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BELOW-THRESHOLD MERGERS: ILLUMINA FINDS THE HOLY GRAIL OF LEGAL CERTAINTY

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Ajal Notowicz, Andrea Hamilton and Charl Van der Merwe, Milbank LLP

In a landmark judgment involving two companies active in the biotech space, the European Court of Justice (ECJ) has curtailed the European Commission's (the Commission) attempts to scrutinise potentially anti-competitive transactions that fall below the EU and national jurisdictional merger control thresholds (*Illumina v Commission and Grail v Commission joined cases C611/22 P and C625/22 P*).

The judgment of 3 September 2024 brings an end to that case, but its ramifications are wider. It represents an important setback for the Commission. Nevertheless, dealmakers need to be mindful of alternative ways that the Commission and national competition authorities may seek to take jurisdiction.

The Commission's Article 22 policy

Article 22 of the EU Merger Regulation (*139/2004/EC*) (EUMR) (Article 22) gives EU member states the right to request the Commission to examine a concentration even though the turnover thresholds set out in the EUMR are not exceeded (*see box "Article 22 referral conditions"*). Before 2021, it was the Commission's policy to permit referrals under Article 22 only where the requesting member state either had jurisdiction to review the transaction under its own merger control rules or did not have a merger control regime at all.

This changed on 31 March 2021, when the Commission published new guidance stating that, in future, it would also accept referral requests from member states that do have a merger control regime where the transaction does not exceed their thresholds (Article 22 guidance) (*https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2021:113:FULL*).

Illumina/GRAIL transaction

Less than three weeks after the Commission changed its policy, on 19 April 2021, the Commission accepted a referral request under Article 22 from France and other member states in relation to Illumina's acquisition of GRAIL. Illumina develops next-generation sequencing systems for genetic and genomic analysis. GRAIL is a developer of cancer screening tests. Illumina paid $7.1 billion for GRAIL even though, at the time, GRAIL did not generate any turnover. The transaction did not meet any EUMR or member state thresholds for merger control notification.

Article 22 referral conditions

The conditions for referring a concentration to the European Commission (the Commission) under Article 22 of the EU Merger Regulation (*139/2004/EC*) (EUMR) (Article 22) are that the concentration must affect trade between member states and it must threaten to significantly affect competition in the member state that is making the request. The Article 22 referral mechanism was originally incorporated into the EUMR at the request of the Netherlands, which did not have a merger control regime at the time but nevertheless wanted the Commission to investigate transactions with adverse effects in its territory. That is why Article 22 is also known as the "Dutch clause".

Ultimately, the Commission prohibited the transaction on the basis that it would hamper competition in the emerging market for cancer detection tests based on sequencing technologies. The Commission also imposed a €423 million penalty on Illumina for completing the transaction without prior approval from the Commission. The parties challenged the decision before the General Court, which sided with the Commission. In June 2024, after the parties had lodged their appeal to the ECJ but before the ECJ issued its judgment, Illumina spun off GRAIL as a listed company, incurring a loss of several billion dollars.

The ECJ judgment

On appeal, the ECJ took a very different view from the General Court. The ECJ annulled the Commission's decision, concluding that the General Court had been wrong to find that a "literal, historical and teleological interpretation" of Article 22 permits member states to ask the Commission to investigate transactions that fall outside their jurisdictional remit. The ECJ explained that notification thresholds are of cardinal importance, as they enable companies to easily determine whether their transaction must be reviewed, by which authority and within what timeframe.

The ECJ also found no basis for the Commission's view that Article 22 had been intended as a corrective mechanism remedying a perceived enforcement gap in turnover-based notification thresholds. Clarity on

the thresholds provides an important guarantee of foreseeability and legal certainty for companies when they assess their position under the merger control rules. The ECJ's judgment is final and cannot be appealed.

The Commission's options going forward

The judgment presents a significant setback for the Commission, as it restricts the main avenue that the Commission intended to use to scrutinise transactions falling below the EUMR and national merger control thresholds. In particular, the Commission's focus was on so-called "killer acquisitions", where an incumbent acquires a pre-revenue or early-stage start-up that has the potential to disrupt the sector.

On 18 September 2024, the Commission announced that, following the ECJ's judgment, all seven member states that originally submitted referral requests under Article 22 regarding Microsoft's acquisition of certain assets of Inflection in the field of generative AI foundation models have withdrawn their requests (*https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727*).

Under the Digital Markets Act, so-called gatekeepers are required to report their acquisitions to the Commission (*see feature article "Digital markets regulation: comparing the new EU and UK regimes", www.practicallaw.com/w-040-0659*). The Commission's wide review discretion under Article 22 provided it with comfort that it would also be able to scrutinise the impact of such transactions, but the ECJ's judgment presents a complication in this regard.

However, the judgment will not spell the end of the Commission's efforts to ensure that below-threshold acquisitions across all sectors can be reviewed. Indeed, the judgment does not question the ability of a member state to refer a transaction to the Commission where that member state has jurisdiction to review the transaction. In addition, within hours of the judgment, outgoing Executive Vice-President Margrethe Vestager issued a statement clarifying that the Commission will still want to ensure that it is able to review transactions that would have an impact in Europe but do not meet the EU notification thresholds (*https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525*).

While below-threshold transactions can still be referred to the Commission under Article 22 where a member state has jurisdiction, to the extent that the Commission considers that enforcement gaps remain in relation to transactions that do not meet national notification thresholds, the Commission has several options at its disposal. However, these are not without complications. At first glance, amending the EUMR seems an obvious route for the Commission, but this risks opening a Pandora's box of further reform proposals.

A more realistic option, particularly in the short term, is for the Commission to continue to rely on Article 22. In the first place, the Commission could, theoretically, encourage Luxembourg, the last member state without its own merger control regime, to request referrals. However, this option is expected to disappear soon, as Luxembourg is in the process of adopting its own merger control rules. Secondly, and more realistically, several member states have in recent years introduced a call-in mechanism for deals that fall below their domestic thresholds. In some instances, only a limited local nexus is required. The list of member states with call-in powers includes Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia and Sweden, and is expected to grow, with several other member states seeking wider powers.

The Commission appears to take the view that this provides it with sufficient legal basis to review a transaction, although it is possible that parties will point at the ECJ's criticism of the extended application of Article 22 and its emphasis on the need for legal certainty to challenge this approach. Member states are also able to lower their thresholds for notification, as, for example, Germany and Austria did by introducing transaction-value thresholds alongside separate turnover-based thresholds.

Finally, as the ECJ confirmed in *Towercast v Autorité de la concurrence and others*, member states are able to pursue merger cases under Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits the abuse of dominance (*C449/21*). In addition, in May 2024, the French competition authority examined non-reportable mergers in the meat-cutting sector under Article 101 of the TFEU, which prohibits anti-competitive agreements (*www.autoritedelaconcurrence.fr/en/press-release/meat-cutting-sector-first-time-autorite-examines-under-antitrust-law-mergers-below*).

While these general competition law prohibitions do not provide a basis for referrals under Article 22, they are nevertheless expected to play a role in national competition authorities' pursuit of killer acquisitions. For example, the French competition authority stated in response to the ECJ's judgment in Illumina that it intends to make full use of such powers (*www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european*).

Implications for dealmakers

Although businesses and their advisers have broadly welcomed Illumina, it is important to realise that the Commission has not given up on its desire to scrutinise a wide range of below-threshold transactions. Article 22 remains available as a tool to assess transactions, but with clearly defined safeguards. Thus, while the expanded Article 22 guidance is now partially defunct, in substance, this will nevertheless continue to provide an indication of the Commission's focus areas in relation to non-notified mergers, particularly with regard to killer acquisitions in the pharmaceutical, biotech and digital sectors.

For parties involved in transactions, it will be important to manage the remaining risks to transactions emanating from possible Article 22 interventions. This can be done primarily through contractual protections, such as conditions precedent.

All eyes will be on member states with wide call-in powers and their approach to making referrals to the Commission. The newfound sense of predictability could end up being short-lived.

Ajal Notowicz and Andrea Hamilton are partners, and Charl Van der Merwe is an associate, at Milbank LLP.