

# Kluwer Competition Law Blog

## EU General Court Confirms European Commission's Article 22 EUMR Referral Policy

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On 13 July 2022, the General Court of the European Union confirmed the European Commission's jurisdiction to review the Illumina/Grail transaction following a referral pursuant to Article 22 EUMR. The judgment is an important endorsement of the EC's recent change in its Article 22 referral policy, and may embolden the EC to call in for review certain transactions where it may have concerns (in particular suspected so-called 'killer acquisitions') even where the transaction does not fulfill any merger control thresholds in the EU.

### Change in EC referral policy

In March 2021, the European Commission (EC) published a guidance paper<sup>[1]</sup> (Guidance Paper) that, with immediate effect, encouraged national competition authorities to refer certain transactions to the EC for review even where they do not meet the national merger control thresholds of the referring Member States.

Under Article 22 of the EU Merger Regulation (EUMR), a Member State may request the EC to review a transaction (not meeting EU or national merger control thresholds) that:

- affects trade between Member States; and
- threatens to significantly affect competition (established on a prima facie basis).

Article 22 EUMR, that has been in force since the entry into force of the EUMR in 1990, was originally designed to deal with the situation of Member States that, at that time, had no merger control rules. With the progressive implementation of national merger control regimes in all Member States (apart from currently Luxembourg, although it is expected to introduce a merger control regime), the EC had a longstanding practice of discouraging referral requests under Article 22 EUMR from Member States that did not themselves have power to review the transaction at stake under their own national rules.

In March 2021, the EC decided to change this practice and adopt a new policy. The driver behind the policy change was to address a perceived enforcement gap regarding the review of so-called 'killer acquisitions' that fall below the thresholds at EU or Member State level (acquisitions by incumbents of start-ups or nascent competitors that might otherwise have played a significant competitive role in the market, especially in the pharma and digital industries where such start-ups or nascent companies may not yet generate substantial turnover to trigger any merger filing requirements). The EC initially considered amending the EUMR's merger control thresholds to include a transaction value threshold in order to address the perceived enforcement gap, but instead decided to implement this policy change with respect to Article 22 referrals that required no amendment to the EUMR.

### **Transactions targeted by the Guidance Paper for referral**

The Guidance Paper states that transactions will be appropriate for an Article 22 referral where the turnover of at least one of the parties 'does not reflect its actual or future competitive potential'. In its assessment, the EC may take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.

According to the illustrative list in the Guidance Paper, cases suitable for referral include transactions where the target:

- is a start-up or recent entrant with significant competitive potential;
- is an important innovator or is conducting potentially important research;
- is an actual or potential competitive force;
- has access to competitively significant assets (raw materials, infrastructure, data or intellectual property rights) and/or provides products or services that are key inputs/components for other industries.

### **Referral of Illumina/Grail to the EC**

As the first case under the new Article 22 referral policy, the EC invited national competition authorities to request a referral of the Illumina/Grail transaction. France made a referral request in March 2021, and this request was joined by Belgium, Greece, Iceland, the Netherlands and Norway.

Illumina is a supplier of next generation sequencing (NGS) systems for genetic and genomic analysis (including NGS instruments, consumables and ancillary services). Grail is a customer of Illumina and develops blood tests for the early detection of cancer (using the NGS systems). The USD 7.1 billion transaction did not meet the review thresholds the EUMR or any national merger control rules, since Grail had no sales in the EU at all. Illumina founded Grail in 2016 and owns 14.5% of the company.

In July 2021, the EC opened an in-depth phase II investigation on the basis of concerns about the impact of the transaction on the development and supply of NGS-based

cancer detection tests. The EC's concerns were based on non-standard theories of harm, namely threats to future competition in a vertical context. The EC was concerned that Illumina could engage in vertical input foreclosure strategies given its leading position in the NGS systems that are crucial inputs for the development and commercialization of NGS-based cancer detection tests such as those offered by Grail. In particular, the EC appears to have had concerns that Illumina might have the ability and incentive to limit innovation efforts that could lead to alternatives to Grail's technology.

While the EC's review of the transaction was ongoing, the parties closed the transaction in August 2021. Subsequently, the EC started a gun-jumping investigation against Illumina for infringing the EUMR's standstill obligation. The EC also imposed interim measures that require Grail to be kept separate from Illumina and be run by an independent hold separate manager.

In April 2021, Illumina challenged before the EU's General Court (supported by Grail) the EC's decision to accept jurisdiction to review the transaction pursuant to Article 22(3) EUMR, and sought its annulment under an expedited procedure.

Illumina also filed legal proceedings in France and the Netherlands to try to stop the national competition authorities in these countries from requesting a referral, but in both jurisdictions these proceedings failed.

## Snapshot overview of key dates

21 September 2020	Public announcement of the Illumina/Grail transaction.
7 December 2020	EC receives a complaint concerning the transaction.
19 February 2021	EC sends a letter to the EU Member States (the 'invitation letter') inviting them to send a referral request under Article 22.
9 March 2021	French competition authority sends a referral request. (subsequently joined by Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities)
11 March 2021	The EC informs Illumina and Grail of the referral request (the 'information letter').
31 March 2021	EC publishes Article 22 guidance.
19 April 2021	EC accepts referral requests.
16 June 2021	The proposed transaction is notified to the EC.
18 August 2021	Illumina announces that it has completed the acquisition of Grail.
20 August 2021	EC announces that it has decided to open an investigation for gun-jumping.
29 October 2021	EC adopts interim measures.

## GC ruling

### *Admissibility*

The GC clarified that an EC decision accepting a referral request is an act that can be challenged as such, including because the transfer of jurisdiction to the EC could delay the implementation of the concentration unduly if it was unlawful. In the context of the French proceedings, the French courts found that the referral request by a national competition authority cannot be challenged by the undertaking concerned before the national courts because such referral cannot be severed from the EC's merger review.

## *Confirmation of jurisdiction under Article 22*

Illumina, supported by Grail, argued that the EC could not accept a referral request under Article 22 where the Member States making that request are not entitled, under their national merger control rules, to examine the transaction which is the subject of that request.

The GC applied a literal, contextual, teleological and historical interpretation, concluding as follows:

- Article 22 provides for the following four cumulative conditions that must be met: (i) the request must be made by one or more Member States; (ii) the transaction must satisfy the definition of ‘concentration’ without meeting the thresholds for European dimension; (iii) the transaction must affect trade between Member States; and (iv) the transaction must threaten to significantly affect competition within the territory of the Member State or States which made the referral request.
- The wording of Article 22 (1), in particular the use of the expression ‘any concentration’, makes it clear that a Member State is entitled to refer any concentration to the EC which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules.
- Although the referral mechanism the EC established was originally to be used in respect of Member States without their own merger control system, its applicability is not limited to that situation alone. The legislature’s intention was to strengthen the application of EU competition law to transactions with cross-border effects, to strengthen the ‘one-stop shop’ principle, and to alleviate the problem of multiple filings.
- The extent of the EC’s power to review mergers depends primarily on the fulfilment of the turnover thresholds which define European dimension, but also, in the alternative, on the referral mechanisms under Article 22.
- Referral mechanisms 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 merit examination at European level.’ Article 22 provides the flexibility necessary for the examination, at EU level, of concentrations which are likely to significantly impede effective competition in the internal market which, because the turnover thresholds have not been exceeded, would otherwise escape control under the merger control systems of both the European Union and the Member States.
- The EC’s interpretation does not disregard the principle of conferral of competences, the principle of subsidiarity, or the principle of proportionality. The GC states that the referral mechanism under Article 22 constitutes only a subsidiary power enabling ‘in certain specific cases and under very specific conditions’ a transaction to be examined by the EC as a corrective mechanism.

The EC rejected as ‘unsubstantiated’ the argument that there would be a high number of transactions which do not have a European dimension and do not fall under a national merger control system which would be affected by the EC’s current interpretation of Article 22.

### *Referral request made in due time*

Illumina, supported by Grail, argued that the referral request was submitted out of the 15 working day time limit prescribed by Article 22.

The GC rejected the plea, holding as follows:

- A referral request under Article 22 must be made within 15 working days of the concentration being ‘made known’ to the Member State concerned, if no notification of that concentration is required.
- ‘Making known’ should be understood as the active transmission of information to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral (in particular whether the concentration affects trade between Member States and threatens to significantly affect competition) have been satisfied. This view is consistent with the findings of The Hague Court when Illumina challenged the Dutch competition authority’s decision to join the French authority’s referral request (see our previous alert here).
- The invitation letter in this case constituted ‘making known’ referred to. The referral request was therefore made in due time.

Illumina argued that the EC’s delay in sending the invitation letter was contrary to the fundamental principle of legal certainty and the principle of good administration.

The GC also rejected this plea, albeit being sympathetic to the delay. It held:

- The EC is required to comply with a reasonable time limit, particularly in the context of merger control, given the fundamental objectives of effectiveness and speed underlying the Merger Regulation.
- Although there was no time limit for the EC to do so, the period of 47 working days between the complaint and the invitation letter was unreasonable.
- However, since it had not been established that the EC’s failure to comply with a reasonable time limit affected the undertakings’ concerned capacity to defend themselves effectively, this delay could not justify the annulment of the contested decision.
- The GC rejected Illumina’s arguments made at the hearing that its rights of defence had been breached by the EC exceeding a reasonable time limit on the grounds that the EC should have contacted the merging parties and heard their views in the period prior to sending the invitation letter so that they could submit comments and correct certain information. The GC considered that these explanations were ‘vague’, and not sufficient to establish an infringement of the rights of defence. It stated that the invitation letter was merely a preparatory act in the context of the procedure leading to the adoption of the decision to accept the referral request, and that the merging parties were in a position effectively to make known their views before the decision to accept the referral request was adopted.

No breach of the protection of legitimate expectations and legal certainty

Illumina, supported by Grail, claimed that the decision to accept the referral request infringed the principles of protection of legitimate expectations and legal certainty. It

claimed that Commissioner Vestager was clear in a statement (made in a policy speech on 11 September 2020) that the EC would not change its policy until it had published its Article 22 guidance, and that the guidance was eventually adopted only after the invitation letter was sent, i.e. in March 2021.

The GC rejected the pleas.

- In order to rely on the principle of the protection of legitimate expectations it is for the party concerned to establish that he or she received precise, unconditional and consistent assurances, originating from authorized, reliable sources, such as to lead him or her to entertain well-founded expectations.
- In the present case, Illumina failed to demonstrate the above circumstances. For instance, the September policy statement of Commissioner Vestager was made in a speech which concerned only the EC's general policy and did not mention specifically the Illumina/Grail transaction, which was only announced subsequently. In her speech, Vestager stated that the EC had a practice of 'discouraging' national authorities from referring cases which they did not have the power to review at national level, but she did not expressly preclude the referral of such transactions in the speech. Indeed Vestager had even in the same speech emphasized that the EC's previous referral practice was never intended to stop the EC from dealing with cases that could seriously affect competition in the single market.

### **Practical implications**

Although Illumina has already announced that it will appeal, the GC ruling will likely encourage the EC to use its new Article 22 referral policy more frequently to review certain transactions that fall outside the thresholds of the EUMR or national merger control thresholds where competition concerns could potentially arise.

The EC may choose to apply a low standard for fulfilling the requirements for an Article 22 reference: namely arguing that the transaction affects trade between Member States and threatens to significantly affect competition, without necessarily providing evidence at an initial stage that this is the case and pushing creative and not necessarily robust novel theories of harm. There is also a risk that such theories of harm remain untested before the EU Courts because in the EU merger control architecture effective court redress against prohibitions simply comes too late and companies have been at least until recently reluctant to challenge merger control decisions.

In the current landscape, merging parties are advised to factor in carefully and at the outset the possibility of an Article 22 referral in transaction timetables, closing conditions and risk allocation provisions in the deal documents.

In particular, the GC's findings on the deadline for when a referral request must be made raises complex procedural and timing issues for merging parties. The GC's definition for when a transaction is 'made known' means that, in practice, parties may have to consider sending 'mini-notifications' to all 27 EU Member States to make the transaction known and manage the risk of a referral and the initiation of the 15-day

deadline (although the deadline may not be triggered until the Member State considers that it has enough information to make an assessment). The gun-jumping risk can be addressed by closing prior to the EC informing the parties that a request for referral was made (as the standstill obligation does not apply before that moment), but this may raise other risks, such as the EC imposing interim measures and possibly eventually prohibiting the transaction and requiring that it be unwound.

For the avoidance of unnecessary regulatory uncertainty, it is hoped that the new policy will in practice only be used in a few specific cases and under very specific conditions, and not lead to an avalanche of transactions that fall below merger control thresholds being called in for review by the EC. However, there is a question as to how this plays out for example for digital transactions: the Digital Markets Act, which is expected to enter into force in October 2022, includes a requirement for large online platforms (so-called 'gatekeepers') to inform the EC of all intended acquisition of tech companies or any transactions that enable the collection of data. The information provided will be relayed to national competition authorities. The DMA explicitly states that the national competition authorities may use the information it has received to request the EC to examine a transaction under the Article 22 EUMR referral mechanism. Hence, in the digital field alone, this new approach may trigger a large amount of additional referrals.

[1] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases

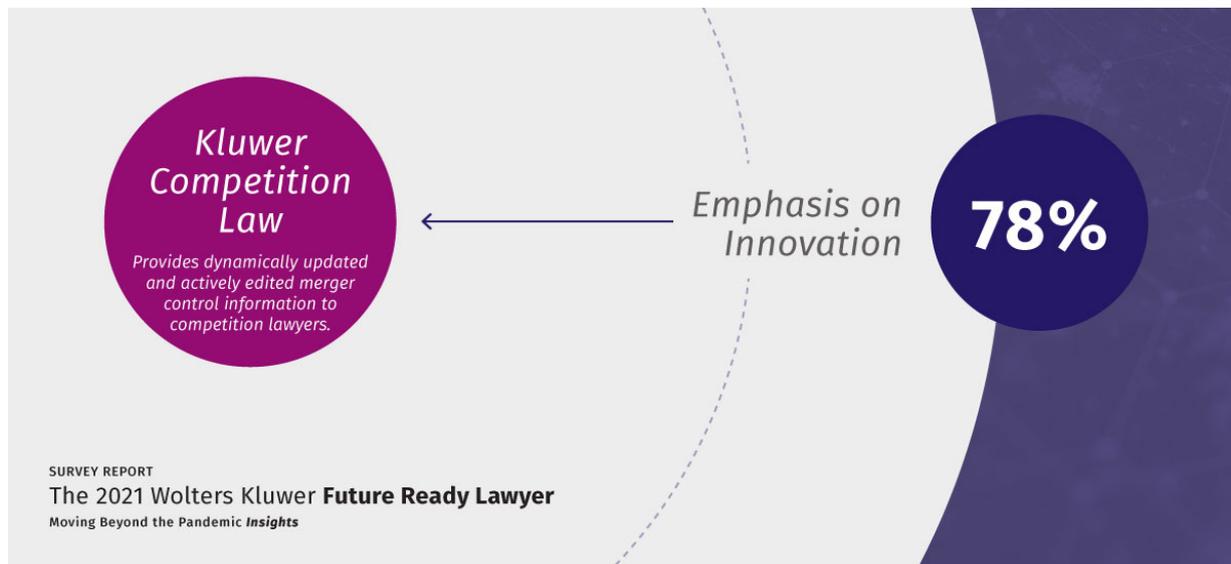
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