The CJEU corrects the expansive interpretation of the European Commission aimed at monitoring below threshold anti-competitive acquisitions of start-ups

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This week the European Court of Justice (CJEU) published its ruling overturning the decision of the General Court and the decision of the European Commission (EC) in the Illumina-Grail case. The substance of the case revolves around Article 22 of the EU Merger Control Regulation (EUMR), a provision which, in its traditional interpretation, allows one or more Member States to refer to the EC economic concentrations subject to merger control in the competent States.

Around 2021, the European Commission was concerned that so-called killer acquisitions (purchases of innovative start-ups by large technology and biotechnology companies) could be carried out without administrative oversight, eliminating potential future independent competitors from the market. The fear was rooted in the fact that the EUMR thresholds require a turnover component of many millions of euros for each of the companies, which start-ups lack.

The EC considered the possibility of modifying the EUMR thresholds to capture the indicated killer acquisitions, but the reform was ruled out in part because Article 22 EUMR acts as a kind of net that would allow the EC to supervise killer acquisitions through detection at the national level and subsequent referral. In addition, the EC established a new interpretation of Article 22 EUMR allowing Member States to refer concentrations to the EC even if they were below the national notification thresholds.

It was precisely this administrative interpretation that gave rise to the litigation when Illumina acquired Grail, a transaction that did not meet any notification threshold in the EU or Member States. Several Member States, following the new interpretation of Article 22 EUMR, referred the operation to the EC, which ordered Illumina to submit to the merger control procedure and, in the event of its refusal, prohibited the operation and ended up imposing a fine of 432 million euros.

Illumina appealed against the European Commission's decision before the General Court of the EU and lost in first instance. On appeal, however, the CJEU ruled in favor of Illumina. To the extent, always limited, that litigation could be predicted, this is an expected result, as we are dealing with a flagrant case in which the Community Executive Power (Commission) and the Judicial Power (General Court) have usurped via interpretation the functions of the Legislator (the only body competent to modify the thresholds of the EUMR). It is hardly conceivable in a democratic system based on legal certainty that the EC should unilaterally introduce new notification thresholds (and, therefore, authorization requirements) for transactions that would not otherwise be subject to those requirements, and enforce them with the utmost rigor.

The effectiveness of some more recent administrative mechanisms, such as the *ad hoc* requirement to notify acquisitions made by large technology platforms subject to the Digital Markets Act, relies heavily on the EC advocated interpretation of Article 22 of the EUMR (given that the detection of additional transactions would only lead to their supervision under the interpretation of the below threshold notification system advocated by the EC). This possibility is now weakened. However, the possibility persists, as recognized by recent CJEU case law (*Towercast* case), that Member States may investigate, under Article 102 TFEU, acquisitions made that adversely impact competition as constituting an abuse of a dominant position. There are also some Member States that have given their competition authorities the power to challenge acquisitions after they have been completed, even if they do not meet the notification thresholds.

These are small consolations for the EC, which will undoubtedly have to reflect on the issue. Perhaps the debate on the possible revision of the notification thresholds of the EUMR will be reopened in order to capture more *killer acquisitions*. Several European countries (Austria, Germany) have notification thresholds that are not strictly based on turnover but on the price or value of the transaction. Spain has a market share threshold which, on reflection, makes much more sense than turnover thresholds, as market share is a much more indicative measure of a company's market power.

Finally, Article 22 EUMR allowed the EC in the past and under the traditional interpretation, to assess some potentially problematic concentrations such as the purchase of WhatsApp by Facebook. It will continue to fulfill that role, but under the orthodox interpretation.