



## ILLUMINA/GRAIL ACQUISITION

First use of the European Commission's new referral policy and failure by the parties to comply with their standstill obligation

November 18, 2021

As detailed in our **October 2020 alert**, European Commissioner for Competition **Margrethe Vestager announced**, at the end of September 2020, a change of doctrine in relation to referrals. The Commission is now encouraging national competition authorities (NCAs) to refer to it some mergers which it thinks deserve to be reviewed at EU level, "whether or not those authorities had the power to review the case themselves".

This new approach, which falls under Article 22 of the EU Merger Regulation (EUMR), reflects the Commission's willingness to review transactions involving highly innovative targets that are only starting to obtain returns on their innovations in the market and which may not today be subject to merger control review. The Commission considers that a company's low turnover or market share does not always reflect its existing or potential future importance in the market.

### The first implementation of the Commission's new doctrine

This reform was highly supported by a large number of NCAs, which very quickly decided to take advantage of the referral procedure.

In September 2020, Illumina, a developer, manufacturer and marketer of genomic sequencers, **announced the acquisition of GRAIL**, a healthcare company developing cancer detection tests based on next generation sequencing (NGS) systems.

Soon after the announcement of the merger, the French Competition Authority (FCA), subsequently joined by the Belgian, Greek, Icelandic, Dutch and Norwegian authorities, **made a referral to the Commission** to have the proposed acquisition reviewed under the EUMR. The NCAs argued that the acquisition could threaten competition. In particular, the FCA highlighted that Illumina could, post-acquisition, make access to its sequencers

more complex for GRAIL's competitors through an increase of prices or by lowering their quality. The FCA further added that such strategy could have a significant impact on competition in the cancer screening test sector given Illumina's influence in the genomic sequencer sector.

Interestingly, the FCA issued its request for referral even before the publication by the Commission of its **guidelines on the application of the referral mechanism** in March 2021.

## The Commission opened an in-depth investigation

The Commission **accepted the referral request in April 2021**. It pointed out, in particular, that GRAIL's competitive significance is not reflected in its turnover (which does not exceed the notification thresholds), while the value of the acquisition exceeds EUR6 billion (US\$7.1bn).

The acquisition was filed in June 2021 and, after a preliminary review, the Commission **opened an in-depth "Phase II" investigation on 22 July 2021**. The Commission was concerned that, following the acquisition, Illumina could: (i) engage in vertical input foreclosure strategies given its leading position in the NGS systems market; and (ii) have an incentive to foreclose GRAIL's competitors, as GRAIL develops NGS-based cancer detection tests. As the parties did not provide certain essential information for the Commission's assessment, the Commission stopped the clock in August 2021. The legal deadline was suspended for over 40 working days. Now, the Commission has until 4 February 2022 to issue its decision.

## Illumina's completion of the deal led to unprecedented interim measures

The Commission's acceptance of the referral request had the effect of prohibiting Illumina from implementing the concentration. Under the EUMR, the standstill obligation is applicable to parties subject to an Article 22 referral "to the extent that the concentration has not been implemented on the date on which the Commission informs the

undertakings concerned that a request has been made". Here, that date was 11 March 2021.

However, while the Commission's review of the acquisition was still ongoing, Illumina **announced that it had completed the acquisition**. In doing so, it indicated that it would "hold GRAIL as a separate company during the European Commission's ongoing regulatory review".

Unsurprisingly, the Commission **announced that it had opened an investigation** to determine whether Illumina's decision constitutes a breach of its standstill obligation.

"This obligation, that we call standstill obligation, is at the heart of our merger control system and we take its possible breaches very seriously."

European Commission Press release of August 20, 2021

The Commission then **sent a Statement of Objections to the parties**, informing them that it intended to adopt interim measures following their alleged breach of the standstill obligation. Most recently, after hearing the parties, the Commission took a new step forward in the procedure, and **imposed the interim measures**. They provide that:

- GRAIL shall be kept separate from Illumina and be run by one or more independent hold separate manager(s), in the exclusive interest of GRAIL
- the parties are prohibited from sharing confidential business information, except where the disclosure is required to comply with the law or in line with the ordinary course of their supplier-customer relationship
- Illumina has to finance additional funds necessary for the operation and development of GRAIL
- the business interactions between the parties shall be undertaken at arm's length and in line with industry practice (ie without unduly favouring GRAIL to the detriment of its competitors)

- GRAIL must actively work on alternative options to the transaction to prepare for the possible scenario in which the Commission were to declare the transaction incompatible with the internal market

The proper implementation of the interim measures imposed, which are binding on both Illumina and GRAIL, will be closely monitored by a monitoring trustee.

These measures are unprecedented: this is the first time that the Commission has adopted interim measures following the early completion of a merger.

## The sanctions for breach of the standstill obligation can be severe

Illumina and GRAIL face a daily penalty of up to 5% of their average daily turnover and/or fines of up to 10% of their annual worldwide turnover if they fail to comply with the interim measures. They could also be fined up to 10% of their annual worldwide turnover should the Commission conclude that they have breached the standstill obligation.

Fines for failure to notify and/or early completion of a merger are relatively rare. But, when they are imposed, the amounts can be high. Given, **according to the Commission**, such behaviour is deemed to undermine “the effectiveness of [the] merger control system”, it aims for fines to be a sufficient deterrent.

One key case is Altice/PT Portugal, where the **Commission fined Altice EUR125 million** for acquiring PT Portugal before approval and, in part, even before filing of the acquisition. The **General Court largely dismissed Altice’s appeal** in September 2021.

It agreed with the Commission that provisions in the sale agreement gave Altice the possibility of exercising decisive influence over PT Portugal before the EC had issued its clearance decision (and in some cases even before the deal had been notified to the EC). It confirmed that, in addition, Altice had intervened in practice in the day-to-day running of PT Portugal, and that sensitive information about PT Portugal was exchanged (**our**

**alert gives more details**). The General Court also ruled that the Commission was entitled to impose separate fines for the failure to notify and the completion of the transaction prior to its clearance since these practices constitute two distinct violations, following the **General Court** and the **Court of Justice** in the Marine Harvest case.

Other examples include Canon/Toshiba, where the **Commission fined Canon EUR28m** for breaching the notification and standstill obligations, as well as Electrabel/Compagnie Nationale du Rhône, where the Commission established a breach of the standstill obligation in relation to a *de facto* takeover implemented by Electrabel in 2003, of which the Commission became aware in the context of a subsequent acquisition, and **fined Electrabel EUR20m** six years later.

In terms of French decision-making practice, the FCA has also **fined Altice – EUR80m jointly and with the SFR group** in 2016 for the early completion of two mergers. In 2012, the FCA also **fined Copagef SA, the head of the Castel group, EUR4m** for failure to notify, and the **Colruyt group EUR392,000** on the same grounds.

## Another twist: Illumina is challenging the Article 22 referral

In April 2021, Illumina **filed an action before the General Court** seeking annulment of: (i) the FCA’s referral request; (ii) the decisions issued by the Commission to each of the other NCAs permitting them to join the referral request; (iii) the Commission’s decision asserting jurisdiction to examine the merger; and (iv) the Commission’s decision informing Illumina of the referral request and prohibiting Illumina from implementing the merger.

Illumina’s appeal is based on four allegations: (i) the Commission’s incompetence, based on an erroneous interpretation of Article 22; (ii) the late referral of the acquisition by the FCA; (iii) the change of policy of the Commission, which is contrary to Illumina’s legitimate expectations and legal certainty; and (iv) the errors of fact and assessment undermining the basis for the Commission’s decision to examine the concentration.

The judgment of the General Court (as well as the Commission’s decisions in standstill obligation investigation and the review of the merger itself) is hotly awaited. It may rule on a number of uncertainties remaining in the context of the new

Article 22 policy, in particular with regard to the “reasonable” time limit within which NCAs may make a referral request to the Commission, when merger filing thresholds are not met.

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