Editorial

EU Merger Control from the Front to the Back Door

On 29 October 2021, the European Commission for the first time adopted interim measures requiring parties to freeze any further integration of a concentration that is still under review. In August, shortly after the opening of a Phase II investigation into the planned takeover, DNA sequencing giant Illumina announced that it had already completed its acquisition of GRAIL, a developer of a multi-cancer early detection test relying on DNA sequencing. Illumina reasoned that it could no longer wait (as the terms of the deal were set to expire, triggering the payment of a \$300 million termination fee) and stressed that it would hold GRAIL as a separate company while the EU merger review is ongoing.¹ The Commission considered this to be insufficient to prevent potentially irreparable harm to competition, however. After hearing the parties, it imposed additional measures to ensure that, pending the outcome of the investigation, their business transactions are carried on at arm's length. It also ordered GRAIL 'to actively work on alternative options' to the \$7.1 billion takeover considering that it may be declared incompatible with the internal market.²

In recent years, the Commission stepped up its enforcement against non-compliance with the notification and/or standstill obligation under the EU Merger Regulation (EUMR) – commonly known, respectively, as procedural and substantive 'gun jumping'. Nonetheless, Illumina's decision to finalise the acquisition despite an ongoing in-depth investigation is unprecedented. Even the US Federal Trade Commission (FTC) was confident that, given the European Commission's decision to open an investigation, Illumina and GRAIL could not implement the transaction without obtaining clearance from Brussels. The FTC therefore dropped its initial effort to obtain a preliminary injunction to prevent the consummation of the merger pending its own administrative proceedings on the legality of the acquisition.³ Preliminary relief was no longer necessary, or so it seemed.⁴

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- 1 Illumina, 'Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test' (Press release, 18 August 2021) <<https://investor.illumina.com/news/press-release-details/2021/Illumina-Acquires-GRAIL-to-Accelerate-Patient-Access-to-Life-Saving-Multi-Cancer-Early-Detection-Test/default.aspx>> accessed 26 November 2021.
- 2 European Commission, 'Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of GRAIL' (Press release, 29 October 2021) IP/21/5661 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5661> accessed 26 November 2021.
- 3 FTC, 'Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case' (Press release, 20 May 2021) <<https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth>> accessed 26 November 2021.
- 4 For criticism see eg Joshua D. Wright, 'U.S. Antitrust Gets a European Makeover: The FTC outsources its investigation of Illumina to Brussels bureaucrats' *Wall Street Journal* (28 September 2021).

So, this gun-jumping case is unique. Yet what renders the case interesting and important is the fact that Illumina fiercely contests the European Commission's competence to scrutinise the acquisition.

Because GRAIL is a small company with almost no turnover, the concentration does not meet the jurisdictional threshold for merger review in any EU Member State (and it certainly does not have an EU dimension). The concentration arrived at the Commission's desk as a result of its reappraisal of the exceptional referral mechanism under Article 22 EUMR. Contrary to previous practice, the Commission no longer discourages – at least in certain circumstances – use of the 'Dutch clause' by Member States that do not have jurisdiction over the transaction in question. In fact, the Commission may now encourage such referrals, as it did in relation to the Illumina/GRAIL acquisition. France responded to the invite and three Member States, as well as Iceland and Norway, later joined that request.

Illumina was unsuccessful in appealing the national request for referral in courts in France and the Netherlands. Yet it also brought before the General Court an action for annulment of the Commission decisions accepting the solicited referral requests. These are procedural decisions, but since they have the legal consequence of triggering the EUMR's standstill obligation for an otherwise non-notifiable concentration, the Court may well find the action admissible. It will then need to assess whether the Commission is entitled to assert jurisdiction over such a referred non-notifiable concentration on the basis of a new broader 'approach' to Article 22 EUMR, rather than a legislative amendment of that provision (which would require unanimous action by the Council).

The Commission's revised policy remains in line with the literal wording of Article 22 EUMR, which indeed allows it to accept referrals of *any* concentration that (a) affects trade between Member States and (b) 'threatens to significantly affect competition' within the territory of the Member State(s) making the request. It does, however, clearly sit at odds with the spirit of the EUMR's jurisdictional system. Moreover, while some Member States may make a referral to the Commission, other Member States empowered to exceptionally capture non-notifiable concentrations (such as Sweden and Germany) remain free to opt for a parallel review under their national merger rules instead. As Nicholas Levy, Adris Risma, and Bianca Buzatu explain in their contribution in this issue of CoRe, 'The EC's new merger referral policy: a creative reform or an unnecessary end to 'Brightline' jurisdictional rules?', the new policy indeed diverges from several core principles that have been at the heart of EU merger control for over 30 years.

Illumina's 'guns blazing, full charge ahead' strategy may early on determine the fate of the Commission's new guidance on the application of Article 22 EUMR and is therefore, perhaps counterintuitively, very much to be welcomed.

Should it survive judicial scrutiny, and should more Member States start supporting it, the practical implications for (certain) companies in the digital, pharma, and biotech

sectors can be significant. The request of the Computer & Communications Industry Association, a trade association that has very little to do with the sector of blood-based cancer testing, to intervene in Illumina's action for annulment, is telling in this regard.⁵ Under the proposed Digital Markets Act, digital gatekeepers will have to inform Brussels of any concentration they enter into. The Article 22 EUMR guidance now leaves open a back door for the Commission to assert jurisdiction to also review them, which only closes six months (!) after their implementation. Also in this respect, the Commission appears to effectively broaden the scope of application of the EUMR by means of soft law.

The Commission's new referral policy is meant to address a perceived enforcement gap vis-à-vis concentrations involving startups with low turnover but high competitive potential in the internal market. Getting nascent and killer acquisitions through the door is only one component of that enforcement gap, however. How to subsequently address the heightened uncertainty when reviewing such mergers? In the second part of his two-part article on 'Killer acquisitions and other forms of anticompetitive collaborations', Björn Lundqvist investigates different ways in which the substantive assessment could become more stringent so as to protect competition in innovations.

This issue of CoRe further includes an article by Christian Bergqvist, 'A single and continuous infringement', in which he discusses the rise and proliferation of this important doctrine and explores unresolved issues regarding its application.

The reports section offers an update on important competition and regulatory law developments in Belgium, Bulgaria, Denmark, Italy, the Netherlands, and the United Kingdom. In the case note section you will find commentaries on the General Court judgments in *CK Telekoms v Commission* (Case T-399/16) and *International Skating Union v Commission* (Case T-93/18). Also included are book reviews of *EU Cartel Law and Economics* (Cedric Argenton et al) and *Experimentalist Competition Law and the Regulation of Markets* (Yane Svetiev).

Ben Van Rompuy
Managing Editor

5 The General Court rejected the application to intervene. See Order of the General Court of 6 October 2021 in Case T-227/21 *Illumina Inc. v Commission* (pending).