

## EU Illumina-Grail Fine Cools Cos.' Merger Control Approach

By **Salomé Cignal de Ugarte and Raphaël Fleischer** (August 9, 2023, 2:08 PM BST)

On July 12, the European Commission imposed a record-breaking fine on U.S. genomics company Illumina Inc. for closing its acquisition of Grail Inc., a U.S. company active in research on early cancer detection, before approval by the commission in breach of European Union merger control rules.[1]

The €432 million (\$480 million) fine corresponds to 10% of Illumina's 2022 global revenue.

This is the highest possible fine — up to 10% of the worldwide group turnover — that the commission can impose for a violation of competition rules, and the first time that the commission has imposed the maximum percentage on a company for "gun-jumping."

Grail was fined a symbolic amount of €1,000, which was also the first time that a target was imposed a fine for gun-jumping.

The executive vice president in charge of competition policy, Margrethe Vestager, referred to this breach as "unprecedented" and noted that the "decision to fine both companies ... shows that this is a very serious infringement." [2]

Illumina and Grail is the first case that the commission has reviewed under its expanded merger control jurisdiction, relying on the referral mechanism of Article 22 of the EU Merger Regulation, or EUMR. It is also the first case where the maximum fine for gun-jumping was imposed.

Pending the European Court of Justice's final ruling on the commission's expansive approach, parties to mergers and acquisitions deals will need to weigh the risk of a referral request, particularly in sensitive sectors.

But when review is ongoing, all parties, including the target company, will need to be particularly careful to avoid the adoption of integration measures prior to clearance and, most importantly, unlawful premerger closing.

### The Illumina and Grail Saga

In late 2020, U.S. pharma company Illumina announced its intention to acquire Grail, a small U.S.



Salomé Cignal de Ugarte



Raphaël Fleischer

company developing blood-based cancer tests based on genomic sequencing and data science tools, for \$8 billion.

Since Grail did not have any revenue in Europe at the time, the parties did not submit a competition filing to the EU or to any European competition authority, as no threshold was triggered.

However, the commission was able to assert jurisdiction over the transaction based on a new interpretation of the referral mechanism contained in Article 22 of the EUMR.[3]

Following a referral request from six member states, the commission in April 2021 decided to review the proposed acquisition of Grail by Illumina and opened an in-depth investigation on July 22, 2021.

The parties appealed this decision to the General Court, but, on July 13, 2022, the General Court confirmed the commission's jurisdiction to review the transaction.[4]

While the commission's in-depth investigation was still ongoing, Illumina publicly announced that it had completed its acquisition of Grail,[5] which merged with two wholly owned subsidiaries of Illumina. The latter also paid Grail's shareholders for their shares.

Illumina noted though that it would "hold GRAIL as a separate company during the European Commission's ongoing regulatory review" and almost immediately set aside approximately \$450 million in anticipation of a possible fine.

Following the company's announcement, the commission adopted interim measures to ensure that Illumina and Grail would remain separate, pending the outcome of the commission's merger investigation.[6]

On Sep. 6, 2022, the commission prohibited Illumina from implementing the acquisition of Grail since it would have significant anti-competitive effects, stifle innovation and reduce consumers' choice in the upcoming segment of blood-based early cancer detection tests.[7]

Following the prohibition decision, the commission renewed and adjusted the interim measures on Oct. 28, 2022.

On Dec. 5, 2022, the commission sent a statement of objections to Illumina and Grail, informing them of the restorative measures it intended to adopt. These would require Illumina to unwind the acquisition of Grail to give the commission's prohibition decision its full effect.

A final decision concerning the unwinding of the deal is still pending.

### **The Standstill Obligation**

According to Article 4(1) of the EUMR, the parties to a merger, acquisition or joint venture are obliged to notify the commission of transactions that have an EU dimension prior to their implementation. In turn, these transactions cannot be implemented prior to their clearance by the commission.

This is referred to as the standstill obligation and is contained in Article 7(1) of the EUMR. Its purpose is to prevent the potentially irreparable negative impact of a transaction on the competitive structure of the market, pending the outcome of the commission investigation.

The commission considers any breach of the standstill obligation, also referred to as gun-jumping, to be a very serious infringement, as it undermines the effective functioning of the EU merger control system.

The ability of the commission to impose fines of up to 10% of the aggregated turnover of companies in cases of a breach of Articles 4(1) or 7(1) is laid out in Article 14(2)(a) and (b) of the EUMR.

The commission has imposed fines against gun-jumping in the past, but, so far, the largest fine for gun-jumping was imposed against Altice SA in 2018: €124.5 million, roughly 1% of the company's global revenue.[8]

When setting the amount of the fines, the commission considers the gravity of the infringement as well as the existence of mitigating or aggravating circumstances.

The fine must also ensure a sufficiently dissuasive and deterrent effect.

### **An Unprecedented Breach**

In its July 12 decision, the commission found that Illumina and Grail had breached the standstill obligation by closing the transaction prior to receiving antitrust clearance.

According to the commission, Illumina "strategically weighed up the risk of a gun-jumping fine against the risk of having to pay a high breakup fee if it failed to acquire GRAIL." [9]

It also considered the potential profits it could obtain by jumping the gun, even if that meant that it could be forced to divest Grail at a later point.

Illumina intentionally decided to proceed and close the deal while the commission was still investigating the transaction, which was ultimately prohibited.

Grail, in turn, was fully aware of the standstill obligation, yet took legal steps to enable the completion of the transaction all while knowing that the commission's review was ongoing.

In the commission's view, Illumina and Grail knowingly breached the standstill obligation while the in-depth investigation was ongoing. This behavior contrasted with previous gun-jumping cases, which were less blatant.[10]

In the past, parties failed to notify competition authorities in less clear-cut scenarios — such as staggered acquisitions of control, acquisition of minority shares or the setting up of joint ventures that were not clearly notifiable — or parties to a transaction shared competitively sensitive information that amounted to impermissible integration measures.

The commission therefore concluded that the present case was an "unprecedented and very serious infringement" that required a proportionate fine.

### **Record-Breaking Fine**

When setting the fine, the commission considered Illumina's deliberate and intentional strategy, and took due account of the separate measures adopted by the company as a mitigating circumstance.

The commission imposed a fine of €432 million, which was 10% of Illumina's annual turnover and the maximum amount allowed under EU merger rules.

The commission decided to impose a symbolic fine of €1,000 on Grail, noting that it was aware of the standstill obligation, but still decided to play an active role in the infringement.

It was the first time the commission imposed a fine on a target company for gun-jumping, and the first time that the statutory maximum fine —10% of the annual global turnover — was imposed on a company for gun-jumping.

The commission justified this based on the severity of the breach and the parties' "blatant disregard" for EU merger control rules.

It further underlined it considered the fine proportionate to deter similar infringements by others in the future.

### **The Commission's Expansive Approach**

The case also confirms the commission's expansive approach to EU merger control.

By fining Illumina and Grail while its jurisdiction is still being appealed by Illumina before the ECJ, the commission is doubling down on its correct interpretation of the referral mechanism of Article 22 of the EUMR and its ability to review "below threshold" deals that significantly affect competition in the EU.

While the commission has made clear that it does not seek to review all below-threshold deals under Article 22 of the EUMR, the fine imposed on Illumina will surely have a chilling effect on the approach companies take toward jurisdiction and may overall lead to potentially longer timelines to close deals that affect competition within the EU.

### **Takeaways**

The fining decision in the Illumina and Grail case underscores the commission's expansive approach and tough stance in terms of merger control enforcement.

Companies operating in Europe will thus need to be vigilant in their compliance with regulatory requirements.

Companies will need to take a conservative approach to merger control jurisdiction on deals that, albeit not formally meeting the thresholds, may still have an impact on competition in the EU. This will be the case in sensitive sectors, such as pharmaceuticals and tech, and when the transaction value is very high or too high for a target with limited revenues, or when structural remedies are not evident.

By imposing the maximum fine, the commission is also sending a clear warning to companies that it will not tolerate violations or gamesmanship around the EU merger control rules. The commission takes procedural infringements of the EUMR very seriously.

Parties will therefore need to include more appropriate language in their deal documents, e.g., on which parties bear the risk of an unexpected commission Article 22 review, the length of a long-stop date in

view of the ever-increasing length of deal reviews, the size of termination fees, etc.

Parties may also want to consider the timeline of break fees and include some qualifying language as to when these are payable, e.g., after a commission finding decision. If Illumina had not been forced to pay such a high break fee, it may not have moved to close the deal.

The Illumina and Grail saga has yielded important questions the business community and regulators may want to see answered.

The commission will probably further refine its stance on Article 22 of the EUMR referrals, e.g., by making it clearer what deals it will go after, by issuing best practice guidelines in addition to the official Article 22 commission guidance, etc.

In the next months — and, potentially, years — the various ongoing appeals before the EU courts should shed clearer light on the commission's interpretation of its own powers.

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*Salomé Cisnal de Ugarte, Ph.D., is a partner and the head of the European antitrust and competition practice at King & Spalding.*

*Raphaël Fleischer is a senior associate at King & Spalding LLP.*

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[1] Case M.10483, Illumina/GRAIL (Article 14 procedure). Illumina plans to appeal to the EU General Court, as it continues to fight regulators over the 2021 Grail acquisition.

[2] See European Commission's press release of July 12, 2023.

[3] See "Ruling On EU Commission Merger Reviews Signifies U-Turn", Law360, August 5, 2023.

[4] See Judgment of July 13 2023 in Case T-227/21, now under appeal before the European Court of Justice with a ruling expected end 2023 or early 2024.

[5] See Illumina's press release of August 18, 2021.

[6] See Case M.10493, Illumina/GRAIL, interim measures decision, under appeal by the parties, currently pending before the General Court.

[7] See Case M.10188, Illumina/GRAIL, prohibition decision, currently under appeal before the General Court.

[8] On April 24, 2018, the Commission adopted Decision C(2018) 2418 (Case M.7993), fining Altice for putting the transaction into effect in breach of Article 4(1) and Article 7(1) EUMR. The General Court upheld the European Commission's decision (Altice Europe v. Commission, Case T-425/18). This judgment is now under appeal before the European Court of Justice (Altice Group Lux v. Commission, Case C-746/21).

[9] According to Illumina's Form 8-K, upon termination of the Merger Agreement under specified circumstances, it would have been required to pay Grail a termination fee of \$300 million.

[10] See, for instance, Altice case referred above, or Case M.8179 Canon/Toshiba Medical Systems, where the parties conducted a two-step warehousing structure involving an interim buyer, which essentially allowed Canon to implement the acquisition of TMSC prior to obtaining the relevant merger control approvals.