The EU's Significant Extraterritorial Expansion of Its Merger Control Regime Threatens Harm to National Governments, Consumers, and Businesses Both in and outside of Europe

EXECUTIVE SUMMARY

February 10, 2023

Recent European Union (EU) merger developments raise concerns for both European and non-European businesses and consumers, and the ability of national governments to regulate events that affect their local economies. In particular, a recent ruling by the General Court of the European Union (GC) interprets Article 22 of the EU Merger Regulation (EUMR)[1] to allow the European Commission (EC) to review transactions that fall below national thresholds and to initiate such reviews outside of the strict time limits set forth in the EUMR.

This new and dramatically expanded application of Article 22 creates profound uncertainty by potentially requiring pre-merger notifications to 27 separate EU Member States, instead of the previous "one-stop-shop" originally envisioned. After this ruling, the criteria for whether the EC is empowered to review transactions is no longer based on objective standards, clear time limits,

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

or material local nexus requirements. The expansion of Article 22 not only creates uncertainty for businesses contemplating M&A activity, it also paves the way for the EC to prohibit mergers that were previously outside of its jurisdiction, including mergers with an insufficient connection to the EU. Legislative history shows that Article 22 was not meant to be used this way.

Contrary to history and the principles articulated by the International Competition Network (ICN), the EC's position creates jurisdiction where none existed previously by either a Member State or the EC itself. In the first case under this new approach, the EC asserted jurisdiction to review an acquisition of Grail by Illumina even though both companies were headquartered outside the European Union and the "proposed transaction did not [otherwise] meet thresholds of EU Merger Regulation."[2] In fact, Grail had no EU presence whatsoever and was not likely to enter the region in the near future. Further, the EC waited to commence its investigation until months after it had learned about the transaction. The GC's endorsement of the EC's position on its use of Article 22 in the *Illumina/GRAIL* case—if confirmed by the Court of Justice of the EU (CJEU), where the case is now pending—will increase transaction costs, make timing for transactions more uncertain, and discourage beneficial mergers.

If the CJEU confirms this new interpretation of Article 22, the EC could review and prohibit mergers even though they do not meet <u>any</u> EU or Member State's notification threshold, do not occur within previously accepted time limits for notification, and do not have a material nexus to the EU. In other words, even if a transaction does not trigger any of the merger filing thresholds set by legislatures in the EU or any Member State, parties may nonetheless need to notify all 27 Member States as well as the EC to determine whether the EC will assert jurisdiction and review the transaction – and then wait an indefinite amount of time, months or longer, to see if the EC will act. These compounded requirements are a significant burden that will not only add confusion and significant delay, but will also threaten to derail beneficial mergers that could improve competition and help consumers. This expansion will affect both European and non-European businesses, including those that have no European presence or plans to enter the European Union. Under this novel theory of Article 22, two small firms with no economic presence in the EU could be subject to the EC's merger review even though neither the EC nor any EU Member State has jurisdiction over the transaction. As the President of the German competition authority recently stated, this interpretation is "incredibly unusual" and is "not 'easy' for a German lawyer to understand. How can authorities without jurisdiction give jurisdiction to another?"[3]

In essence, in seeking to obtain jurisdiction over the *Illumina/GRAIL* transaction, the EC is creating a precedent that would transform Article 22 from a backstop—discouraged and used only in "exceptional circumstances"[4]—into a basis for asserting jurisdiction over any transaction anywhere in the world based on speculative assertions about potential effects on EU commerce

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[2] European Commission Press Release IP/22/5364, Commission prohibits acquisition of GRAIL by Illumina (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[3] Nicholas Hirst and Mario Hilgenfeld, *Non-notifiable mergers won't face German referral to EU yet, Mundt says*, MLEX (Aug. 30, 2022), https://mlexmarketinsight.com/news/insight/non-notifiable-mergers-won-t-face-german-referral-to-eu-yet-mundt-says.

[4] Commission Notice on Case Referral in respect of concentrations, OJ [2005] C 056/2.

many years in the future. In doing so, the EC neither received approval from the Council of the EU nor consulted with the European Parliament, as it should have to amend the Merger Regulation. As one legal opinion commissioned by the German federal economy ministry noted, such unilateral action to circumvent the EU's legislative process raises the question of the "legality" of the Commission's approach and the "legality of merger decisions" taken on its basis.[5]

It is critical that the EU conform its laws and its actions to the international standards that call for a material local nexus and objective standards as conditions for reviewing concentrations to safeguard legal certainty for businesses.

The GC's Endorsement of the Dramatic Expansion of the EU Merger Regime in the Illumina/GRAIL Case—If Confirmed By the CJEU—Would Increase Transaction Costs, Create Uncertainty for the Timing of Transactions, Contravene International Law, and Discourage Beneficial Mergers.

The GC's ruling in the *Illumina/GRAIL* case endorses the EC's expansive interpretation of Article 22 and allows the EC to review transactions that the EC itself determines, on the basis of open-ended qualitative conditions, should be subject to its control—even where a transaction does not have a "Community dimension" or a "national dimension" as those concepts have been understood previously.

Article 22 of the EU Merger Regulation authorizes a Member State to "request the [European] Commission to examine any concentration . . . that does not have a Community dimension . . . but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request."[6] Member States are required to make any such request within fifteen days of the transaction being "made known" to the Member State to ensure that the parties learn promptly that the EC will review the transaction.[7] Article 22 was meant to enable the EC to review transactions that affect multiple Member States (where cross-border effects and consistent outcomes are important) or where a requesting Member State had not yet enacted a merger review regime. It was not meant to create jurisdiction where the requesting Member State has a merger regime, and the Member State legislature has established criteria under which a particular transaction is not subject to review.

The uncertainty created by the new EC interpretation of Article 22 and the GC's ruling in *Illumina/GRAIL* means that parties could now, in addition to traditional notification requirements, need to brief at least all 27 Member States' authorities just to avoid risk of an Article 22 referral after a transaction is completed—even if the transaction does not meet the

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[5] Jens-Uwe Franck, Giorgio Monti, and Alexandre de Streel, Legal Opinion commissioned by the Federal Ministry for Economic Affairs and Energy concerning Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers, 20 September 2021.

[6] EU Merger Regulation.

[7] *Id*., Article 22(1).

threshold notification requirements of any Member State and the transaction itself has no material nexus to the EU.[8]

The New Article 22 Interpretation Lacks Clarity on Timing

Article 22 includes a strict deadline for the initiation of any referral by a Member State to the EC and for the EC to decide whether to accept the referral. Specifically, the Member State must make the referral within fifteen days of the transaction being "made known" to its competition agency—other Member States then have fifteen days to decide whether to join the referral, and then after those fifteen days expire, the EC must decide whether to accept the referral within ten days. These protections were included within Article 22 to ensure that parties to a transaction would know within those time periods whether the EC would review it.

The new interpretation of Article 22 changes the plain meaning of these deadlines by delaying the start of the fifteen-day time period for a Member State referral to a point when the transaction has not only been "made known" to a competition authority but also until the authority has collected enough additional information about the transaction to make a "preliminary assessment" as to whether to make a referral.[9] Thus, the new interpretation would enable a Member State and the EC to extend nearly indefinitely the previously strict fifteen-day deadline until the agencies decided that they had enough information to make this preliminary assessment. Nor is there guidance on the level of information that would be deemed sufficient to enable Member States' antitrust authorities to preliminarily assess the potential referral.

As a result, companies that want certainty regarding potential review of their transactions might have to provide almost full-fledged merger control filings to 27 Member States to try to ensure that those competition authorities had sufficient information to make the required preliminary assessment. Even such efforts would not necessarily achieve the certainty envisioned when Article 22 was passed. For example, an agency could take the position that it needed information from third parties—that would not be in the possession of the parties to the transaction—before making their assessment and that the fifteen-day deadline was not triggered by the information provided by the parties. This circumstance undermines the notification-based system by creating confusion around when Article 22 may be invoked—creating the potential for inefficient use of resources within the competition authorities of Member States as well as uncertainty that can burden or deter beneficial transactions.

The EC's dramatically expanded application of Article 22 and the GC's endorsement of it in the *Illumina/GRAIL* case, if confirmed on appeal by the CJEU, risk creating significant

[8] Notably, notifications could be required even beyond the 27 Member States. While under Article 6(3) of Protocol 24 of the European Economic Area agreement, only Member States can make Article 22 referral requests, EEA members can still join requests. In other words, while countries like Iceland, Lichtenstein, and Norway do not have to power to make Article 22 referral requests themselves, parties may still need to notify competition authorities in those states because they may still become part of the EC review process.

[9] The EC's guidance acknowledges that there should be some time limits, but its guidance refers only to "generally" declining to consider referral requests made by Member States "where more than six months has passed after the implementation of the concentration." Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases at ⁋21.

uncertainties for non-European transactions too, including those that have no significant or planned EU presence and that may have already closed. The EC and the referring Member State did not comply with these clear time limits set forth under Article 22 in the *Illumina/GRAIL* case. Specifically, the EC invited Member States to make a referral request *five months* after the parties publicly announced the transaction[10] and two months after having received a complaint about it.[11] In other words, the EC sought a referral from the Member States far more than fifteen days after the transaction had been "made known" to them. By deciding that the deadline was tolled under these facts, the GC decision extends virtually without limit the fifteen-day time limit codified in the EU Merger Regulation. This allows the EC to assert jurisdiction to review and prohibit transactions long after the Article 22 deadlines should have expired, including after the transactions have closed. While the EC states that "generally" it will not exercise this unlimited power more than six months after a transaction has been completed, it still reserves the right to review *any* merger at any time.

<u>The New Article 22 Interpretation Contravenes International Legal Norms</u>

The GC's interpretation of Article 22 also interferes with the ability of non-European competition authorities to enforce their own laws in their own markets because transactions that have no significant impact outside of their local jurisdictions may now be subject to review by the EC based on speculation about potential developments in the distant future.

This novel interpretation contradicts a long-established doctrine that a sovereign can exercise extraterritorial jurisdiction over conduct abroad, but only if that foreign conduct has effects within its territory. EU courts have adopted the effects principle and applied it to the competition context. In 1999, for example, the Court of First Instance (predecessor to the GC) applied the public international law effects principle to a merger review case.[12] There, the court found that the merger at issue had a "Community dimension" based on each entity's EU turnover and that the merger was thus subject to Commission review under the EU Merger Regulation. The court nonetheless went on to assess the "compatibility of the contested decision with public international law," and applied the effects principle, finding that the Commission could only review the merger if it had "immediate, substantial and foreseeable effect" on the common market.[13] That standard was met in that case because the merging companies competed for the sale of their products in the EU, each had annual revenues in the EU of at least hundreds of millions of European Currency Units, and the merger would have eliminated that pre-existing competition.[14]

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[10] Press release, *Illumina to Acquire GRAIL to Launch New Era of Cancer Detection* (Sept. 21, 2020), https://investor.illumina.com/news/press-release-details/2020/Illumina-to-Acquire-GRAIL-to-Launch-New-Era-of-Cancer-Detection/default.aspx.

[11] Case T-227/21, 13 July 2022, *Illumina v. European Commission*, EU:T:2022:447.

[12] Case T-102/96, 25 March 1999, *Gencor Ltd. v. Commission*, EU:T:1999:65, para. 94.

[13] *Id.* paras. 89–101.

[14] *Id.* paras. 80–101.

Most recently, the CJEU confirmed the effects principle in 2017 in *Intel v. Commission*, a case concerning potential anticompetitive conduct. In that case, the CJEU reviewed a judgment from the GC that upheld the EC's fine of Intel, a U.S. company, for abuse of dominance through exclusivity rebates.[15] Intel argued that the Commission lacked territorial jurisdiction over Intel's agreements with its trade partners (which were concluded in China and involved non-EU companies and which involved products that were sold outside the EU).[16] The CJEU applied the effects principle and held that "the qualified effects test allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an *immediate and substantial effect* in the European Union."[17] The CJEU found the test satisfied in that case because "Intel's conduct . . . formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with an AMD CPU would be available on the market, including in the EEA [and] that Intel's conduct was capable of producing an immediate effect in the EEA."[18]

<u>The New Article 22 Interpretation Discourages Beneficial Mergers</u>

Expanded regulatory uncertainty and new regulatory burdens will deter beneficial and pro-competitive transactions and will discourage businesses from engaging in investments that will foster innovation. The regulatory uncertainty for smaller transactions that have not, until now, been understood to trigger mandatory merger filings will be especially concerning and unfounded. Such smaller transactions are often exempt from merger filing requirements because they are less likely to harm competition, so increasing the regulatory uncertainty and burden for them is particularly unwarranted. These smaller transactions often provide startups with critical financing and technical expertise that they need to survive and thrive.

Finally, the EU competition regime is widely regarded as an example for other jurisdictions. If other jurisdictions follow the EU approach, parties may have to make even more "voluntary" submissions where the transaction has no material nexus. In time, European businesses may have to answer to other international competition agencies regarding purely intra-European transactions that have no material nexus to other parts of the world. As a result, businesses may face an increasingly onerous patchwork of merger control system across the world. The practical implications of such multi-jurisdictional reviews and their costs are likely to dissuade pro-competitive transactions from being undertaken at all.

The Dramatic Potential Expansion of EU Merger Guidance is Not Administrable Because It Lacks Objective Standards and Local Nexus Requirements.

International standards, including those from the International Competition Network (ICN), call for transactions to meet objective thresholds that include time limitations and a

[15] Case C-413/14 P, 6 September 2017, *Intel v. Commission*, ECLI:EU:C:2017:632.

[16] *Id.* paras. 32–35.

[17] *Id.* para. 49 (emphasis added).

[18] *Id.* para. 52.

material nexus to the reviewing competition authority's jurisdiction. The ICN is a network comprised of 141 competition authorities from 129 different jurisdictions. It is recognized as a leading authority on best practices for competition enforcement.

There Should Be Clear, Objective Notification Thresholds

The ICN has emphasized that merger notification thresholds should be "clear and understandable" and based on objectively quantifiable criteria.[19] Objective criteria allow for better transparency, predictability, and legal certainty. That stability is one reason why "[e]fficient operation of capital markets are best served by clear, understandable, and easily administrable 'bright-line' tests."[20] "The specified criteria should [also] be defined in clear and understandable terms" and may include references to taxes, intra-company transfers, and depreciation of assets.[21] In contrast, the ICN explains that "[e]xamples of criteria that are not objectively quantifiable are market share and potential transaction-related effects."[22] Those sorts of considerations "are not appropriate for use in making the initial determination as to whether a transaction requires notification."[23]

The new interpretation of Article 22 lacks objective thresholds and does not comply with the international consensus set forth in the ICN guidance because it authorizes review of transactions that would not meet the threshold notification requirements of the EU or of any Member State. Such an approach is contrary to international standards.

There Should Be A Material Local Nexus for Review

The ICN also recommends that competition authorities only assert jurisdiction over "transactions that have a material nexus to the reviewing jurisdiction." [24] "A material nexus to the reviewing jurisdiction is present when a proposed transaction has a significant and direct economic connection to the jurisdiction."[25] Competition authorities typically show a nexus by pointing to local sales or local asset levels. Put another way, "[n]otification should not be required unless the transaction has a material nexus to the reviewing jurisdiction."[26] That means

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[19] International Competition Network, Recommended Practices for Merger Notification and Review Procedures (2018), Section II, D and E.

[20] *Id*. at Section II, D.

[21] *Id*. at Section II, E.

[22] *Id*.

[23] *Id.*

[24] *Id*. at Section II, A.

[25] *Id*. at Section II, B.

[26] *Id*. at Section II, C.

"each of at least two parties to the transaction have significant local activities" or "the acquired business has a significant presence in the local territory."[27]

The EC's expanded authority to review transactions without a significant "Community dimension" is a consequence of the new guidance lacking a local nexus requirement. The GC's endorsement of the EC's position in the *Illumina/GRAIL* case, if confirmed by the CJEU, would mean that merging companies seeking certainty regarding the scope of the reviews of their transaction would need to provide "voluntary" notifications in a multitude of EU jurisdictions that have no material connection to the transaction to mitigate risk of learning later of an unexpected review and potential enforcement action. Even then, the competition agencies could take the view that the notification was not sufficient to enable them to make a preliminary assessment of a potential referral, further delaying the certainty needed to proceed with the transaction. If other jurisdictions follow this model, the global merger control system could become unworkable for businesses engaged in or contemplating M&A activity.

The Legislative History of Article 22 Confirms That It Was Meant To Apply in Limited Circumstances Where There Is a Material Nexus to the European Community.

Historical interpretation is fundamental to the analysis of EU law. The legislative history of Article 22 confirms that it was meant to enable the EC to review transactions that affect multiple Member States (where cross-border effects and consistent outcome are important) or where a requesting Member State had not yet enacted a merger review regime (which was notably the case in the Netherlands, resulting in the provision being referred to as the "Dutch clause"). Article 22 was not meant to create jurisdiction where the requesting Member State has a merger regime but the transaction fails to meet the merger review thresholds set by the Member State's legislature.

The legislative history of Article 22 is particularly important because, along with textual interpretation, historical interpretation is an important interpretative method under EU law. For example, the GC sought to prioritize the textual and historical interpretations over the contextual one in *United Kingdom v Commission*: "[S]ince the textual and historical interpretations of a regulation, in particular of one of its provisions, do not permit its precise scope to be assessed, the legislation in question must be interpreted by reference to both its purpose and general structure."[28] The significance of historical interpretation was most recently confirmed in *Krone*, where the CJEU stated that: "[W]ith regard to the interpretation of a provision of EU law, it is necessary to take into account not only its terms, but also the context in which it is set and the objectives pursued by the act of which it forms part. *The legislative history of a provision of EU law may also reveal elements relevant to its interpretation.*"[29]

EC Council Minutes from when the EU Merger Regulation was adopted in 1989 show that Article 22 was only meant to apply in limited circumstances, primarily where Member State

[27] *Id.*

[28] T-437/14, 28 September 2016, *United Kingdom v Commission*, EU:T:2016:577, para. 60.

[29] C-65/20, 10 June 2021, *Krone - Verlag*, EU:C:2021:471, para. 25 (emphasis added).

or community thresholds had already been met. As Lord Brittan, then Competition Commissioner, explained shortly thereafter:

> Below [the thresholds], the [Member States'] jurisdiction is in principle exclusive and the [EC] will not interfere. Here too there is one exception, inserted at the request of Italy, the Netherlands and Belgium. Article 22(3) provides that if the [EC] finds at the request of a [Member State] that a concentration without Community-dimension creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within that [Member State's] territory, the [EC] may, if the concentration affects trade between [Member States], take the decisions provided for in the Regulation to safeguard competition. *This provision was necessary because some [Member States] have no effective merger control system* either because their economies are so open that most competition problems have a large element of extraterritoriality or for other political reasons. In any case, the [EC] may intervene only at the request of a [Member State], and not of its own motion. Furthermore, our involvement will be limited to ensuring that competition is safeguarded; a [Member State] can ask us to oppose a merger which endangers competition in its territory, not to allow one which it favours to proceed. *This provision is therefore narrowly defined and would not permit the [EC] to deal with mergers below the threshold on a general basis, even if it were inclined to evade the spirit of the threshold provision in this way. It is consequently one which is also likely to be infrequently applied*.[30]

Similarly, Recital 15 of Regulation 139/2004 confirms that, when the EU Merger Regulation was reformed in 2003, the understanding was still that Article 22 review was premised on a transaction already being reviewable under a Member State's regime: "A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States *which are also competent to review the concentration* should be able to join the request."[31]

Most importantly, any Article 22 referral is also limited by the general scope of application of Regulation 139/2004, which is "defined according to the geographical area of activity of the undertakings concerned and [is] limited by quantitative thresholds in order to cover those concentrations which have a Community dimension."[32]

In line with this approach, the EC used Article 22(1) EUMR rarely and has discouraged such referrals since the Netherlands adopted its merger control rules. The EC has also previously indicated that it would review transactions <u>only</u> if the transactions have substantial economic links with the EU. For example, in its presentation to an Organization for Economic Cooperation and Development roundtable on jurisdictional nexus in merger control regimes, the

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[30] "The Development of Merger Control in EEC Competition Law" in Competition Policy and Merger Control in the Single European Market, Grotius Publications Ltd., Cambridge, 1991, pages 41–42.

[31] EC Merger Regulation at Recital 15.

[32] *Id.* at Recital 9.

EC said that "EU merger control shall not go beyond what is necessary to prevent distortions of competition in the internal market."[33] It also argued "for the elimination of the redundant filing requirements that presently arise for transactions with no conceivable nexus with the EU[,]" saying that "[t]his would save substantial and unnecessary costs currently incurred in respect of EU filings by EU businesses engaged in cross-border M&A activities . . . [and] would help to open the door to advocating for the implementation of similar changes in the numerous jurisdictions around the world that replicate the EU merger control regime."[34]

The EC's and GC's decision in the *Illumina/GRAIL* case cuts against the legislative history by allowing review of a transaction where both companies are headquartered in the United States, and—in the EC's own words—the "proposed transaction did not [otherwise] meet thresholds of EU Merger Regulation." Put another way, the GC ignored both the geographical and quantitative criteria that were originally envisioned as the foundation for Article 22 referrals.

CONCLUSION

The EU's Expanded Interpretation of Article 22 Is Inconsistent with Law & Creates Harmful Uncertainty for Mergers and Europe's Economy.

- The EC's dramatically expanded application of Article 22 creates significant and unwarranted uncertainties for both EU and non-EU businesses.

- Expanded regulatory uncertainty and new regulatory burdens will slow and deter beneficial transactions and provide further disincentives for businesses to engage in investments that will benefit innovation.

- Parties seeking greater regulatory certainty may need to make "voluntary" submissions to a variety of competition authorities—including all 27 EU Member States—to ensure that the transaction has been "made known" to each of the authorities even though the transaction is not required to be notified under either the EU Merger Regulation nor any Member State merger regime.

- If other jurisdictions follow the EU approach, parties may have to make similar "voluntary" submissions in other jurisdictions where the transaction has no material connection.

- The expanded application of Article 22 also may interfere with the ability of non-EC competition authorities to enforce their own competition laws in their own markets

[33] EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION, Local Nexus and Jurisdictional Thresholds in Merger Control from the EU Perspective (June 2016), https://www.slideshare.net/OECD-DAF/local-nexus-and-jurisdictional-thresholds-in-merger-control-from-the-eu-perspective-dg-comp-june-2016-oecd-discussion.

[34] EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION, Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control (2016), https://ec.europa.eu/competition/consultations/2016_merger_control/international_chamber_of_commerce_en.pdf.

because transactions that are properly within the jurisdiction of only the local authorities may now be subject to review by the EC based on speculation about potential developments in the distant future.

The open-ended interpretation by the European Commission, and support by the General Court of the European Union, can neither be the policy nor the law governing merger notification in the European Union.