Illumina/GRAIL—ECJ Finds European Commission Review of Below-Threshold Mergers Unlawful

9 September 2024

The European Court of Justice (ECJ) has set aside the General Court's judgment and annulled the European Commission (Commission) decision, concluding it had no grounds on which to have reviewed and ultimately prohibited Illumina's planned acquisition of Grail.[1] That review was itself the test case for the Commission's revised policy based on Article 22 of the EU Merger Regulation (EUMR) allowing it to assess deals that are below the applicable jurisdictional thresholds.

The ECJ ruled that the General Court's and Commission's position was based on an incorrect literal, historical, contextual and teleological interpretation of the law and clarified that the Commission is not authorised to encourage or accept referrals of proposed transactions from national competition authorities if they do not themselves have jurisdiction to review those transactions under their own national law. The judgment is final and cannot be appealed.

WHAT ARE THE FACTS OF THE ILLUMINA/GRAIL CASE?

On 21 September 2020, Illumina, a U.S. company specialising in next-generation sequencing systems for genetic and genomic analysis (used, among other things, in the development of cancer screening tests) announced its intention to (re-)acquire Grail, a U.S. biotech company active in the development of such screening tests that Illumina had previously spun out in 2016.

The deal was announced just over a week after the Commission had itself announced a radical change in policy "*to start accepting referrals from national competition authorities of mergers that were considered worth reviewing at the EU level—whether or not those authorities had the power to review the case themselves*". This was possible because of the so called "Dutch Clause" in the EUMR (Article 22), a historical mechanism originally designed for Member States without a merger control regime to ask the Commission to review transactions for them. The new policy was adopted to fill a perceived gap in

[1] ECJ judgment of 3 September 2024 in Joined Cases C-611/22 P and C-625/22 P.

merger control so as to allow the Commission to investigate so-called "killer acquisitions" in sectors such as pharmaceutical, digital and generative artificial intelligence, where the competitive importance of a start-up business may not be fairly represented by its revenues.

Illumina's acquisition was contingent on Hart-Scott-Rodino Act approval in the U.S. but was not notified anywhere else and was expected to close in the second half of 2021. That was because Grail did not have any turnover anywhere outside of the United States and therefore did not meet the jurisdictional thresholds for merger control review either at the EU or national level.

Having received a complaint from a third party, the Commission applied its new policy for the first time to Illumina's acquisition. The Commission invited EU Member States to refer the deal to it, accepted such a request from the French competition authority (subsequently joined by various others) and ultimately blocked the proposed transaction in September 2022. In the meantime, Illumina had completed the proposed transaction, for which the Commission imposed a record "gun-jumping" fine of EUR 432 million. The deal was unwound by way of a spin-off in June 2024, and Grail is now an independent public company.

Illumina appealed against the Commission's referral, prohibition and "gun-jumping" decisions. The General Court dismissed Illumina's action challenging the Commission's decision by which it accepted referrals from EU Member States,[2] confirming the Commission's reinterpretation of Article 22 EUMR (see our Client Update of 19 August 2022). Illumina appealed the General Court's judgment before the ECJ.

WHAT ARE THE FINDINGS OF THE ECJ JUDGMENT?

On 3 September 2024, the ECJ settled the argument by setting aside the General Court's judgment and annulling the Commission's decision to review Illumina's acquisition of Grail on the basis it did not have the jurisdiction to do so. The ECJ ruled that the General Court erred in its interpretation of the law by allowing the Member States to refer a transaction to the Commission when it would not be caught by their own merger control regimes.

The ECJ found that the Commission's interpretation of the legislation is liable to upset the balance between the various objectives pursued by the EU merger control regime. In particular, the need to have effective controls in place for potentially harmful transactions whilst at the same time having a predictable system to regulate M&A

[2] General Court judgment of 13 July 2022, Case T-227/21 – *Illumina / Commission*.

activity that also respects the allocation of competence between the Commission and the Member States. The ECJ emphasised the cardinal importance of turnover thresholds in upholding this objective and as a guarantee of foreseeability for those concerned. By contrast, the Commission's interpretation would have significantly undermined predictability and legal certainty, making it all the more challenging for dealmakers who "*must be able easily and quickly to identify to which authority they must turn, and within what time limit and in what form*".

WHAT ARE THE CONSEQUENCES?

The ECJ's judgment rendered the Commission's policy for policing below-threshold mergers unlawful. The Commission can no longer accept referrals from EU Member States if they are not competent to examine a proposed transaction under their own national laws. This path is now blocked as long as the legislation is not revised, which is not a quick and easy political endeavour as it would require agreement from all of the EU Member States. That may be unattractive because it could in turn provoke a wider debate about the goals of EU competition policy.

However, the newfound predictability could be short-lived. A number of EU Member States have already introduced alternative thresholds to cover "killer acquisitions" (such as Germany and Austria back in 2017) or *ex officio* powers to call in transactions that do not meet the relevant financial thresholds (such as Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden). EU Member States that are competent to examine a transaction in that way can still refer a transaction for the Commission's review. The Commission's initial press release after the ECJ's *Illumina* judgment emphasising those powers indicates this might be the path the Commission wants to pursue in the near future. From a process and timing perspective, however, that may be a worse outcome for deal certainty.

In addition, national competition authorities could make greater use of the EU antitrust laws to review deals as either an abuse of dominance or as an anticompetitive agreement. That is based on the ECJ's *Towercast* judgment in which the ECJ confirmed that it is possible to review a transaction once it has closed on that basis.[3] Given that this is likely only to apply in exceptional circumstances, the number of potential cases for this tool will, however, be limited.

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[3] ECJ judgment of 16 March 2023, case C-449/21.

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