

Action brought on 28 April 2021 – Illumina v Commission

(Case T-227/21)

Language of the case: English

Parties

Applicant: Illumina, Inc. (Wilmington, Delaware, United States) (represented by: D. Beard, QC, and P. Chappatte, lawyer)

Defendant: European Commission

Form of order sought

The applicant claims that the Court should:

annul the decision of the European Commission of 19 April 2021 (case COMP/M.10188), pursuant to Article 22(3) of Regulation 139/2004/EC on the control of concentrations between undertakings¹, to accept the request dated 9 March 2021 for a referral under Article 22(1) of the Merger Regulation made by the Autorité de la Concurrence, France, and assert jurisdiction to examine the concentration of Illumina, Inc. and GRAIL, Inc. under the Merger Regulation;

annul the five further joinder decisions issued by the Commission to each of the Netherlands, Belgium, Greece, Iceland and Norway permitting them to join the request for a referral;

annul the request for a referral;

if and insofar as it is necessary to do so, annul the decision of the Commission dated 11 March 2021 which informed Illumina that the Commission had received a request for referral and had the legal consequence, pursuant to Article 22(4), second sentence of the Merger Regulation, that Illumina was prohibited from implementing the concentration pursuant to Article 7 of the Merger Regulation;

order the Commission to pay the costs of the present proceedings.

Pleas in law and main arguments

In support of the action, the applicant relies on four pleas in law.

First plea in law, alleging that the decision of the Commission to examine the concentration is outside its competence. In particular, the decision:

erred in its identification of the objective of the Merger Regulation;

failed to recognise that referrals of cases under Article 22 of the Merger Regulation (and Article 9 thereof) are exceptional and the powers should be construed narrowly;

erred in its assessment of the legislative background to Article 22 of the Merger Regulation;

erred in its interpretation of the text of Article 22 of the Merger Regulation;

was interpreted by the Commission contrary to the principles of subsidiarity, legal certainty and proportionality.

Second plea in law, alleging that the decision of the Commission to examine the concentration is invalid because the request for a referral submitted by the French competition authority was out of time and/or the decision is

contrary to legal certainty and good administration by reason of delays by the Commission. In particular:

The Commission erred in law in the interpretation and application of the notion of “made known” contained in Article 22(1) of the Merger Regulation for the purposes of calculating the date on which the 15 working day period commenced and wrongly failed to find that the request was out time, such that the Commission had no power to take the decision.

Further or alternatively, if and insofar it was the invitation letter under Article 22(5) of the Merger Regulation by which the concentration was “made known” to the French authorities (and/or other Member States), the delay by the Commission in issuing the invitation letter was contrary to the fundamental principle of legal certainty and the obligation to act within a reasonable time under the principle of good administration.

Third plea in law, alleging that the change of policy in the decision of the Commission to examine the concentration is contrary to Illumina’s legitimate expectations and legal certainty, since Commissioner Vestager, on 11 September 2020, made a precise and unconditional statement that there would be a change of the Commission’s policy in relation to Article 22 cases after the issuance of new guidance. Yet the invitation letter was sent prior to the publication of new guidance, at a time when the Commission’s stated policy was to discourage referral requests from Member States that lacked jurisdiction under their own national laws. The Commission therefore pursued its new policy prior to publishing its new Article 22 guidance, contrary to Illumina’s legitimate expectations and legal certainty.

Fourth plea in law, alleging that the Commission made errors of fact and assessment which undermine the basis for the decision of the Commission to examine the concentration. In particular:

there were key factual errors in the invitation letter and the request for a referral and/or there was an unfair procedure/failure to respect the rights of defence which render the decision and/or the request unlawful;

the Commission erred in finding an effect on trade between Member States because it lacked a proper evidential base;

the Commission erred in finding that the concentration threatens to significantly affect competition because it lacked a proper evidential base.

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