

Newsletter, 6 September 2024

The end of a saga: ECJ decision *Illumina/Grail* on merger control under Art. 22 European Merger Regulation

The European Court of Justice (“ECJ”) brings long-awaited legal certainty regarding the – now limited – scope of the referral mechanism under Art. 22 ECMR for concentrations that do not meet the EU or national merger filing thresholds

In its decision of 3 September 2024¹, the ECJ clarifies that the EU Commission is not authorised to encourage or accept referrals under Art. 22 ECMR² of proposed concentrations without a European dimension from national competition authorities (“NCAs”) where those authorities are not competent to examine those proposed concentrations under their own national law, i.e., where the national filing threshold are not met. The ECJ thus overturns the previous contrary ruling of the General Court³ and the underlying decisions of the EU Commission to examine the *Illumina/Grail* merger. Despite facing strong headwinds after this far-reaching decision, the EU Commission and NCAs can still rely on other options to review potentially problematic concentrations below the traditional merger control thresholds through so-called call-in powers provided in national merger control regimes and under Art. 102 TFEU.

Background: The *Illumina/Grail* case

In April 2021, the EU Commission accepted a referral request by the French NCA⁴ in connection with Illumina’s planned acquisition of Grail, a company that develops blood tests for the early detection of cancer. Illumina supplies sequencing- and array-based solutions for genetic and genomic analysis. The transaction did not meet the national merger filing thresholds nor those of ECMR. Nevertheless, the EU Commission decided to review the transaction and confirmed its jurisdiction based on the referral mechanism of Art. 22 ECMR.⁵ Illumina and Grail lodged an appeal against this decision and completed the merger (early) while the review procedure was

still ongoing. After the EU Commission ultimately prohibited the transaction in September 2022, it issued record-breaking gun-jumping fines on both companies shortly afterwards⁶ and requested the dissolution of the merger. Against this backdrop (and due to the outcome of the parallel investigation in the US), Illumina decided to divest the majority of its shares in Grail in December 2023. In July 2022, the General Court initially confirmed the EU Commission’s authority to examine the case under Art. 22 ECMR. By contrast, Advocate General *Emiliou* voted for the opposite result and advised the ECJ to reverse the decision in his opinion in March 2024.⁷

The judgment of the ECJ

The ECJ has now confirmed the Advocate General’s view with a bang and overturned the previous decisions of the General Court and the EU Commission: According to the ECJ, a literal, historical, contextual and teleological interpretation of the ECMR would not allow NCAs to ask the EU Commission to examine a concentration that not only lacks a European dimension (because the EU merger filing thresholds are not met) but also falls outside the NCA’s competence to review such a concentration in the first place since it does not reach the applicable national filing thresholds. The ECJ held that there is no need for a “corrective mechanism” through the ECMR for an effective control of all concentrations with significant effects on the structure of competition in the European Union. Any other interpretation of Art. 22 ECMR would be liable to upset the balance between the various objectives pursued by the regulation. Filing thresholds would serve the purpose of foreseeability and legal certainty for the

¹ ECJ, decision of. 3.9.2024, joint cases [C-611/22 P](#) and [C-625/22 P](#).

² Regulation 139/2004 (EC Merger Regulation, “ECMR”).

³ ECJ, decision of. 13.7.2022, case [T-227/21](#).

⁴ Later followed by other Member States, see EU Commission’s decisions C(2021) 2847-49, 2851, 2854-55.

⁵ See COMMEO [Newsletter](#) 04/21 on Art. 22.

⁶ EUR 432 million against Illumina and EUR 1,000 against Grail, see COMMEO [Newsletter](#) 12/23 for further details.

⁷ [Opinion](#) of 21.3.2024, joint cases C-611/22 P and C-625/22 P.

companies involved. Those companies must be able to easily determine whether their proposed transaction requires merger control clearance and, if so, by which authority and subject to what procedural requirements.

Merger control below the merger filing thresholds – call-in powers of NCAs in the EU

Despite the ECJ's *Illumina/Grail* decision, competition authorities still have other options for examining so-called below-threshold concentrations: Many merger control regimes in Europe include call-in powers of NCAs for concentrations that do not or only partially meet the national filing thresholds. NCAs can call-in a merger if they suspect the concentration to raise competition law concerns. In some jurisdictions, the authorities have the discretion to take action retrospectively up to one year after completion of the transaction in question.

Comparable call-in powers currently exist, e.g., in Denmark, Ireland, Sweden, Italy, Latvia, and Lithuania. Other countries, such as the Netherlands and the Czech Republic, have already announced the planned introduction of call-in powers into their national merger control regimes. Under the German Competition Act, the German Federal Cartel office can review transactions below the merger filing thresholds of Section 35 of the Competition Act ("**ARC**") only in exceptional cases following a market investigation (so-called sector inquiry). Under Section 32f (2) ARC, the authority can order companies in the market under investigation to notify all concentrations in the next three years in which the target company has a turnover of at least EUR 1 million in Germany.

Merger control below the merger filing thresholds – Abuse of dominance under Art. 102 TFEU

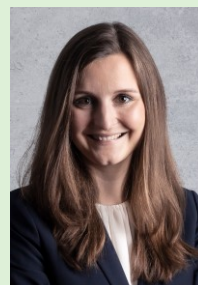
In March 2023, the ECJ opened another door for reviewing concentrations below the EU or national merger control thresholds with its *Towercast* decision:⁸ The ECJ held that NCAs can review acquisitions by a dominant acquirer also after closing under the prohibition of an abuse of a dominant market position pursuant to Art. 102 TFEU.⁹

NCAs have already made use of the *Towercast* doctrine in two cases: In the *Proximus* case¹⁰,

the Belgian competition authority examined a concentration under the abuse prohibition in Art. 102 TFEU in a case similar to the *Towercast* constellation. Notably, the French competition authority, however, applied the ECJ's *Towercast* doctrine to a retrospective investigation of a series of acquisitions under the cartel prohibition in Art. 101 TFEU.¹¹

Comment and outlook

On the one hand, the ECJ's *Illumina/Grail* decision rightens the ship after the EU-Commission's too broad interpretation of Art. 22 ECMR and provides the long-awaited legal certainty on the scope of the referral mechanism. On the other hand, NCAs and the EU Commission are certainly not powerless to continue taking action against "killer acquisitions" or other allegedly problematic concentrations.¹² The importance of a review under Art. 102 TFEU for acquisitions by dominant companies is now likely to become more of a focus for NCAs. The overall European trend towards call-in powers, which apply to transactions by all, i.e., not only dominant companies, will likely also play a more important role in the future. To address the resulting remaining uncertainty for companies, risk allocation clauses in M&A agreements concerning merger control should be adapted.



Franziska Lange-Schlüter, LL.M.



Isabel Oest, LL.M.

COMMEO Rechtsanwälte PartGmbH
Rechtsanwälte und Notar
Speicherstraße 55 | D-60327 Frankfurt am Main
www.commeo-law.com

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⁸ ECJ, decision of 16.3.2023, case [C-449/21](#).

⁹ See COMMEO [Newsletter](#) 06/23.

¹⁰ The proceedings were discontinued by the Belgian competition authority following a disposal of the acquired target company, see [press release](#) dated 6.11.2023.

¹¹ The case concerning companies in the rendering sector was ultimately closed by the authority due to a lack of evidence, see decision of the French competition authority of 2.5.2024, [Décision n° 24-D-05](#).

¹² See [press release](#) of the EU Commission of 3.9.2024.