ALLEN & OVERY

Illumina/GRAIL: General Court gives green light to below-threshold merger referrals

July 2022

In a landmark ruling, the General Court (GC) has confirmed the European Commission (EC)'s decision to accept a referral request from France (and other Member States) for the assessment of Illumina's acquisition of GRAIL. The ruling is a victory for the EC, endorsing its controversial new policy to accept Member State requests to review transactions which do not meet EU or national merger control thresholds.

Key points

- The GC confirmed that under Article 22 of the EU Merger Regulation (EUMR) the EC is able to examine transactions referred to it by Member States, even where the national merger control thresholds are not met.
- The EC can encourage Member States to make referral requests but should invite them to do so within a reasonable period of time.
- Merging parties should take account of a possible Article 22 referral in their transaction documents and timetable, particularly in conditions precedent and when considering allocation of risks.
- Article 22 referrals of digital mergers should be expected with the upcoming entry into force of the EU Digital Markets Act.

The EC historically discouraged referrals from Member States in relation to deals over which the Member States did not have jurisdiction, but in September 2020 it announced a change of policy (see our **alert**), encouraging such referrals from Member States under Article 22 of the EUMR in certain cases. The aim was to enable the EC to better review "killer acquisitions", ie transactions where at least one of the parties' turnover does not reflect its actual or future competitive potential.

The EC set out its revised policy in its March 2021 **guidance on the application of Article 22**.

The first application of this new doctrine occurred in early 2021. The French competition authority (FCA) referred gene-sequencing firm Illumina's acquisition of GRAIL, a company which uses gene sequencing to develop cancer screening tests (see our **alert**). The EC accepted the referral in April 2022 and began its review of the transaction.

Illumina contested the EC's jurisdiction to review the transaction. The GC has now adopted its long-awaited judgment, upholding the EC's approach. Both the **EC** and the **FCA** have welcomed the ruling.

EC's new Article 22 policy confirmed

Illumina alleged that the EC is only able to examine a transaction referred to it by a Member State if that Member State has jurisdiction over the deal based on its own national legislation.

However, the GC considered that the use of the term "any concentration" in Article 22 makes it clear that a Member State is entitled to refer *any* concentration to the EC which satisfies the relevant conditions (broadly, that the deal affects trade between Member States and must threaten to significantly affect competition with the territory of the referring Member State). This is irrespective of the existence or scope of the Member State's national merger control rules.

The GC emphasised in particular that the Article 22 referral policy was a "corrective mechanism", aimed at controlling transactions which are likely to significantly impede effective competition in the internal market.

> "[R]eferral mechanisms are an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid nature, is not capable of covering all concentrations which merit examination at European level."

General Court ruling, paragraph 142

Article 22 referral timelines clarified

Mere knowledge of the existence of a deal is not enough to trigger the 15-day referral period

One of the main uncertainties triggered by the new interpretation of Article 22 was the time period in which Member States could make a referral request to the EC. In particular, Article 22(1) only refers to a 15 working day period from the moment the transaction is "made known" to the referring Member State.

Illumina argued that the deal was "made known" to the national competition authorities (NCAs) and, in particular, the FCA well before February 2021, when the EC sent its letter to Member States inviting a referral.

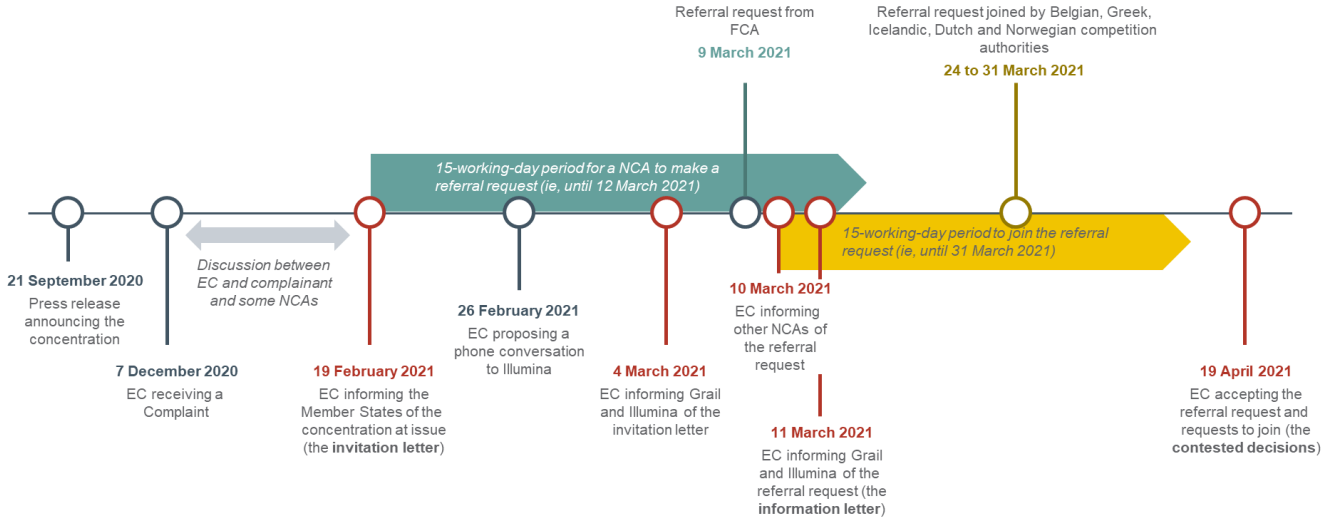
Illumina specifically relied on: (i) its 21 September 2020 press release announcing the deal, (ii) procedural steps taken by the UK Competition and Markets Authority and the U.S. Federal Trade Commission between September and November 2020, and (iii) a statement by the FCA Head of the Mergers Unit, during a conference on 23 March 2021, that the FCA was "monitoring" the market in order to quickly refer transactions to the EC. GRAIL also noted that the EC and NCAs discussed the deal after the EC received a complaint about it in December 2020.

Illumina therefore claimed that the 15 working day period was far exceeded when the FCA submitted its referral request on 9 March 2021.

The GC disagreed. It interpreted "making known" as the active transmission of information to a Member State which is "appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral have been satisfied".

It noted that if the parties' position were adopted, the referral mechanism would be deprived of any efficiency. Member States would be required to constantly review public deal announcements in order to identify those that may be the subject of an Article 22 referral. In order to comply with the 15 working time limit, Member States would need to make a pre-emptive referral request in situations where it is not certain that the relevant referral conditions have been satisfied.

In this case, the GC concluded that the invitation letter sent by the EC constituted the "making known" referred to in Article 22. The referral request was therefore made in due time.



EC took too long to send the invitation letter

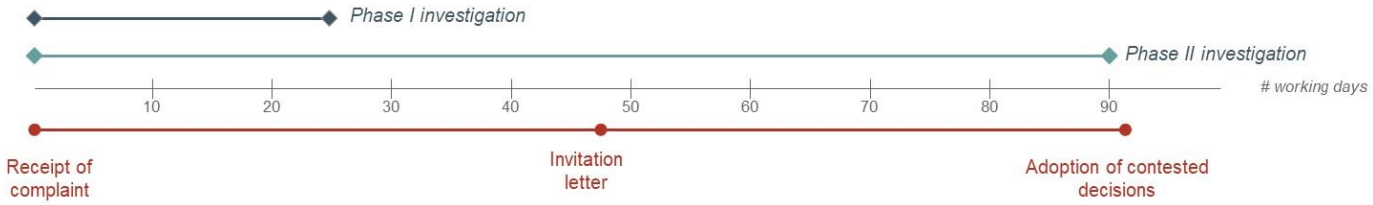
As noted above, the EC received a complaint about the Illumina/GRAIL transaction in December 2020. It then took 47 working days to issue its letter inviting Member States to make an Article 22 referral.

Illumina submitted that this was too long. It claimed that the delay was contrary to the fundamental principle of legal certainty and to the obligation to act within a reasonable time under the principle of good administration.

The GC concluded that a period of 47 working days between the receipt of the complaint and the invitation letter being sent was unreasonable. It concluded that the EC was in a position, after verifying certain aspects with the complainant, to take the necessary steps to send its invitation letter well before 19 February 2021 – especially as the EC mostly relied upon, in its invitation letter, information publicly available by 21 September 2020 at the latest.

The GC further considered that:

- it can be reasonably expected that the EC's examination before sending an invitation letter would not exceed the duration of a phase 1 merger investigation, ie 25 working days, during which the EC must take a decision on whether that concentration raises serious doubts as to its compatibility with the internal market; and
- parties to deals that do not meet the EUMR thresholds would suffer from a considerable disadvantage if the period between the point at which the EC is informed of the transaction and the decision to accept a referral request was – as in this case – the same length as a phase 2 review (ie 90 working days).



The GC's conclusion on this point could have been a "win" for Illumina. However, in order to affect the validity of the decision, the GC noted that case law further requires that a failure to comply with the reasonable time principle adversely affected the ability of the undertakings to defend themselves effectively. This was not the case here – the GC held that the parties had several opportunities to make their views known during the administrative procedure leading to the adoption of the contested decisions.

Nevertheless, the EC is now likely to be more cautious with regards to the time limit in which it issues any letters inviting Member States to refer a transaction, both to avoid any annulment of its decisions and actions for damages by the concerned parties.

The EC's change of policy did not breach Illumina's legitimate expectations

Illumina's last attempt to have the contested decisions annulled was to rely on the protection of legitimate expectations. Illumina claimed, in particular, that it was clear from Executive Vice-President Vestager's speech of 11 September 2020 that the new Article 22 policy would only be implemented from mid-2021, ie once the EC's guidance was published. Illumina noted that the EC's invitation letter was sent before this date.

The GC unsurprisingly rejected the pleas, recalling that in order properly to rely on the principle of the protection of legitimate expectations, it is "for the party concerned to establish that he or she received precise, unconditional and consistent assurances, originating from authorised, reliable sources, such as to lead him or her to entertain well-founded expectations".

In particular, the GC considered that Vestager's speech did not provide "precise, unconditional and consistent assurances" to Illumina, especially as it related to the EC's general policy on mergers. The GC also noted that the referral of below-threshold deals was not precluded as a matter of principle, but only "discouraged" by the EC and that, in any event, the speech was delivered before the announcement of the concentration.

What's next?

The EC's investigations are ongoing

Illumina has already announced that it will appeal the GC's judgment. The Article 22 issue is, however, only one aspect of the case. In August 2021, while the EC's phase 2 investigation into the deal was ongoing, Illumina publicly announced that it had completed the acquisition.

This led the EC to open a gun-jumping investigation, and imposing, for the first time, interim measures (as detailed in our **alert**). The EC has now **sent a statement of objections to the parties**, alleging that they have breached the EUMR by implementing the acquisition before receiving clearance.

Meanwhile, the phase 2 investigation continues, with the review clock restarted on 19 July 2022. And the parties have appealed the interim measures decision. Watch this space for further updates.

Merging parties should take possible Article 22 referrals into account in transaction documents and timetable

The GC's ruling constitutes a major endorsement of the EC's new Article 22 referral policy.

All parties to a transaction – regardless of whether there is a strong nexus to the EU – should carefully consider the possibility of an Article 22 referral in the context of their transaction timetables and deal documents, in particular when negotiating the allocation of risks and conditions precedent to closing. This is particularly the case for deals involving targets which are start-ups, innovators or companies with significant competitive potential in the digital or pharma sectors.

Parties should also be aware that post-closing referrals are also possible under the EC's new policy, although its guidance states that it will generally not consider accepting a referral request which is made more than six months after completion. This adds further complexity to the risk assessment process.

So far, however, the Illumina/GRAIL transaction is the only transaction referred to the EC by Member States which did not have jurisdiction over the concentration. Now that the EC's new policy has received the endorsement of the GC, all eyes will be on whether we see a steady stream of Article 22 referrals going forward.

Article 22 referrals of digital mergers should be expected

The adoption of the EU Digital Markets Act (DMA) is likely to encourage greater use of the new Article 22 policy. The DMA, which sets out a new regime to regulate the conduct of digital firms in the EU, is expected to come into force later this year. Its provisions will start to apply six months after this date.

"Digital gatekeepers" falling within the scope of the regime will be obliged to inform the EC of all transactions: (i) where the parties provide core platform services or any other services in the digital sector; or (ii) which enable the collection of data. The information must be submitted prior to closing, although there is no requirement for the deals to be formally approved. However, the EC is required to pass the information received on to the NCAs. Significantly, the DMA explicitly notes that the NCAs may use this information to request the EC to review a transaction under Article 22. Time will tell how many deals result in referral requests as a result of these provisions.

Contacts

Florence Ninane
Partner – France
Tel + 33 1 4006 5322
florence.ninane@allenovery.com

Noemie Bomble
Associate – France
Tel +33 1 4006 5360
noemie.bomble@allenovery.com

Louise Tolley
PSL Counsel – London
Tel + 44 20 3088 3585
louise.tolley@allenovery.com