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Mind the Gap: ECJ Judgment Determines European Commission Cannot Review Deals Below Member State Merger Control Thresholds

The European Court of Justice ("**ECJ**") has upheld an appeal against the European Commission's ability to accept referrals under Article 22 of the EU Merger Regulation ("**EUMR**") from national competition authorities who are not competent to review deals under national law.

The case at issue concerns Illumina's attempted acquisition of early cancer detection test maker GRAIL (the "**Transaction**"), blocked in 2022 (and since unwound). But the judgment has implications far beyond that Transaction. The Commission will need to revisit how best to cast its jurisdictional net over below-Member State threshold transactions that may raise competition concerns within the internal market. Possible approaches could include amending the EUMR to adopt HSR-style value of transaction thresholds; encouraging more Member States to amend national merger control rules to introduce acquisition value or market share thresholds; or relying on Member States using Articles 101 and 102 TFEU that prohibit anti-competitive agreements and abuse of dominance.

Meanwhile, it is clear that this judgment is unlikely to slow the political push toward review of below-Member State threshold deals in Europe. Concerns around the inability of traditional turnover and market share thresholds to permit reviews of deals in fast-moving sectors such as the digital and life sciences industries (where historic revenues may not capture the "future competitive potential" of targets) will remain—as recent amendments to the UK and proposed amendments to the Australian and Indian merger regimes, as well as longstanding practice in Austria and Germany, all attest.

The Court's findings

The Transaction was controversially referred up to the European Commission on 9 March 2021 by the French Competition Authority (and then later joined by the Belgian, Greek, Icelandic, Dutch, and Norwegian competition authorities) at the Commission's invitation, after a complaint by a third party. The referral for EU-level review was controversial because the Transaction did not satisfy any EU Member State (or indeed any global) turnover threshold as GRAIL had not yet generated any EU revenue. Illumina did engage with regulators in the UK and US—both of which have thresholds not based solely on revenue.

According to the Commission and the General Court (the EU's court of first instance), based on a literal, historical, constructive, and purposive interpretation of the EUMR there was no legal obstacle to the application of Article 22 where the referring

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Member States did not themselves have jurisdiction under national laws. It was not relevant that the origin of Article 22—the so-called "Dutch clause"—was to address an enforcement gap that existed at the time the EUMR was passed (the Netherlands (and others) did not have merger control rules at the time). The General Court held that if the law was interpreted differently, neither the Commission nor Member States would have the ability to review potentially anti-competitive mergers.

The ECJ disagreed, holding that Article 22 does not enable the Commission to accept the referral of concentrations from national competition authorities that are not themselves to review the relevant deals.

- The General Court had erred in its historical interpretation of the EUMR: the documents that it relied on for that exercise did not provide a clear answer on whether Article 22 allows Member States to refer transactions not covered by national merger control rules; and, although the objectives of the EUMR had been "successively extended over time" to strengthen the application of EU competition law, that did not support the Commission's attempts to broaden its use of the Article 22 referral mechanism.

- The ECJ found that the General Court had further erred in its contextual and purposive interpretation of Article 22. Various factors that the General Court had taken into account (*e.g.*, the recitals to the EUMR describing the provision as a "corrective mechanism" to remedy deficiencies in the merger control system) did not in fact support the Commission's position.

- Conversely, the ECJ found that the General Court had failed to take proper account of several factors that it found determinative:

  - from a "systemic perspective", the aim of the EUMR was to establish an effective system that took account of the need for legal certainty with a clear allocation of powers between the Commission and national competition authorities and a predictable system of prior merger control;

  - Article 1(5) EUMR enabled the Council, following a proposal by the Commission, to revise the jurisdictional thresholds under the EUMR, which provided a solution to the jurisdictional issues of concern; and

  - certain differences between the operation of Article 22 and other referral mechanisms under the EUMR (notably the circumstance that an Article 22 referral does not disapply the EUMR for non-referring Member States) militated against an expansive interpretation of Article 22.

As the opinion of Advocate-General Emiliou put it: the Commission would otherwise have the power to review almost any concentration, occurring anywhere in the world, regardless of the undertakings' turnover and presence in the European Union and the value of the transaction. The ECJ concluded this was not the case, adding that it would be "*at odds with the principle of institutional balance.*"

Background to the controversial 2021 change in Commission policy

The Commission significantly changed its policy toward Member States referrals under Article 22 on 26 March 2021 when it announced, following an evaluation of the merger thresholds launched in 2016, that it would encourage and accept more referrals from Member States where transactions did not meet national merger control thresholds. The Competition Commissioner, Margrethe Vestager, had first publicly mentioned this policy change on 11 September 2020—ten days before the *Illumina/GRAIL* deal was signed—whilst noting that "*this won't happen overnight*."

The rationale for the policy change dates back to a concern that arose in relation to the Commission's review of Facebook's US$16 billion acquisition of WhatsApp in 2014. WhatsApp had at the time around 600 million users worldwide and between 50-150 million in the EEA but did not generate sufficient turnover in the EU to satisfy the EU merger control thresholds. The deal was only reviewable by the Commission as a result of the transaction satisfying three Member States' national rules (Cyprus,

Spain, and the UK). While it was reviewable within the orthodox interpretation of Article 22 (before the 2021 policy change), the Transaction highlighted the potential for concentrations involving firms with little or no turnover that could adversely affect competition in the internal market and yet were not reviewable by Member States or the European Commission. This concern is particularly relevant for transactions in relation to pre-monetisation or scale-up digital targets; pipeline pharmaceuticals, biotech or patent portfolio acquisitions.

The Commission considered adopting transaction value thresholds (as the US HSR, Indian, German, and Austrian rules do and which the Australian Treasurer proposes), but consultation feedback was not in favour:

- a majority of respondents did not see a significant enforcement gap borne out by cogent empirical evidence;
- “complementary” thresholds would generate a significant number of “false positive” cases that did not raise competition concerns in Europe and thereby divert Commission resources from those which did;
- purchase price thresholds would raise issues of predictability and legal certainty (given these are a matter of subjective determination between merger parties); and
- the relevance of global purchase price thresholds was unclear given the lack of a link between the value of a transaction and any EU nexus.

On 31 March 2021 (around four months after the Commission received a complaint about the Transaction from a third party, and one month after it wrote to Member States inviting a referral of the GRAIL acquisition), the Commission published its Guidance on referrals, changing its previous approach.

Implications of the judgment

At one pen-stroke, the judgment has rendered the Commission’s March 2021 policy to Article 22 referrals unlawful. Following its first below-threshold case in *Illumina/GRAIL*, the Commission accepted referrals in two further deals not reviewable by any Member States: ***Qualcomm/Autotalks***, a tech case involving vehicle to everything (V2X communications technology), which was abandoned by the parties, and ***EEX/Nasdaq Power***, which involved financial power exchanges, also recently abandoned.

The Commission said in late 2023 that it had by that point “*seriously considered*” more than 60 potential candidate cases, some of which were not notifiable anywhere in the EU.

As for *Illumina/GRAIL*, not only was the Transaction unwound in 2023, but Illumina received the highest ever gun-jumping fine imposed by the Commission (around €432 million) for closing the acquisition despite the Commission’s ongoing review in August 2021.

Back to the Future?

There is likely to be a period of reflection following today’s judgment. One live question is how many problematic cases really avoid merger control review in Europe: in practice few tech cases have fallen into the feared Facebook/WhatsApp category. For example both ***Adobe/Figma*** and ***Facebook/Kustomer*** tripped the German/Austrian acquisition value thresholds and were referred to the Commission under a conventional application of Article 22.

However there will be knock-on effects. For example, mandatory deal reporting by gatekeepers under Article 14 of the Digital Markets Act will no longer function as expected. The Commission will continue to be informed of these deals but may lack the ability to intervene in many of them (unlike the UK CMA under the equivalent Digital Markets Competition and Consumers Act).

So what policy responses are available to the Commission following the judgment?

The first and most obvious is to revisit the output of its 2021 staff working document and seek reform of the EU Merger Regulation to include acquisition value thresholds. The previous objections the Commission flagged to these remain, however, and EU legislative reform would require support from the Member States. While the transaction purchase price reflects the parties' assessment of a target's future value, the underlying assumptions may be very different from the manner in which potential competition is assessed in predicting future market conditions through an antitrust lens. There would, moreover, need to be an additional element in the jurisdictional trigger to ensure a sufficient EU nexus.

An alternative approach could be to rely on Member States to reform domestic thresholds to include acquisition value triggers (that apply in Germany and Austria); or share of supply/market share thresholds (that apply in Portugal and Spain) or to join Denmark, Hungary, Italy, Iceland, Ireland, Lithuania, Norway and Sweden in amending national laws to permit call-in. However, the Commission would have to rely on soft pressure to achieve this, as domestic merger control is, by definition, outside its competence for direct legislative input.

Finally, the Commission could encourage Member States to make use of Articles 101 and 102 TFEU which prohibit anti-competitive agreements and abuse of dominance (the EUMR prevents the Commission itself from applying these rules to concentrations). Indeed, some Member States (for example, Belgium) have already relied on the ECJ's March 2023 judgment in *Towercast* which confirmed that acquisitions by dominant companies falling below EU and national thresholds can be challenged as an abuse of dominance. As Advocate General Kokott has noted, there are a number of practical challenges and limitations in relation to this route, namely that abuse of dominance rules only apply to undertakings with an existing dominant position and there would be difficulty unwinding mergers after completion. Also, in *Towercast* the Court indicates that the mere strengthening of a dominant position is not sufficient and, in observing that regard must be had to the fact that the undertakings concerned are in the same market, the question arises if the doctrine applies to vertical concentrations (as in Illumina/Grail).

This is an area where clarity is essential for businesses and their advisers. The Commission's ability to fine businesses for gun-jumping necessitates a brightline jurisdictional test. While the inherent uncertainties of the Commission's now-rejected interpretation of Article 22 have been removed, uncertainty remains as to how the Commission and Member States will respond to the removal of this mechanism to address non-notifiable mergers that raise potential antitrust concerns.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Ross Ferguson
+44-20-7601-8646
rferguson@paulweiss.com

Annie Herdman
+44-20-7601-8602
aherdman@paulweiss.com

Nicole Kar
+44-20-7601-8657
nkar@paulweiss.com

Henrik Morch
+32-2-884-0802
hmorch@paulweiss.com

Rich Pepper
+44-20-7601-8660
rpepper@paulweiss.com

Lauren O'Brien
+44-20-7601-8648
lobrien@paulweiss.com

Associate William Feerick, law clerk Andrea Wei Ling Chong and legal consultant Timothy Noelanders contributed to this Client Memorandum.