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Judgment of the General Court in Case T-227/21 | Illumina v Commission

The General Court upholds the decisions of the Commission accepting a referral request from France, as joined by other Member States, asking it to assess the proposed acquisition of Grail by Illumina

The Commission has the competence to examine that concentration which did not have a European dimension or fall within the scope of the national merger control rules of Member States of the European Union or States party to the Agreement on the European Economic Area

Illumina is an American company specialising in genomic sequencing. It develops, manufactures and markets integrated systems for genetic analysis, in particular next generation genomic sequencers which are used, among other things, in the development of cancer screening tests. Grail is an American biotechnology company which relies on genomic sequencing to develop such cancer screening tests.

On 21 September 2020, those two undertakings [1] made public a proposal on the acquisition of exclusive control of Grail by Illumina. Since turnover did not exceed the relevant thresholds, the concentration at issue did not have a European dimension, within the meaning of Article 1 of the Merger Regulation, [2] and was accordingly not notified to the European Commission. Nor was it notified in the EU Member States or in States party to the Agreement on the European Economic Area, since it did not reach the relevant national thresholds either.

Under Article 22 of the Merger Regulation, a national competition authority has the option to request referral to the Commission for the examination of any concentration that does not have a European dimension, but which affects trade between Member States and threatens significantly to affect competition in the territory of the Member State concerned.

In the present case, after receiving, on 7 December 2020, a complaint concerning the concentration at issue, the Commission reached the preliminary conclusion that that concentration appeared to satisfy the necessary conditions to be the subject of a referral by a national competition authority. [3] It therefore sent a letter on 19 February 2021 to the Member States ('the invitation letter') in order, first, to inform them of that concentration and, second, to invite them to send it a referral request under Article 22 of the Merger Regulation. On 9 March 2021, the French competition authority sent it such a referral request, which the Greek, Belgian, Norwegian, Icelandic and

[1] Together 'the undertakings concerned'.

[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1; 'the Merger Regulation').

[3] As regards, in particular, the potential impact of the concentration at issue on competition in the internal market, the preliminary analysis carried out by the Commission led it to describe concerns as regards the fact that the transaction could allow Illumina, a company well established in Europe, to block access to Grail's competitors to the next generation sequencing systems required for the development of cancer screening tests, and, accordingly, to restrict their development in the future.

Dutch competition authorities subsequently requested, each in its own right, to join. On 11 March 2021, the Commission informed the undertakings concerned of the referral request ('the information letter'). By decisions of 19 April 2021 ('the contested decisions'), the Commission accepted the referral request, along with the respective requests to join.

Illumina, supported by Grail, brought an action for annulment against the contested decisions and the information letter. By its judgment, delivered by a panel sitting in an extended composition following an expedited procedure, the General Court dismisses that action in its entirety. On this occasion, the General Court rules for the first time on the application of the referral mechanism laid down in Article 22 of the Merger Regulation to a transaction that did not have to be notified in the State which made the referral request but which entails the acquisition of an undertaking whose significance for competition is not reflected in its turnover. In the present case, the General Court acknowledges, in principle, that the Commission may be regarded as competent in such a situation. Moreover, the General Court gives clarification concerning the calculation of the time limit of 15 working days for Member States to submit a referral request in such a situation.

The analysis thus accepted by the General Court prefigured a new approach on the part of the Commission concerning the application of the referral mechanism laid down in Article 22 of the Merger Regulation, according to the guidelines published on 31 March 2021, [4] whose implementation opens the way for the EU merger control rules to better take into account transactions involving innovative undertakings with significant competitive potential.

Findings of the General Court

First, the General Court rules on the admissibility of the action, which the Commission disputes, in the light of the nature of the contested acts.

In that regard, the General Court notes, on the one hand, that the contested decisions are, as such, binding and, on the other hand, that each of them entails a change in legal system applicable to the examination of the concentration at issue. In addition, those decisions which put an end to the specific referral procedure, definitively determined the Commission's position on that matter. By accepting the requests submitted by the national competition authorities concerned, under Article 22 of the Merger Regulation, the Commission acknowledged its own authority to examine the concentration at issue in accordance with the substantive and procedural rules laid down for that purpose by the Merger Regulation, to which, in particular, the standstill obligation referred to in Article 7 relates. In those circumstances, it is therefore necessary to find that the contested decisions constitute challengeable acts for the purposes of Article 263 TFEU.

By contrast, according to the General Court, this is not the case with regard to the information letter, which, although it also triggers the standstill obligation, is merely an intermediary stage in the referral procedure, with the result that the action is held to be inadmissible, in so far as it is directed against that information letter.

Second, as regards the substance of the case, the General Court examines, in the first place, the plea alleging lack of competence on the part of the Commission. In that regard, the General Court specifies at the outset that it is called upon, in that context, to determine whether, under Article 22 of the Merger Regulation, the Commission is competent to examine 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 within the scope of that national legislation.

In the present case, the General Court finds, first, that, when it acknowledged its own competence in such a scenario, the Commission did not rely on an incorrect interpretation of Article 22 of the Merger Regulation.

The wording of that provision, in particular the use of the expression 'any concentration', makes it clear that a

[4] Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (OJ 2021 C 113, p. 1).

Member State is entitled to refer any concentration to the Commission which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules. Furthermore, it follows from the origin of that provision that the referral mechanism it established was originally to be used in respect of Member States without their own merger control system, without limiting its applicability to that situation alone. Moreover, from the point of view of the general structure of the Merger Regulation and its objectives, the General Court emphasises that its scope and therefore the extent of the Commission's power of examination concerning mergers depend primarily on the exceeding of the turnover thresholds which define the European dimension, but also, in the alternative, on the referral mechanisms laid down, inter alia, in Article 22 of that regulation.

In those circumstances, after noting that the objective of the Merger Regulation is to permit effective control of all concentrations with significant effects on the structure of competition in the European Union, the General Court finds, lastly, that the referral mechanism at issue is a corrective mechanism forming part of that objective. It provides the flexibility necessary for the examination, at EU level, of concentrations which are likely to significantly impede effective competition in the internal market which, because the turnover thresholds have not been exceeded, would otherwise escape control under the merger control systems of both the European Union and the Member States. Consequently, the Commission regarded itself as competent to examine the concentration at issue in line with a correct interpretation of Article 22 of the Merger Regulation.

Second, the General Court considers that such an interpretation does not disregard either the principle of conferral of competences, [5] the principle of subsidiarity, [6] or the principle of proportionality [7] Lastly, as regards the principle of legal certainty, the General Court stresses that it is only the interpretation adopted in the contested decisions which ensures the necessary legal certainty and the uniform application of Article 22 of the Merger Regulation in the European Union. The General Court thus finds that the entirety of the plea in law alleging lack of competence on the part of the Commission is unfounded.

As regards, in the second place, the plea in law alleging that the referral request was submitted out of time, the General Court finds that, according to the second subparagraph of Article 22(1) of the Merger Regulation, the referral request must be made within 15 working days of the concentrations being 'made known' to the Member State concerned, if no notification of that concentration is required.

In that regard, the General Court finds, first of all, that such 'making known' should be understood as the active transmission of information to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral have been satisfied. It follows that the invitation letter, in the present case, constitutes the 'making known' referred to. In those circumstances, it must be held that the referral request was made in due time, so that it cannot be regarded as having been submitted out of time.

That being so, in the context of the examination of the subsidiary complaints alleging infringement of the principles of legal certainty and 'good administration', the General Court stresses next that the Commission is nevertheless required to comply with a reasonable time limit in the conduct of administrative procedure, particularly, in the context of merger control, given the fundamental objectives of effectiveness and speed underlying the Merger Regulation. However, in the present case, the General Court considers that a period of 47 days between the complaint's being received and the invitation letter's being sent was unreasonable. Nevertheless, since it has not been established that the Commission's failure to comply with a reasonable time limit affected the capacity of the undertakings concerned to defend themselves effectively, it cannot justify the annulment of the contested decisions. Consequently, the General Court also rejects the second plea in law in its entirety.

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[5] As referred to in Article 4(1) TEU, read in conjunction with Article 5 TEU.

[6] As set out in Article 5(1) and (3) TEU and implemented by Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ 2016, C 202, p. 206).

[7] As set out in Article 5(1) and (4) TEU.

In the third place, the General Court also rejects the plea alleging breach of the principles of the protection of legitimate expectations and of legal certainty. In that regard, since it considers the claims relating to the latter principle to be insufficiently substantiated, the General Court limits its examination to the complaints concerning the principle of the protection of legitimate expectations. It recalls in that regard that in order properly to rely on that principle, it is for the party concerned to establish that he or she received precise, unconditional and consistent assurances, originating from authorised, reliable sources, such as to lead him or her to entertain well-founded expectations. However, in the present case, Illumina failed to demonstrate such circumstances and cannot properly rely on the reorientation of the Commission's decision-making practice.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within 2 months and 10 days of notification of the decision.

The full text of the judgment is published on the CURIA website on the day of delivery.

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