The Future is Irish? Illumina/Grail and Irish Merger Control Powers

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SERVICES: Competition and Regulation

DATE: 04/09/2024

An important ruling of the Court of Justice of the European Union (CJEU) on 3 September 2024, in two cases brought by Illumina and Grail against the European Commission (EC), has essentially held that a company's right to legal certainty places a limit on the EC's most flexible merger control powers. The relevant powers, under Art. 22 of the EU Merger Regulation (EUMR), have been invoked over the last 3 years at the 'new frontiers' of EU enforcement against suspected 'killer acquisitions' of companies which do not meet merger control turnover thresholds.

This is a valuable CJEU ruling for companies engaged in M&A in the EU. It may however result in the Irish Competition Authority (CCPC) having a bigger role in global merger control and specifically in helping the EC review suspected 'killer acquisitions' involving Irish-based pharma and tech companies in particular. We explain why below-

In ruling in favour of Illumina and Grail (and thereby invalidating a €432m gun-jumping fine and a 2022 EC decision prohibiting their merger), the CJEU found that the EC has no power to investigate a merger under Art. 22 EUMR pursuant to referrals from national authorities who themselves lack power to investigate**.** In reaching this decision, the Court relied on the principle of legal certainty and the importance of turnover thresholds in providing that legal certainty.

Commissioner Vestager's statement in reaction to the CJEU ruling sought to downplay its practical significance, by suggesting that the EC will get to the same place in future by instead relying on referrals from other national authorities who have recently acquired 'call-in' powers over 'below threshold' mergers:

"Going forward, in compliance with today's judgment, the Commission will continue to accept referrals made under Article 22 of the Merger Regulation by Member States that have jurisdiction over a concentration under their national rules where the applicable legal requirements are met. In the last few years, several Member States have introduced provisions allowing them to request the notification of transactions that do not meet national thresholds, in situations where they might have a significant competitive impact."

While Ireland was not named by Commissioner Vestager, it is clear that Ireland will have a new importance to the EC. This is because, firstly, Ireland has new national law powers to investigate 'below threshold' mergers affecting competition here and, secondly, Ireland (likely more so than other national authorities across the EU with similar 'call-in' powers) is a Head Office location for many pharma and tech companies whose mergers may be alleged to be 'killer acquisitions' which warrant use of the EC's Art. 22 powers. We therefore expect the EC to look to Ireland for future Art. 22 referrals, just as merging parties may look to Ireland as a prime referrer candidate when in the different situation of considering making a Art. 4(5) referral request to the EC themselves to avoid multiple national merger reviews across the EU.

It should also be noted that the CJEU ruling may provide a new legal basis for parties to dispute the EU law compatibility of the wide national powers of regulators, such as the CCPC, in relation to 'below-threshold' mergers. We refer to the below-quoted paragraphs 208 and 209 of the CJEU ruling, which emphasise that turnover thresholds are important in ensuring that merger control laws respect of legal certainty requirements:

"In that context, it must be borne in mind that, in the scheme of the systems of prior control of concentrations of undertakings successively envisaged at EU level, the thresholds set for determining whether or not a transaction must be notified are of cardinal importance. Undertakings that are potentially subject to notification and standstill obligations must be able easily to determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be

expected.

Determining the competence of the national competition authorities by reference to criteria relating to turnover is an important guarantee of foreseeability and legal certainty for the undertakings concerned, which must be able easily and quickly to identify to which authority they must turn, and within what time limit and in what form…"

This raises the legal question of whether call-in powers *must* be limited by a 'brightline' turnover/market share threshold to be compatible with EU law, or whether limits such as call-in deadlines are sufficient. While the CJEU's ruling in *Towercast* last year is supportive of the compatibility of national authorities' wide competence to review mergers under general competition law powers (ie, rules comparable to Art. 102 TFEU rather than merger control rules), *Towercast* did not consider national call-in powers such as those in Ireland which impose pre-closing notification and suspension obligations and potential liability for huge gun-jumping fines. Thus, any efforts to increase enforcement against 'below threshold' mergers will need to approached carefully by the EC and national authorities with further litigation being possible. In particular, it will be interesting to see whether the EC will favour Art. 22 referrals from Member States like Ireland with wide call-in powers (and no thresholds) or Member States with a more limited national law jurisdiction, if and when the EC has a choice.

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