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QUICK LINKS

Advocate General issues opinion in Illumina/GRAIL case

In a much anticipated legal opinion, Advocate General Emiliou has invited the European Court of Justice to set aside the judgment of the General Court in the Illumina/GRAIL case and to annul the European Commission's decision to review the merger under Article 22 of the EU Merger Regulation (EUMR). Should the Court of Justice agree with the Advocate General's conclusions, this will deal a serious blow to the Commission's strategy to scrutinise below-thresholds deals including "killer acquisitions".

Background: the Commission's unprecedented power grab in merger control

In April 2021, the Commission took the unprecedented step of accepting a referral request from the French Competition Authority to review Illumina's acquisition of GRAIL – a US/US biotech deal which did not qualify for merger control review anywhere in the EEA. It did so after writing to the 27 EU Member States' national competition authorities (NCAs) in February 2021, inviting them to make a referral under the procedure set out in Article 22 EUMR.

Article 22 allows Member States to request the Commission to examine a concentration even where the concentration does not satisfy the turnover thresholds under the EUMR (or under the merger control regimes of NCAs) if that concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request. The original purpose of Article 22 EUMR was to allow Member States without their own merger control regimes to request that the Commission review deals that could affect competition in those States. It was known initially as the "Dutch clause", since at the time of enactment the Netherlands had no merger control system. It now does, and Luxembourg is currently the only EU Member State without a merger control regime.

In recent years Article 22 has been used only very rarely by Member States' NCAs to delegate their merger review powers to the Commission where the latter was better placed to review a deal - for example, where it raised pan-European issues. Until its very first test case in Illumina/GRAIL, the Commission's previous practice had been to discourage referrals from EU Member States if they did not have jurisdiction to review the deal themselves.

In July 2022, the General Court (GC) dismissed Illumina's appeal requesting the annulment of the Commission's decision to assert jurisdiction over Illumina's acquisition of GRAIL. In so doing, the GC confirmed the validity of the Commission's new policy to use Article 22 EUMR to review cases which do not qualify for review under the merger control laws of the requesting Member State, generating significant uncertainty for dealmakers. We covered the GC's judgment in more detail in a previous client briefing. Illumina appealed the judgment to the European Court of Justice (CJ).

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The AG opinion: key points of interest

In an opinion that is highly critical of both the Commission's expansive interpretation of Article 22 and the reasoning of the GC, AG Emiliou proposed that the CJ should set aside the GC's judgment and annul the Commission's decision to assert jurisdiction over the merger.

The scope and purpose of Article 22

The AG strongly disagreed with the GC's conclusion that the Commission's interpretation of Article 22 EUMR was justified on "*literal, historical, contextual and teleological*" grounds and that the provision was intended to provide a "*corrective mechanism*" to ensure the effectiveness of the EUMR framework. The AG emphasised that the GC's interpretation would, "*in one fell swoop*", significantly extend the scope of the EUMR and allow the Commission to consider nearly all concentrations, regardless of whether they occur in the EU and irrespective of the entities' turnover in Europe. In particular:

- AG Emiliou drew support from the text of Article 22, including the limits on the powers granted to the Commission to take "*only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State*" at the request of which it intervenes, to cast doubt on the GC's conclusion that Article 22 was intended to have a broader corrective function within the internal market.

- Moreover, according to the AG, the provision, when considered in its proper context and in light of its history and limited purpose (as explained above), should be understood in the narrow sense to ensure consistency with the overall logic of the EU merger control framework and general principles of EU law. A broader interpretation would create a jurisdiction "sandwich" whereby the Commission reviews deals above the EUMR thresholds, NCAs review those below which are caught by their own rules, and the Commission sweeps up anything left behind. Such a sandwich seems unlikely to reflect the legislature's intention.

Legal certainty and the other objectives of the EUMR

The AG also noted that the objective of effectiveness pursued by the EUMR could not be achieved at the expense of a satisfactory pursuit of the other objectives of the EUMR. According to AG Emiliou, Article 22 should not be interpreted in such a way as to "*maximise the scope and purpose of the provisions of the EUMR to the point that their reach goes beyond the clear intentions of the EU legislature, upsetting the carefully devised balance it has envisaged between the various objectives*".

In particular, the opinion stressed that the broad interpretation of Article 22 supported by the GC would not produce an efficient or predictable legal landscape for merging parties. AG Emiliou was unconvinced by the Commission's contention that legal certainty could still be obtained if the parties bring the merger to the attention of "*those 30 [national] authorities by means of informal notifications*" – in effect defeating the purpose of the one-stop-shop system.

Interestingly, the AG considered that a public deal announcement was not enough for the transaction to be 'made known' to NCAs for the purpose of Article 22, and noted that this would require a form of active communication to the relevant authorities. The AG also considered that, should the CJ agree with the GC's interpretation of Article 22, it could not be concluded that the Commission had breached Illumina's legitimate expectations in its change of Article 22 policy as no "*precise, unconditional and consistent*" assurances had been made in respect of the Illumina/GRAIL deal specifically.

Comment

It is important to note that AG opinions are not binding on the CJ. Although the CJ follows AG opinions in the majority of cases, it remains to be seen how the Court will rule in this case. The final judgment in this matter will be issued by the Grand Chamber of the CJ in due course.

Should the CJ decide to follow AG Emiliou's opinion, the Commission's ability to scrutinise transactions that do not meet the EUMR thresholds will be significantly affected. This would deal a serious blow to the Commission's

strategy to use the referral mechanism in Article 22 to review so-called "killer acquisitions". Since Illumina/GRAIL, the Commission has continued to accept Article 22 referral requests in cases such as Qualcomm's Autotalks acquisition and the EEX-Nasdaq Power deal (as to which, see this previous edition of our newsletter).

AG Emiliou's opinion highlights that, while it may be desirable or "*even necessary*" to change the EUMR's current merger review thresholds, such reviews and changes are the "*task of the EU legislature, not of the Commission*". However, it is still open to the Commission to review below-thresholds deals under the abuse of dominance rules of Article 102 TFEU – a possibility which the CJ confirmed in its Towercast judgment last year (see this previous edition of our newsletter). On that basis, the opinion invites the Commission to make use of this alternative avenue to catch certain concentrations which are not otherwise subject to ex-ante merger control.

OTHER DEVELOPMENTS

ANTITRUST

CMA issues informal guidance in relation to WWF UK's proposal for grocery retailers

On 20 March 2024, the UK Competition and Markets Authority (CMA) published new informal guidance under the CMA's 'open door' policy for green initiatives. The guidance was issued at the request of WWF-UK in relation to a proposed environmental sustainability agreement between retailers, forming part of WWF-UK's 'WWF-Basket' work with retailers to reduce greenhouse gas emissions produced by the groceries sector.

The WWF-UK proposal involves UK supermarkets making a joint commitment to help reduce greenhouse gas emissions in their supply chains by increasing the number of suppliers setting net zero, science-based targets within a specific timeline.

The CMA concluded that the WWF-UK proposal did not have an anti-competitive object and conducted a high-level competitive assessment of its effects. While the CMA considered that the risk of significant harm to competition and consumers appeared likely to be low, it could not reach a definitive conclusion on the potential effects of the proposal given its prospective nature and the lack of necessary information. The CMA then considered whether the four conditions for exemption under section 9 of the Competition Act could be met. The CMA determined that it did not have sufficient information to conclude on the application of the exemption; however, it considered that the proposal could be capable of satisfying the conditions for its application given that there were credible reasons to believe that the proposal may generate environmental benefits for UK consumers in the form of emissions reductions and that these benefits could offset any harmful competitive effects.

The CMA concluded that it does not expect to take enforcement action against the proposal, but that it would expect feedback from suppliers to be taken into account by WWF-UK and the retailers during implementation, and for there to be re-engagement with the CMA if such supplier feedback gives rise to significant concerns. For further details, see our blog post published on 26 March 2024.

Real estate agency challenges Hong Kong Competition Commission's decision to refuse leniency

Real estate agency Midland is challenging a decision by the Hong Kong Competition Commission (HKCC) to deny its request for a leniency marker in the real estate agents cartel case, in an alleged departure from the HKCC's Leniency Policy.

In proceedings before the Hong Kong Competition Tribunal which began in November 2023, the Commission is alleging that Midland and its competitors, Centaline and Ricacorp, had agreed to fix the minimum net commission rate for the sale of first-hand residential properties in Hong Kong at 2%. For details, see our previous client briefing. Centaline and Ricacorp were not named as parties to the proceedings on the basis that they had satisfied the HKCC's Leniency Policy i.e., being the first cartel members to provide substantial assistance to the HKCC's investigation and subsequent enforcement action.

However, in judicial review proceedings filed on 20 March 2024, Midland alleges that it had sought a leniency marker on 13 March 2023 but was informed that a leniency marker was not available and that it should have contacted the Commission sooner. Documents later disclosed to Midland in the underlying proceedings revealed that Centaline and Ricacorp had only formally applied for leniency on 4 May 2023, which led Midland to conclude that it was 'first-in-line' and should have not been told that a leniency marker was not available.

Midland alleges that this deprived it of a fair opportunity to demonstrate what assistance they could have provided the HKCC in order to perfect the leniency marker, which could have given them immunity from the proceedings subsequently initiated by the HKCC.

This is the first time that a decision by the HKCC will be subject to judicial review. Given the importance of a transparent and robust leniency programme to detect and enforce against cartel conduct, the outcome of this challenge is likely to have a profound impact on how businesses approach leniency and how the Commission deals with future leniency applicants.

The substantive trial against Midland has been postponed to August 2025, pending the outcome of Midland's judicial review challenge which will be heard in August 2024.

SUBSIDY CONTROL

European Commission opens further in-depth investigations under EU FSR, while first case withdrawn

On 3 April 2024, the European Commission announced the launch of two in-depth investigations under the Foreign Subsidies Regulation (FSR), marking the opening of the second and third of such investigations, respectively, under the FSR since the regime started to apply on 12 July 2023. The investigations relate to notifications submitted by two consortia that are participating in a public procurement procedure launched by a Romanian contracting authority for the design, construction and operation of a photovoltaic park in Romania. These are (i) ENEVO Group including LONGi Solar Technologie GmbH, which is fully owned by a major supplier of solar photovoltaic solutions, listed on the Hong Kong Stock Exchange; and (ii) Shanghai Electric UK Co. Ltd and Shanghai Electric Hong Kong International Engineering Co. Ltd, both suppliers of industrial-grade energy solutions and wholly-owned by a Chinese state-owned Enterprise.

The Commission considered that, based on its preliminary review, opening an in-depth investigation was justified due to sufficient indications that both bidders have been granted foreign subsidies that distort the internal market. The Commission now has 110 working days to further assess whether the alleged foreign subsidies may have allowed the companies to submit an unduly advantageous offer in reply to a tender, and to reach a final decision.

In addition, on 9 April, Commissioner Vestager announced that the Commission is launching a new FSR inquiry into Chinese suppliers of wind turbines. When speaking at a conference, the Commissioner said that the Commission will investigate conditions for the development of wind parks in Spain, Greece, France, Romania and Bulgaria.

The first in-depth investigation under the FSR was announced in February 2024, following a notification submitted by CRRC Quingdao Sifang Locomotive Co. Ltd, a Chinese state-owned train manufacturer. The notification related to CRRC Locomotive's participation in a public procurement procedure in Bulgaria, for the provision of several electric trains and related maintenance services. However, CRRC Locomotive has since withdrawn from the tender. As a result, the Commission has announced that it will close its in-depth investigation. Thierry Breton, Internal Market Commissioner, commented that "*in just a few weeks, our first investigation under the Foreign Subsidies Regulation has already yielded results. Our Single Market is open for firms that are truly competitive and play fair. We will continue to take all necessary measures to preserve Europe's economic security and competitiveness – with assertiveness and speed*". For further details on this case, see a previous edition of this newsletter.

GENERAL COMPETITION

CMA urges fashion retail businesses to review green claims and practices

The CMA announced on 27 March 2024 that it has accepted voluntary undertakings from three fashion retailers - ASOS, Boohoo and George at Asda – to ensure that their green claims are accurate, clear and not misleading when they display, describe and promote products.

The three fashion retailers have each signed undertakings that commit them to an agreed set of rules around the use of green claims. These include the following: green claims must be accurate and not misleading; statements regarding fabrics must be specific and clear, rather than ambiguous; and criteria used to decide which products are included in environmental collections must be clearly set out and detail any minimum requirements. The rules cover further areas such as claims made about environmental targets and statements made about accreditation schemes.

At the same time, the CMA has published an open letter to the fashion retail sector as a whole regarding green claims urging businesses to review their claims and practices in light of the undertakings, which "*set a benchmark for the industry*". The CMA's Open letter to the fashion sector emphasises the importance of its Green Claims Code in articulating "*how consumer protection law applies to environmental claims and provides a framework for businesses to make environmental claims that help consumers make informed choices*". The Code sets out six principles that businesses must comply with to ensure that their green claims are not misleading.

For further details, see our blog post published on 2 April 2024.

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