



## PRESS RELEASE No 56/24

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Advocate General's Opinion in Joined Cases C-611/22 P | *Illumina v Commission* and C-625/22 P *Grail v Commission and Illumina*

### **Illumina-Grail Merger: AG Emiliou proposes to set aside the General Court judgment and annul Commission decisions on referral request**

*He is of the view that Member States may not request the Commission to examine a concentration which does not have a Community dimension where they have no competence to review such a concentration under national law*

The EU system of merger control – governed by the Merger Regulation<sup>1</sup> – is primarily based on the turnover of the merging companies. Some provisions in that regulation, particularly Article 22, by way of exception empower the Commission to review mergers not meeting the turnover thresholds in question, when cases are referred to it by the Member States' authorities and, as the case may be, after being invited to do so by the Commission.

In the present case the Court of Justice is essentially required to assess whether Article 22 of the Merger Regulation enables the Commission to review a merger referred to it by some Member State's authorities, where the latter lack any competence to review it, since the merger in question falls below the thresholds set out in their national legislation on merger control.

The merger involves the acquisition of sole control of Grail LLC, a US-based company that develops blood tests for the early detection of cancer, by Illumina Inc. – another US-based company marketing sequencing- and array-based solutions for genetic and genomic analysis. Since the merger did not have a European dimension, due to the low turnover of the parties as defined by the Merger Regulation, it was not notified to the Commission. Additionally, since it did not fall within the scope of national merger control rules, it was also not notified to EU and EEA Member States.

Following a complaint relating to the concentration and having invited the Member States to submit a referral request, the Commission received such a request from the French Competition Authority asking it to examine the concentration at issue<sup>2</sup>. Through an information letter, the Commission informed Illumina and Grail of the referral request, stating that the concentration at issue could not be implemented provided that, and in so far as, the standstill obligation laid down in the Merger Regulation was applicable. By its judgment in *Illumina v Commission*<sup>3</sup>, the General Court dismissed the action by Illumina challenging that information letter and the Commission's decisions accepting the referral and the requests to join it. Illumina and Grail have appealed this judgment.

In today's Opinion, **Advocate General Nicholas Emiliou proposes that the Court should set aside the General Court judgment and annul the Commission decisions accepting the referral and the requests to join it as well as the Commission's information letter.**

Advocate General Emiliou finds that **the General Court erred in its interpretation of Article 22 of the Merger Regulation when it came to the conclusion that** a 'literal, historical, contextual and teleological' interpretation of that provision supported the view that **Member States may request the Commission to examine a**

**concentration which does not have a Community dimension, even where they have no competence to review such a concentration under national law.**

After considering the wording, origin, context and purpose of that provision, and having taken into account the logic of the EU system of merger control as well as of some fundamental principles of EU law (such as institutional balance, subsidiarity, legal certainty, and territoriality), the Advocate General takes the view that Article 22 of the Merger Regulation cannot be interpreted as supporting the General Court's broad interpretation of the provision.

Such interpretation gives rise, inter alia, to a very significant extension of the scope of the Merger Regulation and of the Commission's jurisdiction. In one fell swoop, the Commission would gain the power to review almost any concentration, occurring anywhere in the world, regardless of undertakings' turnover and presence in the European Union and the value of the transaction, and at any moment in time, including well after the completion of the merger. Moreover, the procedures that would result from a broad interpretation of Article 22 of the Merger Regulation would hardly be efficient, predictable and capable of ensuring legal certainty to the parties.

AG Emiliou concludes that **the General Court erred in its interpretation and application of Article 22 of the Merger Regulation. Under a proper construction, that provision does not empower the Commission to adopt decisions such as those challenged, and therefore those decisions and the information letter should be annulled.**

**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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<sup>1</sup> [Council Regulation \(EC\) No 139/2004](#) of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

<sup>2</sup> The referral request was made by the French Competition Authority while the Belgian, Greek, Icelandic, Netherlands and Norwegian authorities asked to join the referral.

<sup>3</sup> Judgment of 13 July 2022, *Illumina v Commission*, [T-227/21](#), (see Press release [N° 123/22](#)).