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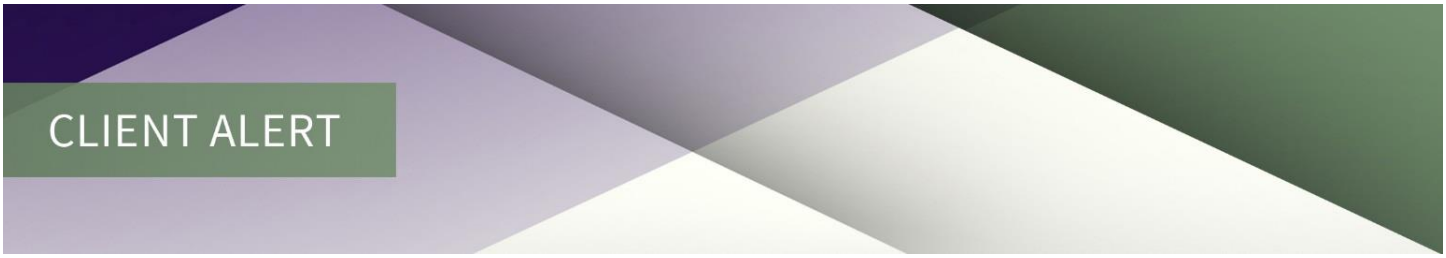

EU Court Clears Way for European Commission to Review Transactions Below Merger Control Thresholds

July 22, 2022

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On 13 July 2022, the General Court of the European Union (the "GC") handed down a landmark judgment endorsing the European Commission's (the "Commission") interpretation of Article 22 of the EU Merger Regulation ("EUMR").

Article 22 allows one or more Member States (in practice, their respective national competition authorities ("NCA")) to request the Commission to examine a concentration even if the Parties to it do not meet the thresholds set out in the EUMR but if the concentration (i) "affects trade between Member States" and (ii) "threatens to significantly affect competition within" the requesting Member State(s).

For a long time, the Commission discouraged referral requests under Article 22 from NCAs that do not have jurisdiction under their domestic regime to review a transaction because the domestic merger control thresholds were not exceeded. However, in March 2021 the Commission declared that it would make more frequent use of this tool. This controversial shift of policy brought less legal certainty for companies doing business in the EU.[1]

In essence, the GC judgment confirms that the Commission, upon referral from an NCA, can review transactions that do not meet the thresholds of the EUMR or of any EU national merger regime.

[1] *See* Willkie's client alert dated 30 March 2021 here.

By doing so, the GC gives its blessing to the Commission to review acquisitions of companies generating little or no revenue by large players, particularly in the digital, biotech, and pharmaceutical sectors. Shortly after the GC ruling, the Commission warned companies that a few so-called "killer acquisitions" — the primary targeted transactions under this new tool – are already on its radar.

What is the case about?

US biotech giant Illumina develops, manufactures, and markets next-generation genomic sequencers used in the development of cancer-screening tests. Grail, a U.S. biotech company, relies on genomic sequencing to develop similar tests.

On 21 September 2020, the two companies made public a plan for Illumina to acquire sole control of Grail. The case did not require any notification at the EU level as Grail did not generate any revenue anywhere in the world.

However, the Commission received complaints about the deal and decided to send a letter to EU Member States in mid-February 2021, inviting them to request a referral under Article 22 of the EUMR.

While some NCAs disputed the fact that the Commission has jurisdiction for such upward referrals, on 9 March 2021 the French Competition Authority obliged and submitted a referral request. The French Competition Authority was subsequently joined by the Greek, Belgian, Norwegian, Icelandic, and Dutch competition authorities. The Commission accepted the referral in mid-April 2021.

Illumina, supported by Grail, filed an action for annulment of the Commission's decision to review the deal. In the meantime, the parties closed the transaction and the Commission initiated a gun-jumping investigation while imposing a hold-separate order on Illumina and Grail. As to the substance of the case, the Commission opened a Phase II investigation but stayed the proceedings until the GC judgment. Phase II is still ongoing.

What did the GC say?

The GC dismissed Illumina's three grounds of appeal:

- ***Confirmation of jurisdiction under Article 22*** – the GC applied a literal, contextual, teleological, and historical interpretation of Article 22 EUMR to confirm that the Commission can review transactions even if they do not trigger a merger control notification under the referring Member State merger control regime.

  According to the GC, this interpretation is in line with the objective of the EUMR to allow the review of every transaction with significant effects on competition within the EU. The Court asserts that the EUMR provides the

necessary flexibility for the examination of mergers that are likely to significantly impede effective competition in the internal market.

- ***The referral request was made in time*** – the GC rejected Illumina's argument according to which the referral request was untimely since the deal had been known for a long time.

  A referral request under Article 22 EUMR must be made within 15 working days of the concentration being "made known" to the Member State concerned.

  According to the GC, the concept of "made known" must be interpreted "as meaning that it requires the relevant information to be actively transmitted to that Member State, enabling it to assess, in a preliminary manner, whether the conditions for a referral request under that article have been satisfied".

  The mere fact that the transaction had become public or was under review by other competition authorities is not sufficient to satisfy the legal test. To start the clock running, the parties must actively engage with the Commission and the relevant NCAs by providing relevant information for the competitive assessment.

  In the case at hand, the GC considered that the starting point for the 15 working days' time limit was the invitation letter sent by the Commission to the NCAs. The GC noted however that, in light of the objective of celerity of the merger control regime, 47 working days between the complaint and the invitation letter was unreasonable. Nevertheless, since this delay did not impact the rights of defense of the parties, an annulment of the Commission's decision was not warranted. Hence the Court reminded the Commission to act speedily whenever it considers requests from the NCAs to refer a transaction.

- ***The Commission did not breach Illumina's legitimate expectations*** – when announcing that it may change its policy in 2020[2], the Commission also made clear that it would continue to implement its former policy of discouraging referrals until the further guidance was published. Contrary to this public statement, the Illumina case was referred prior to the publication of the Commission's guidance on case referrals (at the end of March 2021). Illumina therefore claimed that its legitimate expectations were breached.

  The General Court recalled that, in order to be able to rely on this principle, the company should demonstrate that it had received precise, unconditional, and concordant assurances from the competent authorities of the EU such as to give rise to justified expectations. The GC considered that the Commissioner's speech in 2020 did not meet that standard. In particular, according to the GC, while the Commission indicated that it would continue to discourage referrals, it did not expressly preclude the referral of such transactions.

[2] *See* Commissionner Vestager speech on 11 September 2020 at the International Bar Association 24th Annual Competition Conference, "The future of EU merger control".

Key practical implications

Illumina has already announced that it will appeal the GC's ruling. Nevertheless, following the GC's decision, the Commission made clear that it will use the Article 22 referral policy more frequently.

Willkie had considered the issues raised by the Commission's shift in policy in a previous client alert (here). In particular, the GC judgment paves the way to:

- ***Less legal certainty*** – companies and their advisors will need to assess whether a transaction falling below thresholds may still be referred to the Commission. The criteria for such upward referral are relatively vague (e.g., effect on trade between Member States and threat to affect competition), thereby empowering the Commission with broad discretion to accept referrals.

  Even if the risk of a referral seems low because of clear indications that the transaction will not significantly impede competition, it can never be excluded, and considering that the Commission may accept a referral after closing (in practice, the Commission indicated that it will not consider a referral six months after the transaction closes), parties to a transaction will need to address this risk in deal documents.

- ***Time consuming process*** – whenever a risk of referral is identified, the merging parties will face complex procedural and timing issues. Documents similar to notification forms will need to be submitted to the various NCAs concerned for the Commission to start the clock on the referral process. The Parties will not be able to rely on a public statement to consider that a transaction is "made known" to the NCAs.

Overall, the regulatory environment for M&A activity in Europe continues to become more complex. Indeed, besides the change of policy discussed above, foreign direct investment screening has tightened in Europe with new regimes in almost all EU Member States. In addition, the EU is about to introduce (i) notification obligations for companies that have received foreign subsidies and (ii) notification obligations for so-called "gatekeepers" pursuant to the new Digital Market Act.

In light of the complex regulatory environment, companies doing business in the EU are advised to plan well ahead the timing of their transaction and to assess regulatory filing requirements and the risks associated with such filings.

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