Competition Briefing: Special Edition

Much-anticipated CJEU ruling on European Commission merger review power ends the Illumina/Grail saga in favor of effectiveness and legal certainty

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A. Background

1. In April 2021, the European Commission (the **Commission**) accepted a referral by France (joined by five other Member States, including Greece) to review Illumina's planned acquisition of Grail under Article 22 of the EU Merger Regulation 139/2004 (**EUMR**), although France did not have jurisdiction to review the transaction under the French merger control rules. Illumina is a US based genomic sequencing company, and Grail, also a US company, is an innovative cancer test developer.
2. In September 2022, the transaction was prohibited by the Commission on the basis of innovation risks in the emerging market for early cancer detection tests. The Commission fined Illumina for closing the transaction while the Commission's investigation was ongoing (*gun-jumping*) by a record fine of €432m, corresponding to the 10% turnover statutory maximum fine. It also imposed a symbolic fine of €1k on GRAIL for implementing the transaction before its approval, in breach of merger control rules, on the basis that Grail was fully aware of the standstill obligation yet played an active role in the infringement. This is the first time a fine for gun-jumping was imposed on the target company. In October 2023, the Commission further ordered Illumina to unwind the acquisition.
3. The parties brought an action before the General Court (**GC**) on grounds that the Commission lacked competence to examine, under Article 22 of the EUMR, concentrations not meeting the EU or the referring Member State's jurisdictional thresholds.

4. Despite the GC's confirmation of the Commission's approach, the CJEU reassessed the first instance Court's literal, historical, contextual and teleological interpretation of Article 22 of the EUMR and overturned the GC's ruling on 3 September 2024 (in Joined Cases C-611/22 P and 625/22 P).

B. Key Takeaways

1. In setting aside the GC judgment and holding that Article 22 referrals require that the deal is reviewable in the referring Member State, the CJEU seeks to restore legal certainty and put an end to the Commission's wide interpretation of its powers under Article 22 of the EUMR.
2. According to the CJEU, based on the historical and teleological perspective of the EU merger control regime, the referral mechanism of Article 22(1) of the EUMR is not a '*corrective mechanism*' for the effective control of all concentrations with significant effects on the structure of competition in the EU, with an alleged gap-filling objective which stems from the rigidity of the applicable turnover thresholds[1]. It is not intended to remedy deficiencies in the merger control system by enabling the Commission to monitor transactions that do not meet either the EU or the national notification thresholds.
3. On the contrary, the corrective function of Article 22 of the EUMR lies in the clear allocation of powers between the Commission and the national competition authorities (**NCAs**) in reviewing notifiable transactions.
4. The Article 22 referral mechanism has two primary objectives:
   a. to allow scrutiny of transactions that could distort competition locally in Member States with no national merger control rules[2]; and
   b. to extend the '*one-stop-shop*' principle to allow the Commission to examine transactions notifiable in several Member States, so as to avoid multiple national filings and enhance legal certainty for the notifying parties.
5. The CJEU has emphasized that in the interests of effectiveness, predictability and legal certainty, the parties to a concentration must be able to easily determine whether their transaction is notifiable and, if so, to which authority and when the decision of that authority may be expected.
6. As already confirmed by the CJEU in *Towercast*, below-threshold transactions can still be subject to control by NCAs and national courts under the abuse of dominance rules (Article 102 of the TFEU).
7. Following the CJEU judgment, the Commission issued a press release reporting the withdrawal

[1] Article 22(1) of the EUMR provides for referral to the Commission of concentrations not having a Community dimension, which affect trade between Member States and threaten to significantly affect competition with the territory of the Member State or States making the request.

[2] Today, this remains the case only for Luxembourg, where relevant legislation is pending.

of several decisions concerning the review of the Illumina/Grail acquisition, concluding that it did not have jurisdiction to adopt them. This includes the €432m fine previously imposed on Illumina for gun-jumping. It is likely that the parties may seek to recover damages suffered due to the Commission's decisions.

C. What's Next?

1. Following the Illumina/Grail judgment, the Commission's power to review below-threshold transactions is now limited to cases where the referring Member State does not have a merger control system in place or has jurisdiction to review the deal under its national merger control rules.
2. On 18 September 2024, following issuance of the CJEU ruling, the Commission announced the withdrawal of the initial referral requests by seven Member States for review by it under Article 22 of the EUMR, of the acquisition of certain assets of Inflection AI, Inc. by Microsoft Corporation. The deadline for the Commission to decide upon these requests was 19 September 2024. Further to the CJEU Illumina/GRAIL ruling holding that Member States cannot refer a transaction to the Commission under Article 22 of the EUMR when not competent to review the transaction under their own merger control regime, all referring NCAs have withdrawn their requests.
3. The Commission and the NCAs may now seek to explore possible future legislative reforms to address the enforcement gap that has emerged in cases of acquisitions of start-ups and innovative targets whose turnover does not reflect their competitive position or market potential (also known as '*killer acquisitions*').
4. Applying Article 102 of the TFEU on abuse of dominance is an option. However, this would presuppose that at least one of the parties has a dominant position on the market pre-transaction, therefore this could not fully replace the Article 22 expanded referral mechanism.
5. This may therefore lead to the review of the notification thresholds under the EUMR or more likely to the NCAs lowering their filing thresholds or introducing (or broadening their existing) call-in powers. Several Member States (including Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden) already have rules in place allowing their NCAs to '*call-in*' transactions for review that fall below their national merger thresholds.
6. Importantly, this will also affect the notification obligation of gatekeepers under the Digital Markets Act (**DMA**). Article 14 of the DMA requires gatekeepers to inform the Commission of any intended concentration on their part, whether notifiable to the Commission or any NCAs under national merger control rules. NCAs may use the information received to request the Commission to examine the concentration pursuant to Article 22 of the EUMR. Following the Illumina/Grail decision, NCAs that are not empowered to examine the transaction nationally are also not able to refer it for review to the Commission. This gap also makes the re-examination

of local thresholds more likely.

D. Final Remarks for Businesses

1. The CJEU Illumina/Grail precedent marks a milestone in favor of legal certainty.
2. That being said, businesses involved in start-up deals should not feel they are free of scrutiny, and they should take appropriate proactive measures against:
   a. the risk of *ex-post* investigations of their planned transactions under abuse of dominance provisions; and
   b. the existence of call-in rights already in place in several national jurisdictions, which would enable referral requests under Article 22 of the EUMR.



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