

On March 30, 2021, the Federal Trade Commission (FTC) filed suit to stop Illumina Inc.'s proposed US\$7.1 billion acquisition of [Grail](#), a company developing an early stage cancer detection test. Grail uses Illumina's gene sequencing equipment and chemicals to run its detection tests. The FTC alleged that the acquisition would provide Illumina with both the incentive and ability to disadvantage Grail's competitors by raising their costs and foreclosing them from accessing Illumina's critical gene sequencing equipment. This is one of the few vertical merger cases that has been challenged by federal antitrust authorities in decades. The US DOJ's 2017 case against AT&T's acquisition of Time Warner was probably the most recent, and many thought the case was based on White House politics rather than merit. The government lost that case.

Consistent with recent statements of Acting FTC Chairperson Slaughter, a Democrat who has advocated a much more aggressive stance against vertical transactions, the FTC, which currently consists of two Democrats and two Republicans, voted 4 – 0 to file the complaint against Illumina's planned acquisition. The complaint alleges that Illumina's planned acquisition of Grail would substantially lessen competition in the US multi-cancer early detection (MCED) test market by lessening innovation and potentially increasing prices, as well as reducing the choice and quality of such tests.

Companies other than Grail are also involved in developing MCED tests. The FTC's complaint essentially says that test developers have little choice but to use Illumina's equipment. Illumina could raise prices charged to Grail's competitors and impede their research and development efforts. In essence, Illumina, as the only provider of a critical input into MCED tests, would have both the incentive and the ability to disadvantage Grail's competitors because the value of foregone sales of Illumina products to rivals of Grail would "be offset by the gain in MCED testing revenue captured by Grail."

Although these sorts of foreclosure concerns have been raised in past transactions, they have usually been resolved through legal settlements that allowed the deals to proceed with behavioral conditions attached. That is what happened more than 10 years ago in 2010, when the government approved Ticketmaster Entertainment's merger with Live Nation (a concert promoter). Today critics believe these sorts of behavioral remedies are too lenient, cannot be supervised and should be used sparingly, if at all.

In fact, Illumina offered a behavioral "fix" to the FTC's challenge. This remedy included a commitment to enter into a 12-year supply contract for its sequencing products and support services, as well as a promise that it would not discontinue sequencing products supplied under the offer as long as the customer continues to buy the product. This fix will likely prove inadequate given the makeup of the FTC and language in the [DOJ Merger Remedies Manual](#) (the Manual) (2020). The Manual states, in part, that allowing illegal mergers to proceed subject to certain behavioral commitments is "fundamentally regulatory" and imposes "ongoing government oversight on what should preferably be a free market." The Manual, in no uncertain terms, takes the position that structural remedies are the preferred approach to both horizontal and vertical mergers, given that they are "clean ... certain, [and] effective."

It should also be noted that Grail does not have sales in the MCED test market. In fact, the FTC complaint does not cite any market shares in the MCED test market. The FTC is basing its challenge on the concern that the transaction could harm nascent competition that has not yet developed, but has significant potential for future growth. This notion of incipient competition and the ability of large companies to buy up rivals before they can develop products is an area of increasing concern among antitrust regulators.

I think we can safely predict that this will not be the last vertical merger challenge, and neither will it be the last time the government rejects behavioral remedies as a fix to an otherwise problematic merger. In addition, we are likely to see more challenges to large companies buying up nascent rivals (even where those transactions do not meet the size-of-party or size-of-transaction tests to require a merger control filing).

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