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The Court of Justice of the European Union ("CJEU") has issued an important judgment on 3 September 2024[1] in relation to the merger between Illumina Inc. - a biotech company specialising in genetic testing - and Grail LLC - a *start-up* developer of blood tests for cancer screening - ("Illumina/Grail"), which was prohibited by the European Commission by decision of September 2022[2] .

Apart from the debatable nature of the aforementioned prohibition decision - which gave rise to a sanctioning proceeding against Illumina, for having executed the operation without having been notified and authorised to the EC (an infringement known as "*gun*

[1] Judgment of 3 September 2022, Illumina, Inc. and Grail LLC v European Commission, C-611/22P and C-625/22P, EU:C:2024:677.
[2] Decision of the European Commission of 6 September 2022 in case M.10188.

jumping") - the case has been particularly controversial because the aforementioned operation did not pass the notification threshold of the European merger control system, nor did it do so in any EU Member State. In other words, Illumina was under no obligation to notify the acquisition of Grail, prior to its implementation, either to the European Commission or to any national competition authority.

What happened then? We look at it in brief in this article.

The Illumina/Grail Concentration

The proposed concentration between the two companies was announced in September 2020, when Illumina decided to acquire sole control of Grail. As indicated above, the transaction was not subject to prior notification either at European level or in any Member State. This was mainly because Grail was a *start-up* with a still very modest turnover and market share[3] .

In spite of this, several months later, the European Commission urged the competition authorities of the member states to submit a referral request - via article 22 of Regulation 139/2004 or the 'Merger Regulation'[4] - to analyse the operation, on the grounds that it could affect trade between EU member states and threatened to significantly affect competition in several countries. To do so, it used an extensive - and controversial - interpretation of the powers provided for in the aforementioned Article 22, arguing that the European merger control system should include some corrective mechanism to control "*killer acquisition*" type operations, even in the absence of a European dimension to the operation. [5]even in the absence of a European dimension to such an operation or notification of it to a Member State, in accordance with thresholds.

The French Competition Authority accepted the European Commission's invitation and filed the above-mentioned request for review of the merger on the basis of Article 22 of the Merger Regulation; subsequently, five other national authorities joined this request, after which the Commission initiated the appropriate merger control proceedings, which it would eventually prohibit due to the impact that the merger could have on the field of certain cancer screening tests in the EU. Illumina was even required to undo the transaction.

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[3] Most Member States have notification thresholds based on the turnover of the parties to the transaction (similar to the European system). In some countries, such as Spain or Portugal, a market share threshold is also applied, albeit with certain de minimis rules that are often circumvented by killer acquisitions; in other countries, such as Germany or Austria, a transaction value threshold has recently been introduced, which may be useful in such situations.

[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Official Journal of the European Union, L 24/1. https://www.boe.es/buscar/doc.php?id=DOUE-L-2004-80136

[5] Concept referring to transactions in which an operator acquires a major potential competitor with an innovative technology at an early stage of development with the aim of stopping the development of the innovation in order to avoid a substitution effect (Competition policy for digital era (2019), p. 117). https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en

The General Court agreed with the Commission's reasons

As was foreseeable, Illumina challenged before the General Court ('GC') the Commission's Decisions[6] accepting the referral requests submitted by the six national competition authorities. The company based its appeal on the objective lack of competence of the European Commission to examine the concentration, in the absence of a European dimension to the concentration, and on the impossibility for the national competition authorities to request a review of a case which was also not subject to their respective national merger control systems.

The GC[7] , in July 2022, ruled in favour of the Commission, and considered the requests relating to the analysis of the transaction to be admissible. The Court attached importance to the principle of effectiveness, assessed the reasonableness of the Commission's objective, and interpreted Article 22 of the Merger Regulation as not expressly prohibiting the Commission from reviewing a merger referred by a National Competition Authority, even in the absence of standing of that national authority to review it in its own jurisdiction.

CJEU requires compliance with principle of legal certainty

Both Illumina and Grail lodged appeals against the abovementioned judgment of the GC.

In its recent and forceful judgment, the CJEU overturns the previous judgment of the GC on the grounds that a clear error was made in the interpretation of the Merger Regulation. According to the Court of Justice, interpretations of the thresholds of the *ex ante* merger control system must be in line with the principles of foreseeability and legal certainty. The Regulation, as explained by the CJEU, is based on an effective and foreseeable system of allocation of jurisdiction.

In particular, and although the CJEU admits that the wording of Article 22 is not self-evident, it also states that a historical, teleological and contextual interpretation[8] of the Regulation as a whole prevents the European Commission from requesting a referral of a concentration that does not meet the thresholds set either at the European level or at the level of the requesting Member States.

In this respect, contrary to the TG's thesis, the CJEU does not consider Article 22 to be a "corrective" mechanism enabling the Commission to effectively control any concentration that may threaten free competition in the European market.

According to the CJEU, *ex ante* merger control mechanisms are subject to the principle of legal certainty and predictability, so that a Member State with a national merger control

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[6] European Commission Decision C (2021) 2847 final of 19 April 2021; and Commission Decisions C (2021) 2848 final, C (2021) 2849 final, C (2021) 2851 final, C (2021) 2854 final and C (2021) 2855 final of 19 April 2021.

[7] Judgment of 13 July 2022, Illumina, Inc. v. European Commission, T-227/21, EU:T:2022:447.

[8] The Court analysed the drafts of the first Merger Control Regulation (Regulation 4064/1989) and the parliamentary debates prior to its adoption, in particular with regard to the introduction of the so-called "Dutch clause" or referral mechanism in Article 22. It was found that the real purpose of this article was to allow Member States without their own merger control system to ask the European Commission to analyse certain transactions without a European dimension that could significantly affect competition in their country.

mechanism cannot bypass it and ask the European Commission to analyse a case that is not even subject to the control system in that jurisdiction.

Member States without a national merger control system (currently only Luxembourg) could use Article 22 to request the Commission to analyse a transaction with a particular impact on competition in their country, even if the transaction does not meet the thresholds of the Merger Regulation.

The implications of the judgment

In short, this CJEU ruling prevents the Commission (and the Member States) from using the Article 22 referral mechanism as a legal basis for examining any *killer acquisition,* and obliges them to abide by the limits established in European and national merger control legislation, in the interests of legal certainty for economic operators.

Despite this setback, the outgoing Commissioner for Competition, Margrethe Vestager, has insisted that it is necessary for the Commission to have mechanisms that can monitor this type of transaction. In a press release[9] , she called for a possible reform of the European system - although this is not foreseeable in the short term either - and recalled that the national legislation of several Member States, with *call-in* systems[10] , allows transactions to be analysed even if they do not in principle comply with national notification thresholds. Several Member States have already indicated the possibility of reforming their current system of merger control to add this type of formula to give them greater flexibility in their action.

In Spain, the merger control system is based on two thresholds - turnover and market share - which are not likely to be modified in the short term; indeed, the market share threshold can already serve to bring certain *acquisitions* with a verifiable impact on the market under administrative control.

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[9] European Commission. "*Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions*", available at the following link: https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525

[10] Such a system allows the NCA to require the parties to a concentration to notify the concentration for review and clearance, even if the concentration does not meet national notification thresholds. This is an option provided for in Italian, Swedish or Danish regimes, among others.