Kluwer Competition Law Blog

Unprecedented European Commission Order to Unwind an Acquisition

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On October 12, 2023, the European Commission (EC) ordered Illumina to unwind its already completed acquisition of the cancer test provider GRAIL Inc. This is the first time that the EC has ordered a reversal of an acquisition. This decision opens a new chapter in the ongoing Illumina/GRAIL saga, which has been unfolding for well over two years.

Article 22 EU Merger Regulation referral request

The case started in April 2021, when the EC decided to review Illumina’s proposed acquisition of GRAIL, even though the transaction did not meet the EU’s turnover-based thresholds for mandatory merger notification. In addition, the transaction was not subject to mandatory notification in any EU Member State. France, however, asked the EC to review the transaction under Article 22 of the EU Merger Regulation (EUMR), and five other Member States joined France’s request. The EC decided to review the transaction because GRAIL’s turnover allegedly did not accurately reflect its competitive significance, as evidenced by the $7.1 billion deal value.

The EC’s decision to review the transaction was novel and followed shortly after the publication of its new Article 22 EUMR Guidance in March 2021 and the EC’s decision to actively invite Member States to refer transactions to it. Illumina appealed the EC’s referral decision, but in July 2022, the EU’s General Court upheld the EC’s jurisdiction to review the deal. (For more information on the Article 22 EUMR Guidance, see our earlier alert.)

In August 2021, Illumina announced that it would complete the acquisition even though the EC had begun an in-depth investigation into the transaction a month earlier. In September 2022, the EC blocked the acquisition based on vertical competitive concerns, finding that the transaction threatened to impede innovation and limit options in the emerging market for blood-based early cancer detection tests. (For further information on the EC’s prohibition, see our alert.)

First-ever interim measures

In October 2021, while the EC’s review of the transaction was ongoing and after Illumina closed

the transaction, the EC, also for the first time in a merger procedure, imposed interim measures. The object was to restore and maintain effective competition while preventing irreversible asset integration that could make it ineffectual any later order to unwind the transaction. The EC renewed the measures in October 2022.

Gun-jumping fines

In July 2023, the EC concluded that Illumina and GRAIL had willfully and deliberately infringed the EUMR's standstill obligation by closing the transaction without first obtaining the EC's clearance. The EC imposed its largest-ever gun-jumping fine on Illumina (€432 million, corresponding to the 10% turnover statutory maximum fine). The EC also fined GRAIL a symbolic €1,000, the first-ever gun-jumping fine for a target company. Illumina has challenged its fine before the General Court.

EC restorative measures to unwind the acquisition

Last week's restorative measures, requiring that Illumina unwind the acquisition, replace the October 2022 interim measures. With the divestiture order, the EC aims to restore the pre-transaction status quo.

In practice, this means that GRAIL's independence from Illumina and GRAIL's stand-alone viability and competitiveness must be restored to their pre-transaction levels. Illumina can choose how to divest (e.g., through a sale, initial public offering or other method). The divestiture must be executed within 12 months, with the possibility of a three-month extension, and the EC will oversee the sale to ensure that it is timely and satisfactory.

The EC has also imposed transitional obligations on Illumina and GRAIL pending the divestiture. These measures are designed to ensure that Illumina and GRAIL remain separate and that the divestiture will fully restore competition. Illumina must also guarantee GRAIL's viability by providing the necessary financial support for GRAIL's ongoing development of its early cancer detection test, Galleri, and assisting with Galleri's launch.

Illumina still maintains that the EC did not have jurisdiction to review the GRAIL acquisition. If its appeal to the European Court of Justice on this point prevails, the basis for the divestment order would be void. It appears that Illumina is preparing to divest in case its appeal fails, however.

Practical implications

The Illumina/GRAIL case is groundbreaking and has important future implications for several reasons.

First, when Illumina announced that it would purchase GRAIL in September 2020, the EC had never investigated a transaction that did not meet the thresholds for notification at the level of either the EU or any EU Member State. The EC's issuance of its March 2021 Guidance on the

Article 22 EUMR referral mechanism, which expressly stated that the EC is empowered to review such deals, proved a decisive turning point for the transaction.

Second, following Illumina/GRAIL, in August 2023, the EC decided to review two other transactions—the proposed acquisitions of Autotalks by Qualcomm and Nasdaq Power by EEX—that were notifiable to neither the EC nor any EU Member State. The EC is actively monitoring transactions that have not been notified to the Commission for potential referrals, regularly contacting transacting parties with requests for information and consulting with Member State competition authorities to assess whether an Article 22 EUMR referral request might be appropriate. The EC is monitoring both transactions that are not notified to Member States (such as Illumina/GRAIL) and transactions that are notified in one or more Member States (such as the Cochlear/Oticon transaction, which was referred to the EC in December 2022). The Court of Justice of the European Union, in its *Towercast* judgment, endorsed the EC's referral policy, holding that an acquisition by a dominant company that meets neither the EC nor any Member State notification threshold may nonetheless violate competition law and be reviewed under the EC's prohibition against abuse of dominance or the Member State's domestic law equivalent. Given the EC's new policies, parties to transactions that are not notifiable to the EC or any Member State can no longer rest assured that the EC will not review their transaction. And there is more possibility than there used to be that a transaction that is notifiable to one or more Member States could end up under EC review.

Third, as noted, the EC decided, for the first time, to impose interim measures during its assessment of the transaction. It also imposed the highest-ever fine for gun-jumping and the first fine on a target company (and the amount of the next such fine is unlikely to be purely symbolic).

In conclusion, the Illumina/GRAIL case demonstrates the crucial importance of conducting a thorough antitrust analysis during the negotiation when contemplating a transaction, even when the transaction will not be reportable to the EC or any Member States. The EC has now clearly joined with the US antitrust agencies and the UK Competition and Markets Authority in actively seeking to investigate non-reportable transactions. Transacting parties are well advised to carefully consider the implications of the EC's new focus when they are planning for transactions and negotiating antitrust covenants.

** The piece was originally posted as a client alert on the contributors' webpage, see here.*

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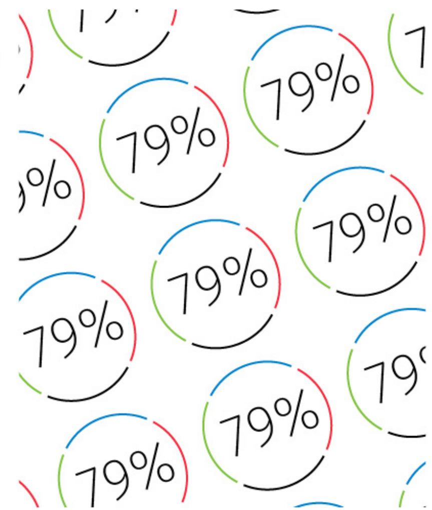

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