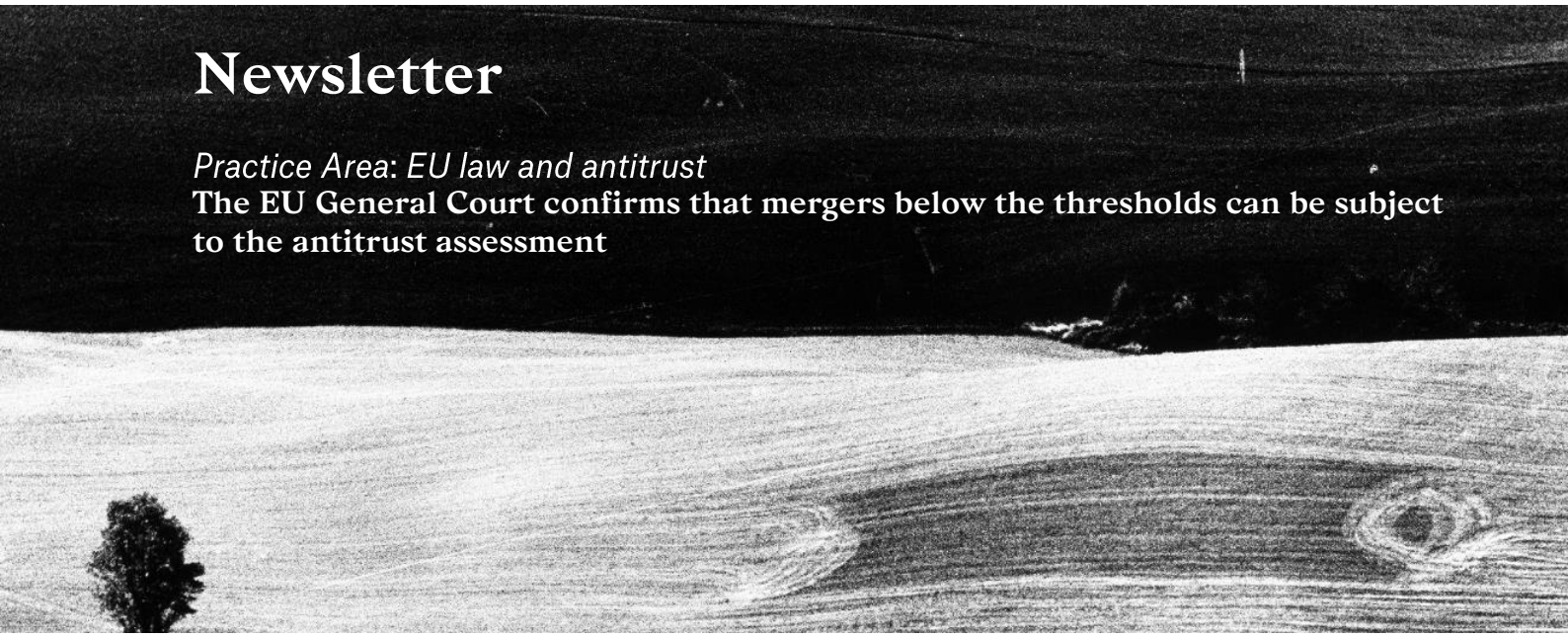

Newsletter

Practice Area: EU law and antitrust

The EU General Court confirms that mergers below the thresholds can be subject to the antitrust assessment

On July 13, 2022, in a ruling anticipated to some extent, in the Illumina case (T-227/21), the EU General Court confirmed that transactions that do not trigger the thresholds for filing can be assessed by the European Commission ("**Commission**") under the referral mechanism provided for in Article 22 of Regulation (EU) No. 139/2004 ("**Merger Regulation**") (see paragraph **I**).

The ruling is in the wake of the new approach regarding the referral mechanism set forth in the Commission's Guidelines on Article 22 of the Merger Regulation published on March 31, 2021 ("**Guidelines**"). With the Guidelines, unlike the previous approach, the Commission encourages Member States to request the intervention of the EU institution even in the case of transactions not notifiable under the relevant national framework (especially in the digital economy and pharmaceutical sectors) (see paragraph **II**).

In this context, notice should be made to what envisaged in Italy by the Draft Law containing the Annual Competition Law ("**Draft Competition Law**") which provides, among others, the extension of the enforcement powers of the Italian Antitrust Authority ("**ICA**") and, more specifically, the power to request for the notification of mergers which do not meet the national thresholds (see paragraph **III**).

It seems clear that against the above developments in case law and policy, M&A transactions will have to consider a much more complex antitrust merger control regime as, also after the closing, in certain cases, the Commission or the ICA may assess the transaction and impose remedies in case of competition concerns.

I. The General Court decision in the Illumina case

The dispute originates from the acquisition by Illumina Inc. ("**Illumina**"), a U.S. company specializing in genomic sequencing, of Grail LLC ("**Grail**"), a U.S. biotechnology company which relies on genomic sequencing to develop cancer screening tests (the "**Transaction**").

The Transaction did not meet the thresholds required for the filing and therefore was not subject to prior notification either before the Commission or to the National Competition Authorities ("**NCAs**").

After receiving a complaint from a third party relating to the possible competition concerns of the Transaction, the Commission informed the relevant Member States and invited them to submit a referral request under Article 22(5) of the Merger Regulation ("**the invitation letter**"). The French Authority proceeded with the referral request which was then joined by the Belgian, Greek, Icelandic, Dutch, and Norwegian Authorities.

On March 9, 2021, the Commission accepted the referral request, and on April 28, 2021, Illumina, supported by Grail, applied to the General Court to annul the Commission's decision to accept the referral and the invitation letter.

The Tribunal dismissed the application in its entirety and held that:

- the Commission has competence insofar as according to Article 22(1) of the Merger Regulation the Commission may examine "any concentration" that may affect trade between member states, irrespective of the scope of national merger control rules. Moreover, the referral mechanism provided by Article 22(1) is intended to introduce an element of flexibility to assess concentrations that would otherwise escape control because they are below the thresholds;
- the 15 working days' time limit from the date on which the concentration is "made known" to the Member State did not expire, since the initial day for calculating the aforementioned time limit begins to run from the time when the Member State has at its disposal all the elements necessary for the assessment of the referral request;
- Illumina failed to show that it had received "*precise, unconditional, and consistent assurances from authorized and reliable sources*" that, in light of legitimate expectation decision – making practice, could allow the violation of this principle.

II. The 2021 Guidelines on the application of the referral mechanism

The Guidelines were adopted to announce to the market a "turnaround" of the Commission's previous practice of discouraging Member States referral requests under Article 22 of the Merger Regulation.

The change in approach is justified by "*gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration*".

In order to provide the NCAs with a guidance in the application of the Guidelines, the Commission identified: *(i)* the legal requirements for referrals; and *(ii)* the other factors that may be considered.

i) Legal requirements

For a referral, the concentration must fulfil two legal requirements and in particular it must:

- affect trade between Member States; and
- threaten to significantly affect competition within the territory of the Member State or States making the request

ii) Other factors that may be considered

"Eligible" cases for a referral according to the Guidelines consist of "*transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential*".

In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.

For purely illustrative purposes, the Commission considers as potentially relevant for the referral the cases where the *target*:

- is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model);
- is an important innovator or is conducting potentially important research;
- is an actual or potential important competitive force
- has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or
- provides products or services that are key inputs/components for other industries.

For the sake of completeness, we recall that, according to the Commission, "*the fact that a transaction has already been closed does not preclude a Member State from requesting a referral*". In any event, the Commission clarifies that where more than six months has passed after the implementation of the concentration the referral would not be appropriate.

Finally, as clarified in the Guidelines, the referral mechanism is intended to operate more frequently in the digital economy, in the pharmaceuticals sector, in sectors where innovation is an important parameter for competition, and for companies that have access to or impact on competitively valuable assets such as raw materials, intellectual property rights, data or infrastructure.

III. Draft Competition Law

Article 32 of the Draft Competition Law provides amendments to the rules on merger control.

Among others, the ICA enforcement powers are extended and it will be able to request the companies to notify transactions below the threshold provided that

- one of the two turnover thresholds provided for in Article 16(1) of Law 287/1990 is met, or the total worldwide turnover of the undertakings concerned exceeds EUR 5 billion;
- there are competition concerns in the national market or in a relevant part of it, also taking into account the detrimental effects on the development and spread of small enterprises characterised by innovative strategies;
- the transaction has been completed no more than six months before the request for filing.

IV. Conclusive remarks

The General Court's decision in the Illumina case, as well as the Commission's Guidelines on the application of the referral mechanism and the extension of the ICA's enforcement powers in cases of transactions below the thresholds contribute to provide a framework of growing sensitivity and uncertainty in relation to mergers, both at European and national level.

The need to prevent that transactions which could have an impact, especially in the digital and pharma sectors, may escape review by both the Commission and the Member States, is crucial for the European competition policy.

In the context of M&A transactions, companies have to consider a much more complex antitrust merger control regime that, especially in the early stages, may generate room for uncertainty.

It is now clear that also after the closing, the Commission or the ICA will be able to assess the transaction and provide for remedies in case of competition concerns.

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