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Axinn Antitrust Insight: FTC Challenges Illumina's Acquisition of Grail

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Axinn Update

By a 4-0 vote, the U.S. Federal Trade Commission sued to block Illumina, Inc.'s $7.1 billion proposed acquisition of GRAIL, Inc. The challenge, announced on March 30, continues a trend of enforcement against acquisitions of potential or nascent competitors. Notably, in *Illumina/GRAIL*, FTC alleges a *vertical* potential-competition theory of harm, and Illumina has promised its clinical oncology customers "equal and fair access to Illumina sequencing," which it argued would mitigate any potential competitive harms from acquiring Grail.

Background

According to the FTC, Grail is one of several companies developing a new kind of diagnostic test, multi-cancer early detection (MCED), that would "revolutionize how cancer is detected and screened," allowing much earlier diagnosis by detecting cancer in asymptomatic patients. Grail's test relies on Illumina's next-generation DNA sequencing (NGS) platform. In December 2019, when FTC successfully challenged Illumina's attempted acquisition of Pacific Biosciences, FTC alleged that Illumina was a monopolist in NGS platforms, with over 90% share. Due to Illumina's strong position in NGS platforms, FTC alleges that Grail and its MCED competitors all rely on Illumina's NGS platform. The FTC alleges that if the transaction proceeds Illumina would have the incentive and ability to favor Grail over other MCED competitors, resulting in diminished innovation in MCED tests.

Vertical Potential-Competition Theory of Harm

The Illumina/Grail challenge continues a trend of enforcement actions where at least one of the merging parties does not have a product that currently competes significantly, or at all, but that is alleged to be poised to compete significantly in the future -- so-called potential or nascent competitors.[1] These cases are harder for the government to win than traditional horizontal mergers involving established competitors because of the absence of evidence of direct competition between the merging firms. In the most recent potential-competition case litigated through trial, the FTC lost its bid to block Steris's acquisition of Synergy in 2015.

Unlike those cases, here Grail is not a nascent competitor of Illumina, rather, the concern is that Illumina would use its market power in NGS platforms to keep Grail's MCED rivals out of the market, raise their costs, or otherwise diminish their competitiveness. Vertical cases involving even established products can be difficult to prove. In 2019, DOJ lost a landmark vertical case in a failed attempt to stop AT&T's acquisition of Time Warner.

That Illumina/Grail is both a vertical acquisition and a potential competition case is worthy of attention. If the FTC succeeds in its challenge, it could mark an important precedent both for potential competition and vertical theories of harm and encourage even more aggressive enforcement actions from the new administration.

Illumina's Behavioral "Fix-it-First" Remedy Offer

Previously, some vertical mergers in which the government feared harm have been remedied with formal or informal behavioral commitments, such as obligations to supply competitors and/or firewalls to prohibit disclosure of competitively sensitive information. FTC Acting Chair Slaughter has criticized the FTC for accepting behavioral remedies in settlements, and this challenge could reflect increased interest in structural remedies, or as in this case, blocking the deal altogether.

For its part, however, Illumina has offered its clinical oncology customers, "contractual guarantees of equal and fair access to Illumina sequencing, and a commitment to drive down prices by more than 40 percent by 2025." This sort of behavioral "fix-it-first" remedy helped AT&T defeat DOJ's challenge of its acquisition of Time Warner. There, AT&T committed to irrevocable offers of arbitration agreements, which both the district court and appeals court factored into their decisions in AT&T's favor.

* * *

This lawsuit features several unique and interesting facets and could mark an important opening gambit for merger enforcement in the Biden Administration. Companies with M&A ambitions should pay attention to this case and the potentially novel precedent it is poised to set one way or another.

[1]*See, e.g.*, FTC's December 2020 challenge of Procter & Gamble's acquisition of Billie; DOJ's November 2020 challenge of Visa's acquisition of Plaid; and FTC's December 2019 challenge of Illumina's acquisition of PacBio.

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