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"The Tribunal of the European Union sustains the Commission in the Illumina and Grail case thanks to a lengthy review of the article 22 of the Merger Regulation"

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To quote this paper: P. MEKARI,"The Tribunal of the European Union sustains the Commission in the Illumina and Grail case thanks to a lengthy review of the article 22 of the Merger Regulation**",** ***Competition Forum, 2022*****, n° 0034,** https://competition-forum.com.

Resume: *The killer acquisition issue has reached a peak with Facebook-Whatsapp and Apple-Shazam Cases. As a result, thanks to a statement of the competition Commissionner Ms Margrethe VESTAGER, enshrined by a communication from the Commission, a change of doctrine in the implementation of the article 22 of the Merger Regulation occurred. The Tribunal of the European Union just confirmed that these soft law acts can operate a change in the implementation of the article 22 without infringing the legal certainty or the legitimate expectations principle.*

Nipping the competitor in the bud, that is what the killer acquisition is about. This expression designates the fact for an undertaking to buy another which is too insignificant regarding his size and turnover to appear in the radar of the competition authorities but whose potential is too important not to be ignored by ambitious peers. Is the acquisition of such an undertaking harmless for fair competition?

For the European Commission it is not. Indeed, according to the latter, it became necessary and urgent to act in particular after the Apple-Shazam and Facebook-WhatsApp[1] cases. Therefore, a change of doctrine in order to correct the mechanism of concentration examination occurred. It has been announced by a statement from the competition Commissionner Ms Margrethe VESTAGER followed by a communication from the Commission. The decision at hand has been rendered by the Tribunal of European Union the 13 July 2022 about case T-227/21. It is the first decision following the announcement of the new doctrine.

Illumina is an American company which is specialized in developing, manufacturing and selling genomic sequences. Grail is a company, specialized in cancer tests. For the need of its activity, the latter needs genomic sequences to develop its tests. On 21 September 2020, Illumina revealed publicly its will to acquire an exclusive control of Grail.

Following, on 7 December 2020, the Commission received a complaint concerning that concentration. Considering the thresholds, the latter reached the conclusion that the appropriate way to realize a merger examination was a referral request emanating from a national competition authority under the article 22 of the European Union Merger Regulation (EUMR) pursuant to the new doctrine announced by the Commission. Therefore, on 19 February 2021 the latter sent an "information letter" to inform the member

[1] A. Piquard,"Facebook a induit la Commission européenne en erreur lors du rachat de WhatsApp", *Le Monde*, 03 juin 2019

states and ask for such a referral. Meanwhile, on 11 March 2011, this information was communicated to the concerned companies i.e. Illumina and Grail.

Subsequently, on 19 April 2011 requests from member states under the Article 22 of the EUMR were sent to the Commission. Indeed, many Member States competition authorities lead by the French Competition Authority responded positively allowing the Commission to initiate the examination of the merger. It came to the conclusion that the concentration could have a negative effect on competition by allowing Illumina to block access to Grail's competitors or to restrict their potential development. Therefore, interim measures had been taken then from the Commission to prevent any reconciliation between the undertakings[2].

Thereafter, Illumina joined by Grail challenged that decision by forming a plea before the Tribunal of the European Union (TEA) by alleging the lack of competence of the Commission. For the companies, in the absence of national merger that allows a Member State to make an examination on the state dimension, the latter is not founded to ask for a referral before the Commission under the Article 22 of the EUMR to ask for an examination by the Commission on the European dimension.

Moreover, the applicants alleged that the referral request was made out of time and therefore is not regular. Indeed, according to the undertakings a request can not be made after 15 working days from the date on which the concentration "was made known to the Member State concerned". Furthermore, also in matter of delays, the applicants consider that the Commission did not act in a reasonable time toward the Member States after receiving the complaint.

As for the Commission, the information letter as well as the requests emanating from the competition authorities of the Member States were not binding and therefore the action cannot be admissible.

The Tribunal is called upon to examine the question whether the Commission, after an announcement in the form of a soft law can declare itself competent to examine a concentration which is the subject of a referral request made by a Member State but does not fall within the scope of its national legislation?

Therefore, the Tribunal has to verify if the legitimate expectations and the legal certainty principle are not infringed so far as well as regarding the delays requirements prescribed by the article 22 of the EUMR?

The Tribunal gives a strong positive answer to the first question by giving a lengthly justification to the legal basis of the article 22 of the EUMR : The Member State examination request under the article aforementioned without falling in the scope of its national legislation is confirmed (I).

Then, the judges rule out the infringement of legal certainty principle regarding the implementation of the article 22. Nevertheless, they comfort undertakings legal certainty by giving precious precisions about the required delays while they reduce the scope of the legitimate expectation principle in that case. As a consequence, according to the Tribunal, the principles aforementioned remain unspoiled (II).

I -The confirmation, by the Tribunal of the European Union, of a Member State examination request under article 22 of the EUMR without falling in the scope of its national legislation

The triggering of the article 22 requires a referral request emanating from a Member State. In fact, the referral is an act which is not admissible unless it creates a legal effect. Thereof is a prerequisite (A). Once this first condition is met, the Tribunal makes a lengthy justification of the Member State examination request without falling in the scope of its national legislation (B).

A - Legal effects, a prerequisite to the admissibility of an action

[2] I. Guittard,"The first decision under the"new " article 22 of the Merger Regulation in Illumina/Grail case", *Competition Forum,* 2021, n°0027, https://competition-forum.com.

First, the tribunal answered the question about the admissibility of the actions introduced by the Commission. On the basis of the article 267 TFEU[3], the tribunal recalls at point, that a decision intended to have legal effects capable of affecting the interests of the complainant is challengeable, while intermediate measures whose purpose is to prepare the final decision are not[4].

That is to say that the decisions that emanate form the member states, under the article 22 of the EUMR, in order to trigger the Commission examination did create a new legal situation toward Illumina and Grail unlike the information letter, or invitation letter that asked to the Membre States to do so.

Therefore, the tribunal declares that the information letter is an intermediate measure which is not challengeable because it does not provoke legal effects. As for the contested decisions, as far as the latter did trigger the Commission examination, and thereafter changed the legal situation of the applicants, those are challengeable[5].

Indeed, in the present case, the legal situation of both applicants changed. According to the article 7 of the EUMR[6], a concentration cannot be implemented until it is approved by the Commission. In this case, it is the contested decision that initiated the examination of the Commission. Once thereof has been triggered, according to the article aforementioned, the Commission had to prevent any rapprochement between the parties to the merger. In that regard, as long as the merger examination is ongoing the merger cannot be implemented. Therefore, in the matter at hand, the Commission pronounced interim measures in October 2021 to prevent the merger to happen before it gets the Commission approval. The Commission did act in order to prevent, what scholars define as a "gun jumping".

These interim measures[7] brought a legal change and put an end to the existing standstill situation. According to the tribunal, it was indeed these contested decisions that were at the origin of the interim measures which caused legal effects towards the applicants affecting their legal situation.

However, the appeal against the contested decisions was only a way for the applicants to contest the new interpretation of the article 22 of the EUMR.

B - The lengthy justification of the Member State examination request without falling in the scope of its national legislation

The tribunal declares that the competence of the Commission to examine, under article 22(1) of Regulation 139/2004, a concentration which is the subject of a referral request made by a Member State which has a national merger control system, but where that concentration does not fall

[3] The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

[4] judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 39 and the case-law cited

[5] Point 82

[6] 1. in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

[7] I. Guittard,"The first decision under the"new " article 22 of the Merger Regulation in Illumina/Grail case", *Competition Forum,* 2021, n°0027, https://competition-forum.com.

within the scope of that national legislation. Thus, the tribunal states that the article 22(1) is effective whether or not the national thresholds are reached. The tribunal considered that it is appropriate in this case to give literal[8], historical[9], contextual[10] and teleological[11] interpretation of the article 22[12].

Literally, at point 89 and following the tribunal reminds us that the article 22(1) of the EUMR mention all concentrations that does not have a [European] dimension without mentioning national thresholds[13]. Therefore, according to this interpretation, the referral under article 22 can be done regarding"any concentration" if the latter affect trade between Member States and threatens to significantly influence competition within the territory of the Member State or States making the request[14].

Historically, the tribunal recalls the origin of the article 22, also called "the dutch clause, or "the one stop shop principle"[15] and points out that this article was not exclusively meant to the membre states that do not have a merger control[16]. Indeed, the one stop shop examination help avoiding parallel examination of the same concentration by the competition authorities when there was a risk of cross-border effects[17].

Contextually, the tribunal answers the allegations of the applicants by demonstrating the legitimate use to the article 22 by highlighting the fact that EUMR is based on articles 101, 102 and 352 TFEU. Indeed, according to the latter of these articles the European Union may give itself additional powers of action necessary for the attainment of its objective[18].

Teleologically, the tribunal points out that the EUMR objective is to permit effective control of all concentrations with significant effects on the structure of competition in the European Union[19]. Therefore the referral mechanism offers a necessary flexibility to remediate to the rigidity of the thresholds in order to avoid distortion of effective competition due to concentrations[20].

The rigor, the technicality and the size of that part of the decision are relevant. Beyond the first purpose of the tribunal which was to answer to the claimants, we can glimpse a desire of the judges to answer the criticism that followed this new policy of the Commission.

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[8] point 89 and following

[9] point 96 and following

[10] point 118 and following

[11] point 140 and following

[12] point 88

[13] D. BOSCO,"Brief remarks on new interpretation of Article 22 of the European Merger Regulation", Competition Forum, 2020, art. n° 0001, https://competition-forum.com.

[14] J. KUPCIK,"The 'Dutch clause' of EUMR – An Overview", Competition Forum, 2022, n° 0036, https://competition-forum.com

Ibid, point 14

[16] point 98

[17] point 101

[18] point 119

[19] point 140

[20] point 142

It seems somehow, that the judges were keen to justify a "brutal reform" undermining the rule of law. Indeed, the declaration of Ms VESTAGER and the communication of the Commission have established a new doctrine ignoring the legislative process and provoking a "problem of a democratic nature"[21]. Therefore, this decision seems to be an important breach in both legal certainty and legitimate expectations principles.

II - The unspoiled legal certainty and legitimate expectations principles

However, the judges consider that these principles remain unspoiled. First, the Tribunal comforts legal certainty principle by giving precious precisions about the computation and the requirement of the delays prescribed by the article 22 (A). Then, concerning thereof, according to the wide justification given about its legal basis, the judges do not give credit to the legal certainty issue. They only answer the claim whereby the legitimate expectations principle has been infringed giving the latter a limited scope in this case (B).

A - The undertaking legal certainty comforted by precious precisions about the computation and the requirement of the article 22 delays

Nevertheless, in matter of legal certainty, the tribunal gives precious precisions about the delays prescribed by article 22 of the EUMR. First, it clarifies the computation of the delay required by the article 22(1). According to this article where no notification of the concentration is required, a request can not be made after 15 working days of the date on which the concentration "was made known to the Member State concerned".

The Court was called upon to interpret this sentence. Thereof is necessary to fix the starting point of the delay aforementioned. The tribunal considers that the "made known" means an active transmission of sufficient information to the Member State. It can not be a public declaration, as it has been claimed by the applicants. Because it can not "depend on unforeseeable and uncertain circumstances such as the extent of media coverage or the level of detail in press release"[22]. The starting point of the delay of 15 days requires an active transmission to the Member State of relevant informations enabling it to carry out a preliminary assessment of the conditions laid down in Article 22(1) of the EUMR[23]. The Tribunal highlights the fact that the applicants have not demonstrate such a transmission before the invitation letter[24]. The latter has in fact "made known" and triggered the starting point of the delay above-mentioned.

Second, clarifications have also been made about the second paragraph of the article 22. Therefore, in the decision at hand, the tribunal starts admitting that the need to act within a reasonable time is a general principle of EU law. The article 22(2) of the EUMR, which prescribes that Commission shall inform the competent authorities of the Member States of any request of merger examination "without delay" must respect such a principle. But, the judges also declare that the infringement of such a principle may justify the annulment of a decision only when it violates the rights of defense of the applicants.[25] In this case, such a violation was not revealed.

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[21] D. BOSCO,"Brief remarks on new interpretation of Article 22 of the European Merger Regulation", Competition Forum, 2020, art. n° 0001, https://competition-forum.com.

[22] point 204

[23] point 211

[24] point 212

[25] point 223

As a result, on the one hand, concerning delays, the predictability for companies with the aim to merge is comforted. But unfortunately, on the other hand, a breach in the principle of legal certainty remains regarding the new interpretation of the article 22. Thereof has been announced by the Commissionner for competition Margrethe VESTAGER on 11 September 2020 and enshrined on 31 march 2021 thanks to a communication from the Commission.

B - The avoidance of the legal certainty question and a limited scope for the legitimate expectations principle

In the decision at hand, the applicants claim that the implementation of the article 22 of the EUMR infringe both the legal certainty and legitimate expectations principles. It is relevant that the judges avoid to respond to the first principle and give a confusing answer about the latter.

Without further explanations they state that "on both the principle of legal certainty and the principle of the protection of legitimate expectations, its arguments relate, as the Commission maintains, in reality, exclusively to that second principle"[26]. The Commission actually argued that the latter was not substantiated[27]. In facts the two principles are rarely separated[28].

At least two reasons may explain that restrained approach. First, the Tribunal has abundantly explained the legal basis of the article 22 as it has been seen above. Therefore, it is unnecessary and it would have been contradictory to answer to this claim on the ground of legal certainty principle. In other words, the demonstration about the legal basis of the article 22 annihilated the issue about the infringement of the legal certainty principle.

Secondly, it appears that the judges are keen to stay out of political considerations. They avoid skillfully the issue brought by the soft law which conducted a change in the Commission doctrine. Indeed, some commentators criticized this decision by considering that the tribunal is giving more scope to soft law than to the principle of legal certainty[29]. But it must be borne in mind, particularly when competition is at stake, that the European judges have endorsed the fact that the Commission has jurisdiction to take action particularly through acts of soft law[30].

But the judges here seem to depart from this approach, considering as it has been seen above, that the article 22 is sufficient on its own and efficient in the case at hand. The declaration of Ms VESTAGER and the communication of the Commission in March 2021 did not infringe the legal certainty principle as they did not modify the article 22 whose substance is in fact clear, precise enough and remained unchanged[31]. That is to say that the judges seem to consider that the soft law in question is exclusively declarative and announce a change of doctrine without bringing any modification in the law. Considering that, there is not any breach in the legal certainty principle in the case at hand.

Otherwise, if such a breach was characterized, the judges would have been compelled to justify the Commission soft law acts. Consequently, going on the political

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[26] point 254

[27] point 252

[28] Francesco MARTUCCI."Les principes de sécurité juridique et de confiance légitime dans la jurisprudence de la Cour de justice de l'Union européenne ", Titre VII [en ligne], n° 5, La sécurité juridique , octobre 2020

[29] Miche DEBROUX,"L'arrêt Illumina Grail/Droit souple 1 - sécurité juridique 0 ", Prédictive Blog, 26 juillet 2022

[30] TEU, 12 février 2014, Beco / Commission, T-81/12, ECLI : EU : T : 2014 : 71, pts 68, 70-75, 77, 81-83

[31] D. BOSCO,"Brief remarks on new interpretation of Article 22 of the European Merger Regulation", Competition Forum, 2020, art. n° 0001, https://competition-forum.com.

ground would have been inevitable. Indeed, they would have not been able to justify the breach in the legal certainty but on the ground on public interest[32].

Nevertheless, the judges answered the claim whereby the principle of legitimate expectations was violated. Thereof presupposes that precise, unconditional and consistent assurances originating from authorized, reliable sources have been given to the person concerned by the competent authorities of the European Union[33].

According to the tribunal, none of such assurances were given to the undertakings, as the ICN recommandations and OECD are irrelevant[34]. As well as the invitation letter, the contested decision[35] and the Ms VESTAGER speech[36]. The latter was only intended to discourage national authorities from referring cases to it and not intended to stop the Commission from dealing with cases comprising risks toward competition[37]. Therefore, the Tribunal consider that the undertakings do not have persuasive reasons to have legitimate expectation.

It is also worth to note, that considering the legitimate expectations principle, the judges emphasized the fact that the declaration of Ms VESTAGER cannot be seen as emanating from a competent authority of the European Union[38]. Therefore, it does not satisfy the conditions required to be examined on the ground of the principle aforementioned. Yet, that declaration initiated the change of doctrine. Indeed, the examination of the Commission was triggered on this basis exclusively. It began before that the Commission enshrined it thanks to a communication. It is confusing that such a soft law act is able to trigger an examination of a merger that would have gone through the Commission radar before it. While at the same time, it is not considered as an act with sufficient scope to be taken in consideration in matter of the legitimate expectations principle on the pretext that it does not emanate from a competent authority of the European Union.

Conclusion :

This decision raises serious issues. First, it reveals the narrowness of the legitimate expectations principle as we just saw. Certainly, we should not confuse the latter with the estoppel principle. However having said that, it would be legitimate for an undertaking to expect similar treatment than its competitors had during decades. The Commission is clearly aware of that issue. The two communications in order to announce a change of the doctrine reveal it.

Furthermore, one could say that in the last years the inaction of the authorities created monsters e.g. killer acquisitions practice, as some digital and pharmaceutical agents became more powerful than states. The competition law would be the last bastion. Could this hypothetical fact legitimize the decision of the judges here, as they would consider the situation as an exceptional circumstance that necessitates an exceptional behavior ? It will not be satisfactory at least for two reasons.

On the one hand, avoiding the legislative process by adopting acts of soft law is an

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[32] CJEC, 22 mars 1961, S.N.U.P.A.T., 42 et 49/59 :"the principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but its application must be combined with that of principle of legality. The question which of these principle should prevail in each particular case depends upon a comparison of public interest with the private interests in question ".

[33] point 255 ; CJEU, 8 September 2020, Carreras Sequeros, C-119/19

[34] point 256

[35] point 257

[36] point 260

[37] Point 261

[38] Point 256

unproductive choice as it is a too easy way to solve legal issues. The proper behavior to adopt here is to work in order to define new thresholds establishing a new efficient scope for merger examination. Thresholds based on the acquisition value of the undertakings could be a serious lead. The risk with the soft law is for European institutions to be less demanding with the production and the substance of the law as it is always possible to modify it thanks to a declaration from here or a communication from there.

On the other hand, the European Union institutions should adopt in all circumstances an exemplary conduct. Thanks to to the internal market and the competition law, a political Europe is born as Professor Francesco MARTUCCI says. Therefore, in these times of dissidence, the European Union judges, more than ever, must be demanding with these institutions.

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