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Top EU Court Finds That the EU Commission Cannot Review Below-Threshold Transactions

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In a landmark ruling, the European Court of Justice ("ECJ") has found that the 2021 decision of the European Commission ("EC") to examine the Illumina/Grail transaction was unlawful. This judgment is a major blow to the EC's efforts to review non-notifiable transactions and the implications of the judgment go far beyond this single case.

The Referral Policy at Issue

In 2021, the EC revised its referral policy under Article 22 of the EU Merger Regulation ("EUMR"). Under the old policy, the EC would only accept referrals of transactions to the EU if the referring Member State had jurisdiction to review the case under national merger rules. Under the amended referral policy, the EC has accepted referrals of cases that did not trigger any merger filings in EU Member States. This change was viewed as controversial as it meant that cases were reviewed under EU merger rules, where the target company did not have any revenues in the EU. The updated EC guidance also considered it to be generally appropriate to refer a case to the EC until six months after closing (even though the EUMR is designed to be a pre-closing system).[1]

Under the revised referral policy, the EC wanted to examine transactions where the target company does generate any or only limited revenues but has significant competitive potential, e.g., a high-value start-up in the pharma or digital sectors. In the EC's view, the acquisition of such companies by large and established companies would be anti-competitive if the intention is to eliminate a potential future competitor (so-called "killer acquisitions").

Refresher on the Transaction

Illumina/Grail was the first case to be reviewed by the EC under this updated referral policy. Illumina, a U.S. developer of next-generation sequencing technology, announced the proposed acquisition of Grail, a U.S. company developing cancer detection blood tests, in September 2020 for $7.1 billion. The transaction did not meet the merger control thresholds at EU or Member State level given that Grail did not generate turnover in the EU at that time (in fact, it did not have any business presence in the EU at all).

In February 2021, pursuant to the revised referral policy, the EC invited Member States to refer to it the transaction under Article 22 EUMR, which France did and five others joined. The EC accepted the referral request in April 2021, and Illumina then notified the transaction before the EC. While the EC's merger review was still ongoing, Illumina completed the transaction. As a result, and due to the standstill obligation under the EUMR, the EC imposed a record gun-jumping fine on Illumina of €432 million for closing the transaction before the EC had cleared it. The EC went on to prohibit the transaction in September 2022 due to vertical foreclosure concerns. Illumina was also ordered to unwind the transaction, and Grail was spun off in June 2024.

Illumina challenged the EC's decision before the EU courts. The General Court ("GC"), the EU's court of first instance, agreed with the EC, finding that there was no legal obstacle to apply Article 22 where the referring Member State did not have jurisdiction under national rules. On September 12, 2024, the ECJ disagreed and overturned the GC's judgment and annulled the EC's referral decision in the Illumina/Grail case.

The ECJ's Judgment

In its judgment, the ECJ undertook a detailed analysis of the wording, history and context of Article 22 EUMR. The court emphasized the need for predictability and legal certainty for transaction parties and found that the GC's interpretation of Article 22 EUMR was inconsistent with a number of objectives of the EUMR. In particular,

- Article 22 EUMR is not a "*corrective mechanism*" or "*intended to fill a gap*" which would allow a referral to the EC of any transaction irrespective of whether the transaction triggers national merger control. Instead, Article 22 has two primary objectives: (1) to allow for the scrutiny of transactions potentially raising local competition issues in Member States without merger control and (2) to enable the

EC to review a transaction that would otherwise have to be reviewed by multiple Member State authorities (so-called "one stop shop" principle).

- Importantly, Article 22 only "*replaces*" the jurisdiction of a Member State if, under the applicable national merger control rules the referring Member State is not precluded from having competence. Put differently, Article 22 cannot be triggered if a Member State lacks the grounds to review the transaction to begin with because the transaction falls below the relevant national thresholds.
- The EC's interpretation of Article 22 EUMR (as endorsed by the GC) is "*liable to upset the balance*" between various objectives pursued by the EUMR (namely, sound administration, statutory merger control timelines, requirements of the business world) and "*undermines the effectiveness, predictability and legal certainty*" that must be guaranteed to merging parties.
- The GC's interpretation of Article 22 EUMR is also "*at odds with the principle of institutional balance*". Even if the thresholds in the EUMR were to be insufficient to review some transactions capable of being anticompetitive, it is for the EU legislature to review those thresholds.
- The threshold for determining whether or not a transaction must be notified are of "*cardinal importance*" and companies must be able to "*easily determine*" whether a merger filing is triggered in light of the standstill obligation. This is an "*important guarantee of foreseeability and legal certainty*".

Implications

The implications for this decision are many. Following the ECJ's ruling, neither the EC's prohibition decision nor its decision to fine Illumina €432 million for gun-jumping can stand. The EC did not have jurisdiction to review the merger and, absent the notification obligation, there was no standstill obligation that Illumina could have breached. It is also possible that Illumina will sue the EC for damages (however, the threshold for such a claim is high). More generally, the EC will have to abandon its 2021 Article 22 guidance and discontinue any ongoing investigations into below-threshold transactions based on its revised referral policy.

Nevertheless, it is likely that the EC will look for other ways to review future potential competition cases going forward. Other authorities (e.g., the U.S. agencies based on the HSR value-of-transaction test) have the ability to review deals where the target company does not have any or only very limited revenues today, and the EC will want a "bite of the apple" too. Executive Vice-President Margrethe Vestager promptly went on record to state that the EC "*will consider the next steps to ensure that the Commission*

is able to review those few cases where a deal would have an impact in Europe but does not otherwise meet the EU notification thresholds".[2]

Most likely, the EC will actively encourage Member States to refer future potential competition cases to the EU. Executive Vice-President Vestager has pointed out that several Member States have recently introduced call-in powers for transactions falling below the thresholds and that therefore the possibilities for referrals under Article 22 are already more extensive than they were in 2021 at the time of the Illumina case. And other Member States may introduce these powers. For instance, the French competition authority mentioned in an initial reaction to the judgment that it will be considering whether to strengthen its merger control powers to allow the authority to review potentially problematic mergers below the French thresholds.[3]

Some Member States (such as Germany and Austria) have also introduced merger control thresholds based on transaction value; these Member States therefore have the power to refer deals implicating a target business with low revenue but a high deal value. Additional Member States could consider introducing such transaction value thresholds as an alternative (or in addition) to call-in powers as a reaction to the ECJ's judgment.

The EC could also encourage Member States to examine below threshold transactions outside of merger control rules, namely under EU abuse of dominance rules, Article 102 TFEU (and national equivalents). In a recent judgment (Towercast), the ECJ confirmed that Member State authorities can investigate below-threshold transactions as potential abuses of dominance following closing. However, in view of the narrow conditions of Article 102 and strict procedural requirements, such review will likely apply only in exceptional cases.

An even more theoretical option to expand the EU's merger review powers would be a change to the EUMR. This would be a lengthy process and could trigger discussions with Member States about other legislative changes (e.g., relating to industrial policy objectives) which the EC may want to avoid.

Conclusion

The ECJ's judgment provides for more legal certainty for parties undertaking global transactions as it makes it clear that the EC cannot use its referral powers under Article 22 EUMR to review transactions for which the referring Member State authorities do not have jurisdiction. This is a welcome development. At the same time,

the EC will likely encourage Member State authorities to call in transactions that are of interest and to subsequently refer them up for review. We would expect to see this most frequently in future potential competition acquisitions, particularly in the digital and pharma sectors. It is also possible the Member States who have not yet done so will introduce call-in powers or transaction value-based threshold tests in order to be able to review these types of cases (either at Member State level or, by way of referral, at the EU level).

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1. See also our previous *Alert* ↩

2. See https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525. ↩

3. See https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european. ↩

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