BCLP. Client Intelligent

Insights

ILLUMINA V EUROPEAN COMMISSION: THE GENERAL COURT'S JUDGMENT MARKS THE END OF THE PRINCIPLE OF LEGAL CERTAINTY IN MERGER CONTROL

Jul 21, 2022

SUMMARY

On the 13 July 2022, the General Court upheld the European Commission's decision to accept a referral from Member States under Article 22 of the EU Regulation n°139/2004 on merger control ("**EUMR**") to review a deal that fell below those Member States' merger control thresholds. This is the first time the General Court has ruled on the application of the Article 22 referral mechanism, confirming that the Commission has the competence to review transactions that meet neither national nor European thresholds where they have been referred to the Commission under Article 22. This judgment will have a significant impact on M&A transactions.

BACKGROUND ON ARTICLE 22 EUMR

Article 22 EUMR provides that one or more Member States may ask the Commission to examine any concentration that does not meet the EU's merger control thresholds but which affects trade between Member States and threatens competition within the territory of the Member State(s) making the request. The Article 22 mechanism, a version of which pre-dates the current 2004 EUMR and was designed at least in part to allow Member States without merger control regimes to refer cases to the Commission, does not specify that a Member State's thresholds must be met for a referral to be made. However, until recently it was the Commission's policy to only accept referrals where the transaction had already been notified in a Member State. In other words, where a transaction was not notifiable at the national level, the parties did not need to consider whether the Commission might nevertheless end up reviewing it.

In 2020, European Commissioner Margrethe Vestager announced a policy shift - that the Commission would entertain requests from Member States under Article 22 that do not meet the notification thresholds for the EU or any Member State. The Commission released guidance in support of this policy in March 2021. BCLP has written about these developments already - please

see our insights here and here. The 2020 policy announcement did not change the wording of Article 22, but rather represented a shift in the Commission's approach to its application.

THE ILLUMINA/GRAIL REFERRAL FROM THE FRENCH COMPETITION AUTHORITY AND OTHERS

The first referral request to the Commission under this new policy was Illumina's proposed acquisition of Grail. Illumina is an American company specialising in genome sequencing, and Grail is an American biotechnology company which uses genomic sequencing to develop cancer screening tests ("**the Parties**"). The Parties announced their intended deal in September 2020, but their relevant turnover did not meet the Commission's or Member States' merger review thresholds, and thus no merger control notifications were submitted.

However, the Commission determined that the proposed transaction satisfied the necessary conditions to be referred by a national competition authority. In February 2021, the Commission wrote to the Member States encouraging them to implement Article 22 in this case. One month later, the French Competition Authority submitted such a referral and was joined by the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities. The Commission, of course, accepted the referral.

While the Commission's review was ongoing, the Parties closed the transaction. Consequently, the Commission started a gun-jumping investigation against Illumina.

Illumina's unsuccessful challenge to the General Court sought to establish that the Commission lacked the competence to accept the referral. The General Court (perhaps unsurprisingly) dismissed this challenge, although Illumina has said it will appeal. As outlined above, Article 22 does not stipulate that any thresholds - EU or Member State - must be met for a referral to be made. The General Court's judgment, subject to any future ruling on the case by the European Court of Justice ("**ECJ**"), confirms that a need to meet a Member State's thresholds should not be read into the Article as a condition for its application as the Article constitutes "*an effective corrective mechanism […] by protecting the interests of the Member States*". Constraining the Article 22 mechanism to circumstances where a Member State's merger control threshold is met would arguably contradict this purpose of Article 22.

PRACTICAL IMPLICATIONS OF THE GENERAL COURT'S RULING: EXTRA RISK AND UNCERTAINTY FOR COMPANIES

The General Court's ruling does not make life easier for dealmakers whose transactions have an effect within the EU. In rejecting Illumina's appeal, the General Court confirms the Commission's competence to review concentrations that trigger no merger control thresholds, where there has been a referral under Article 22. The General Court's judgment thus raises several practical questions with significant impacts for businesses.

First, the General Court's judgment clarifies the timeframe for the Article 22 referral mechanism. **A request under Article 22 must be made within 15 working days of the date on which the concentration was notified or otherwise made known to the Member State.**

In its judgment, the General Court ruled that "making known" is the active transmission of sufficient relevant information to the Member State. Therefore, the 15 working day clock for a Member State to request a referral may not start until that Member State has received notice of the deal - most likely from the transaction parties, the Commission, another Member State or a third party. In other words, in some instances the Article 22 referral mechanism may lead to parties informing many or all national competition authorities of any transaction so that the 15 working day clock can run.

Second, the question of targeted sectors still remains. In theory, **all sectors are covered by Article 22 as the mechanism was intended to capture "sub-threshold" transactions**, involving smaller target companies. The purpose was in particular to control "killer acquisitions" in which incumbent firms acquire innovative targets to discontinue the target's innovation projects and pre-empt future competition. However, before defining the "killer acquisitions" the Commission had previously found that digital and pharma/biotech mergers (such as in Illumina/Grail) are of particular interest. Further guidelines from the Commission are expected to provide clarification on the sectors which are most suitable for an Article 22 referral.

Finally, the judgment raises the **question of deal structure, which will have to take into account the risks and uncertainty** of a possible referral by a national competition authority to the Commission. This means that businesses might need to agree on a condition precedent prior to closing and to withhold the implementation of the transaction pending a possible referral to the Commission.

This judgment could change dealmakers' behaviour, but it will be interesting to see how the ECJ rules on this if Illumina does indeed lodge an appeal.

BCLP's Antitrust and Competition group is continuing to monitor this case. If you have any questions about how the General Court's ruling might affect your business - or if you would like to speak more generally about merger control in the EU, UK or globally - please contact any of the lawyers listed.

RELATED PRACTICE AREAS

- Antitrust

MEET THE TEAM

Victoria Newbold

London

victoria.newbold@bclplaw.com
+44 (0) 20 3400 4133

Julie Catala Marty

Paris

julie.catalamarty@bclplaw.com
+33 (0) 1 44 17 77 95

Tom Wright

Brussels

thomas.wright@bclplaw.com
+32 (0) 2 792 2437