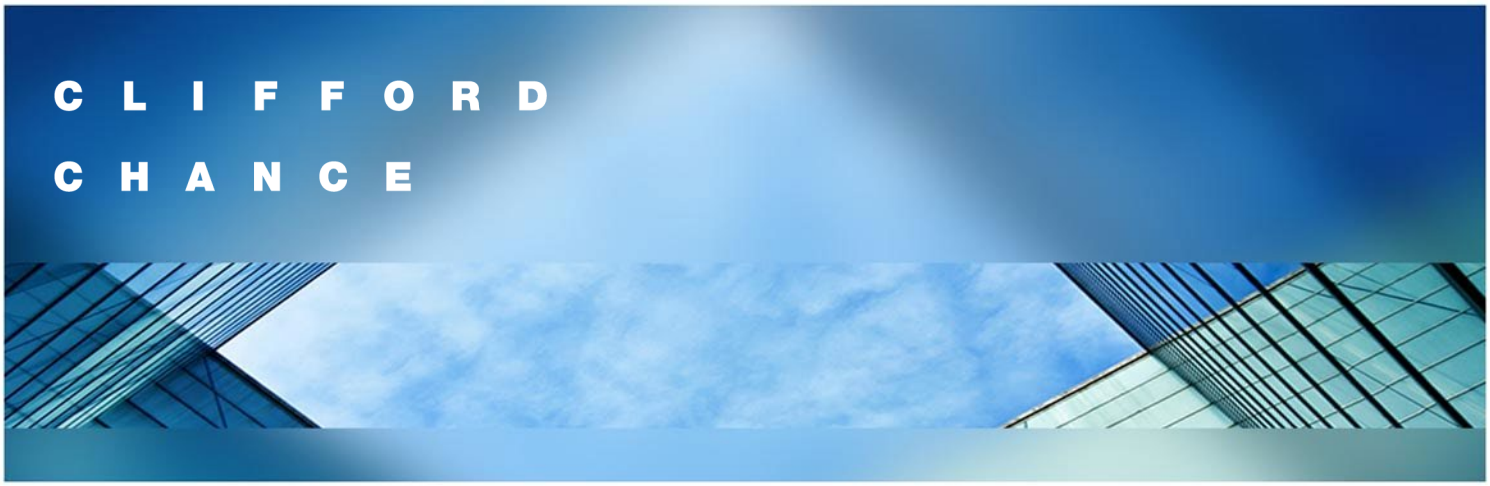

EU GENERAL COURT CONFIRMS THE COMMISSION'S APPROACH TO ARTICLE 22 EUMR IN LANDMARK JUDGMENT

On 13 July 2022, the EU General Court upheld the European Commission's (the **Commission**) decision to review Illumina's proposed acquisition of Grail, having accepted a referral request from France and other EEA Member States under Article 22 EU Merger Regulation (**EUMR**). Ruling for the first time on this question, the General Court found that the Commission is competent to review transactions that may significantly affect competition in one or more EEA Member States, irrespective of whether those transactions meet the merger control thresholds of the EU or any EEA Member State. This landmark judgment confirmed the uncertainty created by the Commission's policy shift for dealmakers, especially in sectors characterised by innovation, such as the tech and pharmaceutical sectors.

Key issues

- The General Court confirmed that the Commission has the power to accept referrals of transactions under Article 22 EUMR from NCAs that lack jurisdiction over the referred transactions
- The ruling clarified that the 15-working-day time limit for referral requests to the Commission starts when sufficient information to analyse the deal is actively transmitted to the NCA(s)
- The General Court's endorsement of the Commission's revised approach to Article 22 might lead to an increase in referral requests to the Commission
- This revised interpretation of Article 22 will cause uncertainty for merging parties and businesses will need to factor referral risk into deal negotiations and timing

BACKGROUND

Article 22 EUMR (**Article 22**) enables competition authorities of EEA Member States (**NCAs**) to request the Commission to review transactions which affect trade between Member States and threaten to significantly affect competition within the territory of the Member State(s) making the request.

Following statements by Commissioner Vestager in 2020 that the Commission would reverse its long-standing informal practice of discouraging NCAs from requesting Article 22 referrals in relation to transactions that did not meet the national merger control thresholds, the Commission issued guidance in March 2021 on its revised approach to the Article 22 referral mechanism (the **Article 22 Guidance**).[1]

Specifically, the Article 22 Guidance stated the Commission's intention to start *encouraging and accepting* referrals by NCAs even in respect of transactions for which these NCAs lacked jurisdiction.[2] This significant departure from previous policy was driven by a perceived "enforcement gap" in EU merger control law which allowed potentially problematic transactions (including so-

[1] Communication from the Commission – Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, Brussels, 26.3.2021 C(2021) 1959 final.

[2] For additional background on the Article 22 Guidance, please see Clifford Chance's briefing here.

called "killer acquisitions") to escape review by virtue of falling below EU and national merger control thresholds.

The proposed acquisition of Grail, LLC. by Illumina, Inc. (the **Transaction**) – two American companies respectively active in genomic sequencing and the development of tests for early cancer screening – is the first case to be assessed under the new approach to Article 22.

Since Grail did not have EU turnover, the Transaction did not trigger merger control filing obligations in the EU or any EEA Member States.

Following a complaint, the Commission considered that the case met the criteria for an Article 22 referral, in particular due to the fact that Grail's importance for competition was not reflected in its turnover,[3] and invited NCAs to request a referral of the Transaction to it. In March 2021, the French NCA requested a referral, which was subsequently joined by the Belgian, Greek, Icelandic, Dutch and Norwegian NCAs. Illumina challenged the referral requests before the courts in France and the Netherlands, but without success.

In April 2021, Illumina brought an action for annulment to the General Court under an expedited procedure against the Commission's decision to accept the referral request. In its action for annulment, Illumina was supported by Grail, who was allowed by the General Court to retain its status of intervener despite the closing of the Transaction. In its judgment of 13 July 2022 in Case T-227/21, *Illumina v Commission* (the **Judgment**), the General Court dismissed Illumina's challenge in its entirety, ruling that the Commission is competent to review referred transactions even when neither the EU nor the referring NCA have merger control jurisdiction, as long as the transaction meets the conditions in Article 22 (*i.e.,* affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) requesting the referral).

THE JUDGMENT

The General Court confirms the Commission's competence under Article 22

Illumina's first plea was that, under Article 22, the Commission does not have competence to review mergers referred to it by Member States which themselves lack jurisdiction over the transaction in question, as was the case with respect to the Transaction.[4]

According to Illumina, such Member States have already sought to protect their interests by establishing a national merger control regime and do not need additional protection by means of Article 22 referrals. On the contrary, Article 22 aims to empower Member States with *no* national merger control regimes to refer deals to the Commission to protect their national interests.

Illumina claimed that the Commission's new approach to Article 22 was incompatible with the "one-stop-shop" objective and contrary to the EU law principles of legal certainty, subsidiarity, and proportionality. Illumina also

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3 *See* European Commission's press release of 20 April 2021, "*Mergers: Commission to assess proposed acquisition of GRAIL by Illumina*".

4 *See* paragraphs 85 *et seq* of the Judgment.

claimed that, as an exceptional provision in the EUMR, Article 22 ought to be interpreted restrictively.

The General Court rejected this first plea in its entirety, ruling that Member States can refer deals to the Commission under Article 22 irrespective of the scope of their national merger control laws.

To reach this conclusion, the General Court conducted a literal, historical, contextual, and teleological interpretation of Article 22(1) and had the following findings:

- **Literal interpretation**. The language of Article 22(1) does not make NCA jurisdiction a prerequisite to referring a deal to the Commission. On the contrary, the General Court agreed with the Commission that the words "*any concentration*" in Article 22 indicate that deals can be subject to referral irrespective of national competence.
- **Historical interpretation.** While the predecessor of Article 22 EUMR (*i.e.*, Article 22 of the previous EU merger regulation[5]) was *especially* intended to assist Member States lacking national merger control regimes, the history of the provision does not indicate that its application was meant to be *limited* to referrals by such Member States. The General Court's historical interpretation concluded that the original objective of Article 22 was to facilitate the examination of mergers with cross-border effects.
- **Contextual interpretation.** The General Court also rejected Illumina's argument that the legal basis used to legislate the EUMR, as well as a comparative view against the other referral mechanisms provided for in Articles 4(4) and 9(1) EUMR are evidence of Article 22 referrals being available only to Member States without national merger control regimes. The General Court, in fact, interprets the referral mechanisms in the EUMR (including Article 22) as supplementing the EU merger control turnover thresholds, empowering the Commission to review deals that do not trigger these thresholds.[6]
- **Teleological interpretation.** Referrals are intended as "*corrective mechanisms*" to remedy the inherent inability of turnover-based merger control thresholds to capture all transactions likely to significantly impede effective competition in the internal market.

The General Court then proceeded to examine and reject other arguments raised by Illumina and Grail, notably that the Commission's interpretation and implementation of Article 22 in this case was in breach of the EU law principle of subsidiarity. The General Court rejected this claim and affirmed that the Commission's interpretation of Article 22 complied with the principle of subsidiarity, noting in particular that respect for the interests of the Member States is ensured, as the Commission can only take jurisdiction if a Member State refers the transaction to it, relinquishing its competence to the Commission.

5 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings

6 *See* paragraph 123 of the Judgment.

Clarifying the starting point for the time limit under Article 22

Illumina and Grail argued that the referral request was submitted after the expiration of the 15-working day deadline of Article 22.[7] In doing so, the applicant challenged the Commission's interpretation of the term "*made known*", which the Commission had interpreted as requiring the Member State to have been informed not only of the *existence* of the transaction but also of the information enabling a *preliminary competitive analysis of the transaction* to be carried out. The applicant argued that the Commission's interpretation would result in a *de facto* notification requirement for under-the-thresholds transactions in all Member States. Rather, Illumina and Grail argued that the starting point for the 15-working day deadline ought to be the moment when the transaction was made public, by means of a press release and media coverage.

The General Court ruled that "*made known*" requires an active transmission of information, such that issuing a public press release about the transaction is not sufficient. According to the General Court, it would be excessive to oblige NCAs to proactively monitor media coverage of all transactions globally, in order to identify potential candidates for a referral to the Commission. Consequently, the time limit of 15 working days starts to run from the moment when the relevant information was transmitted to the Member State concerned.

The General Court's reasoning also sheds light on the level of detail to be provided to the relevant authorities to get the deadline running. The General Court confirmed that for a deal to have been "*made known*" to an NCA, the NCA must have received a minimum amount of information to enable it to assess whether the conditions for a referral are satisfied. The General Court concluded that mere knowledge of the existence of a deal does not allow a Member State to carry out such a preliminary assessment.

The Commission's arguments ultimately accepted by the General Court are somewhat at odds with the Commission's Article 22 Guidance, which provides specific guidelines for cases where the deal has closed, including that referrals would generally not be considered appropriate where more than six months have passed after the implementation of the concentration. The Commission's Article 22 Guidance further notes that "*if the implementation of the concentration* ***was not in the public domain****, this period of six months would run from the moment when material facts about the concentration* ***have been made public in the EU***."[8] Unlike for deals that have not yet been implemented, the language in the Article 22 Guidance seems to imply that making information about the closing of the transaction publicly available in the EU (including via a press release) would be sufficient to kick-start the 6-month time limit.

The Commission's infringement of the principles of legal certainty and good administration did not impact Illumina's rights of defence

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7 Under the second subparagraph of Article 22(1), the referral request "*shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned*."

8 Article 22 Guidance, paragraph 21 (emphasis added).

Illumina also challenged the Commission's delay in sending the referral invitation to the NCAs, as breaching the principles of legal certainty and good administration. Notably, Illumina and Grail argued that the Commission's failure to act within a reasonable time prevented them from knowing, as soon as possible, which competition authorities were competent to examine the Transaction. The Commission's failure to act with "*utmost speed*" also infringed their rights of defence, as the lack of opportunity to submit observations in good time deprived them of the possibility of correcting significant factual errors.

The General Court confirmed that acting within a reasonable time in administrative proceedings is a general principle of EU law, now incorporated in Article 41(1) of the Charter of Fundamental Rights of the EU, to be evaluated in each case in light of factors such as the complexity and importance of a case for the person concerned. The General Court agreed with Illumina and Grail that a period of 47 working days – corresponding to the interval between the moment when the Commission became aware of the existence of the Transaction, and when it issued the referral invitation letter – was excessive. Paragraph 234 suggests that the General Court considers a period of 25 working days (comparable to the time limit for the phase 1 review) as an outer limit for the preliminary analysis preceding the Commission's invitation letter, while a period of 90 working days (comparable to the time limit for the phase 2 review), which had elapsed in this case between the receipt of the complaint and the Commission's acceptance of the referral requests, was considered excessive.

Despite concluding that the Commission infringed the principle of good administration, the General Court allowed the contested decision to stand, given that the delay did not have a material impact on the applicant's rights of defence. Notably, the General Court was not convinced that the invitation letter contained "*significant factual errors*" which the applicant had no opportunity to correct during the merger review procedure before the Commission.

The Commission did not infringe the principle of the protection of legitimate expectations

Finally, Illumina and Grail challenged the Commission's acceptance of the referral requests on the basis of the principles of protection of legitimate expectations and legal certainty. The companies argued that when they agreed on the deal, the Commission was still pursuing its previous policy of declining referrals from NCAs that lacked jurisdiction. Moreover, according to Illumina and Grail, the "*clear and unconditional*" speech the Commission's Vice-President Vestager delivered on 11 September 2020 confirmed that this policy would continue to apply until it was amended by the publication of new guidance towards the middle of 2021.[9] Moreover, the companies argued that the Commission's changed approach contradicted the recommendations of the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD). In contrast, the Commission, downplayed the importance of Vice-President Vestager's speech, characterising it as a "*general political statement*" and arguing that the applicant failed to demonstrate that it has received "*precise, unconditional and*

9 *See* Vice-President Vestager's speech "The future of EU merger control" of 11 September 2020, available here.

consistent assurances" in relation to the Commission's future policy on referrals, as required by EU law precedent.[10]

The General Court sided with the Commission, concluding that neither its pre-existing policy of discouraging the referrals by NCAs with no jurisdiction over the deal, nor the statements of the Commission Vice-President constituted such "*precise, unconditional and consistent assurances*". To the contrary, the Commission's soft law instruments, such as the Article 22 Guidance, generally give rise to legitimate expectations on behalf of market participants, such that the Commission's departure from their content will be considered a breach of the general principles of equal treatment and the protection of legitimate expectations.[11]

NEXT STEPS

Illumina has announced its intention to appeal the General Court's decision before the Court of Justice of the EU. The Commission can, in the meantime, continue its phase 2 review of the Transaction, which has restarted following Illumina's offer of concessions on 19 July 2022.

For businesses, more generally, the General Court's decision affirms the Commission's ability to review certain transactions that fall below EU and national merger control thresholds. Following the General Court's judgment, Vice-President Vestager expressed that the Commission "*had a few acquisitions within [its] sights that may be relevant candidates for Article 22. But that is not a given.*"[12]

IMPLICATIONS FOR TRANSACTIONS

While the Article 22 referral mechanism is not expected to be routinely used, the General Court's endorsement of the Commission's approach might lead to an increase in Article 22 referral requests and gives rise to continued uncertainty for transactions that do not meet merger filing thresholds in the EU or EEA Member States.

In particular in the tech sector, the impact of Article 22 referrals must be considered together with the obligation on large digital "gatekeepers" under the Digital Markets Act (the **DMA**, expected to enter into force in the autumn of 2022) to inform the Commission of *all* transactions in the digital sector. Article 14 of the DMA explicitly allows NCAs to obtain and use the information obtained through such notifications for the purposes of Article 22 referral requests.

As indicated in our previous briefing,[13] the Article 22 referral mechanism raises a number of practical considerations for certain types of transactions (summarised again below). The General Court's endorsement of the Commission's approach generally confirms these points as relevant, while

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10 *See* Cases C-119/19 P and C-126/19 P, *Commission and Council v Carreras Sequeros and Others*, EU:C:2020:676, paragraph 144.

11 *See* Case C-226/11, *Expedia Inc. v Autorité de la concurrence and Others*, EU:C:2012:795, paragraph 28.

12 *See* EU's Vestager: has 'killer' merger deals in sight, may use court-endorsed power

13 *See* Clifford Chance briefing of April 2021, The European Commission expands its remit for merger control review.

also providing clarity on the level of information needed for a transaction to be 'made known' to the Commission or NCA:

- **Risk of referral:** The General Court has confirmed that the Commission is competent to review transactions referred pursuant to Article 22 even where the national merger filing thresholds are not met. This means that parties to transactions that do not meet filing thresholds in the EU will need to consider the risk of a referral request. In this regard, transactions in the digital, pharmaceutical, or other sectors characterised by high degrees of innovation, are likely to be of particular interest. Parties should also note the ability of third parties to inform the Commission (or NCAs) of transactions. A third party had complained to the Commission against the *Illumina/Grail* transaction.
- **Timing:** The time taken between the start of the Article 22 referral process up to the Commission's decision on whether to accept the referral request could take several weeks, varying depending on how the process is initiated (*e.g.*, whether the Commission invites Member States to request a referral or whether Member States proactively do so). If the Commission accepts the referral request, the substantive review timeline then begins, with pre-notification discussions, followed by a phase 1 and, if needed, a phase 2 merger review process. The overall process in the EU could therefore be quite lengthy, which should be taken into account when negotiating deal timelines.
- **Pre-empting discussions:** Parties to transactions that face a significant risk of a referral (*e.g.,* relating to a sector that is characterised by a high degree of innovation) should consider approaching the Commission or NCAs with a short briefing document, which contains sufficient information to qualify as having satisfied the criterion of the transaction having been 'made known' to them. That is, the briefing should include the information needed for a preliminary assessment of whether a transaction meets the conditions for referral in Article 22 (*i.e.*, whether the transaction affects trade between Member States and threatens to significantly affect competition in any Member State(s)).
- **Conditionality in transaction documents**: It will be important to ensure that documentation for transactions that may potentially be at risk of a referral request includes a condition precedent that covers the eventuality of a referral under Article 22. Since, typically, there will be no certainty as to whether a referral request will be accepted by the Commission until sometime after signing of the transaction documents, the conditions precedent may need to be drafted to cover both the possibility that a referral request is not made or not accepted, and the possibility that a referral request is accepted by the Commission.

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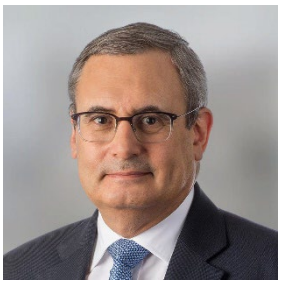

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