THE NEW NORMAL: THE 27-STOP SHOP IS HERE TO STAY

THE GENERAL COURT SANCTIONS THE EU COMMISSION'S ASSERTION OF JURISDICTION IN ILLUMINA/GRAIL

On 13 July, the General Court dismissed Illumina's appeal requesting the annulment of the European Commission's decision to assert jurisdiction over Illumina's acquisition of GRAIL. In so doing, the General Court confirmed the validity of the Commission's new policy to use Article 22 of the EU Merger Regulation (EUMR) to review cases which do not qualify for review under the merger control laws of the requesting Member State. The judgment is expected to embolden the Commission and to usher in a new era of significant uncertainty for dealmakers, likely resulting in a shift to the "27-stop shop".

As discussed in this briefing, on 19 April 2021 the European Commission took the unprecedented step of accepting a referral request from a national competition authority (NCA) with a sophisticated merger control regime in circumstances where the deal in question did not meet that NCA's jurisdictional test. The referral was made by France following an invitation from the Commission to do so under the procedure set out in Article 22 EUMR, and pursuant to the announcement by Commissioner Vestager on 11 September 2020 that "*we plan to start accepting referrals from national competition authorities of mergers that are worth reviewing at EU level – whether or not those authorities had the power to review the case themselves*".

Illumina's appeal against the Commission's assertion of jurisdiction to review its acquisition of GRAIL was heard on an expedited basis in December 2021. Seven months later, on 13 July 2022, the EU's General Court issued its decision, ruling in the Commission's favour.

Illumina's appeal: the Commission's competence, timing considerations, and legitimate expectations

As discussed in this briefing, Illumina appealed on three grounds. *First*, Illumina challenged the Commission's interpretation of Article 22, arguing that the legislation does not confer power on the Commission to accept a referral request in cases which do not qualify for review under the merger control laws of the requesting NCA – and that the decision was therefore outside the Commission's competence.

In the first limb of the second ground Illumina argued that France's referral request dated 9 March 2021 was out of time, as it fell long after the 15 working days which NCAs have to refer a deal after it is "made known" to them. This limb centred on the interpretation of the "made known" requirement in Article 22(1), which Illumina argued had been met by the extensive global press coverage following the deal's announcement six months earlier, in September 2020. In the second limb of this ground, Illumina argued that the Commission's lengthy delay in inviting NCAs to refer the merger months after it had gathered the information it needed to do so was contrary to both the principle of legal certainty, and the obligation to act within a reasonable time under the principle of good administration.

Finally, Illumina argued in its third ground that the Commission had acted contrary to the principle of legal certainty and Illumina's legitimate expectations by inviting NCAs to refer the deal before issuing guidance on how its new Article 22 policy would work in practice - despite Commissioner Vestager's clear statement in September 2020 that "*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*".

The court's ruling

The General Court found in the Commission's favour on all three grounds, ruling that the Commission was competent to call in the deal; France's request was not out of time; although the Commission's timeline was "unreasonable" this did not infringe Illumina's rights of defence; and Illumina did not have the legitimate expectation it claimed. The Court also ordered Illumina to bear the Commission's costs.

What does this mean for dealmakers?

The General Court's sanctioning of the Commission's new Article 22 policy strikes a blow for dealmakers globally.

Under the old policy, merging parties could have confidence that their deals would not be subject to the Commission's review if they fell below the clear thresholds set out in the EUMR and Member States' national merger control legislation. This policy was relied on by parties like Illumina and GRAIL, where the target had no turnover or presence whatsoever in the EEA. However, the Court's ruling that "*taking account of the literal, historical, contextual and teleological interpretations of Article 22 […] it must be held that the Member States may, under the conditions set out in therein, make a referral request under that provision irrespective of the scope of the national merger control rules*" (para. 183, emphasis added) may embolden the Commission to effectively "call in" other deals with a tenuous EEA nexus (by inviting NCAs to make a referral request).

The Court ruled that such an interpretation complies with the principle of proportionality because it "*allows the Commission to examine a concentration under that article only in certain specific cases and under very specific conditions […] which significantly restrict the Commission's freedom of action*". However in practice, these "specific conditions" – namely that a Member State makes the request in respect of a "concentration" which falls below the Commission's own jurisdictional criteria, affects trade between Member States, and threatens to significantly affect competition in the relevant Member State - may prove a low bar to overcome. In particular, the unusual requirement that a deal should "*threaten to significantly affect competition*" is likely to lead to significant uncertainty and to prompt a large number of informal notifications to the 27 Member States.

The judgment provides guidance on what it means for a deal to be "made known" for the purpose of the Article 22(1) deadlines. Finding that a literal interpretation of this "imprecise and ambiguous" phrase fails to yield clear results, the Court ruled that "*the concept of a concentration's being 'made known' […] must, as regards its form, consist of the active transmission of relevant information to the Member State concerned and, as regards its content, contain sufficient information to enable the Member State to carry out a preliminary assessment of the conditions laid down in the first subparagraph of Article 22(1)*" (para. 204, emphasis added). To be sufficient, the information provided must be "comparable" to that provided in a notification (para. 198), although the judgment also maintains that an informal notification is not required (para. 170). With this finding the General Court effectively endorses a shift from the EUMR providing a "one-stop shop" for merger control to a "27-stop shop" so that voluntary briefings to all 27 Member States, or "mini-merger notifications", are likely to become more common, if not the norm for deals potentially falling within the ambit of Article 22.

The Court found that the Commission's lengthy delay of 47 working days between receiving the necessary information and sending the invitation letter was "an unreasonable period of time" as regards the "*fundamental objectives of effectiveness and speed pursued by the EU merger control system*" (paras. 239 and 233). Nevertheless, it ruled that this did not infringe Illumina's rights of defence and therefore did not justify the annulment of the Commission's decision. In doing so, the Court arguably leaves the door open for the Commission to continue to engage in lengthy delays before inviting NCAs to refer a deal, provided it then gives the parties the right to express their views on a possible referral. Whilst the Commission's guidance states that it would "generally" not accept a referral more than six months post-closing, there is no legal basis for this deadline. This provides little comfort to dealmakers who want legal certainty.

Finally, the Court's ruling that Illumina did not have a legitimate expectation because Vestager's speech "*concerned the Commission's general policy on concentrations and did not mention the concentration at issue*", and so could not contain "*precise, unconditional and consistent assurances in relation to the treatment of that concentration*" erects an extremely high bar for establishing legitimate expectation.

Illumina has announced that it will appeal the General Court's decision to the European Court of Justice. It remains to be seen whether that Court will also sanction such a far-reaching interpretation of the Commission's merger control jurisdiction, in light of increasing concerns about the Commission's powers. In the meantime, the General Court's rubber stamping of the Commission's land grab will disappoint dealmakers globally.

Slaughter and May is advising Illumina on its acquisition of GRAIL and action before the European courts.

CONTACT

PHILIPPE CHAPPATTE
PARTNER
T: +44(0)20 7090 4424
E: Philippe.Chappatte@slaughterandmay.com

JOSEPHINE RABINOWITZ
ASSOCIATE
T: +44(0)20 7090 3249
E: Josephine.Rabinowitz@slaughterandmay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650