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French Competition Law Newsletter

Highlights

- The *Conseil d'Etat* holds that it is not competent to hear an objection against a French Competition Authority's referral of a merger to the Commission
- The French Competition Authority releases its opinion on new payment technologies
- The *Conseil constitutionnel* holds that Article L. 464-2(5), 2° of the French Commercial Code is contrary to the Constitution

The *Conseil d'Etat* holds that it is not competent to hear an objection against an FCA's referral of a merger to the Commission

On April 1, 2021 the *Conseil d'Etat* ruled that it lacks jurisdiction to review a French Competition Authority ("**FCA**") decision referring a contemplated merger to the European Commission ("**Commission**") under Article 22 of the EU Merger Regulation ("**EUMR**").[1]

Background

On September 20, 2020, Illumina, a leading global gene sequencing company based in the US, announced the €5.9 billion acquisition of Grail, a US-based biotechnology start-up which develops blood tests that use DNA sequencing to identify early-stage cancers. Illumina founded Grail in 2016 and owns 14.5% of the company. The proposed transaction involves the acquisition by Illumina of full control over Grail. Unlike Illumina, Grail has no EU sales. The transaction therefore does not meet EU or national merger control thresholds.

Under Article 22(1) EUMR, a national competition authority ("**NCA**") can refer a concentration to the Commission—even if it falls below the national thresholds—if two conditions are met: the concentration must (i) "*affect trade between Member States*" and (ii) "*threaten to significantly affect competition within the territory of the Member State or States making the request*". Under Article 22(5) EUMR, the Commission may inform one or several Member States that it considers a concentration fulfils the conditions and invite those States to make a request of referral. In either

[1] *Conseil d'Etat* ruling no. 450878 of April 1, 2021, and Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings.

case, the NCA may refer a case within 15 working days of the date on which the concentration was notified or, if notification is not required, within 15 working days of the date on which the concentration is "*made known*" to it. In September 2020, Commissioner Vestager announced that the Commission would welcome referrals of mergers that fall below national thresholds but which could harm competition, in particular killer acquisitions in the digital and pharmaceutical industries. The Commission published guidelines for national authorities in March.[2]

In the present case, the Commission invited Member States to request a referral of the Illumina/Grail transaction on February 19. The FCA's President submitted a request for referral on March 9, considering that Illumina could make access to its next-generation gene sequencers more complex for Grail's competitors post-transaction.[3] Enforcers in five other countries joined the request (Belgium, Greece, Iceland, the Netherlands, and Norway).

On March 19 and 29, Illumina and Grail respectively filed an application to suspend the FCA's referral request before the *Conseil d'État*.

The *Conseil d'Etat*'s ruling

Illumina and Grail argued that the FCA's decision was procedurally flawed because (i) the FCA's President lacked jurisdiction to refer the merger to the Commission; (ii) the parties had not been consulted or given an opportunity to express their views prior to the referral; and (iii) the FCA's request had exceeded the statutory limit, because the 15-day period under Article 22 had begun to run when the acquisition was announced in September 2020. The parties also alleged that the FCA's decision was substantively wrong because of factual mistakes regarding Grail's activities and the transaction's alleged anticompetitive effects.

The parties finally argued that the FCA's decision violated the principle of legal certainty, because the newly interpreted Article 22(1) procedure may only be used in the event of clear and particularly serious anticompetitive effects, not only potential ones. In turn, the FCA argued that the application for interim relief should be rejected, mainly because the *Conseil d'Etat* lacked jurisdiction.

On April 1, the *Conseil d'Etat* dismissed Illumina and Grail's appeals. It considered that the FCA's referral request could not be separated from the review conducted by the Commission, which is placed under the Court of Justice of the European Union's sole control ("**CJEU**").[4] Thus, regardless of the effects of a request on parties, the administrative judge is not competent to hear an objection to such a request. The *Conseil d'Etat* did not address any of the legal issues raised by the parties on the merits.

On April 20, the Commission accepted to review the merger.[5] As a result, Illumina and Grail will not be able to close the transaction for months, if not over a year. On April 28, Illumina filed an action for annulment of the Commission's decision before the General Court, arguing essentially that this unprecedented use of Article 22(1) leaves companies uncertain as to how the EUMR will be applied.[6]

Take-aways

The *Illumina/Grail* case heralds a major shift in merger control enforcement in Europe. Subject to the parties' appeal before the General Court, it will be the first instance where the Commission reviews a merger that falls below both the EU and national thresholds. The *Conseil d'Etat* decision means that, subject to the General Court's decision, if a merger is referred to the Commission, the parties will have to wait for the Commission's

[2] *See* 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, March 26, 2021, C(2021) 1959 final.

[3] Similarly, on March 31, the US Federal Trade Commission announced its decision to submit a request to the relevant US Court to block this deal, considering that, as a result of the transaction, Illumina would be in a position to prevent or delay the development of products competing with those of Grail.

[4] In March 2020, a Dutch provisional-relief judge also rejected the parties' request to prohibit the Netherlands from joining France's referral request.

[5] See the Commission's press release of April 20, 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

[6] EU General Court, *Illumina v Commission*¸ Case T-227/21, action for annulment lodged on April 28, 2021. *See* also Illumina's press release of April 29, 2021: https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=e2c75c6a-6cbe-4e45-b8a6-6d90d40c253e.

decision on the merger to challenge the referral. However, the EU judges' decision will have few practical implications for the parties, since they would have already suspended their merger plans and undergone a lengthy merger review.

It remains to be seen if the General Court will clarify the boundaries of Article 22(1), in particular regarding (i) the standard of anticompetitive effects required and (ii) the deadline for a referral.

The French Competition Authority releases its opinion on new payment technologies

On April 29, 2021, the French Competition Authority ("**FCA**") issued its opinion on the competitive situation in the payment sector (the "**Opinion**").[7] Although the Opinion concludes that recent developments—including the introduction of new technologies in payment activities and the proliferation of FinTech companies—are "*overall procompetitive*",[8] it raises a number of areas of potential concern on which the FCA pledges to keep a close eye. The Opinion particularly stresses the risks stemming from the expansion of BigTech in the sector.

A sectoral enquiry

The FCA's sectoral enquiry was prompted by new technological developments and market dynamics that have affected the payment sector in recent years. New technologies include remote and contactless payment solutions, payment through smartphones or connected watches (*e.g.*, Apple Pay, Google Pay, Samsung Pay), cloud computing, and block-chain technologies. A wide and diverse range of non-banking players—so-called FinTech—have entered the payment sector offering innovative services to consumers. FinTech companies interact with traditional banks in various ways—cooperation agreements, acquisition of shareholding interests, and financial support from banks to boost FinTech and support their own digital transition. Aside from FinTech, so-called BigTech, *i.e.*, GAFAM (Google, Amazon, Facebook, Apple and Microsoft) and BATX (Baidu, Alibaba, Tencent and Xiaomi), also recently entered the payment sector.

The Opinion aims at examining the functioning of the sector from a competition law perspective and does not qualify behaviour on a defined market under Articles 101 and 102 TFEU. Nevertheless, the Opinion makes a number of findings concerning (i) market definition, which it considers to be a complex exercise in the sector, given in particular the two- or multi-sided nature of markets, (ii) barriers to entry and expansion, (iii) competitive advantages held by the different categories of players—traditional banking actors, FinTech, and BigTech; and (iv) potential areas of concern. Those findings can be summarized at a high level as follows.

Traditional banking actors

The FCA finds that traditional banking actors benefit from a range of competitive advantages: a unique experience in conforming with complex payment service regulations, strong notoriety and reputation when it comes to security and client data protection, solid customer bases, and experience in designing payment solutions.

The FCA considers that some of those advantages may lead to competition risks. In particular, the Opinion insists that banks can restrict access to clients' account information necessary for the provision of payment services by FinTech companies, despite EU directives on payment services. According to the Opinion, APIs allowing FinTech to access banks' data are not fully operational and therefore hinder FinTech's development. However, the Opinion dispels claims that banks could use lobbying wrongfully,

[7] FCA, Opinion 21-A-05 of April 29, 2021 on the sector of new technologies applied to payment activities.

[8] Opinion, para. 394, free translation.

noting that lobbying efforts are legitimate and do not fall within the ambit of competition law unless they qualify as an anticompetitive agreement or an abuse of dominant position. Finally, while certain players claimed during the FCA's enquiry that acquisitions of FinTech companies by banks could weaken competition, the Opinion concludes that, based on the analyses conducted for the purpose of this sectoral enquiry, it did not find that such acquisitions could be considered "killer acquisitions": the acquisitions of stakes in FinTech companies "*neither had as their sole objective to prevent the entry of potential competitors nor hindered innovation from FinTech*".[9]

FinTech

The FCA finds that FinTech actors are essentially pro-competitive because they offer new services to consumers. The Opinion notes that FinTech actors benefit from lower fixed costs and greater agility compared to banking players. Indeed, FinTech companies do not have to maintain costly banking offices and interbank infrastructures, and typically rely on cloud computing to store data. Some of them also rely on existing distribution networks—for example, Orange Bank relies on Orange's existing telecom stores. While the Opinion does not identify any competition concerns related to FinTech, it reports that banks raised concerns over the economic sustainability of the sector because (i) FinTech actors rely on existing payment systems without bearing their costs and (ii) new entrants do not offer a number of non-profitable services.

BigTech

Unsurprisingly, the Opinion raises strong concerns over BigTech players. It notes that they benefit from a massive volume of user data, considerable financial power, and low marginal costs. The Opinion called for "*vigilance*" with regard to two points in particular: (i) data collection and exploitation by BigTech and (ii) conditions for access to contactless payment solutions through smartphones.

— ***Data.*** The Opinion finds that BigTech companies (i) benefit from a very wide community of users and infrastructures serving their other (non-financial) solutions, which allows for economies of scope; and (ii) can exploit very significant volumes of data from users of their non-financial services which, combined with data-analysis technologies, allow BigTech to tailor offers to customers' preference. The Opinion finds that this confers an "*unprecedented market power*"[10] to BigTech which could be leveraged to exclude players on neighbouring markets, such as the payment solutions market.

— ***Access to mobile payment solutions.*** The Opinion explains that BigTech players, which design smartphones and/or operating systems, have created mobile payment solutions (*e.g.,* Apple Pay, Google Pay, Samsung Pay). Yet they can open or restrict access to the near-field-communication ("**NFC**") antennae of their smartphones, which is necessary for contactless payments, thereby locking consumers into a closed system. The Opinion refers to the ongoing investigation of the Commission into Apple Pay, and notes that other practices relating to access to NFC antennae could be anticompetitive.

Takeaways

The Opinion makes a number of findings which will be useful to anticipate, to some extent, the FCA's analysis—both in terms of market definition and substantive assessment—in future merger cases. While it cautiously states that past acquisitions of FinTech companies by banks did not constitute killer acquisitions, this does not exclude the risk that the FCA will refer an acquisition in the payment sector falling below the EU and French merger control thresholds on the basis of the new Article 22 referral guidelines. Finally, the Opinion makes it clear that the French watchdog is carefully monitoring the practices of BigTech in the payment sector.

[9] Opinion, para. 394, free translation.

[10] Opinion, para. 359, free translation.

The *Conseil constitutionnel* holds that Article L. 464-2(5), 2° of the French Commercial Code is contrary to the Constitution

On March 26, 2021, the French *Conseil constitutionnel* ruled that Article L. 464-2(5), 2° of the French Commercial Code, under which the French Competition Authority ("**FCA**") may impose a fine of up to 1% of an undertaking's turnover for obstructing an investigation, was contrary to the French Constitution.[11]

Background

In November 2018, the FCA carried out dawn raids on the premises of various companies and organisations in the engineering and technology consulting sectors in relation to an alleged cartel in France. During the dawn raids at Akka Group, several employees took certain steps, namely altering the functioning of a mailbox, deleting emails, and breaking an affixed seal on an office door, which the FCA qualified as unlawful obstruction under Article L. 464-2(V), 2°. In May 2019, the FCA fined Akka Group €0.9 million.[12]

After the Paris Court of Appeal rejected its appeal, Akka Group challenged the FCA's decision before the French *Cour de Cassation*. It raised a *question prioritaire de constitutionalité* ("**QPC**") which the Court agreed to refer to the *Conseil constitutionnel*, on whether Article L. 464-2(V), 2° of the French Commercial Code sanctions the same act as the one sanctioned under Article L. 405-8 of the French Commercial Code and is therefore contrary to the constitutional principle of necessity of offences and penalties. According to this principle, the same behaviour by the same person cannot be sanctioned twice under different legal provisions.

The *Conseil Constitutionnel* ruling

The *Conseil constitutionel* considered that Articles L.464-2(V), 2° and L.405-8 of the French Commercial Code (i) target the same behaviour (*i.e.*, obstruction during an investigation relating to an alleged anticompetitive practice) and (ii) provide for sanctions (one administrative, the other criminal) which have an identical goal (*i.e.*, to ensure the efficiency of FCA's investigations in securing compliance with competition rules) and whose nature is identical (*i.e.*, pecuniary sanctions of equivalent level). It therefore concluded that Article L. 464-2(V), 2° violated the principle of necessity of offences and penalties, and is therefore unconstitutional.

However, the decision did not benefit Akka. The *Conseil constitutionel* specified that the declaration of unconstitutionality could only be invoked in pending proceedings where the company had previously also been prosecuted on the basis of Article L. 450-8 of the French Commercial Code. This was not the case of Akka Group, which had only been prosecuted under Article L. 464-2(V), not Article L. 450-8.

Takeaway

The *Conseil constitutionel*'s ruling will have limited impact, since the FCA does not typically prosecute a company twice for the same obstruction behaviour on the basis of the two provisions. As an example, in its latest May 3 decision in the "ham" cartel, the FCA fined Fleury Michon for obstruction under Article L. 464-2(V), but did not prosecute it under Article L. 450-8 of the French Commercial Code.[13]

[11] *Conseil Constitutionnel*, no. 2021-892 QPC, March 26, 2021.

[12] See FCA Decision no. 19-D-09 of May 22, 2019 and press release of November 9, 2018. See French Competition Law Newsletter of June 2019.

[13] See FCA Decision no. 21-D-10 of May 3, 2021 and press release of May 3, 2021.

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