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The Italian Competition Authority refers to the Commission the Nvidia-Run:ai acquisition. Some considerations in the aftermath of Illumina/Grail and the US elections

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Introduction

The European Commission is assessing the acquisition of Israeli startup Run:ai by the US tech giant Nvidia upon referral from the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM) under Art. 22(1) EUMR. The case is of particular interest, as it raises question of both legal and policy nature. On the legal side, the referral comes after the European Court of Justice has limited, with the landmark *Illumina/Grail* judgement (C-611/22 P), the power of national competition authorities (NCAs) to refer to the Commission concentrations that are not notifiable under the EUMR. On the policy side, the case's outcome will reveal how the EU intends to regulate the emerging AI market through its competition rules, especially *vis-à-vis* US companies. While the same acquisition is currently under scrutiny by the US Department of Justice (DoJ), the new Trump Administration may shift gear on antitrust enforcement and not 'let the EU take advantage of their companies'. The present contribution will discuss both sides and provide a general outline of the current M&A strategies deployed by companies in the AI market.

The Referral from Italy to the Commission: the call-in power of the Italian Competition Authority

Nvidia is the main global supplier of graphics processing units (GPUs) for data centre applications, while Run:ai supplies 'GPU orchestration software', used to manage AI computing infrastructure. The two companies have been cooperating together since 2020. Since the Nvidia-Run:ai acquisition does not meet the turnover thresholds set out by Art. 1 EUMR, the operation was not notifiable to the Commission. While the acquisition did not meet the general notification thresholds, based on national turnover, set out by Italian competition law (Art. 16(1) Law of 10th October 1990, no. 287), the AGCM has also the power to 'call in' the notification of under-threshold concentrations under certain conditions, set by Art. 16(1-bis). The call-in power was introduced in 2022 and allows the AGCM to request the notification if three conditions are cumulatively satisfied: (i) the concentration was not completed more than six months before; (ii) one of the two national turnover thresholds under Art. 16(1) is met or the global turnover of the

involved undertakings is above 5 billion euro; and (iii) the AGCM 'recognises the existence of concrete competitive risks in the national market or in a relevant part of it, based on the information in its possession, and taking into account the detrimental effects on the development and spread of small innovative enterprises'.

In February 2024, the AGCM adopted a communication on the enforcement of the call-in power under Art. 16(1-bis). The Authority clarified that the provision can be applied to the acquisition of an undertaking with limited or no turnover in Italy by a large multinational undertaking, having considered certain parameters, such as the 'relevance of their innovative activity'. The AGCM also articulated the parameters it uses to assess the concrete competitive risks when turnover is not indicative of, current or future, market power: *inter alia*, when the acquired undertaking is a start-up with significant competitive potential that is not generating significant revenues yet, is an 'important innovator' or is conducting 'potentially important research'. According to the Authority, these risks may affect the Italian market even if the involved undertakings produce no turnover in Italy, *e.g.*, when Italian users and consumers uses digital services without remuneration, their R&D is potentially relevant for the national market or there is any other significant connection with the Italian market. In conclusion, the scope of the AGCM's call-in power is quite broad and able to catch operations performed in other jurisdictions. After the Authority has requested the notification, the involved undertakings have 30 days to notify, otherwise they face fines. At that point, the case is assessed at the national level or referred to the Commission under Art. 22 EUMR.

Activating Art. 22 EUMR after *Illumina/Grail*

The referral from the AGCM offers the opportunity to the Commission to scrutinise a transaction otherwise outside the scope of the EUMR. While the Nvidia-Run:ai acquisition lacks the EU dimension requirement under Art. 1 EUMR, both the AGCM and the Commission considered that it affects trade between Member States and threatens to significantly affect competition within the EEA, including Italy. Therefore, the Commission accepted the referral and requested Nvidia to notify, triggering the standstill obligation on the undertakings. Pending the outcome of the procedure, its start is already an interesting development, as we will see how the Commission and the National Competition Authorities can adapt to the *Illumina/Grail* judgement.

National authorities with broad call-in powers may extend sensibly the capacity of the Commission to scrutinise transactions outside the EUMR scope. Commenting on the judgement, Former Competition Commissioner Margrethe Vestager herself noted that, since the *Illumina/Grail* referral, Member States had already provided for new powers that would allow the Commission to keep receiving referrals under Art. 22 EUMR in compliance with the ruling. The crux of the matter is the ability of the Commission to scrutinise under thresholds *killer acquisitions* of small, yet innovative, startups by large companies. Indeed, the regulator could look at the Nvidia-Run:ai acquisition in two, opposite, ways. Run:ai enables its clients to optimise their computing power, therefore reducing the need for AI hardware and infrastructure. Is Nvidia simply consolidating its market power by absorbing an useful technology that will make its products more appealing? Or does it want to 'kill' this technology so that companies will need more of its AI hardware?

Alan Riley explored the impact of *Illumina/Grail* in an article published in this blog. The referral by the AGCM confirms that keeping on relying on referrals from NCAs is indeed the probable way

forward for the Commission. Yet, Riley highlights the limits of this '*status quo* scenario'. If each NCA has different call-in powers, this may create a fragmented, unpredictable and expensive scenario. Expensive not only for undertakings, but also for enforcers, as companies may proactively notify their transactions to multiple NCAs and the Commission to stave off potential fines or divestiture decisions. Riley concludes by suggesting to adopt an NCA network notice and outline how Article 22(1) EUMR should be applied to killer acquisitions, providing predictability and transparency in line with the parameters set by the Court in *Illumina/Grail*. It will be interesting to see which NCA will join the AGCM. The French *Autorité de la Concurrence* had already expressed its concerns towards Nvidia's power in the AI market. Furthermore, Nvidia is already under scrutiny also on the other side of the Atlantic.

Parallel enforcement in the US and transatlantic cooperation, but for how long?

During the Biden Administration, US antitrust enforcement has increasingly focused on curbing harmful vertical integration by major technology companies. This strategic shift has led the DoJ and the Federal Trade Commission (FTC) to challenge a greater number of mergers compared to previous periods. This phase was accompanied by the amendment of the Merger Guidelines and the modification to the notification requirements under the Hart-Scott-Rodino Act. The increased scrutiny did not spare the AI sector: alongside Nvidia, basically all US tech giants had their AI plans affected by antitrust regulation. For example, Microsoft was scrutinised when it 'acqui-hired' Inflection through the recruitment of certain key figures, or had to relinquish its observer seat on OpenAI's board to address concerns about the acquisition of confidential information.

Going back to Nvidia, the DoJ is currently performing two investigations, one regarding the company's business practices and other regarding the acquisition of Run:ai. Bloomberg reported that the DoJ's inquiries escalated to the issue of subpoenas. The DoJ may be ascertaining whether the company is making more difficult to use the AI semiconductors sold by its competitors, via tying or the imposition of exclusive purchasing obligations on buyers. The competition concerns appear substantiated since, according to some estimates, Nvidia already controls as much as 90% of specialised AI chips. As mentioned, the concerns are shared by European authorities. In July 2024, the DoJ, the FTC, the European Commission and the UK Competition and Markets Authority released a joint statement outlining the competition and consumers risks in the AI market. Yet, this common purpose between the two sides of the Atlantic will probably end with the inauguration of the new Trump Administration, whose return to the White House was backed by part of the Silicon Valley.

***You reap what you sow:* the symbiotic relationship between big tech and startups**

Big tech and startups would indeed prefer to be benignly neglected by regulators. In the last years, the AI ecosystem has seen the emergence of a symbiotic relationship between the two groups, especially regarding the connection with the semiconductor sector. One sector drives the growth and development of the other. This relationship has led major tech firms to adopt two primary strategies to benefit from the growth of AI, while balancing investment and market risks in such a volatile market. The first strategy involves direct investment in AI startups, creating preferential partnerships that offer opportunities for acquisition once these startups reach maturity. In 2023, the

major technology firms provided two-thirds of the $27 billion raised by emerging AI companies. In many cases, they move to directly acquire the startup they have invested in after a few years. Yet, as mentioned, this strategy exposes big tech to undesired attention from regulators. To circumvent this, a second investment strategy, more 'silent', has been also used: complex licensing deals that allow them to extract top talent ('acqui-hire') and technologies without triggering regulatory scrutiny.

Nvidia has been quite proactive in this regard, given that the popularisation of AI drove its stock value up by 237% in 2024. The company has established a dedicated venture capital arm, called NVentures, which, alongside its corporate development team, has built a portfolio of investments into many AI startups, such as AI21Labs, Runway, Cohere, Inflection, Adept, and Mistral. The move by Nvidia to acquire Run:ai reflects these two strategies. The probes by EU and US authorities may discourage, on the one hand, investors and startup founders, who often aim to be acquired by larger companies. On the other, big tech's strategies on innovation may be stemmed by regulatory uncertainty. In 2021, the FTC stopped the acquisition of Arm, a chip designer startup, by Nvidia. Arm was later able to go public, but most start-ups are not able to reach that stage.

Conclusion: the many challenges of competition enforcement in the AI market

The race to capture the opportunities presented by emerging technologies is shaping the AI market. It also impacts the growth of complementary technological sectors, such as the semiconductor sector. These sectors are playing already a central role in the economy. For the EU too, as shown by the Draghi Report or legislative initiatives like the AI Act or the Chips Act, these sectors are a priority and present competition, industrial and geoeconomic challenges. The Commission may have found, through the NCAs' call-in powers, a way to scrutinise killer acquisitions which is compatible with the *Illumina-Grail* judgement, but the solution may not be ideal. More broadly, the question still stands on how (or *if*) competition enforcement can encourage innovation in the AI market, instead of hampering it. Finally, the next years will test if the transatlantic cooperation will keep up, also in the field of antitrust and technological governance.

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