ALSTON & BIRD

Antitrust ADVISORY

SEPTEMBER 4, 2024

European Court of Justice Quashes the European Commission's Policy to Declare Jurisdiction over Below-Threshold Mergers

By Jens-Olrik Murach and Lydia Rachianioti

Yesterday, the European Court of Justice (ECJ) overruled the EU General Court's judgment that confirmed the European Commission's (EC) jurisdiction to review and block Illumina's $7.1 billion acquisition of Grail. The ECJ followed advocate general Nicholas Emiliou's opinion that the General Court significantly and unjustifiably extended the scope of the EU Merger Regulation (EUMR) and of the EC's merger control jurisdiction. With its decision, the ECJ denies the EC's ability to review below-threshold mergers based on an extensive interpretation of the referral mechanism under Article 22 EUMR. It declared the prohibition of the Illumina/Grail acquisition illegal, and with that took away the basis for the €432 million gun-jumping fine and the divestiture order.

The Illumina/Grail Case

In September 2022, the EC prohibited the acquisition of Grail by Illumina, two U.S.-based biotech companies. The parties to the merger did not exceed the EUMR thresholds to establish the EC's jurisdiction, nor was the merger subject to national merger review before any of the EU's Member State competition authorities.

Nonetheless, the EC declared jurisdiction to review and ultimately block the deal by applying a then novel interpretation of the referral mechanism under Article 22 EUMR. Article 22 EUMR allows one or more Member States – in practice, their national competition authorities (NCAs) – to request the EC to examine a concentration if the parties to it do not meet the thresholds set out in the EUMR and if the concentration affects trade between Member States and threatens to significantly affect competition within the requesting Member States.

In March 2021, the EC had published a new guidance, allowing it to take jurisdiction over transactions referred to it by NCAs, even when the referring Member States' merger control thresholds were not met and the authorities did not have jurisdiction. In other words, the EC suggested to take a referral from an authority that did not have any jurisdiction over the case. That should have already rung some rule of law alarm bells. While indeed some NCAs disputed the EC's jurisdiction under such an upward referral, the French Competition Authority, which did not have jurisdiction to review the Illumina/Grail deal under French law, submitted a referral request, subsequently joined by the Greek, Belgian, Norwegian, Icelandic, and Dutch competition authorities, none of which had jurisdiction to review the deal.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

Illumina and Grail appealed the EC's jurisdiction to review the acquisition before the General Court and completed the transaction while the EC's investigation was still pending. The parties also filed appeals against the EC's prohibition, gun-jumping, and divestment orders.

After the General Court dismissed Illumina's and Grail's appeals, stating that the EC correctly applied a "literal, historical, contextual and teleological interpretation" of Article 22 EUMR, providing the EC with the flexibility necessary to achieve the main objective of the EUMR, which is "to permit the control of concentrations likely significantly to impede effective competition in the internal market," the parties further appealed the General Court's judgment on jurisdiction.

The ECJ Main Considerations

The ECJ ruled that the General Court was wrong to conclude that the EUMR provides for a "corrective mechanism" intended to fill a gap in the merger control system, allowing the scrutiny of below-threshold mergers, which lack European dimension and fall outside the EC's and NCAs' jurisdictions. Such a "literal, historical, contextual and teleological interpretation" of Article 22 EUMR could create an imbalance between the various objectives of the EUMR and could adversely impact the foreseeability and legal certainty guaranteed by the established notification thresholds.

The Impact of the ECJ's Decision

The ECJ's judgment puts an end to the EC's policy to take merger control jurisdiction over deals that are not subject to review anywhere in the EU.

The EC's policy was mainly targeted at alleged "killer acquisitions," i.e., acquisitions by larger players of small companies with significant potential and market impact, potentially eliminating competition and promising innovation. The EC and the NCAs will now have to reevaluate the tools available for reviewing such transactions should they fall below merger control thresholds.

One tool could be making use of the powers confirmed by the ECJ in the Towercast1 judgment, in which the ECJ ruled that the direct effect of Article 102 of the Treaty on the Functioning of the European Union (TFEU), the provision that prohibits the abuse of a dominant position (or monopolization), is not precluded by the EUMR. Therefore NCAs (also the EC) are allowed to review below-threshold transactions under that provision. However, Towercast only allows for an ex-post review under a complex substantive test and therefore should be considered inefficient from an enforcer's point of view. Moreover, the use of Article 102 TFEU for mergers has its own practical limitations because it only concerns companies with a dominant position and it is unlikely to result in structural remedies being imposed given the policy considerations around the application of Article 102 TFEU.

1 The ECJ ruling was adopted in the context of a long-lasting French litigation sparked by the acquisition by TDF of its competitor Itas, both operating in television transmission services in France. Following a complaint by Towercast, the only remaining competitor, the French NCA found that the existing ex ante EUMR regime would preclude the application of the antitrust provisions in the TFEU. The case was referred to the ECJ with a request for a preliminary ruling on appeal by the Paris Court of Appeal.

Following the ECJ judgment in Illumina/Grail, the EC's executive vice president and commissioner for competition, Margrethe Vestager, stated that the EC will continue to review deals that could impact the internal market but do not meet the EU notification thresholds. She suggested that the EC will continue to accept Article 22 EUMR referrals from Member States that have recently introduced provisions allowing them to review below-threshold deals and take jurisdiction. In fact, Italy, Ireland, Sweden, Denmark, Slovenia, Latvia, and Hungary are among those Member States that have introduced call-in provisions. However, that policy could create legal challenges of its own kind – on both Member State and EU levels – and may not be sufficient to cover the perceived enforcement gap created by the ECJ ruling. The call-in power can only be used when a deal meets the local nexus requirement of that Member State.

Finally, obviously, legislators at the EU and national levels could become active and align their respective merger control rules to close the perceived enforcement gap.

Jens-Olrik Murach
Partner, Brussels
jens.murach@alston.com
+32 2 486 8826

Lydia Rachianioti
Senior Associate, London
lydia.rachianioti@alston.com
+44 20 8161 4353

You can subscribe to future Antitrust and/or Mergers & Acquisitions advisories and other Alston & Bird publications by completing our **publications subscription form**.

If you have any questions, or would like additional information, please contact one of the **attorneys** *with our* **Antitrust Team** *or one of the* **attorneys** *with our* **Mergers & Acquisitions Team**.