Davis Polk

The EU Court of Justice curtails the EU's attempt to review below-threshold transactions

September 5, 2024 | Client Update | 4-minute read

On 3 September 2024, the EU Court of Justice ruled that EU Member States cannot refer transactions to the European Commission if those transactions are not caught by their own national merger control rules.

The EC's interpretation of Article 22

Article 22 of the EU Merger Regulation (EUMR) was originally intended to enable Member States without merger control regimes to refer transactions to the European Commission (EC) for review. Historically, the use of Article 22 was discouraged by the EC and referrals were only accepted in special cases. This changed in early 2021, when the EC started to encourage Member States to use Article 22 to refer transactions to it, even if these Member States were not competent to review these transactions under their national merger control rules. The EC's stated aim was to call in deals that are potentially harmful to competition despite falling below the mandatory EU (Member State) filing thresholds, to avoid so-called "*killer acquisitions*" passing under the radar.

The Court of Justice's judgement

In the fall of 2020, Illumina entered into an agreement to acquire Grail, which made early cancer detection tests. This transaction did not trigger an EU filing or a filing in any Member State, as the acquisition fell below all relevant merger control thresholds. Nevertheless, in 2021 the EC accepted jurisdiction over this transaction following an Article 22 referral by several Member States, spurred-on by a third-party complaint. The EC, followed by the General Court, defended this approach by arguing that Article 22 was intended to serve as a 'corrective mechanism' to address the enforcement gap for transactions that are not reviewable by the EC or Member States, but could still have a significant impact on competition.

The EU Court of Justice (the Court) has now ruled that this interpretation is incorrect. According to the Court, a literal, historical, contextual and teleological interpretation of the EUMR confirms that it does not allow Member States to refer transactions to the EC if they are themselves not competent to review it. The Court noted the need for merger control procedures to be effective, predictable and guarantee legal certainty, all of which would be jeopardised by the EC's interpretation of Article 22. In addition, the Court confirmed that notifying parties should be able to know whether they must notify their transaction and, if so, to whom and under what procedure. Finally, the Court criticised the fact that the EC's broad interpretation of Article 22 essentially amounted to the EC expanding the scope of the EUMR outside of the specific legislative procedures prescribed by EU law.

What lies ahead?

The Court's judgement condemned the EC's policy of accepting referrals of below-threshold transactions to the dustbin of history. While the EC can and will continue to accept referrals from EU Member States that are competent to review the transaction under their national merger control rules, they can no longer do so if the referring Member States are not competent. Aside from immediate implications for previously cleared and ongoing transactions that underwent an Article 22 referral, the Court's judgement begs the question: can the EC still review below-threshold transactions going forward?

The first and most obvious option for the EC is to include additional threshold in the EUMR to capture transactions that may fall below traditional turnover thresholds, such as transaction value or market share thresholds. Such reform would require political support from Member States, which will take time and may not be the top priority. Such alternative thresholds may also not capture all transactions the EC would like to review, which would still leave an enforcement gap. Alternatively, the EC could nudge Member States to include such powers in their national legislation. While several Member States, such as Germany and Austria, already deployed such thresholds, it is far from certain all Member States would agree to do so.

A second, legally challenging option would be (encouraging Member States) to rely on primary EU law (Article 101 and 102 TFEU) to review below-threshold transactions. This approach was vetted by the Court in *Towercast* but remains relatively untested, except for attempts in Belgium and France. This approach is not without difficulties however, as the authorities would either need to demonstrate that the transaction itself constitutes an abuse of a dominant position or is (part of) an anticompetitive agreement. Conceptual and legal difficulties of applying primary EU law to transactions aside, it is difficult to imagine how this approach would fill the void left by the disappearance of the broad Article 22 referral mechanism, which allowed the EC to review all below-threshold transactions in a near-discretionary manner.

Therefore, while the Article 22 saga is over, the last word about the review of below-threshold transactions has not been said. It remains to be seen how the EC and Member States will react, but the clear message of the Court that notifying parties should be guaranteed predictability, foreseeability and legal certainty should not remain unheard.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Jürgen Schindler
+32 2 405 0500
juergen.schindler@davispolk.com

Frances Dethmers
+32 2 405 0501
frances.dethmers@davispolk.com

Matthew Yeowart
+44 20 7418 1049
matthew.yeowart@davispolk.com

Maxime Cuypers
+32 2 405 0505
maxime.cuypers@davispolk.com

Georgios Karayiannis
+32 2 405 0502
georgios.karayiannis@davispolk.com