

Who controls concentrations without a European dimension?

A Member State that has adopted national rules concerning the control of concentrations that do not have a Community dimension does not have the possibility of referring such concentrations to the European Commission where they are not covered by Council Regulation (EC) No 139/2004.

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Judgment of the Court (Grand Chamber) of 3 September 2024 in Joined Cases C-611/22 P and C-625/22 P

In this judgment, the Court of Justice of the European Union upholds two appeals brought by Illumina Inc. and Grail LLC, both established in the United States, and thereby sets aside the judgment of the General Court of the European Union, Case T-227/21, in which it was decided that the annulment of, first, Decision C(2021) 2847 final of the European Commission accepting the request of the French Competition Authority for the Commission to examine the concentration relating to the ac-

quisition by Illumina of sole control over Grail (the ‘referral request’), second, the Commission decisions accepting the requests of the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities to join said referral request, and, third, the Commission’s letter informing Illumina and Grail of the referral request, did not lie.

Illumina is a company that supplies sequencing- and array-based solutions for genetic and genomic analysis. On 20 September 2020, Illumina entered into an agreement and plan of merger to acquire sole control of Grail, a company that develops blood tests for the early detection of cancers, in

which it already held a 14,5 % stake (the ‘concentration at issue’). On 21 September 2020, Illumina and Grail issued a press release announcing the concentration. Since the turnover of Illumina and Grail did not exceed the relevant thresholds, given the fact that Grail did not have any turnover either in the European Union or elsewhere in the world, the concentration at issue did not have a European dimension for the purposes of Article 1 of Council Regulation (EC) No 139/2004 (the ‘Regulation’) and was not therefore notified to the Commission pursuant to Article 4(1) of the Regulation, nor was it notified in the EU Member States or in the other States party to the EEA Agreement, since it did not fall within the scope of their national merger control rules.

In December 2020, the Commission received a complaint relating to the concentration at issue and, subsequently, the Commission sent to the Member States and the other States party to the EEA Agreement, pursuant to Article 22(5) of the Regulation, a letter informing them of the concentration at issue, explaining to them the reasons why it found that that concentration appeared to meet the criteria laid down in Article 22(1) of the Regulation and inviting them to submit to it a referral request under the latter provision for it to examine that concentration.

According to said Article 22, “[o]ne or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. [...]”.

In March 2021, the French competition authority asked the Commission to examine the concentration at issue, a request that was joined by other Member States and the EFTA Surveillance Authority. The consequence of this request was that the concentration at issue could not be implemented

before the Commission had rejected that request or declared that concentration compatible with the internal market.

Illumina and Grail each brought an action asserting that a Member State which had adopted national merger control rules in respect of concentrations that do not have a European dimension does not have the possibility of referring such concentrations to the Commission where they are not covered by the Regulation. The General Court rejected this argument, stating that an interpretation which makes the application of Article 22 of the Regulation conditional on the scope of application of national merger control rules while providing for an exception for Member States which do not have such rules, would lead to uncertainty concerning the concentrations which are covered by that provision. By contrast, the interpretation adopted in the decisions at issue makes the application of that article conditional solely on the fulfilment of the four cumulative criteria laid down in Article 22 of the Regulation, which ensure the uniform application of that provision in the European Union, in compliance with the principle of legal certainty.

The Court of Justice of the European Union annuls that judgment on the ground that the General Court erred in law in its interpretation of Article 22(1) of the Regulation, since, although its wording supports the conclusion of the judgment, the historical, contextual and teleological criteria do not.

The referral mechanism set out in Article 22 of the Regulation pursues only two primary objectives: the first is to permit the scrutiny of concentrations that could distort competition locally, where the Member State in question does not have any national merger control rules, and the second is to extend the ‘one-stop shop’ principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national

level and thereby to enhance legal certainty for undertakings.

By contrast, it has not been established that that mechanism 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. It follows that Article 22 of the Regulation cannot be regarded as a 'corrective mechanism' for the effective control of all concentrations with significant effects on the structure of competition in the European Union.

Moreover, an interpretation of Article 22 such as that upheld in the judgment under appeal undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration, since, while the Regulation seeks to establish a control system in respect of concentrations of undertakings that are potentially harmful to competition, it seeks at the same time to establish, first, a clear allocation of powers between the Commission and the national competition authorities, and second, an effective and predictable system of prior control for the undertakings concerned.

In this context, the thresholds set for determining whether or not a transaction must be notified are of cardinal importance as 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. An informal notification of a concentration to each of the national competition authorities in the Member States and in the other States party to the EEA Agreement, as suggested by the Commission, would be inconsistent with the objective of effectiveness pursued by the Regulation.

Moreover, the need to permit effective control of all concentrations with significant effects on the structure of competition in the European Union cannot, in any event, lead to the scope of the Regulation being extended, as this would be at odds with the principle of institutional balance deriving from Article 13(2) of the Treaty on European Union.

Finally, the Court of Justice of the European Union gives final judgment in accordance with Article 61(1) of the Statute of the Court of Justice of the European Union and also annuls the Commission's decision accepting the request of the French competition authority for the Commission to examine the concentration relating to the acquisition by Illumina of sole control over Grail and the Commission's decisions accepting the requests of the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities to join said referral request, while rejecting the remainder of the appellants' claims.