

**Alert | Antitrust Litigation & Competition Regulation**



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## **EU General Court Upholds Commission's Landmark Article 22 ECMR Review in *Illumina/Grail***

On July 13, 2022, the EU General Court (EGC) delivered its **judgment** in Case T-227/21, *Illumina, Inc. v European Commission*. In its judgment, the EGC concludes that the European Commission (Commission) has the competence to review a transaction which does not (a) have a European dimension, or (b) fall within the scope of the national merger control rules of EU Member States (or States party to the Agreement on the European Economic Area).

The judgment marks the first time that the EGC has adopted a substantive ruling on Article 22 of **Council Regulation (EC) 139/2004** on the control of concentrations between undertakings (**ECMR**), after the Commission updated its **Guidance** on the provision in March 2021.

### **Commission's New Guidance on Article 22 ECMR**

On March 26, 2021, the Commission adopted its new guidance on the application of the referral mechanism set out in Article 22 ECMR. Since that date, the Commission has started accepting referrals of transactions from EU Member States competition authorities (**NCAs**) that fall below the national merger control thresholds, as well as below the ECMR thresholds. Previously, in principle, EU Member States could only refer mergers to the Commission that fell below the ECMR thresholds, but met national merger

notification requirements, affected cross-border trade, and threatened competition in one or more EU Member State.

The Commission's change is significant for dealmakers: any transaction that may be seen as potentially raising competition issues could end up being reviewed by the Commission, no matter how small the target, and even after the transaction has closed. Moreover, there is no clear time limit on when closed transactions can be referred to the Commission. Additionally, the Commission's change in position is expected to increase the number of cases subject to parallel Commission and NCA merger control review.

The Commission changed its practice because of a perceived enforcement gap regarding potentially anti-competitive transactions falling below all merger thresholds in the EU. Although the Commission's renewed practice is not limited to specific sectors, digital and pharma/biotech mergers (as in *Illumina/Grail*) are of particular relevance.

Where the Commission accepts a referral, a standard "Form CO notification" to the Commission must be made. Form CO notifications are complex and may require in-depth preparation and work, and include a *de facto* mandatory pre-notification phase, which may last many weeks to months.

### **Background to *Illumina/Grail***

The judgement relates to the acquisition by Illumina, Inc. (**Illumina**) of Grail LLC (**Grail**).

Illumina is a company active in the large-scale analysis of genetic variation, particularly nucleic acid sequencing technologies. Grail is an American biotech company that has developed a multi-cancer early detection blood test.

On Sept. 20, 2020, Illumina and Grail entered into an agreement by which Illumina would acquire Grail. One day later, the two companies announced the proposed transaction through a press release.

Although the proposed transaction did not meet the ECMR thresholds, the Commission did receive a complaint about the transaction. The Commission entered into discussions with the complainant and various NCAs – including those of Germany, Austria, Slovenia, and Sweden. With reference to the 2021 Commission's Guidance, the Commission indicated that the proposed transaction would fall under Article 22 ECMR. Not long afterwards, on March 9, 2021, the French NCA submitted a request for the Commission to investigate the proposed transaction.

The Commission found that the transaction between Illumina and Grail was capable of affecting trade between EU Member States and would significantly threaten the competition in the internal market in various EU Member States. As a result of these findings, the transaction was not allowed to proceed. Notwithstanding this, *Illumina/Grail* closed the transaction while the Commission's review was pending.

On April 28, 2021, Illumina **appealed** the Commission's decision which resulted in the EGC's judgment. Cited grounds for the appeal included the Commission's lack of competence to assess the transaction and the late request of the Commission for notification.

### **Findings of the EU General Court**

The EGC ruled that a textual interpretation of Article 22 ECMR makes clear that an EU Member State is entitled to refer any concentration to the Commission if the cumulative requirements set out therein are

met. This is irrespective of the existence or scope of national merger control rules. The EGC's reasoning is as follows:

- Although historically aimed at EU Member States without a national merger control regime, Article 22 ECMR and its referral system may also be used by EU Member States which do have their own merger control system.
- The EGC further rules that by means of a teleological interpretation, referral mechanisms such as those in Article 22 ECMR are an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid nature, is not capable of covering all concentrations which are deemed to merit examination at European level.

## Conclusion

*Illumina/Grail* shows that the Commission is serious about Article 22 ECMR referrals. This trend is bound to continue. Indeed, the EGC's judgment is expected to strengthen the Commission's resolve to reviewing so-called "killer acquisitions", including in the pharma/biotech and digital sectors, that are not notifiable under EU and national merger control regimes.

Therefore, now more than ever EU merger control review will need to be part of any mergers and acquisitions deal contemplation – irrespective of where in the world the deal is intended to take place. There are various options available to merging parties, depending on their desired strategy and the complexity of the case, to seek guidance from the authorities. As an example, one option to consider may be for parties to contact the Commission to determine whether the Commission is likely to accept – or even invite – a referral request by the NCAs.

In addition, consideration will need to be given to Article 12 of the soon-to-be adopted EU **Digital Markets Act (DMA)**, under which designated "gatekeepers" will have an obligation to inform the Commission of any intended concentration prior to implementation, irrespective of whether it is notifiable to the Commission or to an NCA. Presumably, the Commission may be able to make use of Article 22 ECMR to invite EU Member States to refer the case to Commission if the case is outside the Commission's jurisdiction. The DMA may serve as an important source of information to the Commission in this regard.

Finally, the complexity for transactions is further increased by (a) future notifications under the proposed EU Foreign Subsidies Regulation regime, and (b) pre-closing submissions pursuant to national foreign investment review/national security regimes, on which we **reported** recently.

## Authors

This GT Alert was prepared by:

- **Dr. Christoph Enaux** | +49 30.700.171.140 | [christoph.enaux@gtlaw.com](mailto:christoph.enaux@gtlaw.com)
- **Dr. Robert Hardy** | +31 20 301 7327 | [Robert.Hardy@gtlaw.com](mailto:Robert.Hardy@gtlaw.com)
- **Dr. Lucas Wüsthof** | +49 30.700.171.236 | [lucas.wuesthof@gtlaw.com](mailto:lucas.wuesthof@gtlaw.com)

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