How Should Europe Revamp Merger Policy for Non-Notifiable Deals?

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The Commission should continue to accept referrals from Member States and consider revising its merger policy by introducing mandatory notification of mergers in certain sectors and an ex-post control of mergers.

1 Introduction

The European Commission aims to scrutinise non-notifiable mergers, particularly in the digital and healthcare sectors, due to concerns about potential anticompetitive effects. To achieve this, it revised its merger policy, allowing reviews of mergers that do not meet national jurisdictional thresholds through a referral mechanism under a new interpretation of Article 22 of the European Merger Regulation (EUMR). This mechanism enables Member States to refer a merger to the Commission[1].

However, in the *Illumina v. European Commission* judgement, the European Court of Justice (ECJ) ruled that the Commission cannot accept such referrals, arguing that this approach undermines the effectiveness, predictability, and legal certainty that must be guaranteed to the merging parties[2]. Consequently, the Commission can no longer rely on this referral mechanism to review non-notifiable mergers when no Member States can assess the merger.

Now, the Commission faces the challenge of developing a new merger policy that balances the need to assess potentially harmful mergers while ensuring legal certainty and minimising the administrative costs for the Commission and the merging parties of reviewing mergers that pose no competitive threat. This analysis evaluates current merger policies for reviewing non-notifiable mergers and, if a change in merger policy is required, proposes recommendations to the Commission for effectively assessing them while maintaining legal certainty.

[1] European Commission, Communication from the Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases (2021/C 113/01), 31 March 2021.

[2] C-611/22 P, *Illumina, Inc. v European Commission*, ECLI:EU:C:2024:677, 3 September 2024, para. 206.

2 Merger Policies for Reviewing Non-Notifiable Mergers

Competition authorities typically use two systems to review mergers. In a few jurisdictions, a voluntary notification system allows merger entities to notify their acquisitions for merger review voluntarily. Most jurisdictions, however, use a mandatory pre-merger notification system, which requires entities to notify mergers for review when jurisdictional thresholds are met, typically based on turnover or transaction[3].

In some cases, jurisdictions with mandatory pre-merger systems can also review below-threshold mergers, allowing competition authorities to examine potentially harmful mergers that fall below the thresholds[4]. However, reviewing below-threshold mergers increases transaction costs and legal uncertainty, as merging parties must self-assess the risk of a review. This self-assessment has significant legal and economic implications. In most jurisdictions, mergers cannot be implemented before receiving clearance from the competition authority. If merging parties proceed without approval, they may face substantial fines and could be required to unwind the merger, as was the case in Europe with the *Illumina/GRAIL* merger[5]. As a result, parties face considerable risks in jurisdictions that can review non-notifiable mergers.

To mitigate these risks, some jurisdictions implement measures to increase legal certainty. First, authorities can mandate notification of mergers in specific sectors. For instance, in Ireland, media mergers must be notified to the competition authority and the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media[6]. This sector-specific notification provides clarity for merging parties and limits administrative burdens for authorities, as it only targets a limited number of transactions in a clearly defined sector.

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[3] OECD, Investigations of Consummated and Non-Notifiable Mergers, Note by the Secretariat, 25 February 2024.

[4] We use below-threshold and non-notifiable mergers interchangeably.

[5] European Commission, Mergers: Commission Fines Illumina and GRAIL for Implementing their Acquisition Without Prior Merger Control Approval, 12 July 2023 (accessed 13 September 2024). Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773

European Commission, Commission Orders Illumina to Unwind Its Completed Acquisition of GRAIL, 13 October 2023 (accessed 13 September 2024). Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872

Following the *Illumina v. European Commission* judgment, the Commission has withdrawn several decisions. European Commission, Commission Withdraws Several Decisions in the Illumina/GRAIL Case, 6 September 2024 (accessed 23 September 2024). Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEX_24_4586

[6] Competition and Consumer Protection Commission, When to Notify (acccessed 13 September 2024). Available at: https://www.ccpc.ie/business/mergers/when-to-notify/

Second, jurisdictions can mandate notification for dominant companies. In Switzerland, for example, firms found dominant in a market must notify mergers that involve that market or related markets[7]. This ensures predictability for dominant firms and focuses administrative efforts on a narrow subset of non-notifiable mergers.

Third, competition authorities may challenge non-notifiable mergers within a defined timeframe or review them at any time under an ex-post control regime. Brazil, for instance, can review non-notifiable mergers within one year of closing[8], while the United States has no such time limitation[9]. However, such broad discretionary powers can create legal uncertainty, as merging parties cannot predict if or when a review will occur.

Some jurisdictions have introduced a threshold to offer greater legal certainty in ex-post-merger control. For instance, In Italy, the competition authority has a six-month window to review non-notifiable mergers, provided certain turnover thresholds are met[10].

Finally, in the absence of a merger review, competition authorities can still assess post-merger conduct under antitrust laws to determine if the merger leads to anticompetitive agreements or abuse of dominance.

3 Policy Recommendations

The *Illumina v. European Commission* ruling suggests that the review of non-notifiable mergers requires changes in merger policy at both the European and national levels. At the European level, the ECJ indicated that the Commission could revise jurisdictional thresholds or introduce a safeguard mechanism to review such transactions[11]. At the national level, Member States could amend their merger control policies to address this issue[12].

[7] Federal Act on Cartels and other Restraints of Competition, art. 9(4).

[8] Law Nº 12.529 Of November 30, 2011, Art. 88(7).

[9] *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. 586, 697–98, 1957.

[10] Elisa Teti and Alessandro Raffaelli, Italy Merger Control 2024, *Chambers and Partners*, 9 July 2024 (accessed 13 September 2024). Available at: https://practiceguides.chambers.com/practice-guides/merger-control-2024/italy

[11] C-611/22 P, *Illumina, Inc. v European Commission*, ECLI:EU:C:2024:677, 3 September 2024, para. 216.

[12] *Ibid*, para. 217.

At the European level, the Commission has already considered updating its merger control policies to capture non-notifiable mergers. Following a 2016 evaluation, the Commission published a 2021 staff working document on procedural and jurisdictional aspects of EU merger control. This document acknowledged that the turnover-based thresholds, combined with referral mechanisms, have effectively captured significant transactions. However, the Commission ruled out introducing transaction-based thresholds, as used in Germany and Austria, due to concerns over administrative costs[13]. As a result, the Commission revised its interpretation of Article 22 EUMR. Since this revision in 2021, the Commission has assessed 100 below-threshold mergers, 45% of which were in the pharma and biotech sectors, 19% in digital markets, and the rest across various sectors. Out of these, only three mergers were reviewed: *Illumina/GRAIL* (biotech), *Qualcomm/Autotalks* (semiconductors), and *EEX/Nasdaq* (financial services) [14].

Following the *Illumina v. European Commission* ruling, European Competition Commissioner Margrethe Vestager reaffirmed the Commission's opposition to introducing transaction-based thresholds or lowering jurisdictional thresholds, arguing that such changes would not necessarily capture only problematic mergers and would increase administrative costs[15]. She also rejected the idea of giving the Commission the power to request notifications of below-threshold mergers, citing concerns about increased legal uncertainty.

As the 2019-2024 Commission nears its end, any major policy changes will likely be deferred to the 2024-2029 Commission, led by the proposed new Competition Commissioner, Teresa Ribera. Ribera's mandate includes modernising Europe's competition policy to address risks such as "*killer acquisitions*"—acquisitions of innovative firms to eliminate potential future competition[16]. The referral mechanism introduced under the revised interpretation of Article 22 EUMR, complemented by the reporting obligation under Article 14 of the Digital Markets Act (DMA), aims to address such risks. Under the DMA, gatekeepers must inform the Commission of all intended acquisitions in the digital sector, allowing Member States to initiate referral requests for non-notifiable digital mergers. However, no gatekeeper acquisitions have

[13] Commission Staff Working Document Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control {Sec(2021) 156 Final} - {SWD(2021) 67 Final}, 26 March 2021.

[14] Margrethe Vestager, Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association, European Commission, 6 September 2024 (Accessed 23 September 2024). Available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_24_4582

[15] *Ibid*.

[16] Mission Letter to Teresa Ribera Rodríguez, 17 September 2024 (Accessed 23 September 2024). Available at: https://commission.europa.eu/document/5b1aaee5-681f-470b-9fd5-aee14e106196_en

yet been reviewed following referral requests from Member States under Article 22 EUMR, suggesting that the transactions did not raise significant competition concerns[17].

At the national level, several Member States, including Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia, and Sweden, have already revised their merger control policies to allow for the review of non-notifiable mergers, notably by introducing ex-post merger control mechanisms.

Given these developments, the Commission should first assess whether changes to merger policy are necessary, considering the relatively limited number of problematic below-threshold mergers and the potential for increased transaction costs, administrative burdens, and legal uncertainty. If the Commission decides to revise its merger policy, it should consider the following recommendations to ensure an effective review of non-notifiable mergers while preserving legal certainty and minimising administrative costs for both the Commission and the merging parties:

First, the commission should continue accepting referrals from Member States. The Commission should collaborate with Member States capable of reviewing non-notifiable mergers and accepting referrals from them when appropriate. This approach is consistent with the *Illumina v. European Commission* ruling and avoids the need for legislative changes. The *Microsoft/InflectionAI* partnership highlights this path. Following the withdrawal of referral requests by Member States due to the *Illumina v. European Commission* ruling, the Commission signals its intention to work with Member States where the partnership could be notified, outlining the potential for future collaboration in such cases[18].

Second, the Commission should consider introducing mandatory notification requirements in specific sectors. For example, it could mandate notifications for mergers in sectors identified as high-risk, such as digital markets. This would enable the Commission to scrutinise mergers in areas deemed problematic by legislators, similar to the sector-specific approach used in Ireland. Implementing this change would require an amendment to the EUMR. Alternatively, the Commission could amend the DMA to change the current reporting obligation for gatekeepers into a formal notification requirement for all acquisitions. However, this approach

[17] European Commission, DMA List of Acquisitions (accessed 24 September 2024). Available at: https://digital-markets-act-cases.ec.europa.eu/acquisitions

[18] European Commission, Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft, 18 September 2024 (accessed 23 September 2024). Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727

requires careful consideration, as no gatekeeper acquisitions have been reviewed so far through Member State referrals under Article 22 EUMR, suggesting a limited need for such a notification obligation for gatekeepers.

Third, the Commission should Implement an ex-post merger control mechanism. The Commission could introduce an ex-post review process for non-notifiable mergers by revising the EUMR. This mechanism would allow the Commission to review a limited number of problematic mergers after their completion. To ensure legal certainty, the Commission should issue detailed guidance, define a specific time frame, and set clear thresholds for triggering such reviews.

About

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