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European Court of Justice deals blow to European Commission's Article 22 referral policy in landmark Illumina/GRAIL case

On 3 September 2024, the European Court of Justice (CJ) handed down its long-awaited judgment in the Illumina/GRAIL appeal. In a pivotal development, the Court held that the European Commission had no jurisdiction to review Illumina's acquisition of GRAIL under Article 22 of the EU Merger Regulation (EUMR), in circumstances where the merger did not qualify for review under the merger control laws of the referring Member States.

Background: the Commission's unprecedented power grab in merger control

In April 2021, the Commission took the unprecedented step of accepting a referral request from the French Competition Authority to review Illumina's acquisition of GRAIL - a US/US biotech deal which did not qualify for merger control review anywhere in the EEA. It did so after writing to the 27 EU Member States' national competition authorities (NCAs) in February 2021, inviting them to make a referral under the procedure set out in Article 22 EUMR.

Article 22 allows Member States to request that the Commission examine a concentration notwithstanding the fact that the concentration does not have an EU dimension (and so does not satisfy the turnover thresholds under the EUMR) if that concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. The original purpose of Article 22 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, and Luxembourg is currently the only EU Member State without a merger control regime (with reforms currently under way to create such a regime).

In recent years, Article 22 had 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. Until its very first test case in Illumina/GRAIL, 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.

In July 2022, the General Court (GC) dismissed Illumina's appeal requesting the annulment of the Commission's decision to assert jurisdiction over Illumina's acquisition of GRAIL. In so doing, the GC validated the Commission's policy of using Article 22 to review cases which do not qualify for review under the merger control laws of the requesting Member

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State, generating significant uncertainty for dealmakers. We covered the GC's judgment in more detail in a previous client briefing. Illumina appealed the GC's judgment to the CJ.

The CJ's judgment on the scope, purpose and objectives of Article 22

The CJ ruled in favour of Illumina and GRAIL, setting aside the GC's judgment and annulling the decisions by which the Commission accepted the referral requests from the NCAs under Article 22. The CJ largely followed the Advocate General's opinion, which had been highly critical of the Commission's approach (see our previous newsletter).

The CJ found that the GC was wrong to conclude that under a "*literal, historical, contextual and teleological interpretation*" of the EUMR, the Commission was permitted to review cases which do not qualify for review under the merger control laws of the requesting Member State(s). In particular, the CJ found that:

1. Under a contextual and historical interpretation, the Article 22 referral mechanism pursued only two primary objectives. Originally, its purpose was to enable Member States without their own merger control regimes to request that the Commission review deals that could potentially affect competition in those Member States (as explained above). Subsequently, Article 22's purpose was to extend the 'one-stop shop' principle to enable the Commission to review a concentration notified/notifiable in various Member States to avoid multiple notifications to NCAs, thus increasing legal certainty for undertakings. By contrast, it was not established that Article 22 was ever intended by the EU legislature to remedy deficiencies in a merger control system based primarily on turnover thresholds. The GC's conclusion that Article 22 constituted a "*corrective mechanism*" for the effective control of all below-thresholds concentrations was therefore incorrect.
2. The EUMR as a whole has various objectives. One of these objectives is to permit the control of concentrations in terms of their effect on competition. However, another is to establish an effective and predictable merger control system, based on the 'one-stop shop' principle. That system is based both on a clear allocation of the tasks assigned to the Commission and the Member States and on a precise definition of the notification and suspension conditions imposed on the parties to a concentration. In this respect, the Commission's interpretation of Article 22 would have "*undermine[d] the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration*" and would be "*liable to upset the balance between the various objectives pursued*" by the EUMR, including the "*cardinal importance*" of turnover thresholds in guaranteeing foreseeability and legal certainty.

The Court was unconvinced by the Commission's contention that legal certainty could still be obtained if the parties submit informal notifications to all 27 Member States' NCAs – in effect frustrating the purpose of the 'one-stop shop' system.

Comment

The judgment deals a serious blow to the Commission's strategy to use Article 22 to review 'killer acquisitions'. Since Illumina/GRAIL, the Commission had continued to accept Article 22 referral requests in cases such as Qualcomm's Autotalks acquisition and the EEX-Nasdaq Power deal. It has now closed these merger investigations in light of the CJ's judgment.

The Commission previously imposed gun-jumping fines of €432 million on Illumina and a symbolic €1,000 on GRAIL. In respect of the latter, this was the first time a gun-jumping fine had ever been levied against a target company. The judgment overturns the basis for these fines.

Commissioner Vestager has sought to downplay the importance of the judgment for future merger reviews, noting that several Member States have recently introduced reforms enabling NCAs to call-in (and therefore have jurisdiction over) below-threshold deals at the national level. She stated that, as a result, "*the possibilities for referrals to the Commission under Article 22, in compliance with today's judgment, are thus already more extensive than they were at the time of the Illumina-GRAIL referral*". This has the potential to significantly impact the objectives of foreseeability and legal certainty that the judgment aims to protect. In addition, the CJ's judgment recalls that concentrations falling below merger control thresholds may be subject to *ex-post*

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review under the abuse of dominance rules. The Court's Towercast judgment, handed down on 16 March 2023, recognised an additional avenue for regulators to catch concentrations which are not otherwise subject to *ex-ante* merger control (see our previous newsletter).

The judgment is likely to bring about conversations, both at an EU and national level, as to whether thresholds ought to be reviewed and revised downwards to capture additional transactions. The French NCA has already published a statement confirming that it will carefully consider whether any amendments are required to French merger control standards to protect competition in light of the CJ's judgment.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA clears T&L Sugars-Tereos deal on 'failing firm' grounds following Phase 2 review

On 3 September 2024, the UK Competition and Markets Authority (CMA) published its final report clearing sugar producer T&L Sugars Limited's proposed acquisition of Tereos UK & Ireland's retail sugar business, following a Phase 2 investigation.

In its Phase 1 investigation, the CMA found that the two companies only face competition from one other company, British Sugar, and the merger would reduce the number of suppliers from three to two. The CMA took the view that the merger gives rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects in the supply of multiple types of packed sugar to business-to-consumer (B2C) customers in the UK. On 22 March 2024, it referred the merger for a Phase 2 investigation. However, following an in-depth analysis, the CMA found that the merger is not likely to raise competition concerns and provisionally cleared the merger on 6 August 2024.

The CMA has found that Tereos has been loss-making over a sustained period of time, despite a wide range of efforts by Tereos to improve its financial performance. Tereos began a sales process for the business in late 2022, and the evidence showed that there was no other alternative and less anti-competitive purchaser for the business, besides T&L. The CMA's decision was based on 'failing firm' grounds as, without the merger, the most likely scenario would be that Tereos' UK retail business would close and exit the UK B2C channel. Under the counterfactual, there would therefore have been no competition between T&L and Tereos in any case. On this basis, the CMA concluded that the merger may not be expected to result in a substantial lessening of competition within any market or markets in the UK.

Australia releases consultation paper on notification thresholds under new merger control rules

On 30 August 2024, the Treasury of the Australian Government announced its proposed merger notification thresholds for public consultation. This follows its earlier July consultation on the draft legislation introducing a mandatory notification framework in Australia (see our previous edition of the newsletter here).

The Treasury proposes to have (i) monetary thresholds (covering both turnover and global transaction value) and (ii) market concentration thresholds. Mergers or acquisitions which meet either of these thresholds will be subject to the new merger rules, which will commence on 1 January 2026 subject to parliamentary approval. The proposed thresholds aim to capture economically significant acquisitions (including serial acquisitions) and enable scrutiny of acquisitions by businesses with substantial market power, including acquisitions of nascent competitors.

Monetary thresholds

Under the proposed monetary thresholds, notification will be required if either of the following limbs are met, and the jurisdictional nexus is met:

- **Limb 1**: The combined Australian turnover of the merging parties (including the acquirer group, excluding the seller) is at least AU$200 million (around £102 million), and either (i) the Australian turnover is at least

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AU$40 million (around £21 million) for each of at least two of the merger parties or (ii) the global transaction value is at least AU$200 million (around £103 million); or

- **Limb 2**: The acquirer group's Australian turnover is at least AU$500 million (around £256 million), and either (i) the Australian turnover is at least AU$10 million (around £5 million) for each of at least two of the merger parties or (ii) the global transaction value is at least AU$50 million (around £26 million).
- **Jurisdictional nexus**: The target business or asset has a material connection to Australia. This will include, but is not limited to, companies being registered or located in Australia, supplying goods or services to Australian customers, or generating revenue in Australia.

Market concentration thresholds

In addition to the monetary thresholds, notification will be required if either of the following limbs of the market concentration thresholds are met:

- **Limb 1**: The combined share of the merging parties is at least 25% in the affected or adjacent market(s) and the Australian turnover for each of at least two of the parties (including the acquirer group) is at least AU$20 million (around £10 million); or
- **Limb 2**: The combined share of the merging parties is at least 50% in the affected market or adjacent market(s) and the Australian turnover for each of at least two of the parties is at least AU$10 million (around £5 million).

The Treasury's consultation on the proposed notification thresholds is open until 20 September 2024. Some of the key observations from the consultation paper are set out below:

- The consultation paper notes that the Treasury is still considering how to measure market concentration for the purposes of these thresholds. Two options are under consideration: market share (which is the current approach in the Australian Competition and Consumer Commission's Merger Guidelines) or share of supply (which is the approach taken in the UK). The Treasury has specifically invited submissions on these metrics.
- Furthermore, the Treasury notes that scrutiny may be warranted in certain areas to target specific competition risks or types of behaviour (such as serial acquisitions). Sectors such as groceries, fuel, liquor and oncology-radiology sectors have previously been identified by the ACCC as sectors with potential competition issues. If adopted, this would make Australia one of only a small number of jurisdictions to have sector-specific notification requirements, in addition to a cross-sector merger control regime.

SAMR invites comments on its draft guidelines for determining gun-jumping and other penalties for non-compliance in merger cases

On 16 August 2024, China's State Administration for Market Regulation (SAMR) published its draft "*Guidelines for Discretionary Standards in Imposing Penalties for the Illegal Implementation of a Concentration of Undertakings*" (the Draft Guidelines) for public consultation. The Draft Guidelines set out the guiding principles for the determination of penalties for 'gun-jumping' and other infringements of the Anti-Monopoly Law (e.g. completing a transaction without obtaining the necessary merger approval, or failing to comply with the approval conditions imposed by SAMR).

Under the Draft Guidelines, the applicable framework for determining gun-jumping and other penalties will primarily depend on whether the infringement has any actual or potential anti-competitive effect. If the transaction does not result in anti-competitive effects, the usual starting point is RMB 2.5 million (around £268,000), although the final amount of the fine may be adjusted depending on a range of mitigating and aggravating factors (e.g. whether the business has actively cooperated with SAMR during the investigation, whether it concerns a 'first-time' offender). In these cases, the maximum amount of the fine is RMB 5 million (around £536,000).

If the transaction has actual or potential anti-competitive effects, SAMR may require the parties to unwind the transaction and impose a fine of no less than RMB 5 million (around £536,000), but up to 10% of their turnover in

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the preceding year. The final amount will again be determined having regard to the mitigating and aggravating factors, as well as the extent of the illegal implementation of the transaction and the consequent anti-competitive effects. Regardless of whether the infringement has any anti-competitive effect, the fine may be multiplied by two to five times if the circumstances or consequences of the infringement are particularly egregious.

The public consultation is open until 14 September 2024. While some amendments are expected in the final guidelines, the Draft Guidelines offer some helpful guidance on SAMR's current practices and future approach in its enforcement against gun-jumping and other non-compliance cases related to merger control.

SUBSIDY CONTROL

Nuctech loses General Court appeal against European Commission's first ever dawn raid under the EU Foreign Subsidies Regulation

On 12 August 2024, the GC published an order rejecting Nuctech's request for interim relief in an action against the European Commission's decision to conduct its first unannounced inspection ('dawn raid') under the EU Foreign Subsidies Regulation (FSR). This order highlights the significant investigative powers granted to the Commission under the FSR, which aims to address distortions in the EU market caused by foreign subsidies granted by non-EU governments.

The FSR came into force on 12 January 2023 and started to apply from 12 July 2023. On 23 April 2024, the Commission announced that it had carried out its first ever dawn raid under the FSR. The raids took place at the Warsaw and Rotterdam offices of Nuctech, a Chinese state-owned company active in the production and sale of security equipment. For details on the dawn raid, see our previous newsletter.

The order clarified the Commission's power to inspect documents held outside the EU in an FSR context. Nuctech had claimed that the Commission violated EU and international law by requiring Nuctech to produce documents stored on servers located in China. However, the GC held that it was "*not novel*" for the Commission to address an inspection decision to an undertaking incorporated outside the EU, but which operates in the EU, and to carry out inspections at its premises in the EU. The judge noted that "*if the Commission did not have such a right, it would not be able to carry out its investigation effectively and this would jeopardise its ability to hold non-EU entities liable for conduct substantially affecting the internal market*".

Nuctech had also argued that the interim relief was justified by urgency due to the reputational damage resulting from the inspections, the alleged risk to its financial viability, or the risk of it being sanctioned under Chinese law if the requested materials and data were disclosed. However, the GC rejected all of these arguments.

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