BRUSSELS À JOUR

An Illuminating Judgment

Markus Roehrig and Joachim Burger report on the latest developments from the European capital of competition law.

The General Court's judgment of 13 July 2022 in Case T-227/21 – Illumina/GRAIL, confirming the Commission's new approach to referrals pursuant to Article 22 EUMR.

Until March 2021, companies could confidently close a transaction which qualified for merger control neither under the EU Merger Regulation's (EUMR) rules nor in any EU Member State. But that closed door was kicked open when the Commission released its new guidance on Article 22 EUMR. In Illumina/GRAIL, the Court refused to shut that door, endorsing the Commission's view that it has jurisdiction to review a concentration referred to it by a Member State under Article 22 EUMR even if that concentration does not meet the national merger control thresholds of the referring Member State. What follows is a new era of uncertainty for dealmakers. Not only does the Court uphold the new referral policy as such, it also confirms the Commission's view that the deadline of 15 working days for a referral request runs only once the companies involved have actively informed the Member States of a deal potentially falling under Article 22 EUMR. So briefing papers or "mini notifications" to each and every Member State to obtain legal certainty? Companies and their advisors will need to adopt to the "new world" of merger control quickly. More cases may just be around the corner, as Commissioner Vestager has already announced that "we have a few acquisitions within our sights" prone to Article 22 EUMR. So time to sort the facts and identify the pitfalls to look out for.

Background

The judgment revolves around the Commission's revised approach to referrals under Article 22 EUMR, see our April 2021 edition. Article 22 EUMR allows Member States to request the Commission to examine a concentration that does not exceed EUMR

turnover thresholds, but may affect trade between Member States and threatens to significantly affect competition within the territory of the referring Member States.

Until 26 March 2021, if a merger did not meet national merger control thresholds, the Commission explicitly discouraged Member States from making a referral request. The Commission's new Article 22 guidance[1] has been nothing less than a complete reversal of that policy with the sole purpose of closing a perceived enforcement gap. Since the question of whether to notify a deal is dictated by the turnover achieved in preceding years, an increasing number of deals escaped regulatory scrutiny. Particularly so-called "killer acquisitions" of start-ups or "nascent" firms with low to zero turnover, as often seen in the digital economy or pharmaceutical sector, were a thorn in the Commission's side. To close that gap, the Commission decided to actively encourage Member States to refer cases which in their view fulfil the conditions of Article 22 EUMR. And to add to that, the Commission announced that it would proactively send out invitation letters asking for a referral according to Article 22(5) EUMR if it believes a transaction falls within the ambit of Article 22 EUMR.

The first to fall "victim" was US-based sequencing gene company Illumina's proposed acquisition of GRAIL, a US-based company developing blood tests for early cancer detection. The transaction signed in September 2020 was not notifiable in any jurisdiction: GRAIL did not achieve any turnover. But the Commission, following a competitor complaint, took the view that the products developed by GRAIL had a competitive significance (potential "game-changer" in the healthcare sector) that was not appropriately reflected by its – zero – turnover. Therefore, the Commission decided to send out invitation letters encouraging Member States to request a referral. And quite a number, the first being France, followed. Illumina challenged the Commission's subsequent referral decision on three grounds:

- **Jurisdiction**. The Commission has no power to accept referral requests made by a Member State if the concentration does not meet that Member State's national merger control thresholds, and thus no jurisdiction to review such concentrations under the EUMR.
- **Timing**. France's referral request was too late, as the deadline of 15 working days begins once the concentration is "made known" to a Member State, which according to Illumina is once a deal is publicly communicated. Illumina also argued that the 47 days the Commission took to send out the invitation letter after having received the competitor complaint violated the principles of legal certainty and good administration.
- **Legitimate Expectations**. The Commission acted contrary to the principle of legal certainty and violated Illumina's legitimate expectations by inviting Member States to refer the deal even before it announced its revised stance on Article 22 EUMR, even though it had publicly communicated that it would not implement its new policy before it had issued proper guidance.

1 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C (2021) 1959 final.

The Commission's New Referral Policy on Firm Legal Grounds?

The Court rejected Illumina's first plea in law and ruled that the Commission's interpretation of referrals under Article 22 EUMR is valid: The Commission has jurisdiction to review mergers even when they do not meet the national merger control thresholds in the Member State making a referral request under Article 22 EUMR, or in any Member State at all for that matter. To analyze the legality of the new approach, the Court engaged in a literal, historical, contextual and teleological interpretation:

- **Literal Interpretation**. The Court holds that Article 22(1) EUMR expressly uses the wording "any concentration" and contrary to the applicant's arguments, there is no indication in this wording that a referred concentration must also be notifiable under the applicable national merger control rules. Therefore, the mere fact that a company has zero turnover is in itself not relevant. As long as all conditions of Article 22(1) EUMR are met and there are potentially significant cross-border effects, the Commission is within its right to accept a referral request.
- **Legislative History**. The Court acknowledges that Article 22 EUMR was historically introduced for Member States that did not (yet) operate their own merger control system (back then Netherlands and Luxembourg). However, the Court points out that, even though Article 22 EUMR was intended mainly for such Member States, nothing in the legislative history of the EUMR indicates that it was by design limited to such Member States.
- **Contextual Interpretation**. According to the Court, the scope of Article 22 EUMR must be construed independent of, and cannot depend on, the Member States' respective national merger control rules. Then, there are three ways in which the Commission can obtain jurisdiction to review a concentration under the EUMR. In the first place, the Commission has jurisdiction if a concentration exceeds the turnover thresholds pursuant to Article 1(2),(3) EUMR. However, Article 1(1) EUMR explicitly states that this is without prejudice to Article 4(5) EUMR and Article 22 EUMR, both permitting a referral in case EU notification thresholds are not met. Accordingly, Articles 4(5) and 22 EUMR are alternative, "subsidiary" ways for the Commission to obtain jurisdiction under the EUMR.
- **The Provision's Rationale**. The Courts holds that Article 22 EUMR is "a corrective mechanism" and helps to achieve the main objective of the EUMR, i.e. to ensure effective control of all concentrations that might have significant cross-border effects on competition. But for the admittedly new flexible approach under Article 22 EUMR, transactions falling below EU and all national turnover thresholds would escape review. In other words: Just because the turnover is low, a concentration can still cause harm to consumers and the EUMR must enable the Commission to review such concentrations.

That is a rather textbook-like approach to interpreting the scope of Article 22 EUMR, or so it seems. While the provision's plain language surely supports the Court's reading of Article 22 EUMR, antitrust practitioners might feel a certain unease when it comes to some of the Court's sweeping statements. For example, the Court refers to Article 22 EUMR affording the Commission a "subsidiary power" to review concentrations.

However, if Member States decide not to submit a referral request, leaving aside political pressure, the Commission has no legal tools to enforce a referral and establish jurisdiction, even if a review by the Commission was in the EU's interest. Just how can Article 22 EUMR be said to afford a "subsidiary power" if the decision to refer remains solely at the Member State's level? Other findings are similarly unclear such as, for example, the Court's claim that a broad reading of Article 22 EUMR works to safeguard the "one stop shop" principle and increases legal uncertainty, as parties are relieved from applying, within the context of Article 22 EUMR, the "different criteria and concepts determining the scope of the merger control regimes existing in the member States [...] which, because of their unpredictable nature, were rejected by the Commission" when introducing the EUMR. However, split reviews are a risk inherent to the referral mechanism established in Article 22 EUMR and companies and their advisors have many years of experience applying the various thresholds that Member States have chosen to determine jurisdiction under their respective merger control regimes. And then there is the broad line statement that "control of concentrations that affect trade between Member States can be better achieved at EU level" – a statement that NCAs will not necessarily agree with.

There may be valid policy reasons for a review of killer-acquisitions and their potentially anti-competitive effects on an EU level. However, one wonders whether it would not be for the EU legislator to close any perceived enforcement gap, rather than the Commission adopting a new referral policy even if wholeheartedly backed by the Court (but overlooking the immense practical implications and the lack of a due process).

Knowledge Is Power And Trust Must Be Earned

The Court also rejected Illumina's additional arguments in its second and third plea, with far-reaching effects on deal timelines.

- **Deal Timeline**. Contrary to the applicant's arguments, the fact that a transaction is publicly reported is not sufficient to trigger the formal deadline for a referral request. Article 22(1) EUMR requires that the Member State making the request does so within 15 working days of the date on which the transaction was "made known to the Member State concerned". But the Court held that the term "made known" requires more than the NCA simply knowing about the transaction as such: It must enable the Member State to carry out a preliminary assessment as to whether the substantive conditions for a referral request under Article 22 EUMR are satisfied. And the Court goes even further: Even though it does not require an informal notification, the information to be submitted to Member States must be "comparable" to that provided in a notification. In practice, this means that to obtain legal certainty and to not risk late referral request impacting the overall timeline (as in the case at hand), a conservative approach might be best suited. Depending on the deal structure and entities involved, that could well lead to a chain of informal briefing papers or "mini notifications" to all 27 Member States – more on that later.
- **Post-Closing Scrutiny**. Even though the Court found that the period of 47 working days between receiving the competitor complaint and sending the invitation letter

to France was "an unreasonable period of time", this did not suffice to annul the Commission's referral decision. According to the Court, Illumina's ability to defend itself against a potential referral and its right to be heard was not impeded.This means, in practical terms, that even once the Commission obtains knowledge of a transaction, it can – even deliberately – delay the process considerably (the Article 22 EUMR guidance even states that referrals could be possible up to six months post-closing) as long as the parties have the possibility to defend themselves.

- **No Legimitate Expectations**. The Commission's previous practice to discourage Member States from referrals does not preclude an – even sudden – policy shift. A legitimate expectation only arises following "precise, unconditional and consistent assurances from the Commission", which Illumina did not receive. That is a notable statement and an extremely high bar to overcome: But since the policy is already in place since March 2021 and has to be factored into deal planning, it should – while frustrating for Illumina – be of lesser relevance going forward.

Implications for Dealmakers

So the new referral policy is here to stay (pending an appeal the Court of Justice) and the main challenge for dealmakers will be to to rule out risks of a referral as far as possible. But how? A few questions come to mind, which might also be for the Commission to answer:

- **Substantive Requirements for a Referral Request**. The Court has not provided further guidance on when a referral under Article 22 EUMR is mandated, beyond a mere reference to the vague requirements set out in the provision itself. So the Commission might want to think about an extended guidance – for companies and Member States alike – at what point an acquisition becomes a "killer acquisition" prone to Article 22 EUMR. A number of such deals, in particular in the digital economy and pharmaceutical sector, will cater to wider than national markets, increasing the risks of a referral. And if it is not a clear-cut case, the risk of a referral could hit you up to six months post-closing.
- **Mini Notification**. One solution to mitigate risks might be to send out informal briefing papers or "mini notifications" to all 27 or at least those Member States in which anti-competitive effects might arise. But the practical terms are unclear: In what language are such briefing papers accepted? And if a NCA is of the opinion that the information included is not sufficient, does the 15 working days deadline apply only once potentially extensive follow-up questions are answered? The fact that there is no guidance or due process for this makes it incredibly hard for businesses to assess the risk of a referral.
- **Commission as a Conduit**. Another solution might be that the Commission introduces a new form, in which the parties can describe a transaction potentially falling under Article 22 EUMR (e.g., on the nature of the business, market definition and market shares, competitive structure of the markets involved). This form could be send to the Commission, which in turn might provide this to the NCAs (e.g. via the ECN network). But again, and leaving aside the additional delays that the completion of forms tend to create: Would the Commission be willing to do so and would it in

their view already trigger the 15 working days deadline, providing comfort to the parties involved? In the absence of specific guidance and the commitment to follow a specific process, we think it is best to seek close contact with the Commission in early stages of deal planning. And once it is indicated that a deal might fall under Article 22 EUMR and which Member States are concerned, the respective authorities should be informed separately to trigger the 15 working days deadline as early as possible.

- **Split Reviews**. And what if a Member State without applicable thresholds refers, and another one having national jurisdiction does not? The risk of split reviews remains. Admittedly, this is inherent to Article 22 EUMR (which might, again, have called for a change of the EUMR), but will require additional coordination efforts. This is particularly the case in complex transactions: One might think of remedies and the differing views some NCAs and the Commission have on that part.

Next Steps

Illumina has announced that it will appeal the judgment to the European Court of Justice. It remains to be seen whether the appeal will go so far as sanction the far-reaching interpretation of the Commission's approach. But the policy is here to stay in the meantime: As long as the appeal is not handed down, it will continue to affect dealmakers and companies.

And Illumina will have to fight another battleground: As most of you will be aware of, Illumina and GRAIL decided to consummate the merger in August 2021 despite the Commission having initiated a Phase II investigation just one month earlier. That prompted the Commission to open a gun jumping inquiry and it followed up quickly after the 13 July 2022 judgment: Only 6 days later, the Commission send a Statement of Objections alleging that Illumina and GRAIL breached the EUMR by prematurely implementing the acquisition[2]. So more to expect on this sooner rather than later...

In the meantime, don't forget to follow us on LinkedIn for more updates on your favorite EU competition law topics!

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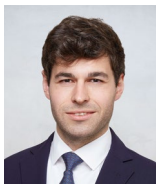

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2 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4604.