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EUROPEAN COURT OF JUSTICE CONFIRMS EUROPEAN COMMISSION'S LACK OF JURISDICTION IN THE ILLUMINA/GRAIL LANDMARK CASE

On 3 September 2024, the European Court of Justice ("ECJ") handed down its long-awaited **judgment** in the Illumina/GRAIL appeal. In a pivotal development, the Court held that the Commission had no jurisdiction to review Illumina's acquisition of GRAIL under Article 22 of the EU Merger Regulation ("EUMR"), in circumstances where the merger did not qualify for review under the merger control laws of the referring Member States.

Background

In April 2021, the Commission accepted a referral request from the French Competition Authority to review Illumina's acquisition of GRAIL – a US/US biotech deal which did not qualify for merger control review anywhere in the EEA. It did so after writing to the 27 EU Member States' national competition authorities ("NCAs") in February 2021, inviting them to make a referral under the procedure set out in Article 22 of the EUMR.

Article 22 allows Member States to request that the Commission examine a concentration notwithstanding the fact that the concentration does not have an EU dimension if that concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State (or Member States) making the request.

In recent years, Article 22 had been rarely used by Member States' NCAs and only in cases where the Commission was better placed to review a deal - for example, where it raised pan-European issues. Until its first test case in Illumina/GRAIL, the Commission's previous practice had been to discourage referrals from EU Member States if they did not have jurisdiction to review the deal themselves.

In July 2022, the General Court (GC) **dismissed** Illumina's appeal requesting the annulment of the Commission's decision to assert jurisdiction over the transaction.

The ECJ's judgment

On appeal, the ECJ ruled in favour of Illumina and GRAIL, setting aside the GC's judgment and annulling the Commission's decision to accept the referral requests from the NCAs under Article 22.

The ECJ found that the GC was wrong to conclude that the Commission was permitted to review cases which do not qualify for review under the merger control laws of the requesting Member State (or Member States). In particular, the ECJ found that:

1. Article 22's referral mechanism had two main objectives: initially, to allow Member States without merger control regimes to request Commission reviews of potentially anticompetitive deals, and later, to implement the "one-stop shop" principle, avoiding multiple notifications to NCAs. It was not intended

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to address deficiencies in a turnover-based merger control system. Thus, the GC's view of Article 22 as a "corrective mechanism" for below-threshold concentrations was incorrect.

2. Amongst other objectives, the EUMR aims to control concentrations affecting competition and establish a predictable merger control system based on the "one-stop shop" principle. This system relies on clear task allocation between the Commission and Member States and precise notification and suspension conditions. The Commission's interpretation of Article 22 would have *"undermine[d] the effectiveness, predictability and legal certainty"* for parties to a concentration and *"upset the balance between the various objectives pursued"* by the EUMR, including the *"cardinal importance"* of turnover thresholds for foreseeability and legal certainty. The Court was unconvinced by the Commission's contention that legal certainty could still be obtained if the parties submit informal notifications to all 27 Member States' NCAs – in effect frustrating the purpose of the "one-stop shop" system.

The Commission previously imposed gun-jumping fines of €432,000,000 on Illumina and a symbolic €1,000 on GRAIL. In respect of the latter, this was the first time a gun-jumping fine had ever been levied against a target company. The judgment overturns the basis for these fines.

Implications

The judgment deals a serious blow to the Commission's strategy to use Article 22 to review below-threshold acquisitions. For example, the Commission has now closed a merger investigation into Microsoft's proposed acquisition of Inflection AI. The transaction did not reach the EUMR notification thresholds and was also not notified in any Member State. Seven Member States responded to a Commission's request for referral and referred the transaction to it for review. In light of the ECJ's judgment, all Member States have decided to withdraw their requests. As a result, the Commission will take no decision in Microsoft's investment.

However, Commissioner Vestager downplayed the judgment's impact on future merger reviews, highlighting recent national reforms allowing NCAs to oversee below-threshold deals. She noted that referral possibilities under Article 22 are now broader than during the Illumina-GRAIL case. This has the potential to significantly impact the objectives of foreseeability and legal certainty that the judgment aims to protect. In addition, the ECJ's judgment recalls that concentrations falling below merger control thresholds may be subject to *ex-post* review under the abuse of dominance rules based on the *Towercast* judgment which we previously covered **here**.

The judgment is likely to lead to conversations, both at an EU and national level, as to whether thresholds ought to be reviewed and revised downwards to capture additional transactions. The French Competition Authority ("FCA") has already published a statement confirming that it will carefully consider whether any amendments are required to French merger control standards to protect competition in light of the ECJ's judgment.

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FRENCH COMPETITION AUTHORITY ISSUES OPINION ON GEN AI SECTOR

The FCA has issued its **opinion** and recommendations on the generative artificial intelligence ("GenAI") sector. This follows the launch of its inquiry and public consultation in February 2024, which we previously covered **here**.

The FCA's opinion focuses on the consolidation of market power of the major digital incumbents in the upstream GenAI market, in particular through control of access to key inputs and investments and partnerships with nascent innovative companies in the GenAI space.

Market dynamics

The FCA's final opinion largely sets out the same market dynamics and competition risks it had identified at the launch of its consultation, specifically:

- High barriers to entry, including the need for: specialized AI chips with high computing power – which the FCA states are facing supply constraints following an explosion in demand; cloud services as an indispensable channel to train and distribute AI models; access to large datasets – with a concern that data from public sources may not be sufficient in the future and that rules around data use will create uncertainty; highly skilled labour; and continued significant financial investment.

- Incumbency advantages of major digital players active on adjacent markets who are likely to benefit from privileged access to the key inputs mentioned above through, e.g.: partnerships with AI chip providers, an ability to buy very large volumes and negotiate preferential terms, as well as an ability to develop internal capabilities; access to large pools of own data and the financial capacity to enter into agreements to access third-party data; and an ability to attract highly skilled workers through attractive pay packages. The opinion states that these players' advantages are also further reinforced by (i) their vertical or conglomerate integration throughout the AI value chain, which gives them both economies of scale and access to a critical mass of users; and (ii) further expansion through minority investments and partnerships in nascent innovative companies in the AI space.

- Risks of anticompetitive behaviour and foreclosure upstream in the value chain. These include: risks related to AI chip suppliers such as limitations on production, price fixing or unfair contractual terms; financial and technological lock-in by cloud service providers and access foreclosure through exclusivity agreements with major developers of AI models; discriminatory access to data; self-preferencing practices of vertically-integrated players and other vertical effects arising from minority investments by major digital companies; no-poach agreements or the recruitment of strategic employees and/or entire teams by the major players.

Enhancing the regulatory framework without the need for new legislation

The FCA's opinion puts forward several recommendations to enhance the competitive landscape of the GenAI sector. Notably, these do not anticipate new legislation, but focus on optimizing existing regulatory frameworks and leveraging existing competition law tools to ensure effective enforcement:

- Use existing competition law tools with a renewed focus on the AI sector: the FCA notes that many of the risks identified may be apprehended through the traditional rules on anticompetitive agreements and abuse of dominance. The FCA advocates paying particular attention to the AI sector and making full and effective use of existing competition tools to address any potential anticompetitive practices.

- Make the existing regulatory framework applicable to the sector more effective. This includes in particular, at a European level, the Digital Markets Act ("DMA"), Data Act and the AI Act. In particular, the FCA suggests that the European Commission could make use of the

DMA to consider whether providers of services that give access to GenAI models in the cloud (Model as a Service) might be designated as gatekeepers; and increase transparency on investments by major digital players in this space by requesting information on minority investments as part of gatekeepers' reporting obligations under the DMA.

- Other policy recommendations include: increasing the development of public supercomputers as an alternative to cloud services to access computing power. These can be used for free – in particular by academics – in return for a contribution to open science. The FCA in its opinion supports their extension to the private sector under certain circumstances and subject to remuneration; and valuing data economically and balancing fair remuneration for rights holders with developers' access to necessary data, in order to facilitate access to both public and private data for the training of GenAI models.

International coordination in the Gen AI sector

As a rapidly evolving space, the GenAI sector is facing increasing scrutiny and consideration by regulators and policymakers alike across the world. As such, coordinated responses are becoming increasingly common – indeed, the FCA **advocates** for international coordination as part of its proposals. It notes that the AI Summit, to be held in France in February 2025, will provide a useful forum for the development of global governance in the field.

This unified approach has recently also been seen in the **joint statement** on competition in generative AI foundation models and AI products published by the European Commission, the UK Competition and Markets Authority, the US Department of Justice and the US Federal Trade Commission in July of this year. The statement identifies similar risks to those in the FCA's inquiry, notably a concentrated control of key inputs in the upstream part of the market, the entrenchment of the market power of key players that are also active in AI-adjacent markets and investments and partnerships involving key players. In response, the statement sets out principles of fair dealing, interoperability and choice to protect competition in the AI ecosystem.

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SPANISH COMPETITION AUTHORITY OPENS APPLE INVESTIGATION

On 24 July 2024, the Spanish National Markets and Competition Authority ("CNMC" by its Spanish acronym) launched an ex officio investigation into an alleged abuse of a dominant position under Article 2 of the Spanish Competition Act ("SCA") and Article 102 of the Treaty on the Functioning of the European Union ("TFEU") by Apple Distribution International Ltd and Apple Inc. ("Apple").

Based on the **CNMC's** press release, the alleged infringements relate to possibly unfair commercial conditions Apple imposed on developers who distribute their apps through its App Store. The investigation will likely scrutinise certain practices in relation to the developers' guidelines for the App Store, such as:

- clauses establishing Ireland as the jurisdiction for dispute resolution proceedings involving Apple; and
- internal procedures for complaints and damages claims under which Spanish developers could be prevented from pursuing their rights effectively.

Separately, Apple is currently facing ongoing non-compliance investigations by the European Commission under the DMA, with respect to the App Store steering rules and new contractual terms for developers to access some of the new features enabled under the DMA – in particular the provision of alternative app stores or the possibility to offer an app via an alternative distribution channel. However, the European Commission has not yet taken any enforcement action with respect to the clauses currently under the spotlight in Spain.

The Spanish investigation suggests that the traditional antitrust toolkit will not take a back seat to the DMA; both frameworks must coexist and complement each other. The CNMC must conclude its investigation within two years.

Apple has defended its business model and emphasised that the rules apply equally to all developers, all of whom compete under identical conditions. Apple has also expressed its willingness to cooperate with the CNMC in hearing and addressing their concerns.

This new investigation is additional evidence that digital markets are increasingly becoming a priority for the CNMC, with this case following on the heels of the fines imposed on Apple and Amazon for restricting competition on Amazon's marketplace in July 2023 (***Amazon/Apple Brandgating*** case), the fine imposed on Booking.com in July 2024 (***Booking*** case) and the ongoing market investigation into cloud services (for which the **public consultation** phase closed in June 2024).

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THE HIDDEN WORLD OF ONLINE CREDIT SCORING: INSIGHTS FROM THE FCO'S REPORT

In June 2024, the FCO published the **final report** of its consumer law sector inquiry "Scoring in the online retail sector", which found that online retailers, payment service providers, and credit reference agencies do not always comply with the applicable provisions of consumer law. The report evaluates the context and processes of credit scoring, provides a legal classification, and recommends action for businesses and policymakers.

What is credit scoring?

Many online retailers and payment service providers carry out credit checks on customers in order to minimise the risk of non-payment. To do this, they often use so-called credit scores, which are calculated by credit reference agencies on the basis of personal data. For the consumer, the process often runs automatically and unnoticed in the background. Information about the credit check is often not provided at all or is difficult to find in the fine print. If the result is unfavourable, the customer may be denied buy-now-pay-later (BNPL) payment methods.

While credit checks and scoring may be economically beneficial for online retailers and consumers, as fewer payment defaults can have a positive effect on prices and credit checks may protect against over-indebtedness, the practice has been repeatedly criticised, in particular due to a lack of transparency and unclear data processing.

The FCO's investigation

The FCO launched a sector inquiry in March 2022. Their analysis shows that there is extensive cooperation and data sharing between online retailers, payment service providers, and credit reference agencies. In particular, they use information on past payment behaviour, the address, age, and gender of the customer, as well as the nature and timing of the order. Certain factors (e.g., frequent changes of address, night-time orders, a male first name, or young age) tend to be rated negatively.

The investigation also revealed that consumer credit checks play a huge role in e-commerce. The retailers surveyed had carried out around 66 million credit checks in 2021, while the payment service providers surveyed had carried out around 350 million credit checks (in Germany).

Based on its findings, the FCO sees evidence of breaches of consumer rights in three areas. First, the lawfulness of data processing related to scoring in online shopping is often questionable (data processing in the context of scoring is only allowed if justified under data protection rules; in cases of doubt, the customer's consent must be obtained). According to the FCO, there is not always a legitimate interest and companies generally do not obtain voluntary or explicit consent from customers. Secondly, the FCO finds, transparency and information obligations towards consumers are not always met. Finally, the FCO argues that it is unclear to what extent the data used by companies for scoring is actually adequate, relevant, and limited to what is necessary to determine the payment likelihood of the individuals concerned, as required under the GDPR.

The FCO's conclusions and recommendations

Some of the issues identified by the FCO potentially infringe current consumer protection law. The FCO is currently unable to initiate proceedings against individual companies to remedy breaches of consumer law, as it does not have the necessary enforcement powers in the area of consumer protection. However, the FCO refers to ongoing discussions about amending the German Act Against Restraints on Competition (GWB) in order to enable the FCO to investigate and remedy breaches of commercial consumer law standards in the future.

The FCO also recommends that the legal framework be made more concrete in order to give consumers a real (informed) choice. Consumers should be given clear and comprehensible information before choosing a payment method and should also be able to give their separate consent to data processing.

Furthermore, the FCO argues that the legal principle of data minimisation must be respected. When discussing permissible criteria for scoring, the respective (economic) effects on consumers and affected companies should be taken into account and weighed against each other. For example, in order to ensure greater protection against discrimination, consideration is being given to prohibiting the processing of address data in the future. Regarding the possibility of controlling the scoring itself, the FCO finds, the establishment of an independent certification body or the support of supervisory authorities could be an option.

While the concrete consequences of the FCO's report may yet be unclear, the report suggests that online credit scoring could face stricter scrutiny in the future.

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ITALIAN COMPETITION AUTHORITY'S INVESTIGATION INTO META

In May, the Italian Competition Authority ("ICA") fined Meta Platforms Ireland Ltd. and Meta Platforms Inc. (jointly, "Meta") €3.5m jointly and severally for certain practices concerning the creation and management of Facebook and Instagram accounts. More specifically, the ICA found that Meta:

- failed to adequately and promptly inform users when they initially registered for an Instagram account that their data would be collected and used for commercial purposes; and
- failed to properly manage the suspension of its users' Facebook and Instagram accounts, in that it: (a) did not clarify how the accounts were suspended (i.e., by an automated or 'human' check); (b) did not inform users that they could challenge the suspension; and (c) gave users only 30 days to challenge the suspension. Meta also failed to help them recover their accounts.

According to the ICA, Meta's conduct led consumers to make a decision (i.e. registration on the platform to use the social networking service) that they would not otherwise have made had they been properly informed. The ICA also held that Meta's conduct violated professional diligence standards, according to which Facebook and Instagram users should be provided as much information as possible – including how to challenge and potentially resolve any issues – in order to allow users with suspended accounts to regain access to the social networks.

The ICA qualified this conduct as unfair and misleading commercial practices in violation of the Italian Consumer Code. The fine took into account the fact that Meta ceased both practices whilst the proceedings were underway. Meta still has the opportunity to appeal the ICA's fine.

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