

CLIENT ALERT

European Commission Prohibits Illumina-Grail Acquisition

Innovation and the Protection of Future Competition in Nascent Markets

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On 6 September 2022, the European Commission (the “**Commission**”) prohibited the acquisition of Grail, a biotech start-up, by Illumina, a large US biotech company (together the “**Parties**”).¹ The decision, which follows a series of clashes between the Parties and the Commission that have notably led to landmark decisions on jurisdictional issues, is remarkable, as the Commission has applied relatively novel theories of harm concerning innovation and the protection of future competition in the context of a vertical merger.

Background

The concentration is the first that was referred to the Commission under the new interpretation of Article 22 of the EU Merger Regulation. This new interpretation allows EU Member States to refer concentrations to the Commission for review even when the merging parties do not exceed the respective national merger control thresholds. Upon appeal by

¹ Please note that the Commission has not yet published the decision. This Client Alert is based on the Commission’s press release, [here](#).

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the Parties, the General Court of the European Union (the “GC”) upheld this policy.² However, confirmation by the European Court of Justice is still pending.³

Despite the ongoing Phase II merger review, Illumina closed the deal. On 19 July 2022, the Commission announced that it had issued a Statement of Objection outlining its preliminary findings that Illumina and Grail had breached the standstill provisions under EU merger control rules.⁴ The implementation of the concentration has also led the Commission to issue an interim injunction requiring Illumina to keep Grail completely separate for the time being.⁵ The Parties appealed the interim measures before the GC. The judgment is pending.⁶ Along with issuing its prohibition decision, the Commission stated that it intends to issue a separate decision ordering the dissolution of the transaction and the restoration of Grail’s independence.⁷

The Commission blocked the transaction, applying a new vertical innovation-based theory of harm

The prohibition decision itself sheds light on the Commission’s approach on innovation-based theories of harm. The Parties announced that they would appeal the decision, which will give the GC an opportunity to review the Commission’s approach.

In its past decisional practice, the Commission had already considered the effects of concentrations on competition for innovation. However, the analysis was mainly limited to horizontal mergers, and focused on the impact on the R&D activities of the merging parties.⁸ In *Illumina/Grail*, the Commission applied an innovation theory of harm in a vertical case and assessed the impact of the merger on the ability of third parties to compete for innovation (or in the words of the Commission, in the “*innovation race*”).

Grail develops a blood-based early cancer detection test, using a technology (NGS systems for genetic and genomic analysis) for which Illumina is the only credible supplier. The Commission considered that a number of Grail’s rivals were developing similar tests, which would be able to compete with Grail’s test in the “*near future*”.⁹ The Commission argued that even though the result of the innovation race towards early cancer detection tests and the future shape of this market was still uncertain, competition for innovation must be protected. Against this backdrop, the Commission concluded that the concentration “*enabled and incentivised Illumina to foreclose GRAIL’s rivals, who are dependent on Illumina’s*

² See Willkie’s Client Alert [here](#).

³ <https://www.illumina.com/company/news-center/press-releases/2022/1ef95365-0ca9-4726-a683-37124b1116b5.html>.

⁴ https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4604.

⁵ https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5661.

⁶ Cases T-755/21 and T-23/22, ongoing.

⁷ https://ec.europa.eu/commission/presscorner/detail/en/speech_22_5371.

⁸ See, for instance, cases M.7932, *Dow/DuPont*, 27 March 2017 and M.8084, *Bayer/Monsanto*, 21 March 2018.

⁹ See Commission’s Press release, note 1.

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technology, from access to an essential input they need to develop and market their own tests".¹⁰ Based on its assessment of the anti-competitive effects, the Commission also concluded that the commitments offered by Illumina were "not sufficient to prevent the harm to innovation".¹¹ The Commission considered that the open licencing of some of Illumina's intellectual property rights and the commitment to conclude agreements with Grail's rivals under a standard contract would not effectively address all potential foreclosure strategies.

Interestingly, in seemingly stark contrast to the Commission's decision, the U.S. Federal Trade Commission's (the "FTC") administrative law judge allowed the transaction to go ahead a week earlier.¹² The judge considered that no company is close to beginning to market and sell a test that would screen as many types of cancer as Grail's test. Even if other tests could be on the market before five to seven years, the judge ruled that the FTC had failed to prove that they would be "reasonably interchangeable" with or "close substitutes"¹³ for Grail's test. Therefore, although Illumina would have the possibility of foreclosing other companies developing cancer tests, it would lack a strong incentive to do so. Based on this different assessment, the FTC administrative law judge concluded that the remedies offered by Illumina were viable and sufficient for protecting the innovation race.

It will be interesting to see how the GC will address the Commission's assessment and which standards the GC will set concerning the criteria of imminence of potential competition or whether it will dismiss the Commission's concerns as too speculative. Obviously, much will depend on the robustness of evidence the Commission had at its disposal when arriving at its decision.

Increased scrutiny of "killer acquisitions"

Illumina/Grail is the first case where the Commission decided to review a concentration that did not fall under the EU and national merger control thresholds. With its new policy, the Commission particularly targets deals in so-called growth markets, such as digital, biotech, pharma, and agrochemicals. With the GC approving this revised approach, we can expect additional cases where the Commission will review acquisitions of small nascent targets by larger established market players (also called "killer acquisitions"). In addition, with the entry into force of the Digital Markets Act,¹⁴ certain gatekeepers will have to notify most if not all of their acquisitions to the Commission. These new developments will very likely put more mergers in innovation-driven markets under the scrutiny of the Commission, and it can be expected that innovation theories of harm will become ever more sophisticated based on such cases. The decision of the GC in *Illumina/Grail* will be an important element in that legal development.

¹⁰ *Ibid.*

¹¹ See Commission's Press release, note 1.

¹² <https://www.ftc.gov/legal-library/browse/cases-proceedings/201-0144-illumina-inc-grail-inc-matter>.

¹³ https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

¹⁴ https://competition-policy.ec.europa.eu/sectors/ict/dma_en.

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