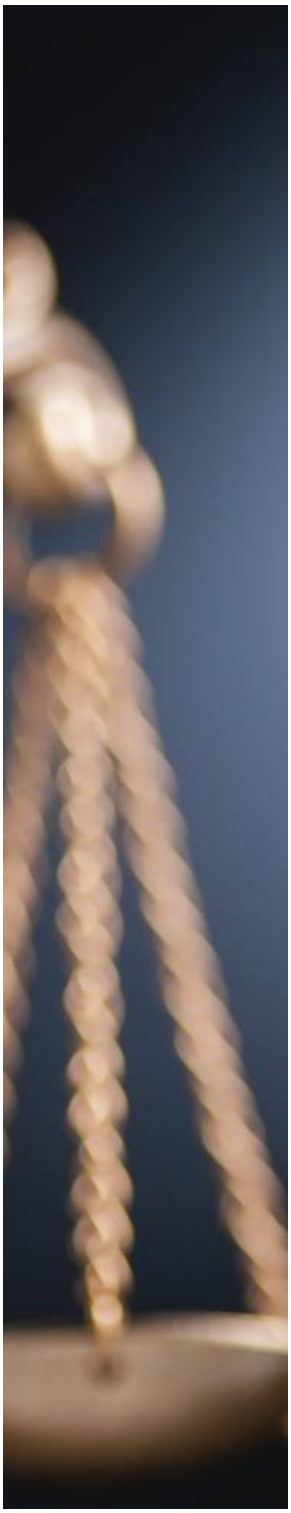


ARTICLE

ILLUMINA/GRAIL CASE: THE ADVOCATE GENERAL OF THE COURT OF JUSTICE PROPOSES SETTING ASIDE THE DECISION BY THE GENERAL COURT

European Law | 17/04/24 | Marc Mossé David Zygas

The Illumina/Grail saga warrants attention because it concerns fundamental principles of EU law [INTERVIEW WITH PR. D. BOSCO]: in his very dense opinion, Advocate General Emiliou proposed setting aside the decision by the General Court and the decisions taken by the Commission based on a literal, contextual and teleological interpretation of the law applicable to merger control.

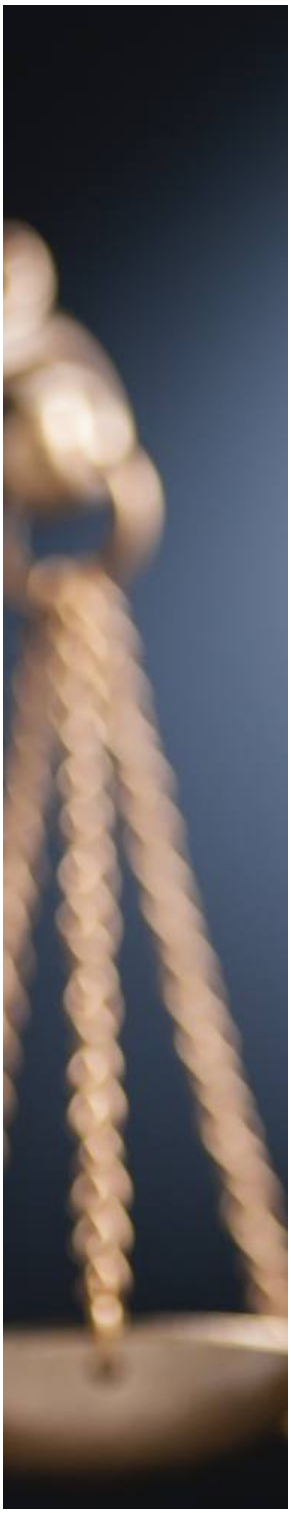
By way of reminder, Illumina Inc., a company headquartered in the United States that supplies sequencing- and array-based solutions for genetic and genomic analysis, sought to acquire sole control over Grail LLC, another company headquartered in the United States that develops blood tests for the early detection of cancers. The transaction was not notified to the European Commission (the "Commission") as under the merger control revenue thresholds set by the Regulation, it did not have a European dimension. It was also not reported to Member States in the EU or the EEA since it also did not fall within the scope of the applicable national merger control laws.

However, following a complaint, the Commission invited Member States to make a referral to the Commission under Article 22 of the Regulation. On March 9th, 2021, the French competition authority, joined by its Belgian, Greek, Islandic, Dutch, and Norwegian counterparts, asked the Commission to examine this concentration on the basis of Article 22 and, by decision of April 19th, 2021, the Commission accepted their request and sent an information letter to the two companies.

Illumina and Grail appealed against the Commission's decision. By judgment of July 13th, 2022,[1] **the General Court dismissed their appeal** and upheld the decisions by the Commission. Illumina and Grail then went before the Court of Justice of the European Union (the "Court of Justice"), lodging appeals on September 22nd and 30th, 2022 respectively.

Advocate General Nicholas Emiliou considers that the new construction made by the European Commission of Article 22 of Regulation No. 139/2004 of January 20th, 2004 on the control of concentrations between undertakings[2] (the "Regulation"), as accepted in the first-level proceedings by the General Court of the European Union (the "General Court"), is not supported at law and that the Commission's decisions accepting the referral by the national authorities of the concentration between Illumina and Grail should accordingly be set aside. In the conclusion to his opinion, which addresses a number of key issues, the Advocate General takes the view that Member States cannot ask the Commission to examine a merger that does not have a Community dimension unless they are competent to review the merger under their national law. According to the Advocate General, **the Commission's construction of Article 22 of the Regulation, as approved by the General Court during the first-level proceedings, is inconsistent with the wording, origin, context and purpose of that provision and would result in giving the Commission the power to control just about any merger, anywhere in the world, regardless of the undertakings' revenue (i.e., turnover) and presence in the European Union, and the value of the transaction, at any moment in time, including long after the completion of a merger. Procedures based on such an extensive interpretation of Article 22 of the Regulation would hardly be predictable, nor would they guarantee legal certainty for the parties involved.**

This opinion should be read by bearing in mind the scope of the *Towercast* judgment of March 16th, 2023 (case C-449/21), in which the CJEU ruled that a merger below the turnover thresholds set out in the Regulation (i.e., a merger with a non-Community dimension) could be subject to review by national competition authorities and national courts in view of the direct effect of the prohibition on abuse of a dominant position laid down in European regulations.[3] If the Court of Justice follows the opinion of its Advocate General, its judgment will have direct consequences for Illumina and Grail, and will affect the other cases currently being examined by the Commission based on the same construction of Article 22 of the Regulation. Also, it will be necessary to consider the effects of an annulment on the conditions for implementing Article 14 of the Digital Market Act, which requires access controllers to inform the Commission or a



competent national authority of any proposed merger where the merging entities or the target of the operation provide core platform services or any other service in the digital sector or enable the collection of data, since this provision concerns the possibility for national authorities to use Article 22 of the Regulation to refer any such proposed merger to the Commission.

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[1]https://curia.europa.eu/juris/document/document_print.jsf?mode=lst&pageIndex=0&docid=262846&part=1&doclang=EN&text=&dir=&occ=first&cid=7551623

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139

[3] https://www.august-debouzy.com/en/blog/1926-mergers-that-do-not-meet-the-thresholds-can-be-controlled-after-their-completion-on-the-basis-of-abuse-of-dominant-position

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