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Illumina/Grail: EU Court overturns approach to “killer acquisitions”

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In a much-anticipated ruling of 3 September 2024, the EU's highest court threw out the policy that the European Commission has been pursuing since 2021, by which it asserted jurisdiction to review so-called “killer acquisitions” falling below the review thresholds of both the Commission and all EU Member States. The Court based itself on issues of high principle, as well as a meticulous examination of the text and history of the EU’s Merger Regulation. The Commission is now confronted with the challenge of developing an alternative mechanism for capturing such deals.

The context of the case

Grail, an innovative healthcare company, has developed a revolutionary test for early cancer detection that relies on next-generation genomic sequencing (“**NGS**”) systems, a market in which Illumina is a large player. In September 2020 Illumina announced it would acquire Grail. Since Grail had no revenues in Europe, the transaction did not require filing with the European Commission (the “**Commission**”) or in any Member State. Nevertheless the Commission asked Member States to consider referring the case to it for review, employing a new approach to Article 22 of the EU Merger Regulation (the “**Regulation**” or “ **EUMR”**), by which that provision would become a general tool for reaching small transactions below filing thresholds but potentially having an outsize economic impact. Certain Member States responded to the Commission’s initiative, and in April 2021 the Commission accepted the requests for it to examine the acquisition.

The position that it was able to take jurisdiction was appealed to the EU’s court of first instance, the General Court (**GC**). The GC confirmed the Commission’s jurisdiction, on the ground that Article 22 should be construed as enabling the Commission to examine *any* concentration (i.e., merger or acquisition of control) that did not meet the thresholds of Article 1 of the EUMR, regardless of the scope of any national merger regime: it was enough that a concentration affects trade between Member States and may have significant effects within the territory of the Member State(s) making the request.

The European Court of Justice (the “**Court**”) reversed the GC’s ruling on appeal,[1] pulling the carpet out from the initial assertion of jurisdiction (and thereby all subsequent measures - the Commission had prohibited the deal and imposed a large gun-jumping fine). The judgment invoked both considerations of high principle, as well as the text and history of the Regulation. The issues of principle command particular attention, with the Court finding that the underlying concept of the policy was at odds with the basic construct of the Regulation, which foresees a regime of bright-line jurisdiction, conferring legal certainty. The ruling leaves the Commission with a very real challenge to find a lawful means of addressing small acquisitions whose prospective impact may be disproportionately large.

The Court’s Decision

Article 22’s original purpose (in 1989) was to enable a Member State lacking domestic merger control to ask the Commission to review deals affecting its territory. In 1997 a further purpose was added, creating a “corrective mechanism” by which cases that triggered separate national filings could be transferred for

single review by the Commission. The Commission's re-purposing of Article 22 to catch cases falling in neither of these categories was reflected in revised Guidance on the Article 22 referral mechanism, published in March 2021.[2] Since then, aside from the Illumina/Grail transaction, the Commission called in a small number of concentrations. The acquisitions of Autotalks by Qualcomm, in the sector of V2X semiconductors for automotive applications, and of Nasdaq Power by EEX, in the sector of energy exchange, were referred to the Commission in August 2023. In March 2024, Luxembourg had referred the Brasserie National/Boissons Heintz transaction to the Commission.

Having regards to the original purpose of Article 22, Advocate General Emiliou, in his preliminary Opinion [3] had invited the Court to set the GC's judgment aside, highlighting the importance of predictability and legal certainty for the merging parties, and noting that the broad interpretation of Article 22 created an uncertainty that could only be remedied by discussing the transaction with each of the Member States' competition authorities.

By a ruling of 3 September 2024, the Court overturned the GC's judgment and annulled the European Commission's acceptance of the various referral requests under Article 22, holding that the policy was inconsistent with the basic concept and structure of the EUMR. It found that, as the national competition authorities did not have the legal competence to review the transaction under their national laws, they could not *ex nihilo* confer jurisdiction on the Commission. An Article 22 referral is possible only if the referring Member State itself has power to review the deal in question (or if a Member State has no such domestic powers - but today only Luxembourg fits that description).

Literal interpretation

While the Court recognized that the wording of Article 22 did not explicitly restrict the ability of a Member State to refer concentrations to the Commission by reference to whether they were caught by the national merger control regime, the Court concluded that this literal interpretation must be balanced with the broader legal context and the objectives of the EUMR.

Teleological Interpretation

The Court's ruling addressed the teleological interpretation of the EUMR, focusing on the need to maintain legal certainty and predictability in merger control. The Court found that the GC's broad interpretation of Article 22 introduced unacceptable levels of uncertainty for businesses. The Court highlighted that companies must be able to determine with confidence whether their transactions will be subject to review, and which authorities will be involved. It emphasized that the EUMR was designed to provide clear rules for when and where concentrations would be reviewed, and that the Commission's broad interpretation of Article 22 undermined this objective, the more so in the absence of a prescribed timetable or procedure.

Historical interpretation

In reviewing the historical context of Article 22, the Court further clarified that the original intent of Article 22 was to enable Member States without national merger control regimes to refer concentrations

to the Commission. Historical records and legislative background did not support an interpretation that would allow the Commission to review concentrations below the jurisdictional thresholds of both the EUMR and the referring Member State's national laws.

Reforms to the EUMR introduced in 1997 had (as noted) added an additional purpose to Article 22, enlisting it as a mechanism for the Member States to send cases to the Commission so as for it to be able to undertake a unitary review, in place of multiple national filings.[4] In other words, where the original function of Article 22 pre-supposed a Member State with *no* merger control rules, the new purpose quite on the contrary pre-supposed Member States which *did* have such domestic rules. A new recital introduced in 1997 described this use of Article 22 as "a corrective mechanism".

The Court criticized the Commission and GC for misappropriating this recital as a supposed basis to employ Article 22 as an overriding tool to allow the Commission to become involved in any deal that would otherwise escape competition review. That was to ignore the obviously intended sense of those words, using them to justify a much wider legislative ambition for which there was no basis.

Contextual Interpretation

The Court also considered the contextual interpretation of Article 22, highlighting the principle of subsidiarity and the overall structure of the EUMR. The Court found that the GC erred in allowing a Member State to refer a concentration to the Commission regardless of whether there was power to review it under national law. This interpretation, according to the Court, undermined the balance intended by the EUMR, which relies on jurisdictional thresholds that determine whether a concentration has a European dimension.

The Court noted that the principle of subsidiarity, as reflected in the EUMR, ensures that concentrations are primarily reviewed by the authority best placed to do so – usually national authorities, unless the concentration has a significant cross-border impact. By accepting referrals from Member States lacking jurisdiction under their own laws, the Commission was effectively bypassing these established thresholds, disrupting the intended distribution of competences between the EU and Member States.

Practical Implications

First, it follows from the Court's ruling that all subsequent steps taken by the Commission against Illumina and Grail are now deprived of any legal basis, and the Commission has quickly confirmed that these are now of no effect. The heavy fine (€432 million) imposed by the Commission on Illumina for closing the acquisition while the Commission review was still pending;[5] as well as the divestment order,[6] are now null and void. However, Illumina has already divested Grail, in view of parallel proceedings in the U.S. where the FTC also blocked the transaction.

The other deals that had been called in by the Commission on the basis of Article 22 now also fall outside of its jurisdiction. The acquisition of Autotalks by Qualcomm, as well as the acquisition of Nasdaq Power by EEX,[7] had already been abandoned in light of the opposition from the Commission. On the other hand, the acquisition of Luxembourg's Brasserie Nationale of Boissons Heintz, which was referred to the Commission by Luxembourg,[8] the only Member State without a merger control regime, arguably falls under the initial purpose of Article 22. Brasserie Nationale has nevertheless appealed the Commission's decision to accept the referral to the General Court.[9]

Second, the judgment leaves in tatters the approach to "killer acquisitions" advocated by the Commission over several years. And while the Commission and the Member States will certainly keep looking for other means to expand their jurisdictional reach to such deals, none of the available alternatives are straightforward.

One option available to European competition authorities is the use of antitrust rules as a potential fall-back when a transaction cannot be reviewed under merger control rules but nonetheless negatively impacts competition. Notably in its *Towercast* judgment,[10] the Court confirmed that Article 102 TFEU – the law controlling abuse of dominance – is a relevant tool to redress the possible harm to competition deriving from a non-reportable merger. The Court relied in this respect on the venerable *Continental Can* judgment[11] which addressed an acquisition by a company with existing dominance.

It was however the limitations of such an approach which originally helped pave the way for the adoption of the EUMR. While the Court recognizes the continuing availability of Article 102 in relevant circumstances, it hardly provides a coherent basis for future systematic action. Ex-post intervention may also not be the most appropriate tool to counterbalance potentially negative effects of competition. It has therefore been presented by the Commission as a last resort solution rather than a proper way forward to close the perceived enforcement gap.

The Commission and Member States therefore need to come up with another solution, more suited to the challenges raised by "killer acquisitions".

In that regard, fresh legislation is in formal terms the most obvious approach, to tailor a mechanism suitable for the purpose of calling in identified troubling transactions. Such a power exists in the U.S. in relation to non-reportable transactions, since the substantive law (Clayton and Sherman Acts) exists independently of the Hart-Scott-Rodino reporting rules. But leaving aside the many legal and technical points arising, the political reality is that the Commission has always been loath to propose amendments to the EUMR: once a proposal is submitted, the way is open for Member States and European Parliament to seek all manner of other changes suiting the political mood. And the Draghi report just issued[12] demonstrates vividly the political appetite to make major changes to EU merger review.

Alternatively, there is a review mechanism in the EUMR itself, allowing for review of the revenue thresholds that trigger a filing obligation. The Court put weight on this in rejecting the Commission's policy. But simply lowering the numerical thresholds would inevitably bring hundreds of smaller and untroubling transactions into the filing obligation, as EVP Vestager recently commented.[13] That would suit neither the business community, nor the Commission itself which would have to devote major resource to deals of no consequence. It would also be at odds with the stated rationale of the EUMR, namely, to allow review of transactions "*with significant effects on the structure of competition in the European Union*". Rather, a different and more discerning approach to jurisdiction would need to be devised - which would however imply the need for a full-blooded amendment to the EUMR.

An idea gaining some currency, at the apparent instigation of the Commission even before the judgment, is for Member States to extend their domestic rules so as to confer power on themselves over a much wider set of transactions. In turn they would then be in a position to refer such deals to the Commission under Article 22, based on the 1997 extension of the EUMR to deal with the problem of multiple national filings. The Court did briefly refer to the debate around "*innovative undertakings …. that generate little or no turnover*",[14] noting that Member States could choose to revise their thresholds

downwards. Article 22 could then become again the deliberate device for capturing relevant transactions, relying now on multiple extensions to national review powers. France, for instance, recently indicated its willingness to move in that direction.[15]

However, such an approach would tend to subvert the purpose of the 1997 amendment. The "corrective mechanism" created then was intended to resolve a problem arising from multiple national rules. It was not intended as the pretext for the Commission, in connivance with Member States, to roll out a regime for systematic harvesting of additional national notifications, with the goal of a general expansion of EU jurisdiction. The Court's strictures on the need for Article 22 policy to be coherent with the basic scheme of the EUMR should not be so instantly disregarded.

Secondly, the basis of various national extensions to domestic merger control laws might seemingly be to confer a call-in power for the national competition agency, as opposed to a bright-line filing threshold. Some Member States have already adopted that approach.[16] That way lies a vast exposure for businesses to legal uncertainty and jeopardy, being unable to foresee from what direction a wish to review a transaction might originate. Again, the Court criticized the uncertainty for businesses of needing potentially to approach each and every Member State in order to ascertain whether it might be considering an Article 22 referral to the Commission. It is far from obvious that the Commission should be sponsoring precisely such a regime of uncertainty, based this time on a need to consult multiple national agencies on their possible exercise of national call-in powers.

Thirdly, even if extensions to national rules are of a more conventional revenue or transaction-value type, a general trend towards extension of national reporting nets must be concerning, against the background already existing of deals triggering dozens of filing obligations. The resulting red tape has become a significant complication in the world of M&A and may raise issues for the national authorities' limited resources.

And fourthly, principles adopted by the International Competition Network[17] stress the importance of *nexus*. Countries should limit their powers to transactions having local nexus. Indeed, the original Article 22 pre-supposed a concentration affecting the relevant national market. Member States extending their review powers to deals happening far way, and with no particular connection to their territory, runs counter to these principles. Of course, Illumina/Grail itself was just such a situation, with Europe affected no more specifically than (for example) Ethiopia or Ecuador. That transaction was properly reviewed in the U.S., Illumina and Grail's home jurisdiction.

In conclusion, the incoming European Commissioner for Competition, once in the role, will face a significant challenge to develop a new mechanism to address potentially anti-competitive transactions that fall below existing thresholds. One question that should be front and centre for the Commission is how many problematic cases really avoid merger control review in the EU. The practical experience to date appears to indicate that the number of such cases is already very limited. The Commission should therefore strive to develop a policy response that is proportionate and does not create undue uncertainty. Merger control is an area where clarity is essential for businesses. In the meantime, **businesses involved in deals that could be perceived as "killer acquisitions" should address the risk of competition agencies reaching out pro-actively, even in the absence of a reporting obligation**. That risk remains highest in deals in the tech and pharmaceutical industries. In this context, the essence of the Commission's guidance on its approach to Article 22 referrals continues to be relevant as a reflection of the Commission's priorities.

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Dechert provided assistance to Illumina in connection with its appeal to the Court.

Footnotes

[1] Court, 3 September 2024, *Illumina / Commission*, Case C611/22 P; Press Release: https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240127en.pdf; Judgement: https://curia.europa.eu/juris/document/document.jsf;jsessionid=625532C1A65A99BAE04D83C049734148?text=&docid=289718&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2343762.

[2] And hence after the announcement of the Illumina deal.

[3] See "European Court of Justice Considers Limits on European Commission's Merger Review Powers", Dechert OnPoint, 07/05/2024, available: https://www.dechert.com/knowledge/onpoint/2024/5/european-commission-s-power-to-review-deals-below-thresholds-thr.html.

[4] The Commission wrote in a 2001 Green Paper (para 86): "[t]he amendments that took effect in 1998 were intended to give Article 22(3) a new function as a means of allowing two or more Member States to make joint referrals to the Commission where they felt that the Commission was better placed to act. Thus, the intention was to strengthen the application of Community competition law in cases with cross-border effects, to strengthen the one-stop shop principle and to alleviate the problem of multiple filings."

[5] EU Commission, Decision 12 July 2023, Case M.10483 Illumina/Grail. See European Commission, "Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval", Press Release of 12 July 2013, available: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3773.

[6] EU Commission, Decision 12 October 2023, Case M.10939, Illumina/Grail. See European Commission, "Commission orders Illumina to unwind its completed acquisition of GRAIL", Press Release of 12 Octobre 2023, available: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872.

[7] Commission decision of 17 August 2023, Qualcomm/Autotalks, case M.11212; and 18 August 2023, EEX/Nasdaq Power, case M.11241.

[8] Commission Decision, 14 March 2024, Brasserie Nationale/Boisson Heintz, case M.11485.

[9] GC, *Brasserie Nationale and Munhowen / Commission*, case T-289/24, pending.

[10] Court, 16 March 2023, *Towercast*, Case C449/21.

[11] Court, 21 February 1973, *Continental Can*, Case 6/72.

[12] Mario Draghi, "The future of European competitiveness", Report, 09/09/20204.

[13] Margrethe Vestager, Opening speech for the 28th Annual competition Conference of the International Bar Association; 06/09/2024, available: https://ec.europa.eu/commission/presscorner/detail/en/speech_24_4582.

[14] Para. 217.

[15] French Competition Authority, "L'Autorité de la concurrence prend note de l'arrêt *Illumina/Grail de* la Cour de justice de l'Union européenne", Press Release, 03/09/2024, available: https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-de-la-concurrence-prend-note-de-larret-illuminagrail-de-la-cour-de.

[16] Ireland has notably adopted, in 2022, an amendment to its Competition Act and has introduced a call-in provision allowing the Irish Competition Agency to require notification of a transaction otherwise falling below thresholds, where it considers the transaction could undermine competition. The Czech Republic has also introduced a bill to give its competition agency a call-in power for under-threshold mergers. Other Member States (e.g. Italy and Sweden) have introduced the possibility for the national competition agency to require notification of a transaction where one limb of their notifications thresholds is met.

[17] The ICN 2018 Recommended Practices for Merger Notification and Review Procedures recommend that competition authorities only assert jurisdiction over 'transactions that have a material nexus to the reviewing jurisdiction'.

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