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Illumina/Grail

Court Rules that the European Commission Cannot Investigate Deals that Fall Below EU and National Merger Thresholds

Europe – September 2024

On 3 September 2024, the European Court of Justice (ECJ) – the EU's most senior court – ruled that the European Commission (Commission) cannot investigate deals that fall below both EU and national merger control thresholds.

The judgment, handed down in a case concerning Illumina's acquisition of Grail, is a significant blow for the Commission, which had controversially sought to use a referral procedure under Article 22 of the EU Merger Regulation (EUMR) to gain competence to review so-called "killer acquisitions", even if they fell outside both its jurisdiction and the jurisdiction of national competition authorities in the EU.

The Illumina/Grail Deal and the Commission Investigation

In September 2020, Illumina, a US-based gene-sequencing company, announced its intention to acquire sole control of Grail, a biotechnology company focused on early cancer detection, in a deal valued at US$7.1 billion. Grail, as the developer of an emerging technology, had no turnover in the EU and the transaction therefore did not meet the thresholds for notification to the Commission or any member state competition authorities.

Nevertheless, concerns were raised about the deal's potential anti-competitive nature, focussing on the risk that Illumina could restrict access to, or raise the prices of, certain gene sequencers used by Grail's competitors in cancer detection. To allow it to investigate these concerns, and after receiving a complaint from a third party, the Commission invited member states to refer the transaction for review under Article 22 EUMR – using the procedure described below – in February 2021.

France made such a referral request, which was subsequently joined by other EU and EFTA member states, none of which had jurisdiction to review the deal under their own merger control laws. The Commission accepted the referral request under Article 22 EUMR in April 2021, leading to Illumina formally notifying the deal in June 2021. However, Illumina proceeded to complete the acquisition in August 2022 while the Commission's investigation was still ongoing.

Illumina appealed the Commission's decision to accept the referral requests to the lower-tier General Court of the EU, arguing *inter alia* that Article 22 EUMR did not allow the Commission to accept referrals from member states that did not themselves have jurisdiction to review the transaction in question. The General Court dismissed Illumina's appeal in July 2022 and upheld the Commission's decision.

This week's ECJ judgment ruled on Illumina and Grail's appeal of the General Court's findings.

The Commission ultimately concluded its investigation in September 2022 by prohibiting the deal, citing concerns that it would negatively impact innovation and reduce competition in the emerging market for cancer detection technologies. In addition, the Commission ordered Illumina to unwind the acquisition and imposed a fine of €432 million for closing the deal without permission – the highest ever fine imposed for so-called "gun-jumping". In parallel, the US Federal Trade Commission also opposed the deal and ordered Illumina to divest Grail. Illumina complied in June 2024, selling Grail at a significant loss on to its US$7.1 billion acquisition three years earlier.

Article 22 EUMR and the Commission's Competence to Investigate Mergers

The starting point for the review of mergers by the Commission is that it has jurisdiction to investigate any "concentration" that has a "Community dimension," meaning one that meets certain thresholds, based on the turnover of the parties, that trigger an automatic notification to the Commission. In addition, the Commission can review mergers that lack a "Community dimension" but are referred to it by national competition authorities or the parties involved in the deal. This mechanism is most often used when a deal falls below the Commission's thresholds but meets the thresholds for notification in three or more EU or EFTA member states. In such cases, under Article 4 EUMR, the parties involved can request the Commission to review the deal, enabling it to act as a "one-stop-shop" and avoiding the need for multiple national filings.

Article 22 EUMR provides that one or more member states can request the Commission to investigate a concentration that does not have a "Community dimension" but which affects trade between member states and threatens to significantly affect competition within the territory of the referring state(s). The origins of Article 22 EUMR lie in the late 1980s when certain member states, such as the Netherlands, had no national merger control regimes and sought to rely on the Commission to investigate deals that risked harm to their markets – hence, it was sometimes referred to as "the Dutch clause".

The Commission's interpretation of Article 22 EUMR, as applied in *Illumina/Grail*, was that any member state could refer a transaction for review, even if it had its own merger control rules and irrespective of whether the deal was notifiable in the Member State making the referral.

This interpretation of Article 22 EUMR was seen by the Commission and certain member states as a means to investigate so-called "killer acquisitions", whereby established companies acquire startups or innovators with limited or no sales – hence the deal falls below turnover-based merger thresholds – that are likely to have a significant impact on competition in the future.

The Commission's approach to addressing "killer acquisitions" using Article 22 EUMR attracted controversy among some antitrust practitioners and dealmakers. Critics argued that the Commission's position undermined the legal certainty provided by turnover thresholds in determining whether a deal requires notification in a particular jurisdiction. This uncertainty made it more challenging for companies to predict whether their transactions would attract scrutiny or be delayed by merger reviews and risked having a chilling effect on deals by undermining businesses' confidence.

The ECJ Judgment

On 3 September 2024, the ECJ upheld Illumina and Grail's appeal, overturning the General Court's judgment and annulling the Commission's acceptance of the referral request.

The ECJ agreed with the General Court that a literal interpretation of Article 22 EUMR, based on its wording, did not conclusively establish how it should be applied. However, unlike the General Court, the ECJ found that no other means of interpretation supported the Commission's position. Having regard to the history of the rule (historical interpretation), its place in the legal system (contextual interpretation) and the objectives of the legislature (teleological interpretation), the ECJ ruled that there was no basis to find that Article 22 EUMR allows a member state that has its own merger control rules to refer a deal that falls below its thresholds to the Commission. To the contrary, the ECJ found that the Article 22 EUMR referral system "presupposes" that, if a member state making a referral has its own merger control rules, those rules do not preclude the competition authority in that state from reviewing the deal itself – for example, because it falls below its thresholds [recital 180].

Moreover, the ECJ held that:

- Contrary to the position advocated by the Commission and endorsed by the General Court, Article 22 EURM is not a "corrective mechanism" intended to enable the scrutiny of transactions that do not meet either the EU or national thresholds [recital 192]
- The Commission's interpretation of Article 22 EUMR "undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration" [recital 206]
- Companies "must be able easily to determine whether their proposed transaction must be the subject of preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected" [recital 208]
- Bright-line thresholds based on parties' turnover are "an important guarantee of foreseeability and legal certainty" for companies, which must be able "easily and quickly to identify to which authority they must turn, and within what time limit" [recital 209]

Finally, the ECJ noted that if the Commission believed it was necessary to extend its powers such that it could investigate "killer acquisitions" that fall below thresholds, it was up to the EU's legislature (in this case, the Council) to amend EU merger control laws accordingly. The Commission had exceeded its competence by seeking to extend its powers through a re-interpretation of Article 22 EUMR.

Conclusions and Key Takeaways

Perhaps the most urgent question raised by the ECJ's judgment is how the Commission will respond. Its interpretation of Article 22 EUMR, which the ECJ comprehensively rejected, was a flagship policy of Vice-President Vestager, the Competition Commissioner, who will cede her post when the new Commission is formed later this year. In a statement issued immediately after the judgment, Vice-President Vestager warned that smaller companies must continue to be "protected against the risk of elimination" by larger competitors and stressed that that the Commission would explore its options "to ensure the ability to review cases where a deal could significantly impact Europe, even if it doesn't meet the EU notification thresholds."

In this regard, the Commission likely has in mind the merger control thresholds in two member states (Austria and Germany) that can be triggered based on the value of a deal, rather than the parties' turnover, as well as the rules in other countries (including Italy, Ireland and – outside the EU – the UK) which allow competition authorities to "call in" a deal that is below their thresholds. Where such rules exist, the member states in question could still refer transactions to the Commission under Article 22 EUMR, irrespective of the parties' turnover, since the national competition authorities concerned have competent jurisdiction. The Commission may hope to encourage other Member States to adopt similar rules, and in theory could push the EU legislature to change its own merger control rules.

However, merger thresholds based on a transaction's global value raise their own concerns, most obviously that they can be triggered by deals that have no connection to the EU and genuinely pose no risk to competition. Equally, it could be argued that call-in powers fail to give businesses the "foreseeability and legal certainty" that the ECJ emphasised are so important.

A further possibility would be to look away from merger control and seek to apply the EU rules prohibiting anti-competitive agreements and abuses of dominant positions to below-threshold acquisitions. The ECJ's 2023 judgment in *Towercast* confirmed that national competition authorities and courts may apply Article 102 of the Treaty on the Functioning of the European Union, which prohibits abuses of dominance, to mergers that are not notifiable. However, it is unclear – and has not been tested in the European courts – whether the Commission may do the same.

Ultimately, the *Illumina/Grail* judgment is likely to be welcomed by dealmakers in the EU and abroad for whom the Commission's radical interpretation of Article 22 EUMR caused serious concerns. However, it reopens the debate on how the Commission and other competition authorities can control "killer acquisitions" that are increasingly becoming a feature of digital, pharmaceutical, tech and life sciences markets.

Joined Cases C-611/22 P and C-625/22 P *Illumina v Commission*, ECLI:EU:C:2024:677. The Judgment of the ECJ is available online here.

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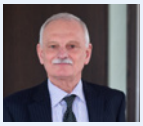

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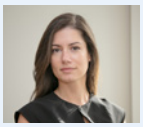

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