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Illumina/Grail: What is the Solution for Killer Acquisitions Now?

Alan Riley (College of Europe) · Tuesday, October 15th, 2024

Introduction

Following the CJEU Illumina/Grail ruling the case here is made for the Commission to negotiate with the national competition authorities (NCAs) to adopt a common approach to dealing with so-called 'killer acquisitions' both substantively and procedurally. The concept here would be for the Commission and the NCAs to negotiate a common network notice which would set out a common and transparent approach which both national authorities and businesses could rely on. At its core, such a Notice would be drawing upon the observation of the CJEU that any application of the first sub-paragraph of Article 22(1) EUMR must comply with the principles of predictability, legal certainty and transparency. Such a notice would permit NCAs to review and refer killer acquisitions with confidence, while providing undertakings with a predictable and transparent regime upon which they could rely.

The dramatic September 3rd judgment of the Court of Justice of the European Union in *Illumina/Grail* set off a cascade of case notes and opinions related to the case. Clearly, the judgment has had a significant impact. The immediate consequence of the CJEU ruling was to squash the decision of the EU General Court which was under appeal. The expansive interpretation of the first subparagraph of Article 22(1) EUMR is dead. That expansive interpretation by which the National Competition Authorities could refer cases to the European Commission using the first subparagraph of Article 22(1) where they themselves lacked the jurisdiction to investigate and rule on such cases is no longer good law and cannot be relied on. With the CJEU ruling the seven NCAs who had made recent referral requests in respect of *Microsoft/Inflection* withdrew those requests. In addition, the gun-jumping decision under which Illumina and Grail paid respectively fines of €423 and €1 million, are quashed along with the accompanying procedural decisions. It is possible, though inevitably difficult given the Union's case law on the subject, for Illumina to ultimately obtain damages.

Consequences for Future Killer Acquisitions

After the dust settles the question remains what exactly is the Commission going to do about so-called 'killer acquisitions'? Accepting that such acquisitions can pose a significant threat to competition Europe's principal competition agency, DG Competition cannot just walk away from

Illumina/Grail and chalk this litigation disaster up to experience. To her credit outgoing Competition Commissioner Vestager recognised in her statement after the judgment was handed down that killer acquisitions pose a competitive threat to the European market and need to be tackled.

The question here is how should the Commission go about seeking to review such acquisitions? There would appear to be three options under discussion. The first would be to amend the EUMR itself. The second would be to deploy Article 102 TFEU instead of any merger regime following the ruling in *Towercast*. Third, would be to rely on those NCAs who already have the legislative authority to refer smaller transactions to the Commission. Clearly where national law gives such NCAs jurisdiction the CJEU ruling in *Illumina/Grail* does not apply in such cases.

It is argued here that in fact for different reasons each of the proposed solutions as stated have their problems.

At first sight, the easiest solution appears to be to seek a legislative amendment to the EUMR. However, that solution is much more problematic than it first appears. There is the understandable fear of the Commission that in the era of the Draghi Report that an opening up of the legislative text of the merger regulation could lead to untoward consequences. These could include a legislative move for instance to make any new regulation more favourable to the establishment of 'European champions' or tilting the merger regime away from a core competition-based analysis.

There are also a number of other practical concerns around any potential legislative amendment. This would include the question as how does one shape a predictable, transparent and effective legislative text. As the CJEU indicated in its ruling there is a compelling demand in any proposed EU merger regime to sustain predictability, transparency, and legal certainty. It is worth re-reading Advocate General Emiliou's Opinion for his detailed discussion of the problems surrounding the Commission's existing guidance on Article 22(1) referrals in being unable to provide predictability and transparency. Those issues do not go away simply by seeking to enact legislation rather than a Commission guidance paper.

Unresolved Issues

There is the prospect for instance of 30 or so NCAs being able to call in acquisitions many of which are likely to be small, and some as with GRAIL not even yet on the market. How will notice periods operate involving transactions with small, and often unknown entities and entities that are not yet operating on the market? Will a statute of limitations apply in order to provide some legal certainty for businesses? Will there be a strong presumption that a deal closed after six months will rarely ever be reopened? Would this be accompanied by some form of simple common notification form, which all entities could file in advance of making a deal to reinforce that presumption? Who would run the clearing house? DG Competition, the ECN or individual NCAs? Will there be a general call in power? Will that call in power at least have some criteria to indicate what types and classes of transactions are likely to be subject to a call in power? Will the referral powers be 'hybrid' providing a call in power along with a deal value threshold as well?

A further problem is that given the need for efficient use of administrative resources how difficult is it likely to be to draft legislation that catches the relevant small acquisitions one would wish to review without being forced to review a significant number of other acquisitions? There would also

be a series of questions for any legislation to deal with such as which killer acquisitions would be left in the hands of an individual NCA to review, and which would be reviewed in Brussels. Other questions would have to be addressed as dealing with the question of nexus of any acquisition with national and Union jurisdiction.

When one begins to consider all the difficulties of drafting legislation one may begin to wonder whether this is the place to start to deal with the EU's killer acquisition problem.

The *Towercast* Option

The second option is to consider the *Towercast* option. This was one option raised by the CJEU in its judgment whereby the NCAs could apply Article 102 TFEU in respect of merger cases below EUMR thresholds following from its recent ruling in *Towercast*. However, this option has a number of significant limitations. One is that *Towercast* is not wholly clear whether the Commission itself can apply Article 102 TFEU to merger cases below the EUMR thresholds. Even if the Commission can apply Article 102 TFEU it can only apply that provision where an undertaking is already dominant. And in addition, competition agencies can only operate ex-post, not ex-ante in respect of Article 102 TFEU. In addition, the scope for opening any interim measures to block a deal closing are extremely limited further reducing the efficacy of an Article 102 TFEU solution.

Accepting the *status quo*

The third option is to just accept the post-*Illumina/Grail* world and take jurisdiction for 'killer acquisitions' where it can be found. As explained above, this was Commissioner Vestager initial response in her post-judgment comments. At least NCAs with jurisdiction can continue to make referrals. This though involves relying on the NCAs who have provided call in powers for deals below national thresholds or enacted other measures such as deal value thresholds being willing to exercise such powers.

And even amongst Member States with such powers they are significantly differentiated. Four Member States, Cyprus, Ireland, Romania and Lithuania now have call in powers. Five Member States, Hungary, Slovenia, Italy, Sweden and Latvia, have hybrid call in and deal value jurisdictional powers and two states Germany and Austria have deal value based thresholds. The Dutch and French authorities are also considering measures to be able to review deals below national thresholds and thereby be able to refer via Article 22(1) appropriate cases to the Commission.

While relying on NCAs who have jurisdiction to make referrals this does not really provide a comprehensive predictable and transparent solution. It's not comprehensive. Not all NCAs have jurisdiction or appear to be willing to widen their jurisdictional thresholds. Even if they all have such powers and were willing to use them we still have all of the questions surrounding predictability, legal certainty and transparency raised by the CJEU in *Illumina/Grail* and discussed above. In addition, even amongst those NCAs who do have jurisdiction those NCAs and the Commission could well face an inundation of proactive merger filings in order to forestall subsequent gun-jumping fines or divestiture orders. This would again involve a significant

diversion of administrative and business resources to file and manage such notifications.

NCA Network Notice as a Way Forward

One way forward would be for the NCAs and the Commission to agree on an NCA network notice which would seek to set out the terms under which Article 22(1) EUMR will be applied to 'killer acquisitions'. The NCAs and the Commission can already draw upon approximately 100 such cases which were considered by the authorities before the September CJEU *Illumina/Grail* ruling as providing case law practice for developing a first notice. Such a notice would be designed to follow the injunction of the CJEU that the operation of Article 22(1) should provide sufficient predictability, legal certainty and transparency for all actors subject to any referral regime.

In that spirit, one option for the NCAs and the Commission would be to seek to establish the main threshold as being a deal value threshold. Such a threshold would have the advantage of providing a degree of predictability and transparency for all parties. As indicated above the majority of NCAs who can make referrals have hybrid powers i.e. both deal value and call in powers. Again in the spirit of the CJEU injunction, an option would be in the network to limit call in powers to markets where there are heightened concerns about the impact on innovation. For example, tech and pharma. In those sectors, the network notice could in a spirit of predictability, transparency and legal certainty seek to indicate the criteria under which call in powers would be likely to be exercised.

The notice would also seek to provide critical guidance for all parties. It would set out the common substantive criteria and key thresholds. In addition, procedurally it would provide common time limits and notice periods, provide a long stop limitation period and provide for a common notification procedure.

Such a network notice would not provide an absolutely perfect solution. However, it would at least provide significantly better predictability, legal certainty and transparency than having a jurisdictional free-for-all. NCAs would operate their referral regimes according to a common rule book. Furthermore, the experience on all sides in operating a network notice would over time give the Commission and the NCAs the confidence to propose a 'referral regulation' to further enhance due process and legal security. Such a referral regulation would not involve amending the EUMR directly. Instead, it would operate in parallel with the EUMR, underpinning the fundamental objectives of European merger review without opening up the existing regulation.

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