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CORRECTING THE CORRECTIVE MECHANISM: EU'S TOP COURT KILLS EUROPEAN COMMISSION'S ABILITY TO REVIEW BELOW-THRESHOLD DEALS

In a landmark judgment, the European Court of Justice has ruled that the European Commission's recalibrated approach to using Article 22 of the EU Merger Regulation to review otherwise non-reportable M&A transactions is unlawful.

This follows Advocate General Emiliou's (non-binding) opinion delivered earlier this year, expressing the same view that the EC exceeded its powers by accepting a referral request from several EU Member States to review Illumina's acquisition of Grail in 2021 – a foreign-to-foreign deal with no nexus to the EU.

The ruling is a clear blow to the EC's ability to review below-threshold deals going forward (especially the so-called "killer acquisitions" of targets with little or no EU turnover on which the EC had set its sights). While the EC has already sought to highlight the alternative powers at its disposal, with implications for the practical risk assessment and timing of potential M&A deals, those alternative powers come with their own challenges.

BACKGROUND TO A LONG RUNNING FIGHT

In September 2020, the EC announced its recalibrated approach to Article 22 and began actively encouraging Member State referrals of transactions that failed to meet EU or national merger control thresholds but which (i) affect trade between Member States; and (ii) threaten to significantly affect competition within the territory of the relevant Member State/s. This volte-face was driven in large part by the EC's fear that it was missing potentially problematic cases involving targets whose value was not yet reflected fully in EU sales (and hence did not meet the generally revenue-based notification thresholds across the EU).

The EC issued new guidance in March 2021 and accepted its first Article 22 referral request under the new policy by France – subsequently joined by five more national authorities – to review biotech firm Illumina's acquisition of Grail, a cancer-testing gene sequencing company, which it ultimately blocked. As we have discussed previously, this was a particularly bold case to choose: Grail did not have any activities or revenues in the EU, or indeed anywhere else. Suddenly, even foreign-to-foreign deals involving 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.

Following an unsuccessful 2022 challenge before the EU General Court, Illumina and Grail appealed the decision before the European Court of Justice.

THE ECJ'S JUDGMENT: ENCOURAGING OR ACCEPTING REFERRALS OF BELOW-THRESHOLD DEALS IS UNLAWFUL

In its September 2024 judgment, the ECJ held that the EC may not encourage or accept referrals of deals falling below the EU thresholds, insofar as the request is made by Member States that do not have jurisdiction to review those deals under their national merger control rules.

In reaching this conclusion, the ECJ focused on the first ground of appeal, relating to the meaning and scope of Article 22(1). Having concluded that the first ground was well founded, the ECJ did not need to consider whether the timing of the referral request and the EC's obligation to act within a reasonable time were lawful, or whether by encouraging the referral the EC had breached the principles of legitimacy and legal certainty.

Through an assessment of the wording of Article 22(1), as well as a close examination of its historical, contextual and teleological interpretation in light of long-established principles of EU law, the ECJ found that the EC fundamentally exceeded its powers by bending a legal instrument in order for it to fit the EC's enforcement objectives, and thereby unlawfully stepping into the legislator's shoes.

Several key points from the ECJ's reasoning are worth highlighting here:

- In considering the legislative history of a provision, the ECJ reiterated that documents cannot be 'picked-and-chosen' arbitrarily, and any preparatory documents (*travaux préparatoires*) in particular must be carefully considered. In this respect, the ECJ emphasised that none of the relevant preparatory documents (or indeed other documents referred to by the General Court) attested to the legislator's intention to use the referral as a "corrective mechanism" to remedy "alleged deficiencies" of the EU merger control regime.
- Among the various "contextual" factors examined by the ECJ, the ECJ emphasised a key aspect militating against the EC's broader interpretation of the Article 22 referral mechanism. In particular, the ECJ noted that a referral, where accepted, means that the EC will replace the requesting Member State in the review of a deal. Such a replacement logically presupposes that where the requesting Member State has a merger control regime in place, the relevant national competition authority "*is not precluded by those rules from having competence, in particular on the ground of the transaction in question falling below the control thresholds which it defines.*"
- A significant part of the judgment was devoted to the reasons why an expansive interpretation is inconsistent with the ultimate objectives that Article 22 and the EU Merger Regulation seek to pursue. In this context, the ECJ noted how the referral mechanism, based on its historical and contextual interpretation, pursues only two primary objectives: (i) allowing the scrutiny of concentrations that could distort competition locally, where the Member State does not have any national merger control rules; and (ii) extending the 'one-stop shop' principle so as to enable the EC to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national level and thereby to enhance legal certainty for undertakings. Against this background, the ECJ concluded that the EC's expansive interpretation of Article 22 as a "corrective mechanism" is "*liable to upset the balance between the various objectives pursued by [the EU Merger Regulation]*" and "*undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration.*" Indeed, merging parties "*must be able easily and quickly to identify to which authority they must turn, and within what time limit and in what form*", which is ensured in particular where jurisdiction is established by reference to criterial relating to turnover.
- Throughout the judgment, the ECJ signposted various available avenues for the EC to tackle the problem of its perceived "enforcement gap". In particular, the ECJ emphasised that a simplified legislative procedure was made available should the EU thresholds need to be revised in the future, allowing for a "*rapid adjustment […] if the competence criteria in use become, because of market developments, no longer apt to capture concentrations with potentially harmful effects.*" In addition, the ECJ explicitly noted the now established "TowerCast" route, whereby deals which are not caught by merger control can be reviewed (albeit ex post) as alleged abusive strategies by dominant firms, as endorsed by the ECJ in TowerCast (C-449/21).

WHAT'S NEXT FOR EU BELOW-THRESHOLD REVIEWS?

- **Next steps for Illumina/Grail.** The ECJ's judgment will mean that all subsequent EC acts will also be annulled, including the record €432 million fine imposed on Illumina for closing the deal prematurely (also subject to appeal). This happened in Schneider/Legrand in the early 2000s: The General Court (then the Court of First Instance) automatically annulled the EC's divestiture decision (Case T-77/02), given that the prohibition decision had been annulled (Case T-310/01). This was also the first time that the CFI ruled that a merging party can be compensated (at least in part) for losses resulting from the illegal prohibition of its merger (Case T-351/03). Though we also note here the long-running and ultimately failed compensation claim (Case C-297/22) by UPS to recover the €1.742bn loss it believed it had suffered as a result of the EC's unlawful 2013 prohibition of UPS/TNT.
- **Implications for future deals.** The ruling comes too late not just for Illumina/Grail. Qualcomm/Autotalks and EEX/Nasdaq, two other below-threshold deals, were both abandoned in the face of referrals to the

EC. For those in more nascent stages, their referral processes will likely now fall away. Whilst the EC can no longer accept referrals of deals which do not trigger EU or national thresholds, it is "carefully studying" the judgment's implications and will continue to accept referrals when a transaction triggers a national threshold. Some EU Member States have already introduced lower or alternative thresholds (e.g. Austria and Germany), or residual powers to call in deals for review which fall below the applicable national thresholds (e.g. Italy and Denmark). Dealmakers should be mindful that this approach is likely to continue following the ECJ's ruling, with more Member States (including France) reviewing their thresholds in an attempt to capture more deals deemed to harm competition. It is unclear, but likely legally permissible following the ECJ's judgment, whether the EC will rely on one or more of these Member States' referrals to call in below-threshold deals. Meanwhile, Luxembourg remains as the one Member State without merger control rules and could because of that provide an additional avenue for future EC reviews, as long as the transaction threatens to significantly affect competition in (at least) Luxembourg. Even then, it is doubtful that the EC would have the political appetite to rely on its smallest Member State alone to continue its practice of calling in below threshold deals. We also note here the ongoing appeal proceedings relating to the EC's decision to accept Luxembourg's sole referral of Brasserie Nationale/Boissons Heintz under Article 22.

- **An extra blow for digital deals.** Article 14 of the EU Digital Markets Act requires designated gatekeepers to report relevant digital deals to the EC. It was designed to work in tandem with Article 22 so that deals that would otherwise not be notifiable could be brought to the EC's attention via the DMA and then referred for review under Article 22. In light of the ECJ's ruling, this mechanism loses much of its utility, and again the EC will need to rely on national powers to enable a review.
- **Next stop: Ex post scrutiny.** Merging parties should also be aware of the potential for ex post investigations of M&A activity for alleged abuses of dominance as another way to catch perceived problematic deals that escape merger control scrutiny.
- **The Holy Grail: Legislative reform?** In his opinion, AG Emiliou stated: "*in a world which is increasingly based on an 'Economy 2.0', it may be desirable, and perhaps even necessary, to change the current thresholds.*" This would require a legislative amendment and not a mere EC policy change. Simple revisions to lower the turnover thresholds would not solve the problem of capturing killer acquisitions – and would require the EC to review disproportionate numbers of "no-issues" deals. But the reforms could potentially take various other forms, such as recent introductions of transaction value thresholds in Austria and Germany, or the UK's particularly elastic "share of supply" test.

FOR MORE INFORMATION

Our Antitrust 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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