice on Remedies, para. 6.

[162] Case T-210/01 *General Electrics v Commission*, paras. 555 and 612.

[163] Kokkoris & Shelanski (2014), p. 517.

[164] EUMR, Recital 31.

[165] EUMR, Article 14(2).

any breach of the commitments could not result in the revocation of the decision according to the EUMR.[166]

3.2.2 Substantive analysis

It is up to the Commission to asses if the proposed remedies, once implemented, would eliminate the competition concerns identified. However, it is only the parties that have the relevant information necessary for such an assessment, particularly as to the feasibility of the commitments proposed and the viability and competitiveness of the assets proposed to be divested. To that end, the parties have to describe in detail, in particular, how the business to be divested is currently operated. With this information the Commission can assess the viability, competitiveness and marketability of the business in question by comparing its current operations to the proposed scope of the business according to the commitments.[167] In the assessment of whether the proposed commitments would eliminate the competition concerns identified, the Commission will consider all relevant factors relating to the proposed remedy itself. This includes for example, the type, scale and scope of the remedy proposed, analysed by reference to the structure and characteristics of the market in which the competition concerns arise. This assessment includes the position of the parties and other players on the market.[168]

The divested activities must consist of a viable business that can compete effectively with the merged entity on a lasting basis. This may also concern activities which are not related to markets where the Commission has identified competition concerns, if this is required to create an effective competitor in the affected markets.[169] Divestitures may also be used in order to remove links between the parties and competitors, when these links contribute to the competition concerns raised by the transaction. This includes the divestiture of minority shareholdings in joint ventures operated together with a major competitor or minority shareholdings in the competitors themselves.[170]

The prospective nature of the merger analysis requires the consideration of multiple factors also in relation to remedies, such as the probability of compliance, the cost of remedial action, the short term or long-term impact of the remedy, the risk of strategic conduct of the merging parties as well as the choice of appropriate monitoring and compliance mechanisms on a regular future basis.[171]

[166] Case T-177/04, *easyJet v Commission*, para. 186.
[167] Notice on Remedies, para. 7.
[168] Notice on Remedies, para. 12.
[169] Notice on Remedies, para. 23.
[170] Notice on Remedies, para. 58.
[171] Kokkoris & Shelanski (2014), p. 515.

The commitments should be proportionate to the competition problem and entirely eliminate it,[172] as well as capable of being implemented effectively within a short period of time.[173] Furthermore the commitments have to be comprehensive and effective from all points of view.[174] If the proposed remedies are so extensive and complex so that the Commission is not able to determine if they would likely maintain effective competition in the market, the Commission cannot clear the concentration.[175] Structural remedies and in particular divestitures, will meet these conditions only in so far as the Commission is able to conclude with the requisite degree of certainty that it will be possible to implement them and that it will be likely that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise.[176]

3.2.3 Remedying M&A transactions below the EUMR jurisdictional thresholds

Remedies for mergers and acquisitions below the EUMR jurisdictional thresholds that have been referred to the Commission pursuant to Article 22 of the EUMR are not regulated separately from remedies under the EUMR in general, as has been described in the above. Neither does the Commission Guidance on Article 22, nor the Commission's FAQ document accompanying the Guidance on Article 22,[177] make any mention of how remedies are supposed to be addressed.

Since the introduction of the Commission Guidance on Article 22, the only and very limited experience on how remedies are to be addressed for these cases can be drawn from the first case referred to the Commission under the new Guidance on Article 22 to be litigated - the Illumina/GRAIL case. In these types of decisions detailed information about the transaction process or structure is not provided to the public due to it concerning commercially sensitive information. However, it has been made public that Illumina had proposed behavioural remedies, including e.g. licensing some of Illumina's NGS patents, a commitment to stop patent lawsuits and a commitment to conclude agreements with GRAIL's rivals under a standard contract. The Commission found that the remedies offered by Illumina did not adequately address the Commission's competition concerns and that it could not be concluded that competition would be preserved on a lasting basis. The Commission found

[172] EUMR, Recital 30.

[173] Notice on Remedies, para. 9.

[174] Case T-210/01 *General Electrics v Commission*, para. 52; Case T-87/05 *EDP v Commission*, para 105.

[175] Notice on Remedies, para 14; examples of such inappropriate remedies in Case T-87/05 *EDP v Commission*, para. 102; Case COMP/M.1672 – *Volvo/Scania* of 15 March 2000.

[176] Case T-210/01 *General Electrics v Commission* ECR II-5575, paras. 555 and 612.

[177] Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases".

that the remedies did not fully remove Illumina's ability or incentives to foreclose GRAIL's rivals, and thus that the remedies would not have prevented the transaction's detrimental effects on competition.[178]

Even though there has not been made any recent changes to the jurisdictional aspects of reviewing non-controlling minority shareholdings this is still of interest. When discussing how the Commission Guidance on Article 22 and the Towercast case have affected the EU competition law treatment of mergers and acquisitions below the EUMR jurisdictional thresholds, the current treatment of non-controlling minority share acquisitions that in themselves are non-reportable provides a point of reference and comparison. The Commission has intervened in these types of cases a significant number of times, and many times authorised them on the basis of remedies entailing a divestiture of such pre-existing minority shareholdings.[179]

3.3 Antitrust remedies

3.3.1 Procedure

For the purpose of applying Article 102 in individual cases NCAs may, when acting on a complaint or on its own initiative, make decisions requiring the termination of an infringement, ordering interim measures, accepting commitments and imposing fines.[180] Even though there is a high degree of convergence between domestic and EU competition law, the possibility remains that there could be differences depending on which system of law that is applied.[181] In relation to Article 102, the Member States are not precluded from adopting and applying stricter national competition laws which prohibit or impose sanctions on unilateral conduct within their national territory.[182] The different Member States' national competition law is outside the scope of this thesis. However, the Towercast case concerns the application of Article 102 TFEU by NCAs. EU law takes precedence over national law, so when clashes occur it is EU law that is to be applied.[183] In cases where NCAs are applying EU competition law, such as Article 102 which has direct effect in the Member States, NCAs must disapply national law.[184]

The Commission may, when acting on a complaint or on its own initiative, make decisions requiring the termination of an infringement. The Commission is also able to impose structural or behavioural remedies on the

[178] Press release, *Commission prohibits acquisition of GRAIL by Illumina*, 6 September 2022.
[179] See e.g. COMP/M.3653 *Siemens/VA Tech* and COMP/M.5405 *IPIC/ MAN Ferrostaal.*
[180] Regulation No 1/2003, Article 5.
[181] Whish & Bailey (2021), p. 77 et seq.
[182] Regulation No 1/2003, Recital 8.
[183] Case 6/64, *Flaminio Costa v ENEL,* Judgment of 15 July 1964.
[184] Whish & Bailey (2021), p. 77.

undertakings, which are proportionate to the infringement and necessary to bring the infringement to an end.[185]

In order to avoid the need to adopt a decision requiring an infringement be brought to an end, the Commission can accept remedies offered by the parties in a preliminary assessment. The Commission can decide to make such remedies binding. Such a decision may be adopted for a specified period.[186] The CJEU has noted that this provides an effective and rapid application of competition law which enables undertakings to participate fully in the procedure, by putting forward the solutions which to them appear the most appropriate and capable of addressing the Commission's concerns.[187]

3.3.2 Substantive analysis

The central objective of any remedy for abusive conduct under Article 102 is to terminate the infringement. Similarly to remedies in merger control, the antitrust remedies fall broadly into two types – structural and behavioural. Behavioural remedies require the dominant undertaking to act or refrain from acting in a certain way. Structural remedies do not involve commitments of specific future conduct but instead involve permanent changes to the structure of the dominant undertaking, such as an obligation to divest or a requirement to split up the firm into independent units. By nature, abuses of dominance tend to be based on conduct by the dominant firm. Therefore it might not be surprising that behavioural remedies are by far the most common. In cases of infringements of Article 102 structural remedies have been extremely rare.[188] Behavioural remedies are usually designed to mirror the abuse. For example, anticompetitive tying would be addressed with a commitment to untie and a refusal to supply would be remedied with a commitment to supply.[189]

In antitrust cases, structural remedies are changes to the structure of the undertaking as it existed before the infringement was committed.[190] Such changes can range from completely breaking up, dissolving or divesting a particular unit to less intrusive measures such as accounting separation. Important to note here is that structural remedies are not meant to alter an otherwise lawful market structure, but solely appropriate as a remedy for abusive conduct. By modifying the dominant firm's market position, structural remedies are intended to permanently diminish or remove the dominant firm's incentive to violate Article 102 and thus reduce the likelihood of repeat infringements. In such scenarios, behavioural remedies may be insufficient to restore the market to the competitive structure that existed before the

[185] Regulation No 1/2003, Article 7(1).
[186] Regulation No 1/2003, Article 9(1).
[187] Case C-441/07 P *Commission v Alrosa*, para. 35.
[188] O'Donoghue QC & Padilla (2020), p. 1126 et seq.
[189] Hellström et al. (2009), p. 58.
[190] Regulation No 1/2003, Recital 12.

anticompetitive conduct, since abusive conduct may have irreversible market consequences.[191]

3.3.3 Remedying M&A transactions reviewed pursuant to Article 102

Remedies for mergers and acquisitions below the EUMR jurisdictional thresholds that are reviewed pursuant to Article 102 TFEU are not separately regulated from remedies under Article 102 in general, as has been described in the above.

AG Kokott makes a statement on the matter in her Opinion in the Towercast case, writing that '(…) contrary to the fears expressed by some of the parties to the proceedings – in view of the primacy of behavioural remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration, but rather only the imposition of a fine.'[192] Practitioners have commented that this statement is confounding. If the abusive conduct in question consists of the acquisition itself, there is doubt on whether a fine would remedy what would be an ongoing abuse. In these cases structural remedies, as opposed to a fine, would for all intents and purposes be necessary to bring the infringement effectively to an end.[193] However, since the CJEU did not comment on the aspect of remedies, AG Kokott's statement is currently the only official source material on how M&A transactions reviewed pursuant to Article 102 are supposed to be remedied. This will be further elaborated on in chapter four.

As regards non-controlling minority shareholdings, remedies were not dealt with in the Gillette case and the Commission simply ordered that the infringement should be brought to an end by disposing of the minority shareholding.[194]

[191] O'Donoghue QC, R. & Padilla, J. (2020), p. 1197 et seq.
[192] Opinion of AG Kokott in Case 449/21 (Towercast), para. 63.
[193] Henry (2023), p. 28.
[194] Case No IV/33.440, *Warner-Lambert/Gillette and others.*

4 Balancing effectiveness in removing competitive harm and proportionality

In chapter three, the overarching frameworks, procedures and substantive assessments of remedying mergers and acquisitions below the EUMR jurisdictional thresholds was described. This chapter will take a more in depth look at how two of the primary aspects of remedies – effectiveness in removing the competitive harm and proportionality – are balanced when remedying mergers and acquisitions under the legal frameworks of merger control and antitrust respectively.

4.1 Remedy effectiveness

4.1.1 Merger control - primacy for structural remedies

Effectiveness in removing the competitive harmfulness is central in any remedial action. Within the merger control framework, the Commission considers divestitures to be the benchmark for other remedies in terms of effectiveness and efficiency.[195] The merger control system is closely connected to queries of the structure of the market, since the provisions of the EUMR apply to significant structural changes.[196] Furthermore, the basic aim of remedies in merger control is to ensure competitive market structures.[197] Accordingly, the Commission considers structural remedies, such as commitments to sell a business unit, to be preferable. Structural remedies generally durably prevent the competition concerns raised by the notified merger and do not require extensive monitoring measures. However, it cannot be automatically ruled out that other types of remedies may also be capable of preventing significant impediment of effective competition.[198] Which type of remedy, structural or behavioural, that is suitable to eliminate the competition concerns identified has to be assessed on a case-by-case basis.[199]

Divestitures are considered best suited to eliminate competition concerns resulting from horizontal overlaps, and they may also be best suited for problems resulting from vertical or conglomerate concerns. However, other structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects. Only exceptionally, in very specific circumstances, can commitments relating to the future behaviour of the merged entity be acceptable. Behavioural remedies in the form of undertakings committing not to raise prices, to reduce product ranges or to remove brands will in general not be sufficient to eliminate competition

[195] Notice on Remedies, para. 61.

[196] EUMR, Recital 8.

[197] Case T-102/96 *Gencor v Commission*, para. 316; Case C-12/03 P *Commission v Tetra Laval*, para. 86; Case T-158/00 *ARD v Commission*, paras. 192 et seq.

[198] Notice on Remedies, para. 15.

[199] Notice on Remedies, para. 16.

concerns resulting from horizontal overlaps. Therefore they can only be accepted if their workability is fully ensured by effective implementation and monitoring as well as not risking to cause distorting effects on competition.[200]

However, it should be noted that structural remedies can also be more risky, from a competition authority's point of view that is, as structural remedies are irreversible. In particular if the wrong buyer is chosen. If for example, the buyer chosen for acquiring the asset divested is not viable or competitive enough, or ends up colluding with the merged firm, the resulting competitive damage cannot be undone.[201]

4.1.2 Antitrust - primacy for behavioural remedies

In antitrust cases structural remedies can only be imposed when there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.[202] There are three cumulative conditions that must be met before structural remedies may be imposed – that behavioural remedies are insufficient, that the structural remedies are effective and that the structural remedies are proportionate.[203] The imposition of a structural remedy is only considered proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.[204] Remedies are not appropriate in cases where the Commission intends to impose a fine.[205]

As was discussed in section 3.3.3, AG Kokott, deemed the imposition of a fine the most realistic repercussion for non-reportable transactions by a dominant firm due to the primacy for behavioural remedies and the principle of proportionality.[206] However, structural remedies may remain as a real possibility.[207] According to O'Donoghue and Padilla, notably before the Towercast ruling, the rule established in Continental Can, that where the identified abuse is a structural transaction, Article 102 allows the imposition of structural remedies – seems uncontroversial today.[208]

Even if a structural remedy such as a dissolution or divestment could be appropriate, this does not come without its challenges. Article 102 investigations take time, and by the time the Commission or NCA have detected and completed their investigation, the target company may already have become so subsumed into the acquirer's business or so dependent on the acquirer that

[200] Notice on Remedies, para. 17.
[201] Motta et al. (2007), p. 606.
[202] Regulation No 1/2003, Article 7(1).
[203] O'Donoghue QC & Padilla (2020), p. 1199 et seq.
[204] Regulation No 1/2003, Recital 12.
[205] Regulation No 1/2003, Recital 13.
[206] Opinion of AG Kokott in Case 449/21 (Towercast), para. 63.
[207] Henry (2023), p. 4.
[208] O'Donoghue QC & Padilla (2020), p. 1198.

a divestment may not recreate the competitive constraint that the target could have exercised but for the acquisition.[209] Importantly, AG Kokott's statement on the primacy for behavioural remedies is not dealt with by the CJEU in their subsequent ruling, confirming the Opinion.

Hence there are two different primacies here, a primacy for structural remedies in merger control and a primacy for behavioural remedies in antitrust. Maier-Rigaud and Lörtscher argue that this is an inconsistent approach from the Commission to remedy mergers and acquisitions that raises questions regarding the analytical framework of the Commission's decisions and the factors behind its remedial practice.[210] Furthermore, they make the argument that these inconsistencies raises the question whether the theory underlying the Commission's merger remedies practice or the theory underlying the Commission's antitrust remedies practice is flawed.[211]

4.2 Remedy proportionality

This section will initially briefly lay the theoretical foundation for the proportionality discussion by describing the principle of proportionality as a general principle of EU law. This also seems appropriate since this is what Kokott seems to be referring to in her Opinion in the Towercast case. Then proportionality, as provided by the specific provisions on remedies, will be described.

4.2.1 The principle of proportionality in general

The principle of proportionality is one of the constitutional principles that set limits on when and how the EU can use its enforcement powers. It was the CJEU that introduced the principle, by drawing upon the legal traditions of the Member States,[212] and today proportionality is well established as a general principle. The principle of proportionality can not only be used to challenge EU action, but also be used against national measures which fall within the EU law scope.[213]

The principle of proportionality stipulates that the content and form of Union action shall not go beyond what is necessary to achieve the objectives being sought.[214] The CJEU has laid down that measures adopted by EU institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.[215] To fulfil the principle of proportionality the

[209] Lübbing, et al., *Expanding the merger control toolkit – Is this the end of non-reportable M&A for firms that are deemed dominant*, Freshfields Bruckhaus Deringer, accessed on 8 May 2023.
[210] Maier-Rigaud & Lörtscher (2019), p. 2.
[211] Ibid, p. 19.
[212] Case 11/70 *Internationale Handelsgesellschaft*, paras. 14-16.
[213] Craig & De Búrca (2020), p. 583.
[214] TEU, Article 5(3) and 5(4).
[215] Case T-65/98, *Van den Bergh Foods v Commission*, para. 201.

exercise of the Union's powers under the Treaties, legislative action and other measures used by the Union institutions to achieve a given objective, must not be more burdensome or more extensive than necessary to achieve said objective.[216]

Applying the principle of proportionality is a balancing operation between means and ends and hence any proportionality inquiry requires the relevant interests to be identified and ascribed weight and value. Normally, there are three stages in a proportionality assessment. First, whether the measure was suitable to achieve the desired end. Second, whether it was necessary to achieve the desired end. And third, whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved, also referred to as proportionality in the narrow sense. The latter is in reality considered when the applicant specifically addresses an argument concerning this stage of the inquiry. Otherwise this may not be a part of the proportionality assessment.[217]

If there is a choice between different effective measures, such as sanctions, the less burdensome for the parties concerned should be chosen. The CJEU have in several cases considered whether there were less restrictive means that would have been equally effective, and the measures imposed hence being unproportionate.[218]

The principle of proportionality has several different functions. The most common proportionality queries are where the individual argues that the policy choice made by the administration is disproportionate. The judiciary is careful in these types of cases since the courts should not overturn policy choices merely because there might have been a different and better way of doing things. Proportionality is applied less intensively in such cases as in other proportionality queries, and the policy choice will only be overturned if it is manifestly disproportionate. Another for this thesis relevant category of proportionality queries are where the claim is that a penalty imposed is excessive. In these cases the courts are reasonably searching, since penalties can infringe on personal liberties and can generally be struck down without undermining the relevant administrative policy.[219]

For EU competition law remedies, proportionality assessments are hence of interest on the on hand in relation to the relevant provisions regulating

[216] Schütze (2021), p. 365 et seq.

[217] Craig & De Búrca (2020), p. 583.

[218] Case 11/70 *Internationale Handelsgesellschaft*; Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and others* and *Helga Neumann-Seiwert v Saarland and Ministerium für Justiz, Gesundheit und Soziales*.

[219] Whish & Bailey (2021), p. 584 et seq.

remedies being proportionate, and on the other hand in relation to the enforcement of said provisions, i.e. the decisions on the remedies, being proportionate.

4.2.2 Proportionate EU competition law remedies

As mentioned in section 3.2, the EUMR explicitly states that that commitments accepted by the Commission should be proportionate to the competition problem and entirely eliminate it.[220] The EUMR also makes a general reference to proportionality by stating that, in accordance with the principle of proportionality, the Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted.[221] This reflects the two categories of proportionality queries relevant in this context, in relation to the regulatory provisions and in relation to the remedies themselves.

The proportionality of merger control remedies has been considered by the Commission in several cases, where the Commission in practice has assessed that the remedies have not gone beyond what is necessary to create the adequate conditions for competition.[222] For example in the ARA Foreclosure decision, the Commission's stated on its decision to impose a structural remedy that 'No other less burdensome measures can be conceived that would equally effectively remove ARA's remaining possibility to refuse shared use to the part of the household collection infrastructure it owns and ensure access to it.'[223]

Under antitrust rules the Commission is empowered to impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.[224] NCAs may impose any structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.[225] Structural remedies can only be imposed when there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.[226] Furthermore, the imposition of a structural remedy is only considered proportionate where there is a substantial risk of a lasting or

[220] EUMR, Recital 30.

[221] EUMR, Recital 6.

[222] Case No. IV/M.877, *Boeing/McDonnell Douglas*; Case COMP/M.2876, *NewsCorp/Telepiu*; Case COMP/M. 3770, *Lufthansa/Swiss*.

[223] Case AT.39759 – *ARA Foreclosure,* para. 147.

[224] Regulation No 1/2003, Article 7.

[225] Article 10, Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, (2019) OJ L 11/3.

[226] Regulation No 1/2003, Article 7(1).

repeated infringement that derives from the very structure of the undertaking.[227] Additionally, Article 102 must be interpreted in light of the general principles of EU law, such as proportionality.[228]

Also in the case of the undertakings concerned offering commitments, in contrast to the Commission imposing them, there is a requirement of proportionality. The CJEU has stated that although Article 9 of Regulation 1/2003 '(…) does not expressly refer to proportionality, the principle of proportionality, as a general principle of European Union law, is nonetheless a criterion for the lawfulness of any act of the institutions of the Union, including decisions taken by the Commission in its capacity of competition authority.'[229] In addition the CJEU has stated that the application of the principle of proportionality when considering a remedy offered by the undertakings in the context of infringement of antitrust rules '(…) is confined to verifying that the commitments in question address the concerns it expressed to the undertakings concerned and that they have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must, however, take into consideration the interests of third parties.'[230]

[227] Regulation No 1/2003, Recital 12.
[228] O'Donoghue QC & Padilla (2020), p. 41.
[229] Case C-441/07 P *Commission v Alrosa*, para. 36.
[230] Case C-441/07 P *Commission v Alrosa*, para. 41.

5 Discussion

The first and second detailed research questions are of a descriptive nature and have been answered through the investigation in chapters 2 and 3. But in order to put the discussion in context, the findings on the jurisdictional scope of the review, which M&A transactions it entails and how they are remedied will be summarized. This chapter will subsequently focus on the third and fourth research sub-questions – how effectiveness in removing competitive harm and proportionality are balanced, and whether EU competition law remedies mergers and acquisitions below the EUMR jurisdictional thresholds coherently and equivalently. This will comprise the normative analysis of the thesis.

5.1 Reviewing and remedying mergers and acquisitions below the EUMR jurisdictional thresholds

5.1.1 Establishing jurisdiction over non-reportable M&A transactions

The investigation has shown that EU competition law provides three main legal mechanisms to establish jurisdiction over M&A transactions below the EUMR jurisdictional thresholds. First, NCAs have the possibility to refer cases below the turnover thresholds, focusing on concentrations in innovative sectors such as digital and pharmaceutical markets, to the Commission pursuant to Article 22 of the EUMR. Second, mergers and acquisitions conducted by dominant companies that do not meet neither the turnover thresholds nor the threshold of control, can be reviewed pursuant to Article 102. Third, the Commission can take pre-existing minority shareholdings into account in the context of a notified merger where the Commission is competent to analyse a separate acquisition of control, and in that way establish indirect jurisdiction of the non-controlling minority share acquisition.

It should be noted that there are still some uncertainties in how jurisdiction is established over these M&A transactions. For referrals pursuant to Article 22, the decision by the Commission to accept the referral was upheld by the General Court, but that decision has been appealed as for whether the Commission can review cases where the referring NCA does not have jurisdiction to review the transaction in the first place. In regard to the residual role of Article 102 in merger control, AG Kokott made clear that an M&A transaction that have been cleared under merger control rules could not be found to be an abuse of dominance unless the dominant firm engaged in abusive conduct beyond the transaction itself. However, this is not made clear by the CJEU in its subsequent judgment. Practitioners who have commented on the case

consider it highly unlikely that mergers and acquisitions that have been cleared under merger control rules would be challenged pursuant to Article 102.

According to the, albeit old, case law by the CJEU, abuse of a dominant position as pertains to minority shareholdings can only arise where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy. The Commission has only on one occasion sought to apply Article 102 to an acquisition of a minority interest, which was in the Gillette case over 30 years ago. In this case the Commission held that the minority shareholding in the competitor would result in at least some influence on commercial policy. Plausibly, this is not the case for all acquisitions of minority interests and thus not all non-controlling minority shareholdings fall within this scope.

M&A transactions referred to the Commission pursuant to Article 22 of the EUMR and pre-existing non-controlling minority shareholdings reviewed as part of a separate notified concentration are both reviewed under the legal framework of merger control. However, these situations are somewhat different since the non-controlling minority shareholdings is not the transaction explicitly under review. It is part of the assessment of the competitive harm, but in relation to the notified concentration. On the other hand, acquisitions by dominant companies that do not meet the turnover thresholds and non-controlling minority shareholdings reviewed pursuant to Article 102 will be remedied under the antitrust framework.

Once jurisdiction has been established, a potentially problematic M&A transaction will either be remedied pursuant to what is prescribed for merger control remedies or antitrust remedies, dependent on which rule was used to establish jurisdiction. Neither of the legal frameworks provide provisions or guidance specifically for how mergers and acquisitions below the jurisdictional thresholds are to be remedied.

5.1.2 Assessments under merger control and antitrust rules – two different legal frameworks

As shown by the investigation, and which will be elaborated on below, there are several differences between remedying mergers and acquisitions under the merger control framework compared to the antitrust framework. The regimes have somewhat different scopes, procedures and substantive assessments. For example, antitrust investigations are typically concerned with the actual infringements of competition law while merger investigations consider the future potential harm to competition.

As regards remedies, the perhaps most obvious difference is that in a merger control context the Commission are bound by the remedies proposed by the parties and cannot unilaterally impose conditions for the clearance of a

merger, whereas in an antitrust context, the Commission has the power to impose remedies on the parties. That being said, the Commission can also accept commitments offered by the parties in a preliminary assessment under Article 102, which allows the parties to put forward the solutions which to them appear the most appropriate and capable of addressing the Commission's concerns.

An important aspect of the EU competition law treatment of mergers and acquisitions below the EUMR jurisdictional thresholds is when the review of these transactions can take place, ex ante or ex post. For referrals under Article 22 EUMR, the fact that a transaction has been closed does not preclude a Member State from referring a case, thus allowing the Commission to make both ex ante and ex post reviews. However, the Commission has made clear that the time expired after the implementation will be considered by the Commission when deciding whether or not to accept the referral and the Commission will generally not accept a referral if more than six months has passed since the closing of the transaction. In regard to the residual role of Article 102 the CJEU did not lay down any limit of the temporal applicability in the Towercast case. The CJEU simply declared that although the EUMR introduces an ex ante control for concentrations with a Union dimension, it does not preclude an ex post control of concentrations that do not meet that threshold.

At the same time, there are also similarities between the two regimes. In both antitrust and merger investigations, the underlying theories of harm are often similar. The study has shown that there is a strong focus on competitive market structures, and the market power of the undertakings concerned. The main purpose of merger control is not to prevent future abuses but to maintain competitive market structures to create better outcomes for consumers. For example by attempting to avoid the creation or strengthening of dominant positions. Accordingly, the basic aim of remedies in merger control is to ensure competitive market structures. As for the residual role of Article 102 in merger control, the CJEU has in the Towercast case reaffirmed that an acquisition in itself can constitute an abuse of a dominant position. Where the acquisition strengthens the dominant position in such a way that the degree of dominance substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depend on the dominant company, it constitutes an Article 102 infringement. The competition concerns that arise when a non-controlling minority shareholding is acquired are based on similar theories of harm as those for acquisitions of control. The competitive harmfulness is generally that the transaction may significantly increase market power.

5.2 Balancing effectiveness in removing competitive harm and proportionality

5.2.1 Remedy effectiveness

Both under the merger control and antitrust legal frameworks, effectiveness in removing the competitive harmfulness is central. However, the investigation has shown that the primacies for different types of remedies under the legal frameworks of merger control and antitrust lead to two different considerations of what is generally deemed effective.

The EUMR provides that remedies should entirely eliminate the competition problem and be effective and comprehensive from all points of view. The study has shown that under the merger control legal framework there is a primacy for structural remedies and the Commission considers divestitures to be the benchmark for other remedies in terms of effectiveness. That being said, behavioural remedies cannot automatically be ruled out as ineffective, and the decisions are made on a case-by-case basis. But only exceptionally, under very specific circumstances, can behavioural remedies be acceptable, since they are generally considered to not be effective in removing competitive harm.

As for the practical experience of remedying mergers and acquisitions below the EUMR jurisdictional thresholds, the very limited experience provided by the Illumina/GRAIL case is in line with the primacy for structural remedies. It is of course difficult to draw any conclusions from one case, but it can still be noted that the proposed behavioural remedies by Illumina were not sufficiently effective for the Commission.

As for the Commission establishing indirect jurisdiction taking pre-existing minority shareholdings into account in the context of a separate, notified merger, the Commission has intervened several times in such cases. Many times the notified concentration has been authorised on the basis of remedies entailing a divestiture of a pre-existing minority shareholding. Hence, it would seem like the Commission stick to their preference for structural remedies also in regard to the competitive harm of non-controlling minority shareholdings reviewed under merger control rules.

Moving on to the effectiveness of remedies in antitrust cases, the central objective of any remedy for abusive conduct under Article 102 is to terminate the infringement. The Commission can impose structural or behavioural remedies on the undertakings which are necessary to bring the infringement to an end, just as in merger control. However, contrarily to the merger control framework, the investigation has shown that under the antitrust legal framework there is a primacy for behavioural remedies. Structural remedies can only be imposed when there is no equally effective behavioural remedy.

Behavioural remedies are by far the most common, and structural remedies are extremely rare.

Based on this primacy, and the principle of proportionality, which will be addressed below, AG Kokott states in her Opinion in the Towercast case that there is not usually a threat of subsequent dissolution of the concentration. This statement is not dealt with by the CJEU in their subsequent ruling, confirming the Opinion, making Kokott's words the only official source material on this matter. However, the relevance of structural remedies might not be so easily dismissed and it can be questioned whether Kokott's solution would be effective in removing the competitive harm. Because contrary to AG Kokott, scholars such as O'Donoghue and Padilla argue, notably before the Towercast case, that it is uncontroversial that Article 102 allows imposition of structural remedies where the identified abuse is a structural transaction. This because in cases of the abusive conduct resulting in irreversible market consequences, behavioural remedies may be insufficient to restore the market to the competitive structure that existed before the anticompetitive conduct. After the judgment in the Towercast case, practitioners have tended to agree with this line of argumentation, and have commented that if the abusive conduct in question consists of the acquisition itself, structural remedies would probably be necessary to bring the infringement effectively to an end.

Practitioners have also commented that even if a structural remedy could be appropriate this does not come without its problems. Due to the lengthy Article 102 investigations the target company may already have become so subsumed into the acquirer's business or so dependent on the acquirer that a divestment may not recreate the competitive constraint that the target could have exercised were it not for the acquisition. This seems to suggest that structural remedies would not be effective in these situations, due to the ex post nature of the residual role of Article 102 in merger control.

The Commission has only on one occasion, the Gillette case, utilised Article 102 to intervene against a minority shareholdings and it is therefore difficult to draw any conclusions. In Gillette the Commission simply ordered that the infringement should be brought to an end by disposing of the minority shareholding. It should be noted, however, that the imposed measure was structural.

5.2.2 Remedy proportionality

The investigation has shown that also proportionality is an inherent part of the remedy assessments under both the merger control and antitrust legal frameworks.

As for case referrals pursuant to Article 22 EUMR the matter of proportionality seems quite clear. Behavioural remedies are generally considered ineffective and since the concentration has not been implemented yet and it is up

to the parties to propose the remedies, the undertakings concerned have many options at hand. However, under Article 22 EUMR also already implemented concentrations can be referred and accepted by the Commission for review, up to six months after the implementation. But as the study has shown, there are no specific provisions for whether the proportionality would be considered differently in an ex post review. The same applies for the ex post review of non-controlling minority shareholdings, as this is also within the legal framework of merger control.

In antitrust infringements on the other hand, the Commission can unilaterally impose structural or behavioural remedies on the undertakings concerned. These remedies also have to be proportionate to the infringement at hand. Structural remedies can only be imposed where any equally effective behavioural remedy would be more burdensome. The imposition of a structural remedy in antitrust cases is only considered proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking.

As has been described, there is no temporal time limit provided by the Towercast case. The same is true for non-controlling minority shareholdings reviewed under Article 102. For these cases, the time passed since the implementation of the transactions is not integrated as an aspect of the proportionality assessment. Neither is how dependent the target company and acquiring company may have become on one another.

The CJEU has stated that also in when the parties propose remedies in antitrust infringement cases, proportionality has to be assessed, even though it is not explicitly provided by Regulation 1/2003. The CJEU has laid down that in such cases the application of the principle of proportionality is confined to verifying that the undertakings concerned have not offered less burdensome remedies that would also have addressed the competition concerns adequately. In my opinion it makes sense that in cases where the parties themselves have proposed the remedies, it is not up to the Commission to assess their adherence to the principle of proportionality. Reasonably the parties would not propose unproportionate commitments to be imposed on themselves. However, in cases where the Commission imposes remedies on the undertakings concerned it must be up to the Commission to consider the principle of proportionality.

The principle of proportionality stipulates that the content and form of Union action shall not go beyond what is necessary to achieve the objectives being sought. If the remedy is necessary to achieve the desired end and the measure did not impose a burden excessive in relation to the objective being sought, the principle of proportionality is fulfilled. EU competition law, both in respect to the merger control and antitrust frameworks, currently provides that the remedy should be proportionate to the competition concern or

infringement in question. Hence remedy effectiveness is central, since if the competition problem so requires and the remedy is proportionate to the competition concern, any remedy necessary - structural or behavioural - can be imposed under both legal frameworks.

In light of this it is unclear to me what AG Kokott intended with referencing the principle of proportionality as an argument against structural remedies being imposed when remedying anticompetitive mergers and acquisitions under the Article 102 framework. What it seems to suggest is that structural remedies would be unproportionate. In my opinion this would be a valid argument. I could see proportionality concerns arise from non-reportable transactions that have already been implemented being imposed by the Commission to be structurally remedied without a temporal limit. However, as has been described in the above, it is not made clear by EU competition law which weight aspects such as the review being ex post, the time transpired since the implementation or the companies' integration should be given in a proportionality assessment.

5.3 A coherent and equivalent EU competition law treatment in regard to remedies?

By bridging the enforcement gaps pursuant to different legal mechanisms and regulations, mergers and acquisitions below the EUMR jurisdictional thresholds are now remedied under two different legal frameworks. I argue that this poses a risk of leading to incoherent and inequivalent remedies.

There are questions as to how EU competition law balances effectiveness in removing competitive harm and proportionality. Within the context of an ex ante merger control assessment it is more understandable that balancing effectiveness and proportionality is so scarcely described by the relevant provisions. There simply is usually not a problem.

For the ex post review pursuant to Article 102 there is a primacy for behavioural remedies. But if this is due to behavioural remedies being considered more proportionate to the competition problem in an ex post review, then that should go for non-controlling minority shareholdings reviewed under merger control and referrals pursuant to Article 22 as well, which it does not. In addition, since the competition problems we are discussing in this context are of a structural nature it is on the other hand questionable whether behavioural remedies would be effective at all.

The different primacies create an inherent problem not only in regard to effectiveness in removing competitive harm but also in regard to proportionality. Behavioural remedies should in the vast majority of cases be considered less burdensome and intrusive than structural remedies as relates to mergers and acquisitions. Under the antitrust framework, behavioural remedies must

always be assessed first, whereas structural remedies are considered the first choice in under the merger control framework. This poses a risk to be inequivalent as relates to the proportionality of the remedies.

The differences are difficult to validate through alleging differences in competitive harm or a prospective compared to retrospective analysis. The specific sectors relevant for Article 22 referrals or the special responsibility of dominant firms or which turnover threshold that has not been met, does not answer why the mergers and acquisitions should be remedied differently. I am of the opinion that this does not suffice as explanation and justification of the different outcomes that the current system may lead to.

Kokott is correct in saying there is a primacy for behavioural remedies within the antitrust framework. Whether that primacy bears any relevance in regard to remedying M&A transactions reviewed pursuant to Article 102 is more questionable. This is in my opinion in need of some clarification. The argument by Maier-Rigaud and Lörtscher that the primacies in themselves are hard to reconcile seems exceedingly relevant as concerns the treatment of mergers and acquisitions below the jurisdictional thresholds.

This risk of incoherency and inequivalence is also relevant for the EU competition law treatment of non-controlling minority shareholdings. These can be reviewed both within the framework of merger control and the framework of Article 102. At this point, it may not be an imminent risk since non-controlling minority shareholdings have not been reviewed pursuant to Article 102 in a long time. However, non-controlling minority shareholdings might find themselves in a similar situation to mergers and acquisitions that do not meet the turnover thresholds. Because since the Commission has changed its approach pursuant to Article 22 of the EUMR and the CJEU has revived the Continental Can case law, the jurisdictional scope of reviewing non-controlling minority shareholdings might expand in a similar way. That is, however, for the future to show.

6 Finishing conclusions

The EUMR is based on jurisdictional thresholds that have separated mergers and acquisitions considered likely to be competitively harmful, from those not considered as likely to be competitively harmful. Recently, we have seen the EU institutions change this position. Both in regard to the criteria of Union dimension, i.e. the turnover thresholds, and to the criteria of concentration, i.e. the threshold of control. The developments are still quite novel, and thus conclusions should be drawn carefully.

Mergers and acquisitions below the jurisdictional thresholds are remedied under the same provisions as those above the thresholds. In addressing this competitive harmfulness there are not any specific considerations made, just because the transactions initially did not meet the jurisdictional thresholds.

Dependent on how jurisdiction has been established this is done either under the legal framework of merger control or antitrust. The primacy for structural remedies in merger control and the primacy for behavioural remedies in antitrust investigations create an inherent issue here. The assumption that there are primacies for different types of remedies, merely because of the jurisdictional rule that has been applied seems not only too simplified, but has also created an unclear legal landscape for remedying mergers and acquisitions below the EUMR jurisdictional thresholds. Neither is it entirely clear how effectiveness in removing competitive harm and proportionality are balanced when remedying these M&A transactions. By choosing to fill the perceived enforcement gaps in EU merger control in this way, the system raises concerns as to the coherency and equivalency of the EU competition law treatment of these mergers and acquisitions.

The different provisions on how mergers and acquisitions below the EUMR jurisdictional thresholds are to be remedied may be the consequence of the differences between merger control rules and antitrust rules. Relating to the frameworks' aims and purposes, but also the procedural and substantive assessments that they entail. Admittedly there are specific aspects of the different transactions and how jurisdiction is established over them. But overall the differences in the assessment of mergers and acquisitions below the jurisdictional thresholds do not amount to an adequate justification for the differences in the assessments of remedying them.

By patching the perceived enforcement gaps of EU merger control through different legislations and mechanisms an unclear legal landscape has been created for non-reportable M&A transactions. There is a need for some clarification or further guidance on how mergers and acquisitions below the EUMR jurisdictional thresholds are supposed to be remedied, so as to create a system that ensures adequate coherency and equivalency.

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