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The first decision under the « new » article 22 of the Merger Regulation in Illumina/Grail case

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Resume: *For the first time, a merger is analyzed under the new interpretation of article 22 of the Merger Regulation. Recently, the European Commission announced that the provision will be broadly interpreted with the goal to « catch » some operations which are under the radar of the law. These operations — called « killer acquisitions » — consist to acquire a promising startup in the purpose to kill a future competitor and its innovative products. Such an operation was suspected in the Illumina and Grail case.*

The parties: Illumina and Grail. Illumina is a company which develops, manufactures and commercialises systems of medical devices in the purpose to develop and run blood-based tests that can detect cancer or select appropriate therapies for cancer patients. Grail also develops blood-based cancer tests, based on genomic sequencing and data science tools. Grail also produces a multi-cancer detection test which is well-known in its market.

The proposed operation: the acquisition of Grail by Illumina. In September 2020, Illumina announced its intention to acquire its competitor Grail. This operation will deploy effects in the European territory and in the US territory. Reasoning on the European side, this operation present some anticompetitive effects. However, the European Commission is not allowed to control this operation: Illumina and Grail's turnovers do not reach the thresholds opening a merger control. Yet, the value of the transaction is estimated to 7,1 millions of dollars and it could harm competition.

First problematic: on what basis should the European Commission control the operation? The « new » article 22 of the Merger Regulation. At the European level, the operation does not reach the control thresholds. At the national levels, the merger was notified in any Member State. That is why France, followed by Belgium, Greece, Island, Netherlands and Norway submitted a

referral request to the Commission under the « new » article 22 of the EU Merger Regulation[1]. The parties tries to challenge the request before the *Conseil d'État* — the highest jurisdiction of the administrative order in France — without success[2]. In April 2021, the European Commission accepted this request[3].

Background on the new interpretation of article 22 of the Merger Regulation. Last March, the EU Commission published a communication giving a new interpretation of article 22 of the Merger Regulation[4]. This provision is related to a mechanism of upward referral which consists for a Member State to refer a suspected merger to the European Commission. Before this new conception, such a merger had to validate a condition: to reach national thresholds instituted by the referring country. Now, this condition is no more required: it means that all mergers — regardless of the size — can be referred, controlled and potentially prohibited by the European Commission.

Background on the practice of « killer acquisitions ». The purpose of such a possibility is to catch killer acquisitions: in this case, Illumina is suspected to acquire Grail to kill a competitor. Indeed, killer acquisitions generally take place in the pharmaceutical and digital sectors, where huge companies use to buy promising competitors in the goal to kill their rivals. By doing so, they also buy industrial property rights and improve their own products, thanks to the ideas of another competitor. The merger law instituted a control which can prevent or stop this situation. However, killer acquisitions failed to fall under the merger control: they did not reach European or even national thresholds, based on the turnover. That is why this condition of thresholds is now ignored — thanks to the letter of the text — by applying article 22 of the Merger Regulation.

Anticompetitive effects: an increasing of prices and a market foreclosure. The preliminary analysis made by the French Competition Authority shows that the final company — resulting of the acquisition of

[1] EU Comm., 19 Apr. 2021, M.10188, *Illumina/Grail.*

[2] The *Conseil d'État* judged itself incompetent to know about the referral request of the article 22 of the Merger Regulation. See: D. Bosco, « Incompétence du juge administratif quant aux demandes de renvoi de l'article 22 du règlement (CE) 139/2004 », *Cont. Conc. Cons.*, n° 6, June 2021, comm. 102, p. 35 ; A. Ronzano, « Renvoi : Le juge des référés du Conseil d'État dit que le juge administratif n'est pas compétent pour connaître d'un recours contre la décision de l'Autorité de la concurrence de renvoyer à la Commission européenne une opération de concentration en dessous des seuils (Illumina / Grail) », 1er Apr. 2021, *Concurrences*, n° 3-2021, art. n°100075.

[3] EU Comm., « Mergers: Commission to assess proposed acquisition of Grail by Illumina », Press Release, 20 Apr. 2021, MEX/21/1846,

[4] EU Comm., « Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases », C(2021) 1959 final, 26 March 2021, pp. 1-8.

Grail by Illumina — could deploy some anticompetitive effects, and precisely, non-coordinated or unilateral effects[5].

First, the operation could increase prices in the market of sequencers. Secondly, the operation could foreclose the relevant market: the resulting merger could avoid or eliminate the access to this market at the detriment of competitors. To resume, the request shows that the operation could reduce competitive pressure and innovation. It means that the merger could affect the development of the cancer tests and also harm the medical progress.

Violation of the standstill obligation. Last August, Illumina made a second announcement confirming its intention to acquire its competitor Grail. Whereas the operation is still under the control of the Commission[6], this public announcement was seen by the authority as a possible violation of the standstill obligation[7]. Indeed, during a merger control, the parties have the obligation to suspend the realization of their acquisition.

Second problematic: how to answer these anticompetitive concerns? The violation of the standstill obligation lead the European Commission to take interim measures in the purpose to prevent Illumina and Grail realizing a gun-jumping and to maintain a competitive environment in the cancer tests market.

For now: interim measures taken by the European Commission. Last September, the European Commission informed the parties of future interim measures, in answer to the violation of the standstill obligation[8]. Last October, the European Commission pronounced theses measures[9]: first, Grail shall be kept separate from Illumina and be run by an independent Hold Separate Manager; secondly, Illumina and Grail are prohibited from sharing confidential business information, except in the context of their supplier-customer relationship; thirdly, Illumina has the obligation to finance additional funds for the operation and development of Grail; fourthly, the business

[5] EU Comm., « Mergers: Commission to assess proposed acquisition of Grail by Illumina », *op. cit.*

[6] EU Comm., « Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina », Press Release, 22 Jul. 2021, IP/21/3844.

[7] EU Comm., « Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction », 20 Aug. 2021, IP/21/4322.

[8] M. Clancy, P. L'Ecluse, C. Longeval, K. T'Syen, « The EU Commission raises the stakes by issuing a statement of objections against a healthcare company in which it threatens to adopt interim measures to prevent potentially irreparable damage on competition (Illumina / Grail) », 20 Sept. 2021, *e-Competitions*, art. n°102430 ; EU Comm., « Mergers: The Commission adopts a Statement of Objections in view of adopting interim measures following Illumina's early acquisition of GRAIL », 20 Sept. 2021, IP/21/4804.

[9] EU Comm., « Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL », 29 Oct. 2021, IP/21/5661.

interactions between the parties shall not be to the detriment of their competitors; finally, Grail shall actively prepare an alternative in the possible scenario where the transaction had to be prohibited by the Commission.

For the future: the preservation of the development of cancer tests products. The Illumina and Grail operation is still in in-depth examination. The parties will have to wait for the final decision: a prohibition or an authorization. However, the intention of Margrethe Vestager — the Executive Vice-President in charge of competition policy — in designing this interim measures is to make sure the parties and their competitors « *can continue developing their innovative cancer detection technology so that it can reach patients as quickly as possible, thus saving many lives* ». This case present also an interest around the concept of the innovation[10], which will have to be more fully taken into account in the analyse of such « killer acquisitions ».

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[10] A. Ronzano, « Renvoi : La Commission ouvre une enquête approfondie sur le projet d'acquisition d'une startup qui a mis au point des tests sanguins capables de détecter une cinquantaine de cancers en phase très précoce (Illumina / Grail) », 22 Jul. 2021, *Concurrences*, n°3-2021, art. n°101784.