The European Commission opens a review of Illumina's acquisition of Grail under the procedure of Article 22 of the 2004 Merger Regulation

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Background

Following the referral request submitted by the *Autorité de la concurrence*, which was joined by several Member States of the European Economic Area (Belgium, Greece, Iceland, the Netherlands, Norway), the Commission has decided to open an examination on Illumina's acquisition of Grail's transaction (see press release of 20 April 2021).

This is the first time since Margrethe Vestager's announcement of her new approach in terms of merger control of "below the threshold" transactions under Article 22 of Regulation 139/2004, that the Commission will examine a merger transaction that was not submitted to a mandatory notification in terms of national turnover thresholds.

This renewed approach to Article 22, which constitutes a return to a reading corresponding to the full scope of framework, responds to the requests expressed by several actors, in particular the French Authority, to mobilise the merger control tool more effectively on a European level. It is thus a question of better controlling the acquisitions of high-value companies in the fields of digital innovation, health or biotechs, and which can make it possible to consolidate the market power of already powerful or dominant companies or significantly affect competition. The referred transaction falls within the framework of these new priorities: it is the takeover by a powerful American company in the healthcare sector of an innovative company which is working on the development of a blood test for cancer screening based on genomic sequencing technology.

The Autorité initiates the referral procedure via Article 22 of the merger regulation of a transaction "below the thresholds" in the new approach adopted by the European Commission in 2020

The European Commission had seised all the Member States of the subject, within the framework provided for by paragraph 5 of Article 22 of Regulation 139/2004.

The European Commission accepted the inquiry submitted by France, subsequently joined by Belgium, Greece, Iceland, the Netherlands and Norway, to examine the proposed acquisition of Grail by the Illumina Group on the basis of Article 22 of Council Regulation 139-2004 of 20 January 2004.

Under the above provision, a national competition authority has the power to request the referral to the European Commission of the examination of a merger which does not have a European dimension but would affect trade between Member States and threaten to significantly affect competition in the territory of one or more Member States making the request.

Furthermore, the Regulation does not require that the Member State(s) concerned is/are led to examine a transaction which should legally be submitted to them under the applicable national rules on mergers.
This mechanism was set up to allow Member States without merger control to request the examination of certain sensitive transactions by the European Commission. As all Member States now have merger control, this mechanism was rarely used with regard to transactions that are not submitted to notification in Member States, until recently, the European Commission recommended that Member States not make a referral request based on Article 22 if the transaction did not exceed the national notification thresholds. However, on 11 September 2020, the European Commission announced the lifting of this recommendation,

implying a return to the original reading of this article. In view of developments in certain markets, the Commission announced that it would now agree to consider referral requests under this Article submitted by national competition authorities, even where the merger transactions in question do not exceed the national notification thresholds of any Member State, provided that the conditions laid down in this Article are met.

A development called for by the Autorité

The *Autorité* had been calling for this development for several years, which considers, on the one hand, that it was necessary to strengthen European merger control in order to be able to examine a certain number of "below the thresholds" transactions and, on the other hand, as European law stands, this mechanism provides the necessary flexibility to target mergers below the thresholds that merit examination at EU level. This new approach of Article 22 constitutes an appropriate and relevant solution to address the growing concerns that certain structuring transactions, which may have a negative impact on competition, escape any control by the competition authorities (see the *Autorité* de la concurrence's press release dated 15 September 2020).

Since the announcement of this return to the original reading of the Article, this Commission decision, issued following an inquiry submitted by the *Autorité de la concurrence*, is therefore the first case of the application of Article 22 of the Regulation to a transaction that did not exceed the national notification thresholds.

European Commission to review acquisition of innovative biotech company Grail by Illumina, the world leader in genome sequencing

On 20 September 2020, Illumina Inc. (hereinafter "Illumina"), an American genomic sequencing company, announced its intention to acquire US-based

Grail for a transaction amount of approximately $8 billion.

- *Parties to the transaction*

Illumina is an American company specialised in genomic sequencing. It develops, manufactures and markets worldwide integrated genetic analysis systems, in particular next-generation genomic sequencers used, among other things, in the development and implementation of cancer screening tests. In 2020, Illumina achieved a global turnover of approximately € 2.6 billion, of which nearly 27% was generated from sales in Europe, Africa and the Middle East.

Grail is a biotech company founded in 2016 that uses genomic sequencing and *data science* tools to develop blood tests for early cancer detection based on genomic sequencing technology. Grail is also developing two other tests, one for cancer diagnosis and the other for residual disease measurement in previously treated patients.

- *The competitive risks identified by the Autorité*

After a preliminary analysis, the *Autorité* asked the European Commission to examine the case, considering that the criteria of affecting trade between Member States and significantly affecting competition on French territory were met. In particular, the *Autorité* found that Illumina is active in Europe, where it markets next generation genomic sequencers which are widely used, in particular by research laboratories. However, these products are necessary for Grail and its competitors to develop their business in the cancer screening test sector. The *Autorité* considered that, as a result of the transaction, Illumina could make access to its sequencers more complex for Grail's competitors in the industry, by increasing their price or lowering their quality. However, given Illumina's influence in the genomic sequencer vector, such a strategy could have a significant impact on competition in the cancer screening test sector.

Five other Member States of the European Economic Area (Belgium, Greece, Iceland, the Netherlands and Norway) have joined France's request. In a decision issued today, the Commission has accepted these various requests, thereby demonstrating that these Member States and the Commission also consider that

the acquisition of Grail by Illumina is likely to affect trade between Member States and to significantly affect competition within the territory of the Member States which made the referral request.

In addition, on 31 March[1], the *Federal Trade Commission* announced its decision to submit to the competent court a request for blocking the transaction between the parties on the grounds, in particular, that, as a result of the transaction, Illumina would be in a position to prevent or delay the development of products competing with those of Grail.

It may be noted that, following the referral request sent to the Commission by the *Autorité de la concurrence,* Illumina and Grail lodged an application for interim relief before the French Administrative Supreme Court (*Conseil d'État*) against this request. The French Administrative Supreme Court (*Conseil d'État*) dismissed the appeal, holding that it had been brought before a court without jurisdiction, as the *Autorité's* referral request could not be separated from the procedure for examining the transaction, which was conducted by the Commission under the supervision of the Court of Justice of the European Union.

[1] https://www.ftc.gov/news-events/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection

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