WHITE & CASE

EU top court delivers a blow to the European Commission's approach on Article 22 below-threshold referrals

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The Court of Justice of the EU (the Court) has overturned the General Court's judgment in Illumina/Grail, effectively putting an end to the EC's revised Article 22 policy approach for below-threshold mergers. Under this approach, the EC could encourage a Member State to refer a transaction meeting neither EU nor any Member State's filing thresholds for the EC's review. Whilst the judgment clarifies this specific issue, there are other tools allowing the EC and other regulators to review below-threshold-deals. Businesses should therefore continue to account for this risk in their deal documentation and planning.

What did the Court say?

Below we summarise key points from the judgment. For background information on the dispute, the EC's Article 22 policy, the General Court's judgment and the Advocate General Emiliou's opinion, see our client alerts here and here.

A Member State can refer a deal for the EC review pursuant to the Article 22 referral mechanism provided, amongst others, that the deal is reviewable in the referring Member State.

The Court held that the General Court's literal, historical and contextual interpretation of the Article 22 EUMR does not support the conclusion that the EC can review a below-threshold deal at the request of a national competition authority that did not initially have jurisdiction over the deal.[1]

The Court compares the Article 22 mechanism to another referral mechanism under Article 4 (5) of the EUMR. The Article 4 (5) mechanism allows deals reviewable by at least three national authorities to be transferred for EC's review, provided certain conditions are met.[2] According to the Court, the comparison supports the view that the EC can only review a deal that is reviewable in a referring Member State.[3] In particular, the Court notes "[…] as regards a referral request made by a Member State that has national rules on the ex ante control of concentrations, the competence conferred by that provision on the Commission to examine the transaction in question is based on it being appropriate for the Commission to replace one or more national authorities, despite the fact that that transaction is not deemed to have a European dimension. Such a replacement nevertheless presupposes that, where the requesting Member State has such rules, the authority responsible for the ex-ante control of concentrations within that State is not precluded by those rules from having competence, in particular on the ground of the transaction in question falling below the control thresholds which it defines".[4]

Article 22 does not provide for a general "corrective mechanism" to catch below-threshold deals.

According to the Court, the General Court misinterpreted the meaning of the term "corrective mechanism" in recital 11 of the EUMR. Instead, the Court clarifies that the recital refers to a mechanism having a corrective function in terms of allocation of competences between the EC and the national competition authorities (i.e. which authorities are better-placed to review specific deals, taking into account also the benefits of the "one-stop shop" principle), not in terms of remedying any perceived enforcement gap that may result from revenue-based thresholds.[5]

According to the Court, the Article 22 mechanism pursues two primary objectives (i) to scrutinise transactions that would have otherwise fallen below an authority's radar because of a lack of a merger control regime at a national level,[6] and (ii) to extend the one-stop shop principle to enable the EC to examine a concentration that is notified or notifiable in several Member States, thereby avoiding multiple notifications at national level and enhancing legal certainty for notifying parties.[7]

The purpose of the EUMR is to establish legal certainty and predictability. The EC's interpretation of the Article 22 mechanism contradicts this objective.

The Court emphasises that, amongst other objectives, the EUMR "seeks also to establish an effective and predictable control system."[8] It argues that the EC's and GC's interpretation of Article 22 "is liable to upset the balance between the various objectives pursued by [the EUMR]" and "undermines the effectiveness, predictability and legal certainty" that must be guaranteed to businesses notifying a deal.[9]

Furthermore, the Court emphasises the "cardinal importance" of revenue-based thresholds. Businesses need to be able to determine whether their deal is reportable and if so, to what competition authority. The Court highlights that this is an important guarantee of foreseeability and legal certainty for notification parties.[10] This reference seems to be putting in doubt the survival of the EC's policy for referrals of below-threshold mergers simply on the basis of other call-in national powers (that are not based on turnover thresholds), although this is something that may still land on the EU Courts on some day.

Outlook

- **Recognition for need of predictability and certainty.** The judgment is a significant setback for the EC's relatively recently introduced Article 22 policy, which aimed to review deals that are non-reportable either at the EU or national level. The Court makes clear that the EC's intervention in the Illumina/Grail case exceeded the EC's merger control powers. That means that Article 22 cannot be the legal basis for the EC to assert jurisdiction over deals based on a referral from a Member State that does not have jurisdiction to review the deal in the first place. Accordingly, the whole EC's guidance on Article 22 referrals and the policy to accept such referrals lacks legal basis.
- **Cautious approach still needed due to expansive powers of national jurisdictions to review below-threshold transactions.** However, this does not signify a return to the days when merger filings could be excluded simply based on target's revenues and assets. All deals especially those in the life sciences and digital sectors, will continue to require a comprehensive analysis of potential antirust risks. There are jurisdictions with transaction value-based or market shares-based

thresholds. Moreover, a growing number of national regulators have powers to call-in below-threshold acquisitions for review. In the EU, seven jurisdictions already have the power to call-in deals that do not meet thresholds but raise competition concerns.[11] The agencies of the Czech Republic, Finland and the Netherlands are also seeking to gain such powers. The EC may even start lobbying Member States to introduce these powers in their national rules.

- **Departing Commissioner Vestager hinted** in her press statement that the EC may rely on national regulators with call-in powers to catch below-threshold deals. That said, for deals to be called in by national regulators, there needs to be effect on competition in the specific jurisdiction and therefore a link with the jurisdiction at stake.
- **Dealmaker beware!** Parties negotiating deals are best advised to continue taking a cautious approach and carefully consider from the outset, the potential reportability of below-threshold deals (especially if the deal has links / nexus with EU jurisdictions with call-in powers) when setting transaction timetables, closing conditions and risk allocation provisions in their deal documents.
- **Review of deals by national regulators under antitrust rules.** National competition authorities (though not the EC – because it has no such powers) may want to catch below-threshold deals through antitrust rules, and potentially look to stretch the test confirmed in the Towercast judgment.[12] Recently, the French Competition Authority (FCA) assessed non-reportable mergers in the meat-cutting sector under Article 101 TFEU. The FCA concluded that it is entitled to do so because, as Article 102 TFEU, Article 101 TFEU is also a "provision [of primary law] having direct effect", and its applicability cannot be ruled out by a piece of secondary legislation.
- **Potentially fewer referrals and fewer questions by the EC for below-threshold transactions?** To date, the practice has been for the EC to ask transaction parties questions when such transactions could be potential Article 22 candidates. It is likely that we may see fewer questions by the EC in this respect or potentially such rounds of questions could be more easily challenged by the parties. Maybe Member States may now play that role and start asking questions. In this context, it should not be forgotten that if a Member State has jurisdiction over a deal, it could use the referral mechanism under Article 22 EUMR, provided that a transaction (i) affects trade between Member States, and (ii) threatens to significantly affect competition. Therefore, the competence that a local agency may have pursuant to national law does not automatically mean that a referral is possible, but the above conditions must also be fulfilled.

1 See for example paras 139, 140, 146, or 148 of the judgment (joined cases C-611/22 P and C-625/22P).

2 For concentrations that do not have a European dimension but are capable of being reviewed by at least three Member States under their national merger control laws.

3 See paras 177-180 of the judgment.

4 Para 180 of the judgment.

5 Paras 192 and 193 of the judgment.

6 Today, except of Luxembourg (where the relevant legislation is currently pending), all NCAs withing the EU have merger control regimes in place.

7 Para 199 of the judgment.

8 Para 203 of the judgment.

9 Paras 205 and 206 of the judgment.

10 Paras 208 and 209 of the judgment.

11 Denmark, Germany, Iceland, Ireland, Italy, Sweden, Hungary. Other countries with such powers in Europe include Norway and the UK.

12 The judgment confirmed that national competition authorities (and national courts) can apply abuse of dominance rules to mergers that did not trigger EU and national merger control thresholds, and were not referred to the European Commission under Article 22 EUMR.