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OPINION | REVIEW & OUTLOOK

The FTC's Unholy Antitrust Grail

The agency overrules its own law judge to block Illumina's acquisition.

By The Editorial Board

The Federal Trade Commission on Monday overruled its own in-house judge and ordered gene-sequencing giant Illumina to divest cancer blood-test startup Grail. FTC Chair Lina Khan is showing that the agency's administrative trials are a sham. Heads the agency wins, tails businesses lose.

A FTC judge in September issued a 203-page opinion rejecting the agency's complaint that alleged the Grail acquisition would harm potential competitors in the embryonic market for multi-cancer early detection tests. Grail currently has no competitors, and the FTC complaint

Illumina makes the platforms that are used to run Grail and other genetic screening tests. Its scientists developed Grail's technology before the company spun off the startup in 2016. As the Grail test improved and became commercially viable, Illumina sought to reacquire Grail and closed its acquisition in August 2021.

Grail claims its test can detect the 12 most deadly cancers with 76% accuracy and has a false positive rate of less than 1%. Earlier detection of aggressive cancers could save thousand of lives a year. Illumina says it can bring the test to market faster owing to its relationships with insurers and reduce the price, now about $949 out of pocket.

But some companies that were interested in buying Grail or that were developing their own cancer tests complained to the FTC that Illumina would thwart rivals. This was the gist of the FTC complaint, which the agency's in-house judge dismissed after a detailed analysis of the facts. Administrative law judges are rarely so scathing.

"The Clayton Act protects competition, not competitors," FTC chief administrative law judge D. Michael Chappell wrote, emphasizing that "antitrust theory and speculation cannot trump facts." He concluded that the FTC had failed to prove its case that Illumina had the ability and incentive to help Grail to the disadvantage of alleged rivals.

For Illumina to divert sales from multi-cancer early detection rivals to Grail, other "test developers would have to have sales in the first place," he explained. But none do. He also noted that Illumina had offered a contractual commitment to provide access to its products to all of its future oncology testing customers equivalent to that it provides to Grail.

The FTC commissioners disagreed with the judge 4-0 and ordered Illumina to unwind its Grail acquisition. Republican Commissioner Christine Wilson wrote in a concurrence that she disagreed with some of her colleagues' legal analysis, but she didn't believe Illumina had met its burden of proof to show the government's competition theory was improbable.

Ms. Khan seems to be trying to make an example out of Illumina by ordering the company to pay "transition assistance" to Grail's next acquirer plus expenses of a government-appointed special monitor to ensure that it complies with the divestiture order. The tacit message to other businesses is don't dare consummate a merger that the agency challenges.

The FTC could have gone to federal court to try to stop the acquisition. Instead, it challenged the deal in its administrative tribunal where it no doubt believed it was more likely to win because it almost always does. Yet after losing, it has now overruled its own judge. What was the purpose of the administrative trial if the FTC could ignore the judge's findings and do whatever it wants anyway?

That's a good question for the independent federal courts. Illumina plans to appeal the divestiture order in federal appellate court where it will have the opportunity to raise several constitutional challenges to the FTC's authority and administrative proceeding that it had earlier raised before the commission. This could get interesting, and the FTC may come to regret its hell-bent effort to stop mergers by whatever means possible.

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