WHEN A CONCENTRATION IS A RESTRICTIVE PRACTICE: THE ROAD AHEAD AND LESSONS LEARNT

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Abstract *The purpose of the article is to analyse if the emerging new methods of ensuring jurisdiction for merger control are actually helpful, justified and, most of all, lawful. To this end, we will review the new approaches to merger control in the European Union, as well as at Member States level, including legislative and jurisprudential innovations: amendments to merger control thresholds, the new interpretation of Article 22 by the European Commission, the subsequent judicial reaction and the emergence of other regimes with references to merger control, such as the Digital Markets Act, and, in particular, the application of the restrictive practices prohibitions, Articles 101 and 102 of the Treaty on the Functioning of the European Union, to merger cases in a context where Article 22 has become a less viable tool after the European Court of Justice judgement on Illumina / Grail.*

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Key words & JEL Classification Codes Merger control; EUMR; killer acquisitions; enforcement gap; Article 22 of the EUMR; Article 101 of the TFEU; Article 102 of the TFEU; Illumina/Grail; Towercast.

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1. INTRODUCTION

The European Union ("EU") merger control system is one of the fundamental pillars of the Competition Law framework, aiming to promote economic efficiency and, to a significant extent, the development of an integrated internal market. The European Commission (the "EC"), alongside national competition authorities, plays a pivotal role in assessing and regulating mergers and acquisitions and the setting up of joint ventures. This body of law, including the EU Merger Regulation[1] ("EUMR") and the national merger control provisions, has been increasingly important over the years, preventing, *ex ante,* transactions resulting in limitations to competition in the relevant markets. In this context, during the last 10 years, the EC issued 3,380 clearance decisions in Phase I, 125 clearance decisions with remedies in Phase I, 11 clearance decisions in Phase II, 48 clearance with remedies decisions in Phase II, and 8 prohibition decisions.[2]

However, the setting up of a merger control framework and its implementation at EU and at national level was a slow and hesitant construction. Indeed, the EU has taken its time to adopt a merger control system. While jurisdictions as the US have adopted and developed merger control policies since the beginning of the XX century, the first EUMR was adopted only in 1989. By then, there were already several Member States with an implemented merger control system, such as Italy, France, Great Britain and Germany, but a significant number of Member States did not have merger control provisions, and some Member States have only recently set up merger control systems (for instance, Luxembourg only implemented an *ex ante* merger control review in 2023).[3]

To assert jurisdiction, the EU and national merger control provisions have, in general, focused on turnover figures as thresholds, except for Portugal and Spain that also have alternative market share thresholds, controversial in what concerns legal certainty, but often useful to track business with limited turnover but a relevant market position.[4]

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1 Council Regulation (EC) no. 139/2004, dated 20 January 2004.

2 According to the information made available by the EC at the competition case search, available at: https://competition-cases.ec.europa.eu/search.

3 Indeed, the aim of limiting barriers to investment and the reliance on the EU-level merger control led to delays is setting up a merger control framework at national level.

4 For instance, interesting transactions on online markets, including the markets for online advertising were, in Portugal in Spain notified in result of the triggering of market share thresholds. For example, FixeAds, who

The debate on the alleged insufficiencies of the turnover threshold regimes has become a popular trending topic on competition law forums, when several acquisitions with apparent competition law relevance were not assessed by the competition authorities, as they did not trigger the EU merger control thresholds[5], including the one billion-dollar acquisition of Instagram, in 2012, by Facebook, as, at the time, Instagram did not generate any revenue (it registered a turnover, in 2024, above USD 51 billion) and only had 13 employees (it has more than 15,000 employees nowadays).[6]

Also, the actual outcome of the merger assessment of concentrations that are, indeed, subject to merger control proceedings, has been increasingly subject to criticism. The EC itself acknowledged that recent studies suggest a certain degree of under enforcement of competition rules, with some potentially harmful mergers allegedly escaping antitrust scrutiny.[7] In particular, research by Stiebale and Szücs examined the impact of 194 horizontal mergers assessed by the EC. Their findings indicate that, following these mergers, the mark-ups of rival firms increased by 2% to 4%, suggesting that some mergers may have been insufficiently scrutinized.

Indeed, the alleged enforcement gap and material assessment insufficiencies have generated reactions that we could characterize as rather erratic, and that, fortunately, have been judicially challenged, as we will further explain below, in terms of legal uncertainty and procedural complexity, which may affect market participants and their ability to effectively predict and navigate the regulatory outcomes.

2. ENFORCEMENT GAP VS BENEFITS OF M&A FOR START-UPS

As mentioned above, traditional merger control criteria were quite straight-forward, which provided legal certainty to market players. In general, companies could know, in advance, when they would be subject to a

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controlled OLX, a Portuguese marketplace platform, intended to acquire CustoJusto, another marketplace platform, a transaction that was ultimately abandoned – Ccent. 26/2015 – FixeAds / Ativos Custo Justo. Similarly, in Spain, based on market share thresholds, APAX notified the Comisión Nacional de los Mercados y la Competencia (“CNMC”) regarding its acquisition of Idealista, as included in the proposal and resolution report issued by the CNMC – C/0680/15 – Apax / Idealista.

5 Faria, Martins & Pedreira, 2021: p. 152-158.

6 According to the information made available by RocketReach, available at: https://rocketreach.co/instagram-profile_b5e4f407f42e66e5.

7 EC, 2024: p. 109.

merger filing obligation, with the support of their legal teams. However, there are some *indicia* that seem to suggest that these criteria could be more suited for traditional markets.

In digital markets, leading market players appeared, within the last few years, to consistently seek out promising start-ups with the intent to acquire them. The objectives of such acquisitions are, apparently, diverse, ranging from the integration of specific technologies into the acquirer's products, to the recruitment of highly skilled personnel to contribute to the acquirer's ongoing projects, or, as some authors, stakeholders and opinion makers seem to imply, eliminate potential competitors, since by acquiring them at such early stage it is possible to prevent them from becoming a competitive threat, enabling big market players to strengthen their market leadership[8].

In this context, it is noteworthy that out of 1,149 mergers involving big tech, from 1987 to July 2022, the EC reviewed only 21 mergers. Most of these mergers fell below the EU and national merger control thresholds due to the low or non-existent turnover of the merger target.[9]

On the other hand, it should be noted that, in general, according to the available data, these acquisitions did not result in the discontinuation of the acquired business, even though it seems that there is a certain degree of product discontinuation, especially when the acquirer and the target are close competitors, however, it is rather uncertain if all products were viable or if product discontinuation was, after all, efficient.[10] Also, innovative and competitive dynamics differ dramatically across industries. Less nimble markets like pharmaceuticals seem to require a different treatment than digital markets, where non-horizontal considerations such as ecosystem building play a larger role in innovation processes and are often behind M&A strategies. Indeed, to address one of the most debated issues on enforcement gap, to a significant degree, it is likely that Instagram has significantly improved its service and its entry and expansion into the market was relevantly swifter after the Facebook acquisition.[11]

8 On the opinion makers front, please refer, for example to https://www.nytimes.com/2024/06/13/opinion/big-tech-ftc-ai.html or https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/.

9 Carugati, 2022.

10 Sperry, 2020.

11 Sperry, 2020.

When discussing the alleged enforcement gap we came across, rather broadly, with the idea of killer acquisitions. The concept of killer acquisitions was first introduced in a landmark research paper written by Colleen Cunningham, Florian Ederer, and Song Ma, with a particular emphasis on the pharmaceutical industry[12]. The term killer acquisitions does not establish a distinct category of acquisitions; rather, it represents a concept rooted in certain theories of harm, in particular harm to potential competition reflects concerns that acquiring potential competitors can result in innovation loss, as well as restricted access to essential infrastructure.

According to the available data, killer acquisitions remain a rather rare phenomenon, in particular in what concerns digital markets. In pharmaceuticals, where the risk may be arguably the highest, the likelihood is between 5.3% and 7.4%.[13] In digital markets, the rate is closer to 1 in 175.[14] Nonetheless, the low probability of the phenomenon does not imply that there is no need for intervention, as the merger control framework is a marginal phenomenon itself. Indeed, 5% to 7% corresponds to the average intervention level, in merger cases, in the EU.[15]

At the same time, strengthening the merger control framework may result in a real risk of discouraging overall merger activity, which is, according to the available data, responsible for increasing research and development expenditure by as much as USD 13.5 billion annually.[16] Also, there is evidence that revenue growth strategies implemented in a post-concentration scenario, which includes cross selling, expanding into new customer segments, accelerating product launches and continuous innovation, substantially decreasing innovation expenses by capitalizing on research and development ("R&D") economies of scale.[17]

Significantly, smaller firms often pursue its acquisition by established market players for various compelling reasons. In a survey carried out by the Silicon Valley Bank, many start-ups, especially those in the technology sector, with fewer than 25 employees and annual revenues under USD 25 million,

12 Cunningham, Ederer & Ma, 2020: p. 649-702.

13 Cunningham, Ederer & Ma, 2020: p. 649-702.

14 Gautier & Lamesch, 2020.

15 Ivaldi, 2023.

16 Kulick & Card, 2023.

17 Kulick & Card, 2023.

consider being acquired as a long-term goal.[18] According to a PwC's 2024 analysis, this trend remains strong in the technology sector, with start-ups increasingly positioning themselves for acquisitions.[19] This purpose can foster innovation and support the emergence of start-ups that might not otherwise come into existence.[20] Choosing acquisition over an initial public offering is increasingly common, as it is made evident in the declining number of initial public offerings ("IPO"), dropping from 486 in 1999[21] to 154 in 2023[22], in the USA.

Indeed, building a new product is incredibly hard, even for the most successful tech firms, as evidenced by the epic failures of Microsoft Zune music player, Windows Phone or Google+ social network, so internal growth is not always a realistic alternative to a merger.

Moreover, there are significant differences between the big tech acquisition strategies and there is a clear shift in M&A trends in the digital market, probably already impacted by the merger control uncertainty in the EU. Going through the existing data, we can conclude, for instance, that the average age of the companies acquired by Facebook is considerably lower than of those acquired by Amazon and Google, that typically are not start-ups, and it should be noted, for example that Google's M&A activity has declined and its lead has become less pronounced.[23]

Finally, interestingly enough, Albrecht, Auer, Fruits and Manne have demonstrated that calls for antitrust reforms could be rather populist, and most mergers are largely benign. Some recent mergers, such as Amazon/Whole Foods, saw a huge number of dire predictions, despite quickly proving to be procompetitive, allowing a more efficient cost structure and incentivizing price cuts in competitors.[24] In contrast, others, such as Facebook/Instagram, drew almost no concerns at the time but are now seen as problematic in retrospect – even though, based on empirical evidence, it is clear that Meta (including Facebook, Instagram and Whatsapp) is losing members,

18 Silicon Valley Bank, 2019.

19 PwC, 2024.

20 EC, 2016.

21 Hardy, 2012.

22 Sinha, 2024.

23 Dave, 2024.

24 Please refer, for example to: https://www.latimes.com/business/la-fi-amazon-whole-foods-qa--20181106-story.html.

considering the emergence of other apps, such as SnapChat and, in particular, TikTok.[25]

In any case, although the size of the enforcement gap is debatable, we will address, in the following sections, the proposed solutions for a problem that exists to a certain degree and in a differentiated manner due to the characteristics of each sector– though, probably to a lesser extent than the doomsday mergers disciples may suggest.

3. ATTEMPTS AT A SOLUTION

Considering the *indicia* of an enforcement gap, mainly in the pharmaceutical and digital sectors, the EC and the national competition authorities have been trying to expand their merger control powers to include the review and control of transactions that fall below both the EU and national thresholds, even though these powers extend, as have been applied, to sectors not identified as "problematic".

From more limited approaches, as the adjustment of guidelines, to adopt a comprehensive perspective, evaluating if transactions result in future or dynamic competition loss, as the Competition and Markets Authority ("CMA") has done recently, and changes to the existing merger control thresholds.[26]

The main obstacle to these changes, as we will further detail below, is the tremendous level of deal uncertainty caused by the possible retroactive assessment of transactions, lengthier M&A procedures and increased costs.

3.1. Adjustment to existing merger control thresholds

As referred, one of the alternatives is to amend the merger control thresholds to cover situations in which the turnover of the target is modest, even though its business is very valuable.

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25 Albrecht, Auer, Fruits and Manne, 2023: p. 51-52.

26 The UK Digital Markets, Competition and Consumer Act revised the merger control thresholds to exclude smaller transactions from the CMA review. The turnover threshold has been raised from GBP 70 million to GBP 100 million. Additionally, a "safe harbour" provision exempts small businesses from the CMA's jurisdiction, even when the share-of-supply threshold is met, as long as each party involved has UK turnover of GBP 10 million or less. The CMA also implemented a new threshold specifically targeting killer acquisitions. This applies when one party holds a 33% or greater share of supply of goods or services in the UK (or a substantial part thereof) and generates more than GBP 350 million in UK turnover, while the other party has a "UK nexus".

For instance, in 2017, Germany and Austria implemented a new threshold to their merger filing control test, an objective threshold: the transaction value. This means that, besides the thresholds based on turnover figures, there is an alternative threshold corresponding to the value of the payment in exchange for the merger (EUR 400 million in Germany and EUR 200 million in Austria), combined with the target being active on the national market to a significant extent.[27]

Other jurisdictions have also more recently embraced value-based thresholds, sometimes including additional market share requirements. In 2021, South Korea implemented a size-of-transaction threshold for merger control reviews. Transactions valued over KRW 600 billion are now subject to review if they involve relevant activities in Korea, such as reaching 1 million monthly users or allocating at least KRW 30 billion in annual R&D expenditure over the preceding three years. In the UK, new thresholds for so-called killer acquisitions were established, allowing reviews even in the absence of direct overlap between merging parties, provided one party has at least a 33% market share and significant UK presence (*i.e.*, turnover exceeding GBP 350 million).[28]

In Australia, new mandatory merger notification thresholds were proposed on 30 August 2024, replacing the previous voluntary regime, which applied only when combined market shares exceeded 20%. The new thresholds are triggered by revenue, transaction value, or market share. Similarly, on 10 September 2024, India's amended Competition Act introduced a value-based threshold for merger control, applicable to transactions exceeding IRN 20 billion, provided that the target has substantial business operations in India.[29]

It is, however, interesting to see what type of transactions have been caught, for instance in Germany, after the value thresholds entered into force. Based on public information, this threshold has caught a very limited number of cases and, in any case, apparently, there are no clear signs of no killer acquisitions.

Indeed, to illustrate this idea, based on public information, from 2017 to 2020 the German Competition Authority (*Bundeskartellamt)* has dealt with

27 Berg & Weinert, 2017.

28 Choi & Lee, 2023.

29 In the United States, value-based thresholds have long been in place. A transaction must be reported if its value exceeds USD 478 million or, alternatively, if one party's net sales or assets exceed USD 23.9 million, while the other party's assets exceed USD 239 million.

a total of 60 cases under the transaction value threshold, of which 34 informal applications were made, with the German Competition Authority informing the parties that no formal filing was required mostly due to a lack of local nexus and in the remaining five cases recommended a formal notification. A total of 31 cases (including the five from above) were formally notified. This resulted in 19 clearance decisions, 10 withdrawn filings, including 6 cases without a local nexus and also including one referral application to the EC in Microsoft's acquisition of GitHub[30], which was cleared by the EC and the target has kept its open source DNA after the merger[31]. Interestingly, almost half of the cases related to the pharmaceutical sector and only four cases to the technology sector. 7 cases related to large real estate properties, not yet generating a rent, which is telling in what concerns the blind nature of this criteria, and 6 to other sectors.

On 17 June 2024, the German Competition Authority has cleared the first acquisition, where Phase II proceedings were initiated, under the transaction value threshold. It was the takeover of Olink Holding AB, Sweden[32], by Thermo Fisher Scientific, Inc., USA[33]. Although Thermo Fisher and Olink did not reach the turnover thresholds required for German merger control, the concentration was notifiable due to the high purchase price of EUR 2.8 billion and substantial operations in Germany identified by the German Competition Authority.[34] Although Thermo Fisher and Olink were only active in neighbouring markets, rather than overlapping ones, the Authority paid particular attention to conglomerate effects, such as the future bundling of the products and services offered by the parties involved in the concentration.

The inclusion of a value-based threshold was also considered at EU level. However, several challenges arise when assessing its appropriateness that were highlighted during the evaluation of the existing merger control framework. Firstly, respondents did not see a significant enforcement gap borne out by cogent empirical evidence. Furthermore, "complementary" thresholds

30 Booluck, 2022.

31 Decision (EC) M. 8994 – Microsoft/Github.

32 Thermo Fisher is a provider of research equipment in the scientific services sector, specialising in the manufacture and development of "High Resolution Accurate Mass" mass spectrometers.

33 Olink is a global biotechnology company that utilises its proprietary Proximity Extension Assay (PEA) a technology in multiplex protein biomarker analysis.

34 Badtke & Jarass, 2024.

would generate a significant number of 'false positive' cases that did not raise competition concerns in Europe and thereby divert EC resources from those which did, a new threshold not based on turnover could introduce legal uncertainty by incorporating unfamiliar concepts into the existing, well-established framework, in particular since the price is a matter of subjective determination between merger parties. Furthermore, public international law principles require a local nexus, meaning that a concentration must demonstrate substantive effects within the jurisdiction, and it was considered that a value-based threshold alone might not satisfy this requirement. Additionally, transaction values vary significantly across industries, especially those with high capital expenditures, such as pharmaceuticals or technology, where deals naturally involve higher figures. As a result, a value-based threshold could place an undue burden on both companies and the EC, leading to protracted competition assessments.[35]

Most of all it is rather unlikely that a consensus could exist in the short run on how to adjust the thresholds at EU level. We recall that it took decades for a merger control framework to be implemented in the EU.

3.2. Article 22 of the EUMR

In this context, as it often happens, the EC tried to expand its jurisdiction by reinterpreting an existing provision and the reappraisal of the application of Article 22 of the EUMR was put in motion to address the potential enforcement gap.[36]

Under Article 22 of the EUMR, a provision included in the 2004 EUMR, that was aimed to provide a tool to Member States without merger control provisions, Member States can ask the EC to analyse a concentration which, despite not having the dimension to be notified under Article 3 of the EUMR, affects trade between Member States and threatens to affect competition in the territory of the Member State making the request. Article 22 was increasingly overlooked over the years, since almost all Member States now have merger control regimes, but, in late 2020, surprisingly, this Article was used to allow the EC to exert jurisdiction over the Illumina/Grail transaction, announced on 21 September 2020.

The Competition Commissioner, Margrethe Vestager, had first publicly mentioned this policy change on 11 September 2020 ten days before the

35 EC, 2019 and 2021a.

36 EC, 2021b: recitals 10 and 11.

Illumina/Grail deal was signed, whilst noting that "this won't happen overnight". But it did. Illumina, Inc. ("Illumina") is an American company which offers solutions for genetic and genomic analysis by sequencing and microarray, developing its business in the cancer screening test market. Grail, LLC. ("Grail"), also an American company, operates in Illumina's market, developing blood tests for early cancer screening. In September 2020, Illumina, which already held 14.5% of Grail's share capital, entered into an agreement and merger plan to acquire sole control of Grail.

In December 2020, the EC received a complaint that triggered several interactions between the EC and the complainant, so that the EC's preliminary conclusion was that the transaction could be subject to a referral request under Article 22 of the EUMR. Following this, the EC informed the Member States of the reasons why it considered that the transaction met the necessary conditions for the application of Article 22 of the EUMR and invited them to make a referral request under that Article.

As a result, several national competition authorities made referral requests under Article 22, the first being the French Competition Authority, in March 2021, followed by the Belgian, Greek, Icelandic, Dutch and Norwegian authorities.[37] With this mechanism, the national competition authorities granted the EC jurisdiction to assess an operation over which they themselves had no jurisdiction, since it did not fulfil the national (nor European) notification thresholds.

Indeed, the referral for EU-level review was controversial because the transaction did not satisfy any EU Member State (or indeed any global) turnover threshold, as Grail had not yet generated any EU revenue and Illumina had engaged with regulators in the UK and US, considering that these jurisdictions have thresholds not based solely on revenue.

After conducting its investigation, the EC: (i) prohibited the transaction; (ii) fined Illumina EUR 432 million for gun jumping; and (iii) imposed a symbolic fine of EUR 1,000 on Grail for going ahead with the operation before authorisation was given.

It is interesting to note that it was only after having initiated the Illumina/Grail case that the EC decided to explain its new approach to Article 22 of the EUMR, by publishing the Guidance on the application of the referral mechanism set out in Article 22 of the EUMR to certain categories of cases,

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37 Case T-227/21, Illumina and Grail v. EC, ECLI:EU:T:2022:447, §14-16.

in 2021, which is a testament to the EC ingenious and proactive approach to overcoming legal difficulties.[38]

The EC tried to stress and certain degree of continuity between the past use of this provision and the new interpretation, stressing in Recital 7 of the Guidance that the mechanism set out in Article 22 of the Merger Regulation has allowed the European Commission to review a significant number of transactions in a wide array of economic sectors, such as industrial, manufacturing, pharmaceutical and digital, including cases subject to an in-depth investigation and/or authorised only following modification by the remedies offered by the parties.[39]

Moreover, Recital 12 of the Guidance outlines the types of cases that may be suitable for referral, particularly when the transaction is not notifiable under the national laws of the Member State(s). It provides criteria for the EC to consider when encouraging or accepting a referral and aims to increase transparency, predictability, and legal certainty for a broader application of Article 22.[40]

As for timing, the EC Guidance emphasizes that, while referrals are subject to Article 22 deadlines, the fact that a transaction has already been completed does not preclude a Member State from requesting a referral. However, the EC generally views referrals as inappropriate if more than 6 months have passed since the transaction's completion, unless it was not publicly disclosed. In exceptional cases, the EC understands it may consider a referral beyond this period, depending on the severity of the competition concerns and the potential negative impact on consumers.[41]

Illumina appealed the EC's decision to the General Court, maintaining that the EC could not accept a referral request from a national competition authority where a merger review law exists, but the referred transaction does not meet the thresholds for notification, since the EC's interpretation was contrary to the EUMR's "one-stop shop" principle and the principles of legal certainty, subsidiarity and proportionality.[42]

The General Court, however, upheld the EC judgement and validated the new interpretation of Article 22 of the EUMR, admitting that a Member

38 EC, 2021b.

39 EC, 2021b: recital 7.

40 EC, 2021b: recital 12.

41 EC, 2021b: recital 21.

42 Modrall, 2022.

State could make use of the referral request even in situations where operations do not meet the notification thresholds (neither national nor EU) – which in turn triggered Illumina's appeal to the European Court of Justice ("ECJ").

According to the EC and the General Court, based on a literal, historical, constructive, and purposive interpretation of the EUMR there was no legal obstacle to the application of Article 22 where the referring Member States did not themselves have jurisdiction under national laws. It was not relevant that the origin of Article 22 was to address an enforcement gap that existed at the time the EUMR was passed when the Netherlands and other Member States did not have merger control rules. The General Court held, in accordance to the ever present effectivity principle, that if the law was interpreted differently, neither the EC nor Member States would have the ability to review potentially anti-competitive mergers.

However, on a perhaps unexpected plot twist, the ECJ disagreed with the General Court's assessment, holding that Article 22 does not enable the EC to accept the referral of concentrations from national competition authorities that are not themselves competent to review the relevant deals[43].

The ECJ understood that General Court had erred in its historical interpretation of the EUMR: the documents that it relied on for that exercise did not provide a clear answer on whether Article 22 allows Member States to refer transactions not covered by national merger control rules; and, although the objectives of the EUMR had been "successively extended over time" to strengthen the application of EU competition law, that did not support the EC's attempts to broaden its use of the Article 22 referral mechanism.

The ECJ found that the General Court had further erred in its contextual and purposive interpretation of Article 22. Several elements that the General Court had taken into account, *e.g.*, the recitals to the EUMR describing the provision as a "corrective mechanism" to remedy deficiencies in the merger control system, did not, in fact, in the Court's view, support the EC's position.

Conversely, the ECJ found that the General Court had failed to take proper account of several factors that it found determining from a "systemic perspective". It noted, in this sense, that the aim of the EUMR was to establish an effective system that took account of the need for legal certainty with a clear allocation of powers between the EC and national competition authorities and a predictable system of prior merger control.

43 C-611/22 P, Illumina, Inc v. European Commission, ECLI:EU:C:2024:677, §222.

The ECJ stressed that Article 1(5) EUMR enabled the Council, following a proposal by the EC, to revise the jurisdictional thresholds under the EUMR, which would provide a lawful a solution to the jurisdictional issues of concern; and certain differences between the operation of Article 22 and other referral mechanisms under the EUMR (notably the circumstance that an Article 22 referral does not disapply the EUMR for non-referring Member States) weighed against an expansive interpretation of Article 22.

As the opinion of Advocate General Emiliou puts it, the EC would otherwise have the power to review almost any concentration, occurring anywhere in the world, regardless of the undertakings' turnover and presence in the EU and the value of the transaction. The ECJ concluded this could not be the case, based on a mere EC Guidance, adding that it would be "*at odds with the principle of institutional balance*".[44]

Consequently, the ECJ's judgment has rendered the EC's March 2021 policy to Article 22 referrals unlawful, after several cases were notified and decided under the reinterpretation of this provision, including Phase II cases Facebook Kustomer[45] and EEX / Nasdaq Power[46], with the latest transaction being abandoned, to a relevant extent, due to the EC scrutiny.

Furthermore, by late 2023 the EC had, according to its own admission, "seriously considered" more than 60 potential candidate cases, some of which were not notifiable anywhere in the EU and Member States, after an initial period of surprise and distrust, were increasingly keen in using this mechanism. As for Portugal, even though it refused to refer the Illumina / Grail transaction, since the target had no activity in this territory, it has subsequently joined the referral in several cases under Article 22. These included the Qualcomm/Autotalks deal, as well as Cochlear's acquisition of Oticon Medical (in the past, notably, in 2005, Portugal also referred the proposed takeover of Endesa by Gas Natural, marking its proactive use of the referral mechanism).[47]

The impact of this judgment, in our view, correctly restating the applicable legal principles to a disruptive intervention in the market by the competition authorities, that should, in an case, be exceptional, will strength the relevance of the other available alternatives, including the reform of the EUMR

44 C-611/22 P, Illumina, Inc v. European Commission, ECLI:EU:C:2024:677, §215.

45 Decision (EC) M. 10262 – Meta (formerly Facebook / Kustomer).

46 Decision (EC) M. 11241 – EEX / NASDAQ Power.

47 EC, 2005.

that would require support from the Member States and/or the continuing reform of the merger control provisions at a national level.

3.3. Digital Markets Act

One of the responses that the EU legislator has given to the enforcement gap regarding merger control, in particular in the digital sector, was the establishment of a new set of rules regarding digital markets transactions, namely the Digital Markets Act ("DMA"), which corresponds to Regulation (EU) 2022/1925, dated 14 September 2022.

The context in which the DMA was adopted is related to the fact that traditional competition law was not adequate to deal with certain behaviours of large technology companies such as *Microsoft, Alphabet, Meta and Apple.*

We will not critically appraise in this article the legal adequacy of creating a regime targeting specifically these entities, or the creation of a kind of abuse of a dominant position without the requirements of this legal tool, as in the DMA, but will acritically mention that the solution to this alleged enforcement gap, now in what concerns restrictive practices, was to create the concept of "gatekeeper", subject to a series of active and passive obligations. "Gatekeepers" correspond to big digital platforms with significant digital market power, which are basically providers of core platform services[48] and meet certain quantitative thresholds.[49]

Gatekeepers, which correspond essentially to the big tech companies, in what concerns what is relevant for the purposes of this article, will need to inform the EC about any merger they envisage, irrespective of the value. Indeed, Article 14 of the DMA not only imposes this information obligation on the gatekeepers, but also obliges the EC to inform the national competition authorities of all the information communicated to it by the gatekeepers

48 "The DMA (Recital 14) identifies the main core platform services as "*online intermediation services, online search engines, operating systems, online social networking, video sharing platform services, number-independent interpersonal communication services, cloud computing services, virtual assistants, web browsers and online advertising services*", Martins & Tarancón 2024: p. 29.

49 "*If the provider of core platform services:*
(i) has achieved an annual EU turnover equal to or above EUR 7.5 billion in each of the last three financial years; or has had an average market capitalisation or equivalent fair market value of at least EUR 75 billion in the last financial year; and it provides the same core platform service in at least three Member States.
(ii) provides a core platform service that in the last financial year has had at least 45 million monthly active end-users established or located in the EU and at least 10,000 yearly active business users established in the EU…
(iii) …in each of the last three financial years."
Martins & Tarancón 2024: p. 29-30.

(§4, Article 14 of the DMA). In addition, the DMA establishes coordination between the mechanism of Article 14 of the DMA and Article 22 of the EUMR, expressly allowing national competition authorities to make use of the referral mechanism to the EC of concentration transactions (that would not be subject to control according to the traditional thresholds applicable) on the basis of information that has come to their attention under Article 14 of the DMA.

However, the outcome of the Illumina/Grail case will have a relevant impact on these provisions, as the mandatory deal reporting by gatekeepers under Article 14 of the DMA will no longer function as expected. The EC will continue to be informed of these deals but may lack the ability to intervene in many of them, unlike the UK CMA under the equivalent Digital Markets, Competition and Consumers Act ("DMCC").

On its turn, the DMCC, in the UK, shares similar purposes with the DMA, in particular addressing the challenges posed by tech giants acquiring smaller and innovative companies, but, in our view, proposes a more balanced solution. Indeed, as referred above, under the DMCC the CMA reviews transactions, that could fit in the term of the so-called "killer acquisitions", even if only one party has a significant presence in the UK and the share of the supply test is not met. The CMA will be able to review transactions where at least one party (most likely the acquirer): (i) has a share of supply of goods or services in the UK (or substantial part of the UK) of at least 33%; and (ii) UK turnover of at least GBP 350 million, provided that the other party (*i.e.,* the target) has a UK nexus (essentially this requires that the target has activities in, or supplies goods or services, in the UK). Indeed, this regime includes a market share requirement that corroborates our view as to the usefulness of this threshold, especially in emerging markets.[50]

In any case, the future will tell what is the impact of the case law and how the EC will confer a useful interpretation to Article 14 of the DMA, since an amendment to these provisions is unlikely in the near future.

4. WHEN A CONCENTRATION IS A RESTRICTIVE PRACTICE

In 1973, the ECJ held, in its landmark Continental Can judgment, that an acquisition by a dominant company of a rival that strengthens its dominant position constitutes an abuse of a dominant position, in violation of Article

50 Choudhury & Madhia, 2024: p. 1-11.

102 TFEU. Continental Can was then widely perceived as a means of overcoming the absence of express provisions for the control of concentrations.[51]

When the first EUMR was adopted, in 1989, introducing a system of *ex ante* merger control review in the EU, increasingly reinforced by the proliferation of national merger control throughout Europe, it seemed that the need for the EC to leverage Article 102 (and 101) of the Treaty on the Functioning of the European Union ("TFEU") when investigating potentially problematic transactions had ceased to exist.

In addition, the EUMR explicitly conceived that it alone would apply to concentrations, not applying the procedural rules implementing Article 101 and 102, a formulation that was broadly maintained in the current form of the EUMR, adopted in 2004, and, therefore, the resurgence of the restrictive practices prohibitions as a means to tackle a concentration below the applicable thresholds was, indeed, surprising.

It should be noted that this resurgence only takes place at a national level, since, as referred, the EUMR seems to limit incursions by the EC within this ambit, what constitutes a clear difference in what concerns Article 22.

4.1. Article 102 of the TFEU and merger control

The methodology for applying, in general, Article 102 of the TFEU begins by determining the company's position on the relevant market. It is necessary to assess whether or not the company has a dominant position in the relevant market in which it operates, which is appreciated by analysing certain criteria such as market share, barriers to market entry, consumer purchasing power and other factors.

Nevertheless, competition law does not penalise the existence of a dominant position in itself, but rather the abuse of that position, which brings us to the second point mentioned above. If the dominant company engages in abusive behaviour, this could be because it has engaged in one of two possible behaviours: exploitative abuse, if the abuses directly exploit customers or suppliers; or exclusionary abuse, if the abuses aim to exclude competitors.

Furthermore, Article 102 of the TFEU provides for the possibility of justifying certain conducts that could be considered abusive from the outset. The application of this justification depends on the conduct having made it

51 Case 6-72, Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities, ECLI:EU:C:1973:22.

possible to obtain benefits for the consumers, not having effectively eliminated competition and being proportionate to the goals it seeks to pursue.

As referred, it has been understood that the Continental Can case law had ceased to be relevant after the EUMR put in place a dedicated *ex ante* control of concentrations. Nonetheless, throughout the years, the issue has resurged at national level (e.g., Belgium, Luxembourg, Italy), for instance in cases as Alken Maes[52], Utopia[53] and CTS Enventim[54], even though the competition authorities and national courts have generally been very demanding as to the application of Article 102 to mergers, especially when a merger control regime existed.

It was not until recently, with the *Towercast* judgment, when the ECJ seems to have established a new, *ex post* tool for merger control. This case, which involved an acquisition of the French television broadcasting company Itas by Telediffusion de France ("TDF"), did not fulfil either the notification thresholds under French law nor under the EU notification thresholds, and therefore was not subject to any kind of *ex ante* control.

However, a year later, Towercast, which is another operator in the television broadcasting market, submitted a complaint with the French Competition Authority (*Autorité de la Concurrence*) regarding the abuse of TDF's dominant position in the referred market, arguing that Article 102 of the TFEU had been infringed.

After conducting an investigation into the alleged violation of Article 102 of the TFEU, the French Competition Authority concluded that it was not competent to apply the rules on abuse of dominant positions to a merger control case, a decision which Towercast appealed against.

Faced with a difficulty in articulating Article 21(1) of the EUMR and Regulation 1/2003 (which regulates the powers of investigation of national competition authorities and the EC regarding dominant position abuse under the terms of Article 102 TFEU), the French court of appeal asked the ECJ to clarify whether Article 21(1) of the EUMR prevents national competition authorities from assessing mergers under Article 102 of the TFEU, even in cases where those mergers have never been notified or reviewed under the EUMR or any national regime.

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52 Decision (of the Belgian Competition Authority) VM-16-0029 – Alken Maes/AB InBev.

53 Decision (of the Luxembourg Competition Authority) 2016-FO-04 – Utopia.

54 Judgment (of the Italian Court, *Tribunale Amministrativo Regionale per il Lazio), case no. 3335/2021* – Autorià Garante della Concorrenza e del Mercato v. Ticketmaster Italia.

The ECJ made it clear that, although the EUMR constitutes the sole procedural instrument applicable to the prior and centralised examination of merger transactions, this does not mean that the possibility of *ex post* control of merger operations that do not meet the national and European thresholds is excluded[55].

The ECJ concluded that there is no incompatibility between the EUMR and the assessment of a merger operation (which was not subject to a prior assessment) by national competition authorities under the direct effect of Article 102 of the TFEU and corresponding national provisions.

In determining the relevant criterion for establishing that an abuse has occurred, the ECJ clarified that the strengthening of a dominant position was not sufficient to constitute abuse. Abuse will be found if the degree of dominance attained by the company significantly hinders competition, for example, by causing only the companies dependent on the dominant company to remain in the market. [56]

The Towercast ruling has confirmed that, not only national competition authorities, but also private entities can challenge merger transactions based on Article 102 of the TFEU, even after the transaction has been completed. This approach to merger control allows national authorities to review merger transactions already completed without a time limitation and national authorities to at least impose fines for violations of Article 102 of the TFEU.

Indeed, it remains to be what will be the implications of the finding of an abuse of dominance in these kind of scenarios, as the ECJ declined to limited the time frame for the use on these mechanisms and remained silent on the consequences, even though Advocate General Kokott considered that "*in view of the primacy of behavioural remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration, but rather only the imposition of a fine*"[57].

In the case Proximus/EDPnet, in 2024, the Belgian Competition Authority ("BCA"), applied, for the first time the Towercast case law[58]. Indeed, EDPnet NV and EDPnet BV, two telecom operators which are active in Belgium and the Netherlands respectively were in financial difficulty and had

55 Case C-449/21, Towercast v. Autorité de la concurrence and Ministère de l'Économie, ECLI:EU:C:2023:207, §41.

56 Case C-449/21, Towercast v. Autorité de la concurrence and Ministère de l'Économie, ECLI:EU:C:2023:207, §52.

57 Opinion of the Advocate General Kokott on cases C-611/22 P and C-625/22 P, ECLI:EU:C:2022:777, §63.

58 Decision (of the Belgian Competition Authority), ABC-2023-RPR.17 – Proximus/EDPnet.

to undergo judicial reorganization, in 2023, to transfer their company assets under judicial authority.

Proximus, a Belgian telecom operator, hence, a competitor, appeared to have submitted the best bid to acquire these companies. The Belgian Institute for Postal Services and Telecommunications and Citymesh objected to the sale decision and sought the Enterprise Court to examine whether Proximus's acquisition of EDPnet could distort competition. The Enterprise Court held that parties did not have to notify the acquisition to the BCA because the deal did not meet the merger control thresholds and there was not enough evidence to determine whether the transaction constitutes *prima facie* abuse of Proximus's dominant position.

However, on the same day, the BCA opened an *ex officio* investigation regarding the acquisition of EDPnet's assets to determine if there could be any abuse of dominance. The BCA held that Proximus's acquisition of EDPnet's assets violated competition law as this acquisition amounts to a prima facie abuse of a dominant position. The BCA considered that it was not unreasonable to assume that Proximus's only major competitor on the market for detail and wholesale broadband Internet would be eliminated because of the acquisition.

The BCA's ruling therefore countered the decision of the Enterprise Court, which found that there was no a priori violation of competition law. In this regard, the BCA pointed out that it is not bound by court decisions because of the powers given to it as a national competition regulator. In the end, Proximus decided to sell EDPNet to Citymesh. This led to the closing of the competition law investigation into the deal.

4.2. Article 101 of the TFEU and merger control

The traditional application of Article 101 of the TFEU involves a systematic process of identifying anti-competitive agreements and practices, assessing, if necessary, their impact on competition, and determining whether they can be exempted under specific conditions.

Moreover, enforcement, that involves fines not exceeding 10% of the infringing operator, is carried out by the EC and national competition authorities. This framework ensures that competition within the EU internal market is protected and promotes economic efficiency and consumer welfare.

The application of Article 101 of the TFEU to mergers has been less debated, but has gained a new impulse after the Towercast judgement.

Previously, it had been established, in pre-adoption of the EU-wide system of merger control case law, that minority shareholdings that do not bring about a change of ownership and control between the interlinked undertakings, or, otherwise, fall outside merger control, may still be captured by antitrust rules.

Pursuant to Philip Morris[59], Article 101 TFEU may apply to agreements between undertakings based on which a minority shareholding is acquired when it is shown that, in light of its economic and legal context, such agreement has "*the object or effect of influencing the competitive behaviour of the companies on the relevant market*". The ECJ further clarified in this case that "*the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition*" but it "*may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business*".

That is, shareholding acquisitions are not a "by object" restriction but need to be evaluated based on their effects. Accordingly, a minority shareholding may be found to be restrictive of competition if it gives rise to either coordination or exchange of commercially sensitive information, or to effective control, at present or in the future, or some degree of influence over the competitor's commercial conduct.[60] It is debatable whether the scope of the "influence" standard under Article 101, which is lower than "decisive" influence under the EUMR, is flexible enough to address seemingly passive minority shareholdings that merely give rise to unilateral anticompetitive effects. The main limitation of Article 101 is that it requires a finding of "agreement" or at least "concerted practice", (*i.e.,* some element of reciprocity rather than a unilateral act) between "undertakings" (rather than an undertaking and an individual with no independent economic activity, for a potentially anticompetitive minority shareholding to come within its ambit).

However, more decisively as to the application of Article 101 in a merger scenario, a couple of months ago, following the Towercast judgement, the

59 Joined cases 142 and 156/84, British American Tobacco Company, Ltd, and R. J. Reynolds Industries, Inc., v. Commission of the European Communities, Philip Morris Incorporated and Rembrandt Group Limited, ECLI:EU:C:1987:490.

60 Joined cases 142 and 156/84, British American Tobacco Company, Ltd, and R. J. Reynolds Industries, Inc., v. Commission of the European Communities, Philip Morris Incorporated and Rembrandt Group Limited, ECLI:EU:C:1987:490, §38 to 40.

French Competition Authority issued its first decision of the application of Article 101 of the TFUE to mergers.[61]

In fact, in 2015, 3 French meat-cutting companies, Akiolis, Saria and Verdannet entered into several asset swap transactions which materialized in the form of 5 mergers. None of these mergers was subject to an *ex ante* merger review by the French Competition Authority as they did not exceed the applicable turnover thresholds.

In 2019, the French Competition Authority initiated *ex officio* Article 101 TFEU proceedings relating to these merger agreements based on suspicions of alleged anticompetitive geographic market sharing practices between the referred companies.

In its decision, which ended a 5-year investigation, the French Competition Authority dismissed the case due to lack of evidence. The French Competition Authority found that the information exchange between the companies did not lead to an anticompetitive plan to allocate geographic markets, insofar as the information exchange took place solely in the context of preparatory discussions for the mergers. Also, the investigation found that in parallel to the alleged anticompetitive discussions, the companies continued to exert competitive pressure on each other in order to secure the most advantageous deal.

Although the case was dismissed, the French Competition Authority seized this opportunity to clarify its interpretation of the Towercast ruling.

By reference to the Towercast case, the French Competition Authority found that it can review non-reportable transactions not only under the abuse of dominance rules (Article 102 TFEU and Article L.420-2 of the French Commercial Code) but also under anti-collusion rules (Article 101 TFEU and Article L.420-1 of the French Commercial Code). In particular, the French Competition Authority rejected the non bis in idem defence as the transactions were not reportable under merger control rules.

5. CONCLUSION

In recent years, the EU has witnessed both national and European authorities' determination to broaden the scope of what is subject to control under merger control legislation, using tools beyond conventional mechanisms, allegedly to capture "killer acquisitions", *i.e.,* acquisitions aiming to shut

61 Decision (of the French Competition Authority) 24-D-05 – Akiolis, Saria, Verdannet.

down potential competition, even though doubts persist as to the impact of this theory of harm.

Merger control has shifted from being solely *ex ante* to also being capable of *ex post* scrutiny, and rather than following criteria clearly established in a pre-existing legal framework, companies are impacted by interpretations and reinterpretations made by the EC, national competition authorities and EU Courts of general provisions, whose jurisdictional impact was not fully anticipated.

The most uncontrollable and legally challenging of these mechanisms was the discretionary use of Article 22 of the EUMR, now rejected by the ECJ. Indeed, despite the setback brought about by the ECJ Illumina/Grail judgment, overcoming the now-rejected interpretation of Article 22, uncertainty remains as to how the EC and Member States will respond to the removal of this mechanism to address non-notifiable mergers that raise potential antitrust concerns.

The impact of this judgment could encourage Member States to make use of Articles 101 and 102 TFEU which prohibit anti-competitive agreements and abuse of dominance

However, the application of the restrictive practices framework to mergers following the Towercast judgement will not solve the enforcement gap at the EC level, considering the EUMR limitations, and is rather unlikely to be significantly used by competition authorities, due to its more restricted scope, limited to undertakings with a dominant position, but will provide a tool for competitors affected by below-threshold transactions, in particular by dominant market players, to bring claims before national courts to challenge concentrations, even though the consequences of such interventions are unclear.

As with the merger control rules of the DMA, the advantage of using restrictive practices provisions to dismantle a concentration *ex post*, further to potentially sanctioning consequences, is that that they do not have the wide spread impact of Article 22, since they are only applicable to certain market players and to certain circumstances, requiring a restrictive conduct and, in particular, a dominant position abusively exerted through the acquisitions.

In any case, as an *ex post* solution, it still generates relevant uncertainty, in particular in what concerns the timing of a potential intervention by the competition authorities. Indeed, when asked to limit the temporal impact of the Towercast judgement, the ECJ has refused to do so considering the direct effect of Article 102 of the TFEU.

Also, it is interesting to note that the Towercast judgement demonstrates that there is no safe harbour for any industry or sector, as telecoms and meat cutting business, the sectors impacted as of late by the referred case law, are not properly digital and pharmaceutical markets, nor the transactions at stake could be qualified as killer acquisitions.

Finally, an alternative approach could be to rely on Member States to reform domestic thresholds to include acquisition value triggers (that apply in Germany and Austria); or share of supply/market share thresholds (that apply in Portugal and Spain) or to join Denmark, Hungary, Italy, Iceland, Ireland, Lithuania, Norway and Sweden in amending national laws to permit call-in, if necessary, in a certain limited period. These alternatives would be beneficial in terms of legal certainty and limitation of false positives and reducing the impact of the Pandora's box opened by a particularly stressful and stressed approach to merger control in the EU in the last few years.

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