Hot Tub Time Machine? What Role for *Towercast* in EU Merger Control

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I. Introduction

Recent judgments in *Towercast*[2] and *Illumina*[3] have ostensibly opened the floodgates to increased *ex-post* and *ex-ante* scrutiny of mergers in Europe to plug a perceived enforcement gap, particularly with respect to so-called 'killer' acquisitions, where a fledgling firm is acquired by a dominant firm with the intent of killing off potential future competition.[4]

Advocate General (AG) Emiliou's recent rejection in his *Illumina* Opinion[5] of expanded *ex-ante* scrutiny of mergers using referrals under Article 22 of the EU Merger Regulation (EUMR) by National Competition Authorities (NCAs) of below threshold mergers to the European Commission (EC) is to be broadly welcomed, as it supports restoring the boundaries of *ex-ante* merger control to within the legislative intent of the EUMR. However, one of his justifications for doing so is his view that following *Towercast*, expanded *ex-post* merger control addresses any enforcement gap. In taking this view, he believes that *ex-post* review need not be ineffective nor time consuming.[6]

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[2] Case C-449/21.
[3] Case T-227/21.
[4] *See, e.g.*, Opinion of AG Kokott in Case C-449/21 *Towercast*, EU:C:2022.
[5] Opinion of AG Emiliou in Joined Cases C-611/22 and C-625/22 EU:C:2024.
[6] Moreover, recent commentary by the Director-General of DG Competition, Olivier Guersent, in response to AG Emiliou's opinion, indicated that the European Commission might be compelled to revert to *Towercast* and use Article 102 of the Treaty on the Functioning of the European Union (TFEU) to review below-threshold deals *ex post* under a revised Regulation 1/2003 (instead of *ex ante* using the Article 22 procedure) raises the prospect of an even more expansive use of *Towercast*. Director General Olivier Guersent acknowledged that even though Regulation

Using the error-cost framework, we shall argue to the contrary: absent strong limiting principles, such *ex-post* merger control review is not only likely to be time consuming but also ineffective. It will be very challenging to carry out a forward-looking assessment of a merger *ex-post* on a consistent basis without a time machine. Furthermore, the specter of *ex-post* review may have chilling effects on innovation, increase funding costs for start-ups, diminish M&A activity, and risk increasing the returns on rent-seeking behaviour from competitors. Such outcomes, besides being contrary to a fundamental objective of EU law, may result in costs that exceed those associated with the enforcement gaps that *Towercast* aims to address.[7]

As such, we conclude that the use of *ex-post* merger control under *Towercast* to address regulatory gaps would likely be neither highly effective nor cost efficient. We therefore propose some principles, developing the basis already set out in *Towercast*, to limit the *ex-post* application of Article 102 TFEU to mergers to its correct role under the EU Treaties as an 'absolute exception'.[8]

1/2003 currently prevented the European Commission from utilizing Article 102 TFEU to review concentrations (as defined under the EUMR), a revision of Regulation 1/2003 was underway. *See* Victoria Ibitoye, 'Guersent: EU will deploy Article 102 if ECJ thwarts Article 22 approach', (Global Competition Review, April 10, 2024), available at https://globalcompetitionreview.com/article/guersent-eu-will-deploy-article-102-if-ecj-thwarts-article-22-approach.

[7] Article 179(1) TFEU: 'The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties.'

[8] See comments by AG Kokott who recently stated in that relying on abuse of dominance laws to review non-notifiable mergers after they close should 'remain the absolute exception'. AG Kokott's comments in turn provoked an intervention from Guillaume Loriot, European Commission deputy director-general for mergers who said that 'something needed to be done' to fill the enforcement gap created by below-threshold mergers: 'Filling the gap remains an issue for many authorities, many authorities across the globe have been grappling with this'. See Bethan John, 'AG Kokott: Abuse rules should only be used to probe deals in exceptional circumstances,' (*Global Competition Review*, April 20, 2024), available at https://globalcompetitionreview.com/article/ag-kokott-abuse-rules-should-only-be-used-probe-deals-in-exceptional-circumstances.

II. Legal and political background to *Towercast*

In its seminal *Continental Can* judgment in 1973, the CJEU established *inter alia* that 'if an undertaking in a dominant position strengthens such position [including by simply acquiring another undertaking] in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one', this could constitute an abuse under Article 102 TFEU.[9] This result was not without controversy. For example, AG Roemer in his Opinion in *Continental Can* concluded that: '[t]he present case itself emphasizes how difficult the economic assessments to be undertaken in this connection are and to what extent there is, on the basis of the theory put forward by the Commission, a lack of foreseeability of the legal consequences. […] Article 86 [now 102] is not suitable for the purpose of controlling mergers. […] Accordingly, the contested decision [EC's decision to prohibit a merger under Article 102 TFEU] ought to be annulled on the grounds that it has no legal basis in Article [102] of the Treaty.'[10]

Thus, although the *Continental Can* judgment established the principle of *ex-post* merger control of mergers under Article 102 TFEU, in practice there was no such *ex-post* application for the reasons set out in AG Roemer's Opinion in *Continental Can* (discussed further below in Section V). Moreover, the EC and the Member States committed to establish a system of exclusively *ex-ante* merger control: in 1989, after 16 years of hard negotiation following the *Continental Can* judgment[11], the European Commission Merger Regulation (4064/89) ('ECMR') was adopted. This contained an explicit policy choice rejecting *ex-post* merger control under

[9] Judgement of the Court Case 6/72 *Continental Can*, EU:C:1973, para 26.
[10] Opinion of AG Roemer Case 6-72 *Continental Can*, EU:C:1972, p. 255–256.
[11] Sven B. Völcker, 'Back To The Future - Merger Control Outside The Merger Regulation' (2023), available at https://ssrn.com/abstract=4657311, p. 3–6.

Articles 101 or 102 TFEU and instead creating 'a new legal instrument […] in the form of a Regulation to permit **effective monitoring** [i.e. *ex-ante* review] of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the **only** instrument applicable to such concentrations' [emphasis added].[12]

The result, as noted by AG Kokott in her Opinion in the *Austria Asphalt* case, was that '[w]hile, within the ambit of the EC Merger Regulation, a system of preventive and mandatory *ex-ante* control was established as being applicable to changes in the structure of the market, the behaviour in which undertakings engage on the market — be this collusive practices or unilateral abuse of a dominant position — is otherwise subject, pursuant to Regulation No 1/2003, only to punitive *ex-post* control, the implementation of which, moreover, lies at the discretion of the competition authorities. […] The previous practice whereby concentrations between undertakings were sporadically reviewed against Article 85 of the EEC Treaty (now Article 101 TFEU) or Article 86 of the EEC Treaty (now Article 102 TFEU) […] became obsolete with the entry into force of the separate EU merger control provisions which are now contained in the EC Merger Regulation.'[13]

This position changed with the *Towercast* and *Illumina*[14] judgments of the CJEU and General Court respectively. These judgments approved attempts by the EC and private parties to

[12] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1, p. 1.
[13] Opinion of AG Kokott in Case C-248/16 *Austria Asphalt*, EU:C:2017, para 36 and n 18.
[14] In September 2020, Illumina announced that it intended to acquire GRAIL, a U.S. biotech company active in the development of cancer screening tests using Illumina's NGS technology. The proposed transaction was not notified to the Commission or national competition authority (NCA) of any EU Member State as GRAIL did not generate any revenue, thereby falling below any jurisdictional thresholds for *ex-ante* merger control review. In March 2021, the EC published its Guidance on the application of the referral mechanism set out in Article 22 [EUMR]', adopting a change in policy with regards to mergers falling below notifiable thresholds by encouraging NCAs to employ Article 22 EUMR to refer such transactions to the EC where the acquisition would affect trade between Member States or would result in a significant reduction in competition within the territory of an EU Member State. Following a referral request from 6 Member States, the EC opened an initial investigation into the acquisition in April 2021. This decision to investigate was appealed by Illumina - the EU General Court upheld the EC's

expand the scope of EU merger control outside the framework described by AG Kokott in *Austria Asphalt* by respectively disinterring *Continental Can* to apply Article 102 TFEU *ex-post* and expanding the interpretation of Article 22 of the EU Merger Regulation 139/2004 (EUMR) (which had replaced the ECMR since 2004) to review mergers that fell below the EUMR jurisdictional thresholds *ex-ante*.

In 2017, Towercast filed a complaint with the French Competition Authority (FCA) over Télédiffusion de France's (TDF) 2016 acquisition of Itas. Towercast argued that the acquisition, which would leave Towercast and TDF as the two remaining competitors in the French terrestrial television broadcasting market, was a 'killer' acquisition and that TDF acquiring Itas solely to eliminate a competitor from the market would constitute abusive conduct under Article 102 TFEU. The transaction was not notified to the FCA or EC and there was no *ex-ante* review under Art. 22 EUMR.[15]

The FCA rejected Towercast's complaint and held that the acquisition could not itself constitute an abuse of dominance under Article 102 TFEU because it was a concentration subject exclusively to *ex-ante* review under the EUMR.[16] On appeal, the Paris Court of Appeal referred to the CJEU for a preliminary ruling on the question of whether the EUMR precludes NCAs from applying Article 102 TFEU to transactions falling below national and EU merger control thresholds and that were not referred to the EC under Article 22 EUMR.[17] The CJEU held in its March 2023 Judgment that, because of the direct effect of Article 102 TFEU (primary law) and

jurisdiction to review the deal in July 2022 in Case T-227/21 on the basis that an EU Member State may refer a merger case to the EC under Article 22 EUMR, even if it falls below national and EU merger control thresholds. This is now on appeal before the Court of Justice of the EU in Case C-611/22 and C-625/22.

[15] Judgement of the Court in Case C-449/21 *Towercast*, EU:C:2023. *See also*, 'CJEU Decision in the *Towercast* case Ex-post review of deals by the back door?' (*Dentons*), available at https://www.dentons.com/en/insights/articles/2023/march/24/cjeu-decision-in-the-towercast-case-ex-post-review-of-deals-by-the-back-door.

[16] Decision 20-D-01 of 16 January 2020.

[17] Decision 20/04300 of 1 July 2021.

its continuing applicability to mergers following *Continental Can*, the EUMR (secondary law) could not preclude NCAs from enforcing Article 102 TFEU under their own procedural rules in cases that fall below national and EU merger control thresholds and have not been referred to the EC under Article 22 EUMR.[18]

As noted above, the most recent developments in this area have been AG Emiliou's *Illumina* Opinion, which cites the availability of *ex-post* merger control confirmed in-*Towercast* as a justification for rejecting expanded *ex-ante* merger control under the EC's reinterpretation of Article 22 EUMR, as well as Olivier Guersent's comments proposing to use this *ex-post* merger control jurisdiction to counterbalance the potential loss of expanded *ex-ante* merger control jurisdiction.[19] Against this background, we discuss how to address the challenge of striking the right balance between *ex-ante* and *ex-post* merger control in the light of producer and consumer welfare in the near and long term as well as the various trade-offs between competing TFEU objectives.

III. Error-Cost Framework for Assessing Trade-Offs Associated with Regulatory Action

One framework for assessing the trade-offs associated with any regulatory action is the 'error-cost' framework.[20] Due to incomplete information at the time of regulatory action, some decisions that are reasonable or correct *ex-ante* will turn out to be erroneous *ex-post*. Both the

[18] Judgement of the Court in Case C-449/21 *Towercast*, EU:C:2023.
[19] Opinion of AG Emiliou in Joined Cases C-611/22 and C-625/22 *Illumina Inc. v European Commission* and *Grail LLC v Illumina Inc.*, EU:C:2024; Victoria Ibitoye, 'Guersent: EU will deploy Article 102 if ECJ thwarts Article 22 approach', (*Global Competition Review*, April 10, 2024), available at https://globalcompetitionreview.com/article/guersent-eu-will-deploy-article-102-if-ecj-thwarts-article-22-approach.
[20] Frank H. Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1, 15.

probability of a wrong decision and the cost to society and consumer welfare of such a decision should be considered.

In this framework, under-enforcement is a 'false negative' decision that results in an anti-competitive outcome, which necessitates an evaluation of both the intensity and duration of the anti-competitive effect. In particular, it is important to consider the self-correcting nature of certain anti-competitive actions whose damage is automatically limited, for example through counteracting market forces that will erode market power over time.[21] This is generally expected to occur in an industry with low barriers to entry, or when there is easy access to capital for new players to enter the market in pursuit of supra-competitive profits being enjoyed by the incumbent.[22] In such a situation, the cost of under-enforcement may be low. In other circumstances, the absence of regulatory intervention might allow an incumbent to increase a dominant position over time and result in a longer term anti-competitive effect. The dominant player may enjoy an inherent advantage of scale over all others in a winner-take-all industry, for example.[23] In such a situation, the cost of under-enforcement may be high. Moreover, under-enforcement can have an impact on not just the mergers that are reviewed, but also the future behaviour of firms considering mergers. For example, under-enforcement might lead to a greater willingness for firms to try mergers that can have anticompetitive effects.

Over-enforcement that prevents what would otherwise be a pro-competitive outcome is a 'false positive' decision. That is, a merger between firms might yield synergies, or allow the financing of investments that venture capitalists might be unwilling to make; an antitrust policy

[21] Herbert J. Hovenkamp, 'Antitrust Error Costs' (2022) 24 University of Pennsylvania Journal of Business Law 293.
[22] Gregory N. Mankiw, Principles of Microeconomics (8th ed., Cengage Learning, 2016), Ch, 4; Joan Robinson, 'What is Perfect Competition' (1934) The Quarterly Journal of Economics.
[23] Eocman Lee et al., 'Reconsideration of the Winner-Take-All Hypothesis: Complex Networks and Local Bias' (2006) 52 Management Science 12.

that is too aggressive risks the loss of these benefits. In addition, it is important to consider not just the impact of the one particular 'false positive' decision, but also its long-term impact on the behaviour of other market participants. In particular, if the decision is seen as precedent setting or unlikely to be easily corrected through future judicial action in the near term, then the cost of over-enforcement can be high for society.[24] For example, the broad interpretation of the EC's 1962 mandatory notification requirement for restrictive agreements led to considerable administrative logjam, delays in responses, and sub-optimal regulatory enforcement.[25] By 1967 more than 37,450 cases were pending, resulting in the EC introducing block exemptions, deeming certain clauses anti-competitive per se, and closing many cases informally through 'comfort letters'.[26] This situation is believed to have reduced overall efficiency and activity in the European economy.[27] At the same time, if market participants are expected to be able to circumvent a bad ruling through innovative contracts or if the enforcement of a bad decision is expected to be limited (for example, to only the current political regime), then the longer term cost of over-enforcement through deterrence is lower.[28] Such circumvention was observed in the 1980s, when many firms developed workarounds around per se restrictions on resale price maintenance through innovative contracts.[29]

Applying this framework to the *Towercast* decision requires an assessment of the overall benefit associated with addressing the regulatory gap related to sub-threshold mergers against the

[24] Herbert J. Hovenkamp, 'Antitrust Error Costs' (2022) 24 University of Pennsylvania Journal of Business Law 293.
[25] FrédéricLoss et al., 'European competition policy modernization: From notifications to legal exception' (2008) 52 European Economic Review 1.
[26] Id.
[27] Id.
[28] Herbert J. Hovenkamp, 'Antitrust Error Costs' (2022) 24 University of Pennsylvania Journal of Business Law 293.
[29] Id, p. 302. Some such contracts, such as price parity clauses and minimum margin agreements are now being challenged by competition authorities.

overall cost associated with potential long-term chilling effects on innovation and R&D resulting from over-enforcement of the *Towercast* decision.

IV. Potential Benefits from the *Towercast* Decision

Towercast arguably[30] provides a mechanism for addressing the enforcement gap associated with below-threshold mergers, including 'killer' acquisitions, through *ex-post* reviews. A risk identified with these acquisitions is the shelving of the products of the acquired firm, with the intent of preventing the further development of products that have the potential to compete with dominant firm's products and challenge its market position. Such acquisitions have been labelled 'killer' acquisitions, and the consequences of stifled development include reduced product choice, variety, and market competition.[31]

Commentators have argued that *Towercast* is consistent with the principles of proportionality and subsidiarity.[32] They note that limitations present in the *Towercast* ruling, such as restricting applicability to instances where the increase in dominance from the acquisition is such that 'only undertakings whose behaviour depends on the dominant undertaking would remain in the market', strikes a balance between ensuring legal certainty and addressing particularly severe impediments to competition.[33] Furthermore, it preserves the principle of subsidiarity mentioned in the EUMR since it recognises NCAs authority to enforce competition rules under Article 102 TFEU.[34]

[30] Opinion of AG Kokott in Case C-449/21 *Towercast* EU:C:2022.
[31] Colleen Cunningham et al., 'Killer Acquisitions' (2020) 129 Journal of Political Economy 3; Jonathan M. Barnett, 'Killer Acquisitions' Reexamined: Economic Hyperbole in the Age of Populist Antitrust'(2024) 3 The University of Chicago Business Law Review 1; Igor Letina, Armin Schmutzler, and Regina Seibel, 'Killer acquisitions and beyond: policy effects on innovation strategies' (2020) 65 International Economic Review 2.
[32] See, e.g., Sven B. Völcker, 'Back To The Future - Merger Control Outside The Merger Regulation' (2023), available at https://ssrn.com/abstract=4657311.
[33] Id.
[34] Id.

However, it is important to note that many recent developments have also attempted to address this regulatory gap without the need for an *ex-post* merger control review. This has either been through administrative enforcement – notably, the EC invited NCAs in early 2021 to refer to it—under Article 22 EUMR—transactions that they find problematic but do not meet national or EC thresholds.[35] The referral to the EC of Illumina's completed acquisition of GRAIL is one such example, which led to a prohibition of the merger by the EC.[36] As noted above, this avenue of administrative enforcement is in itself problematic and might in any event be in jeopardy in light of AG Emiliou's recent opinion that the EC incorrectly interpreted Article 22 EUMR in soliciting referrals from NCAs for below-threshold mergers.[37] Other attempts have been legislative. For example, the European Digital Markets Act (DMA), which entered into force in November 2022, imposed on large digital platforms that are considered 'gatekeepers' an obligation to inform the EC of all their intended acquisitions, allowing scrutiny of otherwise below-threshold transactions that could be 'killer' acquisitions.[38] In addition, some jurisdictions, such as Austria and Germany in 2017, have adopted transaction-value thresholds instead of revenue thresholds, specifically to address concerns related to below-threshold acquisitions.[39]

To the extent these other avenues, particularly legislative, are successful in addressing the regulatory gap associated with below-threshold acquisitions, including 'killer' acquisitions, the overall benefit from enforcing the *Towercast* decision would be limited in any event. With

[35] Speech of Margrethe Vestager at International Bar Association 24th Annual Competition Conference, 'The future of EU merger control', (2020).
[36] Case T-227/21.
[37] Opinion of AG Emiliou in Joined Cases C-611/22 and C-625/22 *Illumina Inc. v European Commission* and *Grail LLC v Illumina Inc.*, EU:C:2024. Indeed, as also noted above, AG Emiliou specifically cited at para. 228 the availability of *ex-post* review following *Towercast* as one of the reasons for rejecting the validity of the Article 22 EUMR procedure.
[38] 'Digital Markets Act: Application timeline,' (*Think Tank European Parliament*, November 11, 2022), available at https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)739226.
[39] Comments by K. Dekeyser, acting Director (Policy and Strategy) at the European Commission's Directorate General for Competition, in 'EU's merger-regime review honing in on thresholds, official says', [2018] <https://content.mlex.com/#/content/1048956/eu-s-merger-regime-review-honingin-on-thresholds-official-says>.

respect to assessing the overall impact of *ex-post* scrutiny of below-threshold acquisitions, it is important to consider both the efficacy of the *Towercast* decision in curbing below-threshold acquisitions by dominant firms that would have resulted in a substantial impediment to competition, such as 'killer' acquisitions, against the costs associated with potential erroneous over-enforcement of such regulatory action.

V. Potential Costs Associated with Erroneous Over-Enforcement of the *Towercast* Decision

In general, it is well established that the degree of systematic risk or uncertainty in the market directly impacts investments and the overall level of R&D in the industry.[40] The *Towercast* decision increases regulatory uncertainty with respect to below-threshold acquisitions by incumbent firms, and hence has a direct impact on the investment, funding, and R&D decisions by market participants in the start-up and venture capital space. This impact can materialise over short- or long-term horizons and can impact the overall level of innovation in the industry. Furthermore, the challenge of disentangling the causal effect of the merger or acquisition from all external factors in an *ex-post* review scenario complicates the application of *Towercast* and raises the prospect of erroneous 'false positive' rulings.

A. Potential Chilling Effect on Innovation

The obvious, first order effect of the *Towercast* decision is that below-threshold acquisitions by incumbent firms face the risk of *ex-post* review. This would be expected to have a direct negative

[40] See, for example, Patrick Bolton, HuiChen, and Neng Weng, 'Market timing, investment, and risk management', (2013) 109 Journal of Financial Economics.

impact on the exit opportunities perceived by venture capitalists, and as a result the appetite for investing in start-ups. Risky investments have highly variable payoffs, and small changes in the probability of certain outcomes can have large changes in total expected return.[41]

The incentive to invest in start-ups by venture capital firms and other investors is crucially dependent on the return from the capital investment.[42] Those returns are realized through various exit scenarios, such as an IPO, future rounds of funding that allow initial investors to cash out their positions, or through acquisition by another firm in the same or another related industry.[43] Acquisition is seen as a viable exit option for most start-ups, and indeed many start-ups deliberately position their offering so as to be attractive to potential buyers.[44]

Increased uncertainty related to whether a below-threshold acquisition will be subject to regulatory scrutiny after the acquisition decreases the *ex-ante* probability of a successful acquisition, and hence the expected value of this exit opportunity. This could manifest itself in a lower sale price or additional conditions attached to the exit, such as extended multi-year waiting period before a VC can sell its stake in the enterprise. Because investors account for this in the initial risk-reward calculus, this risk increases the cost of funding for the start-ups.[45] Studies of the impact of interest rates on investment decisions have estimated that a 1% increase in cost of

[41] For example, a textbook example of a risky investment has a barbell return structure, where there are only two possible outcomes, success and failure, with success leading to massive returns and failure resulting in total loss of initial investment. Because of the barbell nature of the payoff in such a situation, a minor increase in the chances of a successful exit could result in large increase in total expected payoff and make the difference between a risky investment getting funding or not.
[42] Bob Zider, 'How venture capital works', 76 Harvard Business Review 6.
[43] Touraj Parang, 'Exit Path: How to Win the Startup End Game', (1st edition, McGraw Hill, 2022).
[44] Id.
[45] Paul A. Gompers et al., 'How do venture capitalists make decisions?' (2020) 135 Journal of Financial Economics 1.

funding can decrease R&D spending by up to 3% in the long run in advanced economies.[46] While it is difficult to estimate the magnitude of the impact of increased regulatory scrutiny on start-up funding and access to capital, directionally, it is likely to have a negative effect on the level of startup entry and innovation.

Recent work on the impact of start-up acquisitions on innovation finds a net cost associated with restrictions on early-stage start-up acquisitions. Eisfeld (2023), for example, develops a model of startup buyouts and finds that under certain reasonable assumptions about chances of future bankruptcy, restrictions on start-up acquisitions would reduce entry by 8 to 20 percent, with the largest reduction in markets with low profitability.[47] Cabral (2023) develops a model of innovation specific to the tech industry, and finds that in the absence of acquisitions, there would be a 35% decline in consumer welfare 'primarily due to a significantly lower innovation rate'.[48] Similarly, Phillips *et al.* (2013) find that small firms optimally may decide to innovate *more* when they can sell out to larger firms. They conclude that R&D responsiveness of firms increases with demand, competition, and industry merger and acquisition activity.[49] Finally, Letina *et al.* (2023) study the effect of start-up acquisitions on innovation and find that prohibiting start-up acquisitions 'weakly reduces the variety of research projects pursued and thereby the probability of discovering innovations'.[50] Paradoxically, this suggests that the

[46] Dominique Guellec and Evangelos Ioannidis, 'Causes Of Fluctuations In R&D Expenditures A Quantitative Analysis,' OECD Economic Studies No. 29, 1997/II. *See also*, Uluc Aysun, Zeynep Kabukcuoglu, 'Interest rates, R&D investment and the distortionary effects of R&D incentives' (2019) 111 European Economic Review.
[47] Luis Eisfeld, 'Entry and Acquisitions in Software Markets', Working Paper (2023), available at https://luiseeisfeld.github.io/assets/docs/JMP_Eisfeld_TSE.pdf.
[48] Luís Cabral, 'Big Tech Acquisitions', Working Paper (2023), available at https://www.semanticscholar.org/paper/Big-Tech-Acquisitions-Cabral/.
[49] Gordon M. Phillips and Alexei Zhdanov, 'R&D and the incentives from merger and acquisition activity' (2012) 26 The Review of Financial Studies 1.
[50] Igor Letina, Armin Schmutzler, and Regina Seibel, 'Killer acquisitions and beyond: policy effects on innovation strategies' (2020) 65 International Economic Review 2.

Towercast ruling could deter the very innovation that it was meant to protect through plugging the regulatory gap associated with below-threshold acquisitions.

B. Potential for Diminished M&A Activity

It is well established that, in general, policy uncertainty is strongly associated with a reduction in M&A activities both at the macro and firm level.[51] As such, as a matter of general principle, regulators should aim to provide as much certainty and clarity as possible regarding the scope and reach of their action.[52] Bonaime *et al.* (2018) find that a one standard deviation increase in policy uncertainty is associated with a roughly 12 percent decline in the probability of a firm announcing an acquisition the next year, and find no evidence that the deals delayed during periods of high policy uncertainty are later completed.[53] In the case of the *Towercast* judgment, the CJEU's lack of clarity on some important questions increases uncertainty.[54] For one, the CJEU doesn't define when a merger constitutes a 'substantial impediment to competition', essentially repeating the substantive test under *Continental Can* that as a result of the merger 'only undertakings whose behaviour depends on the dominant undertaking […] remain in the market'. Second, it does not specify whether the remedy for any infraction would be limited to monetary fines, or if the remedy might also involve restructuring or unwinding of an already

[51] Alice Bonaime, Huseyin Gulen, and Mihai Ion, 'Does policy uncertainty affect mergers and acquisitions?' (2018) 129 Journal of Financial Economics 3.
[52] *See*, for example, 'The International Competition Network Guiding Principles For Merger Review', US DOJ Antitrust Division, September 20, 2002 ('In order to foster consistency, predictability, and fairness, this guiding principle [of transparency] provides that the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.'). *See also*, Vineet Bhagwat, Robert Dam, and Jarrad Harford, 'The Real Effects of Uncertainty on Merger Activity' (2016) 29 The Review of Financial Studies 11.
[53] *See* Alice Bonaime, Huseyin Gulen, and Mihai Ion, 'Does policy uncertainty affect mergers and acquisitions?' (2018) 129 Journal of Financial Economics 3, p. 531–532.
[54] Case C-449/21.

completed merger or acquisition. Third, it doesn't provide any guidance on temporal restrictions on *ex-post* review, namely whether a merger must be challenged within a certain timeframe of the completion.

The *Towercast* judgment further increases uncertainty by opening the door for competitors to engage in rent-seeking behaviour by challenging completed transactions on specious grounds. While some competitor grievances can be legitimate, European Union courts have previously censured litigations brought about by competitors as 'vexatious', i.e., litigations where there is no genuine interest in receiving judicial relief, and the intent is solely to harass or subdue an adversary or delay a market development, introduction of a new product or an acquisition.[55] Courts and academic researchers have also acknowledged that competitors can have a substantial incentive to challenge acquisitions that make their rivals more efficient or reduce market prices, and cautioned against taking their statements at face value in merger proceedings.[56] Even if a challenge is without merit, it would have the effect of increasing the overhead associated with litigation costs and reducing the *a priori* expected gains from a merger or acquisition. The mere prospect of future litigation that could result in huge costs, such as a restructuring or unwinding of an already completed merger or acquisition, may deter many otherwise pro-competitive mergers or acquisitions from proceeding. The overhead costs associated with a merger or acquisition are generally 1% to 4% of purchase price.[57] The costs

[55] *See*, Case T-321/05, *Astra Zeneca v. Commission* 2010; Case T-119/09 *Protégé Int'l Ltd v. European Commission* 2012; Case S/DC/0639/19 *Merck Sharp & Dohme De España, S.A. and MSD Human Health Holding, B.V. 2022*.
[56] *See*, Ramon Faulí-Oller and Massimo Motta 'Managerial incentives for takeovers' (1996) 5 Journal of Economics & Management Strategy; Thomas Giebe and Miyu Lee, 'Competitors in merger control: Shall they be merely heard or also listened to?' (2020) 49 European Journal of Law and Economics. See also, Brief for the United States and the Federal Trade Commission as Amici Curiae, *Cargill v. Monfort*.
[57] Brian Salsberg and Elizabeth Kaske, 'What drives one-time M&A integration costs and how to estimate them', (*EY*, March 7, 2023), available at https://www.ey.com/en_us/strategy-transactions/four-current-trends-estimating-mergers-acquisitions-integration-costs.

associated with unwinding of a completed transaction, however, can be significantly more.[58] Thus, this increased regulatory scrutiny could have a material impact on the viability of otherwise pro-competitive M&A transactions on the margin, or at the very least increase deadweight loss associated with litigation fees for M&A participants.

In terms of the 'error-cost' framework, both potential effects (increased funding costs for start-ups and diminished M&A activity in the economy) should be viewed as a cost of over-enforcement and must be weighed against potential benefits in terms of reducing the enforcement gap. Notably, this cost will be larger the longer the regulatory uncertainty persists and the more widely this ruling is adopted and accepted by national courts and competition authorities. We are already seeing application of the *Towercast* ruling, with the Belgian authority suspending the Proximus-edpnet deal on this basis.[59]

[58] Timothy J. Muris and Jonathan E. Nuechterlein, 'First Principles for Antitrust Review of Long-Consummated Mergers' (2020) 5 Criterion Journal on Innovation 29. *See also*, 'ABA Antitrust Law Section Competition/Consumer Protection Policy and North American Comments Task Force, Analyzing the Scope of Enforcement Actions Against Consummated Mergers in a Time of Heightened Scrutiny', April 2020; Melody Wang, 'Unscrambling the Eggs: How to Unwind Harmful Mergers after They Have Closed' (2020) 21 UC Davis Business Law Journal; 'Unwinding Consummated Mergers—Just Because You Can Does Not Mean You Should', (*Washington Legal Foundation*, May 7, 2020), available at https://www.wlf.org/2020/05/07/publishing/unwinding-consummated-mergers-just-because-you-can-does-not-mean-you-should/#easy-footnote-bottom-19-16007. This is also currently being experienced by Illumina as it has been required to divest GRAIL (having closed the acquisition without obtaining prior EUMR clearance) by the EU General Court. See Judgment of the General Court in Case T-227/21 *Illumina v Commission* EU:C:2022.

[59] Belgian Competition Authority Press Release, 'The Belgian Competition Authority opens an ex officio investigation into a possible abuse of dominance by Proximus in the context of the takeover of edpnet, in application of the *Towercast* case law' (March 22, 2023), available at https://www.belgiancompetition.be/sites/default/files/content/download/files/20230322_Press_release_10_BCA_0.pdf ('BCA Press Release'). The French Competition Authority (FCA) even launched (and later abandoned) an investigation under Article 101 TFEU into practices involving Akiolis, Saria, and Verdannet, which allegedly 'consisted of creating and implementing an agreement to allocate the French meat-cutting market, by geography, through 21 cross-divestitures of business assets in 2015'. See FCA Press Release, 'Meat-cutting sector: for the first time, the Autorité examines, under antitrust law, mergers below the national notification thresholds, and dismisses the case' (May 15, 2024), available at https://www.autoritedelaconcurrence.fr/en/press-release/meat-cutting-sector-first-time-autorite-examines-under-antitrust-law-mergers-below. If followed, the FCA's approach could potentially open the floodgates into any merger agreement being reviewed *ex-post* as potentially anti-competitive under Article 101 TFEU.

C. Potential Pitfalls of *Ex-Post* Review

Both of the costs described above are further exacerbated by the prospect of erroneous 'false positive' rulings in an *ex-post* review scenario. An *ex-post* review is notably different from an *ex-ante* review in that it must find a way to disentangle the effect of the merger in question from the effect of unrelated events that transpired since the merger and that had an impact on the competitive landscape of the industry. In other words, it must ascertain the causal effect of the merger on the competitive environment.

This is challenging in practice, since the various factors affecting industry dynamics may be difficult to isolate. For example, certain business decisions by a competitor may result in the merged entity obtaining a dominant position in the relevant market to such an extent that all other market participants are dependent on it. An *ex-post* review should not attribute the increased dominance of the merged entity to the merger in this scenario. This can be a very convoluted exercise, especially if the challenge is being brought by the competitor itself that has an incentive to downplay the impact of its own faulty decision making.

Similarly, consider the case of an acquisition in the life sciences sector where *ex-ante* there existed many potential competing drugs in the pipeline in the relevant market. Such pipeline products are subject to uncertainty, as there is no guarantee of market entry. If all (or most) of the drugs fail due to reasons unrelated to the merger, resulting in dominance to the extent that all remaining market participants depend on the merged entity, an *ex-post* analysis of dominance should give due consideration to the pipeline products that were still viable at the time of the merger. In other words, in the 'but-for' world, these drugs would have also failed, and dominance is not a result of the merger. As a result, *ex-ante* merger control and self-assessment by the merging firms under Article 102 TFEU, properly applied, would have found

that there were sufficient competitors active in the relevant innovation spaces and therefore allowed the transaction to proceed without the 'benefit' of hindsight.

The challenges in parsing out the price impact of the merger versus independent factors are well-documented in the academic literature. In many instances, post-merger price increases can be attributable to factors unrelated to the merger. Weinberg and Hosken (2013), for example, study two mergers in the Consumer Packaged Goods (CPG) space and compare the *ex-ante* predicted prices impact from merger simulations to *ex-post* actual price changes.[60] They find that while in one case, the *ex-post* price was higher by about 5 percent than predicted, in the other case the *ex-post* prices were lower by about 10 percent than predicted. In both cases, however, they find the primary source of discrepancy between predicted and actual prices to be unanticipated changes in supply-side factors or marginal costs. Similarly, Peters (2004) compares merger simulation prices to actual post-merger prices for mergers in the airline industry and finds that the unexplained component of the price change is largely accounted for by supply-side effects.[61] These supply-side effects could be a result of external factors unrelated to the merger. As such, a proper post-merger analysis must disentangle the price impact caused by the merger from factors unrelated to the merger, which can be difficult for a competition authority to accomplish in an *ex-post* review.

Even in the absence of independent or non-causal events impacting the market landscape at the point of the *ex-post* review, the increase in dominance by the merged entity (even to the extent that all other market participants are dependent on it) could be a result of pro-competitive effects of the merger rather than any problematic conduct on the part of the merged entity. For

[60] Matthew C. Weinberg and Daniel Hosken, 'Evidence On The Accuracy Of Merger Simulations' (2013) 95 The Review of Economics and Statistics 5.
[61] Craig Peters, 'Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry', (2006) 49 The Journal of Law & Economics 2.

example, efficiencies resulting from a merger might allow the merged entity to provide goods and services at a lower cost, thereby gaining market share from its competitors such that all other parties in the market are dependent on its actions. While an *ex-ante* review would view this merger to be pro-competitive, an *ex-post* review under *Towercast* could find the same merger to be problematic. Again, it will be very challenging to evaluate such an outcome *ex-post* and to disentangle the impact of realized efficiencies from the merger. Additionally, due to the inherent uncertainty associated with R&D activity, with generally only a very small percentage of new products under development actually coming to market, the correct approach to identifying the counterfactual should focus on assessing poles of innovation and innovation spaces rather than the actual outcome of the R&D efforts. To do otherwise would mean that the EC, NCAs, or national courts may make decisions based on information that may not have been available *ex-ante* to market observers. Further, while it is tempting to rely on *ex-post* information to reach conclusions about the causal impact of a merger, it is important to realize that full and complete information may still not accessible to competition authorities in an *ex-post* review setting. The necessary analysis of causation remains a formidable exercise.

VI. Applicability of *Towercast* in Addressing Enforcement Gaps, such as Killer Acquisitions

It is notable that *Continental Can* has not been applied to find a merger to be abusive in any final EU Court judgment. However, it remains the leading authority in the application of Article 102 TFEU to mergers as *Towercast* essentially repeats its substantive test: ‘the mere finding that an undertaking’s position has been strengthened is not sufficient for a finding of abuse, since it must be established that the degree of dominance thus reached [as a result of the merger] would

substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market'.[62] It is clear from this test that the abusive conduct can only be the dominant firm entering into the merger itself. As AG Roemer put it in his *Continental Can* Opinion, the case related to the application of Article 102 to cases of increase in market strength 'without the use of any unfair means'.[63]

As to the question of identifying situations where only undertakings whose behaviour depends on the dominant undertaking would remain in the market, *Towercast* (like *Continental Can* before it) provides little guidance and there have been no cases that interpret and apply these principles. In *Continental Can*, the Court held that a merger can be said to be abusive in and of itself if it so essentially affects competition that the remaining competitors can no longer provide a sufficient counterweight.[64] This could occur in situations where there is no longer equality of opportunity or the possibility of as efficient entry as a result of the merger. However, the requirement that *all* remaining market participants be economically dependent on the merged entity *as a result of* the merger is a much stronger condition that would limit the applicability of *Towercast*, particularly with respect to addressing enforcement gaps, such as killer acquisitions.

In general, the condition of widespread economic dependence requires that there exists a barrier to entry that prevents a prospective competitor from entering the market and providing competitive constraint to the incumbent.[65] This can occur, for example, when the dominant

[62] *Towercast*, para 52.
[63] Opinion of AG Roemer Case 6-72, *Continental Can*, EU:C:1972, p. 256.
[64] Judgement of the Court Case 6/72 *Continental Can*, EU:C:1973, paras 25, 28–29.
[65] For example, French Competition Authority requires that for economic dependence to hold, among other things, there must be difficulty finding 'alternative commercial partners offering similar commercial solutions'. Thomas Tombal, 'Economic Dependence and Data Access' (2020) 51 International Review of Intellectual Property and Competition Law 1.

firm's market power results from a statutory monopoly, intellectual property, or a gatekeeper position.

It is important to note that existing laws can provide effective safeguards in markets with high entry barriers. The DMA, for example, applies to digital platforms that are perceived by the regulators to control access to a market.[66] In other instances, where abuse of dominance occurs after the merger, Article 102 TFEU can be directly used to remedy the situation without invoking *Towercast* and necessitating an *ex-post* review of the completed merger. In effect, the usefulness of *Towercast* as a tool for addressing enforcement gaps such as killer acquisitions is limited to situations where (i) a below-threshold acquisition creates barriers to entry such that all market participants end up dependent on the merged entity, (ii) existing national laws or the DMA do not already provide effective safeguards, and (iii) any alleged misconduct that occurred after the merger cannot be addressed directly by Article 102 TFEU. The limited applicability of *Towercast*, especially in light of the overall costs it can impose — such as chilling innovation, increased funding costs for startups, and diminished M&A activity — calls into question its effectiveness in addressing the perceived enforcement gap associated with killer acquisitions.

Moreover, besides the overall costs to the economy discussed above, it is also important to consider the relatively high administrative costs of an *ex-post* merger control regime. To be effective, such a regime would have to continuously monitor the stock of all below-threshold mergers for potentially anti-competitive developments after the completion of the merger.[67] This cost can be substantial if there are no temporal restrictions on how long after completion, a

[66] 'Implications of the Digital Markets Act for Transatlantic Cooperation' (*CSIS*, September 15, 2021), available at https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation.
[67] While the total number of mergers and acquisitions completed in Europe are around 20,000 each year, only roughly 300 of them are above threshold mergers that get notified to the EC. See 'Competition Merger Control Procedures', (*European Commission*), available at https://competiion-policy.ec.europa.eu/system/files/2021-02/merger_control_procedures_en.pdf; 'Volume of M&A deals Europe 1985-2023', (*Statista*), available at https://www.statista.com/statistics/1113305/number-of-european-merger-and-acquisition-deals/.

merger can be challenged. This would also open the prospect for competitors to engage in rent-seeking behaviour by challenging completed transactions on specious grounds.

In this regard, there is the additional significant risk that the potential application of *Towercast ex-post* to below-threshold mergers could undermine the legal certainty of the 'one stop shop' *ex-ante* merger control process under the EUMR. This may in turn lead firms engaging in M&A activity to make 'failsafe' *ex-ante* applications to the EC which would arguably return EU merger control towards an ineffective and inefficient system of 'comfort letters' (i.e. informal guidance that is not legally binding) analogous to the system under Regulation 17/62 that was abandoned by the EC in 2003 (discussed above in Section III). In other words, *ex-post* enforcement against below-threshold mergers pursuant to *Towercast* could create such uncertainty under the legal exception/self-assessment regime of enforcement of Articles 101 and 102 under Regulation 1/2003 that firms will 'voluntarily' notify their transactions informally (i.e. outside the EUMR framework) to the EC and NCAs to obtain comfort that their transactions will not be challenged *ex-post* pursuant to *Towercast*. Indeed, the EC has already provided guidance to firms engaging in below-threshold transactions to allow informal notification in order to obtain comfort as to the risk of subsequent referral under Article 22 EUMR.[68]

Ultimately, any assessment of the applicability of *Towercast* must keep in mind not just EC's mandate to ensure a competitive market environment, but also the TFEU's objective of 'strengthening its scientific and technological bases' and allowing 'researchers, scientific

[68] See Communication from the Commission of 31 March 2021, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, (2021/C113/01).

knowledge and technology circulate freely'.[69] As such, one must consider the trade-off between limited reduction in enforcement gap likely to be achieved by an *ex-post* merger control regime premised on *Towercast* and the potentially high costs to the EU, both in terms of resources required for the administration of such a regime and the impact of chilling innovation, increased start-up funding costs, and diminished M&A activity on scientific and technological competitiveness of EU. These costs combined with the difficulty of properly assessing the *ex-post* causal impact of a merger in the first place, should dampen any enthusiasm for using *Towercast* as a broader enforcement tool, as suggested by EC Director-General Guersent, for addressing enforcement gaps in the EUMR. This view is in alignment with not only the original guidance in the *Towercast* judgement, which cautioned against interpreting it too broadly,[70] but is also corroborated by recent commentary from AG Kokott reiterating that *ex-post* review of non-notifiable mergers pursuant to *Towercast* to review should 'remain the absolute exception'.[71]

VII. Considerations for Minimising Costs Associated with *Towercast* Ruling

Even if the applicability of *Towercast* ruling is limited, as discussed above, the expected cost associated with potential erroneous overenforcement of *Towercast* (when it does get applied) is

[69] Article 179(1) TFEU: 'The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of other Chapters of the Treaties'.

[70] *Towercast* ruling noted that 'mere finding that an undertaking's position has been strengthened is not sufficient for a finding of abuse', and that an acquisition must 'substantially impede competition' such that only undertakings dependent on the dominant undertaking's behavior are left in the market. Judgement of the Court in Case C-449/21 *Towercast* EU:C:2023, para 52.

[71] See comments by AG Kokott who recently stated in that relying on abuse of dominance laws to review non-notifiable mergers after they close should 'remain the absolute exception'. *See* Bethan John, 'AG Kokott: Abuse rules should only be used to probe deals in exceptional circumstances', (*Global Competition Review*, April 20, 2024) available at https://globalcompetitionreview.com/article/ag-kokott-abuse-rules-should-only-be-used-probe-deals-in-exceptional-circumstances.

high. As such, it is important to explore options for minimising the costs associated with potential overenforcement of *Towercast*.

With respect to the rules for *ex-post* review, it is important that clear guidance be put in place to give due consideration to the causal impact of the at-issue merger on the likelihood of the various *ex-post* events materialising. AG Emiliou's Opinion in *Illumina* suggests that, in an *ex-post* review, the competition authority does not need to make any predictions because it has access to post-merger evidence, such as whether 'there were appreciable effects on price, output and innovation, or whether the target's operations were terminated or significantly reduced'.[72] However, it is important to appropriately discount *ex-post* events that would have occurred regardless of the merger or were not caused by the merger. On the other hand, *ex-ante* information that was available to the undertakings at the time of the merger and *ex-post* events directly resulting from the merger should be duly considered. For example, it would be appropriate to consider a firm's deliberate *ex-post* decision to skuttle the products of the acquired company, but essential to distinguish between a decision taken to curtail competition in the market versus a reaction to changing market dynamics that reduced the profitability of the acquired company's products. Similarly, it would also be important to consider if the increase in market power is a result of increased synergies and greater efficiency from the merger or a result of any exclusionary conduct caused by the merger. While easier said than done, this would be one way of ensuring that a causal link remains between the activities related to the merger and the competitive outcomes. As a general matter of principle, while *ex-post* evidence should not be ruled out, its relevance should be carefully considered with the appropriate level of caution. In particular, it is important to evaluate how and by whom business decisions were taken, what

[72] Opinion of AG Emiliou in Joined Cases C-611/22 and C-625/22 *Illumina Inc. v European Commission* and *Grail LLC v Illumina Inc.*, EU:C:2024.

were the implicit and explicit motivations behind the decisions, the uncertainty associated with the outcomes of the decisions and the different states of the world that could *potentially* have transpired as a result of the decision.[73]

Given the pitfalls of applying *Towercast* set out above, it is all the more important that any concept of a 'by object' abuse should not form part of any such enforcement as this would greatly increase the risk of over-enforcement of Article 102 TFEU. In this regard, AG Emiliou's Opinion in *Illumina* argues that a 'killer acquisition' is 'a paradigmatic example of a 'by object' abuse of dominant position' where conduct has 'the actual or potential effect – **or even the object** – of impeding potentially competing undertakings at an earlier stage, through the placing of obstacles to entry or the use of other blocking measures …, from even entering that or those market(s) and, in so doing, preventing the growth of competition therein to the detriment of consumers, by limiting production, product or alternative service development or innovation' [Emphasis added].[74] However, the better view appears to be that under Article 102 TFEU (unlike under Article 101 TFEU) enforcers must consider all of the relevant circumstances before deciding whether conduct is abusive. While the concept of a 'by object' abuse to sanction certain inherently harmful conduct might appear beneficial, it would be difficult to identify conduct that is harmful 'eight or nine times out of 10' and thus it is preferable for policy makers to introduce new legislation if they believe certain conduct is inherently harmful.[75]

[73] It should also be noted that contemporaneous evidence e.g. of relatively junior employees without decision-making authority should also be treated with caution in such cases.
[74] Opinion of AG Emiliou in Joined Cases C-611/22 and C-625/22 *Illumina Inc. v European Commission* and *Grail LLC v Illumina Inc.*, EU:C:2024.
[75] See remarks of Judge Nils Wahl of 21 March 2024 at a Concurrences conference in Brussels. Janith Aranze, 'Wahl sympathetic to by object analysis in abuse cases', (*Global Competition Review*, March 21, 2024), available at https://globalcompetitionreview.com/article/wahl-sympathetic-object-analysis-in-abuse-cases.

Market participants should also be given clarity and assurance regarding the range of punitive actions that they could potentially be subject to in an *ex-post* review scenario. In line with AG Kokott's Opinion in *Towercast*,[76] the remedy should be limited to monetary fines, rather than unwinding or restructuring of the merger or acquisition, which can be quite inefficient and costly after the fact. Unwinding the transaction may be impossible in practice: the merged firms may have already shared proprietary information or intellectual property, or made redundant a large number of employees, such that the firms would not be sustainable as separate entities anymore.

Finally, some statute of limitations should be implemented to restrict the timeframe within which a completed merger can be challenged. Besides reducing legal uncertainty, it would also lower the monitoring cost for the regulators and diminish the likelihood of reaching a false positive ruling, given, as discussed previously, the difficulty establishing a causal relationship between merger and alleged anti-competitive conduct as time passes after a merger. Furthermore, economic theory suggests that if after some time there is no observed abuse of dominance following the merger, then there must be market constraints in place restricting anti-competitive conduct. This implies diminishing marginal returns to the regulators from continued monitoring over time.

[76] Opinion of AG Kokott in Case C-449/21 *Towercast* EU:C:2022.