Legal Opinion

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the Federal Ministry for Economic Affairs and Energy

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concerning

Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers

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I. Executive Summary

This legal opinion analyses the possibility of basing a strengthened control of acquisitions by digital gatekeepers under Article 114 TFEU. This issue is relevant because several recent economic papers have shown the risks for competition and innovation raised by the acquisitions of start-ups or scale-ups by digital platforms designated as having gatekeeper power. However so far, most of those acquisitions have not been reviewed by the competition agencies and the few that have been analysed have often been authorized without conditions. As many policy reports have shown, this points to a gap in merger control that may need to be closed by amending merger control rules with respect to the notification thresholds, the specification of theories of harm and the standard and burden of proof.

To close this gap, many countries in the EU and beyond (such as the US and the UK) have reformed or are about to reform their merger laws. Some Member States of the EU (such as Germany and Austria) have already reformed their national merger laws, while others (such as France, Italy and Ireland) have plans for reforms. Moreover, other Member States (such as Spain, Sweden, Cyprus, Latvia, Lithuania and Slovenia) may use the specificities of their laws to close the merger gap partly. However, the adoption and implementation of divergent systems and/or standards by the Member States to control digital gatekeeper acquisitions have the potential to severely undermine the digital single market. Hence, to preserve a functioning internal market, a reform is necessary at the EU level.

This opinion reviews four possible options for such EU-level reform and assesses their legality under Article 114 TFEU and EU constitutional law requirements.

– The first option, which has been chosen by the Commission, is to encourage more merger referrals from the Member States to the Commission under Article 22 of the EU Merger Regulation (EUMR).

– The second option is to establish through the Digital Markets Act (DMA) a new notification threshold for digital gatekeepers that would complement the existing thresholds of the EUMR. Once the conditions for this new threshold are met, the acquisition would be reviewed by the Commission under an unchanged EUMR, i.e. according to the existing theories of harms and the current burden and standard of proof.

– The third option is to amend the EUMR to establish new notification thresholds in a manner that would require the notification of mergers involving nascent competitors but also to adapt the Significant Impediment to Effective Competition (SIEC) test used to assess concentrations as well as the rules on proof.

- The fourth option is to establish through the DMA a new and separate regime to review acquisitions by digital gatekeepers, which would either replace or complement the existing merger control under the EUMR.

The first option does not require a change in hard law and has been carried out by the Commission adapting the Guidelines on Article 22 EUMR. However, this option does not appear to be robust enough, as recent cases (in particular *Facebook/Kustomer* and *Illumnia/GRAIL*) have shown: on the one hand, it is not clear whether such an extension of the referral possibilities complies with Article 22 EUMR and, on the other hand, it is uncertain whether the Member States would decide to refer more cases to the Commission.

The three other options require a change to EU hard law, either with the adoption of new rules (in the DMA or separate secondary law) and/or changes of existing rules (in the EUMR). Our opinion analyses whether those changes could be based on Article 114 TFEU and, if so, under which conditions. To do so, the opinion lists and reviews the main conditions set by the Court of Justice of the EU to use Article 114 TFEU as well as other Treaty rules and principles related to the choice and use of legal basis.

On the basis of those Treaty requirements and Court of Justice case law, our opinion concludes that option 2 (i.e. the adoption a new notification threshold in the DMA without changing the EUMR) would be legally feasible under Article 114 TFEU because it would prevent the fragmentation of the digital single market created by the adoption of divergent control regimes for digital gatekeeper acquisitions at the national level and it would improve the functioning of the internal market. Moreover, it would be legally possible to establish a new notification threshold without amending the EUMR.

Furthermore, the opinion concludes that the third option (i.e. amending the EUMR) would also be feasible under Article 114 TFEU. In that regard, it is important to remember that the original Merger Regulation was adopted on the basis of Articles 103 and 352 TFEU (then Articles 87 and 235 EEC), for historical reasons linked to the extensive use of Article 352 TFEU and the absence of Article 114 TFEU in the 1970s, when the Merger Regulation was first conceived. However, the legislature is not bound to retain the original legal basis when amending EU secondary law. A new legal basis may be chosen provided that the conditions for using a new legal basis are met when the legislation is amended. Therefore, the two legal bases originally used to adopt the EUMR do not mean that the EUMR could not be amended today under Article 114 TFEU when the conditions of that provision are met. Our opinion shows that those conditions are met as reforms to merger control clearly contribute to the establishment of the internal market. Thus, a reform of the EUMR to better take into account the risks for competition and innovation of acquisitions by digital gatekeepers could be based on Article 114 TFEU, possibly together with Article 103 TFEU.

Finally, the opinion concludes that the fourth option (i.e. the establishment of a new specific merger control in the DMA without changing the EUMR) could also be based on

Article 114 TFEU. As for the two previous options, the establishment of this specific regime would prevent the risks of fragmentation that would be created by the adoption of divergent national rules on digital gatekeepers' acquisitions and contribute to the internal market with the adoption of one unique control regime for the whole EU.

Ultimately, we conclude that, of the four policy options to strengthen the control of acquisitions by digital gatekeepers, the first option – which is favoured by the Commission – is probably the least robust in law and in practice. The three other options are preferable as they ensure a one-stop shop and they could be based on Article 114 TFEU as interpreted by the Court of Justice. It is then a political choice to decide among those three options. They can also be used sequentially. For instance, the second option could be implemented immediately in the context of the DMA negotiations. Then, the third or fourth option could be implemented later in the context of a more comprehensive review of EU merger control once the lessons learned from applying merger control to the acquisition of nascent competitors by digital gatekeepers have provided helpful experience that could be broadened to a wider range of concentrations.

II. Scope and Structure of the Opinion

The Federal Republic of Germany, represented by the Federal Ministry of Economic Affairs and Energy, has mandated us to provide a legal opinion on the scope of Article 114 TFEU as a legal basis for a Digital Markets Act (DMA) and a possible amendment related to merger control. The subject of this legal opinion is whether and under what conditions merger control with regard to large gatekeeper platforms can be strengthened within the framework of the current legislative procedure for the adoption of the DMA.

On 15 December 2020, the European Commission published its Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)[1] as part of the legislative package on digital services. It is the objective of the proposal to establish harmonized rules in the internal market to guarantee the contestability of digital markets and to address unfair practices in digital markets. The proposal is based on Article 114 TFEU.

The Federal Government welcomes this legislative initiative. However, in the view of the Federal Government, there is still room for improvement on some issues. In particular, in the view of the Federal Government, the proposed provision on mergers lacks ambition. Under Article 12 of the proposed DMA, designated digital gatekeepers would only have an obligation to inform the Commission about any intended concentration, regardless of whether or not it is notifiable under the EU Merger Regulation or national merger rules.

In contrast, the Federal Government considers it necessary to strengthen merger control with regard to the large gatekeeper platforms that would be addressed by the DMA. The

[1] Commission, Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) COM(2020) 842 final (hereinafter, DMA Proposal).

Commission should be enabled to effectively counter those gatekeepers' strategies of systematically buying up nascent firms in order to stifle competition. First, the Commission should therefore be given extended powers to scrutinize and, if necessary, to prohibit mergers that involve digital gatekeepers designated under the DMA. In particular, extended notification obligations should allow the control of large digital gatekeepers' acquisitions of targets with low turnover but high value. Second, the Federal Government suggests an adjustment of the substantive test to account for information asymmetries and to make merger control more effective. Thus, in cases involving designated gatekeepers, the standard of proof and/or the burden of proof could explicitly be changed in favour of the Commission.

Some wonder whether the proposed amendments require a change of the DMA's legal basis. Against this background, this legal opinion aims to identify the implications of the choice of Article 114 TFEU as the legal basis for possible amendments to the proposed DMA. The aim is to measure the scope for addressing the aforementioned merger-related policy objectives in the DMA without the need to adapt the legal basis.

Against this background, this legal opinion will identify the legal requirements and limitations for the DMA and possible amendments resulting from Article 114 TFEU as the chosen legal basis. These requirements and limitations will be specified with regard to the aforementioned objectives pursued by the Federal Government. It will be clarified whether and under which conditions the contemplated amendments could be integrated into the DMA Proposal without changing its legal basis. The following aspects will be considered in particular:

– The harmonizing effect necessary for the use of Article 114 TFEU as a legal basis.

– Whether, under which conditions and to what extent it is possible to modify the EU Merger Regulation for gatekeepers by defining extended notification obligations and lowering the standard of review (standard of proof and/or burden of proof) for the application of the SIEC test.

The opinion is structured as follows: after the executive summary and this introduction, Section III explains the policy background, i.e. why the DMA has been proposed but also the gap in current merger control law in addressing the acquisition of nascent competitors by digital gatekeepers. Section IV reviews how different Member States of the EU have reformed or are about to reform their national merger laws to address this gap and why those divergent national approaches may severely undermine the digital single market. Section V proposes four policy options to close the merger gap at the EU level in order to preserve the integrity of the internal market. Finally, Sections VI to VIII assess whether the options may be adopted on the basis of Article 114 TFEU.

III. Policy Background

1. The EU Commission's DMA Proposal: Policy Objectives, Legal Basis and Legal Instruments

The overall goal of the DMA is to ensure a high level of innovation, quality of service, user choice and competitive and fair pricing in the European digital economy.[2] To achieve this general goal, the proposed DMA sets three specific objectives:[3] (i) ensure the contestability of digital markets, which means that markets should remain open to new entrants and innovators; (ii) guarantee fairness in the B2B relationship between the digital gatekeepers and their business users, which is defined as a balance between the rights and obligations of each party and the absence of a disproportionate advantage in favour of the digital gatekeepers;[4] and (iii) strengthen the internal market.

Contestability refers to decreasing entry barriers to digital markets and to levelling the playing field among existing gatekeepers and other firms offering substitute or complementary digital services. In so doing, long-term efficiency (i.e. the future size of the pie) and consumer welfare are expected to increase. The objective of fairness is more akin to *ex post* fairness and relates to the distribution of the value created by digital markets (the division of the pie). Those objectives are also pursued by other EU laws, in particular competition law. However, the Commission has identified some regulatory gaps that the DMA Proposal aims to close.[5] In covering those gaps, the DMA will complement – and not substitute for – those other EU rules. In particular, the DMA would apply when competition law cannot act or can only act ineffectively because of the following characteristics of the digital platforms: extreme economies of scale and scope, important network effects, multi-sidedness, possible user lock-in and absence of multi-homing, vertical integration and data-driven advantages. Those characteristics are not new in and of themselves, but, when they apply cumulatively, they lead to market concentration as well as dependency and unfairness issues that, according to the Commission, cannot be addressed effectively by existing EU laws.[6]

Finally, the objective of harmonization is key because the biggest digital platforms operate on a global scale and their conducts impact most, if not all, Member States. To achieve regulatory harmonization, the DMA Proposal prohibits Member States from imposing further obligations on gatekeepers for the purpose of ensuring contestable and fair markets.[7] However, Member States remain free to impose obligations (i) that pursue other legitimate interests such as consumer protection or unfair competition, or (ii) that are based on national competition rules, provided this is allowed under EU competition law.

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[2] Recitals 25 and 79 of the DMA Proposal. For the intervention logic underlying the DMA Proposal, see Impact Assessment, p 31.
[3] Article 1(1) of the DMA Proposal.
[4] Article 10(2) and also Article 7(6) and recital 57 of the DMA Proposal.
[5] Recitals 5 and 10–11 of the DMA Proposal.
[6] Recital 2 of the DMA Proposal. See also Impact Assessment, paras 128–130.
[7] Article 1(6) of the DMA Proposal.

2. The Problem of Nascent Competitors and the Importance of Controlling Their Acquisition by (Large) Digital Platform Firms

a) *The Competition and Innovation Risks of Digital Gatekeepers' Acquisitions*

Over recent years, we have observed a wave of mergers and acquisitions in the digital economy.[8] As explained in Table 1 below, those acquisitions may have positive and negative effects on competition and on innovation.

On competition, acquisitions by digital gatekeepers may have negative effects by allowing the acquirer to eliminate competition through the acquisition of high-potential rivals that represent a threat, thereby reducing market contestability. They can, however, also have positive effects by facilitating an efficient transfer of inputs and innovation capabilities, such as technology or talent, between the acquirer and the acquired firm, and thereby accelerate the development of innovations.

On innovation by the new entrants, those acquisitions may have positive effects as the possibility of being acquired after entry stimulates innovative entry, and therefore encourages firms to innovate in the first place. One downside, however, is that it could also lead to inefficient, opportunistic entry for buyout.

After the acquisition, the digital gatekeeper may have an incentive to kill off an acquired innovation when the innovation's cannibalization of the sales of the gatekeeper's existing products is larger than the extra revenues it can earn from it. Conversely, the digital gatekeeper may have stronger incentives than the acquired firm to develop the innovation when there are important supply-side and demand-side synergies between both firms' products and, therefore, the development and diffusion of the innovation can be accelerated through the acquisition. In this case, there is a possible trade-off between the acceleration of the development of innovation and the elimination of competition.

Table 1: Effects of acquisitions by digital gatekeepers

Anticompetitive effects	Pro-competitive effects
Effects on competition	
- **Elimination of potential competition:** the acquired firm offers a substitute	- **Synergies** from the acquisition: input and output complementarities

[8] In total, Gautier and Lamesch count (and analyse) 175 acquisitions made by the five leading US digital firms Alphabet, Amazon, Apple, Facebook and Microsoft during 2015–2017: A. Gautier and G. Lamesch, 'Mergers in the Digital Economy', Information Economics and Policy, 2021. Motta and Peitz also note that Alphabet is reported to have made 48 acquisitions, Amazon 42, Apple 33, Facebook 21 and Microsoft 53. M. Motta and M. Peitz, 'Big Tech Mergers', Information Economics and Policy, 2021. Also M. Bourreau and A. de Streel, Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control, CERRE Issue Paper, January 2020.

- **Reinforcement of market leaders:** if start-ups are sold to them rather than to rivals	
Effects on innovation	
- Innovation **killed** if the acquirer has less incentive than the acquired firm to develop the innovation - **R&D oriented towards maximization of acquisition value** rather than value of innovation	- **Stimulation of innovative entry**, with possibly inefficient entry - Innovation **accelerated** if the acquirer has more incentives to develop the innovation than the acquired firm - **Innovation capabilities complementarities** between the acquirer and the acquired firm: capital, skills/talent, data other resources

Source: Bourreau and de Streel (2020)

b) The Gaps in Current Merger Control Laws

The problem for current competition policy and economic regulation aiming at preserving market contestability is that most of those acquisitions were not reviewed by the European Commission or the national competition authorities as they were below the notification thresholds. Indeed, those thresholds are generally based on the monetary turnover of the firms involved in the concentration. However, digital gatekeepers mostly acquire platforms with no or small monetary turnover as their acquisitions often take place at early stage of the acquired firms' development and, at that early stage, digital firms focus more on the growth of their customer base than on the growth of their turnover and profit (e.g. because they want to be the first to benefit from network effects and hope that the market might tip in their favour). To make things worse, the few acquisitions that have been reviewed were in general cleared without conditions because competition authorities tend to focus more on the effects of the merger on existing competition than on its effect on potential competition and innovation.

With the benefit of hindsight and a better understanding of the competitive forces in the digital economy, a twofold debate is emerging:[9] first, whether more digital gatekeeper acquisitions should be reviewed by the competition authorities and, second, whether additional or different theories of harm and proof should be developed.

[9] See also L. Cabral, Merger policy in digital industries. *Information Economics and Policy*, 2021; OECD, *Start-ups, Killer Acquisitions and Merger Control,* 2020, available at <www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>; E. Argentesi, P. Buccirossi, E. Calvano, T. Duso, A. Marazo, and S. Nava (2019), 'Merger policy in digital markets: An ex-post assessment,' CEPR Discussion Paper 14166.

Thus, enacting a Digital Markets Act without a provision to control concentrations would leave a significant gap in the EU's digital agenda. It is worth noting that this issue will also form part of the US antitrust agenda. In his executive order on promoting competition in the digital economy, President Biden drew attention to the need to develop a policy

> of greater scrutiny of mergers, especially by dominant internet platforms, with particular attention to the acquisition of nascent competitors, serial mergers, the accumulation of data, competition by 'free' products, and the effect on user privacy.[10]

The FTC and the DOJ will soon begin to review current merger guidelines as a first step following from this order.[11]

IV. Fragmented Regulation of Gatekeeper Acquisitions in the Internal Market

In the internal market, an increasing fragmentation of the national merger rules can be observed with regard to acquisitions by large digital gatekeepers. This is especially true for the question of which acquisitions can be taken up by the national competition authorities if the target companies generate no or only little turnover. However, it should also be noted that Member States are considering adjustments to the substantive test or the way it is applied (such as changes in the distribution of the burden of proof or the standard of proof). This would make it more likely that that such acquisitions would be prohibited or permitted only if the acquiring firm accepts substantial structural or behavioural commitments. The following is an overview of the relevant legal situation and envisaged measures in various Member States.

1. Notification threshold: Assessing Acquisitions of Targets with Low or No Turnovers

Merger regimes generally provide for turnover thresholds that decide whether or not a certain concentration must be notified to a competition authority. Where a large digital gatekeeper acquires a firm that does not yet generate any or much turnover, these thresholds are typically not met.

However, a number of Member States have established legal instruments that allow their competition authorities to assess mergers regardless of whether turnover thresholds are met. Without claiming completeness, the following overview demonstrates the variety of legal mechanisms that may be employed to that effect.

[10] Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.

[11] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines, 9 July 2021.

a) Transaction Value-Based Thresholds (Germany, Austria)

In 2017 the German legislature introduced in the Competition Act a threshold based on transaction values,[12] which applies on a subsidiary basis. In the explanatory memorandum to the amendment, it is stated that the 'high purchase price in such takeover cases is often an indication of the existence of innovative business ideas with a high competitive potential'.[13] The German legislature referred explicitly to Facebook's acquisition of WhatsApp to illustrate that the new provision was necessary to close a gap in the German merger control framework.[14] The need to close this gap was explained by the risk that incumbent firms with an internet- or data-based business model will try to buy up potential competitors with high innovation potential:

> This can be used to expand one's own portfolio of products and services. However, the aim of such takeovers can also be not to exploit the innovation potential, but to remove competing business models or products from the market.[15]

Based on essentially the same considerations,[16] Austria also introduced a transaction-value based threshold in 2017.[17]

In addition, the German legislature recently provided the competition authority with the power to oblige particular firms to make a notification for all acquisitions.[18] However, this instrument is primarily intended to close gaps left by the turnover thresholds with regard to acquisitions on regional markets. Its application is based on conditions that preclude it from effectively addressing the challenges of acquisitions by digital gatekeepers. Section 39a of the Competition Act requires, among other things, that the Bundeskartellamt has previously conducted a sector inquiry, that the target firm generated sales of more than two million euros in the previous year, and that it generated more than two-thirds of its sales in Germany.

b) Notification Obligations for Designated Gatekeepers (France)

In February 2020, the French Senate unanimously adopted a 'Proposal for a Law to Ensure Free Consumer Choice in Cyberspace' ('Proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace'[19]). Subsequently the law was submitted to the National Assembly, where it has since rested. It seems that the National Assembly is waiting for the results of the EU's legislative process on the DMA.

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[12] Section 35(1a) of the German Competition Act. The text of this and other provisions that are cited in this section is included in an Annex to this legal opinion.
[13] Deutscher Bundestag, Drucksache 18/10207, 7 November 2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, p 71. Available at <https://dserver.bundestag.de/btd/18/102/1810207.pdf>.
[14] Ibid.
[15] Ibid.
[16] See the governments explanatory memorandum at p 1. Available at <https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01522/fname_618926.pdf>.
[17] Section 9(4) of the Austrian Competition Act.
[18] Section 39a of the German Competition Act.
[19] Available at <https://www.senat.fr/leg/tas19-062.html>.

One element of the Bill is a strengthening of merger law to deal with 'predatory acquisitions'. Thus, Article 7(1) of the Bill foresees that the French competition authority would have to draw up a list of 'structuring undertakings' ('entreprises structurantes'). Relevant factors for this designation of an undertaking include its dominant position on one or more markets, in particular multi-sided markets, the number of unique users of the products or services it offers, its vertical integration and its activities on other related markets, the benefit it derives from the exploitation of significant network effects, its financial value, its access to data essential for access to a market or the development of a business, the importance of its activities for third- party access to markets, and the influence it exerts on the activities of third parties as a result. Thus, the concept of a 'structuring undertaking' is very similar to that of a designated gatekeeper under the DMA Proposal.

Firms that are designated as 'structuring undertakings' will have to inform the competition authority about any planned merger that is likely to affect the French market (Article 7(2) of the Bill). The authority may then impose on the designated firm the obligation to notify the merger, which will trigger an ordinary merger control procedure (Article 7(3) of the Bill).[20]

The explanatory memorandum accompanying the Bill[21] clarifies that the provision is meant to close the gap left by the turnover-based thresholds:

> Many players now consider that the takeover of Instagram and WhatsApp by Facebook should have been examined by the competition authorities. However, the French Competition Authority could not have taken up the matter as the target company only had a limited turnover, well below the thresholds triggering a mandatory declaration under merger law.[22]

Remarkably, the French Senate emphasizes that it supports a corresponding amendment of EU merger law:

> This is why the authors of the draft law would like to see the merger control system amended, both at national and European level, in order to be able to apprehend transactions characterised by potential significant anti-competitive effects but falling outside the scope of the mandatory notification.
>
> While awaiting a European initiative, Article 7 proposes to allow the Competition Authority to discuss acquisitions by systemic companies.[23]

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[20] Sénat, Rapport n°301 (2019-2020) fait au nom de la commission des affaires économiques sur la proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace, Par M. Franck Montaugé et Mme Silviane Noël, p. 49. Available at <https://www.senat.fr/rap/l19-301/l19-3011.pdf>.

[21] Exposé des Motifs, available at <https://www.senat.fr/leg/exposes-des-motifs/ppl19-048-expose.html>

[22] In the French original: 'De nombreux acteurs considèrent aujourd'hui que le rachat d'Instagram et de Whatsapp par Facebook aurait dû être examiné par les autorités de la concurrence. Or, l'Autorité française de la concurrence n'aurait pas pu s'en saisir dans la mesure où la société cible ne réalisait qu'un chiffre d'affaires limité, bien en-deçà des seuils déclenchant une déclaration obligatoire au titre du droit des concentrations.'

[23] In the French original: 'C'est pourquoi les auteurs de la proposition de loi souhaitent que le dispositif de contrôle des concentrations soit amendé, tant au niveau national qu'au niveau européen, afin de pouvoir appréhender les opérations se caractérisant par de potentiels effets anti-concurrentiels importants mais n'entrant pas dans le champ d'application de la notification obligatoire.

c) Market Share Thresholds (Spain, Portugal)

Under Spanish law, in addition to a turnover-based threshold, merger procedures are also applicable based on market share thresholds. According to Article 8(1)(a) of the Spanish Competition Act, any concentration that results in a market share of the merged unit of 30 per cent or more is assessed except when the target's turnover in Spain does not exceed 10 million euros. However, an investigation is opened in any case if the participants in the mergers have an individual or joint market share of at least 50 per cent in any of the affected markets.

This market share threshold has given the Spanish Competition Authority (CNMC) jurisdiction to review the Facebook/WhatsApp and Apple/Shazam mergers and thus allowed it to refer these to the European Commission via Article 4(5) EUMR. It has further allowed the CNMC to review several mergers involving food delivery platforms.[24]

Portuguese law contains a similar provision. Pursuant to Article 37(1)(a) of the Competition Act, any concentration has to be notified if, as a consequence, a market share of at least 50 per cent is acquired, created or reinforced. The same also applies at 30 per cent market share, but only if at least two of the participating firms had an individual turnover in Portugal of more than five million euros.

In some national merger laws, market shares are used as a criterion that allows a competition authority to subject mergers on a case-by-case basis to *ex post* control. These legal instruments are considered in subsection e) below.

d) Reduction of Turnover Thresholds for a Particular Sector (the Netherlands)

According to Article 29(3) of the Dutch Competition Act, the turnover thresholds foreseen for the notification of mergers may be reduced for a certain category of firms. This can take place on the basis of a royal decree ('algemene maatregel van bestuur'). When introducing the instrument in 2006, the legislature primarily had the healthcare sector in mind, notably mergers in the hospital sector.[25] In fact, for this sector a decree on the temporary expansion of merger control has been issued.[26]

While the instrument could potentially be applied in the digital sector, this does not seem to have been considered yet.

'En attendant une initiative européenne, l'article 7 propose de permettre à l'Autorité de la concurrence d'évoquer les acquisitions effectuées par les entreprises systémiques.'

[24] C/1072/19 *MIH Food Delivery Holdings/Just Eat*, 05.12.2019; C/1046/19 *Just Eat/Canary*, 10.09.2019; C/1061/19 *Takeaway/Just Eat*, 19.09.2019; C/0730/16 *Just Eat/La Nevera Roja*, 31.03.2016.

[25] See Regels inzake marktordening, doelmatigheid en beheerste kostenontwikkeling op het gebied van de gezondheidszorg (Wet marktordening gezondheidszorg). Available at <https://zoek.officielebekendmakingen.nl/kst-30186-45.html>.

[26] See Besluit tijdelijke verruiming toepassingsbereik concentratietoezicht op ondernemingen die zorg verlenen. Available at <https://wetten.overheid.nl/BWBR0023022/2018-01-01>.

e) Various Options to Initiate Merger Control Proceedings on a Case-by-Case Basis

Competition laws in several Member States provide for the possibility to decide on a case-by-case basis to scrutinize particular mergers. While procedures and the substantive criteria differ, these instruments allow flexibility to investigate acquisitions irrespective of whether certain turnover thresholds have been met.

(1) Sweden

The Swedish Competition Authority may require a party to notify a concentration 'where particular grounds exist for doing so'[27] if the undertakings' combined aggregate turnover in Sweden concerned exceeds one billion Swedish krona but does not reach the second (cumulative) turnover threshold, which requires that at least two of the undertakings concerned each had a turnover in Sweden that exceeds 200 million krona.[28] Thus, the provision specifically allows the capture of large companies' acquisitions of target companies with no or very low turnover.

While the concept of 'particular grounds' is not defined or further explained in the Competition Act, some indications are mentioned in the preparatory works. In particular, it is stated that 'particular grounds' can be invoked, first, in scenarios where one company acquires smaller competitors in a concentrated market through successive acquisitions, but where each acquisition as such is only of minor importance, and, second, where one company in a concentrated market acquires a nascent firm that could potentially challenge the position of the acquirer.[29] The Swedish Competition Authority has included these scenarios in its merger guidelines.[30]

(2) Cyprus

First of all, it is remarkable that under Cypriot law the turnover thresholds are set at a relatively low level. Considering the example of an acquisition by a large digital gatekeeper, it suffices that the (worldwide) aggregate turnover of the target firm is more than 3.5 million euros, that both firms have turnover in Cyprus, and that both firms combined have an aggregate turnover of at least 3.5 million euros in Cyprus.[31] Therefore, for instance the Facebook/WhatsApp merger could have been assessed, which in turn enabled the firms to initiate a referral under Article 4(5) EUMR.

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[27] Article 7(1) of the Swedish Competition Act.
[28] Article 7 of the Swedish Competition Act.
[29] Prop. 1996/97:82 p. 10–11. Available at < http://193.11.1.138/sv/dokument-lagar/dokument/proposition/andrade-regler-for-anmalan-av-foretagsforvarv_GK0382> and prop. 2007/08:135 pp 201–202, available at < https://www.regeringen.se/49bbc2/contentassets/6c1ff21991514a09a239a9a940e8849d/ny-konkurrenslag-m.m.-prop.-200708135>. Translation taken from Erik Brändt Öfverholm, Philip Thorell and Antonia Malmgren, 'Swedish Merger Control Under the Thresholds: 'The "Particular Grounds" Rule, Its Implications and Inevitable Demise(?)', Europarättslig tidskrift 2019, 669, 671.
[30] Konkurrensverket, 11.1.2018, 617/2017. Guidance from the Swedish Competition Authority for the notification and examination of concentrations between mergers, para 23. Available at < https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/competition/guidance-from-the-swedish-competition-authority-for-the-notification-and-examination-of-concentrations-between-undertakings_2018.pdf>.
[31] Section 3(1), (2)(a) of the Cypriot Competition Act.

Furthermore, if the turnover-based thresholds are not met, the ‘major importance’ of a concentration can be declared by order of the minister, which then results in merger control proceedings.[32] The minister may make such a declaration taking into account the effect it may have on public security, the pluralism of media and the principles of sound administration.[33]

(3) Latvia

In cases where the relevant turnover thresholds for notification of a merger are not met, the Latvian Competition Council can initiate *ex post* control. For this purpose, the authority may initiate a merger control proceeding by requiring within 12 months of the date of the implementation of the merger that the parties submit a report on the merger. However, the authority may only do so if, first, the merger affects a market where the parties’ combined market share exceeds 40 per cent and, second, there are reasonable grounds to suspect that the merger may lead to the creation or strengthening of a dominant position or significantly impede competition in the relevant market.[34]

(4) Lithuania

Under Lithuanian merger law, where the turnover-based thresholds are not met, the Competition Council may impose on the parties to a merger the obligation to submit a notification, thereby initiating an ordinary control procedure. Such an *ex post* control mechanism may only be applied within 12 months of the implementation of the concentration and requires that it is likely that the concentration will result in the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market.[35]

(5) Slovenia

Under Slovenian law, where a concentration does not meet the turnover thresholds for notification, the competition authority may invite the parties to notify the merger if they hold more than a 60 per cent market share of the relevant market in Slovenia. The authority may issue such an invitation within 15 days after it has been notified about the implementation of the merger by the parties involved.[36] The merging parties are thus apparently not obliged to notify each concentration, but can only achieve legal certainty through notification and the expiring of the 15-day period.

(6) Luxembourg

The Luxembourg Competition Act of 23 October 2011[37] does not provide for a merger control regime. Instead, the Competition Council (Conseil de la concurrence) may subject concentrations to *ex post* control pursuant to Article 5 of the Competition Act

[32] Section 3(1), (2)(b) in conjunction with section 5 of the Cypriot Competition Act.
[33] Section 5 in conjunction with section 35 of the Cypriot Competition Act.
[34] Section 15 of the Latvian Competition Act.
[35] Section 13 of the Lithuanian Competition Act.
[36] Section 42(3) of the Slovenian Competition Act.
[37] Loi du 23 octobre 2011 relative à la concurrence. See <https://concurrence.public.lu/dam-assets/fr/legislation/Competition-Act-of-23-October-2011.pdf> (English translation).

(‘Prohibitions of Abuse of a Dominant Position’). An important point of reference in this regard is the Competition Council’s Utopia decision 2016-FO-04.[38] With reference to the ECJ’s *Continental Can* doctrine, the Competition Council stated that the acquisition of a competitor may constitute an abuse of a dominant position if it affects the structure of the market to such an extent that the dominant undertaking faces no competitive pressure from its remaining competitors.[39]

The Utopia decision reinvigorated the discussion on whether Luxembourg should introduce a merger control regime, a debate that could once more regain relevance since a *Tribunal administratif*[40] ruling on merger control, in January 2021, which stated that the Competition Council has no competence to conduct a purely *ex ante* control but can only assess mergers in the strict and narrow confines of abuse control.[41] The Tribunal essentially confirmed the relevant Competition Council decision.[42] A pending competition law reform does not consider the introduction of an *ex ante* merger control regime;[43] both the Luxembourg Association for the Study of Competition Law[44] and the Luxembourg Chamber of Trade[45] are pushing for the inclusion of such a system.

Therefore, in the absence of a merger control regime, the Luxembourg competition authority will continue to have the *ex post* power to prohibit mergers provided that they may be characterized as an abuse of a dominant position.

(7) Ireland

Under Irish law, if a concentration does not meet the turnover thresholds, a merger may be notified voluntarily on the initiative of the parties themselves, or the Irish Competition Authority (CCPC) may request the merging parties to voluntarily notify the transaction if it believes that it may lead to a substantial lessening of competition. Parties have an incentive to do so because, after notification and approval by the CCPC, the merger can

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[38] Available at <https://concurrence.public.lu/fr/decisions/abus-de-position-dominante/2016/decision-2016-fo-04.html>.

[39] Léon Gloden and Katrien Veranneman in: Jean-François Bellis & Porter Elliott, Van Bael & Bellis (ed), Merger Control: International Series, Thomson Reuters (2017), p 475.

[40] The first instance appeal court against administrative decisions.

[41] Tribunal administrative du Grand-Duché du Luxembourg, 1re chambre, N° 43114 du rôle. Available at <https://ja.public.lu/40001-45000/43114.pdf>. See also <https://www.bonnschmitt.net/article/absence-de-controle-ex-ante-des-concentrations>.

[42] Conseil de la Concurrence, Décision 2019-R-01 du 15 mars 2019. Available at <https://concurrence.public.lu/content/dam/concurrence/fr/decisions/classements/Decision-2019-R-01-Version-unique.pdf>.

[43] Legislative materials are available via the Parliament’s website at <https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=7479>

[44] Avis de l’association luxembourgeoise pour l’étude du droit de la concurrence, 03.06.2020. pp 3–4. Available at <https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=F86A33C8DF660FAEA790C241B107658A86B44A5FB7EFA54D25BBC07B84D71A9AF0C899A7B7CBCD84576C3393C5A5FB19$BD97D20A373AB7D0812C6CCF46786608>.

[45] Avis de la chambre de métiers, 9.10.2020, p 2. Available at <https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=E4C012B1459341F2BDD24DAA3792BD1BBCA11C91E5DBF3DB327447C2B8C63C20D937B259B3E0DEC6FA4B8819D4C8F1F4$54B1F83EE93C3AA22DB3702F01907E71>.

no longer be challenged under the competition rules. Otherwise, if the parties choose not to voluntarily notify the merger, the CCPC can challenge the transaction as an illegal anticompetitive agreement and/or as an abuse of a dominant position based on the Irish Competition Act 2002.[46]

In January 2021, the Irish government proposed to strengthen the CCPC's powers with respect to mergers that have been notified voluntarily. Under the proposed reform, the authority will have the power to make interim orders preventing the implementation of the transaction and to unwind completed mergers.[47] While the government has not provided any particular explanation for why it considered this strengthening of powers in below-threshold cases necessary, in the academic literature the proposal has been linked to the issue of 'killer acquisitions'.[48] In any case, it is apparent that Ireland has a well-established system that allows mergers below the notification thresholds to be reviewed, whether by encouraging voluntary notifications or by applying the Irish competition law provisions that correspond to Articles 101 and 102 TFEU.[49]

(8) Italy

As part of the Annual Competition Law, each year the AGCM (Autorità Garante della Concorrenza e del Mercato) proposes to the Parliament competition law reforms that it deems necessary. In March 2021,[50] the authority suggested that it should have the power to order undertakings to notify concentrations that fall below the applicable turnover thresholds. The authority stipulated that such a reform would be in particular necessary to capture concentrations in the digital sector, noting that the acquisition of potential future competitors by large market players was an increasingly common phenomenon in the digital economy.[51]

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[46] Paul K. Gorecki, 'Proposals to reform non-notifiable mergers in Ireland: a step in the right direction?', 42 E.C.L.R. 2021, 484, 484–485: Richard Ryan and Arthur Cox in Jean-François Bellis & Porter Elliott, Van Bael & Bellis (ed), *Merger Control: International Series*, Thomson Reuters (2017), p 382.

[47] See Government of Ireland, Public Consultation on Aspects of the Competition (Amendment) Bill 2021, available at <https://enterprise.gov.ie/en/Consultations/Consultations-files/Competition-Amendment-Bill-2021-Public-Consultation-Document.pdf> p 5 ('the intention is that the Bill will also ensure that the CCPC the power to make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its review of any voluntary notifications received. These orders would remain in force until the merger is cleared or remedial action is taken. In addition, in the event that the CCPC finds that the already completed merger gives rise to a substantial lessening of competition in any market, the CCPC has the power to require that the merger must be unwound and the pre-merger status quo restored to safeguard competition in the relevant market(s) …').

[48] Gorecki, 42 E.C.L.R. 2021, 484, 491, note 51 ('The issue of killer acquisitions has raised questions concerning the appropriate merger thresholds and the power of competition agencies to compel notification for below-threshold mergers … However, it is not at all clear how the Department's proposals relate to killer acquisitions.').

[49] In the period between 2005 and 2020, 50 mergers were notified voluntarily and four mergers were investigated as anticompetitive agreements and/or abuses of a dominant position. Gorecki, 42 E.C.L.R. 2021, 484, 485, Table. 1.

[50] AS1730 - Proposte di Riforma Concorrenziale ai Fini della Legge Annuale per il Mercato e La Concorrenza Anno 2021. Available at <https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf>.

[51] Ibid., p 53 ('La sfida proviene, ad esempio, dall'economia digitale - dove si assiste ad un fenomeno sempre più diffuso di acquisizione, da parte di grandi operatori di mercato, di potenziali futuri

Thus, the authority proposed that it should have the power to intervene in transactions:

- where there are indications of a risk to competition in the national market (or in a relevant part thereof);
- which had been carried out in the last six months at the most;
- where only one of the two turnover thresholds laid down in Article 16(1) is exceeded, i.e. the aggregate worldwide turnover of all the undertakings concerned is more than five billion euros.[52]

2. Substantive Merger Control Standard in Cases of Gatekeeper Acquisitions

The merger control systems of almost all Member States use the SIEC test as it is also embodied in Article 2(2) and (3) EUMR. The SIEC test is a flexible instrument that allows the inclusion of new theories of harm that might be seen as necessary to cope with the challenges that are entailed by the rise of large digital gatekeepers and the anticompetitive strategies used by them.

Essentially for this reason, in April 2021 the Austrian government proposed to include the SIEC test to complement the market dominance test, which is currently the sole criterion under Austrian merger law.[53] In the explanatory memorandum accompanying the proposal, it is stressed that, particularly in view of the digital economy, the greater flexibility of the SIEC test is needed in order to be able to capture all anticompetitive concentrations.[54]

Likewise, in order to have more flexibility in capturing anticompetitive mergers, but also to avoid inconsistencies in the assessment of multi-jurisdictional mergers, the Italian antitrust authority has suggested introducing the SIEC test into Italian merger law.[55]

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concorrenti - ma interessa anche settori tradizionali, dove alcune concentrazioni possono avere un impatto significativo su mercati geografici locali, ma il fatturato delle imprese coinvolte non supera le soglie per la notifica.

È auspicabile, quindi, rafforzare l'attuale sistema di controllo delle concentrazioni evitando che operazioni sotto-soglia potenzialmente problematiche non sfuggano al vaglio dell'Autorità.

A questo riguardo, una soluzione potrebbe essere quella di affiancare all'attuale sistema obbligatorio di notifica da parte delle imprese, la previsione della facoltà per l'Autorità di richiedere, motivandola, la notifica di concentrazioni sottosoglia di cui si è venuti a conoscenza.'). Available at <https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf>.

[52] Ibid., p 54 ('In particolare, si propone di riconoscere un potere di intervento all'Autorità circoscritto alle operazioni:

(i) per le quali si rinvenga un fumus di concreti rischi concorrenziali nel mercato nazionale (o in una sua parte

rilevant e);

(ii) realizzate al massimo negli ultimi sei mesi;

(iii) in cui sia superata una sola delle due soglie di fatturato di cui all' articolo 16, comma 1, ovvero il fatturato totale realizzato a livello mondiale dall'insieme delle imprese interessate sia su periore a 5 miliardi di euro.').

[53] Entwurf Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, 114/ME XXVII. GP – Ministerialentwurf - Gesetzestext. See draft of section 12(1) no 2 b) of the Competition Act. Available at <https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00114/index.shtml#tab-Uebersicht>.

[54] Entwurf Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021, 114/ME XXVII. GP – Ministerialentwurf – Erläuterungen, p 10 ('Zu § 12 Abs. 1 Z 2 (und § 10 Abs. 1 Z 1)'). Available at <https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00114/index.shtml#tab-Uebersicht>.

[55] AS1730 - Proposte di Riforma Concorrenziale ai Fini della Legge Annuale per il Mercato e

Thus, while the Austrian government and the Italian competition authority are striving to implement the SIEC test in order to have the same flexibility available as the Commission and the competition authorities in other Member States, it is precisely this flexibility that holds out the prospect of an inconsistent application. This seems particularly likely in view of the competitive risks from acquisitions by large digital gatekeepers that are relevant to this legal opinion. This is because the competition policy discussion on this question and the development of new theories of harm are in flux. So far, there has been a lack of guidance at the sub-legislative level in this respect, both at the level of the Member States and at the EU level.

Incidentally, the possibility of a regulatory fragmentation exists not only by way of an inconsistent application of the SIEC test to acquisitions by large digital gatekeepers but also in view of adjustments to the merger control regime that are considered in various Member States, notably France and Germany.

a) France

The French proposal for an 'Act to Ensure Free Consumer Choice in Cyberspace' is similar to the DMA Proposal in its regulatory approach, but also contains, as mentioned above, a strengthening of merger control for large digital gatekeepers ('*entreprises structurante*'), which is meant to prevent 'predatory acquisitions'. In addition to the extended possibility to control acquisitions by these gatekeepers, Article 7(4) of the draft also provides for a reversal of the burden of proof should a merger procedure should reach the second phase:

> When the Competition Authority initiates an in-depth examination of a transaction notified pursuant to this Article, the structuring undertaking must provide evidence that the transaction is not likely to harm competition.

As mentioned before, the initiative is seen as (only) a second-best option by the French Senate, which prefers that an EU-wide solution be found to protect competition against the risks posed by the large digital gatekeepers' acquisitions.

b) Germany

Under German law, the newly introduced section 19a of the Competition Act can be seen as a functional equivalent to the proposed DMA. This instrument grants the Bundeskartellamt, the German competition authority, the power to prohibit designated (large) digital gatekeepers from engaging in certain types of behaviour that are considered anticompetitive. Section 19a of the Competition Act does not provide for a strengthened merger regime. However, in the course of the legislative process that resulted in the reform of the Competition Act, the German Parliament stipulated that it had indeed identified gaps in merger control and saw the necessity to sharpen merger

la Concorrenza Anno 2021, p 52. Available at <https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf>.

tools with regard to large digital gatekeepers, but called on the Federal Government to work at the EU level:

> to establish mechanisms to prohibit undertakings of paramount significance for competition across markets [i.e. gatekeepers that are addressed by section 19a of the German Competition Act] from hindering innovation and competition by strategically buying up competitors (so-called 'killer acquisitions').[56]

Against this background, the German Federal Government (together with France and the Netherlands) advocates that the existing EU merger framework should be modified for DMA gatekeepers. In particular, it has been suggested that the substantive test for gatekeeper acquisitions should be adapted to more effectively address cases of 'potentially predatory acquisitions'.[57]

Should the suggested expansion and tightening of merger control fail at EU level, it is foreseeable in the light of the above-mentioned opinion of the German Parliament that the issue will be taken up again at national level. Since under German law the scope of merger control with regard to acquisitions by large digital gatekeepers has already been expanded by way of a threshold based on transaction value, it is in the logic of the quoted policy objectives that it is now a matter of securing innovative digital markets through substantively stricter merger control.

A stricter national standard for acquisitions by large digital gatekeepers is therefore a realistic option not only in France but also in Germany.

V. Four Options to Improve the Control of Digital Gatekeeper Acquisitions

In light of the above observations, the question arises as to how the risks of an increasing fragmentation of the internal market due to diverging approaches in national merger control in the digital sector can be addressed, while at the same time taking into account the outlined ambitions for an extended and substantively tightened control of digital gatekeeper acquisitions. In view of the EU's regulatory competences and the extent of any amendments to the EU legal framework, four main options can be distinguished.

1. Option 1: Encouraging Referral Requests under Article 22 EUMR

The first option is that the Member States refer relevant merger cases to the Commission. Such a 'referral option' is foreseen in Article 22 EUMR. Upon a Member States' referral request, the Commission may take up a case regardless of whether it meets the conditions of Article 1 EUMR. In its recent Guidance on Article 22 EUMR, the

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[56] Deutscher Bundestag, Drucksache 19/25868, 13 January 2021, Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss), 10. Available at < https://dserver.bundestag.de/btd/19/258/1925868.pdf>.

[57] Friends of an Effective Digital Markets Act, Strengthening the Digital Markets Act and Its Enforcement (27 May 2021). Available at < https://web.archive.org/web/20210624202531/https:/www.bmwi.de/Redaktion/DE/Downloads/M-O/non-paper-friends-of-an-effective-digital-markets-act.pdf?__blob=publicationFile&v=4>.

Commission has clarified that it will accept, and indeed under certain circumstances encourage, referral requests by Member States even in cases in which the merger does not 'meet the respective jurisdictional criteria of the referring Member States'.[58]

This option would be strengthened by a new transparency obligation proposed in the DMA according to which designated gatekeepers would be obliged to inform the Commission about any intended concentration 'involving another provider of core platform services or of any other services provided in the digital sector'.[59] This information would enable the Commission to ask the concerned Member States to make a referral request. Such a support to effective merger control of acquisitions by DMA addressees is, however, only a (desirable) side effect.[60] The 'referral option' could be further facilitated if Article 12(1) of the DMA were amended so that the designated gatekeeper would have to inform not only the Commission but also the 'competent national authorities',[61] and if the information obligation were to apply to all acquisitions made by the digital gatekeeper and not just those in the digital sector.[62]

This option does not require any change to the existing legal framework.[63] Therefore, the question of the scope of available legal bases, in particular Article 114 of the TFEU, does not arise here.

This option may prevent a disintegration of the internal market due to diverging notification obligations in the Member States. However, it presupposes that the Member States indeed make use of their 'referral option'. The weaknesses of this option are discussed in detail in section VI below.

2. Option 2: Establishing a New Notification Obligation in the DMA

The second option consists in adding a provision to the DMA stating that any gatekeeper that qualifies as an entity regulated under the DMA would be obliged to notify any

[58] Guidance on Article 22 referrals, para. 6.

[59] Article 12(1) of the DMA Proposal.

[60] Pursuant to Recital 31 of the DMA Proposal, this information obligation is meant to enable the Commission to review gatekeeper designation on the basis of new acquisitions (and to possibly extend the designation to other core platform services) as well as to monitor contestability trends in digital markets.

[61] This has been proposed by the rapporteur of the European Parliament's Committee on the Internal Market and Consumer Protection the European Parliament (Andreas Schwab). European Parliament, Committee on the Internal Market and Consumer Protection, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Contestable and Fair Markets in the Digital Sector (Digital Markets Act)' 2020/0374(COD) (1 June 2021), 54, Amendment 77.

[62] As proposed by Stéphanie Yon-Courtin, the rapporteur of the European Parliament's Committee on Economic and Monetary Affairs (ECON), draft opinion of 7 July 2021, Amendment 73.

[63] To be sure, while not strictly necessary for option 1, the adoption of an obligation for DMA gatekeepers to inform national competition authorities about any envisaged acquisition would be useful for an effective implementation of this option. However, even if the underlying objective of strengthening merger control of acquisitions by DMA gatekeepers were not to be regarded as an integral part of the concept of the DMA Proposal, to include the provision could be defended as the underlying objective was to be considered as only 'incidentally' and would, thus, not prevent Article 114 TFEU from being used as the sole legal basis. See on the choice of legal basis if measures pursue a twofold purpose or have a twofold component below sub VII.2.a).

concentration[64] or any concentration that meets certain requirements as further specified in the DMA[65] to the European Commission regardless of whether it should have been notified under the EU Merger Regulation. If the criteria for a notification as defined in the DMA are met, the procedural and substantive rules of the EU Merger Regulation would then apply.

This option would allow for an extension of the scope of EU merger control, but not for a modification of the SIEC test. To adapt the standard of assessment to the particular competition and innovation risks raised by digital gatekeepers acquisitions, it would however be possible for the Commission to revise the Horizontal and Non-horizontal Merger Guidelines.[66] For instance, the Commission could adopt new sections in both guidelines on the impact of concentrations on innovation and a revised section on conglomerate mergers in the Non-horizontal Merger Guidelines to reflect the experience of recent cases as well as the new insights of the economic literature.

3. Option 3: Amending the EU Merger Regulation

The third option consists in adding a provision to the DMA that (formally) amends the EU Merger Regulation.

This option would allow concerns about acquisitions by large digital gatekeepers to be addressed by tailoring procedures (including an extension of notification obligations), theories of harm and the burden and standard of proof. Beyond the enlargement of the notification thresholds to capture the acquisition of small but promising competitors, the option would also allow a reform of the SIEC to better take into account the innovation effects as well as a reform of the standard of proof and/or the burden of proof, for instance by replacing the current balance of probabilities test by a test that accounts for the scale of any harm (or benefits) alongside their likelihood, as suggested in particular by the Furman report,[67] or by shifting the burden of proof from the Commission (to show that the concentration is anticompetitive) to the merging parties (to show that the concentration is not anticompetitive).[68]

Under this option the EU legislature would have the flexibility, on the one hand, to make use of the established instruments of EU merger control as they have evolved over the last three decades, but which could, on the other hand, be amended with view on specific

[64] Which falls under the definition of a concentration pursuant to Article 3 EUMR. We do not see any necessity to broaden the concept of ‘concentration’ in order to meet the said objectives of a strengthened merger control as regards acquisitions by designated gatekeepers under the DMA.

[65] Such specifications might include, for instance, the condition that the target undertaking has substantial operations in the internal market (indicated, for example, by a certain number of active users) and/or meet certain transaction values.

[66] Commission Guidelines of 16 December 2003 on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, [2004] OJ C 31/5 and Commission Guidelines of 27 November 2007 on the Assessment of Non-horizontal mergers under the Council Regulation on the Control of Concentrations between Undertakings, [2008] OJ C 265/6

[67] Jason Furman, Diane Coyle, Amelia Fletcher, Derek McAuley, Philip Marsden, ‘Unlocking Digital Competition’, March 2019, pp 13 and 100–101.

[68] For some policy proposals, see OECD, *Start-ups, Killer Acquisitions and Merger Control*, 2020. Available at <www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf>.

risks raised by the acquisition of nascent and innovative competitors by major existing companies, in particular in the digital or pharmaceutical sectors. One advantage of this option over the previous one is that all the EU merger rules would remain in a single regulation.

4. Option 4: Establishing a Regime of Merger Control Specifically Dedicated to (Large) Digital Gatekeepers

The fourth option consists in introducing via the DMA (or through a measure supplementing the DMA) a new EU regime to control acquisitions by digital gatekeepers, which would either replace the EU Merger Regulation with regard to those acquisitions or would complement the EU Merger Regulation, thus effectively establishing a system of double control at EU level. For instance, this new regime could be specifically designed to protect (long-term) contestability and fairness, thereby complementing the standard and generally applicable merger control protecting (short-term) efficiency and consumer welfare.

This option would provide the EU legislature with regulatory flexibility to depart from the rules established by the EU Merger Regulation as it is deemed appropriate with regard to acquisitions by designated DMA gatekeepers and, more generally, to align the merger regime closely with the rest of the DMA.

VI. Assessment of Option 1: Harmonized Merger Control via Article 22 EUMR?

For the purposes of analysing option 1, we shall examine the legal issues surrounding the use of Article 22 EUMR to refer mergers to the Commission even when these do not meet the thresholds for notification under the EU Merger Regulation.

1. A New Role for Article 22 EUMR

When included in the EU Merger Regulation in 1989, Article 22 was known as the Dutch clause. This was because the Netherlands had no merger rules at the time and this provision allowed it to benefit from the merger system offered by the Merger Regulation. Now that all Member States except Luxembourg have a merger regime,[69] this provision has a different role: it is the one pathway through which Member States can try to have the Commission review mergers that would otherwise be assessed by multiple national competition authorities. Since the entry into force of the EU Merger Regulation until 30 June 2021 there have been 43 referral requests based on Article 22 and only four have been turned down by the Commission.[70]

Article 22(1) EUMR sets out the conditions that must be met for a Member State to make a referral to the Commission: (i) the transaction is a concentration under Article 3 EUMR;

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[69] See section IV.1.e)(6) above for a discussion of Luxembourg's law on mergers.

[70] The source for these numbers is the Commission's own statistics, which are updated regularly, available at <https://ec.europa.eu/competition-policy/mergers/statistics_en>.

(ii) it does not have an EU dimension as defined in Article 1 EUMR; (iii) it affects trade between Member States; and (iv) it threatens to significantly affect competition within the territory of the Member State or States making the request.

In 2005, the Commission published a Notice concerning all case referrals mechanisms of the EU Merger Regulation to explain how the Commission would handle these. When it came to Article 22 EUMR, the Commission identified certain economic factors that it would consider in deciding whether the merger is best addressed at EU level. In brief, these are cases (i) where the merger raises serious competition concerns in markets that are wider than national or (ii) where there are multiple national markets in different Member States that are affected such that a single assessment is to be preferred.[71] Observe how the first scenario appears to extend Article 22 EUMR to instances where there are expected to be cross-border anticompetitive effects, while the second assumes the possibility of multiple notifications. This departs slightly from the original intention behind the provision.

In 2014 the Commission discussed certain possible amendments to the Merger Regulation. Among these was a suggestion to reform Article 22 EUMR in such a way that referrals would confer on the Commission the exclusive competence to review these concentrations.[72] It was considered that this approach would ensure that the ‘more appropriate authority’ would then receive the case. However, ultimately the Commission opted not to move forward with a legislative proposal.[73]

More recently, in March 2021, the Commission issued a new *Article 22 Guidance*.[74] In this document it notes that it has hitherto pursued a policy of discouraging referral requests from Member States under Article 22 EUMR for those transactions that fell below the notification thresholds of the Member States on the basis that normally such mergers were between firms so small that there would be limited effect on trade between Member States.[75] With this new Guidance the Commission aims ‘to encourage and accept referrals in cases where the referring Member State does not have initial jurisdiction over the case’.[76]

The policy motivation is clear: the Commission wishes to allow Member States to refer mergers that fall outside their national merger regime. And this policy is based on the observation that a spate of mergers in the digital and pharma sectors have been of large

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[71] Commission Notice on Case Referral in Respect of Concentrations [2005] OJ C 56/2, para 45.
[72] Commission Staff Working Document Accompanying the Document White Paper Towards More Effective EU Merger Control SWD(2014)221 final.
[73] The main item for discussion was the acquisition of minority shareholdings and the Commission did not think there was a significant gap to be filled.
[74] Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases 26 March 2021, C(2021) 1959 final, para 8 (Article 22 Guidance).
[75] European Commission, Evaluation of procedural and jurisdictional aspects of EU merger control 26 March 2021 SWD(2021) 66 final para 56.
[76] Article 22 Guidance para 11.

firms acquiring small undertakings and such mergers falling below the notification thresholds of the EU and the Member States.[77]

From a substantive law perspective, the *Article 22 Guidance* seeks to elucidate how the conditions for applying Article 22 will be assessed and it makes specific reference to economic factors relevant for digital markets. For instance, the location of customers (digital platforms have a multi-jurisdictional audience) and the collection of data in several Member States are factors to be used to assess the effect on trade between the Member States.[78] And the elimination of a recent or future entrant is a consideration in determining the competitive impact.[79] Furthermore, the Guidance identifies categories of cases that will normally be appropriate for referral. This list too identifies features found in digital markets, providing that the Commission would be likely to take up a merger:

> where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This would include, for example, cases where the undertaking: (1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries. In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.[80]

Procedurally, the *Article 22 Guidance* provides that referrals may also be made for consummated mergers, although generally the Commission will not accept a referral when more than six months have passed from the completion of the transaction.[81] It also indicates that, if the Member State where the merger has been notified will not request a referral but assesses the merger itself, then this is a factor against taking the case.[82]

2. Limitations and Concerns

The key weakness of this extension is found in the Notice itself:

> the Member States and the Commission retain a considerable margin of discretion in deciding whether to refer cases or accept referrals.[83]

As a result, there is no guarantee that all problematic mergers would be dealt with by the Commission. This risk is compounded by the emergence of national merger rules designed to deal with mergers involving the elimination of nascent competitors. This development makes it less likely that referrals are made by Member States and also less

[77] European Commission, Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control 26 March 2021 SWD(2021) 66 final.
[78] Article 22 Guidance para 14.
[79] Article 22 Guidance para 15.
[80] Article 22 Guidance para 19.
[81] Article 22 Guidance para 21.
[82] Article 22 Guidance para 22.
[83] Article 22 Guidance para 3, restating point 7 of Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2.

likely that the Commission will exercise its discretion to examine these mergers. It may even lead to a situation where Member States that have lower notification thresholds apply the merger rules in ways that are not shared by Member States who do not have lower thresholds and the latter may want to make a referral to the Commission under Article 22 EUMR to secure a more desirable outcome. This is because, when making their decision, national competition authorities will not take into account effects, especially potential ones, on the competitiveness of markets in other Member States. Undesirable side effects on other Member States' markets may occur whether a merger is prohibited or allowed: the prohibition of an acquisition may prevent or delay the scaling-up of a new business model that could increase competitiveness especially in the markets of another Member State. On the contrary, allowing an acquisition may precisely prevent a new independent competitor from entering the market of another Member State. This would risk undermining the internal market.

A further problem is that the Commission is expected to review the effects of the merger on the territories of the Member States that have made the notification.[84] Therefore, the only way to ensure that the Commission examines the effects of these mergers EU-wide is if it receives a notification from all Member States, which is a resource-intensive exercise.

There are a number of procedural concerns as well: The parties to these mergers face a degree of legal uncertainty because they had not expected to notify these mergers to national competition authorities in the EU and now face the cost of notification to the Commission. However, it may be that risks to legal certainty will wane once the application of this Guidance is well understood. Moreover, it should be noted that the concerns regarding legal certainty were already considered inherent in Article 22 EUMR even before this new soft law document.[85] At any rate, the Commission would have been free to apply Articles 101 or 102 TFEU *ex post* to certain consummated mergers: viewed from this perspective, Article 22 might be considered the preferable option.

Finally, it appears that the Guidance is widening the scope of Article 22 EUMR considerably. As originally conceived, it appeared to focus on competition concerns in one Member State, while the Guidance is now suggesting that it can be used to bring to the Commission cases with EU-wide effects that do not fall within the scope of the Merger Regulation as a result of the small turnover of the target. It thus appears that this is a soft law that effectively amends the Regulation or at least the spirit of the Regulation. This raises a more general issue as to the legality of the Guidance as well as the legality of merger decisions taken as a result of a potentially illegal merger referral. The matter is under review in a pending case in front of the General Court in the context of the referral to the Commission of the pharma acquisition of GRAIL by Illumina. The merging parties are challenging the Article 22(3) Commission decision to accept a referral by claiming,

[84] European Commission, Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control 26 March 2021 SWD(2021) 66 final, para 57.
[85] Ibid., para 147.

among others, that the new Guideline and practice of the Commission do not comply with Article 22 EUMR.[86]

Furthermore, on 12 May 2021, the Commission announced that it had accepted a request submitted by 10 Member States to assess the merger between Facebook and Kustomer, which had only been notified in Austria (one of the Member States making the Article 22 referral). In a press release, the Commission took the view that it is the body best placed to assess the cross-border effects of a transaction affecting, inter alia, the market for online display advertising.[87] However, Germany did not join the request,

> because in the Bundeskartellamt's general practice a referral requires a merger to be subject to notification based on national competition law, which still has to be clarified in the present case.[88]

This shows that the Article 22 route does not guarantee a one-stop shop assessment, with the consequent risk of divergent assessments of these mergers. This could be cured by bilateral coordination among competent authorities, as we have seen with several mergers involving the Commission and other competition authorities around the world, but even this would not guarantee a uniform approach all the time.[89]

3. Conclusion

Option 1 does not appear satisfactory with regard to the policy objectives outlined above: preventing fragmentation of the internal market due to diverging merger control in the digital sector and the competition policy ambitions for an extended and/or tightened merger control. Moreover, the option contains a number of legal uncertainties relating to the possibility of extending the scope of Article 22 through guidelines as well as to the scope of the Commission's powers to review transactions *ex post*.

We will in turn consider options 2 to 4, which require amendments to the EU legal frameworks. Thus, the question arises as to whether Article 114 TFEU could be an adequate legal basis for their implementation.

VII. The Relevant Framework under the EU Treaties to Assess Options 2 to 4

In this section we discuss the principles applicable to considering the scope of the legislative competence that the EU has under Article 114 TFEU as well as the lessons

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[86] See Case T-227/21, [2021] OJ C 252/27. In this case, the Commission opened a Phase 2 investigation on 22 July 2021. See Commission Press Release IP/21/3844.

[87] European Commission, Daily News 12.05.2021. In this case, the Commission opened a Phase 2 investigation on 2 August 2021. See Commission Press Release IP/21/4021.

[88] Bundeskartellamt, Press Release, 23.7.2020, 'Bundeskartellamt Examines whether Facebook / Kustomer Merger is Subject to Notification', p 2. Available at <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/23_07_2021_Facebook_Kustomer.html>.

[89] G. Monti, 'The Global Reach of EU Competition Law' in Cremona and Scott (eds) *The Extraterritorial Reach of EU Law* (2019) (explaining how the Commission cooperates with competition agencies outside the EU).

that can be learned from the Court's case law. In section VIII we then apply these principles to the options under consideration.

1. Article 114 TFEU as a Horizontal Basis for Establishing the Internal Market

a) General Principles

The competence conferred on the Union by Article 114 TFEU is

> by reference to a criterion of a functional nature, extending laterally to all measures designed to ensure the attainment of the single market.[90]

However, there are limits:

> Recourse to Article [114 TFEU] is not justified where the measure has only the incidental effect of harmonizing market conditions within the Union.[91]

In *Tobacco 1* the Court held that the measures under Article 114 TFEU must be

> intended to improve the conditions for the establishment and functioning of the internal market'. Article 114 TFEU does not give the Union legislature 'a general power to regulate the internal market.[92]

Moreover, the choice of legal basis must be based on objective factors that are amenable to judicial review.[93]

b) Scope of Application: Establishment and Functioning of the Internal Market

Article 114 TFEU makes reference to Article 26 TFEU, where the internal market is defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. Article 114 TFEU confers on the legislature the power to adopt measures for the establishment and the functioning of the internal market.

Considering the Treaty context, Article 3(3) TEU and Protocol 27 are also important, and some background is necessary to understand the relevance of these provisions. Article 3 TEU sets out, at a high level of generality, the ambitions of the Union. In the aftermath of negative referenda results for the Treaty Establishing a Constitution for Europe (2004), it was considered expedient that the reference to 'free and undistorted competition' (which had originally been inserted in the Treaty Establishing a Constitution for Europe) should not be given such prominence.[94] This appeared necessary to secure the

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[90] *Commission v Council (Titanium Dioxide)*, Case C-300/89, EU:C:1991:244. Opinion of Advocate General Tesauro, para 10.

[91] *Commission v Council ('Cooperation Regulation')*, Case C-209/97, EU:C:1999:559, para 35. On the facts, the Court upheld the use of Article 352 TFEU because the main aim of the regulation was fighting fraud to protect the EU budget and harmonization was only an incidental effect of the legislation.

[92] *Germany v Parliament and Council (Tobacco 1)*, Case C-376/98, EU:C:2000:544, para 83.

[93] *Czech Republic v Parliament and Council (Weapons Directive)*, Case C-482/17, EU:C:2019:1035, para 31.

[94] 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. Article I-3(2), Treaty Establishing a Constitution for Europe.

consensus of some Member States. As a compromise, Protocol 27 on the Internal Market and Competition was inserted to accompany the TEU and TFEU. This has a twofold significance:

First, the recital provides that 'internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted'. This serves to give the notion of internal market a wider meaning than one might surmise from a literal interpretation.

Second, it confirms that the EU has been conferred legislative competence to achieve the internal market objective:

> To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

Observe how the Protocol leaves open all applicable legal bases for the legislature.

The importance of this account for the purposes of this opinion is that the Member States conferred on the EU legislature the power to impose measures to achieve an internal market, but that this market shall be one where competition is not distorted. Thus, the EU is unable to impose legislation that harmonizes anticompetitive national laws. Conversely, harmonizing legislation can be designed with the aim of making markets more competitive. In other words, for the purpose of defining the scope of Article 114 TFEU, 'establishing and ensuring the functioning of the internal market' (Article 26(1) TFEU) and guaranteeing the competitiveness of markets in the EU must not be regarded as distinguishable objectives; the latter must be considered an integral part of the former. This was already the case since *Tobacco 1* but, if anything, the subsequent Treaty amendments have made this position even clearer. Remarkably, this intrinsic (normative) link between the establishing of the internal market and the aim of making markets more competitive has also found expression in the ECJ's rhetoric on Articles 101 and 102 TFEU. In various judgments, the Court described the purpose of these competition law provisions as guaranteeing 'undistorted competition'.[95]

It is also clear that legislation may pursue both the goal of making the market function better and other public policy goals, like public health or environmental protection. In *Titanium Dioxide* for example the Court held that a Directive on Procedures for Harmonizing the Programmes for the Reduction and Eventual Elimination of Pollution Caused by Waste from the Titanium Dioxide Industry had to be based on Article 114 TFEU because this harmonization would place all firms on an even playing field.[96] That the Directive also served to remove hazardous waste for the environment did not take it

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[95] *AC Treuhand,* Case C-194/14, EU:C:2015:717, para 36 ('the main objective of Article [101(1) TFEU] is to ensure that competition remains undistorted within the common market'); *Otis,* Case C-435/18, EU:C:2019:1069, para 26 ('the objective pursued by Article 101 TFEU, which strives to guarantee effective and undistorted competition in the internal market'); *Deutsche Telekom,* Case C-152/19 P, EU:C:2021:238, para 40 ('A dominant undertaking therefore has a special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market').

[96] *Titanium Dioxide*, above note 90, para 23.

out of the scope of this legal basis: Article 114(3) TFEU expressly provides that for measures concerning environmental protection, the legislature should 'take as a base a high level of protection'. This case is particularly interesting because the Court of Justice annulled the Directive, which was based on Article 130 EEC (protection of the environment), where the Council could decide with unanimity after mere consultation of the Parliament, and not Article 100a EEC, where the Council has to decide in cooperation with the Parliament. Given those different roles, the two legal bases could not be applied cumulatively and Article 100a EEC had the advantage of strengthening the role of the European Parliament which is a key element in the legitimacy of the EU legislative process.[97]

But not all environmental laws should be based on Article 114 TFEU. A Directive on waste was found to be rightly based on Article 130s EEC because it was about ensuring that waste management was carried out in accordance with the requirements of environmental protection and in so doing it was actually limiting the circulation of waste across borders.[98] While the Directive inevitably had some harmonizing effects, these were ancillary to the main object of the Directive, which was to protect the environment and the management of waste.[99]

c) The Legal and Evidentiary Burden on the Legislature

The Court has also set a number of thresholds that must be met for legislation based on Article 114 TFEU:

- 'a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom' is not sufficient.[100] Rather, the measure 'must *genuinely* have as its object the improvement of the conditions for the establishment and functioning of the internal market.'[101] The French-language version of this statement is arguably clearer and more informative: 'doit avoir *effectivement* pour objet l'amélioration des conditions de l'établissement et du fonctionnement du marché intérieur'. We thus suggest that this threshold is a search for the objective purpose of the legislation.
- If the measure is designed to address differences between national rules, then these differences must be 'such as to obstruct the fundamental freedoms and thus have a *direct effect* on the functioning of the internal market'.[102]

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[97] Ibid., para 20.
[98] *Commission v Council (Waste Management)*, Case C-155/91, EU:C:1993:98, paras 14–15.
[99] Ibid., para 20.
[100] *Tobacco 1*, above note 92, para 84.
[101] *Tobacco 1*, above note 92, para 84 (emphasis added).
[102] *Germany v Parliament and Council*, Case C-380/03, EU:C:2006:772, para 37 (*Tobacco 2*) (emphasis added); *Poland v Parliament and Council*, Case C-358/14, EU:C:2016:323, para 32; *Weapons Directive*, above note 93, para 34; *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* (*Vodafone*), Case C-58/08, EU:C:2010:321 para 32.

– If the measure addresses the competitiveness of markets, then the divergence among national laws must 'cause *significant* distortions of competition'.[103]

– The Court has also specified that, 'when the existence of obstacles to trade has been established, it is not necessary also to prove distortions of competition in order to justify recourse to Article [114 TFEU]'.[104]

Meeting these thresholds requires some evidence of how present conditions hamper the internal market or competition.[105] In *Tobacco 1* these were not met because the legislature attempted to regulate products where there was hardly any cross-border trade.[106] Conversely, in *Alliance for Natural Health* the Court noted that the Commission had received

> 'a substantial number of complaints from economic operators' on account of the differences between national rules which 'the application of the principle of mutual recognition did not succeed in overcoming'.[107]

It was also aware of litigation alleging that traders found it difficult to export food supplements as a result of national divergences.[108] In *Tobacco 2* there was evidence of divergence in national laws:

> when the draft directive was submitted advertising and/or sponsorship in respect of such products were partially prohibited in six Member States, totally prohibited in four, and the subject of legislative proposals seeking a total prohibition in the remaining five.[109]

There was also evidence of considerable cross-border trade in press products.[110]

Tobacco 2 also suggests that harmonization measures can be over-inclusive and still be lawful: it was argued that the advertising ban also applied to some publications that had only local circulation. The Court responded that an over-inclusive rule is justified if intended to improve the functioning of the internal market.[111] What is arguably implied in the Court's response is that it would have been very difficult and ultimately impractical for the legislature to have drafted a law banning advertising only on publications that had a certain level of cross-border sales. Such a rule would be more costly to enforce too. As the Court noted later on (in examining the proportionality of the measure), a measure exempting certain publications with insufficient cross-border coverage

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[103] *Tobacco 1*, above note 92, paras 84 and 106 (emphasis added); *Vodafone*, above note 102, para 32.
[104] *Tobacco 2*, above note 102, para 67.
[105] On the importance of the legislator exercising its legislative discretion on evidence see also *Afton Chemical Limited v Secretary of State for Transport*, Case C-343/09, EU:C:2010:419 paras 33-34.
[106] *Tobacco 1*, above note 92, para 99.
[107] *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales,* Joined Cases C-154/04 and C-155/04, EU:C:2005:449, para 37.
[108] Ibid., para 36.
[109] *Tobacco 2*, above note 102, para 46.
[110] *Tobacco 2*, above note 102, para 54.
[111] *Tobacco 2,* above note 102, para 80.

> would have rendered the field of application of the prohibition on the advertising of tobacco products unsure and uncertain, which would have prevented the Directive from achieving its objective of harmonisation of national law on the advertising of tobacco products.[112]

The Court gave some guidance in *Tobacco 1* on evaluating the evidence of anticompetitive effects. When it comes to advertising agencies and producers of advertising media, the Court noted that the undertakings located in Member States with fewer restrictions have a competitive advantage

> in terms of economies of scale and increase in profits. The effects of such advantages on competition are, however, remote and indirect and do not constitute distortions which could be described as appreciable. They are not comparable to the distortions of competition caused by differences in production costs.[113]

The Court admitted that in a narrower market (e.g. the organization of sports events) there may be competitive disadvantages, but this does not justify the wide ban in the Directive.[114]

In the market for tobacco products, the Court was equally sceptical about the impact of different regulations on competition:

> Admittedly, as the Commission has stated, producers and sellers of tobacco products are obliged to resort to price competition to influence their market share in Member States which have restrictive legislation. However, that does not constitute a distortion of competition but rather a restriction of forms of competition that applies to all economic operators in those Member States. By imposing a wide-ranging prohibition on the advertising of tobacco products, the Directive would in the future generalise that restriction of forms of competition by limiting, in all the Member States, the means available for economic operators to enter or remain in the market.[115]

It is worth noting the notion of competition that the Court uses in these two cases. It is much closer to that found in state aid than in antitrust. In other words: lax regulation in one state gives that undertaking a competitive advantage over rivals located elsewhere. Appreciability then has to do with the size of that advantage. However, in *Vodafone* the Court took the view that the failure to regulate international roaming by Member States led to anticompetitive effects in the form of high prices for consumers.[116] In other words, to establish a legislative competence under Article 114 TFEU, the Court accepted the argument that the measure in question rectified excessive pricing that resulted from a lack of competition. Thus, the Court’s underlying notion of competition comes close to the antitrust meaning of the term.

In a more recent judgment the Court has had occasion to discuss the role of evidence more closely: the Czech Republic challenged an amendment to a Directive on Control of the Acquisition and Possession of Weapons on the basis (among others) that no impact

[112] *Tobacco 2,* above note 102, para 149.
[113] *Tobacco 1,* above note 92, para 109.
[114] *Tobacco 1*, above note 92, paras 110–111.
[115] *Tobacco 1*, above note 92, para 113.
[116] *Vodafone*, above note 102, paras 38 and 39.

assessment had been carried out.[117] The Court explained that the EU institutions must be able to present to the Court the 'basic facts' that were taken into account in exercising their legislative discretion.[118] However, this did not entail that there must be an impact assessment in all circumstances. This was not mandated by the interinstitutional agreement.[119] On the other hand, it appears from the judgment that, when legislation is expected to have significant economic, environmental or social implications, the Commission will be obliged to carry out an impact assessment.[120] Nevertheless the Court went on to explain that the failure to carry out an impact assessment would not be contrary to the principle of proportionality where

> the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient information enabling it to assess the proportionality of an adopted measure.[121]

On the facts, the Court found that the Commission had relied on a comprehensive study of the Directive, which indicated that further harmonization was required, on nine studies on the need for further regulation of firearms, on public consultations, and information from Member States.[122] The Court thus concluded that the EU institutions had the information necessary to amend the Directive even absent an impact assessment.[123]

The fact that a measure under Article 114 is amended to provide greater harmonization than is already the case does not mean it is invalid – the legislature can update and upgrade legislation, obviously subject to meeting the evidentiary burden to justify this change.[124]

d) Preventative Use of Article 114 TFEU

The legislature may rely on Article 114 TFEU to 'prevent the emergence of future obstacles to trade resulting from multifarious development of national laws'.[125] But it has to be shown that the emergence is *likely* and that the measure is designed to prevent this divergence.[126] This was confirmed in *Vodafone* but here the standard for establishing likelihood seems relatively low: evidence that Member States would consider legislation seems to suffice.[127]

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[117] *Weapons Directive,* above note 93.
[118] Ibid., para 81, citing *Poland v Parliament and Council*, Case C-5/16, EU:C:2018:483, paras 152 and 153.
[119] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making OJ [2016] L 123/1.
[120] *Weapons Directive,* above note 93, paras 83–84.
[121] *Weapons Directive*, above note 93, para 85.
[122] *Weapons Directive*, above note 93, paras 87–92.
[123] *Weapons Directive*, above note 93, paras 93–94.
[124] *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd. (Tobacco Products)*, Case C-491/01, EU:C:2002:741, paras 77–78 and *Vodafone,* above note 102, para 34.
[125] *Tobacco Products,* above note 124, para 61.
[126] *Tobacco Products*, above note 124, para 69 referring to evidence of Member States legislative plans. *Tobacco 1*, above note 92, para 86.
[127] *Vodafone*, above note 102, paras 44–45. Here the Court seemed to be satisfied that there was pressure on Member States to legislate.

e) Type of Harmonizing Measure

Article 114 TFEU refers to 'measures' for approximation. This means that the Union is free to select 'the harmonisation technique most appropriate for achieving the desired result, in particular in fields which are characterised by complex technical features'.[128] More specifically, AG Kokott indicated that there are a wide range of legal instruments available:

> It is not disputed that the term 'measure' used in Article 95(1) [now Article 114(1) TFEU] covers at least all the forms of legal acts in Article 249 EC [now Article 288 TFEU], in other words regulations, directives, decisions and opinions. The adoption of a regulation on the basis of Article 95(1) EC is therefore formally covered.[129]

According to some commentators, this broad possibility changes the nature of harmonization, which is no longer limited to the legislation of the Member States but transfers to EU law what has previously been the competence of each Member State.[130]

The Court has confirmed that Article 114 TFEU can also be used to adopt measures that bind individuals:

> nothing in the wording of Article 114 TFEU implies that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States.[131]

The measure must, however, serve to harmonize divergent (or potentially divergent) national laws. Thus, in *Parliament v Council*, when the institutions disagreed on the proper legal basis for the Regulation on the Statute for a European Cooperative Society, the Court sided with the Council that the proper legal basis was Article 352 TFEU (at the time Article 308 EC) and not Article 114 TFEU because the Regulation did not harmonize national laws on cooperative societies. Rather, the Regulation would create 'a new form of cooperative society in addition to the national forms'. This is outside the scope of Article 114 TFEU. Similarly, the creation of new intellectual property rights falls under Article 352 TFEU.[132]

f) Harmonization Method

Sometimes the process of harmonization requires relatively direct measures: in harmonizing consumer protection law the legislature normally opts for a Directive whose sole purpose is to align national consumer protection laws. As we saw above in *Tobacco Products*, legislation can ban certain goods from entering the market. Summarizing the scope of acceptable regulatory methods, the Court held:

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[128] *United Kingdom v European Parliament and Council (Smoke Flavourings)*, Case C-66/04, EU:C:2005:743 para 45.

[129] *Smoke Flavourings*, above note 128, Opinion of AG Kokott para 27.

[130] Commentaire Mergret, 2eme ed., vol 5, 1993, p 322: 'cette préférence donnée à un acte autre que la directive concourt à un changement de nature de l'harmonisation qui ne constitue plus seulement une action visant les législations des Etats membres et obligeant ceux-ci à établir entre elles des similitudes, voire des liens de reconnaissance, mais a tendance à transformer en droit communautaire ce qui, auparavant, était du ressort de chaque Etat membre'.

[131] *UK v Parliament and Council (ESMA Short Selling)*, Case C-270/12, EU:C:2014:18, para 107.

[132] *Parliament v Council*, Case C-436/03, EU:C:2006:277 paras 37–46.

> Depending on the circumstances, those measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products.[133]

However, the EU is also competent to devise more complex regulatory schemes to indirectly achieve harmonization. Regulation 2065/2003 on Smoke Flavourings Used or Intended for Use in or on Foods provides a relevant example in view of the envisaged regulatory purposes and mechanisms in the DMA.[134] This regulation noted that there were national procedures to authorize the use of smoke flavourings and proposed an EU-level procedure. This requires the submission of an application for authorization, which is first reviewed by the European Food Safety Authority, which will give an opinion on whether or not to authorize the smoke flavouring in question. It is then for the Commission (via a comitology procedure) to either accept the application by a Regulation amending the list of authorized smoke flavourings or reject the application by a decision addressed to the applicant.[135]

The use of Article 114 TFEU as a legal basis for this Regulation was challenged by the UK, which gave the Court the opportunity to explain the parameters for evaluating this type of harmonization technique. The ECJ held that for a multi-stage harmonization procedure (*in casu* fixing basic criteria in a regulation, followed by scientific evaluation and the adoption of a positive list) two conditions must be satisfied:

> First, the Community legislature must determine in the basic act the essential elements of the harmonising measure in question.
>
> Second, the mechanism for implementing those elements must be designed in such a way that it leads to a harmonisation within the meaning of [now] Article 114 TFEU. That is the case where the Community legislature establishes the detailed rules for making decisions at each stage of such an authorisation procedure, and determines and circumscribes precisely the powers of the Commission as the body which has to take the final decision. That applies in particular where the harmonisation in question consists in drawing up a list of products authorised throughout the Community to the exclusion of all other products.[136]

On the facts, the first condition was satisfied because the Regulation contained the parameters for evaluation, the safety rules to be applied and the conditions to be satisfied. Moreover, there was an application procedure and 'harmonised rules concerning the effects of authorisations granted, the consequent rights and obligations, the identification and traceability of primary products, as well as public access, the confidentiality of certain information and data protection'.[137]

The second condition was also met because as we saw above the Regulation clearly defined the tasks conferred on the European Food Safety Authority and the Commission

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[133] *Tobacco 2*, above note 102, para 43.
[134] Smoke Flavourings Regulation [2003] OJ L 309/1.
[135] Articles 8 and 9 of the Smoke Flavourings Regulation.
[136] *Smoke Flavourings*, above note 128, paras 48–49.
[137] *Smoke Flavourings,* above note 128, para 57.

as well as the procedures leading to achieve approximation of laws by establishing a positive list of substances authorized throughout the EU.[138]

The same approach was taken by the Court in the *ESMA Short Selling* judgment, where the UK challenged the legality of a provision empowering ESMA to ban certain short selling operations in certain circumstances to ensure financial stability. The Court confirmed that among the measures for the approximation of laws, the legislature could

> deem it necessary to provide for the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation.[139]

This is particularly useful when the decisions to be taken rely 'on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately'.[140]

g) Subsidiarity Clause and Exemptions

Article 114 TFEU cannot be utilized if there are more specific provisions in the TFEU conferring legislative powers on the EU.[141] For the purposes of this legal opinion, reference should be made to Article 103 TFEU, which takes priority in as a legal basis for 'regulations or directives to give effect to the principles set out in Articles 101 and 102 [TFEU]'.[142] The non-exhaustive list of examples of the kind of legislation that is expected to be based on this provision is that which assists the Commission in applying Articles 101 and 102 TFEU, for example Regulation 1/2003.

The ECN Plus Directive[143] and the Damages Directive[144] instead are based on powers conferred by both Articles 103 and 114 TFEU. This is because, on the one hand, they help apply the competition rules and, on the other, they serve to harmonize public and private enforcement respectively.

It follows that the legislative powers conferred upon the Union under Article 103 TFEU are significant in terms of their economic impact, but the scope for action is limited, so it cannot be suggested that all the competition policy legislative powers could be found only in Article 103 TFEU. This is also confirmed by Protocol 27, as discussed above.[145]

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[138] *Smoke Flavourings*, above note 128, para 62–63.
[139] *ESMA Short Selling,* above note 131, para 104.
[140] Ibid., para 105.
[141] Article 114(1) TFEU reads thus: 'Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 [TFEU]'.
[142] Article 103(1) TFEU.
[143] Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to Empower the Competition Authorities of the Member States to Be More Effective Enforcers and to Ensure the Proper Functioning of the Internal Market, [2019] OJ L 11/3.
[144] Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, [2014] OJ L 349/1.
[145] Above p 29.

For completeness, Article 114 TFEU cannot apply 'to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons'.[146] None of these exclusions is relevant for this opinion.

h) The Role of the Court of Justice

It is settled case law that the objective factors that are meant to legitimize the choice of a legal basis, such as the aim and the content of a measure, 'are amenable to judicial review'.[147] As we have remarked above, the Court has done more than provide the legislature with a drafting guide.[148] While judicial review is not as intense as, for instance, with regard to competition law cases, the discretion of the legislature is not unfettered and, in recent cases, the Court has gone further than before in spelling out the evidentiary burden placed on the EU legislature. Moreover, the Court has also clarified what sorts of legislative acts are not within the scope of Article 114 TFEU: measures that create new legal forms or measures whose effect on the internal market is only incidental. For these, another legal basis must be found. However, in practice, save for one case (*Tobacco 1*), the Court has upheld the legislature's choice of Article 114 TFEU as a legal basis and has even annulled one directive because it was not based on Article 114 TFEU (*Titanium Dioxide*).

It bears noting that, when legislation is reviewed, the task of the Court is to examine 'the legal framework within which new rules are situated' because this can help shed light on the purpose of the rules under review.[149]

2. Other EU Primary Law Issues

a) Choice of Legal Basis if Measures Pursue a Twofold Purpose or Have a Twofold Component

Given the breadth of issues that may be covered by Article 114 TFEU, at times the question arises whether it is the appropriate legal basis. Often the question is asked when it appears that the EU is using Article 114 TFEU to achieve objectives where it has no legislative competence. Legislation harmonizing the advertising and the manufacture of tobacco has proven particularly controversial, in part because it appears that the EU is legislating to protect people's health. More recently, the regulation on handguns has come under judicial scrutiny because it appeared that the legislature was more interested in public safety rather than harmonization. However, the Court has held that, if the

[146] Art 114(2) TFEU.

[147] *Tobacco Products*, above note 124, para 93; *Laserdisken ApS v Kulturministeriet,* Case C-479/04, EU:C:2006:549, para 30.

[148] Contra, S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12(3) German Law Journal 827.

[149] *Weapons Directive*, above note 93, para 32, with reference to *Parliament v Council*, Case C-166/07, EU:C:2009:499, para 52.

preponderance of the legislative effort is designed to achieve objectives pertaining to the internal market, then that single legal basis suffices.[150]

In general terms, it is settled case law, when two competing legal bases are at stake and when the legislation pursues a twofold purpose or has a twofold component, that the Courts asks whether a single legal basis is sufficient because one of those 'is identifiably as the main or predominant purpose or component, whereas the other is merely incidental'.[151] Only

> [e]xceptionally, if … the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases.[152]

On this basis, the ECJ, for instance, annulled Regulation 304/2003 Concerning the Export and Import of Dangerous Chemicals because the measure was only based on Article 175(1) EC (environmental policy; now Article 192 TFEU) but should also have been based on Article 133 EC (common trade policy; now Article 207 TFEU). In order to establish that the Regulation contained commercial and environmental components that were seen as indissociably linked, the Court considered the purpose of the Regulation as set out in its preamble and the operative part,[153] stressing that both pursued purposes converged,[154] and observed the Regulation's scope, finding that certain elements could not be explained by the trade policy purpose alone.[155] As regards internal market legislation, following the aforementioned approach, the General Court confirmed that the Regulation 1008/2009 on trade in seal products could solely be based on Article 95 EC (now Article 114 TFEU), rejecting the submission that the measure ought to have been based on Article 133 EC (common trade policy; now Article 207 TFEU) as well.[156]

For the purposes of this legal opinion, it is important to stress that this case law is *not* relevant in order to distinguish whether a measure primarily serves the integration of the internal market and/or the fostering of competitiveness of markets in the EU. In fact, as it was stated above,[157] the latter objective is an integral part of the former and thus can in any event be pursued by the EU legislature on the basis of Article 114 TFEU or, should the conditions of this legal basis not be fulfilled, on the basis of Article 352 TFEU. However, as will be explained below, the case law may be relevant as an auxiliary argument in the context of option 2.[158]

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[150] *Weapons Directive*, above note 93, para 31, with reference to *Buhagiar and Others*, Case C-267/16, EU:C:2018:26, para 41, which itself refers to *Commission v Parliament and Council*, Case C-43/12, EU:C:2014:298, paras 29 and 30.

[151] *Commission v Parliament and Council (Dangerous Chemicals)*, Case C-178/03, EU:C:2006:4, para 42.

[152] Ibid., para 43.

[153] Ibid., para 45.

[154] Ibid., para 47.

[155] Ibid., paras 50–51.

[156] *Inuit Tapiriit Kanatami and Others v Commission*, Case T-526/10, EU:T:2013:215, paras 65–72. This judgment has been confirmed by the ECJ in *Inuit Tapiriit Kanatami et al*, Case C-398/13 P, EU:C:2015:535.

[157] See above sub VII.1.b), p 30.

[158] See below sub VIII.1.e).

b) Principles of Subsidiarity and Proportionality (Articles 5(3) and (4) TEU)

EU legal acts are only valid when they pass the tests of subsidiarity and proportionality. The Lisbon Treaty contains a protocol that provides further detail on the legislators' task in these respects. Article 5 states:

> Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.[159]

With regard to subsidiarity, when the EU does not have exclusive competence, it may only act

> if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU.[160]

The Court of Justice has clarified that, in carrying out judicial review of the principle of subsidiarity, it will consider the merits of the case made by the legislature and also whether the procedures set out in the protocol (referred to above) have been followed.[161]

Harmonization legislation must be proportionate, which means that the measure must: (i) be appropriate to achieve the legitimate objectives pursued by the legislation and (ii) not go beyond what is necessary to achieve those objectives.[162] In complying with this requirement the legislature has broad discretion because of the complex political, economic and social trade-offs that have to be made. The EU does not need to show that its laws are the best possible measures. It only has to convince the Court that the legislative effort is not 'manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'.[163] The Court has also indicated that the party challenging a measure for infringement of the principle of proportionality is expected to provide 'sufficient evidence to demonstrate the manifestly inappropriate nature of the measures adopted by the EU legislature'.[164]

Legislative discretion is not unchecked. First, the legislature has to base its efforts on objective evidence, which the Court can review to see the motivations behind the choice

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[159] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Article 5.
[160] *Vodafone*, above note 102, para 72.
[161] *Philip Morris Brands SARL and Others v Secretary of State for Health*, Case C-547/14, EU:C:2016:325, para 217.
[162] *Vodafone*, above note 102, para 51.
[163] *Tobacco Products*, above note 124, para 123; *Vodafone*, above note 102, para 52.
[164] *Estonia v Parliament and Council*, Case C-508/13, EU:C:2015:403, para 37.

of harmonization measure. Impact assessments can prove valuable in this respect because there the Commission will evaluate different options and assess the pros and cons of these options.[165]

Second, there may be instances where the scope of regulation has to be limited. A good example is the International Roaming Regulation. In *Vodafone*, the applicants challenged the regulation of retail rates, suggesting that it was sufficient to regulate wholesale markets because in a competitive market one would expect that lower wholesale charges would be passed on to consumers. On the one hand, the Court agreed with the legislature that past events suggested lower prices would not be passed on. On the other, the Court also considered that the regulation was the result of exceptional circumstances, limited in time, and designed to protect consumers directly, which is one of the aims of Article 114(3) TFEU. As a result, the legislation was proportionate in the circumstances.[166]

However, in *ABNA* the Court did quash part of a Directive on the Circulation of Compound Feedingstuffs because it imposed disproportionate obligations on producers of feedingstuffs. The measure as a whole was to ensure that feedingstuffs were safe and that buyers had enough information to determine if the goods they were purchasing were safe. What the parties challenged was an obligation imposed on manufacturers to inform customers, on request, of the exact quantitative composition of animal feedingstuffs. The Court held that this requirement was disproportionate: first, because buyers could then use this information to make their own animal feed; second, because buyers were already entitled to see on the packaging the percentages of different ingredients used, which would suffice for them to be well-informed about what they are purchasing; third, because, since this obligation would only be triggered by the buyer's request it was not clear how this could be related to the protection of public health; and, fourth, because manufacturers have to provide detailed information to the authorities responsible for carrying out inspections so that they can verify that the labels are accurate.[167]

c) Fundamental Rights

It is trite law that EU secondary legislation may not infringe the Treaties or any rule of law, and that this includes fundamental rights.[168] If secondary law does infringe rights that are protected by the Charter of Fundamental Rights, then the Court will assess whether this interference is proportionate in the circumstances. For example, the regulation of tobacco labelling has an impact on a business's freedom of expression. However,

[165] *Vodafone,* above note 102, para 55.
[166] *Vodafone,* above note 102, para 61–70.
[167] *The Queen on the application of ABNA and others v Secretary of State for Health and others*, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paras 80–85.
[168] Article 263(2) TFEU and see, for example, *Kadi v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461.

> In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, is permissible only if it is necessary and actually meets objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.[169]

3. Evolution of Legal Basis: ‘Approximation-of-Laws’ Competences and Article 352 TFEU

As was shown above, to foster internal market integration through harmonization of national laws, thereby preventing distortions of competition, the EU legislature may rely on Article 114 TFEU or any other legal basis included in the relevant Title VII, Chapter 3 of the TFEU (‘Approximation of laws’) or on Article 352 TFEU.[170] However, the latter competence may only be invoked on a subsidiary basis, i.e. where the Treaties do not provide for specific legislative powers. In other words, the most general legal basis (Article 352 TFEU) may only be invoked when ‘the Treaties have not provided the necessary powers’.[171] Thus, the rule of thumb for the EU legislature is to first look for the conferral of a specific competence (e.g. when it comes to legislation to facilitate freedom of establishment, the first port of call is Article 50 TFEU, when it comes to competition law Article 103 TFEU etc.). If the specific provisions do not confer sufficient powers to the EU, then the legislature can look to Article 114 TFEU and, if this proves insufficient, then it can turn to Article 352 TFEU. If none of these legal bases confers a competence to the EU, there is nothing more to do save to seek an amendment of the Treaty and thereby a fresh conferral of powers.

In the course of various Treaty amendments, the EU legislature’s competences for harmonizing Member States’ laws for the establishment and functioning of the internal market were repeatedly expanded and the requirements for legislation have been lowered. Initially, Article 100 EEC Treaty, which essentially corresponded to the present Article 115 TFEU, served as the principal legal basis for the ‘approximation of laws’. Then as now, the provision requires unanimity in the Council. Moreover, only directives may be established on this basis. Therefore, the introduction of Article 100a EEC Treaty through the Single European Act (in force since 1 July 1987) meant a considerable facilitation and thus, in practical terms, an immense gain in significance for the approximation of national laws based on this chapter of the Treaty. While the wording of Article 100a(1) EEC Treaty has remained practically unchanged until now, the initial version of the further specifications in the provision (in particular, Article 100a(3) and (4) EEC Treaty) contained some inconsistencies and were regarded as not precise, so that

[169] *Philip Morris Brands SARL and Others v Secretary of State for Health*, Case C-547/14, EU:C:2016:325, para 149.

[170] Certainly, there are also other legal bases – for instance, competences related to the effectuation of the market freedoms such as Articles 54 or 59 TFEU – that may be used to that effect.

[171] See also *Commission v Council*, Case 45/86, EU:C:1987:163, para 13 confirming that this Article can only be used if no other Treaty provision offers a legal basis.

they were significantly revised by the Treaty of Amsterdam (then Article 95 EC, in force since 1 May 1999).

Perhaps even more importantly, only a series of ECJ decisions clarified the scope of (now) Article 114(1) TFEU, which included the findings that the provision also allowed for the harmonization of procedural laws as well as other enforcement provisions and even multi-stage harmonization schemes that confer rule-making and enforcement powers on the Commission (*Smoke Flavourings*, 2005) or on a EU body established by the legislature (*ESMA*, 2014).[172]

The facilitated use of 'approximation-of-laws' competences (Articles 100a EEC Treaty/Article 95 EC/Article 114 TFEU) and the ECJ's clarification of their (wide) scope led the EU legislature to increasingly resort to them for all kinds of market regulation. At the same time, this resulted in a loss of relevance of Article 352 TFEU as a legal basis for legislation meant to foster internal market integration through harmonization. This is particularly apparent in scenarios of a change of the legal basis, i.e. where the legislature amended legal measures that were initially based on Article 235 EEC Treaty or Article 308 EC (now Article 352 TFEU) on the basis of Article 100a EEC or Article 95 EC (now Article 114 TFEU). To illustrate this point, three examples will be given.

(1) Council Directive 85/339/EEC of 27 June 1985 on Containers of Liquids for Human Consumption[173] was based on Article 235 EEC Treaty (now Article 352 TFEU). Remarkably, in the legislative process, the Economic and Social Committee had criticized this choice of legal basis, stating that the 'Committee … wonders whether express reference should not have been made to Articles 2, 30 and 100, which would seem to be appropriate legal bases for the action proposed by the Commission'.[174] A few years later, when the EU legislature extended the regulation to cover all types of packaging and packaging waste through Council Directive 94/62/EC of 20 December 1994,[175] it based the measure (and the repealing of the old measure) on Article 100a EEC Treaty. In the proposal for this Directive, the Commission stipulated that Article 100a EEC Treaty was the adequate legal basis, noting that 'the current differences between national measures on packaging waste distort competition, hinder the free movement of goods in the common market and result in different levels of environmental protection'.[176] No specific justification was given as to why the measure was now based on Article 100a EEC Treaty, whereas the Commission had based the original Directive on Article 235 EEC Treaty and not on Article 100 EEC Treaty.

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[172] See discussion in section VII.1.f.
[173] [1985] OJ L 176/18.
[174] Opinion on the Proposal for a Council Directive on Containers of Liquids for Human Consumption, [1981] OJ C 343/23, 25, sub 2.2. Available at <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:51981AC1077&from=EN>.
[175] [1994] OJ L 365/10.
[176] KOM(92) 278 endg., Vorschlag für eine Richtlinie des Rates über Verpackungen und Verpackungsabfälle, p 10 sub 6.B (available only in German). Available at <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:51992PC0278&from=EN>.

(2) The EU legislature made a double turn when harmonizing the Member States' laws 'relating to the sulphur content of certain liquid fuels': while initially Council Directive 75/716/EEC[177] was exclusively based on Article 100 EEC Treaty, the amending Council Directive 87/219/EEC[178] was based both on Articles 100 and 235 EEC Treaty. The latter provision was relied on as the legislature regarded the protection of the environment as a separate objective that could not be pursued based on Article 100 EEC Treaty. However, when the legislature amended the Directive again in 1993 through Council Directive 93/12/EEC,[179] it relied solely on Article 100a EEC Treaty. In the light of Article 100a(3) TFEU, the legislature rightly assumed that the mere fact that the protection of the environment was a decisive factor for determining the harmonized level of regulation did not require recourse to a separate legal basis.[180]

(3) Through Council Regulation (EEC) No 222/77[181] the legislature established a transit procedure that was applicable to all movements of goods within the Community and which facilitated the carriage of those goods. The legislature assumed that neither Article 100 EEC Treaty nor any other provision in the Treaty provided an adequate legal basis for such a measure and, therefore, based it on Article 235 EEC Treaty. However, in 1990, when the legislature revised the transit procedure,[182] it reformulated the rules based on Article 100a EEC Treaty. While the Commission did not explain the change of legal basis in the legislative memorandum accompanying the proposal,[183] the explanation seems to lie in the fact that Article 100a EEC Treaty also allowed for the enactment of regulations, whereas Article 100 EEC Treaty only allowed for the enactment of directives.

For the purposes of this legal opinion, there are three main takeaways here. First, in the three original legal measures from the 1970s and 1980s, the legislature resorted to Article 235 EEC Treaty without further justification, although the use of Article 100 EEC Treaty as a specific legal basis seemed, at least in the case of the two directives, a plausible option. Second, the legislature subsequently assumed without any apparent hesitation the possibility of a change of legal basis, i.e. that the legal acts could be amended or repealed on the basis of Article 100a EEC Treaty. Third, in the light of these findings and given that the ECJ has in recent years established a relatively broad scope of Article 114 TFEU, it seems logical, and indeed consistent with the fact that Article 352 TFEU must only be used on a subsidiary basis, that a number of legal measures that

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177 [1975] OJ L 307/22.
178 [1987] OJ L 91/19.
179 [1993] OJ L 75/81.
180 This approach has been confirmed in *Titanium Dioxide,* above note 90.
181 [1977] OJ L 98/1.
182 Council Regulation (EEC) No 2726/90 of 17 September 1990 on Community Transit, [1990] OJ L 262/1.
183 KOM(89) 480 endg. Vorschlag für eine Verordnung (EWG) des Rates über das gemeinschaftliche Versandverfahren. The explanatory memorandum is available only in German at <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:51989PC0480&from=DE>.

were initially based on Article 352 TFEU (or the corresponding preceding provisions) can now indeed (only) be amended or replaced based on Article 114 TFEU.

Furthermore, the Court, in addition to stating that the legal basis of a measure is established objectively, has also stated that prior legislative practice by the Council cannot 'create a precedent binding on the institutions'.[184] AG Lenz considered the role of the legal basis selected in earlier legislation in some detail. He began by noting the realities of law-making: political compromises have to be made, and on the specific facts of the case before the Court he observed that some representatives of Member States agreed to insert an additional legal basis (*in casu* Article 100 EEC) 'only in order to reach a quick solution and … the delegations of the Member States reserved their positions as regards future cases'.[185] Therefore, he maintained that the analysis of the proper legal basis had to be carried out by the Court objectively and that prior practice was irrelevant and cannot generate legitimate expectations. Indeed, the Council has no power to generate legitimate expectations when it comes to selecting the legal basis:

> The voting rules are issued inter alia in the interests of the Community and are not at the disposal of its organs. The latter may only issue measures which are in conformity with the law of the Treaty.[186]

This means that, in principle, a party with standing may challenge an old piece of secondary legislation and the Court would have to examine whether the legal basis selected is correct, but this would have to be done taking into consideration the legal understanding of the various competences at the time the law was enacted.

VIII. Assessing Options 2 to 4: Article 114 TFEU, the DMA and Control of Digital Gatekeeper Acquisitions

1. Option 2: Establishing a New Notification Obligation in the DMA

Option 2 requires that the DMA, including the extended notification obligations for gatekeepers, fulfils the conditions of Article 114 TFEU. To meet the Court's reading of this provision, this would essentially depend on whether the functioning and establishing of the internal market were to be considered the genuine and predominant purpose of the DMA including the provision on mergers. In addition, it needs to be clarified that the EU merger framework can be adapted via the DMA without formally amending the EU Merger Regulation.

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[184] *Germany v Council*, Case C-426/93, EU:C:1995:367, para 21; *UK v Council*, Case 68/86, EU:C:1988:85, para 24.

[185] *UK v Council*, above note184, opinion of AG Lenz, para 29.

[186] Ibid., opinion of AG Lenz, para 43.

a) Fostering Internal Market Integration

(1) Divergent National Merger Laws and Practices

As demonstrated above,[187] Member States have established mechanisms or, in the case of France, plans[188] to expand the scope of application of national merger control, which in particular allow national competition authorities to assess acquisitions by large digital gatekeepers that escape the EU Merger Regulation owing to the turnover thresholds laid down in Article 1 EUMR. As a result, there is enough evidence to show that harmonization would serve to address actual and potential divergences at national level that could, as argued below, undermine the internal market or competition.

The result of the ongoing reforms at national level is that these acquisitions are controlled in some Member States and not in others. Moreover, there is no uniform standard for control. With the exception of Italy, all Member States that provide for merger control have now introduced the SIEC test. However, in the absence of common guidelines and guiding case practice at EU level, this can hardly guarantee a uniform substantive standard for the control of the kind of acquisitions relevant here.

In addition, national merger control is limited to assessing the effects on national markets. External effects on other national markets or even on the internal market as a whole are not taken into account. As explained below, the assessment of acquisitions by large digital gatekeepers at the Member State level, potentially in parallel merger proceedings, creates severe risks of significant distortions of competition and of obstructions to the fundamental freedoms – and, thus, for the proper functioning of the internal market.

(2) Significant Distortions of Competition

In the context of Article 114 TFEU, the most intuitive interpretation of 'distortion of competition', which has also been adopted by the ECJ, means that, owing to regulatory differences among national laws, an undertaking situated in one Member State has a competitive advantage over rivals located elsewhere.[189] A second approach to identifying distortions of competition was taken in *Vodafone*, where the ECJ also accepted the argument that competition can be considered to be distorted – and, thus, a legislative competence under Article 114 TFEU can be justified – where a lack of regulation by the Member States results in anticompetitive effects in form of high consumer prices.[190]

Decentralized, potentially parallel merger control of acquisitions by large digital gatekeepers may in several ways lead to distortions of competition in both meanings.

First, insofar as there is only national merger laws and practices, which, incidentally, also diverge, this will leave firms more or less leeway for external growth. This may distort the

[187] See above sub IV.1.
[188] On the preventive use of Article 114 TFEU see above sub VII.1.d).
[189] See discussion in section VII.1.c), p 33, above.
[190] *Vodafone,* above note 102, paras 38 and 39.

allocation of capital within the internal market. With regard to acquisitions by the large digital platforms, the perspective of potential target companies is particularly relevant. Incentives to invest in start-up firms should not vary in the internal market according to the expectation that cash-out might be more or less beneficial due to divergent national merger laws. In fact, the risk that stricter national merger control law for acquisitions by digital gatekeepers would make investments in digital start-ups less attractive has been addressed at the political level in the Member States.[191] Therefore, given the possible incentives to foster national home-grown start-ups, there seems to be a real risk of a regulatory 'race to the bottom', as national merger law and practice may have a tendency to assess the said acquisitions not sufficiently strictly measured against the socially first-best solution at the EU level. Thus, as a result, the intensity of competition within the internal market may be too low.

Second, in many cases, acquisitions will be cleared subject to behavioural remedies. The Commission's Google/Fitbit decision is a good example of how competition authorities can make extensive use of this instrument when dealing with acquisitions in digital markets. For instance, Google had to commit to not using the health and wellness data collected from Fitbit devices for Google Ads.[192] A similar development can be expected if such acquisitions (when below the EU Merger Regulation's turnover thresholds) are increasingly controlled at the national level. This, however, means that the affected undertaking will be subject to diverging behavioural standards in the internal market, which, in turn, may distort competition in the markets for the services and goods offered by the undertaking. Certainly, this issue could be resolved by cooperation among competent competition authorities, but it adds a layer of complexity for the undertakings and the authorities.

Third, as national merger control considers only effects on national markets, national decisions may entail negative externalities on other Member States. This is particularly relevant in digital markets where business models are typically scalable and benefit from network effects and therefore, even if only in a nascent state, may have strong potential competitive implications for neighbouring national markets. In some scenarios it may be the prohibition, and in others the clearance of a merger by a national competition authority, that hinders the enhancement of competition in other Member States. In the first scenario, this may be the case if the prohibited acquisition would have fostered the scaling-up of a business model, making innovation faster available in the whole internal market, which would then be particularly helpful in some (other) national markets to

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[191] In Germany, in the explanatory memorandum accompanying the (then) proposal for an introduction of a transaction value threshold, it was succinctly emphasized that the threshold was set at such a level that it would not distort the venture capital market. See BT-Drucksache 18/10207, p 73. Available at <https://dserver.bundestag.de/btd/18/102/1810207.pdf>. In France, the issue has been addressed in the Economic Affairs Committee's Report (« RAPPORT FAIT au nom de la commission des affaires économiques sur la proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace, Par M. Franck MONTAUGÉ et Mme Sylviane NOËL, Sénateurs »), p 50. Available at <https://www.senat.fr/rap/l19-301/l19-3011.pdf>.

[192] Case M.9660 – Google/Fitbit (17 December 2020).

intensify competition. In the second scenario, the clearance of a (reverse) 'killer acquisition' may destroy an opportunity for an alternative business model that, if scaled, would have been helpful precisely in other parts of the internal market to promote competition, so that the clearance results in large digital gatekeepers becoming more unassailable throughout the internal market. It can be seen from this that, especially when it comes to protecting potential competition – which is supposed to play a particular role with regard to the assessment of acquisitions by large digital gatekeepers – an EU-wide perspective is essential to avoid distortions of competition.

These distortions of competition can be avoided through extended merger notification obligations at EU law level that will result in an assessment of these concentrations by the Commission under the EU Merger Regulation based on the one-stop-shop principle.

(3) Creating Obstacles to Fundamental Freedoms

National merger control of acquisitions by large digital gatekeepers, possibly in parallel proceedings and with diverging substantive standards, may also create obstacles to the exercise of the EU's fundamental freedoms.

First, as the relevant acquisitions will typically affect several national markets, it will be costly to the merging parties to obtain legal advice as to the several domestic merger laws and, if applicable, to notify the merger with various national competition authorities. Therefore, insofar as a cross-border element is involved, this legal state results in obstacles to the exercise of the freedom of establishment and/or the free movement of capital, which could be avoided or reduced if the one-stop-shop principle applies after a notification to the Commission.

Moreover, where a national competition authority prohibits an acquisition or imposes structural or behavioural remedies on the parties, this may amount to an obstacle to freedom to establishment and/or freedom to capital. Furthermore, given that an undertaking may be forced to withdraw its activities from a certain national market, national merger control may also be regarded as an obstacle to the free movement of goods or services. What is more, behavioural remedies may result in the addressed undertaking to have to comply with diverging regulatory standards and, thus, likewise create obstacles to the free movement of goods or services. While these types of obstacle to the market freedoms may also occur if a concentration is subject (only) to merger control by the Commission, the overall impeding effect will be significantly reduced because a common standard will be applied and because behavioural remedies, for example, will typically apply uniformly to the entire internal market.

b) Improving Internal Market Conditions as the Genuine Objective of the DMA (Including Extended Merger Notifications)

As has been shown, extended obligations imposed on large digital gatekeepers to notify acquisitions and the resulting assessment of these acquisitions by the Commission based on a one-stop-shop principle will prevent significant distortions of competition and avoid or at least reduce obstacles to the exercise of the market freedoms. It is essential that the legislature signals that these expected (significant) positive effects on the integration of the internal market are a major motivation for the adoption of such a notification obligation in the DMA Proposal. These aspects should therefore be specified in the legislative documentation by the Council and/or the European Parliament and, moreover, the rationale of a provision on merges should be explained in a recital to be added to the preamble of the DMA Proposal.[193]

In its case law, the ECJ has pointed out that its review of the Article 114 TFEU conditions relates to the entire measure.[194] Within the scope of this opinion, we cannot address the question of whether the DMA Proposal as a whole meets the criteria under Article 114 TFEU. However, the following should be noted: while some commentators have contested the use of Article 114 TFEU to base the DMA, in particular because it pursues objectives similar to competition law,[195] Article 114 TFEU can be used as a vehicle to step outside competition law in order to develop the law, which has overlapping objectives with competition law, provided that the conditions for Article 114 TFEU to apply are fulfilled. As we have explained above, Article 114 TFEU may be used to address distortions of competition that affect the internal market. Accordingly, some overlap between the application of Articles 101 and 102 and secondary legislation based on Article 114 TFEU is to be expected. In that sense, the relationship between the proposed DMA and competition law is a mirror image of what happened in the telecommunication sector 30 years ago with the parallel adoption of the Harmonization Directive based on Article 114 TFEU to regulate the sector and of liberalisation directives based on Article 106 TFEU.[196] Back then, a number of stakeholders challenged the use of Article 106(3) TFEU to enact directives that largely overlapped with the open network provision (ONP) telecommunications directives adopted under Article 114 TFEU, but the ECJ confirmed that, despite the substantive overlap, both legal bases could be used in parallel, as long as their respective requirements were met.[197]

c) Principle of Proportionality

The extended notification obligations for large digital gatekeepers must be proportionate. They must not go beyond what is necessary to achieve the internal market objective.

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[193] This also fulfils the obligation to state reasons under Article 296(2) TFEU. However, it should be noted that the legislator is not obliged to give reasons for each individual decision within a legislative act separately, see *Eridania,* Case C-250/84, EU:C:1986:22, para 38; *Spain v Commission,* Case C-304/01, EU:C:2004:495, para 51.

[194] *Tobacco 1,* above note 92, para 84; *Vodafone,* above note 102, para 32.

[195] Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12(7) Journal of European Competition Law & Practice 576.

[196] Commission Directive 88/301/EEC of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment OJ [1988] L 131/73 and Commission Directive 90/388/EEC of 28 June 1990 on Competition in the Markets for Telecommunications Services OJ [1990] L 192/10. These two legal bases were found at Article 90(3) and 100a EEC Treaty, respectively, at the time.

[197] *France v Commission*, Case C-202/88, EU:C:1991:120 and *Spain v Commission*, Case C-271/90, EU:C:1992:440.

Therefore, the new notification obligation should target transactions with a meaningful impact on the internal market. One important criterion would be that the new notification requirement is limited to acquirer having been designated as having a gatekeeper position. This would probably be enough to meet the proportionality requirement. However, additional criteria may also be provided regarding the acquired company (for instance that it has substantial operations in the internal market and/or a minimum number of users in the EU) or regarding the value of the transaction.

There are no equally effective measures available: as discussed above the Commission's novel interpretation of Article 22 EUMR is problematic and even if validated by the ECJ it is unlikely to provide for the same degree of harmonization as this second policy does. For the same reasons Article 4(5) EUMR is also not robust enough: the conditions for such a request may not be met or a Member State might disagree with the referral.

Harmonization through a centralized procedure is superior to harmonization requiring the enactment of rules by Member States: as we have observed, these transactions generally affect the EU market as a whole, so a unique assessment by the Commission is preferable.

d) Can the DMA Establish New Notification Obligations without Amending the EU Merger Regulation?

Option 2 means adapting the EU merger framework without changing the EU Merger Regulation itself. The question is whether this amount to an illegal circumvention of the conditions and procedures required by the Treaties for amending the EU Merger Regulation.

We submit that such a consideration could only be relevant (if at all) when the changes to the merger framework, *in casu* the introduction of a new notification obligation, would contradict normative decisions enshrined in the EU Merger Regulation. This is not the case when the application of the – otherwise unchanged – merger control is extended beyond Article 1 EUMR. The thresholds defined in Article 1 EUMR do not exhaustively define the application of the merger control procedure. This policy choice is already obvious from the Regulation itself. Articles 4(5) and 22 EUMR provide for broad options to refer concentrations to the Commission that do not fulfil the conditions laid down in Article 1 EUMR.

Moreover, it should also be noted that Article 1(4) EUMR provided that the operation of the thresholds should be reviewed by the Commission, which may then present a proposal for amendment. Upon such a proposal, Article 1(5) EUMR provides that the Council 'acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3'. While this provision has now expired (the proposal was expected in 2009), it is an indicator that the notification thresholds are not based on substantial normative choices by the EU Merger Regulation's original legislature. In 2009 the

Commission published a report on the functioning of the EUMR.[198] In this report it observed that there were still a good number of transactions that fell below the notification thresholds for the EUMR so that there is 'further scope for "one-stop-shop" review'.[199] This report provided information to the Council but the Commission did not propose legislation at this time.

While it is also true that, in the past, to facilitate access to EU merger control, Article 4(5) of the Regulation was amended on the basis of (now) Article 352 TFEU,[200] this does not exclude the option that in other contexts the scope of application of the merger control procedure under the Regulation can be extended by specific EU law measures such as the DMA. Regulation 2019/452 on the Screening of Foreign Direct Investments[201] can be seen as an example of an EU measure that had an impact on the scope of the EU Merger Regulation without amending it. In its 36th recital, Regulation 2019/452 states that

> This Regulation and Article 21(4) of Regulation (EC) No 139/2004 should be applied in a consistent manner. To the extent that the respective scope of application of those two regulations overlap, the grounds for screening set out in Article 1 of this Regulation and the notion of legitimate interests within the meaning of the third paragraph of Article 21(4) of Regulation (EC) No 139/2004 should be interpreted in a coherent manner …

Therefore, when interpreting, for example, the concept of 'public security' under Article 21(4) EUMR, the factors listed in Article 4 of Regulation 2019/452 and the meaning given to them by future ECJ adjudication will have to be considered in cases where the scope of both instruments overlap. Consequently, as 'public security' within the meaning of Article 21(4) EUMR is one of the concepts that define which concentrations may in addition to the merger control procedure under the EU Merger Regulation be assessed under (possibly stricter) national laws, Regulation 2019/452 has practical impact on the scope of the one-stop-shop principle as enshrined in Article 21 EUMR.

In sum, we may conclude that a new notification obligation could be introduced via the DMA (on the basis of Article 114 TFEU).

e) Additional Note

An additional argument to support option 2 could be made by considering the position of observers who would think that a complementary notification threshold via the DMA would amount to a substantial change of the EUMR and that the EUMR could in principle only be amended on the basis of its existing legal basis (Articles 103 and 352 TFEU).

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[198] Communication from the Commission to the Council – Report on the Functioning of Regulation No 139/2004, COM(2009) 281 final.

[199] Ibid., para 13.

[200] For discussion of this amendment, see EC Commission, Report on the Functioning of Regulation No 139/2004 COM(2009) 281 final, para 18. The Commission had proposed a simplification of this procedure: allowing parties to notify the transaction to the Commission rather than making a reasoned submission: European Commission, White Paper: Towards More Effective EU Merger Control COM(2014) 449 final, paras 59–68.

[201] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, [2019] OJ LI 79/1. The Regulation has been adopted based on Article 207(2) TFEU.

From this perspective, it may seem that, while the DMA can be adopted based on Article 114 TFEU because it serves the purposes of aligning divergent national regulation, the insertion of merger rules into the DMA would require a different legal basis because the merger rules are designed to achieve objectives pertaining to competition policy.

While we do not share those two premises, we submit that, even on the basis of those premises, option 2 would be legally feasible. Indeed, as recalled in Section VII.2.a) above, the ECJ has clarified that, when a legal act pursues two objectives, the legal basis should be chosen according to the primary objective of the act. In this case, the DMA would mostly aim at achieving the internal market. The change of the EU merger control regime would only be an accessory objective. Therefore, a DMA that would amend the EU Merger Regulation to include a complementary notification threshold could be solely based on Article 114 TFEU and would not need to be based on Articles 103 or 352 TFEU.

2. Option 3: Amending the EU Merger Regulation

When considering the conditions for basing secondary legislation on Article 114 TFEU, the same considerations put forward for option 2 would also apply to an amendment of the EU Merger Regulation that would extend the notification obligations for large digital gatekeepers and adjust the SIEC test, in particular the standard of proof and/or the burden of proof with regard to their acquisitions.[202] The difficulty with this third option, however, is whether and under which conditions the Merger Regulation could be amended on the basis of Article 114 TFEU, even though it has been adopted on the basis of (now) Article 352 TFEU.

a) Could an Amendment of the EU Merger Regulation Have Legal Basis (Articles 103 and 114 TFEU) Other than Its Original Legal Basis (Articles 103 and 352 TFEU)?

We submit that the EU Merger Regulation could be amended or replaced based on Articles 103 and 114 TFEU even though it was originally adopted based on (now) Articles 103 and 352 TFEU. First of all, it is the key function of the division of powers as embodied in the EU Treaties to delineate which legal rules may be established using which legislative procedure by which institutions at the EU level. This ensures democratic legitimacy and accountability of EU rule-making, as well as protecting the EU institutional balance and Member States' sovereignty. Therefore, as a matter of principle, as long as the conditions for the use of a particular legal basis are met, this basic concern of the EU Treaties' division of powers is taken into account.

The particularity of this third policy option, however, may lead the ECJ, which usually grants the EU legislature a wide margin of discretion in this respect, to undertake a more precise examination of the facts that are meant to legitimize the use of a certain legal

[202] See above sub V.3.

basis. Such a closer scrutiny may seem appropriate, especially because the voting requirements change with the legal basis as in the case of Articles 352 and 114 TFEU.[203]

Moreover, there are no legitimate interests or expectations of the EU institutions and the Member States (which participate via the Council) that were originally involved in the legislative process that a legal measure could only be amended or repealed using the original legal basis and the associated legislative procedure. As we have noted above, the choice of a legal basis in one instrument does not create any legitimate expectations: the Court has taken the view that the legal basis is tested by reference to objective factors.[204] We have also noted that, as the Treaty legal bases have evolved, the legislature has amended certain pieces of secondary legislation by reference to new legal bases.[205] Therefore today's legislature is not bound by the decision of a former legislature to use a specific legal basis. Otherwise, there would be severe risks of unacceptable petrification of certain areas of law.

b) Can an Amendment of the Merger Regulation Be Based on Article 114 TFEU?

When the Merger Regulation was first proposed in the early 1970s, the legal basis was Articles 87 and 235 EEC (now Articles 103 and 352 TFEU).[206] In a series of proposals in the early 1980s, the matter of legal basis was never revisited. The disagreements between the EU institutions, which favoured EU-wide control of mergers, and the Member States which were against it had to do largely with the standard of assessment and with the thresholds for assigning merger assessment to the Commission.[207] Thus, these amendment proposals only provided for a revision of the articles of the Regulation; the legal basis was not debated.[208] Instead, in the proposals that were released in the late 1980s the full draft regulation was laid out and, while the legal basis has not changed, the Commission observed in recitals that enhancing the EU's competition rules was 'essential for the achievement of the internal market by 1992'.[209] Accordingly the legislature always noted the internal market logic of the Merger Regulation.

The choice of Articles 103 and 352 TFEU as a legal basis may be explained in the following manner. By the time the Merger Regulation came to be agreed, the Court had confirmed that the Commission was competent to review certain mergers when these

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[203] Therefore, especially where the insertion of a provision is only initiated by the Council and/or the European Parliament and, for this reason, without being supported by comprehensive impact assessment as it is typically provided by the Commission, special attention should be paid to the factual substantiation of the requirements under Article 114 TFEU.

[204] See above at note 93.

[205] See above sub VII.3.

[206] Commission Proposal for a Regulation of the Council on the Control of Concentrations between Undertakings, [1973] OJ C 92/1.

[207] For a helpful historical synopsis of the main points of debate, see D.G. Goyder *EC Competition Law* 3rd ed., Oxford 1998, pp 377–385.

[208] For instance, Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings (Merger Control Regulation), [1982] OJ C 36/3; Amendment to the Proposal for a Council Regulation on the Control of Concentrations between Undertakings, [1984] OJ C 51/8.

[209] Amended proposal for a Council Regulation (EEC) on the Control of Concentrations between Undertakings, [1989] OJ C 22/14, Recital 2.

fell within the scope of Articles 101 and 102 TFEU. Accordingly, the Regulation was designed to ensure a comprehensive assessment of all concentrations, justifying reliance on Article 103 TFEU, which confers on the Council the power to specify the scope of Articles 101 and 102.[210] Insofar as Article 352 TFEU is concerned, it should be recalled that, when the original regulation was proposed in 1973, it would have made little difference if the legal basis had been Article 100 EEC or Article 235 EEC. Both of these provisions at the time required unanimity in the Council. Moreover, it has been noted that, in the days before the Single European Act, the EU often elected to use the flexibility clause but that, since the conferral of more specific competences legislation in fields like equal opportunities, environmental law and consumer protection law, which had been originally based on Article 235 EEC, was then amended on the basis of specific competences.[211] It is also worth noting how, in the early days, the Court also allowed the legislature to use Article 235 EEC even when it might have been argued that there was another legal basis. The Court allowed the use of Article 235 EEC because the legislature considered this was more legally certain and also because it did not harm the institutional balance.[212]

On the basis of this account, it seems that the Commission proposed to base the Merger Regulation on Article 235 EEC because that was the norm in the 1970s and this legal basis remains because the legislature was trying to overcome other political objections to the Regulation. Today this legal basis has a residual role.[213] It is likely that, had the legislature considered the legal basis more closely in the late 1980s absent the political pressure to get a regulation agreed quickly, that it would have chosen (what is now) Article 114 TFEU. Furthermore, given that this procedure gives more power to the European Parliament, the democratic credentials are stronger, which is an important

[210] Recitals 5–7 EUMR 1989.

[211] For example: Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions ([1976] OJ L 39/40) was based on Article 235 EEC, while Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast) ([2006] OJ L 204/23) is based on art 141(3) TFEU. Directive 78/659/EEC of 18 July 1978 on the Quality of Fresh Waters Needing Protection or Improvement in Order to Support Fish Life ([1978] OJ L 222/1) was based on Articles 100 and 235 EEC but Directive 2006/44/EC of the European Parliament and of the Council of 6 September 2006 on the Quality of Fresh Waters Needing Protection or Improvement in Order to Support Fish Life ([2006] OJ L 264/20) is based on Article 175(1) TFEU. Directive 79/581/EEC of 19 June 1979 on Consumer Protection in the Indication of the Prices of Foodstuffs ([1979] OJ L 158/19) was based on Article 235 EEC but Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on Consumer Protection in the Indication of the Prices of Products Offered to Consumers ([1998] OJ L 80/27) is based on Article 129a(2) EEC. This trend was noted in The European Convention, Working Group V 'Complementary Competencies', Working Document 19, 03.09.2002. Available at <https://ec.europa.eu/dorie/fileDownload.do;jsessionid=vnkQJmdY0KLGfKPql47TVpG2CtyH3vQGW2QQNfknfMXQ6yJL0HPq!469751194?docId=99203&cardId=99203>.

[212] *Hauptzollamt Bremerhaven v Massey Fergueson,* Case 8/73, EU:C:1973:90 para 4.

[213] T. Konstadinides, 'Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31(1) Yearbook of European Law 227.

consideration from the ECJ’s point of view in determining the legal basis for a measure for which several legal bases can be contemplated.[214]

It is also worth noting that Directive 2017/1132 relating to certain aspects of company law (which is based on Article 50 TFEU) contains provisions to facilitate cross-border mergers. The rationale here is the abolition of restrictions on freedom of establishment, a policy that had been recognized since the 1960s.[215] Thus harmonization of merger control is seen here as an internal market task.

Likewise, in the reviews of the EU Merger Regulation, the Commission observes frequently that the failure to create a one-stop shop for a high number of cross-border mergers harms the internal market. For example, in the 2009 Report, the Commission observed that

> around 6% of the cases notified in at least three Member State gave rise to competition concerns … the negative consequences of parallel proceedings and the potential for a contradictory outcome are particularly important for those cases which raise substantive competition issues.[216]

It follows that it is likely that the Commission erred on the side of caution in 1973 when proposing the EU Merger Regulation. Today, given the evolution of the EU’s legislative competences in light of Treaty amendments and the Court’s case law, the case for basing the EU Merger Regulation on Article 114 TFEU is strong.

For completeness, it is worth noting that Article 103 TFEU should be retained as a parallel legal basis to Article 114 TFEU. Originally, this was justified to take into account the judgment in *Continental Can*, and to allow mergers that strengthen a dominant position to be assessed *ex ante* under the EU Merger Regulation. Today, Article 103 TFEU is also relevant because the Commission is also empowered to carry out an Article 101 TFEU analysis of all joint ventures performing on a lasting basis all the functions of an autonomous economic entity.[217] Furthermore, when the Commission clears a merger, ancillary restraints, such as non-compete agreements or licensing agreements, are immunized against a review under Article 101 TFEU, provided that they are ‘directly related and necessary to the implementation of the concentration’.[218] In other words, certain aspects of the EU Merger Regulation need Article 103 TFEU as a legal basis because this is the ground upon he legislature may ‘give effect to the principles set out in Articles 101 and 102’ TFEU. Observe further that both the EU Damages Directive and the ECN Plus Directive were adopted following the ordinary legislative procedure and based on Articles 103 and 114 TFEU.[219]

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[214] See above at note 97 (*Titanium Dioxide*).
[215] [2017] OJ L 169/46, Recitals 2 and 55–56.
[216] Commission Staff Working Document Accompanying the Document ‘White Paper. Towards more Effective EU Merger Control’, SWD(2014) 221 final (09.07.2014), section 4.2.2.
[217] Articles 2(4) and (5) EUMR.
[218] Articles 6(1)(b) and 8(1) EUMR.
[219] See above at notes 143 and 144.

In sum, we do not see why the EU legislature should be prevented from amending the EU Merger Regulation, or adapting certain elements of it, based on Article 114 TFEU.

c) *A Historical Perspective*

Similar conclusions may be reached if we observe how the various legal bases have evolved over time. When it comes to competition law, the draftsman of the Treaty of Rome, realizing that some secondary law was going to be necessary to ensure that the principal competition law provisions (i.e. Articles 85 and 86 EEC) were enforced properly, inserted Article 87 EEC.[220] Article 87(1) provides that, within three years after the coming into force of the Treaty of Rome the Council would enact all regulations or directives that would facilitate the application of the principles found in Articles 85 and 86 EEC (now Articles 101 and 102 TFEU). The Council would have to act based on unanimity but if no such measures were agreed within three years, then qualified majority voting would take over. Article 87(2) provided an indicative list of the content of such secondary legislation, e.g. the imposition of fines or injunctions. This provision was subsequently amended: the timetable was removed and voting was made possible by qualified majority. The scope of action remained unchanged, however.[221]

Article 100 EEC provided that the Council may issue directives to harmonize national rules that have a direct impact on the establishment and functioning of the internal market, but only if there is unanimity. Article 235 EEC (now Article 352 TFEU) provided that, if Community action is necessary to ensure the functioning of the common market but the Treaty has not provided powers to achieve this, then the Council my take appropriate measures if there is unanimity. Politically, therefore, the choice for Member States was identical irrespective of legal basis: unanimity must be sought. Legally, Article 100 EEC only empowered the Council to legislate by way of directives. Furthermore, the scope of action under Article 100 EEC is narrower (harmonization of national laws that affect the establishment of the common market) than under Article 235 EEC (any measure to make the common market work better).

It is also worth noting that, in 1972, at a meeting of heads of state, it was recognized that further legislative action was required in light of global challenges. In particular, they observed a need ‘to try and provide a uniform foundation for industry throughout the Community’. Among the measures listed to this end we find ‘the preparation of provisions to guarantee that concentrations, affecting undertakings established in the Community, are compatible with the Community’s socio-economic goals, and fair competition…’[222] The heads of state agreed that in achieving these tasks they would ‘use as widely as

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[220] For completeness, note that there are two further legislative competences in the competition law chapter: Article 106(3) TFEU (with regards to privileged undertakings) and Articles 108(4) and 109 TFEU (for state aid).
[221] Article 83 EC and now Article 103 TFEU.
[222] Conference of Heads of State and Government of the Nine Member States and Future Members, Paris, 19–21 October 1972, Special issue of Bulletin of the European Communities 10-1972, pp 7–8.

possible all the provisions of the Treaties, including Article 235 of the EEC Treaty'.[223] Moreover, it is worth recalling that on 21 February 1973 the ECJ rendered its judgment in *Continental Can*, which established that a dominant undertaking could abuse its dominant position by merger.[224]

Taking this background into account, it is not surprising that, when the Commission proposed a Merger Regulation in 1973, it suggested that the legal basis should be Articles 87 and 352. Article 87 (now Article 103 TFEU) appeared necessary because of the judgment in *Continental Can*: the Regulation could facilitate the application of the abuse of dominance provision. Article 352 EEC was, at the time, the only other legal basis that allowed the Council to pass legislation in the form of a regulation. Thus, at this time Article 100 EEC was in no way a plausible legal basis for the Merger Regulation. As we saw above, today the scope of Article 114 TFEU has widened and correspondingly the legislative space for Article 352 TFEU has shrunk.

3. Option 4: Establishing a Regime of Merger Control Specifically Dedicated to (Large) Digital Gatekeepers

The fourth option[225] for adapting the merger regime to the challenges posed by large digital gatekeepers would be to introduce a separate merger control procedure, including an adjusted substantive test, applicable only to acquisitions by these firms. Such a separate merger regime could be adopted either by way of the DMA or via a supplementary measure. It could either replace (alternative A) or complement (alternative B) the application of the EU Merger Regulation.

a) Option 4A: A Separate Merger Regime Replacing the EU Merger Regulation

A stand-alone merger control regime replacing the EU Merger Regulation would amount to a system that would not differ substantially from option 3. Acquisitions by large digital gatekeepers would be dealt with in a one-stop-shop procedure with lowered notification thresholds and with adjustments to the substantive test, in particular with an adapted standard of proof and/or a shift of the burden of proof in favour of the Commission. Moreover, this alternative would require a (formal) amendment of the EU Merger Regulation, because some of the concentrations covered by Articles 1 and 3 EUMR would no longer have to be assessed under the EU Merger Regulation but under an alternative procedure. The main difference would only be that, under option 3, the gap in the EU Merger Regulation would be filled by changing the text of the Regulation, whereas under option 4A the same gap would be filled by a new legal instrument.

From an EU competence perspective, it should therefore make no difference whether the EU legislature implemented option 3 or option 4A. If an implementation of option 3 is considered possible on the basis of Article 114 TFEU (as we argue), this must also be

[223] Ibid., p 11.
[224] *Europemballage Corporation and Continental Can Company v Commission*, Case 6/72, EU:C:1973:22.
[225] See above sub V.4.

true for this alternative.[226] The decision whether to establish an adapted uniform merger control regime for the large digital gatekeepers outside or within the EU Merger Regulation can therefore essentially be made according to institutional or political considerations.

As a general rule, as long as the preferred merger control system for the large digital gatekeepers corresponds in its structure and its essential substantive aspects to those of the EU Merger Regulation, it is advisable to leave it at an amendment of this regulation. The greater the deviations on a substantive scale from the traditional assessment under the EU Merger Regulation, the more appropriate it would seem to establish a separate merger control system.

b) Option 4B: A Separate Merger Regime Complementing the EU Merger Regulation

The second alternative within option 4 would require the EU legislature to establish a fully fledged merger control system applicable to acquisitions by large digital gatekeepers that would be of parallel and cumulative application to the EU Merger Regulation.

We have several instances of double merger review, which applies to the same transactions but with different objectives. For example, a merger between media companies often leads in some Member States to a competition review and a media plurality review. Another recent example is provided by the Commission's proposal for a Regulation on Foreign Subsidies Distorting the Internal Market.[227] Based on Articles 114 and 207(1) TFEU,[228] the Proposal contains a fully fledged system[229] of *ex ante* control of defined mergers and acquisitions, which is supposed to operate alongside merger control under the EU Merger Regulation.[230] The proposal provides in particular that a 'notifiable concentration shall not be implemented before its notification',[231] and that the Commission shall prohibit a concentration 'where [it] finds that a foreign subsidy distorts the internal market'.[232]

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[226] Article 103 TFEU could be considered a complementary legal basis. This applies in particular if the measure for Option 4A, in a similar way as now in the EU Merger Regulation (see above at notes 217 and 218) also provided that merger control, for example with regard to joint ventures or ancillary restraints, should replace an assessment under Article 101 TFEU in conjunction with Regulation 1/2003.

[227] Proposal for a Regulation of the European Parliament and the Council on Foreign Subsidies Distorting the Internal Market, COM/2021/223 final.

[228] Preamble of the Proposal on Foreign Subsidies Distorting the Internal Market.

[229] COM/2021/223 final pp 5–6 and Chapter 3 (Articles 17 to 25) of the Proposal on Foreign Subsidies Distorting the Internal Market.

[230] Article 40(1) of the Proposal on Foreign Subsidies Distorting the Internal Market ('This Regulation is without prejudice to the application of Articles 101, 102, 106, 107 and 108 of the Treaty, Council Regulation (EC) No 1/2003 and Council Regulation (EC) No 139/2004.').

[231] Article 23(1) of the Proposal on Foreign Subsidies Distorting the Internal Market.

[232] Article 24(3)(c) of the Proposal on Foreign Subsidies Distorting the Internal Market. The concept of 'distortion of the internal market' applicable in this context is defined in Articles 3 to 5 of the Proposal.

If adopted without extending the scope of the EU Merger Regulation, option 4B can be readily considered appropriate and necessary to prevent the frictions in the internal market discussed under option 2 above. It is true that, so far, the Member States that have enacted or that envisage merger rules that specifically address acquisitions by the large digital gatekeepers have not established a new layer of merger control in addition to the existing instrument. However, if a one-stop-shop principle – analogous to the one pursuant to Article 21(3) EUMR – were to be included in a measure implementing option 4B, this measure would have a harmonizing effect on the exercise of merger control by the Member States in digital markets, irrespective of whether the expanded and (potentially) tightened national merger control would be pursued under traditional merger law or under a specialized regime.

Implementing option 4B may conflict with Article 21(1) EUMR. This could be resolved by explicitly giving priority to the new legal measure as *lex posterior*. This seems to be the assumption made by the Commission in its proposal for a regulation on foreign subsidies, where it is provided that such a regulation would apply without prejudice to the parallel application of the Merger Regulation.[233]

Moreover, one might argue that the new (additional) merger regime would pursue objectives that are different from the competition policy objectives pursued by the measures mentioned in Article 21(1) EUMR and by the EU Merger Regulation and, therefore, a conflict with the one-stop shop principle as embodied in Article 21(1) EUMR does not exist. However, whether the regulatory objectives pursued with the EU Merger Regulation and with an additional merger regime applicable only to large digital gatekeepers as defined by the DMA Proposal would be sufficiently distinguishable seems uncertain. It is true that the DMA Proposal stresses that its focus is on the 'contestability' of digital markets and 'fairness' in the relationships between the large digital platforms and their business users. However, the concept of 'contestability' has at least a significant overlap with the objectives trditionally pursued by merger control,[234] and whether the 'fairness' criterion could actually influence the substantive assessment of concentrations seems uncertain. On the other hand, it could be argued that while the objectives of merger control do not change significantly in regard to large digital gatekeepers, their involvement does fundamentally change the necessary standards of merger control; in other words, to control acquisitions of nascent competitors by the said firms requires a merger control of a 'different kind' than the one foreseen by the EU Merger Regulation.

Whether these considerations are sufficient to avoid a conflict with Article 21(1) EUMR appears uncertain and depends on the design of Option 4B in detail, in particular whether the new measure would provide for a substantive test clearly distinct from the SIEC test of Article 2(2) and (4) EUMR. For this reason, it is preferable to explicitly amend the EU

[233] Article 40(1) of the Proposal on Foreign Subsidies Distorting the Internal Market.
[234] See Article 2(1) EUMR.

Merger Regulation and to allow in Article 21 EUMR for the parallel and cumulative application of the measure implementing Option 4B.

IX. Annex: National Merger Law Provisions (in Force or Proposed)

1. Austria

Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen (Kartellgesetz 2005 – KartG 2005)

Anmeldebedürftige Zusammenschlüsse

§ 9. […]

(4) Zusammenschlüsse, auf die Abs. 1 nicht anwendbar ist, bedürfen auch der Anmeldung bei der Bundeswettbewerbsbehörde, wenn

1. die beteiligten Unternehmen im letzten Geschäftsjahr vor dem Zusammenschluss Umsatzerlöse von weltweit insgesamt mehr als 300 Millionen Euro erzielten,

2. die beteiligten Unternehmen im letzten Geschäftsjahr vor dem Zusammenschluss im Inland Umsatzerlöse von insgesamt mehr als 15 Millionen Euro erzielten,

3. der Wert der Gegenleistung für den Zusammenschluss mehr als 200 Millionen Euro beträgt und

4. das zu erwerbende Unternehmen in erheblichem Umfang im Inland tätig ist.

Federal Act against Cartels and other Restrictions of Competition (Cartel Act 2005 - KartG 2005)[235]

Notification requirements

§ 9 […]

(4) Mergers to which para. 1 does not apply also require notification to the Federal Competition Authority if

1. the undertakings concerned achieved an aggregate worldwide turnover of more than EUR 300 million in the last business year preceding the transaction,

2. the undertakings concerned achieved an aggregate domestic turnover of more than EUR 15 million in the last business year preceding the transaction,

3. the value of the transaction is more than EUR 200 million, and

4. the undertaking to be acquired is active to a large extent on the domestic market.

2. Cyprus

The Control of Concentrations Between Undertakings Law, Number 83(I)/2014[236]

[…]

3.-(1) This Law shall apply to all concentrations of major importance, as defined in subsection (2).

(2) For the purposes of application of this Law, an act of concentration of undertakings shall be of major importance where-

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235 Translation taken from <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-_Federal_Cartel_Act_final.pdf>.

236 Available at <http://www.competition.gov.cy/competition/competition.nsf/All/5937AB49B8B38080C2257FB2003A442B?OpenDocument>.

(a) (i) the aggregate turnover achieved of each of at least two of the participating undertakings is more than three million, five hundred thousand (3.500.000) euros, and

(ii) at least two of the participating undertakings achieve turnover within the Republic, and

(iii) at least three million, five hundred (3.500.000) euros out of the aggregate turnover of all the participating undertakings is achieved within the Republic, or

(b) it is declared as such by Order of the Minister under section 5 of this Law.

(3) For the purposes of this section the turnover shall be calculated in accordance with the provisions of Schedule II.

(4) This Law shall not apply in cases where a concentration falls within the scope of application of Regulation (EC) No. 139/2004 as from time to time amended or substituted.

[…]

5. The Minister may, even if in relation to a specific concentration of undertakings the conditions of subsection (2) of section 3 are not satisfied, declare by Order, on the basis of the reasons for which he may issue an Order under section 35, that the said concentration is of major importance and in such a case the provisions of this Law shall apply, in relation to this concentration.

[…]

35. The Minister may, prior to the decision of the Commission referred to in section 22, declare by a reasoned Order that a notified concentration shall be deemed to be of major public interest as regards the effect it may have on the public security, the pluralism of the media and the principles of sound administration.

3. France

Proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace

CHAPITRE III

LUTTE CONTRE LES ACQUISITIONS DITES « PRÉDATRICES »

Article 7

I. – Après l'article L. 430-2 du code de commerce, il est inséré un article L. 430-2-1 ainsi rédigé :

« Art. L. 430-2-1. – I. – L'Autorité de la concurrence fixe une liste des entreprises structurantes.

« Pour déterminer si une entreprise est structurante, l'autorité prend en compte, aux niveaux français et européen ou mondial, plusieurs des indices suivants : sa position dominante sur un ou plusieurs marchés, notamment multifaces, le nombre d'utilisateurs uniques des produits ou services qu'elle propose, son intégration verticale et ses activités sur d'autres marchés connexes, le bénéfice qu'elle retire de l'exploitation d'importants effets de réseaux, sa valorisation financière, son accès à des données essentielles pour l'accès à un marché ou le développement d'une activité, l'importance de ses activités pour l'accès de tiers aux marchés et l'influence qu'elle exerce en conséquence sur les activités des tiers.

« II. – Les entreprises structurantes mentionnées au I du présent article informent l'Autorité de la concurrence de toute opération de concentration au sens de l'article L. 430-1 susceptible d'affecter le marché français dans un délai d'un mois avant sa réalisation.

« III. – Le président de l'Autorité de la concurrence ou un vice-président désigné par lui peut enjoindre à une entreprise systémique mentionnée au I du présent article partie à une opération de concentration de soumettre celle-ci, avant sa réalisation, à la procédure prévue aux articles L. 430-3 à L. 430-10.

« IV (nouveau). – Lorsque l'Autorité de la concurrence engage un examen approfondi d'une opération notifiée en application du présent article, l'entreprise structurante doit apporter la preuve que l'opération n'est pas de nature à porter atteinte à la concurrence. »

II (nouveau). – Le dernier alinéa de l'article L. 450-3 du code de commerce est complété par une phrase ainsi rédigée : « Ils ont également accès aux principes et méthodes de conception des algorithmes ainsi qu'aux données utilisées par ces algorithmes. »

Proposal for a law to ensure free consumer choice in cyberspace

CHAPTER III

COMBATING PREDATORY ACQUISITIONS

Article 7

I. - After Article L. 430-2 of the French Commercial Code, the following Article L. 430-2-1 is inserted

"Article L. 430-2-1. - I. - The Competition Authority shall draw up a list of structuring companies.

"To determine whether an undertaking is structuring, the authority shall take into account, at the French and European or world level, several of the following indices: its dominant position on one or more markets, in particular multi-sided markets, the number of unique users of the products or services it offers, its vertical integration and its activities on other related markets, the benefit it derives from the exploitation of significant network effects, its financial value, its access to data essential for access to a market or the development of a business, the importance of its activities for third party access to markets and the influence it exerts on the activities of third parties as a result.

"II. - The structuring undertakings mentioned in I of this article shall inform the Competition Authority of any merger within the meaning of Article L. 430-1 that is likely to affect the French market within one month prior to its implementation.

"III. - The Chairman of the Competition Authority or a Vice-Chairman designated by him may order a systemic undertaking referred to in I of this Article that is party to a merger to submit it to the procedure provided for in Articles L. 430-3 to L. 430-10 before it is implemented.

"IV (new). - When the Competition Authority initiates an in-depth examination of a transaction notified pursuant to this Article, the structuring undertaking must provide evidence that the transaction is not likely to harm competition.

II (new). - The last paragraph of Article L. 450-3 of the Commercial Code is completed by a sentence worded as follows: "They shall also have access to the principles and methods of design of the algorithms and to the data used by these algorithms.

4. Germany

Gesetz gegen Wettbewerbsbeschränkungen (GWB)

§ 35 Geltungsbereich der Zusammenschlusskontrolle

(1) Die Vorschriften über die Zusammenschlusskontrolle finden Anwendung, wenn im letzten Geschäftsjahr vor dem Zusammenschluss

1. die beteiligten Unternehmen insgesamt weltweit Umsatzerlöse von mehr als 500 Millionen Euro und

2. im Inland mindestens ein beteiligtes Unternehmen Umsatzerlöse von mehr als 50 Millionen Euro und ein anderes beteiligtes Unternehmen Umsatzerlöse von mehr als 17,5 Millionen Euro erzielt haben.

(1a) Die Vorschriften über die Zusammenschlusskontrolle finden auch Anwendung, wenn

> 1. die Voraussetzungen des Absatzes 1 Nummer 1 erfüllt sind,
>
> 2. im Inland im letzten Geschäftsjahr vor dem Zusammenschluss
>
>> a) ein beteiligtes Unternehmen Umsatzerlöse von mehr als 50 Millionen Euro erzielt hat und
>>
>> b) weder das zu erwerbende Unternehmen noch ein anderes beteiligtes Unternehmen Umsatzerlöse von jeweils mehr als 17,5 Millionen Euro erzielt haben,
>
> 3. der Wert der Gegenleistung für den Zusammenschluss mehr als 400 Millionen Euro beträgt und
>
> 4. das zu erwerbende Unternehmen nach Nummer 2 in erheblichem Umfang im Inland tätig ist.

…

§ 39a Aufforderung zur Anmeldung künftiger Zusammenschlüsse

(1) Das Bundeskartellamt kann ein Unternehmen durch Verfügung verpflichten, jeden Zusammenschluss des Unternehmens mit anderen Unternehmen in einem oder mehreren bestimmten Wirtschaftszweigen anzumelden, wenn

> 1. das Unternehmen im letzten Geschäftsjahr weltweit Umsatzerlöse von mehr als 500 Millionen Euro erzielt hat,
>
> 2. objektiv nachvollziehbare Anhaltspunkte dafür bestehen, dass durch künftige Zusammenschlüsse der wirksame Wettbewerb im Inland in den genannten Wirtschaftszweigen erheblich behindert werden könnte und
>
> 3. das Unternehmen in den genannten Wirtschaftszweigen einen Anteil von mindestens 15 Prozent am Angebot oder an der Nachfrage von Waren oder Dienstleistungen in Deutschland hat.

(2) Die Anmeldepflicht nach Absatz 1 gilt nur für Zusammenschlüsse bei denen

> 1. das zu erwerbende Unternehmen im letzten Geschäftsjahr Umsatzerlöse von mehr als 2 Millionen Euro erzielt hat und
>
> 2. mehr als zwei Drittel seiner Umsatzerlöse im Inland erzielt hat.

(3) Eine Verfügung nach Absatz 1 setzt voraus, dass das Bundeskartellamt auf einem der betroffenen Wirtschaftszweige zuvor eine Untersuchung nach § 32e durchgeführt hat.

(4) Die Anmeldepflicht nach Absatz 1 gilt für drei Jahre ab Zustellung der Entscheidung. In der Verfügung sind die relevanten Wirtschaftszweige anzugeben.

Act against Restraints of Competition (Competition Act – GWB)[237]

Section 35 Scope of Application of the Control of Concentrations

(1) The provisions on the control of concentrations shall apply if in the last business year preceding the concentration

1. the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million, and

2. the domestic turnover of at least one undertaking concerned was more than EUR 50 million and that of another undertaking concerned was more than EUR 17.5 million.

(1a) The provisions on the control of concentrations shall also apply if

1. the requirements under subsection (1) no 1 are fulfilled,

2. in the last business year preceding the concentration

a) the domestic turnover of one undertaking concerned was more than EUR 50 million and

b) neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 17.5 million,

3. the consideration for the acquisition exceeds EUR 400 million and

4. the target undertaking pursuant to no 2 has substantial operations in Germany.

Section 39a Request for Notification of Future Concentrations

(1) The Bundeskartellamt may order by formal decision that an undertaking is to notify every concentration with other undertakings in one or several specific sectors of the economy if

1. the worldwide turnover of the undertaking concerned was more than EUR 500 million in the last business year,

2. there are objectively verifiable indications that future concentrations could substantially impede effective competition in Germany in the sectors of the economy specified, and

3. in Germany, the undertaking supplies or procures at least 15 per cent of the goods or services in the sectors of the economy specified.

(2) The obligation to notify the Bundeskartellamt pursuant to subsection (1) shall apply only to concentrations where the undertaking to be acquired

1. achieved a turnover of more than EUR 2 million in the last business year and

2. achieved more than two thirds of its turnover in Germany.

[237] Translation taken from <https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0376>.

(3) The issuance of an order pursuant to subsection (1) is conditional on the Bundeskartellamt having conducted an investigation pursuant to Section 32e into one of the sectors of the economy concerned.

(4) The obligation to notify the Bundeskartellamt pursuant to subsection (1) shall apply for a period of three years from the date on which the formal decision is served. The relevant sectors of the economy shall be specified in the decision.

5. Ireland

Competition Act, 2002[238]

Section 18. Obligation to notify certain mergers and acquisitions.

(1) Where a merger or acquisition is agreed or will occur if a public bid that is made is accepted and—

(a) in the most recent financial year—

(i) the world-wide turnover of each of 2 or more of the undertakings involved in the merger or acquisition is not less than \40,000,000,

(ii) each of 2 or more of the undertakings involved in the merger or acquisition carries on business in any part of the island of Ireland, and

(iii) the turnover in the State of any one of the undertakings involved in the merger or acquisition is not less than \40,000,000,

or

(b) the merger or acquisition falls within a class of merger or acquisition specified in an order under subsection (5),

each of the undertakings involved in the merger or acquisition shall notify the Authority in writing of the proposal to put the merger or acquisition into effect, and provide full details thereof, within 1 month after the conclusion of the agreement or the making of the public bid.

[…]

(3) If—

(a) 2 or more undertakings agree to a merger or acquisition, or

(b) a merger or acquisition will occur if a public bid that is made is accepted,

being in either case a merger or acquisition to which subsection (1) does not apply, any of the undertakings which have agreed to or are involved in the merger or acquisition may notify the Authority in writing of the proposal to put the merger or acquisition into effect, and provide full details thereof, within 1 month after the conclusion of the agreement or the making of the public bid.

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[238] Available at <http://www.irishstatutebook.ie/eli/2002/act/14/enacted/en/pdf>.

[…]

Competition and Consumer Protection Act 2014[239]

Amendment of section 18 of Act of 2002

55. Section 18 of the Act of 2002 is amended—

(a) by substituting the following subsections for subsection (1):

"(1) Where—

(a) in relation to a proposed merger or acquisition, in the most recent financial year—

(i) the aggregate turnover in the State of the undertakings involved is not less than €50,000,000, and

(ii) the turnover in the State of each of 2 or more of the undertakings involved is not less than €3,000,000, or

(b) a proposed merger or acquisition falls within a class of merger or acquisition specified in an order under subsection (5),

each of the undertakings involved in the merger or acquisition shall notify the Commission in writing, and provide full details, of the proposal to put the merger or acquisition into effect.

(1A) A notification under subsection (1) —

(a) shall be made before the proposed merger or acquisition is put into effect, and

(b) may be made after any of the following applicable events occurs:

(i) one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted;

(ii) the undertakings involved demonstrate to the Commission a good faith intention to conclude an agreement or a merger or acquisition is agreed;

(iii) in relation to a scheme of arrangement, a scheme document is posted to shareholders.",

[…]

(c) by substituting the following subsection for subsection (3):

"(3) In the case of a proposed merger or acquisition that is not required to be notified under subsection (1), any of the undertakings involved in the merger or acquisition may, before putting the merger or acquisition into effect, notify the Commission in writing, and provide full details, of the proposal to put the merger

[239] Available at <http://www.irishstatutebook.ie/eli/2014/act/29/section/55/enacted/en/html#sec55>.

or acquisition into effect, and such notification may be made after any of the applicable events referred to in paragraph (b) of subsection (1A) occurs.”,

[…]

6. Latvia

Competition Law (Konkurences likums) (in the wording of the Law of 22.04.2004 as amended by the Laws of 13.03.2008, 14.11.2008, 18.06.2009, 12.09.2013 and 12.05.2016, which entered into force on 15.06.2016)[240]

Section 15. Market Participant Merger Provisions

[…]

(2) The market participants who have decided to merge in any of the manners referred to in Paragraph one of this Section, prior to merger shall submit a notification to the Competition Council on the merger if the aggregate turnover in Latvia of the participants in the merger in the last financial year has been not less than 30 million euros, and the turnover in Latvia of at least two participants in the merger in the last financial year has been not less than 1.5 million euros for each.

(2^1) The Competition Council has the right, within 12 months following the implementation of the merger, to request that the participants in the merger submit a notification on a merger that does not conform to the notification provisions referred to Paragraph two of this Section if both of the following conditions exist:

1) the merger is taking place in the relevant market where the participants in the merger operate, and their aggregate market share in the particular market exceeds 40 per cent;

2) there is a cause for suspicion that the merger might result in or strengthen a dominant position, or the competition in the relevant market might be notably reduced.

[…]

7. Lithuania

Republic of Lithuania Law on Competition (Lietuvos Respublikos konkurencijos įstatymas)[241]

Article 13. Application of the Concentration Control Procedure on Own Initiative

1. The Competition Council may impose an obligation on undertakings to submit a notification on concentration and mutatis mutandis apply the concentration control procedure provided for in this Section even though the aggregate income indicators established in Article 8(1) of this Law are not exceeded where it is likely that

[240] Available at <https://likumi.lv/ta/en/en/id/54890-competition-law>.

[241] Available at <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/49e68d00103711e5b0d3e1beb7dd5516?jfwid=q8i88mf0v> (English translation).

concentration will result in the creation or strengthening of a dominant position or a substantial restriction of competition in a relevant market.

2. The Competition Council may adopt a separate resolution to apply the concentration control procedure only in cases where no more than 12 months have passed from the implementation of the concentration in question.

8. Netherlands

Mededingingswet[242]

Artikel 29

1 De bepalingen van dit hoofdstuk zijn van toepassing op concentraties waarbij de gezamenlijke omzet van de betrokken ondernemingen in het voorafgaande kalenderjaar meer bedroeg dan € 150 000 000, waarvan door ten minste twee van de betrokken ondernemingen ieder ten minste € 30 000 000 in Nederland is behaald.

2 De in het eerste lid genoemde bedragen kunnen bij algemene maatregel van bestuur worden verhoogd.

3 Bij algemene maatregel van bestuur kunnen de in het eerste lid bedoelde bedragen voor een bij die algemene maatregel van bestuur te bepalen categorie van ondernemingen voor een periode van ten hoogste vijf jaar worden verlaagd. Deze periode kan telkens bij algemene maatregel van bestuur worden verlengd.

Competition Act[243]

Article 29

1 The provisions of this Chapter shall apply to concentrations, of which the combined turnover of the participating undertakings exceeded [€ 150,000,000] in the preceding calendar year, at least €30,000,000 of which was realized in the Netherlands by at least two of the undertakings involved.
2 The thresholds, referred to in paragraph (1), may be increased by Order in Council.
3 By Order in Council, the threshold, referred to in paragraph (1), may be lowered for specific categories of undertakings as determined by that Order in Council for periods of up to five years. Any such periods may be renewed by Order in Council.

9. Portugal

Lei n.º 19/2012[244]

Artigo 37.º

[242] Available at <https://wetten.overheid.nl/BWBR0008691/2021-02-18>.
[243] Taken from < http://www.dutchcivillaw.com/legislation/competitionact.htm>.
[244] Taken from <http://concorrencia.pt/vPT/A_AdC/legislacao/Documents/Nacional/Lei_19_2012-Lei_da_Concorrencia.pdf>.

Notificação prévia1 — As operações de concentração de empresas estão sujeitas a notificação prévia quando preencham uma das seguintes condições:

a) Em consequência da sua realização se adquira, crie ou reforce uma quota igual ou superior a 50 % no mercado nacional de determinado bem ou serviço, ou numa parte substancial deste;

b) Em consequência da sua realização se adquira, crie ou reforce uma quota igual ou superior a 30 % e inferior a 50 % no mercado nacional de determinado bem ou serviço, ou numa parte substancial deste, desde que o volume de negócios realizado individualmente em Portugal, no último exercício, por pelo menos duas das empresas que participam na operação de concentração seja superior a cinco milhões de euros, líquidos dos impostos com estes diretamente relacionados;

c) O conjunto das empresas que participam na concentração tenha realizado em Portugal, no último exercício, um volume de negócios superior a 100 milhões de euros, líquidos dos impostos com este diretamente relacionados, desde que o volume de negócios realizado individualmente em Portugal por pelo menos duas dessas empresas seja superior a cinco milhões de euros.

[…]

Law No 19/2012[245]

Article 37 Prior notification

1 – Concentrations between undertakings are subject to prior notification when they fulfil one of the following conditions:

a) As a consequence of the concentration, a market share equal to or greater than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced;

b) As a consequence of the concentration, a market share equal to or greater than 30% but smaller than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced in the case where the individual turnover in Portugal in the previous financial year, by at least two of the undertakings involved in the concentration are greater than five million euros, net of taxes directly related to such a turnover;

c) The undertakings that are involved in the concentration have reached an aggregate turnover in the previous financial year greater than 100 million euros, net of taxes directly related to such a turnover, as long as the turnover in Portugal of at least two of these undertakings is above five million euros.

[…]

[245] Taken from <http://www.concorrencia.pt/vEN/News_Events/Noticias/Documents/Lei19_2012_En.pdf>.

10. Slovenia

Zakon o preprečevanju omejevanja konkurence[246]

42. člen

(obveznost priglasitve)

(1) Koncentracijo je treba agenciji priglasiti, če:

- je skupni letni promet v koncentraciji udeleženih podjetij skupaj z drugimi podjetji v skupini v predhodnem poslovnem letu na trgu Republike Slovenije presegel 35 milijonov eurov in

- je letni pomet prevzetega podjetja skupaj z drugimi podjetji v skupini v predhodnem poslovnem letu na trgu Republike Slovenije presegel 1 milijon eurov ali je letni promet v primeru iz tretje alineje prvega odstavka desetega člena tega zakona vsaj dveh v koncentraciji udeleženih podjetij skupaj z drugimi podjetji v skupini v predhodnem poslovnem letu na trgu Republike Slovenije presegel 1 milijon eurov.

(2) Ne glede na dosežen prag iz prejšnjega odstavka koncentracije ni treba priglasiti, če jo v skladu z Uredbo 139/2004/ES presoja Evropska komisija.

(3) Čeprav koncentracija ne dosega pragov iz prvega odstavka tega člena, lahko agencija najpozneje v 15 dneh od dneva, ko v koncentraciji udeležena podjetja obvestijo agencijo o njeni izvedbi, slednja pozove, da jo priglasijo, če imajo skupaj z drugimi podjetji v skupini več kot 60-odstotni tržni delež na trgu Republike Slovenije.

The Prevention of Restriction of Competition Act[247]

Article 42 (Obligation of notification)

(1) The Agency must be notified of a concentration if:

- the total annual turnover of the undertakings involved in a concentration, together with other undertakings in the group, on the market of the Republic of Slovenia exceeded EUR 35 million in the preceding business year, and

- the annual turnover of the acquired undertaking, together with other undertakings in the group, on the market of the Republic of Slovenia exceeded EUR 1 million in the preceding business year; or if, in the case referred to in the third indent of paragraph (1) of Article 10 of this Act, the annual turnover of at least two undertakings concerned in a concentration, together with other undertakings in the group, exceeded EUR 1 million in the preceding business year.

(2) Notwithstanding the achieved threshold referred to in the preceding paragraph, the Agency does not need to be notified of a concentration if it is to be assessed by the European Commission in accordance with Regulation 139/2004/EC.

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[246] Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO5071>.
[247] Available at <http://www.varstvo-konkurence.si/fileadmin/varstvo-konkurence.si/pageuploads/angleska_stran/ZPOMK-1-AN_REV-za_objavo_na_spletu.pdf>.

(3) Even if the concentration does not reach the thresholds referred to in paragraph (1) of this Article, the Agency may, no later than fifteen days following the date on which the undertakings involved in the concentration notify the Agency of its implementation, invite the undertakings to notify the Agency of a concentration if they, together with other undertakings in the group, hold more than a 60% market share on the market of the Republic of Slovenia.

11. Spain

Ley 15/2007, de 3 de julio, de Defensa de la Competencia[248]

Artículo 8. Ámbito de aplicación.

1. El procedimiento de control previsto en la presente ley se aplicará a las concentraciones económicas cuando concurra al menos una de las dos circunstancias siguientes:

a) Que como consecuencia de la concentración se adquiera o se incremente una cuota igual o superior al 30 por ciento del mercado relevante de producto o servicio en el ámbito nacional o en un mercado geográfico definido dentro del mismo.

Quedan exentas del procedimiento de control todas aquéllas concentraciones económicas en las que, aun cumpliendo lo establecido en ésta letra a), el volumen de negocios global en España de la sociedad adquirida o de los activos adquiridos en el último ejercicio contable no supere la cantidad de 10 millones de euros, siempre y cuando las partícipes no tengan una cuota individual o conjunta igual o superior al 50 por ciento en cualquiera de los mercados afectados, en el ámbito nacional o en un mercado geográfico definido dentro del mismo.

b) Que el volumen de negocios global en España del conjunto de los partícipes supere en el último ejercicio contable la cantidad de 240 millones de euros, siempre que al menos dos de los partícipes realicen individualmente en España un volumen de negocios superior a 60 millones de euros.

[…]

Article 8. Scope of application.

1. The control procedure provided for in this Act shall apply to economic concentrations when at least one of the following two circumstances apply:

a) That as a consequence of the concentration a share equal to or greater than 30 per cent of the relevant product or service market at national level or in a defined geographic market within the same is acquired or increased.

Exempt from the control procedure are all those economic concentrations in which, despite complying with the provisions of this letter a), the overall turnover in Spain of the

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[248] Available at <https://www.boe.es/buscar/act.php?lang=es&id=BOE-A-2007-12946&tn=1&p=20210428>.

acquired company or of the assets acquired in the last accounting year does not exceed the sum of 10 million euros, provided that the participants do not have an individual or joint share equal to or greater than 50 per cent in any of the affected markets, at national level or in a defined geographic market within the same.

b) The aggregate turnover in Spain of all the unit-holders as a whole exceeds EUR 240 million in the last accounting year, provided that at least two of the unit-holders individually achieve a turnover in Spain of more than EUR 60 million.

12. Sweden

Konkurrenslagen[249]

4 kap. Företagskoncentrationer

[…]

6 § En företagskoncentration ska anmälas till Konkurrensverket, om

1. de berörda företagen tillsammans har haft en omsättning föregående räkenskapsår i Sverige som överstiger en miljard kronor, och

2. minst två av de berörda företagen har haft en omsättning i Sverige föregående räkenskapsår som överstiger 200 miljoner kronor för vart och ett av företagen.

7 § Om omsättningskravet enligt 6 § 1 är uppfyllt men omsättningen inte överstiger vad som anges i 6 § 2, får

1. Konkurrensverket ålägga en part i en företagskoncentration att anmäla koncentrationen, när det är påkallat av särskilda skäl, eller

2. part eller annan medverkande i en koncentration frivilligt anmäla koncentrationen.

Competition Act[250]

Chapter 4 Control of concentrations

[…]

Article 6

A concentration shall be notified to the Swedish Competition Authority if

1. the combined aggregate turnover in Sweden of all the undertakings concerned in the preceding financial year exceeds SEK 1 billion, and

2. at least two of the undertakings concerned had a turnover in Sweden the preceding financial year which exceeds SEK 200 million for each of the undertakings.

Article 7

If the turnover requirement according to Article 6, point 1 is fulfilled, but the turnover does not exceed what is laid down in Article 6, point 2, the Swedish Competition Authority may

[249] Available at <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/konkurrenslag-2008579_sfs-2008-579>.

[250] Available at <https://www.wipo.int/edocs/lexdocs/laws/en/se/se119en.pdf> (English translation).

1. require a party to a concentration to notify the concentration, where particular grounds exist for so doing, or

2. a party and other participants in a concentration voluntarily notify a concentration.