Artículos

NEW TRENDS IN MERGER CONTROL: CAPTURING THE SO-CALLED KILLER ACQUISITIONS… AND EVERYTHING ELSE

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New trends in Merger Control: Capturing the so-called *Killer Acquisitions*… and Everything Else

When assessing an M&A transaction, once it is determined that the transaction is a concentration under competition law, it must be assessed whether the concentration is subject to a mandatory merger control filing. Until recently, this exercise was — although somewhat complex — quite objective and only the transactions that exceeded the notification thresholds were caught by the mandatory merger control system. However, over the last few years there have been wide-ranging discussions about the adequacy of the existing merger control tools to capture and sufficiently assess the concentrations that could significantly impede effective competition, namely the so-called killer acquisitions. These discussions started to materialize with the European Commission reinterpreting existing tools to broaden its powers for merger control, ending up introducing more uncertainty for businesses, increased costs, potential delays to closing and increased burdens in the drafting of the transaction documents.

Key words:
Concentration of Undertakings, Merger Control, Merger Regulation, Article 22, Referral Mechanism, Killer Acquisitions, M&A Best Practices, Portuguese Competition Act, Competition Law Risks.

Novas tendências no controlo de concentrações: capturando as chamadas *Killer Acquisitions*… e tudo o resto

Ao avaliar uma operação de M&A, uma vez determinado que a operação constitui uma concentração nos termos do direito da concorrência, deve ser avaliado se a concentração está sujeita à obrigação de notificação para efeito de controlo de concentração. Até há pouco tempo, este exercício era — embora algo complexo — bastante objetivo e apenas as operações que excediam os limiares de notificação eram abrangidas pelo siste-

ma de controlo obrigatório das concentrações. Contudo, ao longo dos últimos anos, houve amplas discussões sobre a adequação dos instrumentos de controlo de concentrações existentes para capturar e avaliar suficientemente as concentrações que poderiam criar entraves significativos à concorrência efetiva, nomeadamente as chamadas killer acquisitions. Estas discussões começaram a materializar-se com a abordagem da Comissão Europeia no sentido de reinterpretar os instrumentos existentes para alargar os seus poderes de controlo de concentrações, acabando por introduzir mais incerteza para as empresas, um aumento dos custos, potenciais atrasos no closing e aumento dos encargos na elaboração dos documentos da transação.

Palavras chave:
Concentração de Empresas, Controlo de Concentrações, Regulamento de Concentrações, Artigo 22, Mecanismo de Remessa, Killer Acquisitions, Boas Práticas em sede de Fusões e Aquisições, Lei da Concorrência, Riscos Jus-Concorrenciais.

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The rationale behind the existence of a merger control system is to prevent, *a priori*, the implementation of mergers that may distort competition or hinder the proper functioning of the internal market. Thus, by granting a mandatory nature to the merger control filing, the European Union ("EU") and national legislators aim to be able to deter concentrations with a negative impact on competition.

In this sense, several tools have been created to automatically capture the transactions that are most likely to raise competition concerns.

Based on such tools, when assessing an M&A transaction, it must be assessed whether the transaction is a concentration under competition law, and if the concentration is subject to a mandatory merger control filing. Until recently, this exercise was — although somewhat complex — quite objective and only the transactions that amounted to a lasting change of control and exceeded the notification thresholds were caught by the mandatory merger control system.

In fact, from a competition standpoint, the concept of concentration encompasses transactions that constitute a lasting change in the control structure of the undertaking at stake and, as a consequence, possibly, in the structure of the relevant market[1]. Therefore, the concentration is deemed to occur whenever there is an acquisition of control leading to a durable change of control over certain assets with a market presence that could constitute an undertaking for competition purposes[2].

As a second step, it must be determined whether the concentration is subject to a mandatory merger control filing or not. To this end, in almost all jurisdictions, the notification thresholds are the tool used to determine the transactions that may potentially cause competitive concerns, and as such, must be subject to mandatory merger control.

1 Recital 20, Preamble, Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

2 Article 3(1), Regulation 139/2004, of 20 January 2004, on the control of concentrations between undertakings.

The thresholds set forth in most jurisdictions, including the EU, are based on the turnover of the parties to the concentration[3]. In addition, in certain jurisdictions, the relevant merger control framework sets forth, further to the turnover thresholds, alternative market share thresholds (*e.g.* in Spain[4] and in Portugal[5]) and transaction-value thresholds (*e.g.* in Germany and Austria[6]).

Therefore, currently, most merger control regimes capture (and require mandatory notifications for an *ex-ante* control) transactions that amount to a lasting change of control and trigger the relevant notification thresholds. However, over the last few years, there have been wide-ranging discussions based on the assumption that the existing merger control tools, both at national and EU level, seem no longer sufficient nor adequate to capture and assess concentrations that could significantly impede effective competition.

In fact, this panorama automatically excludes from the competence of the competition authorities operations that may harm competition. This is, for example, the case of transactions aimed at the acquisition of pioneering firms that, although having an exponential growth potential, do not yet generate a significant turnover or have a relevant presence on the market (the so-called *killer acquisitions*) and, as such, do not trigger the relevant thresholds. This is also the case of the acquisition of non-controlling minority shareholdings, because they do not amount to an acquisition of control over a lasting period, even though they can confer a certain degree of influence, depending of the concrete circumstances, over the undertaking at stake.

In this context, the EC and National Competition Authorities ("NCA") have been assessing solutions to widen the scope of mandatory notifications and call-in potentially harmful transactions that would otherwise escape their scrutiny. This is a task faced with its own complexities, as there is a significant risk of creating a bottomless pit into which fall in fact the risky transactions, but also insignificant ones. Thereby, disproportionally and unnecessarily introducing more uncertainty for businesses, increased costs, potential delay to closing and increased burden in the drafting of the transaction documents.

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3 Concentrations in which cumulatively (i) the aggregate worldwide turnover of all the parties exceeds €5 billion, and (ii) the aggregate European turnover of at least two parties individually exceeds €250 million (see Article 1(2) of the EU Merger Regulation); or according to a complementary threshold, transactions in which (i) the aggregate worldwide turnover of all the parties is more than €2,5 billion, (ii) the aggregate turnover of all the parties in three Member States individually is more than €100 million, (iii) the individual turnover of at least two parties is more than €25 million in each of these three Member States, and (iv) the aggregate European turnover of at least two parties individually is more than €100 million (see Article 1(3) of the EU Merger Regulation).

4 Article 8(1), Law no. 15/2007, of 3 July (BOE of 4 July 2007) (Spanish Competition Act) provides two alternative criteria:

as a result of the concentration, a market share equal to or greater than 30% of the relevant product or service market is acquired or increased at the national level or in a defined geographic market within the country, except if the overall turnover in Spain of the acquired company or of the assets acquired in the last period does not exceed the amount of €10 million, provided that the participants do not have an individual or joint share equal to or greater than 50% in any of the affected markets; or

the aggregate turnover in Spain of all the participants exceeds €240 million in the last financial year, provided that at least two of the parties have an individual turnover in Spain of more than €60 million.

5 Article 37(1) of the Portuguese Competition Act provides three alternative criteria, two of them including market shares:

the transaction leads to the acquisition, creation or reinforcement of a market share equal to or greater than 50% in the national market of a specific product or service, or in a substantial part of it (market share criterion);

the transaction leads to the acquisition, creation or reinforcement of a share equal to or greater than 30% but smaller than 50%, provided that the turnover individually achieved in Portugal, by at least two of the companies concerned, is higher than €5 million (mixed criterion); or

the involved undertakings have an aggregate turnover in Portugal of more than €100 million, provided that the turnover achieved individually in Portugal by at least two of those undertakings is higher than €5 million (turnover criterion).

6 German and Austrian Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

It is in this context that the EC and NCAs have, over the last few years, extensively analysed several possibilities opportunities to reform the merger control rules, in particular through new tools, the reinterpretation of existing standards, stricter competitive assessment and more sophisticated substantive assessment of mergers, as further detailed below[7].

1. Capturing the so-called *killer acquisitions*

The type of transactions that pointed out more clearly the merger control systems alleged malfunction are the so-called *killer acquisitions*. These are transactions allegedly aimed at acquiring high potential nascent and innovative firms, normally by undertakings already well established in the relevant markets, which are escaping the control of the competent authorities, as these targets — that do not yet generate a significant turnover or have a relevant presence on the market — would not trigger the existing notification thresholds.

This alleged enforcement gap is said to have resulted in a growing flaw in the system, allowing, without *ex ante* control, to limit, as an autonomous contender, companies whose high potential suggested that they could quickly become a major competitor and a significant source of countervailing power in the relevant markets.

The rationale is that these transactions are, allegedly, mostly aimed at shutting down such pioneering firms while acquiring its high potential emerging technology and key staff, all this while simultaneously eliminating a competitive threat, hence their designation as "*killer acquisitions*". The most commented cases of such alleged practices concern the acquisitions of start-ups in the digital sector or companies in the pharmaceutical sector which R&D has not yet generated any turnover.

To answer this so-called gap, all options have been on the table: lowering the turnover threshold; creating new thresholds, *e.g.* the transaction value threshold; implementing market share threshold in jurisdictions where it does not exist yet; considering *ex-post* control, etc. Many options have been considered and apart from some exceptions — as in Germany and in Austria, which implemented the transaction value threshold — no clear solution had been implemented.

However, in 2021, in the midst of the pandemic and a certain downturn in economic activity, everything has accelerated, somewhat unexpectedly, at least in what concerns the methodology to implement such changes. The discussions have started to materialize at the EU-level with the new guidance issued by the EC on the application of the referral mechanism set out in Article 22 of the EU Merger Regulation ("EUMR") ("Article 22 Guidance")[8].

7 See, *Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control*, published on 26 March 2021, in which the EC assessed whether the current merger control tools suffice to capture transactions that merit EU review and whether the administrative burden on merging firms and other players is proportionate, available at https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf.

8 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, available at https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

2. Several attempts to address the alleged killer acquisitions

The emergence of the *killer acquisition* issue within the merger control scenario has been accompanied by an extensive list of non-notified acquisitions, because they did not trigger the existing merger control thresholds, especially in the EU, which are mainly turnover based.

This type of transactions is mainly (but not exclusively) prevalent in the pharmaceutical and digital economy sectors, in which innovation is key and which comprises companies with significant market power with an alleged claim (and capacity) to extend their domination, without any control, by passing between the cracks of the system.

As an example, since 2006, Google has acquired over 200 companies, including Waze and YouTube, Microsoft over 100 companies, Apple over 90 companies, Facebook absorbed over 80 companies, including Instagram and WhatsApp, Amazon took over 70 companies, such as Whole-Foods Market and Twitch — all acquisitions that are said to have contributed to the exponential growth of these tech giants[9].

In the Facebook/WhatsApp case[10], perceived as an eye-opener case, the acquisition of WhatsApp by Facebook was not caught by the EUMR despite the multi-billion deal value and was only assessed by the EC through the referral mechanism. Similarly, the acquisition of control by Apple over Shazam was only reviewed by the EC after it was referred by several Member States under Article 22(1) EUMR[11]. Nevertheless, and noticeably, both these acquisitions were approved, without remedies/commitments.

The EC, in its Commission Staff Working Document, from March 2021, mentioned that between 2015 and 2019, 87 transactions — 42 in the digital sector, 24 in the pharma sector and 21 from other sectors — might have potentially merited review due to horizontal overlaps or other commercial links. 27 of which drew particular attention, since the transaction value exceeded the target's turnover by a ratio of 10 or more[12].

In this context, the idea that there could be an enforcement gap in this area led to the conclusion that EU Member States and the EU, as well as non-EU jurisdictions, required additional instruments in their toolkit to capture the acquisition of promising undertakings whose turnover was insufficient to trigger the existing merger control thresholds.

9 Based on publicly available information, as updated, for example, the *Ex-post Assessment of Merger Control Decisions in Digital Markets*, prepared by Lear for the Competition and Markets Authority ("CMA"), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

10 Case (CE) COMP/M.7217 – *Facebook/WhatsApp*, of 3 October 2014.

11 Case (CE) M.8788 – *Apple/Shazam*, of 6 September 2018.

12 Paragraphs 105 ff., *Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control*, available at https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf.

The main solution that has been envisaged is to amend the existing merger control thresholds in a way said to be directly inspired by the United States of America ("US") transaction value threshold. This threshold is called the size-of-transaction threshold and captures transactions resulting for the acquirer to hold voting securities, non-corporate interests, and/or assets of target valued above USD 92 million[13]. When the value of the transaction stands between USD 92 million and USD 368 million, parties must also satisfy the applicable size-of-person threshold related to annual net sales or total assets value of the parties. Above USD 368 million, the triggering of the size-of-transaction threshold is sufficient to trigger the notification obligation.

Although, this solution is susceptible to criticism, including the potential for encouraging attempts to artificially reduce the value of the transaction by splitting it up into several transactions, it allows to translate the competitive potential of the target business which is not yet visible through objective measures such as turnover and market shares. This tool is based on the assumption that the acquirer pays the price of what it anticipates the target would likely become — even if at the time the target has generated no or low revenue and has an insignificant presence on the market.

In this context, a transaction value test was also considered by certain Member States (*e.g.* France) and already introduced by Germany and Austria[14].

Germany adopted a transaction value-based threshold, thus imposing the mandatory notification of transactions whose consideration paid exceed EUR 400 million, provided that the target is significantly active in Germany, one of the parties generated a turnover above EUR 50 million German and the parties have a worldwide combined turnover over EUR 500 million. In Austria, the same test was adopted, with slightly lower thresholds.

The United Kingdom ("UK") is assessing the possibility to adopt new tools to catch transactions involving digital businesses that are deemed to have "strategic market status" and which may include a new size-of-transaction test.

In its Report, of December 2020, *A New Pro-Competition Regime for Digital Markets — Advice of the Digital Markets Taskforce*, the CMA resorted to the concept of Strategic Market Status ("SMS") defined, by the Furman Report, as "*enduring market power over a strategic bottleneck market*"[15]. Based on the CMA's recommendations the digital companies having SMS (including Facebook and Google) should be subject to an enforceable code of conduct, pro-competitive interventions and specific merger rules, including the obligation to make the CMA aware of all transactions, as well as a mandatory merger control notification (opposed to the current voluntary nature of the UK merger control system) for transactions that meet clear-cut thresholds based on, preferably (but not yet decided), a size-of-transaction test.

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13 Hart-Scott-Rodino Antitrust Improvements Act of 1976, as updated in 2021.

14 See Germany and Austria joint Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

15 CMA's Report, of December 2020, *A New Pro-Competition Regime for Digital Markets – Advice of the Digital Markets Taskforce*, available at https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

For the time being, the UK, that is now navigating EU law enforcement outside the EU, already has a tool that allows it to capture transactions that escape the EC's and other NCAs jurisdiction. The Enterprise Act 2002, section 23, provides that merger control rules apply, among others, to transactions where, as a result of the merger, a share of 25% or more in the supply or consumption of goods or services of a particular description in the UK (or in a substantial part of the UK) is created or enhanced.

As such, over the last few years several merger transactions in the digital and pharmaceutical sector, despite not being caught by the EUMR or by NCAs' pure turnover thresholds, triggered the UK alternative share of supply test threshold and were reviewed by the Competition and Markets Authority ("CMA"). This was the case of Amazon/The Book Depository[16], Facebook/Instagram[17], Google/Waze[18] and Priceline/Kayak[19] transactions.

France also considered the possibility of introducing an *ex-post* control mechanism or a new threshold based on the value of the transaction, but ultimately these were not included in the new merger control guidelines adopted by the Autorité de la Concurrence ("FCA") in July 2020. Instead, the FCA opted to rely on a broader interpretation of Article 22 EUMR, as suggested by the EC[20].

3. A convenient but questionable reinterpretation of article 22 EUMR

The EU has decided to move from discussion to action, testing an option for some time under analysis, without reaching a consensus. In 2014, in its working paper on the review of the EUMR, the EC proposed to amend the text to ensure that, in the event of an Article 22 referral[21], it would have jurisdiction over the whole territory of the European Economic Area ("EEA"). Thereby, the EC already tried, without actual results, to extend its competence through Article 22, but this referral option would still, apparently, be dependent on the competence of the National Competition Authorities ("NCA") to review the transaction at national level[22].

In 2021, the EC came back more assertively (and aggressively) with this option, with the cooperation of the French competition authority, which has been advocating this option for several years,

16 Case (CMA) ME/5085/11 – *Amazon.com/The Book Depository International Limited*, of 26 October 2011.

17 Case (CMA) ME/5525/12 – *Facebook/Instagram*, of 14 August 2012, at which time Instagram had not generated any turnover since it was established.

18 Case (CMA) ME/6167/13 – *Motorola Mobility Holding (Google, Inc.)/Waze Mobile Limited*, of 11 November 2013.

19 Case (CMA) ME/5882-12 – *Priceline.com/Kayak Software Corporation*, of 9 May 2013.

20 2020 *Merger Control Guidelines of the Autorité de la Concurrence*, of 23 July 2020.

21 Article 22(1) EUMR: "*One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.*

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned."

22 White Paper, *Towards more effective EU merger control*, paragraphs 69 ff., available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449&rid=2.

and bypassing any formal legislative procedure, public consultation or implementation period. After concluding that the German and Austrian transaction-value threshold was not an adequate tool to capture the so-called *killer acquisitions*, the EC found that a revised referral policy was, indeed, the best suited solution under the actual circumstances[23].

Before formally publishing its Article 22 Guidance, and without warning, in February 2021 — more than 6 months after the transaction was announced — the EC had already started to test the water, when it decided to contacte the NCA of all Member States informing that a transaction, already assessed by the CMA, under assessment before the FTC (the US competition authority): the acquisition by Illumina of Grail — a healthcare company developing blood-based tests for early multi-cancer detection — could affect trade between Member States and threaten to significantly affect competition within the territory of one or more Member States[24].

Consequently, the EC invited all the NCAs (from all EU and EEA Member States) to submit a referral request under Article 22(1) of the EUMR, regardless of whether they had jurisdiction under the national merger control rules. An invitation accepted by France, later joined by Belgium, Greece, Iceland, the Netherlands and Norway, thereby enabling the EC to take jurisdiction over a transaction that met none of the relevant thresholds, *i.e.* over a transaction that did not fall under the competence of any NCAs nor the EC.

With the Illumina case preceding the new Guidance on Article 22, the EC has decided not to beat about the bush, ignoring any principle of legal certainty and legitimate expectations, clearly announcing that it aims at ensuring the review by the EC, through referrals by Member States, of transactions that otherwise would escape merger control by falling below the relevant and existing thresholds.

As a way of legitimising this approach, the EC adopted, *a posteriori*, on 26 March 2021 the Article 22 Guidance, relying on criteria that are not necessarily predictable from the companies' standpoint, as further detailed below, and represent a complete shift from its previous position, by now encouraging referrals from Member States even if national filing thresholds are not met[25].

Concretely, Article 22 allows one or more Member States to request the EC to examine a concentration which does not have an EU dimension but which affects trade between Member States and threatens to significantly affect competition in the territory of the requesting Member State(s). The EC had developed a practice of discouraging such referrals where the request came from Member States that did not have the original competence to review the transaction, only accepting Article 22 referrals if the transaction exceeded the national notification thresholds in at least one Member State.

23 Section 5.1.1.6, *Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger control*, available at https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf.

24 Case M.10188 – Illumina / Grail, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_10188.

25 For further information, see UM Newsletter on *The European Commission's new policy to broaden the scope of merger control*, available at https://www.uria.com/documentos/circulares/1396/documento/12251/UM-Nesletter.pdf?id=12251.

However, it was understood that as the wording of Article 22 is very broad, and makes it possible to catch almost any concentration, it has emerged as the "ideal" instrument for the EC to review the applicable rules, bypassing the rules laid down by both the EU and the national Member States' legislatures.

Thus, through such reinterpretation, the EC has expressly granted itself — outside of any legislative procedure — the ability to review a transaction falling below all merger thresholds in the EU, just based on the assumption that it may affect trade between Member States and significantly affect competition within the territory of the Member State(s) making the request for referral.

In practical terms, this ends up introducing more uncertainty for businesses, increased costs, potential delays to closing and increased burdens in the drafting of the transaction documents, as detailed below.

4. A stab in the back of legal certainty and foreseeability of mandatory merger control filing

When assessing an M&A transaction, once it is determined that the transaction is a concentration under competition law, it must be assessed whether the concentration is subject to a mandatory merger control filing[26].

In this context, the reinterpretation of Article 22 bases the obligation to notify concentrations on unpredictable criteria.

Previously, although with some complexities, it was possible to assure companies that the notification thresholds were not met and that, consequently, there would be no mandatory merger control, since the threshold-based merger control system follows an objective approach – based on actual figures.

However, now, with the re-purposed Article 22, it is impossible to do so without a substantive review of the impact of the transaction, which may involve a rather subjective analysis, as parties to a transaction will have to try to anticipate a potential interest to review the transaction in any EU Member States, without any precise and objective criteria.

Although imperfect, the system of thresholds guaranteed a certain degree of legal certainty, which is now undermined by this new system based on a subjective assessment of the substance of the transaction.

26 For further information on this subject, see Tânia Luísa Faria and Margot Lopes Martins (2020). Pre-Closing Competition Law Issues: How To Overcome The Gun Jumping Mania and Other Competition Law Risks. *Actualidad Jurídica Uría Menéndez*, 54, pp. 186-203, available at https://www.uria.com/documentos/publicaciones/7210/documento/foro-ue02.pdf?id=12047.

Moreover, the Article 22 Guidance is very short, general, and leave ample room for interpretation of the criteria to be considered, which further limits the foreseeability of the obligation to notify a concentration to the EC or an NCA.

In fact, to be subject to notification under an Article 22 request referral, only two requirements need to be fulfilled: the transaction must (i) affect trade between Member States; and (ii) threaten to significantly affect competition within the territory of the Member State requesting the referral.

In its Guidance the EC provided certain elements for the analysis of a transaction under the spectrum of Article 22. However, the orientations remain demanding to interpret with application methods that are likely to be complicated to implement.

For example, for the second criterion, the EC resort to the concept of "*a real risk that the transaction may have a significant adverse impact on competition*", explaining that the EC will particularly take into account the "prospective nature" of the merger control assessment[27]. Thus, any risk of change can be taken into account. However, the target is of course bound to change and evolve, but the acquirer obviously does not have all the elements to assess exactly, beforehand, how and to what extent the target may evolve in the market.

Additionally, the deadline for an NCA to refer a transaction, over which it has no jurisdiction, to the EC is also unpredictable. Where no notification is required, the interested NCA must request a referral to the EC within 15 working days of the date on which it has "*sufficient information to make a preliminary assessment*" as to the relevance of an eventual referral. This leaves excessive discretion for the authority to determine when it actually became aware of the transaction[28].

The Illumina/Grail case, abovementioned, is the perfect example of the unpredictability of a reference to a deadline which onset is largely subjective. The transaction was publicly announced in September 2020 and further received extensive coverage in relevant international newspapers, including the Financial Times, being easily accessible to the NCAs. Yet, the EC considered that the French referral request, submitted in March 2021, six months after its extensive release in the press, had met the deadline criteria.

Moreover, under the Article 22 Guidance, the NCAs may request a referral of transactions already closed. Thus, subjecting the parties to suspend a transaction already entered into, and likely already implemented, for up to six months after closing, and potentially longer if justified by the extent of the competitive concerns[29]. This means that, in case the EC find any relevant competitive concerns, it may order to revert the transaction, imposing the re-establishment of the situation prior to the transaction.

Furthermore, considering that there are 27 Member States, which may potentially require the referral of the operation to mandatory control, this creates, in addition to subjectivity in the appli-

27 Paragraph 15, Article 22 Guidance.

28 Paragraph 28, Article 22 Guidance.

29 Paragraph 21, Article 22 Guidance.

cability of the notifiability criteria, significant coordination problems and will necessarily delay the M&A process. Bearing in mind that one authority is sufficient to trigger the Article 22 mechanism, provided that the EC accept the referral, in order for the transaction to be mandatorily notified — even if no notification threshold is reached.

While it is undeniable that it is necessary to apprehend certain mergers that do not fall between the cracks and are potentially harmful for competition, it is necessary for the EC to be more precise, to define deadlines, to clearly determine the transactions concerned, and to resort to the notion of clear and objective thresholds, so as to increase the visibility of the parties and avoid transforming the merger control system into a bottomless pit.

5. The impact of minority/common shareholdings

The so-called *killer acquisition* are not the only type of transaction the competition authorities are willing to start capturing. The EC and the NCAs have also turned to the issue of minority/common shareholdings that normally fall outside the scope of merger control, but are not unlikely to raise competition concerns.

Although some jurisdictions already apply merger control rules to acquisitions of non-controlling minority shareholdings, merger control regimes have mainly focused on minority shareholding acquisitions that confer control (*i.e.* give the acquirer the possibility of exercising decisive influence over an undertaking) and are not equipped with tools to face this reality, which has brought an increasing attention to it.

In fact, in the EU, as in Portugal, a change of control on a lasting basis is the fundamental criterion for the merger control rules to apply to a given transaction. Therefore, from a competition standpoint, a concentration is deemed to occur whenever there is a durable change of control over certain assets with a market presence that could constitute an undertaking for competition purposes.

As such, while the criterion of a lasting change of control is almost always met in the case of majority shareholdings, minority shareholdings do not in principle lead to a lasting change of control, except when they grant the ability to influence the target's strategic decisions, *e.g.* through veto rights in key strategic matters, such as budget's approvals, business plans and appointment of board members.

Therefore, *ex ante* merger control is only mandatory if the minority shareholding grants its holder a decisive influence over the target. Outside of this scenario, and in most cases, minority shareholding acquisitions do not confer control and, as such, they are not subject to merger control rules. In other words, in such cases competition authorities do not have the power to review or take action against non-controlling minority shareholding acquisitions, even if they could potentially harm competition.

Thus, as in the case of the so-called *killer acquisitions,* there is an apparent enforcement gap, which leads to potentially harmful transactions escaping prior control by the competent authorities.

6. The importance of non-controlling minority/ common shareholdings in competition law assessment

The possibility that non-controlling shareholding acquisitions may harm competition even when there is no change of control of the target has been identified in several cases such as the Ryanair/ Aer Lingus case[30], Siemens/VA Tech case[31], Dow/DuPont[32] and Bayer/Monsanto[33]. In those cases, various risks have been identified.

The authorities have considered that non-controlling shareholding acquisitions may lead to horizontal coordinated effects, in particular in the context of sharing sensitive information between two companies with the same minority shareholders, in the sense that the common shareholder has privileged access to both undertakings information.

The Ryanair/Aer Lingus case highlighted this risk and shed light on this enforcement gap. In this case, in 2007, the EC initially prohibited the takeover of Aer Lingus by Ryanair as it would, allegedly, significantly impede effective competition. However, Ryanair subsequently acquired minority shareholdings in Aer Lingus until it held a 29.8% stake. Aer Lingus requested the EC to revert the transaction, arguing that these subsequent acquisitions by Ryanair amounted to an unlawful partial implementation of a concentration.

However, and even if competition concerns could arise from the transaction, the EC rejected such claim, based on the fact that Ryanair's minority shareholding in Aer Lingus did not grant it any *de jure* or *de facto* control[34]. Thus, considering that there was no "concentration" within the meaning of competition law, but a mere acquisition of a minority shareholding falling outside the scope of the EUMR, such that the EC had no power to require its divestment. The case was brought before the General Court of Justice, which upheld the EC's decision[35]. Therefore, technically, under the EUMR, no concentration had been implemented since there was no acquisition of control, *i.e.* no possibility of exercising decisive influence over Aer Lingus.

As such, even if competition concerns had been identified — namely because Ryanair could use its minority shareholding to access Aer Lingus' confidential strategic plans and business secrets, thus lessening Aer Lingus' capacity to compete with Ryanair and/or weakening Ryanair's incentives to compete, given its desire to maintain the value of its investment in Aer Lingus — the EC had no competence over it.

30 Case (CE) COMP/M.4439 – *Ryanair/ Aer Lingus*, of 11 October 2007.

31 Case (CE) COMP/M.3653 – *Siemens/VA Tech*, of 13 July 2005.

32 Case (CE) M.7932 – *Dow/DuPont*, of 27 March 2017.

33 Case (CE) M.8084 – *Bayer/Monsanto*, of 21 March 2018.

34 Case (CE) COMP/M.4439 – Ryanair / Aer Lingus, paragraph 11.

35 Case (General Court) T-411/07 - Aer Lingus Group plc v. EC, of 6 July 2010.

This case was particularly important as it revealed the EC's incapacity to take action against non-controlling minority shareholding acquisitions that could actually harm competition. In fact, subsequently, in 2010, the UK competition authority, the OFT at the time, decided to review this transaction and ultimately only cleared the transaction upon remedies, requiring Ryanair to sell its 29.8% stake in Aer Lingus down to 5%[36].

According to the OFT found that, although Ryanair did not have board representation in Aer Lingus, its minority shareholding granted it the ability to "materially influence" Aer Lingus' policy. The OFT considered that Ryanair could block various types of shareholder resolution relevant for Aer Lingus commercial strategy. In this context, and as the Ryanair and Aer Lingus together accounted for more than 25% of the market for air passengers between the UK and Ireland, the abovementioned "share of supply" test was met. Therefore, the OFT had jurisdiction to review this transaction, under the national provisions.

Another case that apparently shed some light on the harmful horizontal effects that non-controlling minority shareholding acquisitions can have on competition was the Siemens/VA Tech case. In this case, the EC considered that Siemens' minority shareholding in SMS Demag, a competitor of VA Tech, might threaten competition as Siemens could access strategic information about SMS Demag's business policy and therefore lessen competition in a highly concentrated market. In this sense, the merger was only approved after Siemens' commitments to transfer its rights as a shareholder of SMS Demag to a trustee pending the divestiture.

Besides, risks of unilateral vertical effects have also been identified, namely in case the companies concerned are present on an upstream and a downstream market.

Attention was brought to the possibility of non-controlling acquisitions producing harmful vertical effects in competition with the IPIC/MAN Ferrostaal case[37]. In this case, the EC had concerns that the transaction would reduce competition on the high-quality melamine markets because of the vertical relationship between Eurotecnica — in which MAN Ferrostaal held a minority shareholding — and the Austrian melamine producer AMI, controlled by IPIC. The EC had concerns that, further to the merger, the merged entity would have the ability control entry and expansion in the high-quality melamine market by steering Eurotecnica's licensing policy vis-à-vis AMI's competitors which are dependent on this technology. Consequently, the EC only cleared the acquisition upon IPIC's commitment to divest Man Ferrostaal's minority shareholding in Eurotecnica.

Similar reasoning was applied in the Arena Atlântida/Pavilhão Atlântico/Atlântico case in Portugal, in which the remedies included the divestment by the acquirer's group of a minority shareholding in a competitor[38]. In its assessment of the transaction, the Portuguese Competition Authority ("AdC") noted that one of the shareholder held a 32.5% minority stake of Ticketline, a company active in the ticketing services market, and a direct competitor of Blueticket — a subsidiary of the

36 Case (OFT) Ryanair / Aer Lingus Group plc, available at https://www.gov.uk/cma-cases/ryanair-aer-lingus-merger-inquiry#core-documents.

37 Case (CE) COMP/M.5406 - IPIC/MAN Ferrostaal, of 13 March 2009.

38 Case (AdC) Ccent. 38/2012 – *Arena Atlântida/Pavilhão Atlântico*Atlântico*, of 21 March 2013.

acquirer — and was a director of the latter. In addition, Pavilhão Atlântico — the target — and Blueticket were suppliers of a company wholly owned this shareholder, both active in the promotion of shows in Portugal, an activity vertically related to the exploitation of venues for shows and ticketing services. Thus, considering, in addition, that Arena Atlântida can significantly condition the competitive capacity of the show promoters in Portugal, which, moreover, are competitors of its shareholders, the AdC concluded that the merger could hinder competition in the market, insofar as the merged company would have the ability and the incentives to distort competition in the market. As such, the transaction was only cleared upon the adoption of remedies including, among others, the divestment of the minority stake held in Ticketline.

Finally, common institutional shareholding may also have unilateral horizontal effects due to a competitive disincentive vis-à-vis other companies in which the shareholders hold shares, the so-called *common shareholdings*.

Common shareholding is characterised by the simultaneous holding of minority stakes in several competing companies. Although, as mentioned a minority shareholding does not lead to a substantial change in the control of the target company and does not allow the shareholder to influence the strategy of the company in a decisive way, situations of common ownership are being discussed in relation to competition policy.

Common shareholding could be the source of possible anticompetitive behaviour by facilitating collusion or by unilaterally influencing commercial decisions, for example, leading to price increases.

In this context, and although they have not become a regular feature in EU merger analysis, the EC took into account common shareholdings in Dow/DuPont[39] and Bayer/Monsanto[40] in 2017 and 2018. The EC concluded that the usual market share indicators, such as the HHI Index, were likely to underestimate the level of market concentration, underestimating the expected non-coordinated effects of the Transaction[41]. The EC considered, during the review of these cases, that the presence of the same investors in the capital of such companies would reduce their incentive to compete and to invest in R&D, namely when this would harm the interests of the competing firms held in the same institutional investor portfolio.

Besides, the existence of structural links between companies due to the presence of the same minority shareholders in their capital may also lead to the establishment of a blocking mechanism for potential new entrants on the market.

In conclusion, without constituting a concentration within the meaning of the EUMR, acquisition of minority/common shareholdings can lead to anticompetitive behaviours, in breach of Article

39 Case (CE) M.7932 – *Dow/DuPont*, of 27 March 2017.

40 Case (CE) M.8084 – Bayer/Monsanto, of 21 March 2018.

41 Case (CE) M.7932 Dow/DuPont, Annex 5, paragraphs 4 and 81; Case (CE) M.8084 Bayer/Monsanto, paragraph 229.

101 (restrictive practices)[42] or Article 102 (abuse of dominant position)[43] of the TFEU (and corresponding national provisions), and are, for that reason, capable of being subject to the EC's or of the NCAs' *ex-post* control.

7. A continuous but unsuccessful hunt for a solution

Even if, over the last years there were various calls to look on this issue, it remains relatively unassessed, since national and EU competition law does not allow authorities to review the so-called non-controlling minority shareholdings under the framework of merger control.

Seeking to "catch" all types of transactions that may harm competition, the EC launched a consultation, in 2013, which suggested ways to reform the EUMR, in particular with regard to the control of minority shareholdings. As a follow-up, it published, in 2014, a White Paper[44] that described in detail its concerns about non-controlling minority shareholdings and their potential horizontal and vertical effects on competition. The EC identified several risks, namely: (i) reducing competitive pressure between competitors; (ii) substantially facilitating coordination among competitors; and (iii) allowing companies to hamper competitors' access to inputs or customers.

Therefore, the White Paper also proposed extending the EUMR's scope, setting out a "targeted" transparency system in which an undertaking would be required to submit an information notice to the EC if it proposes to acquire a minority shareholding that qualifies as a "competitively significant link". For an acquisition to be considered a competitively significant link, (i) there must be a competitive relationship between the acquirer and the target, or they must be vertically related; and (ii) the acquired shareholding must be at least 20%, or between 5% and 20% but accompanied by additional factors, such as a *de facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information.

Under the White Paper, the EU would follow the examples of the UK, Germany and Canada and focus on the potential interest, influence or link that the acquirer could hold over the target to em-

42 Article 101(1), TFEU: *"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."*

43 Article 102, TFEU: "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

44 White Paper *Towards more effective EU merger control*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449&rid=2.

power the EC to review and take action against non-controlling minority shareholding acquisitions that are potentially harmful to competition. The proposed amendment to the EU's merger control regime was finally not adopted due to the administrative burden it would place on companies.

A number of recent studies have considered that the potential impact of common shareholdings on competition in and across markets in terms of the less vigorous competition is not totally clear. The conclusion, at least in the EU and the UK (which both published reports on this issue in 2020[45,46]), is that there is currently insufficient empirical evidence to take any action and that a more detailed analysis is needed on the causal link between a common shareholding and any actual impact on competition.

Given the identified harmful effects that non-controlling shareholding acquisitions may have on competition and the inability or incapacity of many jurisdictions to presently review or take action against them in an *ex-ante* scenario, it is only natural that NCAs and the EC are looking for ways to bridge the gap[47].

Thus, although most merger control regimes only review transactions when an acquisition leads to a controlling influence, some jurisdictions have adopted solutions to allow NCAs to take action against harmful non-controlling minority shareholdings, such as Austria, Germany, the UK, Australia, Brazil (as low as 5%), Canada, India, Israel, Japan, Mexico, South Korea and the US.

The US system, for example, does not use the change of control concept as a criterion for jurisdiction, focusing on the value of what will be held as a result of the acquisition – any acquisition of assets, voting securities, or non-corporate interests requires the notification and pre-approval of the National Competent Authority ("NCA") if (i) at least one party to the transaction is engaged in commerce or in any activity affecting commerce in the US; (ii) the size of transaction threshold is met and, if necessary, (iii) the size of person threshold is met.

Other systems, such as the UK, the German and Canadian systems, have managed to include in their merger control regimes transactions regarding the acquisition of non-controlling shareholdings, considering relevant not only the decisive influence or control of the acquirer over the target, but also its "material influence" (UK), "competitive influence" (Germany) or "significant interest" (Canada), which can be presumed upon the acquisition of a minimum of shareholding (which differs depending on the jurisdiction).

The UK regime sets out three increasing levels of control which each result in the target being brought under the control of the acquirer: material influence, de facto control, and a controlling interest (de jure control). Material influence is a lower level of control than decisive influence (as used in the EUMR) and is presumed with acquisitions of shareholdings above 25%. Shareholdings

45 The EU Report on *Barriers to Competition through Joint Ownership by Institutional Investors*, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652708/IPOL_STU(2020)652708_EN.pdf.

46 The CMA Report on *The State of UK Competition,* available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939636/State_of_Competition_Report_Nov_2020_Final.pdf.

47 For example, the German Monopolies Commission Report on *Common Ownership* (2018), available at https://www.monopolkommission.de/images/HG22/Main_Report_XXII_Common_Ownership.pdf; EU Report on *Common Shareholding in Europe* (2020), available at https://publications.jrc.ec.europa.eu/repository/bitstream/JRC121476/jrc121476_jrc_commonshareholding_final_1.pdf.

of 15% or more will be analysed and could give rise to material influence and even shareholdings of less than 15% may be considered to give rise to material influence if they are accompanied by other exceptional factors allowing the acquirer to influence the policy of the target.

Under the German regime, the acquisition of 25% or more of the equity or voting rights in a target is notifiable to the NCA, even if there is no acquisition of control. Furthermore, the acquisition of a minority shareholding (including below 25%) conferring the ability to exercise decisive influence (and therefore control) also falls within the merger rules scope and, finally, the acquisition of a non-controlling minority shareholding (including below 25%) conferring the ability to exercise (directly or indirectly) a significant competitive influence (less than control) is a notifiable event.

In the Canadian system, the acquisition of (i) more than 35% of the voting shares of a private corporation; (ii) rights to more than 35% of the profits; or (iii) more than 35% of the assets on dissolution of a non-corporate entity, confers a significant interest and is therefore notifiable to the NCA. The acquisition of more than 20% of a public corporation also confers a significant interest and is also notifiable to the NCA. Moreover, acquisitions of control or of a significant interest are subject to the merger provisions under the Competition Act and are reviewable and, to that end, the NCA's Merger Enforcement Guidelines suggest that shareholdings of 10% or more could actually confer a significant interest and therefore be reviewable and notifiable if the applicable thresholds are met, but this is not a clear line.

Moreover, another solution found by other regimes, such as Ukraine, India or Israel, is to set out low thresholds of shareholding for acquisitions to be subject to mandatory merger control, regardless of the level influence the acquirer may have over the target – in all three of these jurisdictions, any acquisition of more than 25% of shareholding is notifiable to the respective NCA.

In the US, the merger control regime does not require the acquisition of "control" as for a transaction to be reviewable by the competent authorities. The US competition agencies have the authority to review any transaction which have the potential to result in a substantial lessening of competition, as long as the transaction impacts on commerce in the US. Thus, an acquisition of voting securities that meets the notification thresholds is reportable even if the acquirer does not acquire control over the target entity. As such, acquisition of a non-controlling minority stake may be notifiable in the US.

For the remaining jurisdictions, in the assessment of transactions for which the NCAs and the EC have competence to review or take action against, it is expected that they pay increasing attention to the minority shareholdings that the parties involved may hold and the harmful effects these may have on competition.

In this sense, from the parties standpoint, when assessing an M&A transactions, parties should have that in mind and consider if the proposed acquisition does not allow the acquirer to exercise some kind of influence that could lead the authorities to consider their relevance. Besides, any merger control regime that intends to include in its scope the review of non-controlling minority shareholding acquisitions presents the risk of broadening the scope to a point where almost any acquisitions would be subject to review, causing an unnecessary and disproportionate administrative burden on companies and NCAs.

8. Revisiting the substantive criteria for the assessment of mergers

In what concerns the substantive assessment of mergers, the apparent inadequacy of the current criteria, or at least of the traditional way of thinking focused on price increases, has led to new calls, namely for more importance to be given to the merger's impact in terms of reducing choice and harming innovation.

In fact, the approach to the substantive assessment of mergers is taking a road towards evolution, adding other considerations. So far, the basic idea of competitive assessment, in the context of merger control, focuses on the idea of efficiency gains, which can be simplified as follows: *at least one agent is made better off, and no one worse off* (so-called Pareto Efficiency).

In this context, the substantive criteria for the assessment of mergers have mainly focused on static efficiencies analysis, *i.e*. an assessment conducted for a given point in time. Thereby, mainly focussing on whether a merger leads to a static loss of competition between firms.

However, although we cannot speak of a trade-off between static and dynamic efficiencies considerations, recent cases have shown an increased attention over dynamic effects, namely on whether the transaction is capable of leading to an increase in investment and innovation.

This has been highlighted, notably, in the way remedies — *i.e.* commitments offered by the parties to solve competition concerns in the context of a merger — have been assessed and approached by competition authorities.

For example, even though mergers involving Big Tech firms have generally received clearance, some required extensive remedies, many of them related to the maintenance of an adequate level of user choice. For instance, in what concerns the remedies necessary to green light the Google/Fitbit transaction[48], which in the EU sought to ensure that EEA users would have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services (such as Google Search, Google Maps, Google Assistant and YouTube).

Antitrust authorities have continued to intervene based on concerns over a loss of, or reduction in, innovation in the last year. The FTC's, CE's and CMA's concerns that, for instance, forced Illumina to walk away from its acquisition of PacBio[49], or led to remedies (in the EU, US, China and South Korea) in Danaher's acquisition of GE's biopharma businesses[50], are high profile examples of the increasing weight placed on innovation concerns. Even in Spain, the CNMC only approved

48 Case (CE) M.9660 – *Google/Fitbit*, of 17 December 2020.

49 Case (FTC) no. 9387 – *Illumina Inc./Pacific Biosciences of California, Inc*. and Case (CMA) ME/6795/18 – *Illumina / PacBio*.

50 Case (EC) M.9331 – *Danaher/GE Healthcare Life Sciences Biopharma*, of 18 December 2019 and Case (FTC) no. C- 4710 – *Danaher Corporation*, of 19 March 2020.

Pigment's acquisition of Ferro's coating business subject to a commitment that a certain level of innovation would be maintained[51].

Consequently, assessing the impact of a merger on innovation is now common and, in many cases, the authorities' focus on innovation has gone hand-in-hand with concerns over the removal of nascent competition. Established guidance is being revised to take account of digital transformation, as evidenced by the EC's consultation on its over 20-year-old market definition notice (which was open from 26 June 2020 to 9 October 2020 and which is expected to result in the adoption of a new notice in 2022).

Furthermore, we are once again seeing the eternal return of European competition law's everlasting battle to rid itself of economic consumer welfare driven considerations, only to see the resurgence of these concerns in albeit different, and sometimes more "glamorous", forms.

After national champions protectionism seemed to have made a comeback in the reaction to the EC prohibitions in the Siemens/Alstom case[52], the COVID-19 crisis now appears to be serving as an excuse to include more economic policy considerations in merger control cases, even though the European Commissioner for Competition, Margrethe Vestager, stated that the COVID-19 crisis should not be a shield that allows mergers that harm consumers and slow down the recovery[53].

That said, we are already seeing concerns being raised in some jurisdictions, even indirectly, that economic problems created by the pandemic are playing an increasing part in merger control assessment. One factor is the protection of workers. The same European Commissioner for Competition has, in the past, encouraged the participation of more stakeholders in the merger control process, with trade unions being invited to contact the Directorate-General for Competition during mergers and companies involved in mergers being reminded of their duty to inform and consult workers. In Germany, for instance, the preservation of jobs have already played a part in securing merger control approval.

Towards the end of 2020, we also saw NCAs start to consider how sustainability issues interact with antitrust policy. In its October 2020 call for contributions on competition policy and the Green Deal, the EC noted that mergers could eliminate the pressure between firms to innovate on sustainability aspects of some products or production processes[54]. And in its decision clearing the Aurubis/Metallo metal recycling deal in May 2020, the EC considered sustainability and the circular economy as a factor[55].

In Portugal, for example, in the context of the global pandemic, the AdC has also spent time evaluating options to strengthen competition regimes, with a special focus on innovation. The AdC drew attention to the importance of promoting innovation towards a better and more sustainable

51 Case (CNMC) C/1116/20 – *Pigments / Negocio Ferro*, of 15 December 2020.

52 Case (EC) M.8677 – *Siemens/Alstom*, of 6 February 2019.

53 Declaration made during the American Bar Association Enforcers Roundtable panel discussion, in April 2020.

54 Outline of the call for contributions available at https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf.

55 Case (EC) M.9409 – *Aurubis/Metallo Group Holding*, of 4 May 2020.

economic recovery. Making the protection and incentives for innovation one of its priorities for 2021, the AdC considers that the removal of structural and legislative barriers that impede innovation, efficiency, and growth contribute for a greater competitiveness between companies[56]. Based on the AdC's priorities for 2021, this authority is also looking to take account of the digital transformation, looking to adapt the existing tools to this new reality and new business models[57]. Such evolution is likely to result in more sophisticated and diversified substantive assessment of mergers.

While further analysis of the policy considerations in this area is needed, we can undoubtedly expect further developments in the near future and/or a more critical appraisal of the uncertain outlooks and eternal returns on this matter. Undertakings must remain vigilant for new rules and, especially, new, sometimes unexpected and often overcomplicated, enforcement approaches.

9. Conclusion

These ongoing debates are having a relevant impact at the EU, and national level, requiring to carefully assess any transaction that, although not falling within a traditional merger control assessment and/or not fulfilling the national or EU notification thresholds, could justify being subject to merger control.

It is no longer possible to simply exclude the notifiability of a transaction on the basis that Member States' notification thresholds are not met. Parties to a concentration falling below national thresholds will now systematically — except in obvious cases — need to assess whether their transaction can significantly affect competition in any EU Member State.

Similarly, potential competitive concerns cannot be simply dismissed, requiring an often more sophisticated assessment, particularly in view of the indirect effects of the transaction resulting from the minority shareholdings held by the parties, or the possible impact of the transaction on innovation.

This is likely to increase the number of cases subject to mandatory merger control filling, the time period for M&A transactions review, the costs incurred by the parties, as well as the level of deal uncertainty caused by eventual retroactive assessment of the transactions.

56 PCA's Competition policy priorities for 2021. Available at http://www.concorrencia.pt/vEN/A_AdC/Instrumentos_de_gestao/Documents/Competition%20Policy%20priorities%20for%202021.pdf.

57 On this matter, see for example the PCA's Report on Digital ecosystems, Big Data and Algorithms, of July 2019, Available at www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf.

The PCA's Report on Technological Innovation and Competition in the Financial Sector in Portugal (2018), available at http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Documents/2021%20-%20Relat%C3%B3rio%20de%20Acompanhamento%20das%20Recomenda%C3%A7%C3%B5es%20da%20AdC%20no%20%C3%A2mbito%20do%20Issues%20Paper%20FinTech.pdf; and

The PCA's Report on Competition in the Financial Sector in Portugal – Follow-up of AdC's Recommendation in the context of Issues Paper FinTech (2021), available at http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Documents/2021%20-%20Relat%C3%B3rio%20de%20Acompanhamento%20das%20Recomenda%C3%A7%C3%B5es%20da%20AdC%20no%20%C3%A2mbito%20do%20Issues%20Paper%20FinTech.pdf.

Besides, any transaction that could lead to anticompetitive behaviour, as mentioned, for example, regarding non-controlling minority/common shareholding, can nevertheless be subject to *ex-post* control through the prohibitions of restrictive practices, under Article 101, or abuse of dominant position, under Article 102 of the TFUE, or under any other applicable similar provisions, with the respective sanctioning consequences.

Thus, the safest approach, in case of actual doubts, and further to thorough assessment of the transaction from a competition standpoint, would be to contact the competent authorities, before the closing, and on an informal basis, to clarify their views on the transaction.

In view of the level of uncertainty and limited guidance, in what concerns the Article 22 referral re-purposed mechanism, it seems all the more relevant to contact the EC in advance to find out whether they plan to accept an eventual referral request from Member State(s) or invite them to do so. It remains to be seen whether this is merely a safety net, creating a mechanism that mainly aims at deterrence and will be used only in extreme cases, or whether the intention of the EC and NCAs is to resort to this tool on a more regular basis. The ECJ's views on this is also expected with great anticipation, in particular the result of the appeal in the above referred Illumina/Grail.

In this sense, it is possible that Part II of this article will be required in the near future.