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ILLUMINA'S LIGHT ON ARTICLE 22 EUMR: THE SUSPENDED STEP AND UNCERTAIN FUTURE OF EU MERGER CONTROL OVER BELOW-THRESHOLD "KILLER" MERGERS

By Anna Tzanaki[1]

I. INTRODUCTION

Illumina/Grail marks a "critical juncture"[2] in EU merger control. Breaking with the past, reliance on a centralized and predictable administrative system of ex ante merger control is no longer a given in the EU.[3] The expansive use of the *ad hoc* Article 22 referral mechanism under the EU Merger Regulation[4] would *de facto* erode its "brightline" jurisdictional rules and upend the allocation of "exclusive" EU and Member State merger competences based on turnover thresholds:[5] the exception could override the rule with significant systemic consequences.[6] The unprecedented face-off between the Commission and Member States over who is to rule over potentially problematic but non-reportable "killer" mergers has been resolved, for now and in part, by the EU Courts.

On September 3, 2024, the European Court of Justice ("ECJ") delivered its much-awaited judgment in the Illumina and Grail cases.[7] In a high-stake judgment reversing the General Court's earlier decision,[8] the EU's highest Court quashed the Commission's attempt to extend its merger review powers over below-threshold transactions by "repurposing" Article 22 of the EUMR. But although the "new" Article 22 may be declared dead, its legacy lives on and shadows of uncertainty loom over the future of EU merger control.

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[1] Lecturer in Law, University of Leeds; Affiliate Fellow, Stigler Center for the Study of the Economy and the State, University of Chicago Booth School of Business; Senior Research Fellow, UCL Centre of Law, Economics & Society; Affiliated Scholar, Dynamic Competition Initiative. a.tzanaki@leeds.ac.uk. The title of this article is inspired by and in part borrows from Theodoros Angelopoulos' film 'The Suspended Step of the Stork' (1991). The article draws on an earlier op-ed discussing similar topics: Anna Tzanaki, *Article 22 EUMR Illumina-ted: The Commission's killer Solution for below-threshold Mergers is dead – long live the 'double Dutch'*, EU Law Live, 09/09/2024, https://eulawlive.com/competition-corner/article-22-eumr-illumina-ted-the-commissions-killer-solution-for-below-threshold-mergers-is-dead-long-live-the-double-dutch-by-anna-tzanaki/.

[2] Laurent Warlouzet, *The Centralization of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control (1956-91)*, 54 JOURNAL OF COMMON MARKET STUDIES 725 (2016).

[3] Jotte Mulder & Wolf Sauter, *A New Regime for below Threshold Mergers in EU Competition Law? The Illumina/Grail and Towercast Judgments*, 11 JOURNAL OF ANTITRUST ENFORCEMENT 544 (2023).

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

[5] Commission Notice on Case Referral in respect of concentrations [2005] OJ C 56/2 ("Case Referral Notice"), paras 2–3.

[6] Anna Tzanaki, *Dynamism and Politics in EU Merger Control: The Perils and Promise of a Killer Acquisitions Solution Through a Law & Economics Lens*, ANTITRUST LAW JOURNAL (forthcoming).

[7] Joined Cases C-611/22 P and C-625/22 P *Illumina v. Commission and Grail v. Commission*, Judgment of 3 September 2024, ECLI:EU:C:2024:677.

[8] Case T-227/21 *Illumina Inc v. Commission*, Judgment of 13 July 2022, ECLI:EU:T:2022:447.

II. THE "NEW" ARTICLE 22 EUMR AS AN EU SOLUTION FOR "KILLER" MERGERS

It all started when the Commission announced a new policy, crystallised in a Guidance of March 2021,[9] that sought to significantly expand the scope for "upward" referral from Member States to the Commission of mergers with no "EU dimension" under Article 22 EUMR, also known as the "Dutch clause." In sharp contrast to past practice,[10] this "new" approach to Article 22 could enable the Commission to examine "through the backdoor" transactions that were not notifiable and fell short of not only the EUMR thresholds but also national thresholds of referring Member States with domestic merger control laws in place.[11] In practice, following this change, there was no minimum jurisdictional "floor" for establishing EU competence over any merger if some affected Member State was willing to refer the case upwards.[12]

The Commission's intention with the new policy was to gain the ability to flex its jurisdictional muscle over 'killer acquisitions'[13] that could affect competition and innovation in the EU especially in digital and pharmaceutical sectors on a case-by-case basis.[14] As killer mergers are driven by the motive to eliminate future competitive threats, they often involve acquisitions of innovative target companies with high value but no or limited turnover that thus fall below the EUMR turnover-based thresholds and outside the EU's exclusive competence.[15] In the Commission's understanding, however, the "killer acquisition" narrative is used as a "shorthand" for any problematic below-threshold merger that may escape *ex ante* merger review under the EUMR.[16] Concerns did not merely involve harm to competition and EU consumers rather European competitiveness, the EU's technological leadership and its internal market were at stake.[17] Absent an EU solution, it was feared that any void left by the EUMR could be covered by Member State laws leading to potential fragmentation of the

[9] 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 ("Article 22 Guidance").
[10] *Id.*, para 8.
[11] Opinion of Advocate General Emiliou of 21 March 2024 in Joined Cases C-611/22 P and C-625/22 P *Illumina v. Commission and Grail v. Commission*, ECLI:EU:C:2024:264, para 185.
[12] Tzanaki, *supra* note 6.
[13] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 JOURNAL OF POLITICAL ECONOMY 649 (2021); OECD, *Start-Ups, Killer Acquisitions and Merger Control* – Background Note DAF/COMP(2020)5 (2020); Pierre Régibeau, *Killer Acquisitions? Evidence and Potential Theories of Harm*, *in* RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF COMPETITION ENFORCEMENT 300 (Ioannis Kokkoris & Claudia Lemus eds., 2022).
[14] Article 22 Guidance, paras 9–10; Speech by EVP Vestager at the International Bar Association 26th Annual Competition Conference in Florence 'Merger control: the goals and limits of competition policy in a changing world' (September 9, 2022): "[as] a targeted tool; [Article 22] can respond to the challenges posed by these dynamic markets and the special features of some digital players. Whether for 'killer acquisitions' or other types of 'pre-emptive acquisitions,' it is the dynamism of today's markets - in particular for pharma and tech - that makes this kind of targeted tool so vital."
[15] Staff Working Document, *Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control*, SWD(2021) 66 final (Brussels, 26 March 2021), 3–5.
[16] Speech by EVP M. Vestager at the 28th Annual Competition Conference of the International Bar Association (Florence, September 6, 2024).
[17] Tzanaki, *supra* note 6.

internal market.[18] At the same time, innovative European startups could be the target of killer acquisitions by foreign companies seeking their elimination as a source of future competition.[19]

III. *ILLUMINA/GRAIL* AND AGGRESSIVE EU MERGER ENFORCEMENT BELOW THRESHOLDS

The *Illumina/Grail* merger was the first case where the Commission's new policy of accepting or indeed inviting Article 22 referrals regardless of national competence was hastily put to use.[20] The merger was not notifiable in the EU or any of its Member States.[21] This was also the first time the Commission prohibited and ordered the unwinding of a completed acquisition, which was not subject to mandatory *ex ante* review, and imposed a record-high gun jumping fine on the acquirer as well as a first-ever symbolic fine on the target for closing the transaction pending its *ad hoc* review and without obtaining prior clearance by the Commission.[22]

But *Illumina/Grail* was not an isolated case. In its short life until stuck down by the ECJ, there were three more occasions where the "new" approach to Article 22 was deployed. In each of these cases, all referring Member States had no competence to review the transaction under existing national laws. The Commission accepted the referrals in the first two cases, *Qualcomm/Autotalks* and *EEX/Nasdaq Powerdeals.*[23] Both mergers were eventually abandoned. A third case, *Microsoft/Inflection*, reached the Commission but was later withdrawn as in the meantime the ECJ with its *Illumina and Grail* judgment blocked such "no jurisdiction" referrals.[24] The Article 22 referrals in the first and third case followed invitation letters by the Commission.

IV. THE ECJ'S BLOCK TO THE COMMISSION'S EXTENDED POWERS AND THE NARROW RATIONALE OF ARTICLE 22

Unmoved by the valid policy concerns put forward, the ECJ rejected a broad reading of Article 22 as a "targeted" solution to the EUMR's perceived enforcement gap due to the operation of its rigid turnover thresholds.[25] Contrary to the Commission's and the General Court's interpretation, the ECJ's *Ilumina and Grail* judgment settled that Article 22 EUMR cannot serve as a general-purpose "'"corrective mechanism" intended to remedy deficiencies in the

[18] Jens-Uwe Franck, Giorgio Monti & Alexandre de Streel, Options to Strengthen the Control of Acquisitions by Digital Gatekeepers in EU Law, TILEC DISCUSSION PAPER NO. DP2021-16, 2021, 8 (2021).
[19] President von Leyen's Political Guidelines for the Next European Commission 2024-2029, 7; Mario Draghi, *The future of European competitiveness – A competitiveness strategy for Europe*, Part B – In-depth analysis and recommendations, 77 (2024).
[20] Magali Eben & David Reader, *Taking Aim at Innovation-Crushing Mergers: A Killer Instinct Unleashed?*, 42 YEARBOOK OF EUROPEAN LAW 286, 305 (2024).
[21] Alec Burnside & Adam Kidane, *Double Dutch: Illumina/GRAIL, Article 22 and the General Court*, 8 COMPETITION LAW & POLICY DEBATE 140, 141 (2024).
[22] See Case M.10939, *Illumina/Grail*, for all related Commission decisions.
[23] See https://ec.europa.eu/commission/presscorner/detail/en/mex_23_4201 and https://ec.europa.eu/commission/presscorner/detail/en/mex_23_4221.
[24] See https://ec.europa.eu/commission/presscorner/detail/en/IP_24_4727.
[25] See *supra* note 14 and Article 22 Guidance, para 11.

merger control system, by enabling the scrutiny of transactions that do not meet either the EU or the national thresholds."[26] In short, the "new" approach to Article 22 was struck down as unlawful.

The Court made explicit that the Commission cannot "encourage or accept referrals of proposed concentrations without a European dimension from national competition authorities where those authorities are not competent to examine those proposed concentrations under their own national law."[27] Advocate General Emiliou provided further reasoning: "no one can give what they do not have."[28] EU jurisdiction cannot be "created" relying on referral from Member States with no original jurisdiction in the first place; rather case referrals are meant to facilitate the "reallocation" of existing competences between the EU and Member States in light of the principles of subsidiarity, legal certainty and "one-stop shop."[29] National competence remains a prerequisite for triggering Article 22 referrals for Member States that have enacted merger control laws.[30]

The ECJ's conclusion in favor of a narrow scope of Article 22 is based on the history, context and purpose of the provision and the EUMR as a whole.[31] In particular, it is made clear that the Article 22 referral mechanism "pursues *only* two primary objectives:" first, the original rationale for the "Dutch clause" when the EUMR was introduced in 1989 was "to permit the scrutiny of concentrations that could distort competition *locally*, where the Member State in question does not have any national merger control rules" (such as Netherlands at the time, and only Luxembourg at present); and second, with the 1997 amendment of the EUMR, "to extend the "one-stop shop" principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order *to avoid multiple notifications* at national level."[32]

Accordingly, the aim and function of Article 22 was for the Commission to act "on behalf of" referring Member States and "replace" national authorities in scrutinizing merger transactions to ensure protection of competition in all affected markets and a more effective and efficient merger review at EU level when appropriate.[33] It is thus telling that the Commission's jurisdiction to assess the competitive effects of referred mergers is limited to the territory of Member State(s) requesting or joining an Article 22 referral, whose operation in case of cross-border mergers triggering multiple national filings is "replacing several national procedures with one centralized procedure."[34] In contrast to Article 4(5) referrals,

[26] *Illumina and Grail v. Commission*, *supra* note 7, para 192. See also paras 200-201.
[27] Court of Justice of the European Union, Press Release No 127/24, Luxembourg (September 3, 2024).
[28] Opinion AG Emiliou, *supra* note 11, para 65.
[29] *Id.*, para 179; Recital 11 EUMR. For an in-depth analysis of the systemic function of case referrals in EU merger control and the (lack of) fit of the "new" approach to Article 22 in this frame, see Tzanaki, *supra* note 6.
[30] *Illumina and Grail v. Commission, supra* note 7, para 198.
[31] *Id.*, para 128 et seq.
[32] *Id.*, para 199; Opinion AG Emiliou, *supra* note 11, paras 173, 181–182.
[33] *Illumina and Grail v. Commission, supra* note 7, paras 197 and 179-180; Opinion AG Emiliou, *supra* note 11, paras 100, 165, 182. See also Case Referral Notice, paras 5, 7–13.
[34] Opinion AG Emiliou, *supra* note 11, paras 166, 182, 185; Case Referral Notice, footnote 45; Article 22 Guidance, footnote 12.

concentrations referred upwards to the Commission under Article 22 cannot acquire an "EU dimension" they did not initially have, which would enable their EU-wide review.[35]

V. THE POLITICAL BOUNDS OF EFFECTIVENESS AND THE EUMR AS A BALANCE OF PRINCIPLES

The core issue in the background of the *Illumina/Grail* dispute was the effectiveness of EU merger control – i.e. its ability to catch all potentially harmful mergers – given the purely turnover-based thresholds of the EUMR.[36] The attempted "new" Article 22 could conveniently close all gaps without an amendment of the EUMR.[37] But much to the Commission's dismay, the ECJ was not persuaded that the "end" of effectiveness justified the Commission's assertive means.[38] Effectiveness has had clear limits.[39] The limits were not only legal but also political.

The EUMR was founded on the principle of a "clear allocation of powers" between the Commission and Member States.[40] Since its introduction, the Commission's competence under the EUMR has been confined to reviewing "concentrations" with an "EU dimension" determined by clear-cut turnover thresholds.[41] This jurisdictional design was no accident or merely a technocratic matter.[42] The threshold-based rules of competence allocation were "at the heart of the political bargain struck between the Commission and Member States" that were eventually convinced to cede part of their national powers for supranational, EU-wide merger control to arise.[43] Against this backdrop, "centralised" *ex ante* EU merger control applies "exclusively" to transactions above the EUMR thresholds that are deemed to involve significant structural changes and have a cross-border impact whereas below-threshold transactions remain within the sole competence of Member States.[44] The EUMR's case referral system could allow for narrow exceptions to this principle:[45] for instance, below-threshold mergers without an "EU dimension" could be referred upwards to the Commission for review.[46] However, referral mechanisms, in particular under Article 22, were meant to be exceptional and limited.[47]

The "new" Article 22 would disturb this equilibrium. The Commission's creative attempt to expand the scope of Article 22 more liberally enabling upward referrals would ultimately entail seizing powers from Member States and antagonising their competence without revising the EUMR that would entail renegotiation of the original competence

[35] *Illumina and Grail v. Commission, supra* note 7, paras 178-179; Recital 16 EUMR; Case Referral Notice, para 73.
[36] Staff Working Document, *supra* note 15 at 5.
[37] See *supra* note 12 and surrounding text and Article 22 Guidance, para 11.
[38] *Illumina and Grail v. Commission*, *supra* note 7, paras 211–217.
[39] *Id.*, paras 200–210.
[40] *Id.*, paras 203 and 207.
[41] Articles 1 and 3 EUMR.
[42] LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET, 53 (1991).
[43] Tzanaki, *supra* note 6.
[44] *Illumina and Grail v. Commission*, *supra* note 7, para 195; Recital 8 EUMR; Case Referral Notice, para 2.
[45] Case Referral Notice, paras 2–4.
[46] By merging parties or Member States under Articles 4(5) or 22 EUMR respectively.
[47] Case Referral Notice, paras 4 and 7; BRITTAN, *supra* note 42 at 40, 42, 52.

allocation bargain with Member States.[48] The exception could override the rule with significant and potentially unintended consequences: by unilaterally "repurposing" the discretionary Article 22 mechanism, merger competence in the EU would be transformed from a "zero-sum" to a "non-zero sum" game – i.e. from a system of fixed and exclusive competences to one of potentially overlapping competences that could lead to parallel or conflicting reviews.[49]

Such expansive interpretation of Article 22 in pursuit of effectiveness would also upset the principle of institutional balance[50] as well as "the balance between the various objectives" pursued by the EUMR.[51] Besides the precise allocation of competences, key principles underpinning the EU system of merger control and case referrals such as subsidiarity, "one-stop shop" and legal certainty would be undermined.[52] In turn, this would disproportionately threaten the efficiency and predictability of merger review guaranteed to merging parties and ironically also the effectiveness of the EU merger control designed as a mandatory *ex ante* control regime.[53] Given the (notification and standstill) obligations attached to the EU system of prior control, it is said that objective jurisdictional criteria such as turnover and "the thresholds set for determining whether or not a transaction must be notified are of cardinal importance."[54] By contrast, "enhanced"[55] use of Article 22 that would leave room for (potentially multiple) informal and unclear procedures and lingering uncertainty about jurisdiction over a given below-threshold merger would not strike a proper balance between all objectives of the EUMR.[56]

VI. VARYING VISIONS OF THE FUTURE – EU SYSTEMIC REFORM OR DOUBLING DOWN ON THE "DUTCH CLAUSE"?

As things have evolved, the Commission's aiming at problematic below-thresholds mergers seems to be significantly curtailed. So what can be done? The ECJ reflected on available solutions, yet none of these places the Commission in the driving seat. One route is the *revision of the EUMR* that could put several options on the negotiating table. For instance, Article 1(5) EUMR provides for a simplified legislative procedure to lower the existing turnover *thresholds* or introduce additional jurisdictional *criteria* (e.g. based on transaction value) that

[48] Tzanaki, *supra* note 6.
[49] *Id.*
[50] *Illumina and Grail v. Commission*, *supra* note 7, para 215.
[51] *Id.*, paras 202 and 205; Opinion AG Emiliou, *supra* note 11, paras 191–193 and 197 (suggesting that the effectiveness of the EU merger control system is the *primary* but not *the only* objective pursued by the EUMR as the General Court had previously suggested).
[52] Opinion AG Emiliou, *supra* note 11, paras 182, 193, 199–214. Unlike past reform initiatives regarding Articles 4(5) or 22 referrals that promoted the principles of subsidiarity and "one-stop shop," the "new" Article 22 would not be animated by such principles. See *id.*, paras 91, 108, 127, 166 and *supra* notes 29 and 35 for further references.
[53] *Illumina and Grail v. Commission, supra* note 7, paras 204, 206 and 210. See also Rupprecht Podszun, *Thresholds of Merger Notification: The Challenge of Digital Markets, the Turnover Lottery, and the Question of Re-Interpreting Rules*, *in* RESEARCH HANDBOOK ON COMPETITION & TECHNOLOGY 1, 25 (Pier Luigi Parcu, Maria Alessandra Rossi, & Marco Botta eds., forthcoming) (criticizing the institutional design under the "new" Article 22 that would "one-sidedly" favor the Commission over merging parties).
[54] *Illumina and Grail v. Commission*, *supra* note 7, paras 208–209.
[55] Vestager, *supra* note 14.
[56] *Illumina and Grail v. Commission*, *supra* note 7, paras 204 and 210.

could swiftly expand the EUMR's scope and the Commission's competence.[57] Legal certainty would favor this option.[58] Alternatively, the EU legislature could "provide for a *safeguard mechanism* enabling the Commission to scrutinise" problematic below-threshold transactions on an ad hoc basis.[59] The ECJ did not specify what concrete form this could take but a few options come to mind: i) introduction of a "New Competition Tool" that could allow intervention following a market investigation;[60] ii) introduction of standalone "call-in" powers by the Commission without dependence on referral from Member States; or iii) revision of Article 22 EUMR "to allow for the referral of sub-threshold mergers by Member States without jurisdiction in defined circumstances."[61] These alternatives could save on filing costs but could cost more in terms of legal certainty.[62]

A second route is for legislative *change at the level of Member States* that are free "to revise downwards their own thresholds determining competence" under national law.[63] Although the ECJ did not allude to such possibility (in fact its reasoning would seem to point to the opposite direction),[64] it remains open whether expanding national competence on the basis of "call-in" powers rather than notification thresholds could support upward referrals under Article 22 EUMR. This latter option could keep up with subsidiarity but not necessarily legal certainty or the "one-stop shop" principle.[65] A third route is antitrust enforcement and potential *ex post* review of mergers based on *Article 102 TFEU* abuse of dominance rules that are directly applicable by national competition authorities and courts[66] as confirmed in *Towercast*.[67] Legal certainty and the "one-stop shop" principle could be compromised with this option.

But is the Commission the "end loser" post-*Illumina*? Not yet. The Commission may have lost this battle, but it appears unwilling to surrender the arms in the long and strategic fight over competence to review below-threshold "killer" mergers. With the option of standalone "call-in" powers unlikely to be politically feasible,[68] the Commission's "second-

[57] *Id.*, paras 183–184 and 216.
[58] Draghi, *supra* note 19 at 304 (advocating for a "simple solution" in the form of a new transaction value-based threshold for mandatory notifications at EU level).
[59] *Illumina and Grail v. Commission*, *supra* note 7, para 216.
[60] Draghi, *supra* note 19 at 302-304; Martin Peitz & Jens-Uwe Franck, *Germany's New Competition Tool: Sector Inquiry With Remedies*, CRC TR 224 DISCUSSION PAPER NO. 598 at 7-8 (discussing the conditions for extended merger control under Germany's NCT that enables the Bundeskartellamt to require notification of mergers or remedies from companies in problematic sectors).
[61] Vestager, *supra* note 16.
[62] *Id.*
[63] *Illumina and Grail v. Commission*, *supra* note 7, para 217.
[64] See *supra* note 54 and surrounding text.
[65] However, if tested before the EU Courts this option could pass depending on whether the principles of effectiveness and subsidiarity (formal national competence by a single member State) are prioritized over legal certainty and the "one-stop shop" principle (allowing Article 22 referrals in cases of cross-border mergers involving multiple filings at national level or at least joint referrals based on national competence of several Member States).
[66] *Illumina and Grail v. Commission, supra* note 7, para 214.
[67] Case C-449/21 *Towercast*, Judgment of 16 March 2023, ECLI:EU:C:2023:207; see also Opinion of Advocate General Kokott of 13 October 2022, ECLI:EU:C:2022:777.
[68] Javier Espinoza, *Brussels Seeks Powers to Block 'Killer Acquisitions' in Europe and Beyond*, FINANCIAL TIMES (October 16, 2024).

best" option seems to be, for now, Article 22 referrals. In this light, rapidly reacting to the *Illumina* judgment, the Commission reiterated that the need for an EU killer solution remains and that it will continue to accept referrals from Member States competent to review the referred mergers.[69] As several Member States have recently expanded their own jurisdiction, e.g. by introducing national "call-in" powers "allowing them to request the notification of transactions that do not meet national thresholds," "traditional" Article 22 referrals are said to be more extensively possible.[70] In addition, a possible revision of the EUMR could in fact bring back by legislative means the "new" Article 22 and "no jurisdiction" referrals that the ECJ struck down.[71] In practice, however, even without such revision, the possibility of "call-in" referrals could have an almost equivalent effect.

With renewed ingenuity, the Commission seems to have gained some of the lost ground. As the ECJ's judgment in the *Illumina/Grail* case did not rule out the feasibility of "call-in" referrals and until the Courts settle questions regarding necessary and sufficient conditions for triggering Article 22 referrals[72] or until legislators introduce new EU powers regarding below-threshold mergers,[73] more creative flexing by the Commission doubling down on Article 22 as a jurisdictional basis may be expected. As an indication, the Commission's pivoting post-*Illumina* has not been empty talk: there is already a test case, *Nvidia/Run:AI*, where aggressive EU merger enforcement below thresholds relies on a "solo" Article 22 referral by Italy based on its national "call-in" powers.[74]

VII. CERTAINTY AND ITS DISCONTENTS – A NEW ERA FOR EU MERGER CONTROL

A valuable lesson for EU merger policy may be drawn from the famous words of U.S. Supreme Court justice Oliver Wendell Holmes: "Certainty is an illusion and repose is not the destiny of man."[75] Indeed, in the era of "killer acquisitions" a new dawn is rising for EU merger control involving increasing uncertainty and no immediate way of going back to the past safety of "brightline" jurisdictional rules. Despite the landmark reversal of the Commission's "new" approach to Article 22 that sought to legitimate EU merger enforcement below national thresholds, the ECJ's *Illumina and Grail* judgment did not single-handedly restore legal certainty in EU merger control. Jurisdictional certainty required self-restraint in keeping up with the original "zero-sum" competence allocation bargain between the EU and Member States.[76] Ironically, that bargain which led to the certainty-centric EU system of ex ante merger control created its own discontents. Now, as dynamic competition concerns have put pressure on the existing EU merger control framework and its jurisdictional design, the

[69] Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the *Illumina/GRAIL* merger jurisdiction decisions (September 3, 2024).
[70] *Id.*
[71] See *supra* note 61 and surrounding text.
[72] See *supra* note 65 and surrounding text.
[73] See *supra* notes 57–61 and surrounding text.
[74] Commission to assess the proposed acquisition of Run:ai by NVIDIA: https://ec.europa.eu/commission/presscorner/detail/en/mex_24_5623. A decision is expected by December 20, 2024.
[75] Oliver Wendell Holmes, *The Path of the Law*, 10 HARVARD LAW REVIEW 457, 466 (1897).
[76] See *supra* notes 48-49 and surrounding text.

Commission's unilateral actions have disrupted the "very certain" equilibrium of constrained and fixed EU powers over M&A on which the EUMR was founded.[77]

Post-*Illumina*, the cause of uncertainty is not only the Commission's recent pivoting relying on "traditional" Article 22 referrals based on national "call-in" powers to establish EU competence. Member States in turn have had mixed reactions to the Commission's expansive use of Article 22 under "new" or "traditional" approaches, each pursuing their own self-interested vision of certainty – certainty of not being disregarded or left out – in the brave new world of "strategic"[78] merger control below thresholds given killer acquisitions, Article 22 referrals and the growing importance of innovation for competition policy.[79] For instance, Germany and Austria hold to their pre-*Illumina* policy and established practice under national law of disfavoring "no jurisdiction" referrals and being able to refer upwards under Article 22 only mergers hitting their national transaction value thresholds.[80] France that has a mandatory notification merger control regime similar to the EU's purely based on turnover thresholds, but as yet no other powers of extended merger control,[81] is not content that its ability to trigger "no jurisdiction" referrals is curtailed post-*Illumina* and until a better solution is found, they suggest pursuing below-threshold enforcement at national level based on Articles 101 and 102 TFEU (or equivalent provisions in national law) that are currently at its disposal.[82] Smaller Member States, whose interests the original "Dutch clause" was enacted to protect,[83] such as Italy also wish to retain their prerogative and leave their options open by expanding national merger control and introducing "call-in" powers which could trigger national or EU enforcement.[84]

But the desire for self-preservation is not a substitute for certainty let alone constructive outcomes. At this time and age, the jurisdictional situation in the EU regarding below-threshold mergers is rather dynamic and out of the hands of any single actor's control, be it the Commission or Member States. Once increasing uncertainty becomes too costly for all involved, then new ground may be found for negotiation and political compromise that could reshape the competence allocation bargain underpinning the original EUMR. This could also involve a rebalancing of the principles of effectiveness versus legal certainty. Yet, until mutually agreed change brings new "certainty," we are now in a "non-zero sum"[85] state of the world!

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[77] Tzanaki, *supra* note 6.
[78] *Id.*
[79] See *supra* note 19 for references.
[80] See the statements of the heads of the German and Austrian competition authorities on Linkedin to this end.
[81] OECD, *supra* note 13 at 17, 46–47.
[82] The Autorité de la concurrence takes note of the *Illumina/Grail* judgment by the Court of Justice of the European Union and remains committed to tackle mergers that may harm competition in innovative sectors: https://www.autoritedelaconcurrence.fr/en/article/autorite-de-la-concurrence-takes-note-illumina-grail-judgment-court-justice-european-union (September 3, 2024).
[83] Ethan Schwartz, *Politics as Usual: The History of European Community Merger Control*, 18 YALE JOURNAL OF INTERNATIONAL LAW 607, 653, 660 (1993).
[84] See *supra* note 74 and surrounding text.
[85] See *supra* note 49 and surrounding text.