REMEDIES AFTER *ILLUMINA/GRAIL* – THE THORNY QUESTION OF PROPORTIONALITY

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The 2024 judgment from the European Court of Justice in the *Illumina/GRAIL* case provided a major clarification on the possibility for the European Commission ("EC") to review transactions that fall below the notification thresholds. The judgment invalidates the EC's novel interpretation of accepting and indeed encouraging referrals from EU Member States of transactions that did not meet the merger control review threshold at the EU or national levels, as well as the EC's long-standing practice of allowing any Member State (even those without competence to review the transaction at a national level) to join a referral request. This article discusses the implications of the *Illumina/GRAIL* judgment, with a particular focus on its impact on the scope of the EC's substantive assessment in referred cases and its ability to extract remedies that go beyond the territories of the Member States that validly refer the transaction for the EC's review.

I. INTRODUCTION

For several years, the public discourse on merger control has been dominated by the view that a number of problematic transactions were escaping any form of merger control review, because they did not meet the criteria triggering an obligation to notify the transaction for review. The perceived "enforcement gap" related in particular to transactions where a company with a strong market position is buying a new innovative entrant – with revenues so small that they do not meet the revenue-based criteria for a filing – to eliminate a competitive threat.

To ensure that those so-called "killer acquisitions" did not escape a review, the European Commission ("EC") started accepting and indeed encouraging EU Member States ("Member States") to refer transactions that did not meet the national notification criteria for the EC's review. This entailed a novel interpretation of Article 22 of the EU Merger Regulation ("EUMR"), which foresees the mechanism allowing Member States to refer transactions to the EC for review.[2] Until 2021, the EC's policy was to only accept referrals from Member States that either did not have national merger control rules or that were competent to review a transaction but considered the EC better placed to do so. Under the novel interpretation, the EC was ready to accept referrals also where a Member State did not have, under its national merger control rules, competence to review the transaction.

Following the Court of Justice's ruling in *Illumina/GRAIL*,[3] that interpretation no longer stands. The EC's ability to review transactions that do not meet national thresholds, along with a Member States' ability to refer and to join such referrals where they do not have competence to review at a national level, has been redefined.

The restriction of the Member States' ability to refer transactions to the EC has a direct impact on the scope of the EC's review, as the EC is only competent to review the effects of the transaction on the territories of the Member States that validly referred the transaction to the EC. This article examines how the scope of the EC's competence may impact the EC's ability to require remedies that are not limited to the referring Member States.

II. THE *ILLUMINA/GRAIL* JUDGMENT AND THE LIMITATION ON THE MEMBER STATES' ABILITY TO REFER CASES TO THE EC

The EC's novel interpretation of Article 22, welcoming referrals of transactions that did not meet the notification thresholds at national level, was put to test after the French national competition authority requested that the Illumina/GRAIL transaction be referred for review by the EC in March 2021, despite the transaction not meeting the requirement for a mandatory notification in France. That request was subsequently joined by the Belgian, Greek, Icelandic, Dutch and Norwegian national competition authorities, none of which had competence under their national laws to review the transaction. The EC accepted the referral and, following its review of the transaction, decided to block it in 2022. Since Illumina had closed the acquisition while the proceedings were ongoing, the EC imposed interim measures requiring Illumina to hold GRAIL separate, and, subsequently to divest GRAIL.[4] Illumina challenged the EC's competence to accept the referral before the General Court.[5] The General Court sided with the EC, but on appeal, the Court of Justice overturned the General Court's judgment and annulled the EC's decision to accept a referral.[6]

The Court of Justice's ruling thus invalidates the EC's novel interpretation of Article 22 and clarifies that Member States may refer a transaction for the EC's review only if they either did not enact any national merger control rules or where their national merger control rules give the Member States' authorities competence to review the transaction. Following the Court of Justice's judgment in *Illumina/GRAIL*, the EC has withdrawn its 2022 guidance on Article 22 referrals.[7]

The judgment also invalidates the EC's longstanding practice of allowing any Member State to join a referral request made by another Member State. Prior to 2021, the EC accepted that any Member State could join a request for a case to be referred to the EC, as long as the

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Article 22.

3 Judgment of 3 September 2024, *Illumina, Inc. v. European Commission*, C611/22 P and C625/22 P, EU:C:2024:677.

4 For an overview of the different EC decisions in the Illumina/GRAIL case, see Press Release, European Commission, Commission approves Illumina's plan to unwind its completed acquisition of GRAIL (April 12, 2024).

5 Judgment of 13 July 2022, *Illumina, Inc. v. European Commission*, Case T227/21, EU:T:2022:447.

6 *Illumina, Inc. v. European Commission, supra* note 3.

7 European Commission, Communication from the Commission concerning the withdrawal of act 2021/C 113/01, C/2024/7190.

original request emanated from a Member State that was competent to review the transaction on the basis of national merger control rules. While the judgment does not say so expressly, it effectively confirms that Member States without a competence to review the transaction may no longer join a referral. Indeed, the Court of Justice considers that recital 15 EUMR, which provides that *"Member States which are also competent to review the concentration should be able to join the* [referral] *request,"* evidences that Member States who are not competent, under their national merger control rules, to review the transaction cannot initiate a referral.[8] This interpretation necessarily implies that a Member State which does not have such competence may not join a referral either. Nevertheless, Member States retain the ability to review transactions under the prohibition on abuse of dominance in Article 102 TFEU (or the equivalent provision under national law), even after they have closed, as confirmed in the 2023 judgment of the Court of Justice in *Towercast*.[9]

Since the *Illumina/GRAIL* referral request to the EC, several Member States have revised their merger control regimes in a way that allows national competition authorities to assess transactions that fall below the thresholds for a mandatory notification. At present, Denmark, Hungary, Italy, Ireland, Latvia, Lithuania, Slovenia and Sweden have such regimes. Some of these regimes allow for a very broad range of below threshold mergers to be reviewed, such as in Ireland, where the national competition authority is competent to review any merger that "*may have an effect on competition in markets for goods or services*" in Ireland.[10] For others, a more stringent test needs to be met, such as in Latvia, where the national competition authorities may only review a below-threshold merger if the parties' combined market share exceeds 40 percent on the relevant market.[11]

Where such authorities are competent, under their national rules, to review a below-threshold transaction, they can still make an upwards referral to the EC. Indeed, following the *Illumina/GRAIL* judgment, the EC issued a press release confirming that it will still accept referrals from authorities who have competence to review a transaction that does not meet the criteria for a mandatory filing.[12] It subsequently accepted a referral of NVIDIA's acquisition of Run:ai from Italy, which had asserted jurisdiction to review the transaction using its powers to "call in" below-threshold transactions.[13]

As such, the *Illumina/GRAIL* judgment is unlikely to prevent below-threshold transactions from being referred to the EC. However, it impacts the scope of the EC's review, insofar as the EC's competence only extends to the territory of the Member States that have referred the transaction to it.

III. THE TERRITORIAL SCOPE OF THE EC'S REVIEW IN THE POST-*ILLUMINA/GRAIL* WORLD

Under Article 22, the EC only has jurisdiction to assess the effects of a potential transaction on the territory of the Member State which has referred the case to the EC, either by means of the original request or by virtue of joining a request of another Member State.[14]

As a result, the clarification from the *Illumina/GRAIL* judgment that only Member States that are competent to review the transaction may make the original request or join a referral has a direct impact on the scope of the EC's review. Yet, restricting the territorial scope of the EC's review to only one or a few Member States is at odds with the policy concern underlying its use. The concept of "killer acquisition" entails that a company is buying a potential competitor: it is difficult to imagine credible scenarios where an innovative entrant, in particular in the pharmaceutical or technology sector, would be a potential competitor only in one or a few Member States but not others.

In practice, where the EC found that the geographic market spanned the European Economic Area ("EEA"),[15] it has, to date, conducted the assessment on that basis, without limiting itself to the territories of the referring Member States. For example, in *Apple/Shazam*, seven Member States referred the transaction to the EC, but the EC assessed the effect on the EEA-wide markets for digital music streaming services

8 Council Regulation (EC) No 139/2004, *supra* note 2, recital 15.

9 Judgment of 16 March 2023, *Towercast v. Autorité de la concurrence and Ministère de l'Économie*, Case C-449/21, EU:C:2023:207.

10 Competition (Amendment) Act 2022, section 15.

11 Competition Law 2001, section 15.

12 Press Release, European Commission, Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions (September 3, 2024).

13 Press Release, European Commission, Daily News: Commission to assess the proposed acquisition of Run:ai by NVIDIA (October 31, 2024).

14 European Commission, Notice on Case Referral in respect of concentrations [2005] C 56/02, para. 50 and footnote 49.

15 The EEA covers the territory of the European Union, as well as Iceland, Liechtenstein, and Norway.

and stand-alone music recognition apps for smart mobile devices, without a specific consideration of the impact in the territories of the Member States that referred the transaction.[16] Even where a Member State refused to join a referral request and conducted a parallel investigation under national laws, the EC did not carve out that Member State's territory from an EEA-wide market. Such was the case in *Meta/Kustomer,*[17] where Germany refused to refer and required the transaction to be notified separately in Germany.[18]

It is unlikely that the *Illumina/GRAIL* judgment will materially affect the EC's approach in that respect. Concerns identified on an EEA-wide market would by definition also affect the territories of the Member States referring the transaction. Conversely, if a market is defined as national in scope, then the EC's review should be limited to those Member States that have referred the transaction. This was the approach adopted in *Knauf/Armstrong*, discussed below.[19] However, in *Meta/Kustomer*,[20] despite the territorial scope of its competence being limited to only those ten Member States that referred the case, when assessing the effects of the acquisition of Kustomer on the market for online display advertising, the EC relied on Meta's market shares in various sub-segments of the online display advertising market at national level, including in several EEA countries which had not been part of the referral, to find that Meta held significant market power on that market (although the EC ultimately concluded that the transaction would not significantly impede effective competition in that market). This was so despite the fact that a separate review of the transaction under German national rules was ongoing.[21]

The Court's clarifications in *Illumina/GRAIL* could provide support for companies to challenge EC's requests for market shares in Member States that did not join a referral where the market is national in scope. If the EC's assessment leans on the impact of the transaction on those Member States, that could also provide a basis to challenge the validity of the EC's conclusions, including in terms of the scope of the remedies that the EC considered necessary to address its concerns.

IV. REMEDIES NEGOTIATIONS POST-*ILLUMINA/GRAIL*

To alleviate concerns identified by the EC during its review of a transaction, the parties may offer remedies, which must be *"proportionate to the competition problem and entirely eliminate it."*[22] In other words, remedies should not go beyond what is necessary to remedy the perceived risk to competition as a result of the transaction.

Where competition concerns are identified in relation to an EEA-wide market, remedies need to also be offered at the EEA level. For example, in *Microsoft/Activision*, the EC found that the market for both physical and digital game distribution was at least EEA-wide and accepted commitments from Microsoft to ensure that all consumers based in the EEA who had the right to stream the relevant games on the transaction closing date would have the right to stream the relevant games for a period of 10 years.[23] Similarly, in *Takeda/Shire*, to address concerns relating to the potential discontinuation of a pipeline pharmaceutical product that could be offered across the EEA, the remedy entailed the divestment of global rights to that pipeline product, with the possibility for Takeda to re-acquire rights to that product outside of the EEA.[24]

EEA-wide remedies were also accepted to address EEA-wide concerns in cases that were reviewed by the EC following an Article 22 referral. Thus, in *Meta/Kustomer*,[25] where the EC raised concerns regarding the supply of Customer Relationship Management software solutions, the remedies entailed guaranteed access to relevant software solutions across the EEA, rather than being limited to those ten Member States

16 COMP/M. 8788, *Apple/Shazam.*

17 COMP/M.10262, *Meta (Formerly Facebook)/Kustomer.*

18 Press Release, Bundeskartellamt, Bundeskartellamt considers Meta/Kustomer merger to be subject to notification (December 9, 2021).

19 COMP/M.8832, *Knauf/Armstrong.*

20 *Meta/Kustomer, supra* note 17.

21 *Id.*, recital 548.

22 EUMR, recital 30; European Commission, Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] C 267/1, para. 85.

23 COMP/M.10646, *Microsoft/Activision Blizzard*, recital 760 and footnote 845.

24 COMP/M.8955, *Takeda/Shire*, recital 123.

25 *Meta/Kustomer, supra* note 17.

that had made the referral or joined.[26] Again, the EEA-wide remedies were offered and accepted at the EU level despite the fact that the German Federal Cartel Office was conducting a parallel review of the transaction.

Even where markets are national and concerns are raised in relation to only some of them, the EC often requires remedies to be broader in scope to limit the risk that a remedy confined to one Member State would be rendered ineffective by sales into that Member State from neighboring EU countries or that the divested business will lack sufficient scale or geographic footprint to be competitive. For example, in *AB InBev/SAB Miller*, the parties agreed to divest global rights to the relevant brands in Hungary, Romania, Czech Republic, Slovakia and Poland (i.e. those markets in which the EC had concerns regarding the effect of the concentration on competition).[27] This is also true in cases that were reviewed by the EC following an Article 22 referral. For example, in *Knauf/Armstrong*, Knauf committed to divest Armstrong's mineral fiber and grids business in Austria, Estonia, Germany, Ireland, Italy, Latvia, Lithuania, Portugal, Spain, Turkey, and the UK, in circumstances where markets were national in scope and the EC was only assessing the effect of the transaction on the five referring Member States (Austria, Germany, Spain, Lithuania and the UK).[28] The scope of the remedies was driven by concerns that offering a more limited divestment would not allow the divested business to compete effectively in the five Member States concerned.[29]

However, the *Illumina/GRAIL* case law, combined with the principle of proportionality, may make it more difficult for the EC to extract broader remedies. This is especially so in relation to markets where the parties have strong arguments that remedies confined to the territory of a particular Member State address any competition concerns that could arise in that territory.

For example, in cases concerning the technology sector, competition concerns often relate to the integration of services of the target company into the acquirer's product, interoperability restrictions, the cross-use of data to further cement a company's already significant market power in a related market, or input foreclosure. In those markets, the EC has often considered that concerns could be addressed with behavioral remedies, which typically include obligations not to integrate certain services, to share certain data or information with competitors, or not to hamper the operation of competitors' products when integrated with one of the acquired or existing products. Examples of such cases include *Microsoft/LinkedIn*,[30] where Microsoft committed to ensure that LinkedIn would remain optional for both users of Windows and manufacturers of computers and to provide application programming interfaces ("APIs") to enable interoperability between the Microsoft Office suite and other professional social networking services; *Broadcom/VMware*,[31] where Broadcom committed to guarantee access to the interoperability APIs as well as to the materials, tools and technical support necessary for the development and certification of Fiber Channel Host-Bus Adapters ("FC HBAs"); and *Google/Fitbit*,[32] where Google committed to implementing a data-silo to maintain a technical separation of a Fitbit user's data from any other Google data used for advertising and to maintain interoperability between Google Android and competing wearable devices and between Fitbit and other competing operating systems. Where a concern can be addressed by a commitment not to integrate certain products or to provide certain services on a standalone basis, and where it is relatively straightforward to identify when the product or service is offered in a particular Member State concerned, it may be more difficult for the EC to require such remedies to be offered at an EEA-wide level if the relevant markets are national in scope. However, in the cases cited above, many of the relevant geographic markets were defined as being EEA-wide or global in scope, so it is not certain that the remedies imposed would have differed if those cases had been the subject of an Article 22 referral by only some Member States. Where the EC identifies competition concerns in vertically-related or complementary markets, only one of which is national in scope, the possibility of a remedy that is tailored only to the referring Member States will depend largely on whether it is feasible to commit to supplying to, or purchasing from, rivals in the referring Member State(s), or to refrain from tying or bundling strategies only in respect of customers in the referring Member State(s).

In the pharmaceutical sector, competition concerns in below-threshold transactions could arise, in particular, in relation to acquisitions of small targets developing innovative pipeline products which, if successful, would compete with the existing or future products of the acquirer. Those concerns are typically addressed by the requirement to divest the rights to the pipeline product, although the EC has accepted in some cases that the divesting party retains or re-acquires the non-EEA rights to the divested products. Companies could rely on *Illumina/GRAIL* to argue that, where the case was referred to the EC by one Member State, the EC could only require a narrower remedy that addresses the concern in

26 *Id.* recital 631.

27 COMP/M.7881, *AB InBev/Sabmiller*, recital 366.

28 *Knauf/Armstrong, supra* note 19, recitals 235-239.

29 *Id.* recitals 227 and 242.

30 COMP/M.8124, *Microsoft/LinkedIn.*

31 COMP/M.10806, *Broadcom/VMware.*

32 COMP/M.9660, *Google/Fitbit.*

the territory of that Member State, with the company retaining or being able to re-acquire the rights to the pipeline product for the rest of the EEA. The strength of such arguments will vary significantly on the specific facts, including whether acquiring the rights to the product for only one or a few Member State(s) would give the acquirer sufficient incentives to develop the product in Member State(s) concerned, especially if it is deprived of the economies of scale associated with being able to commercialize products across a broader range of countries and to optimize manufacturing processes accordingly.

V. CONCLUSION

Whether companies will be able to hold the EC to the proportionality standard in remedies negotiations more effectively after the *Illumina/GRAIL* case remains to be seen. In practice, companies are unlikely to risk the potential commercial downside of a transaction being prohibited in order to agree a more limited set of remedies on principle, particularly where non-EEA-wide remedies may in fact be more difficult to implement, such as in relation to some data-based remedies.

If the EC rejects the notifying party's remedies proposals and blocks the transaction, it would be open to the notifying party to challenge that decision before Courts, including on the basis that the EC's rejection of that proposal was disproportionate. However, companies are seldom willing to litigate in merger control as having the Court quash a prohibition decision several years after the transaction signed generally fails to attain any meaningful business objectives.

Still, the EC will be mindful of the risk that its approach to remedies could be invalidated by the Courts, and of the repercussions that such a negative decision would have on its overall merger control practice. *Illumina/GRAIL* may just have given some additional bargaining power to companies in their remedies discussions with the EC.

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