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Client Alert

Antitrust

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The EU General Court confirms the Commission's jurisdiction to review transactions that do not meet any national thresholds

In its judgment of 13 July 2022, the EU General Court confirmed that transactions that do not meet EU or Member State thresholds can be referred by national competition authorities to the European Commission (the **"Commission**") under Article 22 of Regulation 139/2004 ("**EUMR**").

The General Court backed the interpretation of Article 22 EUMR set out in the Commission's new Guidance on the referral mechanism set out in Article 22 EUMR (the "**Guidance**") aimed at catching so-called "killer acquisitions". The Commission's previous policy was to discourage Member States to refer transactions that do not meet their national thresholds. The Guidance therefore constitutes an important U-turn from the Commission's previous referral policy.

BACKGROUND

On 20 September 2020, Illumina entered into an agreement to acquire sole control over Grail for a cash and stock consideration of $8 billion. Illumina develops, manufactures and markets integrated systems for genetic analysis, in particular next generation genomic sequencers which are used in the development of cancer screening tests. Grail develops blood tests for the early detection of cancers. Grail and its competitors rely on Illumina to run their cancer-screening tests.

Since Grail did not generate any turnover in the EU, the transaction did not meet any of the Member States' or the EU thresholds. The transaction was therefore not notified anywhere in the EU.

The chronology of events is as follows:

— On 7 December 2020, the Commission received a complaint about the transaction.

— On 19 February 2021, the Commission sent a letter to the Member States' competition authorities (the "**invitation letter**") inviting them to

make a referral under Article 22(1) EUMR despite the transaction not meeting their national thresholds.

— On 9 March 2021, the French competition authority made a referral request. The Belgian, Greek, Icelandic, Dutch and Norwegian competition authorities later joined the referral request.

— On 11 March 2021, the Commission informed Illumina and Grail of that referral request (the "**information letter**").

— It is only on 31 March 2021 that the Commission published the Guidance.

— By decisions of 19 April 2021, the Commission accepted the referral requests (the "**contested decisions**").

— Lastly, on 28 April 2021, Illumina brought an action for annulment against the contested decisions and the information letter.

THE ARTICLE 22 GUIDANCE NOTE

For decades, the Commission's practice was to discourage referrals of transactions that do not meet national thresholds. The Guidance, however, encourages the referral of transactions where the referring Member State does not have initial jurisdiction over the case when there are concerns that the transaction (i) affects trade between Member States and (ii) significantly affects competition within the referring Member State's territory (*i.e.*, when the cumulative conditions of Article 22(1) EUMR are met).

According to Article 22 EUMR, the referral request should be made 15 working days from the date on which the concentration is "*made known*" to the Member State. Once a referral request has been made, the Commission transfers it to other Member States which have another 15 working days to decide whether to join the referral request. The Commission then has 10 working days to accept the referral request. If the Commission accepts the request, the normal notification procedure starts.

In addition, the Guidance allows Member States to refer transactions that have already been implemented. The Guidance however mentions that the Commission "*would not generally consider a referral appropriate where six months has passed after the implementation of the concentration*".

THE GENERAL COURT'S JUDGMENT

In its judgment, the General Court ruled for the first time on the application of the Article 22 EUMR referral mechanism in cases where a transaction does not meet any national thresholds.

a. Validation of the Commission's jurisdiction under the Guidance

The General Court ruled that Article 22 EUMR allows the Commission to review a concentration following a referral request made by a Member State, even if that Member State's national thresholds are not met. In particular, the Court found that the wording "*any concentration*" in Article 22 EUMR makes it clear that Member States are entitled to refer concentrations that do not meet their national thresholds but still meet the cumulative conditions of Article 22(1) EUMR.

To support its analysis, the General Court mentioned that the referral mechanism was initially used by Member States which did not have a national merger control system. The General Court also ruled that the objective of the EUMR is to enable effective control of all concentrations that significantly affect the structure of competition in the EU and that the referral mechanism of Article 22 EUMR contributes to that objective.

b. Clarification of the 15 working-day period

According to Article 22(1) EUMR, if no notification is required, a referral request must be made within 15 working days of the concentration being "*made known*" to the Member State. Illumina argued that the concentration was made known to the Member States on the date of the transaction's press release (*i.e.*, 21 September 2020) and that therefore the

French referral request was made too late. On the contrary, the Commission argued that the transaction was only made known to France on the date of the invitation letter.

The General Court sided with the Commission, noting that "*made known*" should be understood as "*the active transmission of information"* to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral have been satisfied. According to the General Court, the French referral request was made on time.

The General Court's reasoning diminishes legal certainty for companies involved in transactions that are at risk of referral. Companies now face the difficult choice of either pro-actively contacting the Commission to receive reassurance that it will not send an invitation letter (as suggested by the Commission), thereby putting the transaction on the Commission's radar, or alternatively face the uncertainty that the Commission might ask for a referral up to six months post-closing. Indeed, the Guidance specifies that the Commission will generally not find it appropriate to refer a transaction when six months have passed after the closing.

Note that the General Court somewhat mitigated this legal uncertainty by stating that the Commission should act within a reasonable time limit in the conduct of merger control reviews. The General Court found that the period of 47 working days between the complaint and the invitation letter was unreasonable. However, the General Court found that the Commission's failure did not impact Illumina's rights of defense, and that therefore the annulment of the Commission's decision is not justified.

c. Legitimate expectations

The General Court also rejected Illumina's claim that its legitimate expectations had been breached by the Commission sending the invitation letter before the publication of the Guidance. The General Court noted that for the principle of legitimate expectations to be breached, a company must have received *"precise, unconditional and consistent assurances, originating from authorized, reliable sources*", such as to lead him or her to entertain well-founded expectations. The General Court found that public statements made in a speech of 11 September 2020 by Margrethe Vestager (the Vice-President of the Commission) where she stated that it was time to change the past referral policy, but that "*this won't happen overnight"*, did not constitute precise, unconditional and consistent assurances.

TAKEAWAYS

The judgment of 13 July 2022 in *Illumina* v *Commission* has a significant impact on merger control in the EU:

— Transactions in the tech and pharma industries, or any other transactions involving a target whose turnover does not appropriately reflect its competitive importance on the market, are at risk of referral to the Commission even where the target does not generate *any* turnover in the EU. This substantially decreases legal certainty for companies which could face a lengthy and costly merger control review, even after the transaction has closed.

— Companies involved in transactions at risk of referral now face the difficult choice of either pro-actively contacting the Commission to receive reassurance that the transaction will not be subject to a referral (as suggested by the Commission), thereby putting the transaction on the Commission's radar, or alternatively face the uncertainty that the Commission might ask for a referral up to six months post-closing.

— More generally, the judgment diminishes legal certainty in the EU to the extent that the General Court backed a sudden U-turn of a well-established Commission policy, and validated the application of this new policy to individual companies before it was even published by the Commission.

Lastly, in her speech of 15 July 2022, Margrethe Vestager stated that she was very happy with the General Court's judgment and that a few potential killer acquisitions are currently on the Commission's radar. Coupled with the

Commission's future powers under the Digital Markets Act, which will require "gatekeepers" to inform the Commission of any concentrations relating to their core business areas, it is very unlikely that any potentially problematic transactions would go unnoticed by the Commission, as least as far as digital markets are concerned.

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