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EU General Court Sides with European Commission: Merger Deals That Do Not Meet National Thresholds Can Be Examined by the Commission

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In a highly anticipated judgment, the EU's General Court has confirmed that on the basis of a referral request from a national EEA competition authority, the European Commission can review deals that do not trigger EU merger control thresholds or the merger control thresholds of any EEA Member State. The Court found that the Commission was justified to take jurisdiction over Illumina's acquisition of Grail following a number of such referral requests. The judgment is a vindication of the Commission's approach and whilst it brings clarity on this key jurisdictional principle, it will lead to greater uncertainty for merging parties.

The controversy

There is an ongoing global debate about whether deals that risk harming competition fly under competition authorities' radars because they do not meet the relevant merger notification thresholds. In Europe, Article 22 of the EU Merger Regulation allows national competition authorities from the European Economic Area (EEA) to request the European Commission to examine deals that do not meet the automatic EU turnover thresholds. The Commission previously discouraged such referral requests when the relevant national merger notification thresholds were not met. However, because of a perceived "*enforcement gap*", particularly in the digital and pharma sectors and particularly in relation to acquisitions by incumbents of nascent competitors who may have low or even no turnover in Europe, the Commission adopted guidance in March 2021 which changed this approach. Under this guidance, the Commission now encourages referral requests from national competition authorities where deals do not meet the relevant national thresholds but where a merger may harm competition in the EU internal market.

The Commission's wide jurisdiction upheld

This principle has not been universally accepted and has been challenged in the proposed recent, and high profile, Illumina-Grail transaction. Illumina is a US-based genomics company and Grail is a US-based healthcare company which develops cancer detection tests based on next generation sequencing systems. Illumina's proposed takeover of Grail was not notifiable at EU level nor in any EEA Member State.

On 19 April 2021, the Commission accepted a referral request from France, which was later joined by requests from Belgium, France, Greece, Iceland, the Netherlands and Norway, to examine the deal. Illumina appealed the Commission's ability to take jurisdiction to the EU General Court on the basis that the transaction was not notifiable under the merger control laws of any EEA Member State.

In a judgment of 13 July 2022, the General Court upheld the Commission's approach -

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this is a significant victory for the Commission with implications for companies considering global deals.

The details of the General Court judgment

First ground of appeal: jurisdiction

The main ground of Illumina's appeal was that the Commission had no right to take jurisdiction on the basis of the different national referral requests since the relevant merger control thresholds were not triggered in any EEA Member State. The judgment contains an extensive analysis based on "*literal, historical, contextual and teleological interpretations of Article 22*", and concludes that Article 22 does give the Commission the right to take jurisdiction in such circumstances.

The Court's starting point is the language of Article 22 itself, which refers to the possibility for Member States to refer "*any concentration*" to the Commission which does not meet the automatic EU turnover thresholds, and which affects trade between Member States and threatens to significantly affect competition within the Member State(s) making the request. This is irrespective of the nature of national merger control rules or even their existence. In this regard, the Court also points to Article 22 referring to the fact that a Member State can make the request within 15 working days of the deal being notified or "*otherwise being made known*" to it - this demonstrates that the provision does not relate solely to deals which are notifiable at Member State level. This logic is further supported by the fact that the initial referral request can subsequently be joined by any Member State, again irrespective of whether the deal is notifiable in its jurisdiction.

The Court also provides a historical rationale, highlighting that one reason for the inclusion of Article 22 in the EU Merger Regulation was to allow Member States which did not have merger control law at the time (such as the Netherlands) to refer deals which may harm competition to be examined by the Commission, but without limiting it to that scenario or one where national merger control thresholds are met. Indeed, the Court stresses that whilst the primary mechanism for the Commission to examine deals is through the relevant EU-related turnover thresholds, Article 22 was designed as a supplementary mechanism to allow the Commission to examine deals which may harm competition but which do not meet those automatic thresholds.

Second ground of appeal: timing

The Court also looked at whether the Commission had acted in accordance with the timing provisions of Article 22. The core question was whether the relevant referral requests had occurred within the Article 22 time limits - these relate to when the respective Member States were "*made known*" of the deal. Illumina had argued that this date was significantly earlier than 19 February 2021, which was when the Commission invited the Member States to consider making an Article 22 referral request, *inter alia* because the deal had been publicly announced on 21 September 2020.

The Court did not accept this argumentation. It rather found that the "*making known*" was the "*active transmission*" to Member States of information allowing them to make an assessment of whether to make a referral request, and that in this case, that was the invitation letter from the Commission of 19 February 2021. Accordingly, all the referral requests were in time. The Court held that for reasons of legal certainty, the moment of "*making known*" has to be an objective point in time rather than a subjective criterion such as the public announcement of a deal which would require competition authorities to constantly review such announcements.

The Court did fault the Commission for not sending the invitation letter to Member States in a reasonable time (47 working days from when there was a complaint about the deal, with the Court suggesting that it could have been within 25 working days to mirror the phase one assessment period). However, this was held to not infringe Illumina's rights of

defence since that letter was only a preparatory act not affecting its legal situation, and it had had an opportunity to comment on the referral requests before the Article 22 Decision via which the Commission took jurisdiction.

Third ground of appeal: legitimate expectations

Illumina also argued that the change in the Commission's Article 22 guidance violated its legitimate expectations - this argument was also dismissed by the Court. In line with existing case-law, the Court held that Illumina had failed to demonstrate that it had obtained specific, precise and actionable assurances from the Commission in relation to either the merger at issue or in relation to mergers that did not fall within the scope of national merger control rules in general. It therefore held that Illumina could not rely on the reorientation of the Commission's decision-making practice (also noting in this regard that the Commission had previously discouraged rather than precluded notifications under Article 22 where national merger thresholds were not met).

The future

Illumina has already announced that it will appeal today's judgment to the EU's highest court, the European Court of Justice. Such an appeal will take at least 18 months but is not suspensory.

Today's judgment is therefore a comprehensive vindication of the Commission's approach and will embolden it to invite referrals from Member States where it considers that a deal that would otherwise not be notifiable in the EEA may harm competition. A sense of perspective is important - this does not mean open season for all deals because it is only deals that affect trade between EEA Member States and that threaten to significantly affect competition that can be referred, and the Court itself stressed these limitations. Nevertheless, it is clear that the judgment will lead to greater uncertainty for merging parties because if the argument can plausibly be made that a deal raises a potential competition issue, the Commission may end up examining it even if it is not otherwise notifiable anywhere in the EEA.

There are limits to how much this can be managed in advance. We nevertheless recommend that for such deals, companies and their advisors map out sufficiently in advance credible arguments why their deal will not harm competition and that where it is clear that there is a possibility of a referral request, they engage quickly with both the Commission and the relevant national competition authorities.

The following Gibson Dunn lawyers prepared this client alert: Nicholas Banasevic, Rachel Brass, Ali Nikpay, Christian Riis-Madsen, Stephen Weissman, Attila Borsos, and Mairi McMartin.

Gibson Dunn's lawyers are available to assist in addressing any questions that you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Antitrust and Competition practice group:

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