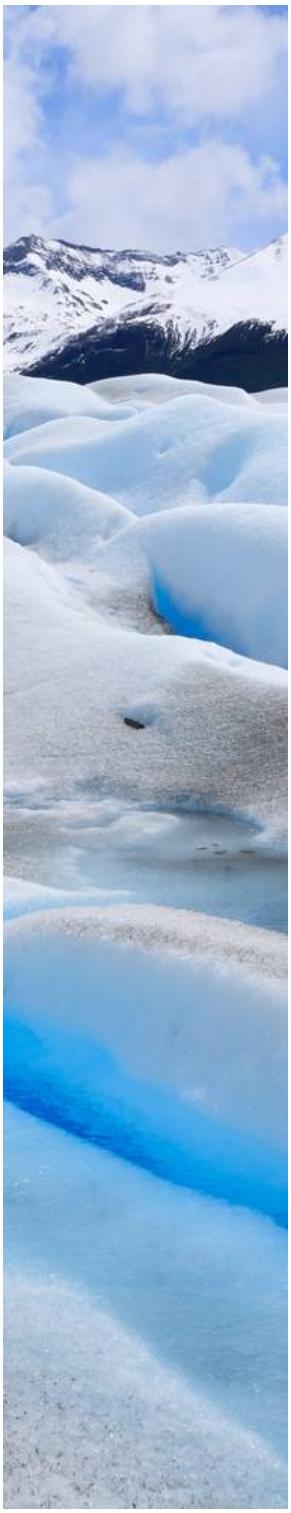


ARTICLE

MERGERS BELOW THRESHOLDS CAN INDEED BE CONTROLLED

Competition, Retail and Consumer Law | 22/07/22 |

On September 11, 2020, the European Commission (the "**Commission**") had announced its new approach to Article 22 of the Merger Regulation 139/2004 ("**Article 22**")[1]. From now on, the Commission can control mergers that do not exceed the national thresholds and for which the national authorities have asked to exercise such control, based on this disposition[2].

This new approach was then implemented in March 2021 in relation to the acquisition of Grail by Illumina.

Illumina is a US-based genomic sequencing company that develops, manufactures, and markets genetic analysis systems used in the development of cancer screening tests. Grail is a US biotechnology company that uses genomic sequencing to develop these tests.

On September 21, 2020, both companies had publicly announced the proposed acquisition by Illumina of the exclusive control of Grail (the "**Operation**"). Due to the low turnover of these two undertakings in the European Union, the Operation did not meet the EU control thresholds[3] or the national thresholds of any Member State[4].

Consequently, Illumina and Grail could normally have carried out the concentration without prior review and clearance by the Commission or by a national competition authority.

Following a complaint relating to this concentration, the Commission found that it did raise competition concerns. On February 19, 2021, it invited the national competition authorities (the "**Authorities**") to apply Article 22.

On March 9, 2021, the French Competition Authority submitted a request for referral of the review to the Commission, followed by several other Authorities. The Commission granted these requests and announced that the Operation should be notified.

Illumina and Grail then brought an action before the General Court of the European Union (the "**Court**") challenging these decisions (the "**Disputed Decisions**"), and thereby challenging the Commission's new approach to the application of Article 22.

In a judgment dated July 13, 2022[5] (the "**Judgment**"), the Court confirmed the Disputed Decisions and approved the Commission's new approach to the application of Article 22.

The Judgment first rules on the admissibility of the action (1.), confirms the validity of the Disputed Decisions (2.) and specifies the modalities of implementation of Article 22 (3.).

1. The decision of the Commission to review the Operation could be disputed

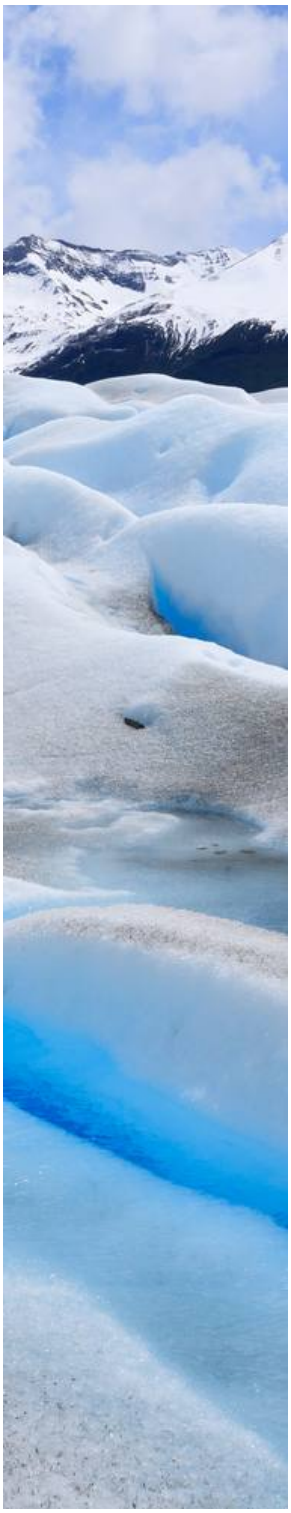
The Commission, as well as several Authorities thought that the action was not admissible and therefore should be dismissed, in particular because the Disputed Decisions were merely preparatory acts to the actual procedure of reviewing the Operation.

The Court reminds that all decisions "*which are intended to have binding legal effects*" may be challenged[6]. The effects of the disputed act must however be capable "*of affecting the interests of the applicant by bringing about a distinct change in his or her legal position*"[7].

The Court notes that the Disputed Decisions were such that they submitted the Operation to merger control, although these did not have a community dimension. Had these decisions not be adopted, the Operation would not have been examined and subjected to the constraints inherent to merger control, in particular to the obligation of suspension, but could have been carried out immediately in the European Union.

It concludes that the Disputed Decisions constitute acts which affected the interests of Illumina and Grail, and thus can be challenged. The appeal was therefore admissible.

2. The Commission can review mergers below national thresholds…



According to Illumina and Grail, Article 22 could only be used to remedy the absence of national merger control systems in certain Member States[8], and to "*prevent a concentration affecting* [their] *territory from not being subject to any scrutiny*"[9].

Consequently, this disposition should not allow the Commission to accept a request for referral issued by a Member State which has its own merger control system, but whose thresholds were not met by the operation.

The Court first notes that Article 22 concerns "*any concentration*", whether it meets national thresholds or not, and does not differentiate and does not differentiate between Member States with their own merger control legislation and others[10].

It goes on to explain that the first introduction of Article 22, allowing member states that didn't have a merger control systems to have the Commission examine operations which could have negative effects on their territories[11], does not imply that this mechanism applies exclusively in such circumstances.

Finally, the Court reminds that the purpose of the Regulation "*is to permit effective control of all concentrations with significant effects*" on the competition in the Union[12]. However, the Commission's power to examine such operations depends mainly on whether the turnover thresholds are exceeded: this rigid system has its flaws, since an operation that is likely to have negative effects on competition and on the market whilst not exceeding these thresholds would not normally be controlled[13].

Article 22, together with the other referral mechanisms provided for in the Regulation, therefore constitutes a "*corrective mechanism*", which creates "*a subsidiary power of the Commission*", giving it the required flexibility to examine potentially problematic concentrations, and allowing it to effectively pursue the purpose of the Regulation[14].

The Court therefore confirms that Article 22 can be applied to an operation that does not meet national control thresholds.

3. … but it must do so in a within a reasonable timeframe

Illumina and Grail criticized the tardiness of the request for referral and of the Commission's invitation, as the Authorities and the Commission had been aware of the transaction before Article 22 was triggered.

When the concentration does not require notification in any Member State, Article 22 provides that the request for referral to the Commission must be made "*within 15 working days of the date on which the concentration was* […] *made known to the Member State concerned"*.

The Regulation does not specify what "*made known*" involves: the question was whether it implies the spontaneous transmission of information to the Authorities, or whether the mere knowledge of the existence of the transaction by the latter is sufficient to trigger the 15-day time limit, which is what Illumina and Grail argued.

The Court opts for the first solution: the "communication" must allow the Member State to assess whether the conditions of Article 22 are met and to determine whether it is appropriate to request a referral to the Commission.

This entails "*the active transmission* [by the undertakings involved in the Transaction] *of information*" that allows this analysis to be carried out.

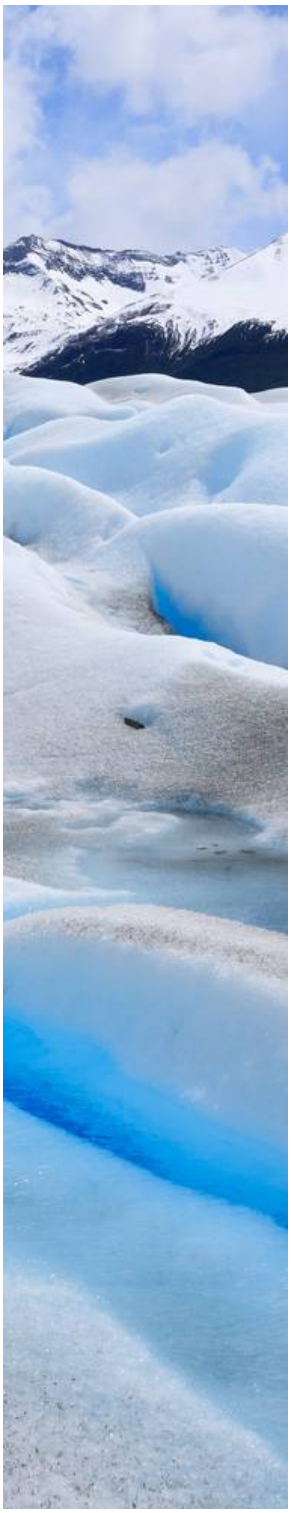
In other words, the burden of communication lies with the companies.

Illumina and Grail had not actively provided any information about the Operation to the Authorities. The latter only became aware of the Operation on February 19, 2021, when the Commission sent them a letter inviting them to refer the matter for review.

The Court rules that it was this letter which allowed the Authorities to make a preliminary assessment of the conditions for the application of Article 22, and which constituted the "communication" that triggered the 15-day time limit. As the request for referral was made on 9 March 2021, the deadline was met.

That being said, the Court rules in favor of Illumina and Grail on their second argument. The companies considered that the letter dated February 19, 2021 had been sent too late by the Commission, which knew of the existence of the Operation as early as September 2020 through the press release published by Illumina.

Article 22 does not impose an express deadline on the Commission to inform Member States of the existence



of a concentration that meets the criteria for a referral.

However, general principles of European law require "*to act within a reasonable time in conducting administrative proceedings relating to competition policy*"[15]. Moreover, in respect to merger control, "*the competition authority competent to examine a given concentration must be capable of being identified at the earliest possible moment*"[16].

The Commission became aware of the transaction on 7 December 2020, at which point it was able to begin its analysis. The Court also points out that most of the elements on which the Commission relied to conduct its analysis were already public at the time of the complaint and hence that the delay was not justified. It concludes that "*the invitation letter was sent* [on February 19, 2021] *within an unreasonable period of time*"[17].

However, this does not lead to the annulment of the Disputed Decisions as Illumina and Grail did not prove that their rights of defence were violated.

The position adopted by the Court has important practical consequences.

It confirms that undertakings must, for their concentrations below thresholds, carry out a preliminary review with regard to Article 22.

It also confirms that once this review has been carried out, and provided that a risk is identified, they must liaise spontaneously with the competition authorities of the Member States concerned.

The French Competition Authority, which supported the Commission's new approach and was directly involved in the application of Article 22 to the Operation, warmly welcomed the Court's decision[18].

This case is far from over.

The review of the merits of the Operation is still underway, in phase 2 (in-depth review), and it is very likely that commitments will be required for clearance.

In addition, on 19 July 2022, the Commission sent a statement of objection to both companies, that the Operation went through ahead of time, in breach of the standstill obligation laid down in the Merger Regulation ("*gun jumping*")[19].

All this while no control threshold was crossed.

[1] Article 22 establishes a referral mechanism allowing a national competition authority to ask the Commission to examine "*any concentration*" that does not meet community thresholds, "*but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request*". The Commission can also encourage member states to present such a request, when it considers that the above-mentioned criteria is met.

[2] See our article of April 27, 2021 on this matter: https://www.august-debouzy.com/en/blog/1678-mergers-below-thresholds-can-now-be-controlled

[3] Article 1 of the Regulation states that a concentration operation has community dimension when the combined worldwide turnover achieved by all concerned undertakings exceeds 5 billion euros, and the turnover realised individually by at least two of these undertakings in the European Union exceeds 250 million euros.

[4] In France, article L.430-2 of the Commercial Code states that a concentration operation must be notified to the Competition Authority when the combined worldwide turnover excluding VAT of all concerned undertakings is above 150 million euros, the turnover excluding VAT realised by at least two of these undertakings in France is above 50 million euros, provided the operation does not have community dimension.

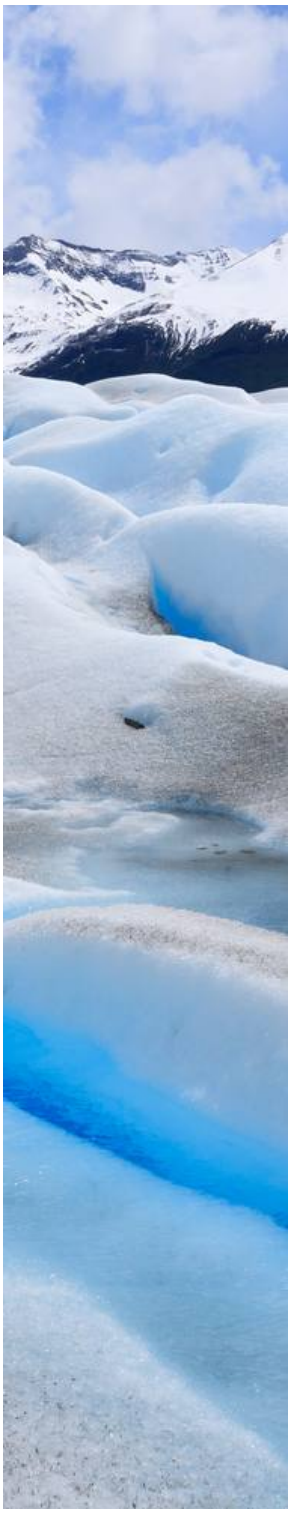
[5] Decision of July 13, 2022, case T-227/21, Illumina / Grail.

[6] Paragraph 63 of the Judgement

[7] Paragraph 65 of the Judgement

[8] For instance Luxemburg

[9] Paragraph 85 of the Judgement



[10] Paragraph 89 and seq. of the Judgement

[11] The mechanism was introduced by the Regulation (CEE) n°4064/89 of December 21, 1989, which was succeeded by the Regulation, on the initiative of the Netherlands, which did not have an internal merger control : hence why Article 22 is sometimes referred to as “the Dutch clause”.

[12] Paragraph 140 of the judgement

[13] It is the case for “killer acquisitions”, that is to say mainly the acquisition of innovating young companies, whose potential is not reflected by a high turnover, by more established companies, in order to neutralize the competition that they could create and thus, reinforce their position.

[14] Paragraph 142 of the Judgement.

[15] Paragraph 223 of the Judgement.

[16] Paragraph 226 of the Judgement.

[17] Paragraph 239 of the Judgement.

[18] https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/rachat-de-grail-par-illumina-lautorite-se-felicite-de-larret-du-tribunal-de

[19] https://ec.europa.eu/commission/presscorner/detail/fr/IP_22_4604