



U.S. Chamber of Commerce

The FTC, Europe, and Illumina-Grail: *When Cooperation Crosses the Line*

In the U.S. mergers are presumed lawful, and the burden is on the government to prove the transaction is likely to harm competition. Ultimately, to block a transaction, the government must do so in court. Further, mergers are intensely fact specific to the transaction, and the competitive impact in the U.S. will be different than in foreign markets. In many mergers, one or both of the parties fail to have business dealings in a foreign jurisdiction, making any review initiated by that foreign jurisdiction highly questionable. In short, merger review requires limited, if any, cooperation with foreign agencies, and mergers that span multiple jurisdictions should be conducted in parallel, not in some coordinated fashion to make an end run around U.S. courts.

It would be of grave concern if the Federal Trade Commission (FTC) was found to be improperly coordinating its merger review with foreign competition agencies in ways that deny the merging parties their due process rights in U.S. courts, in turn harming U.S. companies seeking to improve their international competitiveness. Yet such a serious concern was first raised by the U.S. Chamber in a September 2021 [blog post](#) as part of the FTC's ongoing attempt to block the Illumina-Grail transaction.¹

In February 2022, the Chamber issued a Freedom of Information Act (FOIA) request for communications the FTC may have had with foreign jurisdictions regarding its ongoing efforts to block Illumina's acquisition of Grail. The FTC stalled in making a timely response to the Chamber and ultimately produced transcripts of its administrative trial. Those transcripts were already public and had nothing to do with FTC communications with foreign agencies. The agency claimed that it did not need to produce anything further because the European Union (EU) was a "consultant" to the agency on the Illumina-Grail matter.

1. The Chamber has taken no position on the merits of the Illumina-Grail transaction, but it believes that every transaction requires the FTC to follow the law and that the merging parties be afforded due process.

The Chamber sued the FTC over this and other unanswered FOIA requests. As part of the litigation, the FTC recently was forced to produce its communications with foreign agencies. Unfortunately, the FTC redacted the content of those communications, and the Chamber is evaluating those confidentiality claims as part of ongoing litigation.

Despite the redactions, several revelations raise serious questions about whether the FTC crossed a line from cooperation with foreign agencies into an effort to conspire with them against U.S. companies.

Specifically, the documents show that the FTC had extensive correspondence with competition officials in France, Austria, the U.K., and the EU about the merger without any apparent legitimate reason to do so—and around the same time that those foreign jurisdictions began raising questions about this merger of two American companies.

Background

Typically, when the FTC wants to block a merger, it seeks to obtain a preliminary injunction from a federal court, rather than use its internal administrative processes, which can take a long time. The FTC initially sought a preliminary injunction in the Illumina-Grail case. After it did so, many experts publicly commented that the FTC's challenge might not hold up in court.

The FTC withdrew its complaint in court after the EU announced that it intends to review the transaction, despite the EU at the time having no clear legal basis to do so.² The EU relied on a novel interpretation of its authority to justify its action despite never having previously used its newly self-identified authority in such a manner.

At that time, the transaction needed to close in December 2021. Illumina-Grail was put under tremendous pressure to abandon the transaction. Europe's pending review of the transaction was months away from concluding its investigation. The FTC, while no longer seeking a preliminary injunction, decided to move ahead with its own internal administrative trial that would last well into the following year. Illumina-Grail, facing uncertainty extending well beyond the contractually required date to close the transaction, went ahead and legally closed the deal, forcing the FTC to seek to unwind the transaction.

The transaction, to this day, continues to face uncertainty. The FTC recently lost its own internal trial, and the FTC commissioners will soon vote to decide whether

2. In July 2021, the Chamber wrote a [letter](#) to the Europe competition authority expressing deep concerns about its novel and completely unexpected interpretation of Article 22. This interpretation allows the EU to exercise extraterritorial review of mergers that fail to have a legitimate nexus to the European market.

to overturn the advice that their own chief administrative law judge has given them, which is to stop challenging the deal. If the commissioners still move to unwind the transaction, the case is headed back to court. In Europe, there are multiple questions being litigated as the EU ultimately moved to block the transaction.

Key Questions

Why all the coordination?

Any decision to block a transaction must be made independently based on the facts and the governing law specific to each jurisdiction. Instead, the FTC, by its own admission, viewed the EU as a consultant on the transaction. Recent FOIA disclosures show that the agency had extensive conversations with foreign jurisdictions at key moments in the investigative timeline leading up to the decision by the FTC and the EU to block the transaction.

Why the silence?

It has long been an accepted international best practice that only those mergers that have a material impact within a jurisdiction should be reviewed by that jurisdiction. In the Illumina-Grail transaction, Grail has no business operations and generated no revenues from within the EU. Yet the European Commission (EC) decided to upend international norms by manufacturing a reason (with help from France) to review the Illumina-Grail transaction.

Historically, had a foreign jurisdiction done this to two American firms, the U.S. government would have aggressively pushed back on procedural grounds even if the FTC was challenging the transaction on the merits here at home.

Why didn't the FTC move ahead in court?

Normally, when the FTC goes to court to block a merger it seeks a preliminary injunction. When Illumina-Grail announced it would close, the FTC could have returned to court. Instead, Illumina-Grail has had to endure a cumbersome internal administrative trial, and the FTC suffered an embarrassing defeat before its own chief administrative law judge. Now, the transaction appears headed back to court later this year. Rather than waste precious agency resources, the FTC should have stayed the course and followed its normal protocols and sought an injunction.

FOIA Litigation Uncovers—

Topline findings

- The FTC recently produced 332 files, some containing multiple emails as part of a thread. The emails often reference calls or facilitate the sharing of attachments.
- The FTC had communications with foreign agencies dating back to October 2020.
- The FTC proactively sought help from foreign jurisdictions. Not a single one of these exchanges appears to have been initiated by the foreign agency.
- The FTC sought to discuss the case with four foreign authorities, first the U.K., followed by Austria, the EU and France.
- Email communication from April 2021 forward is almost exclusively with the EU, save two productions from November 2021 and December 2022 with the U.K. and two productions from October 2021 that included both the EU and the U.K.

Extensive Communications

- 266 separate productions, containing multiple emails with the European authority
- 34 separate productions, containing multiple emails with the U.K. authority
- 16 separate productions, containing multiple emails with the Austrian authority
- 14 separate productions, containing multiple emails with the French authority
- 2 separate productions, containing multiple emails with the U.K. and EU on the same thread
- While most of the communications are led by FTC staffers Sarah Wohl, Maria Coppola, and John Nathan, there are in total some dozens of FTC staff on these

emails, including a small number of emails with, at the time, Acting Chair Slaughter and Commissioner Chopra.

U.K.

Sarah Wohl
Maria Coppola
Rebecca Slaughter
Rohit Chopra
Brandon Abrams
Eric Edmondson
Samuel Fulliton
Lauren Gaskin
Kevin Hearle
Jason Hulbert
Matthew Joseph
John McAdams
Betty McNeil
Stephen Mohr
Dylan Naegele
Joseph Neely

Jonathan Ripa
Nicholas Widnell

EU

Sarah Wohl
Maria Coppola
Jon Nathan
William Cooke
Bridget Simons
Susan Musser
Nicolas Stebinger
Hana Verwilt
James McCollough
Stephen Mohr
Jordan Andrew
Daniel Zach
Nicholas Widnell

Joseph Neely
Wells Harrell
Jillian Canning

Austria

Sarah Wohl
Krisztian Katona
William Cooke

France

Sarah Wohl
Maria Coppola
Joseph Neely
Stephen Mohr
Paul O'Brien

Timeline

Items in bold are nonpublic communications discovered as a result of ongoing Chamber FOIA litigation.

September 21, 2020	Illumina publicly announces its intent to acquire GRAIL
October 29, 2020	FTC first reaches out to the U.K. Authority
January 28, 2021	U.K. Authority emails Acting Chair Slaughter
February 16, 2021	FTC first reaches out to the Austrian Authority
February 19, 2021	EC sends an invitation seeking an Article 22 referral
March 1, 2021	Illumina responds to HSR Second Request
March 9, 2021	French Authority makes an Article 22 referral to the EC
March 10, 2021	FTC first reaches out to the EU Authority
March 30, 2021	FTC first reaches out to the French Authority
March 30/31, 2021	FTC files complaint in federal court/administrative forum

March 31, 2021	Multiple U.K. Authority emails to Acting Chair Slaughter and Commissioner Chopra include reference to a March 30, 2021, that was held
March 31, 2021	EC publishes Article 22 guidance
April 19, 2021	EC accepts the Article 22 referral from France
May 20, 2021	FTC moves to dismiss its federal court case
May 28, 2021	Federal court dismisses FTC case
August 19, 2021	Illumina-Grail close their deal
August–November, 2021	FTC administrative trial
October 25 and 29, 2021	FTC, U.K., and CMA all on email thread