# EU Merger Control Concerns Remain After ECJ Illumina Ruling

By **Matthew Hall** (September 11, 2024)

Matthew Hall

On Sept. 3, the Court of Justice of the European Union, the EU's top court, handed down its **judgment** in joined cases Illumina Inc. v. Commission and Grail LLC v. Commission.

The judgment limited the European Commission's scope to review merger and acquisition transactions that fall below the EU Merger Regulation's turnover-based jurisdictional thresholds under the EU Merger Regulation.[1]

When the parties reach the thresholds, a transaction must be filed for approval with the European Commission, and clearance obtained prior to closing. The EU Merger Regulation contains a provision under which member states may request the commission to review a transaction despite the parties falling below the thresholds.

This is the so-called referral mechanism in Article 22. If a request is accepted, the commission then reviews the transaction instead of the relevant member state or states.

The commission published in 2021 guidance on its approach to the use of the referral mechanism.[2] This stated that the commission would in relevant cases "encourage and accept referrals ... where the referring member state does not have initial jurisdiction [under its merger control law] over the case (but where the criteria of Article 22 are met)."

This was a change from the commission 's previous practice of discouraging referral requests from member states that did not have jurisdiction under their own laws.

That earlier practice had been based on the commission's experience that such transactions were not generally likely to have a significant impact on the EU internal market.

However, particularly in the digital and pharmaceutical sectors, the commission had become concerned that in practice a number of cross-border transactions that potentially had a significant impact on competition in the EU had escaped review by both the commission and the member states.

These were often so-called killer acquisitions, where a small company was acquired in order to remove it as a potential competitor to the buyer.

Shortly after publication of its 2021 guidance, the commission accepted a referral request from six member states in relation to the proposed acquisition of Grail by Illumina.[3]

Grail had no revenue in the EU, the transaction did not reach the EU Merger Regulation thresholds and it was not notified for clearance in any member state. Both companies are U.S.-based.

Along with other related commission decisions, all now withdrawn by the commission following the ECJ's judgment,[4] this decision by the commission was appealed by the parties to the EU General Court. The General Court upheld the commission's jurisdiction under the EU Merger Regulation but this was overturned by the ECJ.

Following the ECJ's judgment, there is now greater legal certainty for transaction parties when considering the potential application of the EU Merger Regulation, but nevertheless navigating merger control rules in the EU remains complex and often uncertain.

**Illumina-Grail Referral and Appeals**

The proposed acquisition of Grail by Illumina concerned the pharmaceutical sector and was therefore of a type expressly targeted by the commission's guidance. The commission was concerned that the combined company could restrict access to or increase prices of next-generation sequencers and reagents to the detriment of Grail's rivals active in genomic cancer tests.

It was noted that Grail's competitive significance was not reflected in its turnover, as evidenced by the $7.1 billion deal value. The commission considered that Illumina must have a good commercial reason to invest such a sum and third parties could be negatively impacted.

The commission's acceptance of the referral requests was initially upheld on appeal by the General Court. The parties appealed that judgment and the ECJ agreed that the commission is not authorized to encourage or accept referrals of transactions below the EU Merger Regulation thresholds where the EU member state is not competent to examine the transaction under its own national law.

The ECJ held that the EU Merger Regulation does not provide for a general "corrective mechanism" allowing for it to control any transaction with potential effects on the structure of competition in the EU.

The clear turnover-based jurisdictional thresholds in the EU Merger Regulation are an important guarantee of foreseeability and legal certainty for the parties. They must be able easily to determine whether their proposed transaction needs to be filed for approval and, if so, to which authority — the commission or national regulators in the EU — and subject to what procedural requirements.

**The Commission Reacts**

Reacting to the judgment and the finding that the commission's 2021 guidance is effectively unlawful, the commission restated its concerns about killer acquisitions.[5] It noted that a company with limited turnover may still play a significant competitive role on the market, as a startup with significant potential, or as an important innovator.

The acquisition of such a company may be intended to, or result in, the neutralization of such a company as a possible source of competition.

The commission confirmed that, going forward, in compliance with the judgment, it will continue to accept referrals made under Article 22 by member states that have jurisdiction under their national rules where the applicable legal requirements are met.

The commission also pointed out that in the last few years several member states have introduced provisions allowing them to request the notification of transactions that do not meet the normal national thresholds, in situations where they might have a significant competitive impact.

It warned that the possibilities for referrals to the commission under Article 22 are accordingly more extensive than they were at the time of the original Illumina-Grail referral.

**Legal Uncertainty Remains**

A key plank of the commission's efforts to ensure more potentially anticompetitive mergers can be reviewed has been removed by the ECJ's judgment. To some extent this has increased legal certainty in the review of merger and acquisition transactions in the EU. However, the position for companies and their advisers remains uncertain and difficult to navigate.

One issue was pointed out by the commission in its reaction to the judgment: Several member states can now require the notification of transactions that are below threshold, but may raise concerns. This is under general powers in the relevant legislation that operate alongside the standard jurisdictional thresholds. Those powers often leave significant discretion to the regulator, and it is difficult for parties to determine their relevance.

In those cases, the relevant national law does catch the transaction, meaning that it can then be referred to the commission if not reviewed by the national regulator itself. Other EU member state regulators are likely to press for similar powers under national law.

In Italy, for example, the regulator can request parties to notify, up to six months after closing, certain transactions that are considered capable of impairing competition in Italy even if the standard thresholds are not met.

Although these below-threshold powers operate alongside standard national jurisdictional thresholds, it remains the case — and uncontroversial if unwelcome for dealmakers — that where those thresholds are met a member state can request a referral. This was the point made by the commission. If such a request is made, uncertainty is introduced.

In addition, two member states, Germany and Austria, have transaction value thresholds, which are designed to catch transactions with a high consideration where the target has limited or no turnover — for example, the Illumina acquisition of Grail. Again, those cases can be referred to the commission for review under Article 22.

Following the ECJ's judgment, Andreas Mundt, head of the German competition authority, noted that cases caught by the German transaction value threshold have been referred to the commission under Article 22.[6]

Mundt said on LinkedIn that "this provision ... has proven to be very effective as it allows us to examine or refer [to the commission] critical mergers that in some cases otherwise could not be assessed at all."

Market share thresholds are also used in some member states — Portugal, Spain — and those are very flexible, albeit where the target is small these rules would usually require an overlap with the buyer in order to reach the threshold.

Although not an option available to the commission, because the EU Merger Regulation stops this, member state regulators can also in some cases use the standard competition rules. The ECJ held in March 2023 in Towercast SASU v. Autorité de la concurrence and Ministre chargé de l'économie — a preliminary ruling request from France — that acquisitions by dominant companies that are below EU and national merger thresholds can still be challenged as an abuse of dominance.[7]

This is a difficult issue for companies, not least since investigations are ex post with no provision for filings to be made and the time frames are much longer than any merger review. This is also difficult for regulators, given the difficulty of proving dominance and that the particular acquisition is an abuse of that dominance.

Member state regulators can also apply the general rules that ban anticompetitive agreements. The French competition authority did this in the 2024 case of Atemax, Soleval and others concerning the meat-cutting sector.[8]

It indicated after the ECJ's judgment that it will do so again, saying that "[the authority] intends to make full use of the existing instruments, whether based on Articles 101 and 102 of the Treaty on the Functioning of the European Union or on equivalent provisions under national law."[9]

Another issue for the commission is that while digital gatekeepers identified under the EU Digital Markets Act will still have to inform it of acquisitions, the commission may not be able to investigate those transactions under the EU Merger Regulation, as it had assumed it would be able to do under the new Article 22 policy.

**Conclusion**

Legal certainty concerning the application of the EU Merger Regulation has to some extent been improved by the judgment, but significant uncertainties remain under existing laws. There are several ways in which transactions can be caught at national level, and potentially referred to the commission, despite bright-line merger control jurisdictional thresholds not being met.

Laws allowing below-threshold transactions to be reviewed are — intentionally — widely drafted. Transaction value threshold tests also operate alongside standard thresholds and are set fairly low in order to catch a range of transactions.

The local nexus requirement contained in those tests does limit jurisdiction, but is notoriously difficult to apply with certainty. Market share tests are often difficult to apply.

The potential use by national regulators of general competition law rules in relation to mergers is a further concern. Abuse of dominance rules and the general rules controlling anticompetitive agreements are not designed for mergers and acquisitions. Those regimes are usually applied ex-post and are often in effect open-ended.

The ECJ's judgment overturning the commission's claim of jurisdiction over Illumina's acquisition of Grail was a significant defeat for the commission.

The commission will have to reflect on the implications, but the case is unlikely to deter its push to ensure that merger and acquisition transactions below the standard EU member state jurisdictional thresholds can be reviewed when it considers this to be necessary.

Despite the range of other tools available, the judgment will inevitably lead to calls for further legislation or at least an amendment to the EU Merger Regulation to plug what the commission sees as an enforcement gap. The commission could also pressure member states to reduce their own thresholds or for more to introduce below-threshold regimes.

The France competition authority, in its comments on Illumina-Grail, also floated that possibility, stating that "[the authority] will ... be considering whether to strengthen the merger control instruments at its disposal under national law to apprehend potentially problematic mergers that do not meet the notification thresholds currently applicable in France."[10]

The ECJ's judgment in Illumina-Grail is a welcome and appropriate check on the commission's power to review transactions that fall below the turnover-based jurisdictional thresholds in the EU Merger Regulation. However, there remain many pitfalls in EU merger control.

---

*Matthew Hall is a partner at McGuireWoods LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Joined Cases C-611/22 P Illumina v Commission and C-625/22 P and Grail v. Commission and Illumina: https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-09/cp240127en.pdf.

[3] https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.

[4] https://ec.europa.eu/commission/presscorner/detail/en/mex_24_4586.

[5] https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525.

[6] https://www.linkedin.com/feed/update/urn:li:activity:7236718076824629248.

[7] Towercast v. Autorité de la concurrence - Case C-449/21: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0449.

[8] https://www.autoritedelaconcurrence.fr/en/article/autorite-dismisses-case-concerning-practices-implemented-meat-cutting-sector.

[9] https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european.

[10] Ibid.