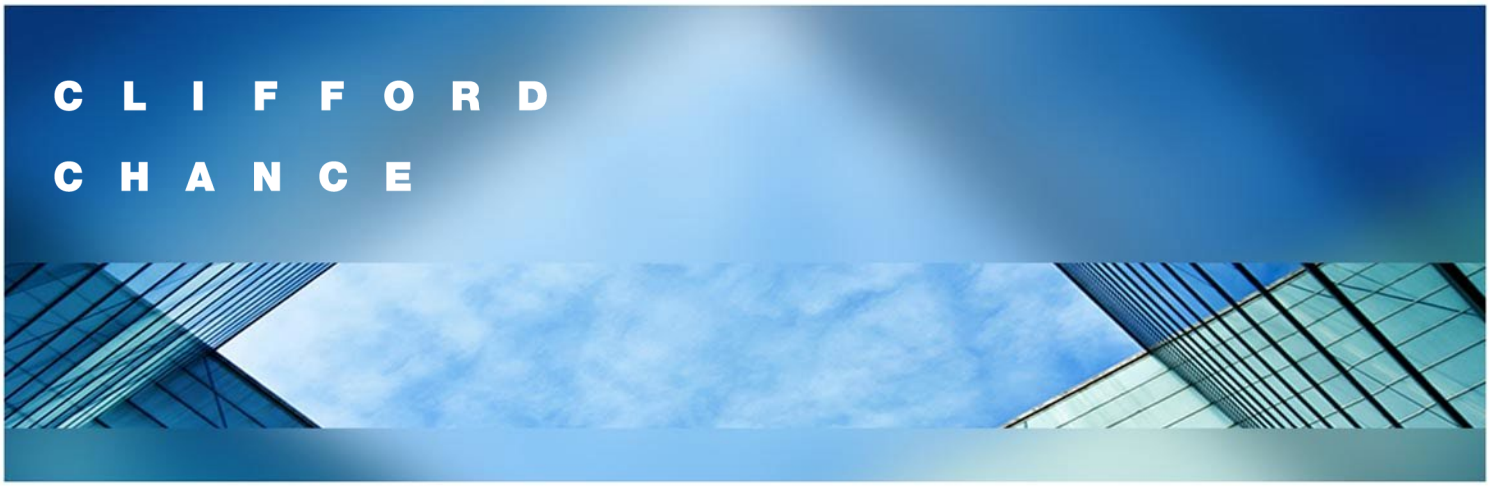

EU COURT OF JUSTICE JUDGMENT IN *ILLUMINA/GRAIL* REJECTS EUROPEAN COMMISSION'S EXPANSION OF MERGER REVIEW JURISDICTION

In a final, non-appealable judgment, the Court of Justice of the EU (**CJEU**) has ruled that the European Commission (**EC**) does not have jurisdiction to review mergers that are referred to it by EU member state authorities under Article 22 of the EU Merger Regulation (**EUMR**), in circumstances where the merger does not meet the thresholds for notification under the EUMR and does not meet the criteria for review under any national merger control rules of the EU member states.

Parties to mergers that do not meet the thresholds for review under EU or member state merger control laws now have legal certainty that they can close their transactions without risk of the transaction still being referred to and reviewed by the EC. However, that comfort is tempered by the recently resurrected possibility of post-closing challenges under other provisions of EU competition law, as a result of the CJEU's *Towercast* judgment. Moreover, many national competition authorities (**NCAs**) in the EU now have "hybrid" regimes that allow them to review certain below-threshold mergers and will therefore still be able to refer mergers upwards for review by the EC even if the thresholds for a mandatory national filing are not met.

BACKGROUND

The *Illumina/Grail* case concerned the interpretation of Article 22 of the EUMR, which provides for the possibility for NCAs to refer a transaction to the EC for review. The question in the case was whether the EC is allowed to accept such referrals if none of the referring NCAs had jurisdiction to review the merger under their national merger control laws. In particular, Grail, the target of Illumina's acquisition, had no turnover or market share in any EU member state, and so fell below the jurisdictional thresholds of the NCAs that referred the transaction to the EC. The EC subsequently prohibited the transaction and required it to be unwound.

Key takeaways

- Parties to mergers that do not meet the thresholds for review in any EU jurisdiction now have the legal certainty that they can implement their transaction safe from any challenge under EU or national merger control laws.
- However, referrals of mergers by member states with "hybrid" regimes (which allow the authority to call in certain mergers for review even if they do not meet the thresholds for mandatory filing) are still possible.
- The EC and NCAs might now be more inclined to consider other avenues to challenge transactions. Even if challenges under merger control laws are precluded, the CJEU's recent *Towercast* judgment allows NCAs and courts to challenge mergers under the prohibition on abuse of dominance in Article 102 TFEU, even after they have closed.
- Over the longer term, the EC and EU member states may expand their jurisdictional thresholds in response to the judgment, to capture transactions that would otherwise not be subject to any review.

Historically, the EC had refused to accept referrals where the transaction fell below the national thresholds but changed its policy in March 2021 due to the perceived need to capture so-called "killer acquisitions", namely deals whereby a business purchases a target with minimal current activities in order to pre-empt future competition. The acquisition of Grail by Illumina was the first below-threshold transaction to be reviewed by the EC under its new policy.

THE CJEU'S JUDGMENT

In its first instance ruling on Illumina's appeal, the General Court (**GC**) upheld the right of the EC to accept the referral of the *Illumina/Grail* merger. However, the CJEU disagreed. It found that while the language of Article 22 did not, in and of itself, preclude permitting referrals by a member state without jurisdiction to review the deal, such an interpretation would be erroneous based on the history, context and aims of the provision.

In particular, the CJEU noted that the aim of Article 22 was to allow referrals by member states that did not have a merger control regime and to achieve procedural efficiency by allowing for a "one stop shop" review by the EC of mergers that would otherwise be reviewable in multiple member states. Nothing in the text of the EUMR or the documents that were prepared during its legislative process supported the argument that it was also intended to be a "corrective mechanism" for gaps in the scope of the EUMR and national merger control regimes. On the contrary, certain provisions in the EUMR suggested (albeit indirectly) that referrals could only be made by NCAs that were themselves "competent" to review the merger under their national regimes.

The CJEU also noted that the GC's ruling was inconsistent with the imperative to ensure a predictable and effective legal framework for the merging parties "within deadlines compatible with both the requirements of sound administration and the requirements of the business world". Parties to mergers falling outside national jurisdictional criteria would have to notify NCAs of all the 30 EU and EEA member states of their intention to conclude a transaction in order to obtain comfort as to whether an Article 22 referral would be triggered and would be subject to unclear procedural requirements in the event of a referral. To the extent that capturing killer acquisitions is a legitimate concern, the CJEU said that member states are free to revise the thresholds of their national regimes downwards to capture them.

IMPLICATIONS

The CJEU's judgment provides much-needed clarity on the correct interpretation of Article 22. Parties to mergers that do not meet the thresholds for review in any EU jurisdiction now have the legal certainty that they can implement their transaction safe from any challenge under EU or national merger control laws. However, that legal certainty is tempered by two factors.

First, even if challenges under merger control laws are precluded, the CJEU's recent *Towercast* judgment clarified that national authorities and courts are free to challenge mergers under the prohibition on abuse of dominance in Article 102 TFEU, even after they have closed (see our briefing). A recent decision of the French competition authority concluded that the *Towercast* ruling's reasoning also allows challenges under the Article 101 prohibition on anticompetitive agreements, suggesting that mergers involving non-dominant parties may also be at risk. Authorities have made sparing use of this possibility to date, but that could change as a result of the CJEU's *Illumina/Grail* judgment.

Second, the *Illumina/Grail* ruling does not appear to exclude referrals of mergers by member states with "hybrid" regimes, which allow the NCA to "call in" certain mergers for review even if they do not meet the thresholds for a mandatory filing. At present, Denmark, Hungary, Italy, Ireland, Latvia, Lithuania, Slovenia and Sweden have such regimes and some allow for a very broad range of below threshold mergers to be reviewed. Ireland's, for example, requires only that the merger "may have an effect on competition in markets for goods or services" in Ireland. Where such authorities are competent to review a below threshold transaction, they can still make an upwards referral to the EC. The EU Competition Commissioner, Magrethe Vestager, has issued a press release following the judgment to confirm that the EC will still accept such referrals. While Article 22 allows the EC to review a merger's effect on competition only in those member states that have referred the merger, many referred mergers (including, in the EC's view, *Illumina/Grail*) have EU-wide effects, such that the EC can prohibit the merger or impose remedies irrespective of which NCA makes the referral.

Commissioner Vestager has also stated that the EC "will consider the next steps to ensure that the EC is able to review those few cases where a deal would have an impact in Europe but does not otherwise meet the EU notification thresholds". The EUMR foresees that changes to the notification criteria and thresholds can be made based on a simplified procedure that does not require unanimous approval of member states' governments. We may also see even more member states introducing hybrid regimes.

Being able to receive Article 22 referrals will be seen as critical by the EC especially in relation to digital markets. The Digital Markets Act requires designated gatekeepers to inform the EC of their planned acquisitions, to allow the EC to ask member states to refer those acquisitions to it for review under Article 22. The limitation of the scope of Article 22 limits the EC's ability to review gatekeeper mergers that are not reviewable in any of the member states.

A more specific consequence of the ruling is that the EC's decision to prohibit and unwind the *Illumina/Grail* merger is now devoid of a legal basis, as is its decision to impose a fine of €432 million for closing the acquisition prior to the EC's prohibition decision. Given that the difference between the price that Illumina paid for Grail and the amount it received from its subsequent divestiture runs into several billions of dollars, Illumina may bring a claim for substantial damages against the EC, although the transaction was also prohibited by the US Federal Trade Commission.

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