Preliminary Communication
UDC: 334.758.2:65.016.4:347.776(4-67EU)
DOI: https://doi.org/10.22598/iele.2023.10.1.3

DYNAMIC INDUSTRIES REQUIRE A DYNAMIC APPROACH TO LAW? ON THE ILLUMINA-GRAIL TAKEOVER

Václav Šmejkal *

ABSTRACT

The factually complicated and legally innovative development of the Grail by Illumina takeover case is now more than two years old and there is still no final denouement in sight. It is a case with significant implications for the future development of the application of EU competition law in the area of takeover control. In this case, the Commission has tested both its new approach to the use of Article 22 EUMR and the application of the harm theory of foreclosure of rivals from a market that is nascent and will reach its full potential only in the future. This text seeks to outline the complicated development of the case, the various aspects of which are now being dealt with in parallel before the Commission, the General Court, and the Court of Justice. In addition, it seeks to show which questions of the future EU merger control regime have already been answered, which remain to be answered and what are the limits of the search for answers.

KEYWORDS: *EU control of concentrations*, *vertical takeover, non-horizontal merger, jurisdictional criteria, article 22 of EUMR, referrals of cases, market foreclosure.*

1. INTRODUCTION

At the time of this writing, at the turn of 2022/23, the vertical merger of the US medical research and development firms Illumina and Grail, negligible by their combined turnover in the EU, was the subject of a pending proceeding

* Václav Šmejkal, Charles University, Faculty of Law in Prague and researcher at Skoda Auto University Research Center in Mladá Boleslav, Czechia; smejkalvaclav@gmail.com.

before the Commission (for gun-jumping) [1], of one General Court decision[2] and two further actions brought before that Court (against the Commission's decisions on interim measures and to prohibit the merger) [3], and two actions before the Court of Justice (in particular against the General Court's decision on how the Commission had acquired the power to decide on the merger) [4]. Thus, although we are more likely only halfway through the battle between two US firms and the guardian of undistorted competition in the EU, we can already speak of a landmark case or landmark decisions that will show how EU competition law will deal with the threat of so-called killer acquisitions in dynamic technology sectors.

Many articles and studies will surely be written about the "Illumina-Grail saga"[5], because only the decisions of the EU courts will make it clear whether it is possible to intervene against "small but dangerous" takeovers without amending the EU Merger Regulation (EUMR) 139/2004[6], or without first adopting industry-specific regulations (the precursor of which is the newly effective Digital Markets Act) [7]. The aforementioned court verdicts will, beyond any doubt, have real implications for the conduct of competition authorities across the EU. Equally significant will be their impact on companies in industries where

[1] Illumina-Grail case has several „branches" before the Commission itself: the gun-jumping issue under case number M.10483, the merger review under case number M.10188, the interim measures procedure under case numbers M.10493 and M.10938. Some Commission decisions have not been published in full at the time of writing (January 3, 2023). Check for details: [https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result&policy_area_id=1,2,3].

[2] Judgment of the General court in the case T-227/21 *Illumina v Commission*

[3] *Illumina v Commission*, case T-755/21 (interim measures); Illumina v Commission, case T-709/22 (ban on acquisition).

[4] *Illumina v Commission*, case C-611/22 P and *Grail v Commission and Illumina*, case C-625/22 P.

[5] On 3 January 2023 the Google Search for "Illumina Grail acquisition" showed over 84,000 search results.

[6] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

[7] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act). According to its Article 14 „Obligation to inform about concentrations" the so-called internet gatekeepers shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation (EC) No 139/2004, where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data, irrespective of whether it is notifiable to the Commission under that Regulation or to a competent national competition authority under national merger rules.

a quick takeover of a promising start-up with no customers and no turnover makes strategic sense, because it is motivated by the desire to control a promising technology before it is captured by competitors or to gain dominance over the entire nascent market of the future. At the same time, it is not without significance to write about the Illumina-Grail case today, as this text attempts to do. The EU competition case in question has branched out to a considerable extent. Without an ongoing inventory, it could become opaque and therefore difficult to track, which is a pity if we accept the thesis of its historical importance highlighted above. Moreover, even today it is possible to critically reflect on the desirability of "dynamizing" the law through interpretation and application practice, which otherwise tends to be rigid and subject to only slow and predictable changes due to its guarantees of legal certainty and protection of legitimate expectations. No less topical is the second question of whether the assessment of the long-term effects of vertical mergers of large firms (i.e. with turnovers for which the rules presume competition significance) should be governed by the same evidentiary standards as in the case of vertical mergers which are undersized by the turnovers of the firms involved.

In the first part of the text, the circumstances of the takeover of Grail by Illumina are described in more detail to explain its "extraordinary" nature. The second part then describes the solution chosen by the Commission to obtain the power to decide on the takeover. The third part summarises the arguments for and against the innovative approach of the Commission (and subsequently of the EU General Court too) to the application of Article 22 EUMR, which allowed the opening of a "backdoor" through which the Commission gained jurisdiction over the case. The fourth part then looks at the prohibition of the vertical takeover in question because of the expected harm to competition in an innovation-driven market whose potential is expected to be fully realized only beyond the horizon of the current decade. The common denominator of the analysis will be the question, already hinted at, as to whether it is justified to "surprise" undertakings with innovative approaches and theories of harm based on the belief that a particular takeover poses a major threat to future competition.

2. KILLER ACQUISITION WHOSE SOLUTION WILL NOT WAIT

Illumina is characterized in official and news descriptions of the case as a globally active genomics company whose business rests mainly on the development, manufacturing, and commercialization of the next generation of sequencing systems (so-called NGS) for genetic and genomic analysis. It also supplies the EU, but does not have significant turnover there, nor is the EU market essential to its business, although according to Commissioner Vestager,

it holds a dominant position in the NGS market as such.[8] For the year 2020, when it announced its intention to take over Grail, it realized global revenues of around USD 3.2 billion[9]. Grail is a healthcare company focused on developing revolutionary technologies for cancer detection blood tests based on NGS[10]. Illumina had already held a 14.5% stake in it before the current case arose. At the time of the announcement of the takeover intention (21 September 2020) Grail did not generate any revenue in any EU Member State or elsewhere in the world and just started a limited commercialization of its new Galleri test in the US (which enables the detection of more than 50 types of cancer)[11].

This brief characterization already allows us to draw competition-law consequences. It is a vertical (non-horizontal) merger because it is not a takeover in the same relevant market (between competitors) but a merger between markets that are technologically and commercially adjacent since NGS systems are necessary for the development of blood tests for cancer detection. The undertaking is acquired, in which the acquirer already has a certain participation (without conferring decisive influence), has mainly its research and the resulting promising technological product, but not yet a market share that can be expressed in terms of turnover. Given the expected growth in the importance of gene medicine, one can certainly bet on the potential of both the acquired company and the merged entity combining the know-how of NGS and the cancer testing based on it. The value of the transaction is testimony to this: Illumina intended to take an 85.4% stake (and thus sole control) in Grail for USD 7.1 billion[12].

---

[8] Vestager, M. Remarks by Executive Vice-President Vestager on the Commission decision to prohibit the acquisition of GRAIL by Illumina, Brussels, 6 September 2022, SPEECH/22/5371, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_5371], accessed on 03/01/2023.

[9] Press release: Illumina Reports Financial Results for Fourth Quarter and Fiscal Year 2020. February 11, 2021, [https://investor.illumina.com/news/press-release-details/2021/Illumina-Reports-Financial-Results-for-Fourth-Quarter-and-Fiscal-Year-2020/default.aspx], accessed on 03/01/2023.

[10] Thill-Tayara, M., Provost. M. Illumina/Grail: pourquoi la Commission européenne a interdit l´opération. *L'usine nouvelle* 21/10/2022, [https://www.usinenouvelle.com/blogs/cabinet-dechert/illumina-grail-pourquoi-la-commission-europeenne-a-interdit-l-operation.N2058282], accessed on 03/01/2023.

[11] Press release: Illumina Intends to Appeal European Commission's Decision in GRAIL Deal. September 6, 2022, [https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=1ef95365-0ca9-4726-a683-37124b1116b5], accessed on 03/01/2023.

[12] Foo Yun Chee. EU to examine Illumina's $7.1 billion acquisition of Grail on antitrust grounds. *Reuters*, April 20, 2021, [https://www.reuters.com/article/us-grail-m-a-illumina-eu-idUSKBN2C71MA], accessed on 03/01/2023.

The just-described competitive potential of the combined entity, expressed also in the high takeover price for a company currently without revenues, has attracted the attention of companies from the same industry on both sides of the Atlantic, as well as regulators - the US FTC[13] and the EU Commission. The merger control system in EU law, based on the EUMR (and similar rules in individual EU Member States), is based on the premise that *ex ante* control of the competitive effects of a merger is necessary where the size of the merging firms threatens to achieve such market power that the merged entity, either alone or in coordination with other larger players within the oligopoly, will manipulate competition (i.e. prices, supply, the pace of innovation) in the affected markets. The power to control a concentration, as well as the necessary link of the concentration to competition in the EU (local nexus), are therefore conditional on a certain level of turnover of the merging firms that makes it significant for the EU (or a specific Member State). As stated in the Preamble of the EUMR, and then specified in its Article 1: "The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds to cover those concentrations which have a Community dimension." (recital 9).

For the analysis of the Illumina-Grail case, the exact turnover thresholds set out in the EUMR (or in merger rules of its Member States) are not relevant, nor are the turnover figures realized before the notification of the merger by one or the other firm, since no one has even attempted to dispute that: "the concentration at issue did not have a European dimension for the purpose of Article 1 of Regulation No 139/2004 and was not therefore notified to the European Commission pursuant to Article 4(1) of that regulation. Nor was the concentration at issue notified in the EU Member States or in States party to the Agreement on the European Economic Area…, since it did not fall within the scope of their national merger control rules."[14] It is simply a fact that in terms of turnover, the notified merger was "undersized" (for the EU as a whole and also for its Member States) and should have been considered uninteresting in terms of the historically formed approach to the risk to competition following the implementation of a merger. On the other hand, there was a technologically important and socially sensitive field (early detection of a disease that kills between 200-300 out of every 100,000 people in

[13] Federal Trade Commission. In the matter of Illumina, Inc., a corporation and GRAIL, Inc., a corporation. File Number: 201 0144, Docket Number: 9401. At the heart of the FTC's objections to the takeover is a concern that the proposed acquisition will diminish innovation in the U.S. market for MCED tests.

[14] Paras 9, 10 of the General Court judgment.

EU Member States each year)[15] and the aforementioned striking transaction price (USD 7.1 billion).

One option was undoubtedly to let the takeover proceed and then seek to address its potential negative effects on competition in the EU through the application of Article 102 TFEU prohibiting abuse of a dominant position. Logically, if Illumina were to gain control of the emerging market for genetic blood tests for cancer detection after the takeover of Grail, and then seek to squeeze out nascent European competitors, or monopolistic raise prices for its supplies to hospitals and laboratories, these would be precisely the exclusionary or exploitative practices that Article 102 TFEU targets (however difficult and, in particular, lengthy it may be in practice to prove them and then enforce their ban).

But these are impacts on future prices and supply, on quantifiable or directly tangible market characteristics. But what to do with the wasted potential for innovation that would not develop fast enough? This is because one firm, early in the development of the market, achieved vertical integration through a clever takeover, enabling it to hamper the efforts of competitors who did not have the advantage of its own NSG technologies… Competing innovations within a nascent technology, their frequency and pace, are the result of hard-to-quantify, in some ways intangible dependencies on many factors - among which the potential consequences of one takeover may or may not be the most decisive (not forgetting the Schumpeterian hypothesis that more concentrated industries stimulate more innovation)[16]. Either way, there is undoubtedly a risk that without ex-ante intervention, before the takeover is implemented, its ex-post effects on the pace of innovation in a given technology market may be difficult to address effectively with the remaining competition law instruments.

The European Commission, aware of these risks (as will be shown in the following chapter), received a "third party" complaint against the publicly announced takeover of Grail by Illumina on 7 December 2020 and had to weigh the risks of its possible intervention and non-intervention.

---

[15] Eurostat. Cancer Statistics 31 May 2022, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Cancer_statistics], accessed on 03/01/2023.

[16] Bykova, Anna A., The Impact of Industry's Concentration on Innovation: Evidence from Russia (2017). *Journal of Corporate Finance Research*, Vol. 11, No. 1, 2017, pp. 37-49, [https://ssrn.com/abstract=3025681], accessed on 03/01/2023.; Gayle, G. P. Market concentration and innovation: New empirical evidence on the Schumpeterian hypothesis. *ResearchGate*, November 2001, [https://www.researchgate.net/publication/228586113_Market_concentration_and_innovation_New_empirical_evidence_on_the_Schumpeterian_hypothesis], accessed on 03/01/2023.

3. ARTICLE 22 EUMR AS A READY-MADE SOLUTION

There has been discussion in the EU for several years about a possible alternative to the EUMR turnover criterion, which would allow even those mergers identified above with the acronym "small but dangerous" to be subjected to preliminary screening. The pitfall of most of the alternatives discussed has been the unknown effectiveness of the proposed solutions and, most importantly, the need to change the content of the EUMR, which requires unanimity of the Member States in the EU Council.[17] Vice-President of the Commission and Competition Commissioner M. Vestager, therefore, offered (at the IBA's annual online conference on 11 September 2020)[18] a more easily achievable solution - "an answer hidden in plain sight" -, consisting in the active use of Article 22 of the EUMR governing the referrals of merger cases from national to the European level of review. This five-paragraph EUMR article provides, in brief, as follows:

- One or more Member States may request the Commission to investigate any concentration where it affects trade between Member States and threatens to significantly affect competition in the territory of the Member State or States making the request.
- Such a request shall be made no later than 15 working days from the date on which the concentration is notified or, where notification is not required, is made known to the Member State concerned by other means.
- The Commission shall then inform the competent authorities of the Member States and the undertakings concerned of the request. Any other Member State shall have the right to join the initial request within 15 working days of the date on which it was informed by the Commission of the one.
- Where the Commission adopts a decision to review the concentration in accordance with the request, it shall inform all Member States and the undertakings concerned of its decision, and the Member State or States which made the request shall no longer apply their national competition laws to the concentration. The undertakings concerned must suspend their merger (comply with the stand-still obligation) from the moment the Commission

[17] The author of this text has devoted a more detailed study to this issue, entitled Concentrations in Digital Sector – a New EU Antitrust Standard for „Killer Acquisitions" needed? *InterEULawEast* Vol. 7 No. 2, 2020, p. 1-16, in which possible changes to the EUMR are described in more detail, [https://hrcak.srce.hr/file/364229], accessed on 03/01/2023.

[18] Vestager, M. The future of EU merger control. International Bar Association 24th Annual Competition Conference. 11 September 2020, [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en], accessed on 03/01/2023.

informs them of the referral until the Commission completes its examination.

– The Commission may itself invite that Member State or those Member States to submit a request for a referral if it considers that the concentration meets the referral criteria.

Article 22 was historically included in the EU Merger Control Regulation (originally Regulation 4064/89) mainly as a safeguard for Member States with no enacted national control regime (today only Luxembourg), and therefore does not contain a condition that only Member States with statutory control powers can request a referral. The Commission briefly commented on the use of Article 22 EUMR in its *Notice on Case Referral in respect of concentrations*,[19] issued already in 2005, following the adoption of the current EUMR in 2004. In it, it points out that for a referral to be made by one or more Member States to the Commission under Article 22, there are two legal requirements to be fulfilled: (i) the concentration must affect trade between the Member States; (ii) it must threaten to significantly affect competition within the territory of the Member State or States making the request, and further briefly characterizes these exclusive conditions. (paras 42-44)

It is worth noting that in this document the Commission also states that: "a referral may also be triggered before a formal filing has been made in any Member State jurisdiction", but also that "it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds" and „a referral should normally only be made when there is a compelling reason for departing from 'original jurisdiction' over the case in question". (paras 6,7,13). Thus, it cannot be argued that undertakings could not have had any idea that a referral request could occur even without notification of their merger in a Member State, but on the other hand, they could have been under the impression that this would not be an entirely normal procedure, but rather an exceptional case.

This impression could be confirmed by the statistics. The EU merger control statistics show that from the start of Commission merger control in September 1990 to the end of November 2022, a total of 41 such referrals have been accepted (out of a total of 8726 mergers controlled), with the most frequent use (4 referrals per year) occurring in 2005 and 2006, just after the adoption of the EUMR and the issuance of the Commission's *Notice on Case Referral*.[20] In

[19] European Commission. Commission Notice on Case Referral in respect of concentrations (2005/C 56/02). OJ C 56, 5.3.2005, p. 2–23.

[20] European Commission. Statistics on Mergers cases. 30 November 2022, [https://competition-policy.ec.europa.eu/mergers/statistics_en], accessed on 03/01/2023.

her (relevant) speech of 11 September 2020, the Commissioner admitted that Article 22 had so far served only "on a few occasions" and that the Commission had even had "a practice of discouraging national authorities from referring cases to us which they didn't have the power to review themselves." Even a look at the referrals immediately preceding the Illumina-Grail merger shows that the referral was made by Member States for which the intention to merge was compulsorily notified under their national rules.[21] The fact that prior national notification is not a condition for referral was also briefly pointed out by Commissioner Vestager when she announced in her September 2020 speech: "We plan to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves."[22]

So, on 11 September 2020, the Commission announced its intention not to amend the EUMR, but to change the approach to its Article 22 so that its control effectively reaches even "small but dangerous concentrations". Just 10 days later, on 21 September 2020, Illumina published its intention to take over Grail. This timing is not irrelevant because the Commissioner's announcement that "the time has come to change our approach", was accompanied by a kind of assurance that "this won't happen overnight – we need time for everyone to adjust to the change, and time to put guidance in place about how and when we'll accept these referrals. But if all goes well, I hope we'll be able to put this new policy into effect around the middle of next year."[23]

Before this happened, however, the Commission received the aforementioned "third party" complaint (7 December 2020) and in the same winter (17 February 2021) it decided, under Article 22(5) EUMR, to address an "invitation letter" to the Member States informing them in detail of the intention of Illumina to take over Grail and inviting them to send their referral requests. This triggered a procedure that, although foreseen in Article 22 of the EUMR, was not commonly used for non-notifiable mergers in Member States until the Commissioner pointed it out in her speech given less than six months ago. And the procedure was triggered more than a month before the Commission had time to issue the promised *Guidance on the application of*

[21] Cases Apple/Shazam (2018), case M.8788, Knauf/Armstrong (2018), case M.8832, Johnson and Johnson/Tachosil (2019), case M.9547 and Mastercard/Nets (2020), case M.9744, all started with a notification of the merger in a Member State and in none of the cases was the merger prohibited by the Commission (Case M.9547 ended with the withdrawal of the notification by the undertakings).

[22] Op cit ref 18.

[23] Op cit ref 18.

the referral mechanism set out in Article 22 EUMR, which did not happen until 31 March 2021.[24]

The impression is thus that the Commission became urgently concerned about the consequences of the concentration after receiving the complaint. By its invitation letter, sent two months later (in fact in 47 working days later, due to the Season's break) it then set in motion a sequence of events dictated by fixed deadlines of EUMR, even though it must have been clear that it would thereby pre-empt the issuance of the promised Guidelines. As early as February 2021, the Commission had to inform the representatives of both companies, because already on 9 March 2020 a first referral request came from France to which five other States joined within 15 days. Thus, although the Commission's change of approach to Article 22 EUMR was not intended to "happen overnight", it created obligations and restrictions (stand-still) for Illumina and Grail twenty days before the Commission specified and explained this change of approach in its Guidelines.

So it was only on the last day of March 2021 that the Commission published in the Official Journal of the EU what it described as "a reappraisal of the application of Article 22 of the Merger Regulation" (para 11) which aims to provide corporate practice with "indications about the categories of cases that may constitute suitable candidates for a referral in situations where the transaction is not notifiable under the laws of the referring Member State(s), and thus on the criteria that the Commission may take into account in such situations when encouraging or accepting such a referral." The Commission has identified the purpose of its action as "to increase transparency, predictability, and legal certainty as regards a wider application of Article 22 of the Merger Regulation." (para 12) For the merger of Illumina and Grail, already underway more than half a year before, the Guidelines could hardly fulfill this purpose. On April 19, 2021, the Commission then notified the undertakings concerned of its decision that it had accepted the referral request and would deal with their merger.

[24] European Commission. 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 2021/C 113/01. OJ C 113, 31.3.2021, p. 1–6.

4. TREATMENT OF THE CASE BY THE GENERAL COURT (CASE T-227/21)

Illumina, supported by Grail, brought an action against the Commission's decision (to accept the referral requests) before the General Court already on 28 April 2021 seeking its annulment in an expedited procedure.[25] Focusing on the issue of Article 22, and leaving aside other aspects of the action, Illumina argued that the Commission's decision to examine the concentrations was outside its competence, that the referral request of France was made late, and that the change of the Commission's approach was so abrupt that it breached Illumina's legitimate expectations and the principles of legal certainty and good administration.

On the question of the Commission's competence, the issue was whether Article 22 EUMR could also be used to allow a referral to be requested by Member States which had national merger control laws, but which did not give them jurisdiction to review as they had not even been notified of the merger. Illumina apparently considered that this Article could be used either only by States with a national merger control system that must have been duly notified or, conversely, only by States that did not have such a system and could not have been notified. To adopt such an interpretation in the present merger case would mean that only Luxembourg and no one else could request a referral under Article 22 EUMR. However, Luxembourg was not among the requesting States in the case.

The General Court devoted a substantial part of its decision to this objection (paras 85-184) and subjected Article 22 EUMR to a thorough literal, contextual, teleological, and historical interpretation. All of them essentially led its judges to the conclusion that the EU legislature had laid down only the following conditions for a referral request:

1. There must be a concentration within the meaning of the EUMR (its Art 3 "Definition of concentration");
2. The concentration does not meet the EU notification threshold (as set in Article 1 "Scope" of the EUMR);
3. This concentration affects trade between Member States;
4. This concentration threatens to significantly affect competition within Member State(s) making the request.

[25] Judgment of the General Court (Third Chamber, Extended Composition) of 13 July 2022, *Illumina, Inc. v European Commission*, T-227/21, EU:T:2022:447.

Given that Article 22 (1) EUMR explicitly refers to "any concentration" and that the EU legislator has never indicated that it intended to limit its use exclusively to states without a national system of control of concentrations, the General Court has identified the referral mechanism introduced by this Article (in full compliance with Recital 11 of the EUMR Preamble) as *an effective corrective mechanism* (paras 141-142) complementing the EUMR's standard turnover criteria, the purpose of which is to ensure the effectiveness of the protection of competition in the EU as well as the competing interests of the Member States. In short, both the referral and its acceptance were lawful in this respect.

Another Illumina's plea, that the referral was requested out of the time limit, required the determination of the point in time from which the 15-day period referred to in Article 22(1) EUMR runs. The Article provides that it is to be from "the date on which the concentration is notified or, if no notification required, otherwise made known to the Member State concerned". The General Court thus had to establish the meaning of "made known to the Member State". If this condition was already fulfilled by the general publication of the intention to take over (made on 21 September 2020), the request for a referral made on 9 March 2021 was definitely beyond all deadlines. The General Court, however, also taking into account that the Member State has only 15 days from that moment to formally request the referral, concluded that this period could run only from the moment when there has been the active transmission of relevant information enabling the Member State concerned to make a preliminary assessment of whether the conditions of the Article 22 (1) EUMR have been satisfied. (para 204) Such information to the Member States in this case was only made by the invitation letter of the Commission, sent on 19 February 2021. The request for referral was thus made in due time.[26]

So far, the General Court's reasoning has not only been quite sophisticated but also logical and persuasive. It would be surprising if the Court of Justice founds compelling reasons to reject it. Conversely, as regards the General Court's conclusions on whether the legitimate expectations of undertakings, the

[26] However, the 47 working days that elapsed between the Commission's receipt of the 'third party' complaint and the time it sent its letter of invitation to the Member States were considered by the General Court to be an unreasonably long delay (albeit not so serious as to jeopardise the undertakings' rights of defence). (para. 233) It can be speculated that the Commission also had a difficult decision to make at that time regarding the acceleration of the transition to the new approach to Article 22 EUMR compared to the original plan (i.e. that it was taken by surprise by the seriousness of the complaint concerning the Illumina-Grail merger), which is why it sent the invitation letter only on 17 February 2021 and not a month or more earlier. Although the General Court did not find in this delay a reason to annul the decision, it issued a certain "admonition" to the Commission *pro futuro*.

principle of legal certainty, and good administration have been affected, it is difficult to be similarly positive. It is clear from the Commissioner's speech of 11 September 2020, quoted above, that she was announcing something of a turnaround which, although it would not require a change in legislation, would not "happen overnight" because it needs time for everyone to adjust to the change and time to put guidance in place. This did not quite happen in the case of Illumina-Grail, and the businesses concerned may have felt caught off guard by the acceleration of a new approach they may not have counted on. The Commission argued (not entirely convincingly) before the General Court that "its past practice of discouraging Member States not having jurisdiction from submitting a referral request does not mean that it excluded the application of that provision to any future case" and moreover that, in her speech on 11 September 2020, the Commissioner Vestager did not provide any precise, unconditional and consistent assurances excluding certain referral requests. (para 31)

The General Court based its conclusion on the fact that following the settled case law of the CJEU, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional, and consistent assurances originating from authorized, reliable sources have been given to the person concerned by the competent authorities of the European Union. (para 254) The Commissioner's speech was aimed at merger control policy in general and no expectations about this particular takeover could therefore be derived from it. The General Court dealt in the same vein with the question of the infringement of the principle of legal certainty. By adhering only to the terms of Article 22 EUMR and its *Notice on Case Referral*, available to all since 2005, the Commission achieved that the very kind of interpretation adopted in the contested decision ensured the necessary legal certainty and the uniform application of Article 22 of Regulation No 139/2004 in the European Union. (paras 175-178)

Regarding the (dis)respect of the principle of good administration, it was said before the General Court that the Commission had acted transparently, as already on 26 February 2021 it had informed the applicant that its invitation letter had been sent (i.e. a week after dispatching the invitation letter and almost two weeks before receiving the first referral request). (para 35) Moreover, from 26 February 2021 onwards, communications between the parties to the merger and the Commission had been sufficiently frequent that the undertakings could not be said to have been surprised by the Commission's decision to accept the referral request and to review their merger.[27] It is true that, if we proceed from how the right to good administration is characterized by the EU Charter

[27] The General Court then addressed the objection to the good administration principle more in the context of the infringement of the reasonable time principle, as described above.

of Fundamental Rights[28] in its Article 41, the criteria for its fulfillment consist in respecting the principles of due process in the conduct of administrative authorities (impartial and fair handling of the case, within a reasonable time, right to be heard, to have access to the file, to respect the legitimate interests of confidentiality and professional and business secrecy, etc.) They, however, do not stipulate the right to be informed in advance that an EU authority is going to act in a particular way in a particular case.

The applicant did therefore not succeed on this point either, although this was where the Commission's and the General Court's approach caused the greatest embarrassment among commentators.[29] The evolution of EU merger control should have deserved at least a duly published piece of soft law, better a certain transition period, or at least a clearer deadline. If the Commission wants to be transparent, clear, and consistent with companies, its intervention in the Grail acquisition by Illumina is not the best example of such an approach. In its soft law *Code of good administrative behavior for staff of the European Commission in their relations with the public*, issued 2000, the Commission refers, inter alia, to the principle of consistency: "The Commission shall be consistent in its administrative behavior and shall follow its normal practice. Any exceptions to this principle must be duly justified."[30] Of course, it can be argued that this is only a guide for administrative staff and their conduct, not binding rules of procedure for the EU Commission's decision-making. Even so, one may question whether the Commission was "consistent in its behavior", whether it "followed its normal practice" etc.

In the appeal brought against that decision of the General Court (case C-611/22 P), Illumina (in addition to reiterating its objections to the interpretation of Article 22 EUMR and the time limits it lays down) focused precisely on the breach of legal certainty and legitimate expectations principles, in particular how the General Court interpreted them in favor of the Commission and against the applicant[31]. The analysis shows that, in particular in the latter objections the applicant's position is likely to be strong.

---

[28] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

[29] See for instance Monegato, C. The modernisation of EU Merger control. *Lexxion.eu*, 26 September 2022, [https://www.lexxion.eu/coreblogpost/the-modernisation-of-eu-merger-control/], accessed on 03/01/2023.

[30] European Commission. Code of good administrative behaviour for staff of the European Commission in their relations with the public. Doc 2000Q3614 — EN — 16.11.2011 — 012.001 — 13 Annex.

[31] Appeal brought on 22 September 2022 by Illumina, Inc. against the judgment of the General Court (Third Chamber, Extended Composition) delivered on 13 July 2022 in Case T-227/21, *Illumina v Commission* (Case C-611/22 P) OJ C 432/15, 14.11.2022.

It is somewhat paradoxical that everything that will be discussed below (and which is no less interesting from an EU competition perspective) would be rendered meaningless if the EU Court of Justice were to reach a contrary view to that of the General Court. If it turns out that the Commission's power to control takeovers was unjustified, all its decisions in Illumina-Grail will logically cease to be valid.

5. THE GUN-JUMPING AND THE SIGNIFICANT IMPEDIMENT TO EFFECTIVE COMPETITION

The General Court adopted the above-described decision on 13 July 2022, less than 15 months after the filing of the lawsuit. However, the case has not slept in the interim. The Commission initiated a review of the takeover, announcing its in-depth Phase II in July 2021, signaling that it had serious concerns about its implications for competition. However, on 18 August 2021, roughly 11 months after the announcement of the takeover intention and still while the proceedings before the Commission was pending, Illumina announced the termination of the takeover of Grail and a change in its legal form because of gaining full control of it.[32]

The Commission immediately (20 August 2021) opened an investigation for possible breach of the stand-still obligation (so-called gun-jumping) and on 20 October 2021 imposed the interim measures that required Grail to be kept separate from Illumina and be run by an independent separate manager. Illumina reacted against these measures by another action brought on December 1, 2021 (case T-755/21).[33] The Commission, surely waiting for the outcome of the first

[32] The move is not generally attributed to Illumina's and Grail's confidence in succeeding in their litigation with the Commission as to the terms of the takeover agreement, under which Illumina would allegedly have to pay a significant regulatory termination fee if the transaction had not closed before September 20, 2021. See in Mordall, J. Illumina/Grail Prohibition: The End of the beginning for EU review of „killer acquisitions"? *Kluwer Competition Law Blog*, September 8, 2022, [http://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/], accessed on 03/01/2023.

[33] Action brought on 1 December 2021 – *Illumina v. Commission*, Case T-755/21, The applicant claims that the Court should: annul the Commission's decision of 29 October 2021 in case COMP/M.10493 taken pursuant to Art. 8(5)(a) of Council Regulation No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) 1 (i) finding that Illumina implemented the acquisition of GRAIL in breach of Art. 7 EUMR; (ii) imposing on Illumina and GRAIL the interim measures set out in section 4.7 of the decision; and (iii) requiring Illumina and GRAIL to implement or procure the implementation of such measures immediately, failing which periodic penalties shall be imposed (the Decision).

action challenging its very jurisdiction, issued its Statement of Objections concerning the gun jumping only on 19 July 2022.

But then followed a decision that deserves further analysis: On 6 September 2002, the Commission prohibited Illumina's acquisitions by Grail for the risk of foreclosure of competition by Grail's rivals. The Commission thus found the acquisition (still challenged for its premature implementation) incompatible with the EU internal market, as it threatened to cause a significant impediment to effective competition on it. This was followed by the issuance of a Statement of Objections (5 December 2022) in which the Commission outlined measures to unwind (by way of a divestiture leading to full separation) the blocked acquisition of Grail by Illumina[34]. The prohibition decision that has, as Commissioner Vestager said, more than 600 pages and that is based on more than a million (!) documents, has not yet been published.[35] The analysis can therefore, for the time being, only draw on the Commission's press release[36] and Commissioner Vestager's comments on it[37], which fortunately shed sufficient light on the reasoning that led to the prohibition.

There is no doubt that this decision is also extraordinary. Before its adoption, the Commission rejected, based on extensive market testing, several types of remedies proposed by Illumina because, in its view, they did not adequately address its competition concerns. It, therefore, decided to impose a prohibition on an "undersized" takeover (in terms of turnover of the parties) which was, moreover, a vertical (non-horizontal) merger and therefore required for its prohibition a relatively untested "innovation competition" theory of harm[38]. The Commission's concerns in the present case were based on two assumptions, the fulfillment of which, according to the Commission was not only possible

[34] European Commission. Press release IP/22/7403, Brussels, 5 December 2022.

[35] Op cit ref 8.

[36] European Commission. Mergers: Commission prohibits acquisition of GRAIL by Illumina, Brussels, 6 September 2022. IP/22/5364.

[37] Op cit ref 8.

[38] The novelty of the Commission's decision therefore lies firstly in the fact that the acquired entity (Grail) had no turnover in the EU and secondly in the fact that the innovation theory of harm was applied for the first time to a vertical concentration. See comments by: González-Díaz, F.E., Bitsakou, L., Levy, N., Cullen, B. Illumina/GRAIL: EC Blocks Transaction Below EU and Referring Member State Merger Control Thresholds for the First Time. September 15, 2022, Cleary Gottlieb, [https://www.clearygottlieb.com/news-and-insights/publication-listing/illumina-grail-ec-blocks-transaction-below-eu-and-referring-member-state-merger-control-thresholds-for-the-first-time], accessed on 03/01/2023; K&L Gates LLP. Illumina/Grail – The Dawn of a New Era for Global Merger Control? 31/10/2022, [https://www.jdsupra.com/legalnews/illumina-grail-the-dawn-of-a-new-era-1924190/], accessed on 03/01/ 2023.

but *prima facie* likely. Firstly, the nascent market for blood tests for cancer is set to boom, with a volume of around EUR 40 billion per annum by 2035. In other words, although sales of the Grail takeover are currently tiny, in the future it could be a hen laying golden eggs. Second, this emerging market is based on the use of NGS technology, in which Illumina is the dominant player. If it controls Grail, it will have the ability as well as the incentives to cut access to its NGS technology to Grail's rivals and delay thus the entry of potential competitors (and their competing innovations) into the early cancer-detection testing market. In short, according to the Commission, the potential foreclosure effect will be particularly devastating for the innovation race in the nascent market for blood tests for cancer. It is clear that Grail's European competitors, from whom the Commission has been collecting reactions, fear just that: that Illumina may refuse, delay or degrade their supplies, or at least increase prices paid for its NGS technology because the company is well aware that its technology has no credible alternative in the short or medium term and the barriers to entry are quite high.

The Commission in its *Guidelines on the assessment of non-horizontal mergers*[39] acknowledges, on the other hand, that vertical mergers provide also substantial scope for efficiencies (para 13) and as to their possible non-coordinated effects warns precisely against anticompetitive foreclosure (para 18). Sometimes both efficiency gains and the risk of foreclosure can result from the same takeover, and the Commission must make a difficult choice between the benefits to consumers (resulting from foreseeable efficiency gains) and the potential foreclosure of competition. If it chooses to demonstrate a prevailing risk of foreclosure, the very ability to foreclose rivals arises from the unique or directly dominant position of the merged entity. More difficult, on the other hand, is to demonstrate those incentives that make its anticompetitive conduct *prima facie* likely. The Commission counts in its Guidelines among obvious incentives to foreclose: the ownership structure of the merged entity, the type of strategies adopted on the market in the past, the content of internal strategic documents such as business plans (para 45), which, of course, can be countered by various disincentives. To prove that the incentives to foreclose would definitely prevail over the disincentives, the Commission must have convincing enough (albeit pointing into the probable future) evidence. As a general rule, if such evidence is not the past conduct of the acquiring company, the Commission must have on its side a well-founded economic assessment showing that such anti-competitive conduct would objectively be in the mer-

[39] European Commission. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07) 18.10.2008.

ged entity's commercial interests. Without such evidence, vertical mergers are usually more likely candidates for seamless transaction approval[40].

The Commission's rejection of Illumina's proposed remedies demonstrates that concerns about foreclosure risk were so strong that they were difficult to rebut and offset. Illumina offered a license open to alternative NGS suppliers to some of its NGS patents, a commitment to stop patent lawsuits as well as a commitment to conclude agreements with Grail's rivals under the conditions set out in a standard contract that would stay valid until 2033. In all cases, the Commission concluded that such measures would either have only a limited impact, would not cover all likely foreclosure strategies, and would be very difficult to control. Illumina, on the other hand, argued that permitting the merger under these conditions would tend to make Grail's life-saving multi-cancer early detection test more available, more affordable, and more accessible – saving lives and lowering healthcare costs – including in the EU.[41] The fact that both the Commission and Illumina are projecting the development of a market that has yet to expand in the coming years (with the aforementioned expected volume of EUR 40 billion over a 13-year horizon) naturally makes it easier both to question expectations of unilateral market domination and the prediction that this market will flourish to the benefit of all.

[40] P. Ibañez Colomo, in his extensive 2018 study on the decision-making practice of the Commission and the EU Courts in competition cases, aptly wrote that „it is not obvious to assume that non-horizontal concentrations fall within the scope of EU merger control. After all they do not in themselves – or at least not directly – have anti-competitive effects. Such effects can only be expected where the merged entity has the ability and incentives to engage in a foreclosure strategy." See in Ibañez Colomo, P. The Shaping of EU Competition Law. Cambridge University Press 2018, p. 247. And the practice of competition authorities, influenced by the neoliberal Chicago School of anti-trust, for a long time neglected vertical mergers and preferred to laissez-faire market forces to do their business. There have been very few prohibition decisions by the Commission in vertical transactions since the establishment of the EU's merger control in 1990 and the last major intervention due to the threat of vertical foreclosure, was the ban on the merger of Deutsche Börse and London Stock Exchange Group in 2017. However this was a highly challenging mega-merger duly notified to the European Commission, not a merger of companies whose turnover did not reach the level required for notification either in the EU or in a Member State. See in: Johnson, P., Gamble, A. The Rediscovery of Vertical Merger Enforcement*? CPI Antitrust Chronicle*, August 2018. [www.competitionpolicyinternational.com], accessed on 03/01/2023. Among other things, the authors refer to the fact that national competition authorities responding to the International Competition Network's Vertical Mergers Survey reported that vertical mergers accounted for only 1 in 10 cases in which they intervened.

[41] Press release. Illumina Intends to Appeal European Commission's Decision in GRAIL Deal, September 6, 2022., [https://www.illumina.com/company/news-center/press-releases/2022/1ef95365-0ca9-4726-a683-37124b1116b5.html], accessed on 03/01/2023.

The Commission must therefore hope that the EU Courts will view its bold prediction regarding the future non-coordinated effect of a merger (i.e. of future unilateral behavior of a merger entity) in the way that Advocate General J. Kokott recommended in her opinion on another merger case in October this year[42]: "any prospective analysis relating to the future developments of a relevant market and the future behavior of operators who are or will be active on it can be based only on the determination of a more or less strong probability…". (para 28). According to the Advocate General, it is therefore not possible to apply the same evidentiary standards to the Commission's predictions as are required in criminal cases and thus to require that the risk of foreclosure be established "beyond a reasonable doubt", but neither as "very probable" or "particularly likely" (para 56). The more likely outcome of the balance of probabilities test should be sufficient.

Based on what is known by now about the circumstances of the Illumina-Grail takeover, the Commission seems to have such arguments in its decision. And the fact that the US FTC has similar reservations about the takeover[43] blunts any criticism that the Commission is pandering to the interests of Grail's European rivals who fear US domination of a promising future market. The only question is whether the EU Courts will accept the same standard of proof to assess the impact of takeovers that have a "Union dimension" (and are therefore "suspicious" by the size of the merging firms) as for takeovers that are undersized by both EU and national standards (and whose threat to competition in innovations is based on an estimate of the future growth and importance of the relevant market).

6. CONCLUSION

The pending decisions of the EU Courts will show whether the Commission's dynamic approach to this undersized vertical takeover has charted the course for merger control in the EU going forward. First, we will learn whether Article 22 EUMR may be the appropriate solution to control virtually any plausible killer acquisition that, regardless of the turnover of the firms involved, will pose a threat to competition in EU markets. Some comments outright claim, that the Commission will have from now an unlimited jurisdiction to review any merger that can potentially threaten competition in the European

[42] Opinion of Advocate General Kokott delivered on 20 October 2022, Case C-376/20 P *European Commission v CK Telecoms UK Investments Ltd*. EU:C:2022:817.

[43] Op cit ref 13.

Economic Area[44]. Second, we will learn whether the Commission has hit the evidentiary standard for demonstrating a sufficiently likely threat that, as a result of the undersized vertical takeover, looms over the future market, which promises beneficial innovations, but which is also full of uncertainties. If the Commission succeeds on both counts, it will be a success without question, finding the key that opens the door to effective control of takeovers that would otherwise escape any ex-ante control or ex-ante prohibition.

In terms of corporate strategies and planning for growth through mergers and acquisitions, this is of course a journey into relative uncertainty. Even in anticipation of the slightest concern about the consequences of a merger in a Member State, companies should enter into negotiations with competition authorities to avoid the surprise of unexpected requests for referral and subsequent stand-still obligations. As regards the future theories of harm that the Commission may use in looking at whether and how the generally expected consequences of non-horizontal mergers (not only for the prices, and the range of choice but also for the pace and usefulness of innovation) will manifest themselves in a particular case, it is difficult to advise anything in principle, at least until the expected decisions of the EU Courts indicate how strict a standard of proof will be required. Any similar dispute will inevitably always be a battle of highly sophisticated models of economic experts and their conclusions as to whether certain outcomes are more or less likely and whether incentives to act are only theoretically present or are instead compelling enough.

The Commission has shown a great deal of determination and courage to take risks. Its action in the Illumina Grail takeover was not so much an attempt to catch up with the speeding train as a decisive signal to slow it down - to allow for a thorough check - and possibly to stop it altogether - if the prevailing evidence is judged sufficient to conclude that there is a significant impediment to effective competition.

[44] K&L Gates LLP. Illumina/Grail – The Dawn of a New Era for Global Merger Control? 31/10/2022, [https://www.jdsupra.com/legalnews/illumina-grail-the-dawn-of-a-new-era-1924190/], accessed on 03/01/ 2023.

LITERATURE

1. Bykova, Anna A.: The Impact of Industry's Concentration on Innovation: Evidence from Russia (2017). *Journal of Corporate Finance Research*, Vol. 11, No. 1, pp. 37-49, 2017.
   – DOI: https://doi.org/10.17323/j.jcfr.2073-0438.11.1.2017.37-49
2. European Commission: *Code of good administrative behaviour for staff of the European Commission in their relations with the public*. Doc 2000Q3614 — EN — 16.11.2011 — 012.001 — 13 Annex.
3. European Commission: *Commission Notice on Case Referral in respect of concentrations*. (2005/C 56/02). OJ C 56, 5.3.2005.
4. European Commission: *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*. (2008/C 265/07) 18.10.2008.
5. European Commission: *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*. 2021/C 113/01. OJ C 113, 31.3.2021.
6. European Commission: *Mergers: Commission prohibits acquisition of GRAIL by Illumina*. Brussels, 6 September 2022. IP/22/5364.
7. European Commission: *Statistics on Mergers cases*. 30 November 2022, [https://competition-policy.ec.europa.eu/mergers/statistics_en], accessed on 03/01/2023.
8. European Commission: *Mergers: The Commission adopts a Statement of Objections outlining measures to unwind Illumina's blocked acquisition of GRAIL*. Press release 5 December 2022, Brussels IP/22/7403.
9. Federal Trade Commission: *In the matter of Illumina, Inc., a corporation and GRAIL, Inc., a corporation*. File Number: 201 0144, Docket Number: 9401.
10. Foo Yun Chee: EU to examine Illumina's $7.1 billion acquisition of Grail on antitrust grounds. *Reuters*, April 20, 2021, [https://www.reuters.com/article/us-grail-m-a-illumina-eu-idUSKBN2C71MA], accessed on 03/01/2023.
11. Gayle, G. P.: Market concentration and innovation: New empirical evidence on the Schumpeterian hypothesis. *ResearchGate*, November 2001, [https://www.researchgate.net/publication/228586113_Market_concentration_and_innovation_New_empirical_evidence_on_the_Schumpeterian_hypothesis], accessed on 03/01/2023.
12. González-Díaz, F.E.; Bitsakou, L.; Levy, N.; Cullen, B.: *Illumina/GRAIL: EC Blocks Transaction Below EU and Referring Member State Merger Control Thresholds for the First Time. September 15, 2022*, Cleary Gottlieb, [https://www.clearygottlieb.com/news-and-insights/publication-listing/illumina-grail-ec-blocks-transaction-below-eu-and-referring-member-state-merger-control-thresholds-for-the-first-time], accessed on 03/01/2023.

13. Ibaňez Colomo, P.: *The Shaping of EU Competition Law*. Cambridge University Press 2018.
– DOI: https://doi.org/10.1017/9781108378505

14. Johnson, P., Gamble, A.: The Rediscovery of Vertical Merger Enforcement? *CPI Antitrust Chronicle*, August 2018. [www.competitionpolicyinternational.com], accessed on 03/01/2023.

15. K&L Gates LLP: Illumina/Grail – The Dawn of a New Era for Global Merger Control? 31/10/2022, [https://www.jdsupra.com/legalnews/illumina-grail-the-dawn-of-a-new-era-1924190/], accessed on 03/01/ 2023.

16. Monegato, C.: The modernisation of EU Merger control. *Lexxion.eu*, 26 September 2022, [https://www.lexxion.eu/coreblogpost/the-modernisation-of-eu-merger-control/], accessed on 03/01/2023.

17. Mordall, J.: Illumina/Grail Prohibition: The End of the beginning for EU review of „killer acquisitions"? *Kluwer Competition Law Blog*, September 8, 2022, [http://competitionlawblog.kluwercompetitionlaw.com/2022/09/08/illumina-grail-prohibition-the-end-of-the-beginning-for-eu-review-of-killer-acquisitions/], accessed on 03/01/2023.

18. Press release: *Illumina Reports Financial Results for Fourth Quarter and Fiscal Year 2020*. February 11, 2021, [https://investor.illumina.com/news/press-release-details/2021/Illumina-Reports-Financial-Results-for-Fourth-Quarter-and-Fiscal-Year-2020/default.aspx], accessed on 03/01/2023.

19. Press release: *Illumina Intends to Appeal European Commission's Decision in GRAIL Deal*. September 6, 2022, [https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=1ef95365-0ca9-4726-a683-37124b1116b5], accessed on 03/01/2023.

20. Šmejkal, V.: Concentrations in Digital Sector – a New EU Antitrust Standard for „Killer Acquisitions" needed? *InterEULawEast* Vol. 7 No. 2, 2020.
– DOI: https://doi.org/10.22598/iele.2020.7.2.1

21. Thill-Tayara, M., Provost. M.: Illumina/Grail: pourquoi la Commission européenne a interdit l´opération. *L'usine nouvelle* 21/10/2022, [https://www.usine-nouvelle.com/blogs/cabinet-dechert/illumina-grail-pourquoi-la-commission-europeenne-a-interdit-l-operation.N2058282], accessed on 03/01/2023.

22. Vestager, M. *The future of EU merger control. International Bar Association 24th Annual Competition Conference*. 11 September 2020, [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en], accessed on 03/01/2023.

23. Vestager, M. *Remarks by Executive Vice-President Vestager on the Commission decision to prohibit the acquisition of GRAIL by Illumina*. Brussels, 6 September 2022, SPEECH/22/5371.