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European Commission imposes highest ever gun-jumping fine

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On 12 July 2023, the European Commission (EC) fined Illumina €432 million for closing its acquisition of GRAIL without prior EC approval. Representing 10% of Illumina's global revenues and the maximum permitted under EC merger control rules, it is the largest antitrust gun-jumping fine ever imposed by a regulator.

The historic fine is significantly larger than the previous record fine of €124.5 million imposed in 2018. The EC also imposed a symbolic fine of €1,000 on GRAIL which, although low value, is notable for being the first time the EC has imposed any gun-jumping fine on a target company.

Background

Despite the parties' revenues being below relevant EU Merger Regulation (EUMR) filing thresholds, Illumina's acquisition of GRAIL was called-in for formal review by the EC using its discretionary Article 22 EUMR mechanism following a referral request from six EU Member States. The EC's assertion of jurisdiction to run a formal review triggered a standstill obligation that prevented the parties from implementing the transaction.

Being the first high profile use of Article 22, Illumina contested the EC's jurisdiction and announced that it had closed the acquisition despite the EC's ongoing in-depth investigation. The closing prompted the EC to impose interim measures requiring the two companies to remain separate, pending the outcome of the EC's review. The EC ultimately prohibited the transaction in September 2022 and required that Illumina unwind the acquisition of GRAIL.

Illumina continues to challenge the EC's jurisdiction, with a European Court of Justice decision still pending after a first instance judgment finding in favor for the EC. Illumina has also indicated its intention to appeal the EC's fine, which it has characterized as "unlawful, inappropriate and disproportionate".

Practical considerations

This development illustrates the potentially severe consequences of failing to comply with EC merger control rules, including when transactions are called-in for review under the Article 22 EUMR mechanism.

Practical considerations for deal teams include:

- **Call-in risk**: deal teams should carefully consider risk of the EC asserting jurisdiction depending on the industry, target company etc. Where appropriate, contractual protections should be included in transaction documents to ensure closing will not occur until an EC review has completed. Companies should also consider whether it is prudent to proactively brief the EC (and Member States) on the substantive aspects of the deal rather than waiting to see if the EC raises questions, which may occur at a late stage in deal process. A referral can take place at any time unless the EC and Member States are properly informed and they can decide whether to make a referral shorter. It has also

become more common for the EC to ask questions on deals that do not meet the thresholds but concern strategic industries (e.g., pharmaceuticals, high-tech, and raw materials).

- **Deal timing**: closing may be meaningfully delayed if the EC decides to assert jurisdiction. Complex reviews may run for 12+ months and may ultimately result in deal prohibition or far-reaching remedies (such as structural divestments) being imposed. Timing implications should be considered when agreeing long-stop dates and the contractual efforts standard each party has to adhere to in order to secure regulatory clearances.
- **Sanctions for non-compliance will be severe**: the Illumina fine confirms that the EC is willing to impose the maximum possible sanction where it determines that an acquirer has willfully ignored the standstill obligation during a pending review. This reflects a global trend towards increasingly higher fines over the past decade. Transacting parties should ensure appropriate compliance policies are established between signing and closing to remove the risk of sanctions being imposed. Target companies should also be wary that it is no longer only the acquirer that bears the risk of facing a sanction as targets may also be punished if the EC decides they are complicit in non-compliance.

The EC is expected to continue to actively use the Article 22 EUMR mechanism across a range of sectors to investigate transactions that would have previously avoided scrutiny and to enforce compliance with its competition merger control rules vigorously.

Taken together with the new, parallel EC merger control regime established by the EU Foreign Subsidies Regulation (see separate client update), active foreign direct investment screening regulators and risk of investigations by antitrust regulators in other major jurisdictions, notably the US and UK, there is an increasingly complex regulatory landscape for companies engaged in cross-border M&A to navigate. Identifying and anticipating regulatory review processes from an early stage in deal planning will allow merging parties to mitigate adverse timing implications and other execution risks as well as avoiding sanctions for non-compliance.

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