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CLIENT BRIEFING

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THE 27-STOP SHOP?

THE EU COMMISSION'S UNPRECEDENTED POWER GRAB IN MERGER CONTROL

The European Commission has accepted jurisdiction in a first test case for its new policy on Article 22 EUMR. It will now accept – and indeed actively encourage – referral requests from EU Member States that do not have jurisdiction to review the deal under their own merger control rules. The new policy expands the reach of the Commission's merger control powers considerably, without public consultation or approval from lawmakers, and will create significant uncertainty for dealmakers globally.

On 19 April 2021, the European Commission accepted a referral request from the French Competiton Authority to review Illumina's acquisition of GRAIL – a US/US biotech deal which did not fall for merger control review anywhere in the EEA, which was announced over seven months previously.

It did so after writing to the 27 EU Member States' national competition authorities (NCAs) on 19 February 2021, inviting them to make a referral under the procedure set out in Article 22 of the EU Merger Regulation (EUMR).

This is the first time in the 30 year history of the EU merger rules that the Commission has accepted a referral request from a Member State that has its own national merger control regime, but does not have jurisdiction over the deal in question.

What's changed?

The original purpose of Article 22 EUMR was to allow Member States without their own merger control regimes to request that the Commission review deals that could affect competition in those States. It was known initially as the "*Dutch clause*", since at the time of enactment the Netherlands had no merger control system. It now does – as do all EU Member States with the exception of Luxembourg – and in recent years Article 22 has been used only very rarely by Member States' NCAs to delegate their merger review powers to the Commission where the latter was better placed to review a deal - for example, where it raised pan-European issues.

The Commission's previous practice had been to discourage referrals from EU Member States if they did not have jurisdiction to review the deal themselves.

The change in policy is prompted by concerns that "*killer acquisitions*" of promising start-ups – especially by Big Tech and Big Pharma companies – were escaping merger review in Europe where the targets had no or little turnover.

Commissioner Vestager had foreshadowed this shift in approach in a speech in September 2020 – although she had indicated that change would not happen until the Commission had brought in guidance on how the new policy would be applied. The Commission did bring in guidance on 26 March 2021 – without any public consultation – but over a month after it had intervened in *Illumina / GRAIL*.

"…the time has come to change our approach. We plan to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves.

This won't happen overnight – we need time for everyone to adjust to the change, and time to put guidance in place about how and when we'll accept these referrals. But if all goes well, I hope we'll be able to put this new policy into effect around the middle of next year."

Commissioner Vestager, 11 September 2020

Not all EU Member States are in support of the Commission's new approach. A number of NCAs have said that they do not believe that they have the legal basis to refer deals under Article 22 if they don't have jurisdiction over them themselves. And there is cause for concern in the business and legal community too.

From the one-stop shop to the 27-stop shop?

The Commission's new policy poses significant challenges of legal certainty and deal timing. It leaves merging parties globally without a clear picture of whether the EU merger rules would apply to their deals. Whereas previously companies could rely on the clear

jurisdictional thresholds in the merger rules at EU and national level and come to a firm view on where their deals needed to be notified, now deals which fall short of even the lower national thresholds could be subject to Commission review if there is a perceived risk of harm to competition, even after they have closed.

The Commission's guidance states that it would "*generally*" not accept a referral more than six months after a deal has closed - but there is no legal basis for that deadline, and nothing preventing the Commission departing from it.

NCAs have 15 working days to refer a merger to the Commission after the transaction is "made known" to them – but the Commission's guidance is unclear on what level of knowledge would start the clock running. In *Illumina / GRAIL*, the Commission accepted France's referral over seven months after the deal was announced, on the basis of facts that were in the public domain in September 2020.

The upshot of the new policy is likely to be that the EUMR will shift from being an efficient "*one-stop shop*" for merger review into a "*27-stop shop*". Merging parties, having satisfied themselves that neither the Commission nor any Member State has jurisdiction over their deal, will need to consider briefing all 27 EU Member States in an attempt to manage the risk of a referral occurring after the deal closing. Informal voluntary approaches to the authorities – "mini-merger notifications" – may become the norm, as even the Commission's senior officials have recognised:

> *"…yes, it means that undertakings will probably have to approach colleagues in the national authorities to explain why, if they have any doubts, their transaction should not be subject to an Article 22 referral below the national review thresholds."*
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> ***Olivier Guersent, Director General for Competition at DG Comp, speaking at a webinar on 5 March 2021***

Although the Commission's guidance calls out the digital and pharmeuticals sectors in particular, it's not just Big Tech and Big Pharma that need to be concerned about this. The new approach would capture potentially any deal where the parties' perceived competitive potential isn't reflected in their turnover. All dealmakers will now need to consider whether their transactions could affect competition in any EU Member State, and address the antitrust risk in their deal documents.

Meanwhile, Illumina has this week lodged a fast track appeal with the EU Court requesting annulment of the Commission's decision to accept jurisdiction in *Illumina / GRAIL*. It is hoped that the Commission will support the fast track application, to address the uncertainty of the new policy for all stakeholders. How the EU Court responds to the Commission's unprecedented power grab will be of interest to dealmakers everywhere.

Slaughter and May is advising Illumina on its acquisition of GRAIL and appeal to the General Court.

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