MERGER REVIEWS OF NON-REPORTABLE M&A DEALS: HOW CAN DEALMAKERS MANAGE THE INCREASING RISKS?

EU referrals of non-reportable deals are like buses: you wait for ages and then two come along at once. It has been 28 months since the European Commission's controversial move to accept the referral of *Illumina/Grail* – a deal with no EU revenues or presence, which the EC subsequently prohibited. Now, we have two more referrals of deals that do not meet EU or any Member State merger control thresholds within days of each other: *Qualcomm/Autotalks* and *EEX/Nasdaq*.

What do these cases – coupled with the EC's consideration of around 50 other possible referrals – tell us about its approach, and how can dealmakers successfully manage the resulting risks to their deal execution and timing?

BACKGROUND: *ILLUMINA/GRAIL* AS THE FIRST WARNING SHOT

Under Article 22 of the EU Merger Regulation, the national competition authorities of EU Member States (NCAs) can ask the EC to review below-threshold transactions (i.e. transactions that do not meet the EU or any national merger control thresholds), where they (i) affect trade between Member States; and (ii) threaten to significantly affect competition within the territory of the relevant Member State/s.

Before March 2021, the need to assess the risk of an Article 22 referral was more limited because the EC actively discouraged referrals when NCAs did not have jurisdiction over a transaction. But this all changed in 2021, when the EC amended its guidance to actively encourage referrals in these very circumstances. Subsequently, the EC issued a practical Q&A to alleviate concerns and address criticisms of its new interpretation of Article 22. This volte-face was driven in large part by the EC's fear that potentially problematic cases involving targets whose value was not yet reflected fully in European sales, were not being caught by the merger rules. Using the existing Article 22 referral mechanism as a way to gain jurisdiction was considered preferable to the more complex option of overhauling the EU jurisdictional thresholds to capture high value/low turnover deals.

The EC accepted its first Article 22 referral under the new policy following a request from France to review biotech Illumina's acquisition of Grail, a cancer-testing gene sequencing company. This was a particularly bold case to choose: Grail did not conduct any activities or have any turnover in Europe. Suddenly, even deals involving non-EU targets with no activities in the EU became at real risk of referral, with clear implications for the execution and timing of global M&A deals.

LESSONS FROM THE LATEST CASES

28 months after *Illumina/Grail*, in August 2023, the EC accepted two more referral requests:

- Qualcomm's acquisition of Autotalks, an Israeli manufacturer of chipsets used in vehicle-to-everything (V2X) communications technology sector for manned and driverless vehicles. A total of 15 NCAs responded

to the EC's invitation for referral, seemingly due to concerns that the deal will potentially combine "*two of the main suppliers of V2X semiconductors in the EEA*" which are "*key to improving road safety, traffic management and reducing CO2 emissions as well as for the deployment of autonomous vehicles*".

- The acquisition by EEX (a German subsidiary of Deutsche Börse AG and the leading energy exchange in Europe) of Nasdaq Power, a Swedish and Norwegian subsidiary of Nasdaq, Inc. which provides trading and clearing services of Nordic, German and French futures contracts for electricity and EU emission allowances. Four NCAs supported a referral, on the basis that the merging parties are the only providers of these services for Nordic power contracts, which are seen as key for energy price stability "*in the current context of the energy crisis*".

These back-to-back cases – which could yet be appealed to the General Court – signal above all that the EC is not deterred by Illumina's ongoing appeal or wider criticisms of its referral policy. They also show that the EC will not just target tech and pharma, but other sectors too, including energy and the reduction of emissions. Although so-called "killer acquisitions" of nascent competitors are a clear focal point for the EC (along with other authorities), these cases also show that there are no bright lines, and other scenarios can also spark interest, including deals with potential regional effects.

In terms of procedure, both acquirers must now submit a formal EC notification and, as stressed in letters sent to them by the EC, cannot close their deal pending its review. If they do, hefty gun-jumping fines could be on the way. As a clear warning to others, the EC imposed a record €432 million fine on Illumina for closing its acquisition of Grail prematurely – which Illumina is also appealing.

LESSONS FROM THE "ALMOST" CASES

Since 2020, the EC has considered whether to accept referrals for about 50 deals, many in the healthcare sector. Half of them were considered on the EC's own initiative, whilst the other half were brought to its attention via merging parties, NCAs, or third-party complainants. In practice, the EC can also invite an NCA to refer a merger to it (as it did in *Qualcomm/Autotalks*).

The EC – particularly its tech and life sciences divisions – has been actively monitoring markets and M&A transactions, principally via public sources, analysis, and through its contacts with other agencies, to identify suitable candidates for referral.

In addition, from early September 2023, designated digital "gatekeepers" subject to the reporting requirements of Article 14 of the EU Digital Markets Act must inform the EC of all intended transactions involving "*another provider of core platform services or of any other services provided in the digital sector*", whether or not these deals meet the EU merger control thresholds. This will be another avenue for the EC to become aware of the M&A activity of the largest tech firms and to invite referral requests of non-reportable deals.

BEWARE THE RISK OF OTHER REGULATORY "CALL INS" – INCLUDING THE UK

Besides the risks of an EU referral, merging parties should continue to assess the risk of other potential filings where authorities have residual jurisdiction to "call in" and review below-threshold deals under merger control rules (e.g. the United States, Canada, and Mexico), foreign investment control rules (e.g. Germany), or the new EU Foreign Subsidies Regulation. Regulators are increasingly keen to use their powers to the fullest to intervene in potentially problematic M&A deals.

The UK Competition and Markets Authority is no exception. It is no secret that the CMA is interventionist in its approach to merger enforcement, and is happy to diverge from EC decision-making post-Brexit. While the CMA does not technically have residual jurisdiction to review deals which do not meet the UK thresholds, these thresholds are sufficiently elastic (and are set to be broadened even further) to give the CMA broad discretion to "call in" potentially problematic deals, either before or up to four months after closing. The CMA also has powers to prevent closing pending its review.

FOUR STEPS TO MITIGATE THE CERTAIN UNCERTAINTIES

In this new normal, dealmakers must grapple with the uncertainty and potential delays brought about by non-reportable deals nonetheless requiring notification. But there are steps which they can take to mitigate the risks of additional reviews, and to ensure a smooth process with as few surprises as possible:

i. **Assess whether a non-reportable deal is likely to attract scrutiny.** While the EC guidance is clear that nothing is off limits, the golden thread is a focus on deals where the turnover of at least one party does not reflect its competitive potential. Examples include

a start-up or recent entrant, or a significant innovator conducting important research. Clearly, industries like tech and pharma where innovation is central are particularly relevant here, but not exclusively. High-profile deals involving competitors – especially deals that are likely to raise third-party complaints – should be assessed closely for potential competition concerns.

ii. **Consider approaching the EC for a steer if the referral risk seems high.** Under its guidance (para 24), merging parties can reach out to the EC with an informal briefing paper. Where appropriate, the EC will then give a preliminary indication whether the transaction would be a good candidate for referral. This typically takes five working days, although there is no legal deadline. Compare this with the CMA, which will typically respond to a briefing paper within one month to indicate whether it intends to initiate a review.

iii. **Allocate the referral risk and reflect relevant timings in deal documents.** Consider including a condition precedent to closing which covers the possibility of a referral. Long stop dates should accommodate the timing required for a referral process plus a full merger review, and/or have a mechanism for re-negotiation, especially where significant break fees are involved.

iv. **Ensure any referral process is triggered as soon as possible.** A referral request must be made within 15 working days of the date on which the transaction is notified or otherwise ***made known*** to the NCA concerned. The relevant information should be ***actively transmitted*** and ***sufficient*** to enable the NCA to preliminarily assess whether the conditions of referral could be met. As we have discussed previously, issuing a press announcement is not sufficient. Importantly, there is no specific time limit for the EC to invite NCAs to make a referral – and according to the General Court in Illumina's appeal, this invitation letter was how the deal was made known to the NCAs. To get the clock ticking sooner in high-risk cases, the parties could consider sending briefing papers to relevant NCAs explaining the nature of the deal and why it does not meet the criteria for referral.

FOR MORE INFORMATION

Our Antitrust/Competition team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:

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