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European Commission Asserts Jurisdiction to Review Two Non-notifiable Deals

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In August 2023, the European Commission (EC) asserted jurisdiction to assess two acquisitions that did not reach the notification thresholds at EU or national levels. The EC accepted requests from member states to assess *Qualcomm/Autotalks* and *EEX/Nasdaq Power* under Article 22 of the EU Merger Regulation (EUMR). The cases highlight the extensive reach of the EC's merger control powers, which extend over deals that are not subject to any mandatory notification requirements.

The Scope of the EC's Merger Control Powers

The EUMR grants the EC exclusive jurisdiction to review mergers and acquisitions that have an "EU dimension", defined as satisfying certain thresholds based on the parties' turnover. In parallel, the national competition authorities of the member states have jurisdiction to review deals that could have an effect on competition in their markets, based (for the most part) on the parties' turnover in the member states in question. The EUMR also allows for referrals, whereby member states can ask the EC to review a deal in their place, or vice versa, so that the "most appropriate" authority or authorities can conduct the investigation. The parties to a deal can also make such requests – this is used most commonly when parties ask the EC to review a deal that would otherwise have to be notified to three or more national competition authorities.

Under the referral framework, a member state can ask the EC to investigate a deal even if it is not notifiable in that country. Article 22 EUMR allows member states to refer to the EC a merger or acquisition that does not have an "EU dimension" and falls below the notification thresholds at national level. However, the EC had discouraged member states from using Article 22 EUMR until relatively recently, based on its experience that such transactions were unlikely to have a significant impact on the EU market.

In March 2021, the EC announced that it had reappraised its policy and actively encouraged member states to use Article 22 EUMR. The EC sought to close what it saw as an enforcement gap that had allowed deals that merited investigation to close without any scrutiny. In particular, the EC expressed concern about the acquisition of "firms that play or may develop into playing a significant competitive role on the market … despite generating little or no turnover at the moment of the concentration". Such deals, the EC argued, were becoming increasingly common in the digital and pharmaceutical sectors, as well as other industries where innovation is an important parameter of competition.

In April 2021, following a referral request from six member states, the EC started a review of the planned US$7.1 billion acquisition by Illumina of GRAIL. The EC opened an in-depth ("Phase 2") investigation in July 2021, and ultimately prohibited the deal in September 2022, citing concerns that it would stifle innovation and consumer choice in the emerging market for cancer detection tests.

Since Illumina had closed the deal in August 2021, before the EC completed its investigation, the EC imposed a record US$476 million (€432 million) fine, amounting to 10% of Illumina's annual global turnover, in July 2023.

Qualcomm/Autotalks and *EEX/Nasdaq Power* are the first two uses of Article 22 EUMR since Illumina/Grail and the EC's announcement that it had "reappraised" its policy in this area.

Qualcomm/Autotalks

Qualcomm, a US-based semiconductor manufacturer, intends to acquire Autotalks, an Israeli semiconductor manufacturer that specialises in chipsets that enable vehicles to communicate with each other and their surrounding environment, known as vehicle-to-everything (V2X) communications. The deal was initially notified to the German competition authority in May 2023 but was withdrawn the same month. Although it has not been confirmed, this may have been because the deal does not meet the national thresholds. The EC has confirmed that it does not reach the notification thresholds at EU level and was not notifiable in any member states.

However, seven member states requested the EC to assess the deal, pursuant to Article 22 EUMR.[1] A further eight member states subsequently joined the initial referral requests.[2] On 17 August 2023, the EC confirmed that it had accepted the requests and would require Qualcomm to notify the deal for review.

In its initial comments, the EC has noted that the deal will combine "two of the main suppliers of V2X semiconductors in the EEA". A press release from the Dutch competition authority is more specific in explaining its concerns, stating that "Autotalks is a small company with low turnover, but it does have highly promising technologies and products for further developing traffic-safety systems in vehicles. As a result of the acquisition, Qualcomm can become so dominant in this area that they can easily push competitors and alternative systems out of the market."

Against this background, *Qualcomm/Autotalks* would seem to fall squarely within the category of deals that the EC intends to use Article 22 EUMR to review: the acquisition by an already strong competitor of an emerging player with a potentially market-leading new product. Qualcomm must now notify the deal and wait for the outcome of the EC's review before it can complete the acquisition.

1 The initial referral requests were made by Belgium, France, Italy, the Netherlands, Poland, Spain and Sweden.

2 The following member states joined the initial requests: Czechia, Denmark, Finland, Ireland, Luxembourg, Portugal, Romania and Slovakia.

EEX/Nasdaq Power

European Energy Exchange AG (EEX), a subsidiary of Deutsche Börse, is a leading European exchange that develops and operates markets for energy and commodity products. It has announced plans to acquire Nasdaq Power, a Swedish and Norwegian subsidiary of Nasdaq, Inc., which provides a marketplace for trading and clearing of Nordic and other European futures contracts for electricity and EU emission allowances.

The acquisition is not notifiable at EU level or in any member states, but the Danish and Finnish competition authorities requested a referral to the EC under Article 22 EUMR. They were subsequently joined by Sweden and Norway.

The EC has accepted the referral and will investigate the deal, which will combine the only two providers of services facilitating the on-exchange trading and clearing of Nordic power contracts. The EC noted in its initial press release that maintaining a "strong and competitive trading and clearing ecosystem" to support the smooth functioning of energy markets is especially important in the context of the current energy crisis. Like Qualcomm, EEX must now notify its deal and wait for EC approval before it closes.

EEX/Nasdaq Power differs somewhat from the previous examples of the EC asserting jurisdiction under Article 22 EUMR. Unlike *Illumina/GRAIL* and *Qualcomm/Autotalks*, the target of the deal is not a new player with a promising or innovative product, but an established competitor in an existing market. As such, *EEX/Nasdaq Power* demonstrates that the EC and national competition authorities will use the referral system to assess mergers and acquisitions that raise "conventional" concerns, as well as so-called killer deals in innovation-intensive sectors.

Key Takeaways

The status of Article 22 EUMR is currently subject to judicial review, as Illumina is appealing the EC's assertion of jurisdiction over the GRAIL acquisition before the European Court of Justice. An earlier European General Court judgment dismissed Illumina's appeal and upheld the EC's decision. In any event, the EC and national competition authorities are clearly confident in their powers to use Article 22 EUMR to review below-threshold deals and, as the two most recent cases suggest, intend to do so more often.

As such, businesses that are active in mergers and acquisitions must consider these extensive powers when planning transactions. The revival in the use of Article 22 EUMR means that businesses can no longer be confident that, if their deal does not meet any of the relevant notification thresholds in the EU, it will go under the radar and avoid scrutiny. It is particularly important to note, in this regard, that the EC asserted jurisdiction over (and ultimately prohibited) Illumina's acquisition of GRAIL despite the latter having no revenues at all in the EU.

Businesses and their advisers should self-assess whether a deal that is below the notification thresholds may raise competition concerns, such that one or more authorities may decide that it needs to be assessed before closing.

This will be especially important when the target is a business whose turnover, to quote the EC's guidance, "does not reflect its actual or future competitive potential". The guidance provides examples of when this may be the case, which are unfortunately very broad. These include:

- When the target is a startup or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model)
- When the target is an important innovator or is conducting potentially important research
- When the target is an actual or potential important competitive force
- When the target has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights)
- When the target provides products or services that are key inputs/components for other industries

As well as self-assessing the risk of a referral, businesses can proactively engage with the EC and national competition authorities when planning a transaction, if they think that it could be a candidate for a referral. This should provide some insight into whether any national authorities are minded to ask the EC to assert jurisdiction, and whether the EC considers that the criteria for a referral are met. As with any deal, the parties should also take into account the extent to which competitors, customers or other players in the market will be opposed to the transaction and might use the EUMR toolbox to encourage the EC or national authorities to take an active interest.

As a proportion of all deal activity in the EU, three examples of the EC asserting jurisdiction over below-threshold deals in the last three years may seem unremarkable. However, these three cases are sufficient to give businesses some cause for concern and illustrate that the reach of EU merger control is continuing to grow.

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