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LUND UNIVERSITY

Raoul Warnerbring

The road not taken

Killer Acquisitions, the changing nature of merger regulation and constitutional legitimacy in the modern EU

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Supervisor: Eduardo Gill-Pedro

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Summary.

With the recent *Illumina/Grail* judgement and subsequent prohibition, more and more scholars within the EU are starting to pay attention to killer acquisitions and are considering them as a growing problem. However, solutions to these problems must still be legitimate in accordance with the purpose, values and ideals of the EU.

This is done through analysing whether or not the judgements in the Illumina/Grail can be understood using the theory of functional constitutionalism. Furthermore such an endeavour highlights the importance of the internal market when trying to construe what the EU is, and why a more holistic approach to governance (and specifically merger regulation) is futile.

The analysis of the argumentation in the *Illumina/Grail* showed that the Court still adheres to their previous purposive approach, and whereas the Commission are showing some holistic tendencies, the functional approach combined with an interpretation of the internal market as a goal in it of itself is still the status quo. Subsequently, the paper finds that these judgements can be understood as legitimate using this framework.

Preface.

Firstly, I would like to thank my wonderful supervisor Eduardo Gill-Pedro for helping me all throughout the work on this paper.

As my time in Lund is coming to a close, I find myself reminiscing over my years spent in this small, wonderful town. My time in Lund started as a question, “why am I here?”. This question was quickly followed by moments of doubt, as I found myself continuously wondering if I fit in, if I was clever enough, and possibly most importantly, to what extent me being a 18 year old kid with braces who still lived with his mother would affect my chances of meeting girls. Thankfully, my first term in Lund proved to me that at least the first two doubts were in vain, I did belong here and I was surprisingly clever enough to stop fearing my abilities. As for the third doubt, my circumstances did make my dating life quite dull, but I remained hopeful as I entered the supposed roaring twenties.

However, those hopes and dreams came to a somewhat of a halt in the beginning of 2020, when we found out that my mother had been diagnosed with terminal breast cancer. Amongst this turmoil the question from the first day at Juridicum came back, this time as a lingering and persistent statement. In the midst of trying to conquer the wall, I became convinced that I was in fact not clever enough, nor did I belong among some of the elite students from all over the world. In the midst of all this self doubt, one very damp and cold January morning stumbled into the office of Eva Lindell Frantz, who reassured me in a time of need. Seeing my self-doubt and insecurities, she convinced me that everything would be okay, even for a little old me. Seeing as I myself have sporadically worked as a substitute teacher over the years, you Eva, will be a symbol for all the wonderful teachers who aid, support and offer advice to all of us students, young or old. For this I am very grateful.

At the same time as Eva gave me reassurance in regards to my struggling endeavours within academia, a wonderful priest by the name of Jan offered me personal and spiritual guidance, and helped me overcome the initial shock over my mothers illness. This helped me enormously over the years.

Eventually, after some hardships, ups and downs and moments of reflection, my time in Lund turned out better than I hoped. For this I give enormous amounts of credit to my friends, you all know who you are and you have helped me at my worst and cheered me on at my best. Wherever we end up in the world, I hope that we maintain contact and that we never suffer the fate of being sad that things have ended, but instead embrace the joy of what was. The same goes for my wonderful mother, who has shown me that anything is possible, and that life exists in the small moments we share with each other. Without her support and guidance through the years, I would never have received the tools necessary to complete this education. I also want to give my thanks to the wonderful people at the 12 B Corridor at Ulrikedal, who have provided the most pleasant of living buddies over the years.

Furthermore, I would like to thank the wonderful Emil Norén, who has provided monumental support and help over the years, guiding me through my transformation from an insecure teenager to a somewhat confident young man. I hope that whoever reads this paper has someone as kind as helpful like him in their lives, to support them on a bad day.

Of course, I am not sure where I would be were it not for my wonderful girlfriend Wilma. You have been an extraordinary help during these years, and I have found strength, confidence and courage through our moments together. You have always been my number one supporter and this paper is dedicated especially to you.

Lastly, I would like to thank myself. I thank myself for not giving up, for believing in myself and for having a good time doing so. If I could go back to that scared, 18 year old kid, and look him in the eye, I am confident that he would be enormously proud of what he became. The memories he gained, the people he met, and the adventures he had. And even though this journey started with a question, it ends in a similar vein. Where I am going or who I will be in the future, only time will tell. But I am certainly excited for the journey.

1 Introduction.

1.1 Background.

Since the 1970/80s, mergers and acquisitions (M&A) has been a central area of law both within its practical sphere, as well as within academia. As for the latter, our theoretical attempts at understanding M&A often boils down to the question of how some of these transactions are made and what effects they might have on competition law. When it comes to the why, a key idea within studies regarding M&A has been that firms engage in these large-scale transactions in order to succeed with the process of value creation. Oftentimes, this value creation was to be done by making sure that the buyer, through the transaction, was able to create both financial and operating synergies.[1] Furthermore, in a modern capitalistic society, these transactions tend to actually act as "cleaners" which eliminates failing firms from the market. It can be important to remember that the business sphere of society can oftentimes be quite leviathan-inspired, where only the strongest firm survives. Even still, according to many, this survival of the fittest-mentality facilitates growth and better goods and services for the general public, since firms are always incentives to act accordingly.

However, this system has had to be regulated during the years, leading to the creation of competition law, which intends to protect the customers from being exploited through preventing the creation of monopolistic markets. Later on, merger regulation was created out of competition law, with the intent of creating more efficiency in the fight against the creation of dominant positions. In many ways, both competition law and merger regulation were created with the intent of limiting the potential side effects of these large-scale transactions as efficiently as possible, whilst still maintaining the positive effects of M&A on the market and on society as a whole.

Nonetheless, in recent years a new criticism has arisen in regards to the way the landscape of M&A is constructed. According to these critics, many firms are starting to use the aforementioned transactions in order to simply kill the opposition, as opposed to creating synergies or improving their own business. Furthermore, these critics argue that some firms have begun to use a particular strategy in which the goal is to "*discontinue the development of the target's innovation projects and pre-emt future competition*".[2] And even though these

[1] DePamphilis (2014) p. 6-7
[2] Cunningham (2018) p. 4

tactics may have been used since the inception of M&A, they are being applied at a much larger scale. Oftentimes, the reasoning bases itself on the notion that these smaller firms pose a future threat to the buyer, thus creating the allegations that these *killer acquisitions* de facto harm future competitiveness, as opposed to "normal " anti-competitive behaviour which normally limits itself to the current market landscape.[3]

Following these criticisms, the idea of combating killer acquisitions garnered so much support that it led to the creation of a new *theory of harm.* Furthermore, the theory of harm was, according to its supporters, particularly important within the pharma industry where startups with new products are being bought and "killed" at a larger rate.[4] There is certainly regulation in the EU that directly targets big acquisitions that may create a dominating positions[5], but these critics have found that firms tend to circumvent the thresholds used in the EU regulation by acquiring small businesses with a small turnover, therefore escaping the merger regulation through legal loopholes. This is even more apparent when studying the enormous sums that some of these transactions add up to, clearly indicating that the buyer clearly sees substantial value in acquiring the target.[6]

In recent years, the EU has tried to expand its merger regulation in order to tackle such killer acquisitions. As with all change, these developments call into question what values the EU are trying to convey in a modern age. For a while, the public lacked sufficient insight as to what potential stance the Commission and Court would adopt in regards to these concentrations.[7] This lack of insight and the public's desire to regulate killer acquisitions correlated with the rise of values as a variable in public discourse, see for example the rise of corporate social responsibility (CSR).[8] Therefore, according to some scholars, if the EU fails to regulate killer acquisitions accordingly, a form of cognitive dissonance would be created that could permeate all of society and public discourse, perhaps going so far as to create a "crisis of capitalism".[9]

Nonetheless, the choice to regulate and combat killer acquisitions also has to be anchored in established principles and values in order to be considered legitimate in the eyes of the peoples of Europe. According to some scholars, the EU faces an inherent and inevitable

[3] See among others Levy, Nicholas, Mostyn, Henry & Buzatu, Bianca, "Reforming EU merger control to capture 'killer acquisitions' – the case for caution", Competition Law Journal, 2020, vol. 19, no. 2,
[4] Start-ups, Killer Acquisitions and Merger Control p. 9
[5] See the EUMR
[6] See for example Facebook's acquisition of Instagram
[7] Skog, R, (2015), s 11
[8] See Vinson, Scott and Lamont (1977)
[9] Sarkar (2012) p. 35

dilemma in regards to constitutional legitimacy.[10] Furthermore, these scholars argue that such issues of legitimacy are a result of the EU:s social deficit, which in turn arises from the conflict of values between institutions and the citizens of Europe.[11]

The EU has tried to respond to these social demands. Within the sphere of M&A, the "new" guidance in regards to article 22 of the EUMR, aims to tackle those acquisitions that fall below the thresholds, using the so-called Dutch clause to appraise more and more of these sorts of transactions.[12] However, this new changed article 22 also raises some questions, in particular whether or not these changes can be considered legitimate within the scope of the EU. What this means is questioning whether the introduction of a new article 22 EUMR has support in the ideas and values within the EU.

This leads us to the somewhat new *Illumina/Grail* case and subsequent prohibition. In it, the Court corroborated the Commission's far-reaching powers when it came to appraising mergers which lacked a community dimension. Subsequently, this case, along with the Commission's decision to prohibit the merger, is our first insight into this new field of merger control.

With this new knowledge, we are finally able to examine the new position of the EU and how it relates to maybe its most famous theoretical criticism, that being from where the EU derives its legitimacy and how it can be maintained in a globalised and complicated world. This paper is therefore a study of values, and how their potential conflict might create a crisis of constitutional legitimacy within the Union. Doing this will require a genealogical study in which the core values of the EU are derived, and subsequently juxtaposed to both the judgement in the *Illumina/Grail*, and the theories from these aforementioned scholars.

1.2 Purpose and research question.

The purpose of this paper is to analyse and discuss, through the lens of the internal market, what affects the *Illumina/Grail* case and the killer acquisition theory of harm might have on constitutional legitimacy within the EU.

In order to fulfil the purpose of the paper, the following research question will be answered:

[10] Davies (2015) p. 14
[11] Hettne (2010) Kan Lissabonfördraget minska EU:s sociala underskott? Sieps, Europapolitisk analys 2010:4
[12] 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, paragraphs 9-10

Can the judgements presented in the Illumina/Grail-case be understood as legitimate using the theory of functional constitutionalism?

Many previous scholars have examined killer acquisitions and more specifically, their effects on the process of M&A and also on competition within the union. Most of these scholars apply a strictly legal perspective in which they argue around whether or not the EU should create a broader merger control that encompasses killer acquisitions. The tendency to limit the investigation to this question can also be found within larger institutions. For example, the Commission quite recently published a staff assessment report regarding the functioning of the EU merger control. Additionally, the OECD have themselves published a consolidating report regarding killer acquisitions and merger control.[13] These papers adapted a prescription based approach in order to demonstrate lex ferenda.

This is where my paper differentiates, seeing as the thesis is based on the notion of analysing whether or not the new legal developments are anchored in the judiciary principles within the union. My paper focuses on whether or not these attempts at regulating killer acquisitions are being performed in a manner where its justification is constitutionally legitimate, this culminates in a broader discussion regarding legitimacy and justification. This paper is in some ways a jurisprudential critique, and I will not be providing any policy recommendations or solutions to the potential issues presented.

1.3 Methodology and limitations.

1.3.1 Overview.

This paper is based on a quite complicated subject matter. In order to fully answer the research question, a likewise technical approach is necessary. Phrasing it quite simply, *the paper aims at discussing constitutional legitimacy in the EU, in light of the Illumina/Grail case and through the lens of the internal market.*

As my research question states, this paper aims at investigating whether or not the judgements presented in the Illumina/Grail case, by both the Commission and the Court, can be understood as legitimate using the theory of functional constitutionalism. Whereas the legal dogmatic method is applied in order to study how principles and values derived from the law in and of itself can solve legal problems[14], functional constitutionalism is a way of

[13] START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL © OECD 2020
[14] Peczenik (2005) p. 814-815.

trying to justify the law by looking at its purpose. Therefore, in order to answer the research question, the purpose in question has to be properly established and well known. This is where the legal dogmatic method becomes relevant in trying to investigate what this purpose is.

Putting it simple, by combining functional constitutionalism and legal dogmatics, a certain type of methodology is created. Using this methodology, the legal dogmatic method will be applied on the areas of law relevant in the Illumina/Grail-case, in order to find out their core purpose. Afterwards, this purpose and its compatibility with the judgements presented by both the Court and the Commission will be discussed using functional constitutionalism.

In the following, I will elaborate on my choices of methodology. Mainly, how I interpret the legal dogmatic method and why the theory of functional constitutionalism has been chosen.

1.3.2 The Legal Dogmatic Method.

A quite elaborate definition of the legal dogmatic method has been presented by Jan M. Smits, who described legal doctrine as "*...research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law*"[15]. In other words, the legal dogmatic method is based on using accepted sources of law (legislation, preparatory works, case law and doctrine) in order to find *lex lata*.[16] In my case, lex lata is whatever evidence supports the differing interpretations and subsequent justifications of the internal market. .

Firstly, in order to adopt the legal dogmatic method, it is key for the writer to place himself within the legal system, creating a form of unity of discourse in which the writer is given the authority to address legislators on their own terms.[17] This internal perspective means that the writer uses the same terminology as the object of the study. Furthermore, some scholars would argue that when the writer adopts an external context (going outside of sources pertaining to existing law), he or she moves away from approaching the problem through a legal perspective.[18] As previously mentioned, this paper does not aim at going outside the regular sources of law, but instead to use the legal dogmatic method to demarcate the purpose behind the relevant legislation. Note that the creation of this "two-step-process" using both

[15] Smits (2015) p. 5
[16] Kleineman, 'Rättsdogmatisk metod', in: Nääv & Zamboni (Red.), Juridisk metodlära (2018), p. 24.
[17] Rubin, o.c., Michigan Law Review 86 (1988), at 1859
[18] Smits (2015) p. 7

the legal dogmatic method and functional constitutionalism does not entail going outside the established legal sphere.

Secondly, In order for the legal-dogmatic-method part of the paper to be correctly constructed, the law described has to be placed within a relevant system.[19] Put in a EU-context, this means that the presented law has to be anchored in the core values found inside of the Union. Within the context of this paper, this means focusing on the purpose behind the legislation related to competition and merger law.

Chosen lens.

Choosing the internal market as the backdrop for the legal dogmatic method, along with focusing on the purposes behind the legislation, does have some consequences which must be addressed. Most importantly, it requires the author to adopt the perspective of the EU judge. When writing a paper that concerns the EU and its legislation, the perspective of the judge proves in my view more useful in giving a thorough explanation of the existing law. This is due to the construction of the EU, whereby all legislation according to article 3(3) TEU must be anchored in the purpose of establishing such an internal EU market. Accordingly, some scholars label studies surrounding EU law as using the "EU legal method".[20] This methodology goes hand in hand with the CJEU, who use a teleological approach whereby the wording within the legislation is given a smaller role than the context and purpose of the legislation.[21]

Since this part of the paper concerns itself with the task of trying to demarcate the purpose behind the regulation (whether it be the economist or holistic perspective), I find it very useful to apply this perspective, as it in my opinion fits in nicely with the actual workings of the Court.

Definitions and sources.

In order to make this paper as reader-friendly as possible, the term internal market will have to be properly defined. There are many definitions and functions of the internal market, and its principles are nowadays applied within areas such as environmental, labour and consumer law.[22] A study of all these aspects of the internal market would be impossible due to a lack of

[19] Smits (2015) p. 6
[20] Reichel, 'EU-rättslig metod', in: Nääv & Zamboni (Red.), Juridisk metodlära (2018), p. 109.
[21] Hettne and Otken Eriksson (Red.), EU-rättslig metod: Teori och genomslag i svensk rättstillämpning (2011), p. 34 ff.; 158; Reichel, 'EU-rättslig metod', in: Nääv & Zamboni (Red.), Juridisk metodlära (2018), p. 122.
[22] Bernitz & Kjellgren (2018) p. 309

time. Therefore, as aforementioned I will mainly focus on the history of the internal market as it pertains to *competition law* and *merger regulation* within the EU. My purpose with such an undertaking is to act in accordance with a EU judge. This also goes back to the idea of placing the internal market at the centre of which the system revolves around. Here, a wide range of sources will be presented. These include textbooks, case law, public announcements, legal articles and reports published by relevant actors within the EU.

Furthermore, since this paper takes quite a broad aim at the merger regulation, both the terms "mergers" and "acquisitions" will be used in this paper, whilst still maintaining their individual meaning. The reason for this is me wanting not to limit myself to either transaction, especially since this paper to some degree concerns itself more with legitimacy in wake of the transactions rather than the transaction in itself.

On the legislation specifically, it is a key characteristic of a correctly applied legal dogmatic method that the presentation and description of law is based on the most recent legislation and developments. That is, the law has to be applicable and relevant. Again, this fits with the idea of presenting law as a part of a *system* whereby past or outdated case law is only relevant as long as it is part of the coherent story of the present day law.[23] In this paper, I will only be using the latest development when it comes to merger control and killer acquisitions. Therefore, when presenting article 22 EUMR and the *Illumina/Grail* case, only the killer acquisitions theory of harm will be presented, with a punctuation on horizontal mergers. Furthermore, when discussing the *Illumina/Grail* case, emphasis will be put on both the prohibition presented by the Commission, and the judgement conferred by the ECJ. However, the bulk of the discussion will be related to the prohibition, seeing as this is more connected with the presented law and its relationship to the internal market. Likewise, other theories of harm (such vertical theories of harm or conglomerate theories of harm)[24] will not be presented. There are two reasons for this. Firstly, there is a lack of time for such an endeavour. Secondly, as will be shown later, the Commission uses the killer acquisition (or innovation) theory of harm in their *Illumina/Grail* judgement, making it the most suitable for this paper.

As mentioned in the research question, this paper aims at discussing constitutional legitimacy within the EU in relation to the *Illumina/Grail* case. There are many reasons as to why the *Illumina/Grail* case has been chosen as the object of this somewhat jurisprudential case study. First and foremost, the case is in my opinion a groundbreaking step into the future of M&A, a world where we are trying to somewhat dampen the occurrence of killer acquisitions through

[23] Smits (2015) p. 6
[24] Start-ups, Killer Acquisitions and Merger Control p. 10

a new interpretation of Art. 22 EUMR. As will be elaborated on later, the *Illumina/Grail* case is in my opinion a great example of the conflict between values and the necessity to change in a complicated world. Finally, as I am writing this paper[25] the case is still in a somewhat of an infant state. Therefore, discussing the case and giving it some legal and philosophical nuance will in my opinion advance the discourse.

In accordance with the EU legal theory, primary law, secondary law and case law are all part of the EU legally binding sources.[26] Note that The Charter of Fundamental Rights of the European Union (Charter) is categorised as primary law, thus giving it the same legal status as for example treaties.[27] This in contrast to secondary law, which includes those legal sources that are enabled through the primary law.[28] One such example is the EUMR, which through its categorization as a regulation, is seen as binding secondary law.[29] Therefore, much of the discussion regarding this sub-question will be related to this relationship between primary and secondary law.

1.3.3 Elaboration on the functional approach to legal dogmatics.

Once the purpose behind the legislation has been discovered using the legal dogmatic method, the theory of functional constitutionalism will be used in order to investigate whether or not the decisions presented in the Illumina/Grail can be considered legitimate. This somewhat jurisprudential approach, along with the questions of constitutional legitimacy, might leave many readers perplexed, given that they are not already engrossed in the ongoing discourse. For starters, what is exactly legitimacy and moreso, who has the authority to decide what constitutes a legitimate authority? Furthermore, why should we even care as to why something is legitimate or not?[30]

To start off with, one possible definition is that legitimacy is the capacity of a norm or an institution to instigate obligations on those who are its subjects.[31] This age-old question, whether an action is legitimate or not can furthermore also be nuanced by dividing the term into two, that being the object of legitimacy and the audience of legitimacy. In this paper, the audience of legitimacy is of little to no relevance to the research question. The object of

[25] Winter of 2023
[26] Hettne and Otken Eriksson (Red.), EU-rättslig metod: Teori och genomslag i svensk rättstillämpning (2011), p. 40.
[27] See Article 6(1) of TEU; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007
[28] Hettne and Otken Eriksson (Red.), EU-rättslig metod: Teori och genomslag i svensk rättstillämpning (2011), p. 42.
[29] See Article 288 TFEU.
[30] Schmidt p. 29-30.
[31] Gill-Pedro p. 203

legitimacy in our case becomes the EU as an overarching project. However, with respect to the research question this paper does not intend to evaluate whether or not the EU is a legitimate enterprise as a whole, rather it looks at whether or not the decisions made[32] in the *Illumina/Grail* supports or devalues legitimacy within the union. Here, I will answer this research question using a more moral definition of legitimacy, approaching legitimacy as a more normative criterion, trying to find whether or not the obligations imposed in the *Illumina/Grail* are justified with reference to moral or political principles.[33]

Choice of framework and the relationship between framework and theory

There are many scholars who have contributed to the discourse surrounding constitutional legitimacy within the EU. Many of them are so-called *idealists* who claim that valid law is determined with reference to what the law should be, thus arguing for an intrinsic relationship between morality and the construction of law, a law which is created with reference to some core ideals.[34] One example of such idealism can be found in the works of Lindeboom, who has put forward an argument for a more holistic understanding of the EU, placing more of an emphasis on Art. 2 in the Treaties, anchoring the decisions made by the EUs institutions anchored in more substance, moving beyond the internal market.[35]

Lindebooms theory differs in many aspects to that of Isiksel. Mainly, Lindeboom focuses on the end goal (and the subsequent values and ideals connected to that goal), whilst Isiksels focuses on the journey towards that destination. This does not mean that idealist legitimacy is not useful. These theories are more often than not related to what the purpose of the regulation should be. As aforementioned, an idealist examines what the law should be, therefore the legislation gains legitimacy through some desired characteristics. Such a perspective is of great value when investigating the discourse, since it allows for questions such as what should and/or could give legitimacy within a holistic perspective. Nonetheless, in my opinion the holistic perspective fails at creating a sufficient framework capable of acting as a background for the entire paper. In my view Isiksels theory is more suitable when it comes to explaining and applying the issue of constitutional legitimacy, as any action (and therefore goal) that goes against the purpose of the institution loses legitimacy. The holistic perspective serves better as a point of discussion, since it in my opinion is more related to the purpose of the regulation. Thus, the ideas of Lindeboom and Scharph will be brought up under the functional constitutional umbrella.

[32] And potentially future choices
[33] Gill-Pedro p. 204
[34] Gill-Pedro p. 206
[35] Lindeboom (2020) p. 103

Subsequently, this paper will be using Isiksels theory on constitutional legitimacy as its framework. What this means is that her theory will be the theoretical backdrop, and the *Illumina/Grail* case will be evaluated using her standards of legitimacy. The theory of functional constitutionalism is, as will be elaborated on in the following, a theory of legitimacy closely related to that of idealism.

Note, functional constitutionalism as it will be used in this paper is simply a tool, a framework which states that the EU receives legitimacy through its function and subsequently its ability to do so accordingly. What this means is that constitutional legitimacy is achieved when its institutions act in accordance with the purpose of the regulation. However, many scholars differ when trying to demarcate the exact purpose of the Union, necessitating the aforementioned usage of the legal dogmatic method. Therefore, chapter 3 will be devoted towards trying to find out what the purpose behind the regulation is. Finally, in chapter 4 these theories will be discussed and evaluated under the umbrella of functional constitutionalism, in order to discuss whether or not the EU should or even can change the road they have chosen.

Subsequently, this part of the paper aims to provide further nuance to the existing discourse regarding legitimacy in the Union, an endeavour only possible through this perspective. The point of view of the judge would therefore be insufficient within the discussion, since it is the job of the judge to use the legal dogmatic method in order to give a single definitive answer as to what constitutes right versus wrong.[36] Furthermore, although this part of the paper is written from the perspective of the legislator, it will be done with an open mind and with the aforementioned intention of contributing to the discourse.

1.4 Disposition.

Chapter two will focus on the constitutional framework at the core of this paper, that being the theory of functional constitutionalism presented by Isiksel. It will conclude with a presentation of the different theories on constitutional legitimacy.

Chapter three focuses on the internal market and its relationship with competition law and merger regulation. Furthermore, Article 22 EUMR and the *Illumina Grail* case will also be showcased. In order to fully comprehend what is new in the *Illumina Grail* judgement, the EUMR, killer acquisitions theory of harm and overall competition law will be explained to varying extents.

[36] Davies (2015) p. 10

Following this, Chapter four will include a discussion regarding whether or not the judgements in the Illumina/Grail case can be understood as legitimate using the theories presented in chapter 2.

2. Constitutional legitimacy

Democracy - Legitimacy

The EU is not a "normal" constitution. If one would, for example, examine the Swedish constitution it would be quite clear that the governing power resides with its citizens, who elect the members of parliament.[37] Such an endeavour in some ways goes all the way back to Abraham Lincoln, and the idea of power of the people, by the people, for the people. Even though the EU has an elected parliament, it differs heavily to that of other constitutions since its core, according to Schmidt, is not out and out democratic. It is, simply put, quite complicated.

The EU has no elected government in it of itself. It is however, a melting pot consisting of 27 democracies who all joined a common cause. This is important, seeing as the EU receives its authority from these Member States. In many ways, the EU is its Member States and an argument can be made that if the Member States have legitimacy due to their status and democracies, then the EU should automatically receive the same legitimacy. This argument has however been criticised in the past few years. The main reason is that as the EU has gained substantial power over more and more areas of law, the democratic processes within the domestic Member States have been eroded. Whilst citizens in the Member States elect officials who claim to fulfil their national preferences, these same officials are later tied down and restricted due to the nature of the EU.[38]

This goes back to the classic idea of the grundnorm, initially presented by Kelsen. Similar to the works of Max Weber, the grundnorm is based on the assumption that people within a defined nation state act according to the grundnorm due to some form of moral authority that derives from the grundnorm itself, moving away from for example natural law and creating legal positivism. In a liberal society, the idea is that such obedience to the grundnorm is based on the principles within democracy and the constitution. According to Schmidt, the EU has over the years become more and more of a moral authority, with Member States surrendering

[37] See 1 chapter 1 § The Institute of Government
[38] Schmidt p. 25-28

far-reaching national sovereignty in favour of the EU.[39] This essentially means that the EU, for all its member States, is the new grundnorm. Using the above terminology, this also implies that the EU gives itself authority through their own existence.

However, the existence of the EU as a grundnorm should not inherently be construed as implying that the EU receives its legitimacy through democracy. The terms legitimacy and democracy are not terms that are necessarily intrinxec. In fact, there are many ways in which legitimacy and democracy differ from each other. As Schmidt writes, *"...democracy refers to a specific form of government and legitimacy to whether a government of any form is accepted by its citizens as having the authority to govern. Legitimacy may exist without democracy, but democracy cannot exist without legitimacy, since it is by definition based on citizen consent".*[40] According to her, legitimacy comes from the governing bodies (in this case the EU) ability to satisfy the interests of the citizens, as well as maintaining their values and beliefs through action. This in contrast to the term democracy, which in a liberal society oftentimes also includes demand for free and fair elections, the ability to partake within the political sphere, the function of the rule of law and the protection of human rights. Putting democracy and legitimacy together, we find a situation where the elected authority is accepted as legitimate by its citizens since it governs in an effective way all the while responding to their preferences in ways that benefit public interest. The grundnorm, in that case, can only be accepted if it aims to effectively maintain the values of the subordinates.[41]

In Schmidts work, she argues that there are two ways to understand legitimacy. Those are output and input legitimacy. According to her; *"Output legitimacy describes acceptance of the coercive powers of government so long as their exercise is seen to serve the common good of the polity and is constrained by the norms of the community. Input legitimacy represents the exercise of collective self-government so as to ensure government responsiveness to people's preferences, as shaped through political debate in a common public space and political competition in institutions that ensure political socials' accountability via general elections."*[42]

In the following, I will elaborate on Isiksels theory of functional constitutionalism and how legitimacy can be derived from the function of the system in and of itself. As previously mentioned, this theory on output legitimacy will serve as the backdrop and framework from which the *Illumina/Grai*l case will be evaluated.

[39] Schmidt p. 27
[40] Schmidt p. 26
[41] Schmidt p. 30-40
[42] Schmidt p. 31

2.1 Functional constitutionalism.

Introduction.

As aforementioned, output legitimacy focuses on the working of authority and how their decisions are in alignment with "the common good" and are "constrained" accordingly.

As any legal scholar should be aware of, the main constraints when it comes to political power tends to be the constitution of the authority in question. Subsequently, the first question we must ask ourselves when trying to find a definition of such constraints is how constitutions ground and regulate their use of power. One such way is to frame it as a minimum, whereby all public authority must conform to a body of stable norms.[43] Such an endeavour is often called constitutionalism. As MacCormick puts it, *"Constitutionalism as a minimal virtue involves duly respecting the conditional quality of powers conferred ... and involves observing faithfully the (interpreted) conditions of the respective agencies' empowerment."*.[44] What MacCormick is trying to convey is that constitutionalism is and should be separate from other political values such as democracy, justice, equality etc. The constitution, he argues, is similar to the *grundnorm* essential in it of itself as the guiding force for the exercise of political power.[45] Thus, any breach of such power would lead to large constitutional ambiguity, or a crisis of constitutional legitimacy. One could also say that output legitimacy is harmed if such constitutionalism is not followed accordingly by the authority, in this case the EU. This leads us to the second question, which is why and how this limitation of power should be constructed.

Justification

In her book *"Europe's functional constitution : a theory of constitutionalism beyond the state",* Isiksel argues that the EU, in order to preserve legitimacy and to create a thorough constitution, has adopted what she calls the *"functionalist logic of constitutional authority"*. What this means is a system in which the exercise of political power is justified by reference to its role in enabling the effective use of such power. Before continuing, it should be noted that Isiksel sees this functionalism as a justification for the use of political power rather than the explanation.[46] Furthermore, Isiksel also recognises other sources of constitutional

[43] Isiksel p. 33
[44] Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (Oxford University Press 1999) 103. Emphasis original.
[45] Isiksel p. 33
[46] The possible explanations have been provided by Moravcsik among others, and will be presented further on in this part of the paper.

legitimacy, that being democratic and rights based legislation.[47] As previously mentioned, these input idealistic theories of legitimacy will not be elaborated on within the scope of this research question.

Moving on the EU specifically, Isiksel argues that the EU in its present form replicates many of the classical tropes found in a constitution. This includes a hierarchically ordered system of legal norms, judicial review, a schedule of directly applicable individual rights, and institutions charged with making policies, implementing them, and monitoring that the Member States act accordingly.[48] Furthermore, the Court has for many years played a key role in facilitating this constitutional development, with their judgements in Cassis and Dassonville being instrumental in bringing together distinct legal norms of the different Member States under regimen of supranational legal norms.[49]

Continuing on this topic, Isiksel argues that constitutionalism implies "pervasive" authority. What this essentially means is that any exhibition of public power must be put through the filter of constitutional validity, in this case through the EU treaties and principle of the internal market in order to become legitimate. This is made even more complicated due to the nature of the EU, where national domestic regulations have given up only parts of their sovereignty to the EU. This has the effect of only enabling constitutional validity only within those areas of law in which the EU has competence. In order to prevent a huge democratic deficit, any expansion of this authority must be corroborated by the Member States, who also have the theoretical possibility to reduce said authority. Furthermore, Isiksel argues that the authority that the EU does have, from where its constitutional filter exists, stems from the goal of creating an economic union. This goal seeps through all areas of public areas of law.

What this means is that unlike other constitutions, the EU operates on the basis of conferred powers with a limited scope of authority. The power that the EU does have, has been given to them by the Member States. Even in a federal state, such as Germany or the United States, where the federal constitution can be construed as quite feeble, this perceived weakness is unlike in the EU the consequence of actions taken by this authority in and of itself. Even though some might view the EU as a "traditional" constitutional order, where the EU is the sovereign power and it is up to the Member States to act accordingly, this explanation is not sufficient. As Isiksel writes, *"Constitutional autonomy in Europe's contemporary legal landscape is more helpfully conceived as graduated, intersectional, heterarchical, and*

[47] Isiksel p. 45
[48] Isiksel p. 57
[49] Isiksel p. 58

pluralistic, rather than exclusive, comprehensive, hierarchical, and monistic".[50] The same goes for the relationship between the Court and the different domestic courts all over Europe, who have developed a practice of what Isiksel calls "constitutional toleration". This allows a plurality of autonomous orders to support each other's authority without giving way for one or the other.[51]

This perspective on the workings of the EU is what Isiksel calls functional constitutionalism, a purposefully configured source of public authority which reaches different parts of governance. The purpose in question is according to Isiksel the creation of a coherent internal market which in turn maintains an economic union. Subsequently, she argues that the EU is an inherently teleological organisation and that its chosen constitution coheres around the internal market. The EU and their authority, is justified by and through its function in creating and maintaining the internal market.[52]

What this means, in relation to the research question, is that any decision made by the EU can be scrutinised and discussed as to how it continues the function and development of the EU and specifically, the internal market. In regards to the *Illumina/Grail*, the question then becomes how the reasoning found in the case can be understood using this framework. In order to give this methodology some nuance, it is in my opinion important to delve deeper into some of the explanations behind this functional approach, and to try and answer why the EU is constructed in such a way.

Explanation

Before continuing, I want to give a quick briefing as for the following part of this paper, which concerns itself with the work presented by Moravcsik. In many ways, Moravcsiks thesis is not really in theoretical alignment with the workings of Isiksel. Within the theory of functional constitutionalism, Isiksel focuses on claiming the creation of legitimacy within purposive institutions. Moravcsik, on the other hand, presents an empirical study which aims at trying to establish why countries within Europe decided to surrender parts of their sovereign power in favour of the EU. Therefore, this next part is a bit of an excursion which aims at trying to explain the possible origins of the thinking and mindset which made the EU a purposive institution. Subsequently, my intention is to provide the reader with a somewhat deeper understanding of the chosen methodology.

[50] Isiksel p. 81
[51] Isiksel p. 82
[52] Isiksel p. 84

As mentioned above, Functional constitutionalism is and has been at the core of the union for many years. Even though this is key for its legitimacy, it does not explain its origin. Some explanations behind the journey towards functional constitutionalism can be found in the empirical research presented by Moravcsik in his book *"The Choice For Europe - Social Purpose & State Power From Messina To Maastricht"*. The book is based on the idea that individual member states have an inherent desire to fulfil their own national preferences.[53] National preferences, he explains, are ordered and weighted values based on possible future outcomes that result from political interaction.[54] Furthermore, when it comes to the choice to enter the union (and thus the internal market), there are according to him only two possible preferences.

These theories, which aim to showcase how and why the EU became what it is today, are the *Geopolitical theory* and the theory of *Economic interest and preference*. According to Moravcsik, the geopolitical explanation of the adherence to the internal market is based on the notion that national security will be achieved through economic cooperation, by removing the incentives for conflict. When analysing the history of the Union, Moravcsik finds some evidence to support this thesis. This, among others, includes the desire of Chancellor Adenauer to integrate Germany into the west post WW2, the *Ostpolitik* proposed by Willy Brandt in the 1970s and the Single European Act of 1986 along with the Maastricht Treaty on the European Union, which Moravcsik argues was in direct ideological opposition to the politics of Margaret Thatcher.[55] All of these movements were, according to Moravcsik, connected with the idea of uniting Europe, placing the "internal market" at the centre of this goal. Furthermore, Moravcsik places this goal in the broader context of what he calls "high politics". Subsequently, high politics are more often than not the inherent desire to protect the security and sovereignty of the Member State.[56]

Whereas the geopolitical theory sees the internal market as a tool for the development of high politics, making the consequences indirect, the theory of *Economic interest and preference* stresses the direct consequences. This means that cooperation is a way for governments to restructure the economic policy externalities to their advantage within the member states.[57] Using this view, one objective of both domestic and foreign economic policy is to maintain high levels of competition when it comes to national producers.[58] Again, in theory Moravcsik

[53] Moravcsik p. 3
[54] Moravcsik p. 25
[55] Moravcsik p. 27
[56] Moravcsik p. 28
[57] Moravcsik p. 35
[58] Moravcsik p. 37

argues that the internal market is built on national preferences and egotistical desires connected to competition. Without the creation of the internal market and without cooperation, some if not all Member States would suffer. The greater the exports and the domestic competition, the higher the desire for trade liberalisation, something that prima facie can be seen between the 1950s and the 1990s, where trade exploded and more and more countries joined the EU.[59]

In his book, Moravcsik uses a substantive case study in order to present the different stages of the EC and its relationship to geopolitical and political economy theories. In his analysis of the processes and negotiations behind the Treaty of Rome, Common Agricultural Policy, European Monetary System, Single European Act and the Maastricht Treaty on European Union, he finds strong evidence to support the idea that these developments within the internal market were based on the desire to fulfil the Member states economic preferences. This has its roots in Europe post World War II, in which governments tended to be heavily influenced by domestic producers, which created strong incentives for economic liberalisation within Europe. In many ways, these domestic outcries were connected to large restructuring of markets within Europe, with liberalisation creating new innovation and possibilities. When looking at the preferences exhibited by Germany, France and Britain during the aforementioned negotiations, Moravcsik found that in every case an overwhelming amount of evidence suggests that economic motivations superseded geopolitical interests or ideology.[60] "*In twelve out of fifteen core national positions, political economic concerns appear sufficient to explain national motivations; in all fifteen the predominant influence on national preferences was economic interest*".[61]

When analysing the countries within the union, Moravcsik finds that EU members, even more than countries in North America or East Asia, showcased the largest amount of export-dependency (as a percentage of GNP). In the 1960s for example, Germany relied three to six times as much on their regional partners within the EC than the USA or Japan. With the development of the internal market, that ratio rose to seven and ten times more. This, according to Moravcsik, indicates strong domestic pressures for trade liberalisation and the establishment of the internal market.[62] Thus, to surmise Moravcsik, the internal market as a legal construction was and is the result of these national preferences which more often than not are based on strictly economic values, proposed by domestic discourse.

[59] Moravcsik p. 41
[60] Moravcsik p. 474
[61] Moravcsik p. 474
[62] Moravcsik p. 495

More importantly the few times geopolitical factors mattered in the decision making was when it was unclear whether cooperation would benefit the Member States. Furthermore, this also means that in cases where proposed legislation or case law might create legal uncertainty, subjective geopolitical preferences will ultimately play a bigger role, harming cooperation.[63] In many ways, Moravcsiks book complements the thesis presented by Isiksel, that the EU is a functional constitution in which the purpose of the Union is key when justifying its existence. Using the framework presented by Isiksel, one could word the aforementioned conclusion from Moravcsik such that countries had less incentives to engage with and through the EU when the function, and therefore legitimacy, was potentially incoherent. Whereas Isiksel presents the legitimacy, and Moravcsik showcases the explanations, we are still left with the question of "purpose". Such a question is very relevant, since the failure to uphold this purpose starves the EU of legitimacy. In my opinion, in order to fully understand functional constitutionalism, we have to discuss the theories presented by Jabko. This theory, as will be shown in the following, is closely related to those of Isiksel, and will be used in order to nuance the discussion surrounding functional constitutionalism and its relationship to the *Illumina/Grail*.

Purpose

In his book "*Playing the Market: A Political Strategy for Uniting Europe, 1985-2005"*, Jabko argues that the purpose and point of the EU is, and always will be, the maintenance of the internal market. To elaborate, the internal market was chosen as the justification for the uniting of Europe. Furthermore, using Jabkos definition, political strategy is a socially constructed method of collective action that brings together actors with different and varying motivations.[64] In the late 20th century, these actors may have had varying goals of the political strategy (a united Europe, a free market economy or a social market economy), but they all used the internal market as a vessel to transport them to this goal.[65] Within politics, he argues, it is not uncommon for opposing actors to work together, even though they have differentiating ideas of what the goal is and when it will be achieved.[66] But where the EU differentiates, is the fact that the internal market served as the filter through which these values had to be put through.

Whilst analysing the development of the EU during the 1980s and 1990s, Jabko found that the era was paved by different goals and agendas. Using classical political verbiage, on the

[63] Moravcsik p. 477
[64] Jabko p. 26
[65] Jabko p. 27
[66] Jabko p. 29

right side of the political spectrum promoters of the free market saw the EU and the internal market as the perfect vessel. Whilst, on the contrary many on the left saw the EU as a counterweight against the invisible hand of the market, in which the somewhat regulated internal market would help and support customer welfare.[67] In many ways, the creation of the internal market constituted a gamble, in which these political actors had different ideas of how the future would play out. Nevertheless, the importance of *function* remained the same.

Criticism and placing functional constitutionalism in a broader perspective

Isiksel recognizes some ways in which functional constitutionalism might be somewhat problematic. Mostly, these issues relate to public insight and democratic involvement. If the EU upholds its legitimacy through its pure function, then the public might feel that they have little to say about the legislation. Even though many institutions within more "classical" constitutions are not based on entirely democratic principles, but rather on the maintenance or certain values (such as security, public order etc) they are still given their authority from a governing power totally anchored on such ideals.[68] As Isiksel puts it *"In contrast to democratic and rights-based models, the EU's constitutional system relies disproportionately on a commitment to effective government"*.[69]

As interesting as the theory of functional constitutionalism is, its real value might be absorbed from analysing it é contrario. According to Isiksel, when the EU does not have the competence (or the ability to function) better in a certain question, they ultimately lose legitimacy. This in contrast to a constitution which is more anchored in a strictly more democratic approach. Such an institution might survive if their members persist in living with each other in a community of equals. Isiksel mentions the EU:s difficulties in tackling the Euro-crisis as a situation where the trust, and ultimately legitimacy of the Union is put in jeopardy, since the EU can be perceived as not completing their main function.[70] The same goes, of course, for when the EU acts in a way in which its effectiveness can be questioned.

Furthermore, Isiksel warns that the purposive nature of a functional constitutionalism faces its biggest threat when its cardinal objective (creating and maintaining the internal market) comes in conflict with other deeply rooted moral perceptions and values. These could be democracy and different legal cultures within Member States.[71] Such criticism could possibly be given to all theories surrounding idealistic output legitimacy. As mentioned above,

[67] Jabko p. 28
[68] Isikler p. 90
[69] Isikler p. 91
[70] Isikler p. 92
[71] Isikler p. 228

Scharph in particular has been critical to what he calls "the purposive nature" of the EU, which in his opinion makes any move to a more social market economy impossible. Another critique is that functional constitutionalism only leads to an elitist approach to law, only concerned with value creation and measurements anchored in strictly economism, eliminating progress in other fields of society.[72] The different perspectives of functional constitutionalism will be brought up in the subsequent discussion regarding the *Illumina/Grail* case.[73]

Summary and moving forward

This part of the paper concerned itself with explaining the theoretical framework that will be used when trying to understand the *Illumina/Grail* case in light of constitutional legitimacy. Note that these theories should not be understood as part of some universal truth, nor the opinion of the author. When discussing the case further on in this paper, it becomes crucial to understand functional constitutionalism and how it justifies itself through its actions. This is a high risk game which can go one of two ways. Either, the reasoning in the *Illumina/Grail* case adheres clearly to functional constitutionalism, thus making the case legitimate, or it fails to do so, harming the EU and its legitimacy. Such an order is why this theory was chosen ahead of the other idealistic ways of justifying legitimacy. Functional constitutionalism, as has been shown, justifies itself, thus making it in my opinion the most suitable to apply on a case.

In the following, I will elaborate on the internal market. As aforementioned, the common idea is that the EU works, or functions, when decisions made by its institutions maintain or even strengthen the role of the internal market. The following part of the paper aims at providing sufficient proof for this statement, whilst also investigating the different perspectives on what purpose, ideals and values can be found within the internal market, both as a rule and as a legal concept. This goes hand in hand with the part of the methodology concerned with legal dogmatics, i.e. the journey of finding the answer to the legal question using the legal sources at hand. As for the different perspectives, these will mainly be the economist perspective and similarly, the holistic point of view. Throughout chapter 3, I will therefore be limiting my presentation to primarily focus on these.

[72] Scharpf p. 216
[73] Scharpf p. 216

3. The internal market

3.1 Introduction.

Jacques Delors famously stated that no one falls in love with the internal market, but this, as Mario Monti later added, is maybe not necessarily a bad thing.[74] In the perfect world, the internal market is not seen nor heard. Rather the internal market acts as the invisible hand within the union, guiding the key decisions made at both international and domestic level. The internal market is in many ways integral to the characteristics of the union, and have been a part of the union since the start in 1957. On a concrete level, it is stated in Art. 3(3) TEU that the EU shall establish an internal market. What this means is further specified in Art. 26(2) TFEU. In this provision it is stated that an area without internal frontiers working with free movement of goods, persons, services and capitals must be ensured, also known as the four freedoms. What this essentially means is that different, smaller, national markets transform into a collective, larger, market based on economic freedom and high levels of competition.[75]

3.2 A brief history and key cases.

At the beginning, the internal market was constructed in order to create a "common market" for coal and steel, as a part of the European Coal and Steel community (ECSC). According to some scholars, the early goal was to create a regional market that matched that of the United States. This created a shift between those Member States who wished to capitalise on the removal of barriers to competition and those who feared the expansion of competition within the union. In many ways, this was the ignition that started the movement towards what we today consider to be the internal market. Another idea behind the common market was to prevent future conflicts between the then six member states. This aim was to be fulfilled through trade, by removing barriers between the countries and allowing free trade, the incentives for war would decrease.[76]

Later, during the late 50s and early 60s, the then European Economic Community (EEC) moved away from political integration and focused more on economic collaboration. Furthermore, it was stated as far back in the treaty of Rome that European integration is to be

[74] See p. 12 in the so-called Monti-rapport.
[75] See Art. 26 TFEU and Barnard (2016)
[76] Bernitz & Kjellgren (2018) p. 284

fulfilled through the "common market" (now the internal market).[77] Through the common market, and by removing trade barriers and common customs tariffs the aforementioned four freedoms were to be distributed freely within the region.[78] By harmonising the economic activity within the union (through the treaty of Rome), the standard of living would be ensured. This proved successful, seeing as the total exports of the six Member States in the common market rose from 35 % in 1960 to 49 % in 1970.[79] Subsequently, the treaty also had the purpose of encouraging the Member States to have closer relationships with each other.[80] With more and more countries joining the EEC, some feared that the growing diversity of Member-state interests would make legal harmonisation through European legislation more and more difficult.[81] This all changed, in a doctrinal way through *Van Gend & Loos* and *Costa V. Enel,* in which the court found that the Treaty of Rome had a direct legal order, from which individuals within the Member States could derive rights and freedoms.[82] They also stated that this European law was supreme to national legislation. The court did this by stating that the rights found in the Treaties were starting to become part of the individuals legal heritage.[83]

Furthermore, in order to continue the development of the common market, the former EEC focused heavily on what is called "negative integration". A clear example of this was Art. 30 EEC, which openly prohibited quantitative restrictions and measures that have an equivalent effect. This essentially meant that both the EEC and the ECJ focused on removing provisions within the individual member states that could harm the internal market.[84] However, this way of viewing the internal market was not without exceptions, as was seen in Art. 36 EEC whereby some situations which allowed deviance from conformity were listed. Among these were for example public morality, public order or the interest in protecting the lives of people.[85] Nonetheless, as has been noted many times in case law, the last part of Art. 36 EEC states that such measures (that can be considered exceptions) may not constitute a means for arbitrary discrimination or an indirect limitation of trade between Member States. This culminated in the now famous Dassonville Case.

[77] Treaty of Rome, 11957E/TXT.
[78] Craig & De Búrca, p. 4-5.
[79] Boltho & Eichengreen, 2008, p. 23
[80] Craig & De Búrca, p. 6
[81] Scharpf (2009) p. 215
[82] Van Gend & Loos, C-26/62, 05.02.1963
[83] Costa v. Enel, C-6/64, 15.07.1964.
[84] Bernitz & Kjellgren (2018) p. 284
[85] See Art. 36 EEC

3.2.1 Dassonville.

The Dassonville case concerned parallel import of Scottish whiskey. In short, the case revolved around Scottish whiskey that was imported to Belgium from France. When the liquor arrived in Belgium, it was given a declaration of origin by the retailer, proclaiming that the whiskey was from Britain. In France, where the goods had been bought, such a declaration did not require any proof in the form of a certificate of origin. In Belgium however, such a certificate was necessary in order to import or sell goods. This was due to the Belgian states desire to protect their producers and to ensure quality goods to its citizens. At its core, the case was about whether or not the Belgian legislation was incompatible with Art. 30 ECT.[86]

In its verdict, the court stated that anyone who wished to import whisky to Belgium from France, instead of importing directly from the country of origin, would face sufficient difficulties when it comes to obtaining the certificate of origin.[87] Furthermore, the court articulated the now famous principle, that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[88]

3.2.2 Cassis.

Following the judgement in Dassonville, the court came to realise that the formula established in the case was too wide in order to be effectively applied. The solution to this problem came through the Cassis decision, which elaborated on the application of Art. 30 ECT. In many ways, the solution found in Cassis introduced a much more flexible control over the national legislation than the one presented in Dassonville.[89]

The starting point for the court was the situation in which national legislation, which on paper treated domestic and imported goods equally, in reality favoured domestic goods. This situation could easily harm trade and the function of the internal market.[90] In short, the case revolved around a french liqueur which was prohibited from being marketed as a liqueur in Germany. This was due to the liqueur containing less than 25 % alcohol, something that was legal in France but not in Germany. The German limitation on beverages containing small percentages on alcohol was motivated by a desire to keep the alcohol consumption low,

[86] Rundegren in Ny Juridik 1:95 p. 77
[87] 9 Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, [4]
[88] 9 Case 8/74 Procureur du Roi v Dassonville [1974] ECR 837, [5].
[89] Scharpf (2009) p. 218
[90] Bernitz & Kjellgren (2018) p. 331

seeing as the Germans feared that by allowing such liqueur, people who usually stayed away from alcohol would be incentivised. Furthermore, this German limitation was unequivocally neutral, and was applied on both domestic alcohol beverages and imported ones. The Court stated that a product which was legally manufactured in a Member State basically was not allowed to be denied access to the markets of other Member States. Later on, this principle was to be called the Cassis-principle, or the idea of mutual recognition.[91]

In Cassis, the court re-interpreted the language within Art. 30 ECT and in the process of presenting the idea of mutual recognition, they also introduced their own open-ended formula in regards to exemptions to Art. 30 ECT. As aforementioned, the German legislation was motivated with reference to the protection of public health, an omission which was in line with the exceptions allowed in regards to Art. 30 ECT. The court circumvented this by adding that '*obstacles to movement within the Community ... must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defense of the consumer*'.[92] Thus, the Court changed the meaning of Art. 30 ECT, by stating that the specific exemptions granted in the treaty were mere justifications, that may be severe enough to constitute any one of the mandatory requirements. Furthermore, the invoked exception still has to pass a test of proportionality set out by the Court.[93]

3.2.3 What do Dassonville and Cassis teach us?

On a case-law basis, it is clear to say that both Dassonville and Cassis De Dijon have had a profound impact on the development of the internal market and European integration. On a broader level, the cases very much cemented the view of the EU as a purposive project, whereby the ECJ adopted a very progressive stance. Still however, there remains some uncertainty as to what these cases really have to say about the internal market as a legal theory or concept. This overarching scepticism was seen in later cases such as in *Hündermund*, where Advocate General Tesauro questioned if "*...Article 30 of the Treaty [is] a provision intended to liberalize intraCommunity trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?*"[94]

[91] Bernitz & Kjellgren (2018) p. 332
[92] C-120/78, 20.02.1979 at § 8.
[93] Scharpf (2009) p. 219
[94] See Case C-292/92

Some have speculated in regards to this perceived legal uncertainty. According to Lindeboom, the judgement presented in Dassonville creates what he calls interpretative dissonance, meaning a phenomenon which invokes the need for theories of interpretation, such as textualism and purposivism. Thus, interpretative dissonance becomes the trigger for the use of all other forms of interpretation.[95] According to Lindeboom, this situation has not been solved in future case law, with the court simply referring to Dassonville with broad, meaningless phrases and slogans.[96] Furthermore, he argues, the above-mentioned quote by Advocate General Tesauro can be summed up in two sub questions: what does it mean to liberalise intra-community trade, and how will the EU do this?[97]

Beforehand, a quick overview will be given over competition law and its relationship to the internal market.

3.3 Competition law.

3.3.1 Introduction.

As previously mentioned, the internal market is key in understanding the EU and its purposive approach to legislation. Even though the principles and values found in Dassonville and Cassis are fundamental to understanding this purpose, there is a need for nuance in regards to the specific provisions in the EUMR that this paper focuses on. Furthermore, the EUMR is in many ways a tree that has been grown on the soil of competition law, making it necessary to also give an overview of the competition law in the EU. Thus, in some ways, this part of the paper aims to briefly explain the EU competition law in the context of European integration, meaning how competition law has fulfilled the purpose of the internal market.[98] This is again done within the framework and idea of functional constitutionalism, and I will be trying to define what reasons and justifications are hidden beneath the veil of competition law.

3.3.2 History of antitrust.

The 1951 ECSC Treaty was at its core an attempt to connect the two at the time most dominant economic superpowers in Europe, that being France and Germany. Specifically, the treaty aimed at somewhat uniting the war industry, which contained the production of coal

[95] Lindeboom (2020) p. 89
[96] Lindeboom (2020) p. 92
[97] Lindeboom (2020) p. 87
[98] History and Framework of EU Competition Law p. 27

and steel. Due to this, some scholars have argued that the purpose behind this attempt at economic unification was to try to prevent future conflict between the two nations. This was seemingly corroborated at the 1950 Schuman Declaration, when the then French Minister of foreign affairs Robert Schuman declared that *"The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible"*.[99]

In the late 50s, competition law and specifically antitrust became a key role in Europe through the 1957 EEC treaty. The key difference between its inclusion in the EEC treaty and the ECSC treaty was the way the internal market was to be achieved. In the ECSC treaty, the goal was to pool together the resources of France and Germany. In the EEC treaty however, the four freedoms were introduced, with the goal of eliminating state barriers to trade through negative integration.

3.3.3 The purpose of competition law.

The primary basis for all competition law can be found in the Treaties. Even though the Treaties have been subject to countless changes and reinterpretations in the years since its inception, the key role of competition law remains the same in both mergers and antitrust. For example, in the 1957 EEC treaty it was stated in Art. 3(g) that one key activity of the Community was the *establishment* and *maintenance* of competition within the internal market. This view was seemingly corroborated in the now classic case *Consten V. Grundig*, in which the Court applied Art. 85 EEC (the current Art. 101 TFEU) for the first time. In it, the court accepted that the vertical agreement between the German producer and French distributor actually led to higher trade within the established sector. However, when the purpose of the agreement was to partition the market, the actual effects of the agreements were not of interest. This was due to such an agreement being harmful to the core of the union, that being the establishment of an internal market.[100] The same goes for the judgement in *Walt Wilhelm*, in which the Court again proclaimed that the aim of competition law is the safeguarding of the internal market.[101] What this essentially meant was that Art. 101 TFEU and Art. 3(g) were to be construed in a way in which the internal market was given the position of fundamental law, and agreements which even threatened to restrict the internal market were to be nullified.

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[99] Available at: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en

[100] Joined cases 56 and 58/64 Établissements Consten S.à.R.L. and Grundig Verkaufs-GmbH v Commission [1966] ECR 429, at 340.

[101] Case 14/68 Walt Wilhelm et al. v Bundeskartellamt [1969] ECR 1, para 9

The idea of competition law as born out of the need to maintain the internal market (in accordance with Art. 3 (g)) confirmed later, when the so-called "Constitution of Europe" was proposed. This failed project clearly stated that one of its objectives was that *"The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted"*.[102] Nonetheless, some of these provisions were later added to the Maastricht treaty, where it is clearly stated as early as Art. B. that European integration is one of the objectives of the European Union.[103]

At this moment in time, Art. 3(1)b of the TFEU states that the Union has exclusive competence in *"the establishing of the competition rules necessary for the functioning of the internal market"*. From a strictly textual perspective, it is clear through the wording (necessary and functioning) that competition is secondary to the upholding of the internal market. Furthermore, the link between the functioning of the internal market and competition law is corroborated through Protocol 27 in the SGEI (services of general economic interests) "*that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted"*. In many ways, according to Sauter, competition policy within the EU is not a goal in and of itself, but merely a tool which can be used to achieve the internal market.[104]

One might wonder if there exists values embedded in competition law besides the maintenance of the internal market. According to Sauter, there is some evidence to suggest that *consumer welfare* is a key value when it comes to competition law.[105] One such example can be found in the 2000 Guidelines on vertical restraints, where it was stated that one of the objectives behind EU competition law is the allocation of resources and the enhancement of consumer welfare. However, in the same guidelines, again we see that competition is labelled as a tool within antitrust for the fulfilment of the internal market.[106] In his work, Sauter has argued that the Court of Justice differs in regards to both the Commission and the General Court. According to him, the former puts much more of an emphasis on the integration model, whereas the latter has tried to adopt the more economic-based method in which consumer welfare is highlighted.[107]

[102] See the proposed Article 1-III.
[103] Scharph (2009) p. 14
[104] History and Framework of EU Competition Law p 59
[105] History and Framework of EU Competition Law p. 44
[106] Commission Notice: Guidelines on Vertical Restraints, OJ 2000, C291/1 at para 7
[107] Sauter p. 44

3.4 Brief overview of merger regulation and the thresholds.

Unlike antitrust, there is no proposed regime for merger control within the Treaties. Instead, merger control has been introduced to the EU firstly through the 1989 Council regulation, and later through the reformed version in 2004.[108] Before the existence of the EUMR, the Commission appraised mergers through the now antitrust articles 101 and 102 TFEU. In the *Continental Can* case from 1973, the Commission stated that Art. 102 TFEU also covered situations where mergers constituted an abuse of the market, most notably in situations where the result was a monopolisation of the market.[109]

However, the ex post appraisal within antitrust proved futile when examining mergers. It seemed queasy to have to wait and see whether a merger would have problematic results and then try to address them. Rather, the institutions of the EU found it more in line with the purpose of the regulation to try and prohibit such transactions before they even became problematic. This, together with the unanimous wish to create a "one-stop-shop" for mergers led to the creation of the EUMR.[110]

Similarly to antitrust, the main objective with the EUMR is to prevent mergers that create significant distortion and lessening of competition within the internal market. But whereas the appraisal within anti trust takes place ex post, the judgement when it comes to mergers takes place ex ante.[111] This constitutes a complicated notification and clearance system based on if certain turnover thresholds are met.[112]

The turnover thresholds can be found in Art. 1 EUMR and are far beyond the more intention based cut-offs for antitrust. There are requisites for when a merger can be construed as having a community dimension. These are when:

1. the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and
2. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million

One exception to this is when each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member

[108] Regulation 139/2004. Henceforth known as "EUMR".
[109] Case 6/72 Continental Can, above (n 11), para 26
[110] History and Framework of EU Competition Law p. 199
[111] Meaning before the agreement between the independent undertakings is fulfilled
[112] Sauter (2016) p. 196

State.[113] Furthermore, Art. 1 P. 3 EUMR provides some situations in which the merger has a community dimension even though the thresholds in Art. 1. P. 2 EUMR is not met. These cumulative scenarios are when:

1. the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million
2. in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million
3. in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
4. the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million

These apply in situations where the thresholds in Art. 1.2 EUMR are not met. This is however, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.[114]

If a transaction is large enough to be covered by the thresholds, it has to be appraised using the substantive test found in Art. 2 (3) EUMR:

A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

The test was changed through the 2004 regulation. The former substantive test in the 1989 regulation focused on the strengthening or creation of a dominant position.[115] With the changes in 2004, the new SIEC test broadened the horizon for what could be appraised by the Commission.[116] As seen in the 2004 guidelines on the assessment of horizontal mergers, the objective with this change was to give the Commission sufficient tools to handle both coordinated and non-coordinated effects on the internal market, that were not so severe as to be categorised as creating a dominant position.[117] These non-coordinated effects may arise in markets where, due to there only being few firms left, the remaining firms are able to act in a way which harms competition without engaging in coordinated behaviour. According to

[113] See Art. 1 p. 2 s. 3 EUMR
[114] See Art. 1. p. 3 s. 2 EUMR
[115] Regulation 4064/89, above (n 7), Article 1(3)
[116] History and Framework of EU Competition Law p. 202
[117] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004, C31/5, at para 24ff.

Kokkoris, the American *Heinz* case showcases this gap between the merger regulation from 1989 and the one from 2004.[118]

In the case, Heinz and Beech-Nut competed against each other on the same product market (baby foods), and their severe rivalry resulted in several consumer-benefits, mainly lower prices and more innovation. The competition also had similar effects on Gerber, the largest firm within this market. Subsequently, the proposed merger between the second and third largest firms on this product market raised concerns over the potential risks of an oligopoly. Accordingly, the merger would eliminate competition both at wholesale and retail level, something that would ultimately harm the consumers due to higher prices and less innovation. It would also increase the risk of coordinated behaviour between the surviving firm and Gerber. According to Kokkoris, this merger would have been allowed using the 1989 regulation, due to it not including the largest firm on the market and the fact that the resulting firm would not lead to a dominant position in it of itself.[119]

The arguments for the introduction of the SIEC test were mostly that the EUMR would become far more efficient by introducing a more economics-based tool, since it puts more of an emphasis on empirical evidence, economic analysis, especially in cases regarding collective dominance.[120] As Kokkoris says, "*The SLC test appears to deal more effectively with cases where one cannot state that there is a risk of concerted practices but where concentration nonetheless enables the company to act to the detriment of consumers".*[121] One key consequence of this was that the Commission was now given the tools to assess individual transactions based on their potential harm to consumer welfare, without having to base their judgement on structural parameters such as dominant position.[122] Since moving to the SIEC test, the factors that the Commission shall focus on are the market position of the undertakings concerned and their economic and financial power; the alternatives available to suppliers and users; their access to supplies or markets; any legal or other barriers to entry; supply and demand trends for the relevant goods and services; the interests of the intermediate and ultimate consumers; and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[123]

[118] Kokkoris p. 65
[119] Kokkoris p. 66
[120] Kokkoris p. 67
[121] Kokkoris p. 68
[122] Kokkoris p. 73
[123] Article 2(1)b of Recast EUMR and Kokkorris p. 73

3.4.2 Exceptions.

As with most legislation, there are some exceptions as to when a behaviour is allowed. Even though a merger might have considerably adverse effects on competition within the internal market, it can be permitted if it results in high levels of efficiency. These positive effects on efficiency are of course only allowed if they outweigh the negative effects on competition. When assessing this exception, according to the Guidelines, the Commission specifically looks at the effects of the merger on consumer welfare. The main rule is that consumers should not be worse off due to the merger. On the contrary, there must exist a clear and obvious connection between the merger and the benefit of the consumers. Furthermore, since the appraisal is done ex ante, the efficiencies must be likely to materialise.[124]

Another exception is the so-called failing firm exception. This exception is to be applied by the Commission and is in many ways a codification of principles brought forward in case law by the Court.[125] Once again the criteria is more focused on the social and economic perspective, and the exception is often brought forward within extremely competitive product markets in which the target firm might be failing and are looking to exit the market. Thus, a merger might enhance efficiency whilst also preserving jobs or other socially beneficiary causes. Whether or not this is the case is up to the party advancing the argument, more often than not the buyer.[126] Here the Commission looks at whether or not the target would be forced out of the market due to financial issues, if there are not other alternatives that are more likely to lessen the effects on competition and lastly, if the assets of the target firm would exit the market given their demise.[127]

The key in understanding the failing firm argument is that the Commission has to find no causality between the merger and the negative effects on competition. Given that the target was bound to "die" regardless of the merger, the principle here is that the merger is no threat in itself to competition within the market. Furthermore, the failing firm defence is in many ways an exceptional situation, something that the ECJ stated in *Kali und Salz.*[128]

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[124] Kokkoris p. 94
[125] See for example M308 Kali und Salz/MdK/Treuhand [1998] OJ C275/3 and Case M2314 BASF/Pantochim/Eurodial [2002] L132/45
[126] Kokoris p. 95
[127] Kokoris p. 96
[128] M308 Kali und Salz/MdK/Treuhand [1994] OJ L'186/30.

3.4.3 Objectives and values within mergers.

Using an albeit American perspective, DePamphilis argues that mergers come and go just like waves. This phenomenon, he says, is due to the market reacting to "shocks" within the industries they operate within. These shocks can for example be deregulation, new technology, advancing distribution channels or a rise in commodity prices. Such changes within the industry gives firms the incentives to acquire other businesses and to create economies of scale and scope.[129] Furthermore, these changes in the market ultimately lead to what some call operational restructuring, meaning changes in the composition of a firm's assets structure by acquiring new businesses. Operational restructuring of course goes both ways, with some firms looking to sell either their whole business, or parts of it.[130]

Shifting the focus to the EU specifically, the purpose of the EUMR is to ensure that these *restructuring* activities within the union take place in the interest of the internal market, whilst also making sure that the competition is not substantially harmed.[131] Accordingly, Art.2 EUMR specifies that the Commission should take the following into account when appraising mergers:

a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community; (b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

Article 2. EUMR highlights the connections between the EUMR and the primary law of the union. As aforementioned, the treaties do not give any suggestion as to the creation of a merger control. However, Art. 2 EUMR is quite linked to the principle of undistorted competition in Art. 3(1)g in the EC and the principle of an open market economy in Art. 4(1)c.[132]

[129] DePamphilis p. 11
[130] DePamphilis p. 15-16
[131] History and Framework of EU Competition Law p. 197
[132] History and Framework of EU Competition Law p. 197

In recent years, there has been an ongoing debate as to what values should be at the core of the merger regulation. On one hand, the so-called "Franco-German" proposal from 2019 advocated the changing of the EUMR in order to facilitate the creation of "European Champions". These were meant to be large firms who could compete in the global market.[133] The idea was that by changing the ways of appraising mergers, and by allowing the creation of conglomerate industry giants, jobs and social welfare in the EU would be protected. This argument gained prominence when the Commission prohibited the proposed merger between industrial giants Siemens and Alstom, due to the harm such an endeavour would have on competition in markets for railway signalling systems and high-speed trains.[134]

At almost the same time as the verdict in *Siemens/Alstom*, the European Parliament issued a resolution in which they urged the Commission to consider fundamental "goals" such as food safety, consumer welfare and the protection of the environment and climate.[135] This could possibly be understood as a critique of some aspects of the European Champions-debate, in which many politicians in both France and Germany noted that the EU merger regulation was in dire need of change. Their argument was essentially that the Commission should adopt a more protectionist approach, in which they to a higher degree took industrial policy into account.[136]

Whereas the European Champions theory received criticism[137] for possibly politicising merger regulation, with the risk of favouring certain markets and Member States, the idea of changing the merger regulation in such a way where other factors other than economism were prioritised stuck around. One such theory, which argues that consumer welfare could and most likely should be accepted within the framework of functional constitutionalism, has been presented by both Lindeboom and Scharph respectively. According to Lindeboom, there are some arguments in favour of expanding the way we construe the internal market. This criticism in a sense argues that we should reinterpret our knowledge of the internal market so that broader terms and principles (beyond strictly economic) are used when trying to decipher the internal market.[138]

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[133] Undesministeri um für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, A Franco, German Manifesto for a European industrial policy fit for the 21st Century, 19.02.2019, www.bmwi.de/Redaktion/DE/Downloads/F/franco, accessed October 3, 2023
[134] Siemens/Alstom (Case M.8677) Commission Decision C(2019) 921 final [2019]
[135] European Parliament, Resolution of 31 January 2019 on the Annual Report on Competition Policy ,P8_TA PROV(2019)0062 <www.europarl.europa.eu/doceo/document/TA 8 2019 0062_EN.html> accessed October 3, 2023
[136] Reader p. 128
[137] Van Bael & Bellis, p. 717-718
[138]Lindeboom (2020) p. 103

Using a somewhat holistic perspective on the internal market would, according to Lindeboom, entail referencing the broader background of the Treaties, more specifically Art. 2 TEU. Thus, according to him, the internal market can only be understood if it is specifically connected to Art. 2 TEU. This point of view has also been brought forward by Isiksel, who argues that the EU should consider moving beyond economism. According to her, institutions in the EU (and in the Western world as a whole) are losing their ability to evaluate political ideas without doing so using strictly economic terms such as "employment", "growth" and "revenue". Naturally, this might create a further democratic deficit in the Union whereby the peoples of Europe might come to the conclusion that economic growth is the only value that truly matters. As Isiksel writes, *"The EU's functional constitutionalism exemplifies the ascent of economic logic as a privileged measure of legitimacy and the corresponding decline of other ideals once considered central to constitutionalism"*.[139] Nonetheless, in order to prevent such an impoverishment of the EU along with its principles and values, Isiksel suggests that the EU tries to better communicate its goals and purposes without using strictly economic terms.[140]

Again, there is some factual evidence for such an undertaking starting to take place. In the Communication on the Citizen's Agenda, presented by the commission, they noted the importance of achieving the goals set up in Art. 2 TEU.[141] This includes the promotion of a higher quality of life, social cohesion environmental protection, by ensuring "*citizen's existing rights of access to employment, education, social services, health care and other forms of social protection across Europe*".[142] The same goes for the Commission's most recent publications on the subject (*Towards a Single Market Act*) whereby they proposed to conduct an "*in-depth analysis of the social impact of all proposed legislation concerning the single market*".[143]

Is this change truly a paradigm shift? One could say that there was as early as Cassis signs that non economic values and interests are a part of the internal market.[144] Furthermore, as Bulakowski notes, many Member States within the union have adopted domestic rules which allows for the recognition of public interests when executing merger control.[145] However, Bulakowski concludes that this development has yet to permeate the merger regulation at EU

[139] Isiksel p. 231
[140] Isiksel p. 232
[141] Communication on the Citizen's Agenda
[142] Communication on the Citizen's Agenda at. 5
[143] According to the most recent Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a Single Market Act, COM(2010) 608 final, at 23.
[144] See e.g. the mandatory requirements in 120/78 Cassis de Dijon.
[145] NORDIC JOURNAL OF EUROPEAN LAW p. 175

level, where the appraisal is still based on economics and the maintenance of the internal market. If it were to be a part of the understanding of the internal market, it would prove an interesting nuance within the application of functional constitutionalism.

Within the framework of functional constitutionalism, one could argue that the ideas presented in the *Towards a Single Market Act*, specifically the ones relating to the importance of anchoring the internal market in the principles found in the TEU, creates a more value-based understanding of merger regulation. . The consequences of this could, according to Lianos, be that the new approach to positive integration becomes a much more results and effect based appraisal, whereby non economic perspectives such as consumer welfare are taken into account.[146] What subsequent consequences might follow from this, in light of the Illumina/Grail, will be highlighted in the discussion.

3.4.4 Summary and thoughts on the internal market as a legal concept.

As has been shown, both antitrust and merger regulation are anchored in the *functioning* of the internal market. The role of the internal market is often quite obvious, with antitrust being constructed on the basis of Art. 3(g) in the 1957 EEC Treaty and the EUMR seemingly being born out of a desire to maintain the functioning of the internal market where article 102 TFEU was not sufficient. Both antitrust and merger control are often seen as necessary tools, or one could say the core, required to maintain the competition of the market.

Even though this methodology is quite obvious, looking at both famous case law and other decisions by key EU institutions, the question remains as to what end goal is sufficient enough that the quest towards that goal, is potent to such an degree that it enables legitimacy. In my opinion, two different approaches can be construed from this investigation into the internal market.

The first "goal", considers the internal market as a goal in itself. Note that this, economist, view of the internal market does not exclude the possibility of serving the common good. Nor does this mean that the economist perspective lacks any inherent value. On the contrary, the creation of the internal market is oftentimes seen as something valuable, a goal to strive towards. Nonetheless, the potentially positive effects are a result of the internal market and not the other way around.

Such positive effects could for example be lessened incentives for conflict within Europe. As the Treaty from the 50s suggest, the goal was most likely peace between German-Franco

[146] Shifting Narratives in European Economic Integration: Trade in Services, Pluralism and Trust p. 14

relations. Another argument, which was mentioned above[147], is that the internal market creates unity in the EU-markets , which should ultimately help customers. Nonetheless, as the Union became what it is today, more and more decisions focused on the internal market as a legal concept, and its creation as the main value. This has for example been corroborated in Protocol 27 in the SGEI, along with the judgements in classical cases such as *Walt Wilhelm*, *Cassis* and *Dassonville*. In these cases, the EU was focused on using negative integration in order to create the internal market. This reasoning was again corroborated in the proposed "Constitution of Europe" which also clearly advocated for the internal market as its main goal and ideal. Furthermore, in recent years the reasoning in the proposed *Siemens/Alstom* merger was also in my opinion heavily influenced by this form of functional constitutionalism. Even though the internal market has been somewhat established, with fewer cases concerning negative integration, the Court now focuses on maintenance. In the proposed merger despite the heavy influence from lobbyists who wished to see the EU anchor their decision in industrial policy, the Commission stayed firm and upheld that it is the functioning of the internal market that is the main value and goal.

What the focus on the Internal market does is that it gives the EU a goal and a vision to strive towards. Placing this economist perspective within the framework of functional constitutionalism, the EU gains legitimacy by adhering to this goal and by acting in a way in which the strict interpretation of the internal market is upheld. Subsequently, the *Illumina/Grail* case has to anchor itself in the maintenance of the internal market. As mentioned, other "goals" such as sustainability, customer welfare and to a lesser extent European Champions can still be mentioned, but only as tools which must be put in place in order to secure the internal market.

The other perspective that can be derived from this presentation, is a far more holistic one, oftentimes (within a merger/competition law aspect) focusing on customer welfare. It is quite clear in my opinion that the idea of the internal market in a EUMR-perspective is closely related to the protection of customers through minimising harm to competition. This view is corroborated when looking at case law, guidelines and the opinions of literary scholars. It is also quite clear when viewing the merger legislation é contrario, where a seemingly harmful merger may be accepted only if customer welfare is guaranteed. The same goes for the failing firm argument, whereby it is up to the acquiring firm to prove that the merger will *not* harm customers. In some ways, this implies the importance of consumer welfare even when the target was bound for bankruptcy. Within antitrust, scholars such as Sauter have argued that the Court and the Commission differ in regards to their emphasis on the value of consumer

[147] See for example the judgements in Cassis and Dassonville

welfare. This goes hand in hand with the resolution brought forward by the European Parliament in 2019, where they urged the Commission to approach mergers more holistically with consumer welfare in mind. The same argument is, according to Kokkoris, the basis for the transformation of the EUMR into a legislation based on the application of the SIEC test.

In light of functional constitutionalism, the question becomes whether both, one or none of the aforementioned economist or holistic perspectives are in themselves sufficient enough goals that their fulfilment can be seen as necessary and adequate enough as to provide legitimacy. In the following, I will be looking at the *Illumina/Grail* case and trying to decipher which one of these perspectives the Court adheres to in their judgement.

4. Article 22 EUMR and the Illumina Grail case

As seen above, the legal basis for merger control within the EU can be found in the EU merger regulation, otherwise known as Council Regulation (EC) No 139/2004 of 20 January 2004 or the EUMR. As aforementioned, the EUMR is to a large extent based on the same core principles as antitrust, together creating the base for competition law. The ex ante appraisal is sometimes a difficult task that requires the application of a theory of competitive harm, which is used in order to try to determine why a certain merger would affect the market in a way which harms the consumers.[148]

In this next part of the paper, I will provide a brief background over Art. 22 EUMR and the killer acquisitions theory of competitive harm.

4.1 The Dutch Clause.

Article 22 in the EUMR came to be due to the request of several Member States when the Merger Regulation was first adopted in 1989. The main reason behind this request was that many of these countries lacked their own domestic merger regulation, among them the Netherlands. Subsequently, the Dutch clause was born.[149]

In the years following the adoption of the Merger Regulation, article 22 lost some of its relevance. This was mainly due to all Member States (except Luxembourg) adopting their own domestic legislation.[150] Furthermore, the Dutch clause was scarcely applied within the

[148] Whish R and Bailey D, Competition Law (7th edn, OUP 2012) p. 818
[149] Levy et al., 2020, p. 43
[150] Broberg, 2012, p. 215

Union, with the article being used 43 times up until 2021.[151] Besides the fact that almost all member states have a merger regulation, one reason for the lack of referral using Art. 22 EUMR might be the effectiveness of the one-stop-shop principle.

Initially, as aforementioned, Art. 22 was used as a referral for Member States who wished to have a certain concentration evaluated by the Commission. This concentration need not necessarily have a community dimension (it does however need to constitute a concentration within the meaning of Art. 3) but it has to affect trade within the internal market and make up a threat to competition within the referring Member State/States.[152] The initial idea was thus to help those Member States who lacked a domestic legislation to evaluate certain mergers. This referral mechanism provides another way for EU merger control, in addition to its exclusive jurisdiction over those transactions that do in fact have a community dimension.

Any Member State that wishes to apply Art. 22 has to do so within 15 working days of the date of the national notification, or within 15 working days of the date the transaction was "made known" to the member state (if no national notification is triggered).[153] When the referral request has been made, it is the duty of the EC to inform the merging parties and other Member States without delay. This triggers an additional 15 working days deadline for other Member States to join the referral request. Once the merging parties have been informed by the EC, they are forbidden to consummate the transaction in accordance with Art. 7 of the EUMR.

In recent years the application of Art. 22 has changed. On September 11 2020 it was announced that the EC "*would start accepting referrals from national competition authorities of mergers [under Article 22] that are worth reviewing at the EU level—whether or not those authorities ha[ve] the power to review the case themselves.*". This process would begin during 2021.[154] This development should be understood using the guidelines presented by the Commission, in which they argue that this change is anchored in the wording of the article, and that the expansion of the referral system is in line with the purpose of the legislation.[155] Furthermore, transactions within the digital and pharma sectors were specifically pointed out as sectors where normal merger regulation did not suffice, due to them not triggering the thresholds in the EUMR.[156]

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[151] European Commission, Merger Statistics, uppdaterad sammanställning över koncentrations-ärenden hos kommissionen. https://ec.europa.eu/competition/mergers/statistics.pdf.
[152] See Art. 22
[153] Id. at 6-7
[154] Vestager, supra note 4.
[155] Guidance on article 22, 2021, p. 2, s. 6.
[156] Commission Guidance, supra Note 5, at 3

In the same guidelines, the commission clarified the first requisite of Art. 22, that being the effect of trade between Member States. According to the commission, this is triggered once the transaction "*is liable to have some discernible influence on the pattern of trade between Member States*."[157] Furthermore, they also provided four factors that should be considered when appraising whether or not a transaction affects the internal market. These are the location of potential customers, the availability and offering of the products or services at stake, the collection of data in several member states, or the development and implementation of R&D projects (whose results may be commercialised in more than one country within the Union).[158]

The second requisite, that being whether or not competition is significantly altered within the referring Member State/States, was also explained by the Commission. "*[T]he creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices*."[159]

The Commission also explained the category of cases that will be construed using Art. 22. These were to be cases where the turnover of at least one of the undertakings involved is not entirely corresponding to the actual, or even future, competitive potential. This includes start-ups, an innovator that is conducting research, an actual competitor, a firm that has access to key information and data or a firm that provides products that are influential and key for other industries.[160]

Some have argued that the new application of Art. 22 EUMR constitutes a return to the roots of the article, that being the possibility to let the Commission appraise those mergers that would otherwise be free from scrutiny.[161]

[157] Commission Guidance, supra Note 5, at 4.
[158] Commission Guidance, supra Note 5, at 4
[159] Commission Guidance, supra Note 5, at 4
[160] Commission Guidance, supra Note 5, at 4
[161] McNelis & Hirst, 9 oktober 2020

4.2 A brief explanation of killer acquisitions and its theory of harm.

Killer acquisitions can be quite tricky to understand, made even more difficult by the unfortunate circumstance that there are no formal definitions. The general idea however, is that some incumbent firms engage in mergers with the desire to "kill" potential competition. This is done by either eliminating a new product or innovative technology that could challenge the position of the acquiring firm or by removing the target firm from the market altogether.[162] Such endeavours are mostly common within the tech and pharma industries, where innovation plays a key role. Within the pharmaceutical industries, companies compete with each other to develop new "blockbuster" drugs which will guarantee a large steady stream of income for many years. Thus, there are tremendous incentives for expensive and risky R&D developments. The idea here is that companies, through the incentives for innovation, will minimise the risk of monopolisation of the markets.[163]

Even in those innovation-heavy markets where some firms allocate much of the power, the threat to these successful incumbents will not come from existing firms, but from future competition.[164] Here, it is important to make a connection between dynamic markets and future competition. Within dynamic markets, we find firms that continue to innovate and develop their business, more often than not in order to remain relevant and competitive.[165] These markets are more often than not known for quick changes in demand and expansive restructuring activities, which gives the produced products short life-spans on the market.[166]

In regards to potential competition, this is since 2004 part of the merger control within the EU due to the adaptation of the SIEC test.[167] This test analyses the effects of a merger from the perspective of a certain defined market.[168] Furthermore, the Commission often applies certain theories of harm, explaining why certain behaviour is incompatible with the internal market.

Following the introduction of the new EUMR, the Commission issued new Guidelines which were put in place to highlight key similarities and differences when it comes to understanding the new regulation.[169] It also presents what method the Commission will use when assessing the markets. A fully comprehensive overview over these Guidelines are beyond the scope of

[162] Whish (2002) p. 2
[163] Whish (2002) p. 4
[164] Whish (2002) p. 5
[165] OECD, Start-ups, Killer Acquisitions and Merger Control, p. 27
[166] Galloway, 2011, p. 76
[167] OECD, Start-ups, Killer Acquisitions and Merger Control, p. 27
[168] Hildebrand, 2016, p. 415-416
[169] Kokkoris p. 84

this paper. Instead, I will focus on what the Guidelines have to say on mergers as an elimination of important competition.

According to the guidelines, the fact that the SIEC test is applied in order to find future competition makes the process much more complicated, since there are clear issues with determining the potential success of the target firm. Without clear market shares, a functioning logistics department and a defined customer base, such an endeavour becomes difficult.[170] According to some scholars however, recent developments indicate that the Commission is starting to apply a broader theory of harm, in spite of these technical difficulties. The theory of harm would in that case be that there exists *tangible obstacles for the maintenance of the internal market if established firms buy and subsequently kill future competitors or their products*.[171]

As aforementioned, it was already clear in the previous guidelines to the EUMR that these types of transactions were deemed to be harmful to the internal market. Again, this was also corroborated in the paper released by the OECD.[172] There are several theories as to why killer acquisitions have become more and more of a problem within the EU in recent years. One theory is that firms have obtained higher levels of pricing power in the previous decades, with some arguing that this is the result of insufficient merger control.[173] Another explanation is that through the many restructuring activities in the past few years (such as the introduction of automatization and digitalization), some firms have naturally been better than others at taking advantage of these changes. Given the aforementioned theory brought forward by DePamphilis, that mergers occur with the desire to create economies of scale and scope, in particular within markets affected by restructuring, it is no coincidence that some firms have grown exponentially. These new superstar-firms ultimately lead to higher entry barriers for new firms on the market.

There also exists some empirical evidence to prove that killer acquisitions are a growing problem. In a study performed by Cunningham and others, they found that when analysing 16 000 mergers over the past 25 years, there was a 26 % lower chance that the innovation within the target firm was realised after the transaction. This in comparison to when the acquiring firm and the target were not deemed competitors within the same product market. Furthermore, this study also showed that an estimated 6 % of all mergers within the

[170] See the guidelines on article 22 EUMR, p. 2 s. 9
[171] Caffarra, Gregory, & Tomaso (2020) section 1.
[172] OECD, Start-ups, Killer Acquisitions and Merger Control, p. 29
[173] Levy, Waksman & Sheridan, 2020, p. 325

pharmaceutical sector could be defined as killer acquisitions. This lowered the development of new products by roughly 4 %.[174]

At the end of their research paper, Cunningham states that these trends within pharma hurt the customers, due to them ultimately having less choice on the market.[175] The view that killer acquisitions are harmful to consumers and society as a whole has also been corroborated by the OECD in their large report on the subject.[176]

4.3 Facts in the Illumina/Grail case.

On 21 september 2020, it was announced that Illumina Inc, an american biotechnology company, would acquire exclusive control over Grail, a likewise american company within the same market. Illumina is a supplier of a certain genomic sequencing technology which can be used in order to discover, and treat, cancer. This business led to Illumina having a worldwide turnover of around EUR 2.5 billion. Furthermore, both companies were closely related, due to the target Grail being a subsidiary to Illumina, with the latter owning roughly 14.5 % of the shares since Grail was introduced to the market. At the time of the announcement, Grail also provided products that detected cancer, whilst also having two "pipeline" products that might confirm a cancer diagnosis and also detect post-treatment relapses. These products were dependent on certain NGS-systems provided by Illumina, which makes the proposed merger a vertical one.

The acquisition was approximately valued at around EUR 8 billion, but failed to fall within the EUMR due to the transaction lacking a European dimension. This was mostly because neither Illumina or Grail failed to generate any turnover in the EU, which also meant that no national merger control within any Member state appraised the acquisition. Subsequently, the Commission was not notified of the acquisition.

On 7 December 2020, the Commission received a complaint of the acquisition, inciting them to engage in a preliminary assessment of the transaction. This assessment concluded on 19 February 2021, where the Commission sent the Member States a letter of invitation, where they urged the domestic authorities to issue a referral in accordance with Art. 22 EUMR. This led to the French national competition authority issuing a referral request on 9 March 2021. Furthermore, Greece, Belgium, Iceland, the Netherlands and Norway joined in on the referral, which was formally accepted on 19 April 2021.

[174] Cunningham, Ederer & Ma, 2021, p. 2-6
[175] Cunningham, Ederer & Ma, 2021, p. 50
[176] OECD, Start-ups, Killer Acquisitions and Merger Control, p. 24

Both Illumina and Grail opposed the referral, and questioned whether or not the Commission could use Art. 22 EUMR even when the merger does not fall within any Member States domestic merger regulation. Therefore, the merging parties decided to apply to the General Court with the purpose of having the Commission's decision (to overview the transaction) annulled. Subsequently, it is important to note that the questions asked to the Court surrounded whether or not the Commission had the authority to investigate the transaction. It did not focus on whether or not the Commission had any merit in believing that the merger would harm competition. Since the focus of this paper is the prohibition presented by the Commission on September 6, 2022, the following will simply be a brief presentation of the results in Court.

4.3.1 Pleas.

Illumina submitted three pleas to the Court.

1. The Commission lacked competence to initiate an investigation that is not reviewable under the domestic merger regulations in a Member State.
2. The referral to the Commission was requested out of time, alternatively the Commission failed to send out its invitation letter in time.
3. The Commission has acted against the principle of legitimate expectations by changing its referral system.

The main argument presented by Illumina was that if a concentration does not have any European dimension, then Art. 22 EUMR does not allow a concentration to be appraised if it cannot be legally reviewed in the Member State submitting the request.

4.3.2 The opinion of the Court.

The Court started off by presenting a literal interpretation of the current law. The Court states that nothing in Art. 22 EUMR would lead Illumina to believe that the provision should be construed as implying that the referral is only possible if the concentration falls within the scope of the referring Member State.[177] Firstly, this is due to the cumulative nature of the article, in which a referral is possible when;

1. The referral request must be made by one or more Member States;
2. The transaction in question must be a concentration, as defined by art.3 EUMR;
3. The concentration must affect trade between Member States; and

[177] Illumina v Commission EU:T:2022:447 at [89]–[95].

4. The concentration must threaten to significantly affect competition within the territory of the relevant Member State(s).

Secondly, the wording any concentration alludes that "...a concentration may be the subject of a referral, regardless of the existence or scope of national merger control rules, provided that the cumulative conditions referred to in paragraph 89 above are satisfied".[178]

Moving on to a historical interpretation[179], the Court argued that even though Art. 22 EUMR was originally meant to help those Member States without a domestic merger regulation, serving as the aforementioned "Dutch Clause", this was never intended as the only purpose of the article. On the contrary, Art. 22 EUMR has many uses and purposes, with one of them being a simplified procedure in which a one-stop-shop is created. Overall, using a historical approach the Commission again denies the argument put forward by Illumina.

4.3.3 Teleological interpretation and legal certainty.

The Court puts forward the argument that the EUMR aims to make the Commission's investigation and prohibition of concentrations dependent on and limited through, the potential exceeding of turnover thresholds. Furthermore, Art. 22 looks to supplement these thresholds by allowing for referrals, which acts as corrective mechanisms.[180] In some ways, the Court argues that the point of the EUMR is to allow for investigations into all those concentrations which might have significant effects on the structure of competition within the Union.[181] Subsequently, Art. 22 EUMR acts as a flexible way for the Commission to scrutinise these types of transactions, without becoming stuck in the rigid thresholds.[182]

The conclusion of this is, according to the Court, that a teleological interpretation provides sufficient evidence which supports the referral system in Art. 22 EUMR, even when the referring Member State lacks any domestic legislation allowing themselves to investigate the concentration. Any other way, would go against the purpose of the legislation.[183]

Furthermore, a wide application of Art. 22 EUMR, as presented by the Court, is favourable using the principle of subsidiarity, which states that the objectives of an act must not be

[178] Illumina v Commission EU:T:2022:447 at [91]
[179] Illumina v Commission EU:T:2022:447 at [96]-- [117]
[180] Illumina v Commission EU:T:2022:447 at [141]
[181] Illumina v Commission EU:T:2022:447 at [142]
[182] Illumina v Commission EU:T:2022:447 at [143-148]
[183] Illumina v Commission EU:T:2022:447 at [148]

sufficiently achievable at a domestic level, but rather more attainable at an EU level. In some ways, this goes back to functional constitutionalism and the idea of constructing the EU and its legislation in a way as to achieving maximum efficiency in regards to fulfilling the purpose. In this case the EU has, according to the Court, better tools are more possibilities in examining large cross-border concentrations. The very nature of this case, where competition within the internal market could be harmed but Member States lack the sufficient tools, is according to the Court enough to showcase the accordance with the principle of subsidiarity. As the Court says, *"...interpretation therefore ensures that a concentration which, despite those significant negative effects, would not be subject to any examination, either by the national authorities or by the Commission, may be examined by the Commission. It thus concerns an action which cannot be achieved by the Member States. On the contrary, in that situation, it is essential to act at EU level"*.[184]

On the matter of legal certainty, the Court rejected the notion that a wide interpretation of Art. 22 EUMR would create legal uncertainty. According to the Court, the principle of legal certainty on one hand requires legislation to be clear and precise, and on the other that the application of said legislation is consequential and foreseeable. This has the desired consequence that individuals and corporations are well aware of the obligations set out in legislation, and how they must act accordingly.[185] If the proposed order laid out by Illumina and Grail were to become law, the Court says, the legal ambiguity would become enormous. A situation where the application of Art. 22 EUMR on one hand acts as a Dutch clause and exception, and on the other can only be used if the referring Member State has a merger regulation of its own, creating far reaching contradictions and legal uncertainty.[186] In conclusion, the Court finds that the Commission's application of Art. 22 EUMR, preserves legal certainty.

4.3.4 Referral.

Furthermore, Illumina claimed that the referral request was submitted after the time limit found in the second subparagraph of Art. 22(1) EUMR had expired.[187] Their argument was based on the fact that information found in the invitation letter (given to Illumina) became publicly known in September 2020, which would have given the French competition authority enough time to conduct an investigation before the referral was even made.

[184] Illumina v Commission EU:T:2022:447 at [163]
[185] Illumina v Commission EU:T:2022:447 at [173]
[186] Illumina v Commission EU:T:2022:447 at [174-175]
[187] Illumina v Commission EU:T:2022:447 at [186]

This raised the question of how to understand the phrase “made known” in Art. 22 EUMR. Should it be seen as actively taking part of the information or being passively aware of the information? On this matter, the Court found that when a concentration is “notified”, and when it's “made known”, both scenarios lead to the same consequence, that being the trigger of the 15-working-day time limit. Thus, according to the Court, both these concepts were comparable.[188]

Furthermore, when referring a case to the Commission, the term “made known” must include sufficient information for the Member State. If the requisite for “made known” is too low, within the context of a referral, there is according to the Court a risk that Member States simply refer a case to the Commission too quickly and without knowledge, in order to comply with the time limits.[189] The Court also acknowledged that in other parts of the EUMR (the being Art. 4(4) and Art. (9)), requests to issue a referral must be done within a time limit which starts in a notification.[190] Finally, the Court concluded that the requisite “made known” in Art. 22 EUMR must mean an active transmission of information. Another reason for this was again due to teleological reasons. Seeing as Art. 22 EUMR is, among other things, based on the idea of efficiency, it would seem foolish to have to constantly review new public announcements. It would also create uncertainty as to when exactly the 15-working-day limit begins.[191]

What this meant was that passive knowledge through public announcements did not meet the standard of “made known” in Art. 22 EUMR, and that this requisite shall only be seen as fulfilled when the information is actively provided.

Illumina also claimed that due to the information already being in the public domain, the Commission was already aware of the planned concentration. The time taken to produce an invitation letter (2 months) constituted an undue delay due to this previous knowledge. According to the Court, it is the responsibility of the Court to send out an invitation within reasonable time.[192] There were 47 working days between the day the Commission received the complaint regarding the concentration and when the invitation letter was produced. This was, according to the Court, too many days to be seen as within reasonable time. [193] However, in order to annul the decision of the Commission, it was up to Illumina to prove that the

[188] Illumina v Commission EU:T:2022:447 at [198]
[189] Illumina v Commission EU:T:2022:447 at [199]
[190] Illumina v Commission EU:T:2022:447 at [200]
[191] Illumina v Commission EU:T:2022:447 at [204–207]
[192] Illumina v Commission EU:T:2022:447 at [221-223]
[193] Illumina v Commission EU:T:2022:447 at [224-238]

errors of the Commission meant that Illumina had their right to defence infringed. Such an endeavour was tried, in which Illumina argued that if the invitation letter was sent earlier, then Illumina and Grail could clarify some problems that were later revealed. Nonetheless, the Court maintained that this argument was not sufficient in showing that Illumina had their rights of defence harmed.[194]

Finally, Illumina claimed that the Commission acted against the principle of legitimate expectations. This was based on the notion that the Commission had previously been against accepting referrals from Member States who could not apply their own merger control on the concentration. Furthermore, Illumina pointed out that a speech by EVP Margarethe Vestager in 2020 proved that such a policy would not change until mid-2021.[195] This argument was shot down by the Court, who argued that this speech, which did not originate from the EU administration, was of general nature and could not have brought with it any legitimate expectations regarding the Illumina/Grail concentration.[196]

4.3.5 The prohibition.

On 6 september, 2022 the Commission publicly announced that they had prohibited the then completed merger between Illumina and Grail. According to the Commission, this concentration had the risk of enabling and incentivising Illumina to foreclose Grails competition. As aforementioned, Illumina and Grail were already closely connected through a vertical trade agreement, where Grail bought crucial NGS systems from Illumina. Through a concentration, the Commission feared that the competitors to Illumina, who also bought highly sought after technology from Illumina, would find themselves in a highly disadvantaged situation. Thus, by acquiring Grail, Illumina would be able to cut access to NGS-systems from Grails competition, which de facto would give Illumina far reaching control over the cancer-detection testing market.

Furthermore, the Commission speculated in what ways this exploitation of potential market power could be used. According to them, Illumina could;

- Refuse to supply the NGS-systems to Grails rivals on the market
- Increase the prices
- Degrade quality in those NGS-systems actually sold to Grails rivals
- Delay supplies

[194] Illumina v Commission EU:T:2022:447 at [240-247]
[195] Illumina v Commission EU:T:2022:447 at [251]
[196] Illumina v Commission EU:T:2022:447 at [254-265]

All of these potential risks, individually or collectively, could, according to the Commission result in significant damage done to the competition within the developing market of NGS-based cancer detection tests within the EU.

As for Grail specifically, they along with their rivals are according to the Commission in the midst of an innovation race to both develop, and subsequently commercialise these early cancer detection tests. Here, the Commission seemingly applies the aforementioned Killer acquisition theory of harm when they state that "*While there is still uncertainty about the exact results of this innovation race and the future shape of the market for early cancer detection tests, protecting the current innovation competition is crucial to ensure that early cancer detection tests with different features and price points will come to the market"*.

Specifically, Illumina would have the ability to foreclose (or if you want, "kill"), Grails rivals. Due to the previously mentioned NGS-test being the best ones in the market, with no credible substitute in sight and with significant barriers to enter, Grails competitors are almost entirely dependent on the trade with Illumina. Furthermore, Illumina would also have large incentives for stopping the sale of NGS-tests to Grails competition. This is firstly due to those sales only accounting for a small part of all profits generated by Illumina. Secondly, and arguably most importantly, these forms of cancer protection products have an enormous potential, where the market is estimated to reach more than EUR 40 billion per annum on a global basis by 2035. Again, the Commission looks at the potential harm, seeing as they argue that Illumina must have a great desire in harming Grails competitors today, even though such an undertaking will only become lucrative in the future. Thus, the Commission looks at the future competition within a highly competitive and innovative area of pharma.

Illumina answered with some proposed remedies, both of which were dismissed due to them not being sufficiently far reaching, or unclear in how they would be implemented.

5. Discussion and conclusion.

The *Illumina/Grail* case is in many ways a trailblazing case, and will bring with it a whole new set of arguments and tools within the existing discourse regarding the EU and their role in combating killer acquisitions. As the research question states, this paper aims at trying to investigate whether or not the judgements presented in this case can be understood as legitimate using the theory of functional constitutionalism. What this means is that we use the aforementioned information on the internal market in order to evaluate whether or not the decisions made in the case runs the risk of undermining the legitimacy of the merger

regulation. Furthermore, given the framework of functional constitutionalism, the question becomes what purposes, ideals and values as means of justification shine through in the judgement and subsequent prohibition. If we can establish such findings, the next step is discussing to what extent such an endeavour is possible and/or achievable from the perspective of the legislator.

In my opinion, which will be elaborated on in the following, the judgements presented in this case are clear examples of the relationship between economism and holisticism, two purposes/means of justification which have been prevalent in the history of the internal market. So, within the scope of this discussion, both these terms of justification will be analysed and critiqued. Firstly however, I will discuss what the application of functional constitutionalism on the Illumina/Grail actually entails.

Relationship with functional constitutionalism.

In the judgement, presented by the Court, it is quite clear that the referral is motivated by teleological motivations, where the Court examines and refers to the *purpose* of the legislation.[197] As the court says, the point of the EUMR is to allow for investigations into all those concentrations which might have significant effects on the structure of competition within the Union.[198] In order to be completely in line with Isiksels theory, these decisions will have to have been made in accordance with the purpose of the institution. By enabling a referral that might not have any support in the explicit wording of the law (even though the Court finds that the wording does not prohibit such an endeavour), the Court is seemingly, albeit possibly unconsciously, motivating their decision with reference to the function of the merger regulation. As the Court themselves say, if a referral from a member state was not possible and the member state in question lacked a sufficient merger regulation to handle the cross-border concentration on their own, then those large transactions that still have an enormous effect on the Union would go unchecked.[199]

Such reasoning has been displayed by the Court in previous case law within competition regulation, namely the aforementioned *Walt Wilhelm* case, in which the Court also focused on cementing the internal market as the purpose of the Union.[200] Furthermore, the arguments presented by the Court in the *Illumina/Grail* case are also closely related to those that were brought up in the common discourse during the creation of the merger regulation in itself.

[197] See section 4.3.3
[198] Illumina v Commission EU:T:2022:447 at [148]
[199] Iumina v Commission EU:T:2022:447 at [163]
[200] Case 14/68 Walt Wilhelm et al. v Bundeskartellamt [1969] ECR 1, para 9

Back then, the argument was that the ex post appraisal of mergers using the Competition regulation was insufficient, and failed to function accordingly. Therefore, the EUMR had to be created in order to somewhat guarantee the functioning of the merger control, and therefore, the maintenance of the internal market.[201] Nonetheless, what makes killer acquisitions and the *Illumina/Grail* case stand out, is that we have yet to agree on any particular way of preventing these transactions.

Killer acquisitions do have, according to the aforementioned research presented by Cunningham, a large documented effect on dynamic markets and possible/future innovation.[202] The potential rejection of the referral would indirectly allow certain concentrations that have a large effect on the internal market, but lacked a considerable enough turnover and/or any "European dimension".[203] In my opinion (which has been corroborated in the studies regarding killer acquisitions) the certain context surrounding these transactions has to be taken into account. Sincet killer acquisitions, such as the allegedly proposed one in the *Illumina/Grail*, oftentimes occur within the pharma industry, could possibly affect the public reaction in the wake of a potential transaction. Subsequently, the fact that the *Illumina/Grail* merger was to occur within an area known for its innovation, makes the analysis within the functional constitutionalist framework all the more interesting.

The application of the functionalist framework entails that the EU could and most likely would lose legitimacy if they failed to appraise these transactions. If concentrations such as Illuminas acquisition of Grail were to go unchecked, then a sufficient argument could be presented which damned the EU for not living up to its purpose.[204] There are, however, as I have tried to showcase throughout the paper, many different perspectives and ideas on what the purpose of the EU is, and perhaps more importantly, what it should be. This goes back to the idea of justification within the functionalist framework. I will come back to this point later on in the discussion.

In my opinion, both the Court's judgement and the prohibition presented by the Commission motivate my choice of purposive approach. It is clear that killer acquisitions, and merger regulation in general, is motivated by the need and desire to enable the internal market to function accordingly. Mainly, the referral judgement is based on the notion of maintaining efficiency, as seen in the Courts reference to the principle as subsidiarity[205], along with their

[201] History and Framework of EU Competition Law p. 199
[202] Cunningham, Ederer & Ma, 2021, p. 50
[203] See section 4.3.3
[204] Isikler p. 92
[205] Illumina v Commission EU:T:2022:447 at [163]

reasoning surrounding the term "made known".[206] Without such efficiency, the internal market would not operate accordingly. Note that the Court never extends this argument further than simply shining a light on the internal market. Nowhere in their reasoning is the internal market mentioned as a tool for something bigger, on the contrary, since it is always mentioned as the end goal.

As aforementioned, by essentially limiting the freedom of contract within this sphere, the EU wishes to give incentives for innovation and entrepreneurship.[207] The arguments in the prohibition reflect this notion, and where it goes further than previous merger regulation is in its scope. In the beginning, when antitrust and ex post appraisals were the status quo, the Commission evaluated the potential anti-competitiveness only after the completion of the transactions. Only many years later, with the introduction of the EUMR, was the Commission able to apply an ex ante methodology.[208] Now, as the Commission themselves argue in the prohibition, they are giving themselves authority to stop a merger due to unforeseen (or at best plausible) harm to future competition.

The desire to protect the incentives for innovation is clearly articulated throughout almost all written doctrine and case law within both competition law and merger regulation. Furthermore, these arguments that the Commission presents fit quite well into the discourse of killer acquisitions. As both Cunningham and the OECD have stated, these transactions do have the potential to harm competition.[209] Therefore, it would seem that preventing killer acquisitions is a somewhat functionalistic endeavour, but before we make any conclusions, we must look at the justifications, meaning the end-goals and purposes used in order to justify the expansion of the merger regulation.

Economism.

Applying the functionalist framework on the judgement presented by the Court, then the end goal of merger regulation is the maintenance of the internal market (the economist perspective), the actions of the institutions can be justified with reference to a somewhat clear and obvious goal. There is in my opinion some evidence to support the notion that the internal market in its own way is the main value within the EU, superseding other ideals and values. Such evidence can be found both in the historic discourse surrounding merger regulation and in the way the decisions were motivated. One does not need to look further

[206] Illumina v Commission EU:T:2022:447 at [204–207]
[207] Whish (2002) p. 4
[208] Kokkoris p. 94
[209] OECD, Start-ups, Killer Acquisitions and Merger Control, p. 27

than the development of the SIEC-test, which was clearly implemented into the EUMR in order to appraise mergers using more economic tools and metrics.[210]

Another example is the failed attempt at a constitution for Europe, which clearly placed the internal market as the goal, not the destination.[211] Overall, as I have tried to showcase above, the historic tendencies behind both the competition law and the merger regulation all point to this purpose, for the most part. What makes the actions in the *Illumina/Grail* differ from the status quo is that, beyond dealing with a new area of transactions, they are not related to negative integration, focusing more on expanding regulation rather than removing obstacles.

In such a scenario, the goal is the creation and maintenance of the internal market as the main core value in itself. Put in a killer acquisition-context, transactions such as the one proposed in the *Illumina/Grail* must therefore be forbidden with reference to their potential harm to the functioning of the market. If Illumina were to acquire Grail, then their accumulated market dominance would entail them to control large parts of the market. Therefore, putting it é contrario, the EU fails to uphold their function if they allow acquisitions that harm the market to take place. This should therefore, in accordance with the framework found within functional constitutionalism, enable these decisions in this case to be categorised as legitimate.

Legitimacy is therefore achieved by acting in a way in which perceived killer acquisitions are prevented. In this case, the justification is the economist approach. On the face of it, the application of functional constitutionalism combined with this method of justification allows the EU to achieve legitimacy in their decision making.

Potential problems with the economist justification

There are however also some ways in which the perceived legitimacy can be harmed using functional constitutionalism. One such critique can be exposed by turning the discourse surrounding killer acquisitions on its head. Subsequently, the issue becomes what do we do if the economist's way of justifying the prohibition, with reference to the purpose, fails? Let me elaborate.

Even though some scholars are in agreement as to the potential damage these transactions could present to competition and innovation, there is in my opinion no obvious consensus as to how we prevent or stop these large conglomerates. Bearing the writings of Moravcsik in

[210] History and Framework of EU Competition Law p. 202
[211] Scharph (2009) p. 14

mind, one could also make the argument that the internal market could possibly be harmed by prohibiting killer acquisitions, albeit perhaps not in the Illumina/Grail-case (since it concerned itself with mostly American business), but on a broader level. This goes back to Moravcsiks theory that the existence of the EU is based on the creation of economic growth above all else. Subsequently, as the EU tries to compete in a globalised world, perhaps it would stand to gain economic efficiency by allowing large firms to be created within its borders. Massive conglomerates could create new possibilities for employment, and an allocation of resources might also provide large-scale innovation within several fields. Furthermore, such an argument would not be entirely unorthodox within the existing merger regulation, look no further than the "*failing firm*" exception which, though albeit very restrictive, allows for the transaction to go through due to its positive effects on the economy.[212]

The view that some transactions, which may or may not be labelled as killer acquisitions, are necessary in order for the EU to thrive has seemingly been brought forward in the above mentioned Franco-German proposal. In it, its authors advocated for negative integration within merger regulation, with the goal and purpose being the facilitation of "European Champions".[213] Note that these proposals arose in light of the proposed *Siemens/Alstrom* merger, and a future prohibition in the *Illumina/Grail* case could possibly give fuel to this fire. However, as previously mentioned, the *Siemens/Alstrom* case was also followed by a resolution which urged the EU:s institutions to consider customer welfare more in their executive decisions. But, as Bulakowski mentioned, this did not come to pass, further supporting the notion of trying to use economism as the main source of justification.[214]

In my opinion this is one of the most potent criticisms against the economist justification. In a complicated world, who is to say that the choice to attack killer acquisitions is the correct way forward. Furthermore, it also strengthens to so -called interpretive dissonance associated with the internal market. If the internal market is given an economist label, and therefore used as a justification in the quest for legitimacy, then perhaps the EU has to decide what the end goal with the project is. If we have completed negative integration, is the next step to use the internal market in order to create said European Champions? And, more importantly within the context of this paper, is the creation of such firms oxymoronic with the prohibition of killer acquisitions?

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[212] Kokoris p. 96
[213] Undesministeri um für Wirtschaft und Energie, Le ministère de l'Économie et des Finances, A Franco, German Manifesto for a European industrial policy fit for the 21st Century,
[214] NORDIC JOURNAL OF EUROPEAN LAW p. 175

Therefore, one could say that it is perhaps too early to say whether the EU has achieved legitimacy in the Illumina/Grail case. There is an old saying which states that life is a science looking backwards, by a mystery going forwards. Perhaps it's the same with this economist's way of justification. In my opinion, it definitely has all the components necessary to elicit legitimacy within the functionalist umbrella. The question is however, if it's sufficiently effective.

Holisticism.

The next question is whether the more holistic form of justification enables the EU to achieve legitimacy using functional constitutionalism. In my opinion, this is a far more difficult task. There are several reasons for this. Mainly, as my paper has shown in chapter 3, there is far less evidence supporting the notion that values such as customer welfare (for example) are in any way such an intrinsic factor of the EU that any failure to live up to this standard would harm legitimacy.

A clear example of this is the application of the SIEC test. On one hand, as Kokkoris mentions, the introduction of the SIEC test meant the Court was able to move away from their previously quite conservative position, and was able to prohibit concentrations without them necessarily resulting in the creation of a dominant position.[215] Such reasoning originates from the arguments presented by US Courts in the *Heinz Case*, and has been adopted several times in the EU case law. Nonetheless, even though the SIEC test has proven very favourable in prohibiting such mergers, it is still, as Kokkoris mentions, born out of economic reasoning. Such economic reasoning includes the consideration of customer welfare, along with for example market shares and barrier entries. As has been seen in the case law, the SIEC test might take some of these holistic values into account, however they are only necessary elements as to so far they showcase whether or not the proposed transaction goes against the purpose of the legislation, that being the maintenance of the internal market.

Another reason as to why the holistic perspective will most likely fail within the framework of functional constitutionalism is the issue of conflicting values. Even though the economist justification can be critiqued with reference to the problem of “is it efficient enough?”, this problem becomes enormous within the holistic justification. Mainly, it becomes impossible to decide what key value is so important that adherence to it can be seen as so crucial, that it becomes the main purpose and subsequent vessel for legitimacy. Who is to say that customer welfare is the most important value in a merger appraisal? What other values should we

[215] Kokkoris p. 68

introduce? What happens when two values clash, for example customer welfare and the need and want to protect certain ecological systems?

Nonetheless, as Chapter 3 illustrates, the importance of the holistic perspective may grow in the coming years. Excellent examples of this are the *Communication on the Citizen's Agenda* and the *Towards a Single Market Act,* which demonstrates the Commission's desire to move more towards a new way of understanding M&A. This way of introducing values will in my opinion also be problematic within the theory of functional constitutionalism. Such an endeavour would most likely entail the institutions referencing the TEU to a larger extent, or even changing the meaning and application of the internal market. The latter would mean moving away from the goal of establishing the internal market in itself, a creation whose maintenance has the *consequence* of fulfilling other values and ideals, and instead making it the other way around. In my opinion, this would be equally problematic, as it would most likely make the internal market similar to what Jabko described as a "chameleon".[216] In that case, it would be even harder to demarcate what exactly the purpose is, making the mission of creating legitimacy using functional constitutionalism much more difficult.

Subsequently, I find it very difficult for the EU to achieve legitimacy with reference to holistic ideals and values using functional constitutionalism. In many ways, I believe that this is why the Illumina/Grail is shaped the way it is. Even though holistic arguments are presented (mostly by the Commission) the end result is adherence to the idea of the internal market as the centrepiece of the purposive approach.

There are of course arguments that suggest that the EU should abandon the purposive approach altogether, mainly from Scharph and those who envision a value-based social market economy. The same goes for the potential criticism that the purposive approach is inherently technocratic and potentially anti-democratic, something that even Isiksel noted about her own theory. However, such critique based on the preference for input legitimacy de facto means arguing against the application of the functionalist method. Even though these criticisms are incredibly interesting, it goes beyond the scope of my research question to try and answer them.

[216] Jabko p. 27

Conclusion and final remarks.

As Dempahpilis rightly argues, the landscape of M&A is constantly changing, occurring in so called waves.[217] One could speculate whether or not we are in the middle of a killer - acquisition wave. If this is true, this of course also requires the legislator to adapt to the times. However, as I have found in this paper, the EU should not try to create too big a metamorphosis in regards to how they view merger control. Using functional constitutionalism, it becomes very hard for the EU to achieve legitimacy during such a change. Therefore, I believe that the Court will and should present the internal market as their key justification in the upcoming trial.

In this trial, I believe that the Court most likely will present a combination of the economic and holistic perspectives, but where the maintenance of the internal market will be the end goal, with consumer welfare being an argument, albeit a strong one, for this and not the other way around. Such an endeavour, where economic data and reasoning is the foundation of the Court's argument, would provide little to no change to how we use and understand the SIEC test. The functionalist approach could therefore be used in a way in which simply corroborates how the test should and will be used in a new and changing world. .

This paper aimed at discussing constitutional legitimacy in the EU, in light of the *Illumina/Grail* case and through the lens of the internal market. Furthermore, this was done by adopting a theory on constitutional legitimacy which looks at the actions correlation with a desired purpose as justification for its existence and ultimately, legitimacy. Looking at two ways of understanding the purpose of the EU (the internal market) this methodology found that the economist justification is far superior when it comes to creating legitimacy. Subsequently, the judgements in the Illumina Grail case along with the changing application of article 22 EUMR can be understood as legitimate using the theory of functional constitutionalism.

[217] DePamphilis p. 11

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Sammanfattning, opponering.

- Uppsatsen använder ett akademiskt och teoretiskt verktyg i formen av konstitutionell legitimitet för att undersöka lämpligheten i ett kommande rättsfall rörande killer acquisitions.
- Följden av det här "verktyget" blir att en särskild version av den EU-rättsliga metoden tillämpas, där framförallt perspektivet från en EU-domare används för att jämföra argumentationen i rättsfallet med upprätthållandet av den interna marknaden.
- Uppsatsen finner att det troligtvis finns 2 vägar domstolen kan gå i det kommande avgörandet. Antingen förankrar de sig i den traditionella vägen, och lägger tyngd på att förbjuda förvärvet sett till upprätthållandet av den interna marknaden, eller så applicerar de en mer värdebaserad bedömning. Min uppsats finner att inom det valda verktyget, blir det svårt för EU att upprätthålla legitimitet om de motiverar sitt avgörande med hänvisning till något annat än den interna marknaden. På så vis har EU redan valt sin väg.