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EC Imposes Unprecedented Fines on Illumina and Grail for Gun Jumping

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The EC sets the highest possible fine of 10% of revenue on Illumina, and for the first time fines target (Grail), for gun-jumping, setting a precedent.

On 12 July 2023, the European Commission imposed a fine of €432 million on Illumina (and €1,000 on Grail) for having implemented their merger before approval by the European Commission (i.e., gun jumping), in breach of the “stand-still” obligation contained in the EU Merger Regulation (EUMR). While this is not the first decision of the European Commission to impose gun jumping fines (see for example the fines imposed on [Altice](#), [Marine Harvest](#) or on [Canon](#)), it represents the highest fine for gun jumping to date and it is the first case in which:

- A fine is imposed in relation to a transaction that did not meet the jurisdictional thresholds of the EUMR or of any EU Member State, but over which the European Commission – so far [successfully](#)– claimed jurisdiction based on an expansive interpretation of the upwards referral clause contained in Article 22 EUMR (for more background please refer to our website, [here](#) and [here](#)).
- The maximum possible fine for gun jumping has been imposed (i.e. approx. 10% of Illumina’s global turnover; previous fines were much below this, like approx. 1% in the case of Altice).
- A fine (albeit symbolic, of €1,000) has been imposed on the target of a concentration (to date, only acquiring companies had been fined for gun-jumping infringements).

As indicated in the first bullet above, the violation of the EUMR’s stand-still obligation also took place in a very specific context and in special circumstances. In April 2021, the European Commission accepted the referral of the matter by a number of EU competition authorities (none of which had jurisdiction) and opened an in-depth investigation in July 2021. Nevertheless, Illumina and Grail publicly announced the closing of the transaction in August 2021. In reaction, the European Commission imposed interim measures to ensure Illumina and Grail remained separate during the EU merger control investigation. Ultimately, the enforcement of the stand-still obligation via interim measures would be all the more relevant as the concentration was prohibited by the European Commission in September 2022.

By imposing a hefty fine on Illumina and imposing a symbolic fine on Grail, the European Commission confirms its position to take a tough stand on gun jumping, irrespective of how it ends up under its authority to review it.

Previous cases have confirmed that [gun jumping is considered a separate infringement from the failure to notify a transaction](#). The fine imposed on Grail is nevertheless somewhat surprising. While only symbolic in this case, this may herald a new approach going forward in which (non-symbolic) fines are imposed on target companies as well in case their acquisition is implemented prior to clearance. As potential jointly and severally liable parents, sellers therefore also, from that point of view, have an interest in making sure gun jumping does not occur.

The fine imposed on Illumina is open to challenge before the EU Courts, as the company has announced. The Illumina/Grail transaction was the first (and so far, only) transaction to be called in pursuant to the new approach under Article 22 EUMR, which is still being challenged by Illumina before the EU courts. Ultimately, Illumina also complied with the interim order to hold itself separate from Grail. Accordingly, and although Illumina's public announcement to implement the transaction was seen in all likelihood by the European Commission as defiant and justifying tough fines, the European Commission's fining decision might at least be contested as disproportionate.

Until the EU Courts decide on the various legal questions surrounding this case, companies involved in complex mergers raising plausible substantive issues are advised to exert caution and anticipate possible Article 22 EUMR referrals with ancillary "stand-still" effects. Since mergers warranting this type of scrutiny are likely to be those of higher profile, in-depth investigations may only be avoided by preparing strong defence arguments and by identifying and considering remedies (if at all possible) that can allow the merger to go ahead in case it is objected to by the European Commission. This is particularly relevant for mergers in the health and life sciences sector, which are characterised by granular European Commission reviews and by a high rate of remedies introduced by companies in Phase I of investigations.

** This piece is a re-post of the authors' original client alert, available [here](#).*

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