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CLIENT ALERT

Top EU Court Annuls European Commission Block of *Illumina/Grail* Acquisition

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Executive Summary

The Grand Chamber of the Court of Justice of the European Union (the ***CJEU***) has annulled a merger prohibition by the European Commission (the ***Commission***) of the acquisition of Grail by Illumina. The CJEU found that the Commission did not in fact have jurisdiction to review the transaction.

In its judgement, the CJEU held that European national competition authorities (***NCAs***) cannot use Article 22 of the EU Merger Regulation[1] (***Article 22***) to refer a transaction to the Commission for review where the transaction does not satisfy the NCAs' own national merger control thresholds. This clarification closes the door on a referral mechanism that the Commission had actively encouraged and supported in recent years to allow it to review transactions which did not otherwise meet the thresholds for merger reviews anywhere in Europe.

For a more detailed assessment of the practical implications for dealmakers, please see below.

[1] The Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the ***EU Merger Regulation***) (here).

Background

In September 2020, Illumina (a US-based company specialising in genetic analysis solutions) announced an offer for Grail (a US-based company that develops blood tests for early detection of cancer), in a deal worth $7.1 billion (the ***Transaction***).

Grail's business had no turnover in Europe (or indeed anywhere else) and as such did not trigger a notification to the Commission. The Transaction also did not meet any other (non-turnover based) thresholds for merger control notifications in any EU Member States. Illumina therefore did not notify the Transaction to the Commission or any other authority.

After receiving a complaint in December 2020 regarding the effect of the Transaction on competition, the Commission invited NCAs to refer the Transaction to the Commission for review under Article 22. Article 22 allows NCAs to refer mergers to the Commission for review even when they do not meet the Commission's merger control jurisdictional thresholds, provided that the concentration affects trade between Member States and threatens to significantly affect competition within the referring Member State(s) in question.

The French competition authority took up the invitation (followed by the NCAs in Belgium, Greece, Iceland, the Netherlands and Norway), and the Commission launched an investigation into the Transaction in July 2021.

In 2022, Illumina and Grail challenged the Commission's decision to review the Transaction before the EU's General Court on the basis that the Commission did not have jurisdiction. Their central argument was that none of the NCAs which had referred the Transaction to the Commission originally had jurisdiction to review the Transaction under their own merger control laws, and consequently it was not an option for them to use Article 22 to refer the case to the Commission in the first place.

The EU's General Court dismissed the appeal, finding in favour of the Commission. In particular, it found that the wording of Article 22 made it "*clear*" that Member States are entitled to refer "*any*" concentration to the Commission (provided the two conditions relating to the 'effect on trade' and the 'threat to significantly affect competition' locally were also satisfied). The General Court held that it was therefore irrelevant whether a merger met the national merger control thresholds of the referring Member State.

Ultimately, the Commission's merger review of the Transaction concluded in September 2022 with a block of the Transaction. The Commission considered that the Transaction would stifle innovation in the emerging market for cancer detection tests based on sequencing technologies. This meant that Illumina, which had already completed the Transaction at this point, was forced to divest Grail, unwinding the Transaction. It did so in June 2024 by spinning off Grail as a listed company, losing billions of dollars on its original investment in the process.

CJEU findings

On 3 September 2024, the CJEU held that the General Court was wrong to confirm the Commission's interpretation of Article 22. The EU's top court held that a "*literal, historical, contextual and teleological interpretation*" of the EU Merger Regulation confirms that NCAs cannot make any Article 22 referrals to the Commission where the merger does not meet their own national merger thresholds. The CJEU held that the EU Merger Regulation does not confer such wide powers on NCAs and the Commission.

In particular, the CJEU noted that when Article 22 came into force it was intended to achieve two specific things:

- First, to allow Member States that did not have any merger control regime in place (e.g. the Netherlands at the time) to refer transactions for review by the Commission instead; and
- Second, to allow a transaction that met the merger control thresholds in multiple Member States to be reviewed by the Commission under the one-stop-shop principle (instead of each NCA conducting individual and parallel investigations).[2]

Contrary to the Commission's position and practice, the purpose of Article 22 was not to be a "*corrective mechanism*" for the Commission to exercise control over transactions that it did not have jurisdiction to review.

Comment

Prior to 2021, Article 22 referral requests had only been made by NCAs which themselves had jurisdiction to review the transaction under their national merger control laws, or which did not themselves have a merger control regime at all. The expansion of this mechanism in *Illumina/Grail*, at the Commission's invitation, effectively allowed the Commission to review any transaction, provided there was at least one 'willing' Member State to refer the case to the Commission.

The Commission considered this to be a valuable tool in policing so-called "killer acquisitions" where an incumbent purchases a promising pre-revenue or early stage start-up with the potential to disrupt the market.

The CJEU judgement has now clarified that Article 22 cannot be used in this way, effectively closing this avenue to the Commission.[3]

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[2] The EU Merger Regulation already included an option under Article 4(5) for merging parties themselves to request such a referral where the thresholds were met in at least three separate Member States. Article 22 could therefore be seen as providing a similar power to the NCAs themselves where the merging parties did not do so proactively.

[3] There remains one Member State which does not currently have a merger control regime, and which could therefore still be the source of a "legitimate" Article 22 referral in this manner even following the CJEU decision in *Illumina/Grail*. However, the Member State in question, Luxembourg, has not historically been proactive in making such referrals, and we understand it is in any event in the process of adopting its own regime.

However, this is unlikely to deter the Commission from its ultimate goal, and the immediate reaction by Executive Vice President Margrethe Vestager reflected a change in the enforcement landscape since 2021 in any event: it expressly noted that several Member States have since introduced provisions allowing them to request the notification of transactions that do not meet national thresholds, thus allowing significantly greater scope than before for Article 22 referrals in compliance with the CJEU's judgement.

In addition, the CJEU recently confirmed in another judgment (*Towercast*) that in principle the Commission has jurisdiction to review completed, non-notifiable mergers under the EU laws on the abuse of a dominant position (Article 102 TFEU). As such, while Illumina has now comprehensively won this specific battle, the Commission's broader more interventionist agenda remains unchanged. The Commission can be expected to work with NCAs to further strengthen its ability to review acquisitions of no revenue or low revenue start-up businesses. As such, dealmakers must continue to consider carefully the antitrust impact of their transactions even where the transaction does not meet the established merger control thresholds and possible 'creative' opportunities for authorities to challenge the transaction before or indeed after completion.

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