

Illumina & Grail: Another Step Toward The Europeanization Of U.S. Antitrust Law

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Although the United States has historically led the way in the field of antitrust law, it is currently taking a backseat to the European Union, which has become the global role model in competition law. The Illumina/Grail merger illustrates this tendency.

In March 2021, the FTC challenged the merger and filed an administrative complaint for a temporary restraining order to keep Illumina and Grail from closing the transaction. Specifically, the FTC avers that Illumina's acquisition of Grail will "lessen competition in the U.S. MCED test market by raising costs and hindering development efforts of Grail's rivals." Effectively, the FTC is leaning on the theory of harm, known as "increased leverage theory," that aims at protecting competitors in the downstream market from the merged firm's stronger "bargaining position in affiliate negotiations." However, this theory was soundly rejected only a few years ago in *United States v. AT&T, Inc.* where the Court stuck with the traditional lodestar of American antitrust law, i.e. the consumer welfare theory. In a fanciful attempt to overrule the AT&T decision, the increased leverage theory was incorporated in Section 4 of the (already withdrawn) 2020 Vertical Merger Guidelines. Notwithstanding, after only two months, the FTC dropped its temporary restraining order petition as Illumina and Grail had, in the meantime, been prevented from merging under European competition law. Indeed, in view of its cooperation with the FTC, the European Commission announced in April 2021 an investigation into the transaction at stake pursuant to a new interpretation of Article 22 of the E.U. Merger Regulation.

Unlike its American counterpart, European competition law has traditionally served an array of policy goals that, going beyond the mere consumer welfare, include the protection of small- and medium-sized enterprises as well as the preservation of a competitive market structure. Accordingly, mergers like

Illumina/Grail usually have a harder time passing the scrutiny of the European institutions. However, what is unprecedented in this case is the European Commission's willingness to go the extra mile to crack down on an acquisition that involves two American companies, one of which—Grail—does not even have any business activity in the European Union.

In March 2021, the EC issued a new interpretation of the referral mechanism set out by Article 22 of the Merger Regulation. Particularly, National Competition Authorities may now require the European Commission to assess any proposed merger that “may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States,” irrespective of the merging parties' actual presence in the European market. By adopting this new interpretation, the European Union was able to come to the rescue of the ill-equipped FTC by halting the Illumina/Grail transaction thanks to the (administrative) standstill obligation imposed by Article 7 of the E.U. Merger Regulation.

In conclusion, Illumina and Grail have been the hapless victims of a joint EC-FTC scheme that should send chills down the spine of any American company interested in a vertical merger, mainly for two reasons. First, according to the new interpretation of Article 22 of the E.U. Merger Regulation, many cutting-edge U.S. mergers are likely to be scrutinized by the European Commission under the E.U. stringent theory of harm, even if the companies involved have no current business in the European Market. Second, to challenge these mergers, the FTC will likely engage in unprecedented transatlantic forum shopping to obtain from the European Commission a (administrative) temporary restraining order that should otherwise be sought before an American court. This may be just the beginning of a far-reaching “Europeanization of the U.S. antitrust.”