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A “KILLER ACQUISITION” IS WHEN A COMPANY ACQUIRES CONTROL OF AN INNOVATIVE COMPANY TO ELIMINATE THEM AS A POSSIBLE SOURCE OF FUTURE COMPETITION

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How does EU competition law see these acquisitions?

There has been a recent shift in competition rules. Traditionally, European merger control has been based on an ex-ante assessment (mergers, acquisition of controlling interests, etc.) of transactions with major economic significance. The parties to a concentration must, in particular, give notice of the transaction to the competition authorities before its implementation if the thresholds defined under EU or national laws are met. At the European level, a transaction will fall within the remit of the Commission if the combined worldwide turnover of all the merging parties exceeds €5 billion and if their EU-wide turnover individually exceeds €250 million. The problem posed by a “killer” acquisition is that, by definition, the target is still in the early stages of its development and has low, if any, turnover. The transaction is therefore not subject to EU merger control. It should be added that it often will also escape control by the national competition authorities for the same reason, which is that transactions typically fall into their merger control net on the basis of thresholds that are also defined based on turnover.

The European Commission has thus taken a non-legislative initiative through its novel interpretation of Article 22 of the EU merger regulation (No. 139/2004). This regulation initially allowed a member state that did not have national control over a concentration to make a referral to the Commission if it affected competition within its territory. However, since 2021, the Commission has considered that a national competition authority can rely on this regulation to make a referral to it, even if not falling within the scope of its national competence. This new doctrine was applied that same year in in the Illumina GRAIL case. The European Court of First Instance confirmed this analysis, noting that the text of the regulation does not expressly require that the competition authority requesting the referral be itself competent - but this judgment is currently the subject of an appeal. In Europe, therefore, we now have an instrument for controlling acquisitions below the controllability thresholds, especially given that the new Digital Markets Act, which is expected to enter into force in 2023 will require digital giants to inform the Commission of their M&A activity. In the digital area, this will be an important source of information for the application of the “new” Article 22.

Now that Europe has a new tool, should be expect a surge in merger controls?

I don’t think so, the declarations made by the European Commission don’t point to that. But I am worried about the consequences of this reform on the legal certainty provided to companies in Europe. Defining the scope of merger control by reference to turnover thresholds gave them this legal certainty because companies knew, at the transaction negotiating stage, whether it was subject to administrative control. The “competition risk” was held in check. Henceforth, the criterion triggering a right of review by the competition authorities has changed: a transaction can be reviewed if there is a risk that it can ”significantly affect competition”. This criterion is clearly not as foreseeable as that of turnover. Another factor of uncertainty is that the Commission can review a transaction after it has been closed, the Commission having indicated that it has a look-back period of up to six months after closing (or longer when the magnitude of the transaction so warrants). The risk of an ex-post control will thus hang over the transaction for a potentially long period.

In a nutshell, while the actual volume of litigation over killer acquisitions is likely to be limited, the legal impact of the reform will be felt by all European players deciding to make a below-threshold transaction. All sectors of the economy are concerned, as are all companies, whether European or not.

But isn’t it a good thing that the competition authorities are equipping themselves to fight against killer acquisitions and protect economic sovereignty in Europe?

I doubt that sustainable economic sovereignty can be built through regulations and administrative constraints. If we want Europe to once again become the master of its destiny, then we shouldn’t deter investors and entrepreneurs. Killer acquisition strategies are a limited-scale phenomenon. If we must intervene (and I’m not sure that we should), we should at least focus on a more targeted tool than that imagined by the Commission. In fact, the Court of Justice will soon be entering its decision in the Towercast case on the possibility of applying Article 102 TFUE to killer acquisition strategies on the basis of abuse of dominance. This is a possible lead to be explored, even if it is also not without risk.