

How Illumina/Grail Is Affecting EU Merger Control 1 Year On

By **Benjamin Geisel** and **Karel Bourgeois** (October 29, 2025, 2:30 PM GMT)

On Sept. 3, 2024, the European Court of Justice ruled in its landmark Illumina/Grail judgment that the European Commission could not accept merger referrals from national competition authorities under Article 22 of the European Union Merger Regulation, or EUMR, unless those authorities had jurisdiction to review the transaction themselves.[1]

As we mark this anniversary, in this article we examine recent developments in EU merger control and take a look at how the commission and national competition authorities are currently dealing with below-threshold mergers. We also look at the implications for companies and lawyers going forward.

Recap

In 2021, the commission adopted guidance clarifying that a national competition authority could refer a transaction under Article 22 of the EUMR to the commission for review, even if it was not notifiable under national merger control rules. This allowed authorities to bypass the system of EU and national merger control thresholds, and enabled the commission to investigate transactions that fell below these thresholds.

Previously, below-threshold transactions had escaped any merger review, which was seen as a major loophole, allowing large multinationals to acquire nascent competitors with no substantial turnover, e.g., innovative startup companies, in deals that nonetheless had significant market effect, including so-called killer acquisitions.

The 2024 Illumina/Grail judgment clarified that an Article 22 merger referral could only be made if the referring national competition authority had jurisdiction to review the transaction or in cases where there was no national merger control regime at all.

This was clearly a blow to the commission and member state authorities, which had considered Article 22 referrals an effective mechanism to review acquisitions of nascent competitors or killer acquisitions.

Illumination of EU Merger Referrals

One year on, it is fair to say that Article 22 of the EUMR has survived the Illumina/Grail ruling to some extent.



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Following the ruling, both the commission and various member state authorities swiftly published statements emphasizing their commitment to continuing referrals and investigating below-threshold mergers using all available tools.

Some member states amended or announced their intention to amend their national merger control laws. These amendments would allow their competition authorities to either call in certain mergers or introduce alternative thresholds, such as market share or other nonmonetary criteria.

There have also been two recent EU General Court cases that consider Article 22 of the EUMR, post Illumina/Graill, as follows.

In the case of Brasserie Nationale/Boissons Heintz, the Luxembourg Competition Authority **referred** a merger between Luxembourg's largest brewery, Brasserie Nationale, and one of its main competitors, Boissons Heintz, to the commission.[2]

Due to the significance of imports to Luxembourg in this sector, the commission determined that trade between member states could be affected and it accepted the referral in March 2024. Brasserie Nationale challenged the referral before the EU General Court, arguing that the referral request had been made after the expiry of the 15-day referral period.

However, in July of this year, the General Court confirmed the commission's decision to accept the referral, stating that the initial information received from the parties had been insufficient for the Luxembourg Competition Authority to assess whether the conditions for a referral were present.

The commission ultimately cleared the transaction, subject to divestment conditions.[3] Although this case involves a referral from a member state that does not yet have a merger control regime, and therefore undoubtedly falls within the scope of Article 22 of the EUMR, the General Court's judgment still provides helpful clarifications regarding its application.

The Nvidia/Run:ai case of December 2024 is perhaps even more interesting in terms of the scope of Article 22 EUMR, especially in the aftermath of the Illumina/Graill judgment.[4]

Following a referral from the Italian Competition Authority, the commission investigated Nvidia's acquisition of the artificial intelligence startup company Run:ai. Given Run:ai's low turnover, the transaction did not meet Italy's regular turnover thresholds.

Therefore, the Italian Competition Authority used its new call-in powers, which allow it to require parties to notify the competition authority of their deal if the authority believes that the merger may harm competition and if the parties meet at least one of three turnover-related criteria.

Although the commission **cleared** the transaction unconditionally, Nvidia appealed the referral to the General Court in January this year.[5] Nvidia argued that the referral was not in line with the CJEU's Illumina/Graill decision.

Although the call-in powers used to catch the Nvidia/Run:ai transaction are relatively new, Italy is not the only country to have adopted such powers in recent years. These new regimes can be broadly divided into two groups:

- Regimes that allow for a call-in if certain lower-than-regular turnover or market share thresholds are met; and
- Regimes that allow for a call-in without any further requirements, other than a possible or likely impact on competition. Italy, along with Denmark, Hungary, Sweden, Latvia and Slovenia, belongs to group 1, while Ireland, Lithuania and Cyprus belong to group 2.

Additionally, the competition authorities in Belgium, Germany, the Netherlands and France have begun advocating for call-in powers, even though their competition laws have not yet been amended.

Other approaches include introducing market share thresholds, similar to those in the Spanish and Portuguese merger control regimes, or transaction-value thresholds, like those in Germany and Austria.

However, it is clear that call-in powers are currently favored because they give authorities the greatest flexibility to decide whether to exercise jurisdiction over a transaction.

No Merger Control, No Problem for Competition Authorities

However, the absence of flexible merger control rules does not mean that competition authorities leave transactions unscrutinized. Instead, they apply existing tools somewhat more creatively and sometimes interpret case law rather broadly.

For instance, the Belgian Competition Authority applied the CJEU's ruling in *Towercast v. Autorité de la concurrence* in 2023^[6] in the case of *Dossche Mill/Ceres* early this year.^[7]

According to the *Towercast* ruling, a transaction that is not required to be reported to either the commission or the competition authority of a member state may still be investigated by the latter under Article 102 of the Treaty on the Functioning of the EU, or TFEU, which prohibits the abuse of a dominant position.

The Belgian Competition Authority announced an ex officio investigation explicitly referencing *Towercast*, albeit by applying Article 101 of the TFEU, which prohibits restrictive agreements between companies.

According to the Belgian Competition Authority, *Towercast* should also apply in Article 101 scenarios, and the proposed acquisition of Ceres's artisanal flour business by its main competitor, Dossche Mills, could be characterized as an anticompetitive agreement. The parties eventually abandoned the transaction, causing the Belgian Competition Authority to end the investigation.

Applying Article 101 of the TFEU to below-threshold mergers significantly expands the powers of competition authorities to review and potentially block those mergers. Indeed, Article 101 of the TFEU enables competition authorities to intervene even if the acquirer does not hold a dominant market position premerger, as illustrated by the Belgian Competition Authority's investigation into the *Dossche Mills/Ceres* merger.

According to the Belgian Competition Authority decision, Dossche Mills held a market share of 25%-35% on the relevant market before the proposed transaction, which is clearly below the dominance threshold. The application of Article 101 of the TFEU to below-threshold mergers will likely be tested in court.

Acqui-Hires

Recently, companies — particularly Big Tech companies — have started hiring a target company's personnel rather than acquiring the company itself. This development is referred to as "acqui-hire," and is primarily seen in the AI space, where a company's value largely consists of its expert staff.

For instance, in 2024, Microsoft Corp. acquired nearly the entire Inflection AI Inc. team, including two of its founders, in a deal that also involved licensing Inflection's technology.[8]

The commission initially investigated the acquisition and determined that, since it involved all the assets necessary for Microsoft to take over Inflection's market position in generative AI foundation models and AI chatbots, it constituted a concentration under EU merger control rules and was thus within the scope of those rules.

However, the commission had to close its investigation as the EU merger control thresholds were not met. Following the judgment in Illumina/Grail, the member states that had referred the case to the commission withdrew their referrals, since the transaction was also not notifiable in any of them. Subsequently, the German Competition Authority picked up the case and concluded that the transaction resulted in a de facto acquisition of Inflection under German law.[9]

However, the authority also had to discontinue its investigation because the transaction did not meet the German turnover or transaction-value thresholds, which require substantial domestic operations of the target.

Impact on Companies

All of the developments described here increase complexity and uncertainty for companies when assessing the regulatory implications of merger and acquisition transactions. The days of straightforward merger filing analyses are over.

Today, failing to meet the relevant monetary thresholds does not automatically mean that a transaction will escape antitrust scrutiny. Instead, companies must carefully assess the impact of their transaction on a country-by-country basis to anticipate whether a competition authority might take a closer look, either by exercising call-in powers or by initiating an ex officio antitrust investigation.

Practical Takeaways

In case of a below-threshold M&A transaction, organizations should conduct an in-depth analysis that takes into account the relevant sectors in which the parties are active and their market positions, and examines whether the transaction may lead to disgruntled competitors or other market participants who may bring it to an authority's attention.

Companies and their external advisers should also consider whether it would be sensible to contact a competition authority in advance to determine whether a filing would be necessary.

Although a merger control review can be cumbersome and time-consuming, adding to the timeline of the deal, an outreach can provide greater certainty and help to avoid unpleasant surprises further down the line, possibly even after the deal has closed.

When sending an upfront notice to a competition authority, it is important to provide sufficient detail to enable the authority to make an initial assessment. This is particularly important where receiving such a notice can trigger waiting periods, including referral deadlines.

Furthermore, although competition authorities may currently be struggling to review acqui-hire transactions, it is likely that someone will soon test the legal waters by applying call-in powers or the Towercast judgment to such a scenario.

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[1] CJEU judgment of 3 September 2024, Case C-611/22 P, Illumina / Grail, EU:C:2024:677.

[2] General Court judgment of 2 July 2025, Case T-289/24, Brasserie Nationale/Boissons Heintz, EU:T:2025:655.

[3] Commission decision of 17 July 2025 in case M.11485, Brasserie Nationale / Boissons Heintz.

[4] Commission decision of 20 December 2024 in case M.11766, Nvidia / Run:AI.

[5] Action brought before the General Court on 10 January 2025 in Case T-15/25, Nvidia v. Commission.

[6] CJEU judgement of 16 March 2023, Case C-449/21, Towercast, EU:C:2023:207.

[7] Belgian Competition Authority press release of 22 January 2025, N°3/2025, Dossche Mills/Ceres. The Belgian Competition Authority had previously referenced Towercast in its proceedings in Proximus/EDPNet in 2023 where it investigated Proximus's planned acquisition of EDPNet as a potential abuse of dominance under Article 102 TFEU. The French Competition Authority referred to the Towercast judgment when it investigated a series of asset swaps in 2024, assessing whether these transactions constituted a restrictive practice under Article 101 TFEU.

[8] Commission press release of 18 September 2024, Microsoft/Inflection.

[9] Bundeskartellamt press release of 29 November 2024, Microsoft/Inflection.