10 September 2024

EU Merger Control

Highest EU Court Quashes Commission's Merger Call-in Practice

INTRODUCTION

On 3 September 2024, the Court of Justice of the European Union, in its judgment relating to Illumina's acquisition of Grail,[1] held that the European Commission acted *ultra vires* by asserting jurisdiction over non-reportable mergers under its expanded Article 22 EUMR referral policy introduced in 2021. The judgment removes the risk of EU Member States with merger control laws referring mergers to the Commission where the relevant national competition authority does not have jurisdiction to review under those laws.

However, legal certainty has not been fully restored due to certain Member States' own call-in powers, which in turn may allow the Commission to continue reviewing below-threshold mergers following Article 22 referrals from those Member States. *Ex-post* antitrust investigations of non-reportable mergers by the Commission or national competition authorities in the EU also remain possible but are less likely to play a prominent role. Even less likely seems a legislative reform.

JUDGMENT

In September 2020, Illumina, the world's largest DNA-sequencing technology company, agreed to (re-)acquire sole control of Grail, which develops multi-cancer early detection blood tests. At the time, Grail had no turnover in any EU Member State. It did not, therefore, require notification to, and approval from, the Commission prior to its implementation. The planned merger also did not require merger control approval in any other Member State under applicable national merger control laws.

However, following the announcement of its revised Article 22 referral policy in September 2020, the Commission sent letters to all Member States in January 2021, informing them about the possibility of

referring the planned *Illumina/Grail* merger to the Commission for review under Article 22 of the EU Merger Regulation (EUMR). Article 22 allows Member States to refer mergers without an EU dimension to the Commission for review where the merger threatens to significantly affect competition in the EU.

Three months later, in March 2021, the French *Autorité de la Concurrence* made an Article 22 request, notwithstanding that it did not have jurisdiction to review the merger under French merger control law itself. The Commission accepted the request, reviewed and subsequently prohibited the merger, ordering Illumina – which had, in the meanwhile, implemented the merger – to implement interim measures, unwind the transaction and pay a (hefty) gun-jumping fine (EUR 432 million).

The key question before the Court was whether Article 22 EUMR gave the Commission the power to accept referral requests from Member States that had no jurisdiction to review the transaction under their national merger control laws. At first instance, the General Court sided with the Commission holding that Member States could request the referral of a merger without EU dimension to the Commission irrespective of whether the referring Member State's authorities had jurisdiction to review the transaction itself.

On appeal, the Court disagreed, emphasising that Article 22 EUMR could not be construed as a "corrective mechanism" being intended to fill a perceived gap in the merger control system.[2] Such an interpretation would undermine the "effectiveness, predictability and legal certainty that must be guaranteed"[3] in merger control processes. Furthermore, the Court held that determining jurisdiction by reference to criteria relating to turnover was an "important guarantee of foreseeability and legal certainty".[4]

On this basis, the European Court of Justice annulled the General Court's judgment and the Commission's decisions accepting the Article 22 referral request. This, in turn, removes the legal basis for the Commission's previous decisions ordering interim measures and the unwinding of the Illumina/Grail merger, and imposing the EUR 432 million gun-jumping fine on Illumina, which the Commission subsequently withdrew on 6 September 2024.

IMPLICATIONS

As a result of the judgment, the Commission will have to reverse its Article 22 EUMR referral policy, adopted on 26 March 2021 and first applied in *Illumina/Grail*. However, in their initial reaction to the judgment, the Commission already emphasised its continued interest in "surgical, focused intervention"[5] in relation to below-threshold transactions which pose a threat to innovation (*i.e.*, high-value mergers involving acquisitions of nascent players with little or no turnover; regularly referred to as "killer acquisitions").

In this context, the Commission itself acknowledged that the perceived enforcement gap was narrow with only "few cases" being problematic. In fact, over the past three years since the adoption of its revised Article 22 referral policy, the Commission found that 97% of the below-threshold transactions that were looked at did not require a review. This should not come as a surprise since notification thresholds in Austria

and Germany (transaction-value-based) as well as Spain and Portugal (market-share-based) certainly contribute to narrowing any perceived "gap".

This means that, including for proportionality reasons[6], any legislative reform of the EUMR (*e.g.*, by lowering the existing turnover thresholds) is unlikely. Furthermore, following the judgment of the European Court of Justice in *Towercast*,[7] *ex-post* antitrust investigations of non-reportable mergers by the Commission or the national competition authorities remain possible but are less likely to play a prominent role bearing in mind the inherent procedural and substantive challenges associated with *ex post* reviews.

Instead, most importantly, based on its public reaction to the judgment, the Commission can be expected to continue using Article 22 EUMR by accepting referrals from the growing number of Member States (including, currently, Denmark, Hungary, Ireland, Italy, Lithuania and Sweden) with jurisdiction over below-threshold mergers due to their broad call-in powers, some even in the absence of target turnover in the relevant territory.[8]

In addition to Luxemburg as the only Member State without an *ex ante* merger control regime which has always had (but, until earlier this year, never used) the possibility to make Article 22 referral requests, in practice, EU Member States may thus continue to be able to refer mergers to the Commission provided that they have jurisdiction to review or call-in the merger under national law – irrespective of whether national notification thresholds are met.

Such a referral mechanism based on national call-in powers would likely give rise to further jurisdictional challenges in the future since it seems difficult to reconcile with the requirements of foreseeability and legal certainty stressed by the Court in its judgment (in fact, the Court noted that "it is open to the Member States to revise downwards their own thresholds determining competence **based on turnover**"[9]) as well as international law as raised by AG Nicholas Emiliou in his Opinion.[10]

In the meantime, however, and absent any statement by the Commission to the contrary, deal makers in particular in the tech and pharma sectors are well-advised to take such referral risk from Member States with broad call-in powers seriously and, where appropriate, address that risk in their agreements (including condition precedents). Gatekeepers under the Digital Markets Act (DMA)[11] are also on notice that their below-thresholds deals may still get referred to the Commission as a result of their information obligation pursuant to Article 14 DMA.

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ENDNOTES

1 Case C-611/22 P *Illumina v Commission* [2024] EU:C:2024:677.

2 *Id.*, paragraph 200.

3 *Id.*, paragraph 206.

4 *Id.*, paragraph 209.

5 Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association, Florence (Italy), 6 September 2024.

6 *Id*.

7 Case C-449/21 *Towercast* [2023] EU:C:2023:207.

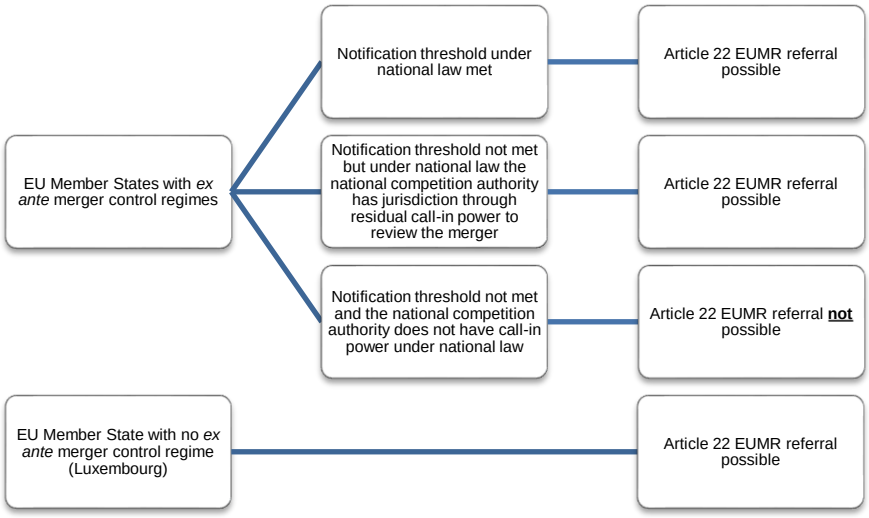
8 The Italian competition authority, for example, has the power to review a merger where the total worldwide turnover of the merging parties exceeds EUR 5 billion and the transaction gives rise to competition concerns in Italy, even if the merging parties do not meet the notification threshold.

9 Case C-611/22 P *Illumina v Commission* [2024] EU:C:2024:677, paragraph 217 (emphasis added).

10 Opinion of AG Emiliou in Case C-611/22 P *Illumina v Commission* [2024] EU:C:2024:264, paragraph 221.

11 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

SUMMARY OF ARTICLE 22 EUMR REFERRALS FOLLOWING THE JUDGMENT



Note: In Luxembourg, a draft bill, which would introduce a mandatory, pre-closing merger control review regime, is currently pending parliamentary approval.

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