SLAUGHTER AND MAY/

CLIENT BRIEFING

FEBRUARY 2022

ILLUMINA/GRAIL: ALL EYES ON THE GENERAL COURT

THE COMMISSION'S NEW ARTICLE 22 POLICY COMES BEFORE THE EUROPEAN GENERAL COURT

Last December the General Court heard Illumina's appeal requesting annulment of the European Commission's decision to accept jurisdiction in Illumina/GRAIL. Despite GRAIL having no turnover in the EEA, the Commission launched its review in April 2021 under its new policy on Article 22 of the EU Merger Regulation (EUMR), before issuing guidance on its implementation and over seven months after the deal was publicly announced. With a decision expected in the next few months, dealmakers eagerly await the Court's verdict in the hope that it might stem the significant uncertainty created by the Commission's new policy.

As discussed in this briefing, on 19 April 2021 the European Commission took the unprecedented step of accepting a referral request from a national competition authority (NCA) which did not have jurisdiction to review the deal in question despite having a sophisticated merger control regime. The referral was made following an invitation from the Commission to do so under the procedure set out in Article 22 EUMR, and constituted the first attempt by the Commission to expand its powers pursuant to the policy change first announced by Commissioner Vestager in September 2020.

On 16 December 2021, the EU's General Court heard Illumina's appeal against the Commission's assertion of jurisdiction. All eyes are on the Court as a decision is expected in the next few months.

The Commission's incorrect reading of Article 22 masks an attempt to expand its influence

Illumina's first ground of appeal challenged the Commission's interpretation of Article 22 as allowing for intervention in cases without any EEA nexus whatsoever. Illumina pointed to the EUMR's concern with providing certainty and clarity for businesses considering where to notify their deals. It noted that such certainty is fundamentally undermined if Article 22 can be used to bypass the "one stop shop" and instead create a "27 stop shop" where merging parties might have to brief all 27 NCAs to manage the risk of a referral.

Illumina argued that by interpreting Article 22 as permitting an NCA without jurisdiction under its own national merger control rules to "create" jurisdiction by requesting the jurisdiction-lacking Commission to review a deal, the Commission was attempting to expand its influence by the back door. Such an interpretation of Article 22, Illumina said, creates 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. The Commission's interpretation of Article 22, contrary to the purpose and intent of the EUMR, could therefore be considered to be an attempt to fill what it perceives as "gaps" in the legislative framework.

France's tardy request and the Commission's lengthy delay undermine legal certainty

Under Article 22, NCAs have 15 working days to refer a merger after the deal is "made known" to them. Regardless of the Court's interpretation of the scope of Article 22, Illumina told the Court that France's request to refer the deal was anyway made too late, almost six months after the deal was publicly announced in September 2020. This delay was despite the fact that the deal had garnered significant publicity in France and across Europe on announcement, thus raising the question – pertinent for all dealmakers – of exactly what is required to make a deal "known" to 27 NCAs. Moreover in this particular case, the limited information relied on in France's referral request was in the public domain long before March 2021.

Illumina also pointed to the Commission's lengthy delay in inviting NCAs to refer the merger months after it had gathered the information it needed to make the request. In the context of a merger which had been announced many months previously, Illumina argued that this delay was contrary to both the principle of legal certainty, and the obligation to act within a reasonable time under the principle of good administration. The Court's reaction to this ground will be eagerly awaited.

The Commission has violated the Parties' legitimate expectations

If the Commission is to radically change policy, businesses need to know this in advance so they can modify their behaviour. Commissioner Vestager was clear and unambiguous in her statement announcing the policy change in September 2020: we will not change policy until we have put out guidance. But the Article 22 guidance was not issued until over a month after the Commission invited NCAs to refer the deal. Illumina's third ground of appeal challenged the Commission's actions in acting contrary to Illumina's legitimate expectation that the Commission would not change policy without letting Illumina and the rest of the business world know what the Commission was going to do under the new policy by promulgating guidance. To do otherwise, Illumina said, is to treat Illumina and GRAIL as guinea pigs without even letting them know, depriving them of any advance warning of the Commission's paradigm shift in the review of mergers in the EU.

Whilst waiting for the Court's verdict, Illumina and GRAIL continue to work with the Commission to clear the deal.

Slaughter and May is advising Illumina on its acquisition of GRAIL and appeal to the General Court.

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