

European Court of Justice Curtails European Commission's Expansion of Its Merger Control Powers

The judgment rejects the European Commission's expansive re-interpretation of the European Union Merger Regulation, stressing the need for legal certainty in line with the EU legislature's intent.

With its *Illumina/GRAIL* judgment (3 September 2024), the European Court of Justice (the ECJ) confirmed that it does not shy away from reining in the European Commission (the Commission) when it exceeds its institutional competence. After a legal battle that lasted more than three-and-a-half years, GRAIL succeeded in preventing the Commission from creating a new power under the European Union Merger Regulation (EUMR) to call in and review any transaction it considers potentially problematic. The ECJ clearly held that if the Commission considers that certain transactions warranting review — so-called killer acquisitions — escape merger control then the Commission should pursue legislative reform. Latham represented GRAIL in this prolonged legal battle.

While the ECJ does not, as such, rule on the appropriateness of call-in provisions to address the alleged killer acquisition problem, the judgment establishes a judicial preference for (turnover) thresholds as offering the necessary predictability and legal certainty required in a mandatory ex ante merger control regime. The ECJ emphasised that merger control is characterised by a need for speed, and, as such, requires clear provisions enabling transactional parties to identify easily and quickly where they must notify a transaction, in what form, and within which timeframes.

The ruling reinforces the foundational principle of legal certainty; one of the EU legislature's key objectives when adopting the merger rules, and an objective that was clearly reflected in the EUMR's preparatory documents submitted by GRAIL during the litigation process. The Commission will have to respect this cardinal principle — stressed by the both the EU's legislative and judicial branches — when contemplating any future legislative reform or enforcement policy.

This Client Alert sets out the key takeaways from the judgment and summarises notable passages.

Key Takeaways

- The judgment flatly rejects the Commission's new interpretation of Article 22 EUMR. For more than three decades, the EUMR envisaged the possibility of case referrals between Member States and the Commission — subject to strict procedural safeguards designed to promote legal certainty and decision-making by the best-placed authority. Critically, this referral system was predicated on the transfer of competence from one authority to another. Cases qualifying for review at the Member

State level could, in certain circumstances, be transferred to the Commission (Articles 4(5) and 22 EUMR), or vice versa (Articles 4(4) and 9 EUMR). The Commission's reimagining of Article 22 in *Illumina/GRAIL* threatened this carefully crafted mechanism, purporting to create competence in the Commission where neither it nor the requesting Member State had jurisdiction to review a deal. The Court definitively rejected the construct.

- In doing so, the ECJ judgment also prohibits non-competent Member States from joining Article 22 reviews initiated upon the request of a competent Member State. The Court noted that relevant recitals of the EUMR: “mak[e] sense only if the competence of a Member State to scrutinise a concentration is a prerequisite for that Member State to be able to request the referral of that concentration to the Commission or for it to join such a request.” (para. 198). Therefore, the Court's finding calls into question the legality of a number of completed Article 22 investigations where such joinders occurred.
- Furthermore, the Court's conclusions significantly impact the geographic scope of future Commission reviews pursuant to Article 22. The Commission's powers of review under Article 22 EUMR are limited to the territories of referring Member States. If fewer Member States can lawfully join such a request, the geographic scope of Commission review will shrink to fit.
- The Court appeared untroubled by the inherent risk that transactions falling below EUMR and Member State thresholds would not be subject to merger control. The Court directed the Commission to pursue legislative reform — as the EUMR prescribes — to close a perceived “enforcement gap” (paras. 177-184 and 211-219). We expect the Commission to first explore two alternative mechanisms of asserting jurisdiction over sub-threshold deals (including the storied killer acquisition):
 - First, in line with the Commission's [press release](#) immediately following the ruling, the Commission may seek to rely on Article 22 referral requests from a subset of Member States with apparent wide-ranging “call-in” powers under domestic law. They include Denmark, Iceland, Ireland, Italy, Lithuania, Norway, and Sweden, where domestic legislation provides for call-in powers limited by no or only trivial quantitative thresholds. The ECJ was not called upon to evaluate the legality of such an approach. The judgment forcefully defends legal certainty and the need for companies doing business in Europe to “be able easily to determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected.” (para. 208) This leaves some doubt as to whether even this jurisdictional footing is secure, and, indeed, future test cases are likely.
 - Second, the ECJ also acknowledges that transactions falling below the EU and Member State thresholds could still be pursued under EU abuse of dominance rules, provided the acquirer occupies a position of such exceptional market power (para. 214, referring to the ECJ *Towercast* judgment ([C-449/21](#))). Such cases are likely to remain rare, however.

Background and Key Passages

The Commission's new Article 22 EUMR policy: In late 2020 / early 2021, the Commission re-interpreted Article 22 EUMR to grant itself the competence to rely on Article 22 EUMR as a de facto call-in provision enabling the Commission to review potentially any transaction (regardless of whether the concerned transaction meets the EU or any Member State notification thresholds).

The General Court's validation of the new policy: In 2022, the General Court validated the Commission's re-interpretation claiming that it is confirmed by a literal, historical, contextual, and teleological interpretation of Article 22 EUMR.

The ECJ reins in the Commission's expansive interpretation of its own competence: With the *Illumina/GRAIL* judgment, the ECJ annulled the General Court's judgment and ended the Commission's expansive interpretation of its own competences. The ECJ's reasoning follows the traditional interpretation methods of EU law. In summary:

- The inconclusive wording of Article 22 EUMR requires application of the other traditional interpretation methods (paras.121-128).
- The historic interpretation in the General Court's judgment does not confirm the Commission's interpretation but rather is inconclusive (paras.135-145). To the contrary, the ECJ agrees with GRAIL (paras. 84-85) that a correct interpretation of the entire body of *travaux préparatoires* tends to contradict the Commission's interpretation, as "none of those documents attests to the EU legislature's intention to use the referral mechanisms provided for in [Article 22 EUMR]" as a de facto call-in provision (paras. 146-150).

Notably, the ECJ observes that the EU legislature accepted in the *travaux préparatoires* that the agreed jurisdictional framework would necessarily result in certain sub-threshold (problematic) transactions escaping review: "the EU legislature took account of the fact that, regardless of the type and amount of the thresholds chosen, certain concentrations which could affect the internal market would, in any event, escape an ex ante review by the Commission under that regulation".

- The contextual elements invoked by the General Court judgment do not confirm the Commission's interpretation but are inconclusive (paras.153-176). Moreover, the ECJ agrees with GRAIL's submission (para. 87) that the General Court overlooked key contextual elements that contradict the Commission's interpretation, such as the fact that Article 1 EUMR foresees a simplified procedure to adjust the EUMR's thresholds.
- The ECJ finds no support for (and errors of interpretation in) the General Court's teleological interpretation, which concluded that Article 22 EUMR was intended to be a call-in provision correcting for the perceived rigidity of bright-line turnover thresholds (paras. 186-219). The ECJ found no provision supporting the General Court's holding that a Member State can refer transactions to the Commission, irrespective of the scope of its domestic merger control rules (paras. 196-198).

Contrary to the General Court's finding, both the historical and contextual interpretation reveal that Article 22 EUMR only has two purposes: enable a Member State without merger control to refer transactions, and avoid parallel merger reviews in multiple Member States (para. 199). Notably, the ECJ once more explicitly acknowledges that under the current setup of the EUMR, certain transactions will necessarily escape merger review: "it has not been established that that [Article 22] was intended to remedy deficiencies in the control system inherent in a scheme based principally on turnover thresholds, which is, by definition, incapable of covering all potentially problematic concentrations." (para. 200)

The ECJ further holds that the General Court's interpretation would be inconsistent with several objectives pursued by the EUMR, such as the principles of legal certainty, one-stop shop, effectiveness, and predictability (paras. 202-206): "[the Commission's] interpretation undermines the effectiveness,

predictability and legal certainty that must be guaranteed to the parties to a concentration". The ECJ seems to question the appropriateness of call-in provisions in a general way and expresses a preference for (turnover) thresholds to guarantee legal certainty in the context of a mandatory ex ante merger control regime: "it must be borne in mind that, in the scheme of the systems of prior control of concentrations of undertakings successively envisaged at EU level, the thresholds set for determining whether or not a transaction must be notified are of cardinal importance. Undertakings that are potentially subject to notification and standstill obligations must be able easily to determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected. Determining the competence of the national competition authorities by reference to criteria relating to turnover is an important guarantee of foreseeability and legal certainty for the undertakings concerned, which must be able easily and quickly to identify to which authority they must turn, and within what time limit and in what form, particularly as regards the language and content of the information required, they must refer the matter to the Commission when they participate in a concentration." (paras. 208-209). Any future change to the EU merger control regime and the process for referrals from Member States will have to take this into account.

In addition, the ECJ holds that the need for effective merger control cannot lead to extending the scope of the EUMR, particularly taking into account that other tools are available in the antitrust toolbox to remedy problematic transactions such as an application of Article 102 TFEU by Member States (paras. 211-214).

Finally, the ECJ holds that by re-interpreting Article 22 EUMR so extensively, the Commission clearly exceeded its institutional competence and stepped into the shoes of the EU legislature (paras. 215-219).

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