

Illumina / GRAIL: EU General Court Upholds Commission's New Referral Policy

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On 13 July 2022, the EU's General Court rejected a request to annul the European Commission's (the "Commission") decision to review the \$7.1 billion acquisition of biotech company GRAIL by Illumina. The deal was referred to the Commission by several of the EU Member States under Article 22 of the EU Merger Regulation (the "EUMR"), even though it met neither the merger control thresholds under the EUMR nor those of any Member State's national merger control regime.¹

In doing so, the General Court confirmed the Commission's interpretation of its expanded referral policy that encourages EU Member States to refer "any concentration" to the Commission even where they themselves do not have jurisdiction. The Commission's declared goal is to review transactions where the parties' competitive importance is not fairly represented by their revenues, thereby preventing so called "killer acquisitions" such as where an established tech company acquires a small but innovative start-up with the intention of eliminating future competition. Speaking on the enforcement gap in March 2021, EU Commissioner Margrethe Vestager noted that "[a] number of transactions involving companies with low turnover, but high competitive potential in the internal market are not reviewed by either the Commission or the Member States". While the Commission had in particular the digital and pharmaceutical sectors in mind, in principle this new policy—now endorsed by the General Court—enables the Commission to review any transaction that meets the necessary conditions at the request of even a single EU Member State.

Illumina has announced that it will appeal the General Court's judgment. It therefore remains to be seen whether the European Court of Justice will share the Commission's interpretation of Article 22 EUMR. For the time being, however, the General Court's endorsement of the Commission's approach is likely to encourage use of the referral mechanism, meaning merging parties must carefully consider whether their transaction may be caught (even in circumstances where it otherwise does not meet the national or EU thresholds).

¹ General Court, Judgment of 13 July 2022, Case T-227/21 – *Illumina / Commission*.

WHAT ARE THE FACTS OF THE ILLUMINA/GRAIL CASE?

On 21 September 2020, Illumina, a U.S. company specialising in next generation sequencing (“NGS”) systems for genetic and genomic analysis (used, among other things, in the development of cancer screening tests) announced that it intended to acquire GRAIL, a U.S. biotech company active in the development of such screening tests using Illumina’s NGS technology. The proposed transaction was not notified to the Commission or the national competition authority (“NCA”) of any EU Member State because GRAIL did not generate any revenue in the EU or, indeed, anywhere else in the world and therefore did not meet the relevant jurisdictional thresholds for review.

Following a complaint about the deal from an unnamed third party in December 2020, the Commission applied its new Article 22 EUMR policy for the first time. In February 2021, it sent an invitation letter to the EU Member States informing them of the deal and inviting them to refer the case to the Commission for review. The French competition authority made such a referral request and was joined by a number of other NCAs.

The Commission subsequently opened an in-depth Phase II investigation in July 2021 on the basis of concerns around the impact of the transaction on future competition and innovation in the market for the development and commercialisation of NGS-based cancer detection tests. Illumina (supported by GRAIL) sought to annul the Commission’s decision to review the completed acquisition and its acceptance of the referral request under Article 22 EUMR, as well as the issuance of the “information letters” inviting EU Member States to refer the case.

WHAT DOES ARTICLE 22 EUMR SAY?

Under Article 22 EUMR, one or more NCA may request the Commission to examine “any concentration” that does not have a European dimension but which affects trade between EU Member States and threatens to significantly affect competition in the territory of the EU Member States concerned.

This so called “Dutch Clause” was introduced back in 1989 at a time when several EU Member States, including the Netherlands, did not have a merger control regime and so needed a mechanism to review transactions that might have a negative impact on domestic competition. Since the “Dutch Clause” was introduced, the regulatory landscape has changed significantly, and now only Luxembourg lacks its own national merger control regime. The EU Commission therefore developed a practice of discouraging (but not excluding) referral requests from EU Member States that could

not themselves review any given transaction. This was based on the Commission's experience that transactions that were not considered relevant under national law were likely too small to have a significant impact on the wider EU internal market.

However, recent years saw a reappraisal of that approach, the main reason being increasing discomfort about a perceived enforcement gap whereby certain high-profile transactions, particularly in the digital sector, may escape review despite the target companies posing (or having the potential to pose) a significant competitive constraint on the industry leaders. At the same time, the Commission's view has been that value-based thresholds risked being disproportionate (where the threshold is set too low) or ineffective (if set too high). Instead, the Commission decided to revise its Article 22 policy in September 2020 by encouraging and accepting referrals in cases where the referring EU Member State does not have original jurisdiction over the transaction.

WHAT WERE THE FINDINGS OF THE GENERAL COURT?

The General Court confirmed the Commission's interpretation of Article 22 EUMR that it can review transactions that have been referred by an EU Member State even if a transaction does not meet the relevant national merger control thresholds (provided the four cumulative conditions of Article 22 EUMR are met). In particular, the General Court held that the objective of the EUMR was to permit effective control of all concentrations with significant effects on competition in the EU. The referral mechanism under Article 22 EUMR is therefore a "*corrective mechanism*" which—in the view of the General Court—provides the needed flexibility in a system based principally on turnover thresholds which is therefore rigid in nature.

In addressing Illumina's argument that the referral request was submitted out of time, the General Court also clarified the crucial question of when a transaction is considered to have been "*made known*" to the EU Member State concerned. According to the General Court, "*made known*" requires an active transmission of the appropriate information to the EU Member State concerned. A press release is not sufficient. In the case at hand, the General Court considered that the 15-working-day deadline only started to run when the Member States received the invitation letter from the Commission informing them about the proposed transaction and inviting them to refer the case to the Commission.

The General Court also addressed Illumina's argument that the delay between learning about the transaction and sending the invitation letter was contrary to the fundamental principle of legal certainty and the right to good administration. The General Court stressed that the Commission is required to comply with a reasonable time limit in

administrative procedures, particularly in the context of merger control, and found that the period of 47 days between the complaint being received and the invitation letter being sent was unreasonable. According to the General Court, this, however, had not affected Illumina's capacity to defend itself effectively and therefore did not justify an annulment.

Finally, the General Court rejected Illumina's final plea that the Commission infringed the principles of legal certainty and legitimate expectation by stating in September 2020 that its existing policy would not change until it was amended by the publication of new guidance towards the middle of 2021. Pointing to established case law, the General Court held that in order to rely on that, Illumina would have had to demonstrate that the Commission had given "*precise, unconditional and consistent assurances*" such that it was led to "*entertain well-founded expectations*". The General Court held that Illumina did not demonstrate this was the case.

WHAT DOES THIS MEAN IN PRACTICE?

We expect the Commission and EU Member States will more regularly cooperate on referring deals that fall below their respective thresholds but which could raise competition concerns. This appears particularly likely in the digital space given the proposed Digital Markets Act, which further requires large online platforms to inform the Commission of all intended acquisitions involving "*core platform services or any other services [which occur] in the digital sector or enable the collection of data*".² That provision explicitly enables NCAs to use such information (relayed to them by the Commission) to request that the Commission examine the acquisition under Article 22 EUMR.

While Illumina has already announced that it will appeal the General Court's judgment, businesses must continue to bear in mind the Commission's new referral policy in their deal planning. In particular, the following points need to be considered:

- **Referral risk assessment:** Businesses need to assess whether their transaction is a likely candidate to be referred to the Commission. That particularly applies to "killer" acquisitions, where the target's influence on competition is disproportionate to its size. The potential risk of third-party complaints (including from the parties' competitors) also needs to be taken into account. Given the broad discretion the Commission has, it will, however, often be hard to rule out a referral with certainty.

² Article 14, Digital Markets Act (not yet entered into force).

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- **Deal timing:** An Article 22 EUMR referral can have a significant impact on the deal timing, in particular if the transaction is not otherwise notifiable for merger control purposes. Merging parties will need to take this into account and in particular consider an extended long-stop date where such a risk is identified.
 - **Closing and integration:** Given that the standstill obligation under Article 22 EUMR only applies once the Commission has informed the merging parties of a referral request, merging parties will also need to assess whether to close and begin integration given the possibility of a late referral.

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