Antitrust, Vol. 38, No. 1, Fall 2023.

The EC's New Merger Referral Policy and the Transatlantic Reverberations of Illumina/GRAIL on the FTC's Administrative Process

BY HUGH M. HOLLMAN, CHARLES POMMIÈS, AND NICHOLAS P. PUTZ

THE REGULATION OF MERGERS AND acquisitions is a central function of competition authorities around the world. They face the challenge of finding the right balance between the trade-offs and uncertainties in each case. On the one hand, competition authorities need to detect and then remedy or prevent transactions that would create or enhance market power that may result in substantial anticompetitive harms often evidenced by higher prices, lower quality, and the stifling of innovation. On the other hand, competition authorities need to be careful and proportionate in avoiding both over and under-enforcement that would deter or distort efficient and beneficial transactions, impose excessive costs or delays, or undermine legal certainty or predictability. They also need to adapt and update their analytical tools, methods, and criteria to reflect the changing dynamics and complexities of markets, industries, and technologies while remaining in step with evolving objectives and values of society.

As competition authorities' thinking continues to evolve there must be appropriate checks and balances to protect the legitimacy of administrative processes and to prevent potential administrative overreach. Competition authorities reviewing transactions may operate in administrative environments without oversight of their day-to-day actions and decisions. While the opposite end of the spectrum—intense scrutiny of every action—is undoubtedly impractical, parties that find themselves in front of competition authorities should be afforded the opportunity to seek timely external review at critical junctures of an administrative process. Relatedly, as parties are increasingly finding themselves in front of more active competition authorities around the world, often simultaneously, appropriate external domestic oversight will also ensure that competition authorities cannot take advantage of each other's administrative systems to avoid appropriate domestic checks and balances.

A perfect checks and balances storm illustrating these various tensions in global administrative processes was created in March 2021 when the European Commission issued updated guidance on the application of Article 22 of the EU Merger Regulation (EUMR) that altered its longstanding practice of discouraging the recourse to Article 22 and, in parallel, announced that it would review Illumina's acquisition of GRAIL under the EUMR. The updated Article 22 guidance encourages EC review of transactions not meeting EU or national jurisdiction thresholds. With this policy update, the EU joins the ranks of other jurisdictions, including the U.S., which can challenge a transaction even where merger notification thresholds are not met.

While the EC changed its policy for scrutinizing transactions that did not meet its own reporting thresholds, the U.S. Federal Trade Commission was moving to block the transaction via its own administrative process without simultaneously pursuing a court-ordered injunction. The FTC was able to rely on intervention by the EC under its recent revision to its Article 22 policy to suspend the transaction, mooting a request for a preliminary injunction and allowing the FTC to challenge the transaction only via its much lengthier administrative process.[1] As the Illumina/GRAIL parties faced these merger review complications in front of the FTC in light of the EC's simultaneous administrative processes, the FTC's own internal administrative process was separately facing a strong domestic challenge in *Axon Enterprise, Inc. v. FTC*, with serious constitutional questions, some directly relevant to considerations in Illumina/GRAIL, being leveled at the FTC.[2]

Updated Article 22 Guidance

The new EUMR Article 22 guidance amounted to a much needed update in the EC's methods for identifying reviewable transactions because it addressed some of the gaps and challenges that were previously faced by the Commission in capturing and assessing the competitive effects of certain types of transactions, especially those involving nascent or potential competitors and innovation markets.[3]

Article 22 of the EUMR allows the EC to review transactions that do not meet the EU or national jurisdictional thresholds, but may affect trade between Member States and threaten to significantly impede effective competition, upon

Hugh Hollman is a partner at Allen & Overy LLP, Charles Pommiès is a counsel at Allen & Overy LLP, and Nicholas Putz is an associate at Allen & Overy LLP.

the request of one or more Member States. However, the EC's previous practice discouraged such requests unless the transaction affected the requesting Member State(s) and had a clear impact on the EU's internal market. This meant that some transactions that could have significant cross-border or EU-wide implications, but did not generate sufficient turnover in the EU or in any Member State, could escape the EC's scrutiny, even if they raised serious competition concerns.

The EC's update to Article 22, announced in March 2021, aimed to address this gap by clarifying that the EC will accept and encourage Article 22 referrals from Member States regardless of whether they have jurisdiction over the transaction, and regardless of whether the transaction has already been completed. The EC also indicated that it will adopt a more proactive approach in identifying and inviting referrals of transactions that may have a significant impact on the internal market, particularly in sectors where the turnover of the parties may not reflect their actual or future competitive potential, such as digital or innovation markets.

Article 22's Original Rationale and the EC's Evolving Policy

Article 22 was originally introduced on a Dutch initiative (hence it being occasionally referred to as the "Dutch clause") to enable countries that had not yet established their own system of merger control; to scrutinize mergers that would nonetheless have an impact on competition. When the original merger regulation was enacted in 1989, only three Member States (France, Germany and the UK) had a domestic merger control regime.

However, having regard to the importance of legal certainty, the referral system was meant to remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds. As national legislation developed (Luxembourg, the only Member State that nowadays does not have a merger control regime, is in the process of adopting one), the EC exercised the discretion granted to it by the EUMR and developed a practice of discouraging referral requests under Article 22 from Member States that did not have original jurisdiction over a transaction. This practice was notably based on the experience that such transactions were not generally likely to have a significant impact.

It was only in recent years that the Article 22 referral mechanism regained traction, particularly in the context of so-called "killer acquisitions" in the digital and pharmaceutical sectors. Market developments resulted in an increasing number of cases in which start-ups generating little or no turnover in the moment, but with significant potential for playing an increased competitive role on the market, were acquired by larger companies.

The EC noted in that respect that while the EU turnover thresholds have generally been effective in capturing transactions with a significant impact on competition, a number of cross-border transactions which could potentially also have such an impact have escaped review by both the EC and the Member States. The EC eventually concluded that its approach of discouraging Article 22 referrals where a transaction falls outside national merger control jurisdiction limits the effectiveness of these referrals as a corrective mechanism to the EU turnover-based thresholds. The Article 22 Guidance is intended to close that perceived regulatory enforcement gap. Accepting (and even encouraging) the referral of relevant transactions would give Member States and the EC the flexibility to target transactions which merit review at EU level, without imposing on parties the mandatory notification of transactions that do not.

The EC will focus on transactions where one of the parties' turnover does not reflect its actual or future competitive potential. The Article 22 Guidance is intended to be a targeted tool focusing on specific categories of cases but not limited to any specific economic sector, although the EC does particularly call out digital, pharmaceuticals and biotechnologies.

Scenarios in which a transaction would be considered an appropriate candidate for an Article 22 referral include where a party:

- is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues;
- is an important innovator or is conducting potentially important research;
- is an actual or potential important competitive force;
- has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); or
- provides products or services that are key inputs or components for other industries.

Significantly, deal value will also play a role. The EC may take into account whether the value of the consideration is particularly high compared to the current turnover of the target, as it could be an indication that the turnover of the target does not reflect its actual or future competitive potential.

Legal Requirements For an Article 22 Referral

A Member State seeking to refer to the EC a transaction that does not meet the EUMR turnover thresholds must demonstrate that two legal requirements are fulfilled.

First, the transaction must affect trade between Member States. A transaction which has an impact within the confines of one Member State only cannot be referred to the EC. The EC considers that "some discernible influence on the pattern of trade between Member States" (including direct or indirect and actual or potential influence) is sufficient to fulfil the requirement. The Article 22 Guidance lists as relevant factors the location of customers, the availability and offering of the products or services at stake, the collection of data in several Member States, or the development and implementation of R&D projects whose results may be

commercialised in more than one Member State. That said, the condition of affectation of trade is arguably not onerous. In what was seemingly a purely domestic transaction involving the merger of two supermarket chains in Finland, referred to the EC by the Finnish competition authority in 1996, the EU's Court of First Instance (now General Court) accepted the EC's argument that the transaction would create foreclosure effects for new entrants, including potential entrants from other Member States, coupled with the fact that 30 percent of the products sold by the undertakings concerned originated outside Finland. Additionally, the General Court and the EC took into account recent expansions by the undertakings concerned to Sweden and the parties' membership of several international purchasing organisations.

Second, a referring Member State must demonstrate that there is a "real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny."[4] This essentially requires the referring Member State to conduct a prima facie merger assessment along the parameters included in the EC's Horizontal and Non-Horizontal Merger Guidelines.[5] Accordingly, relevant considerations include the creation or strengthening of a dominant position, the elimination of an important competitive force, the reduction of competitors' ability or incentive to compete, or the ability or incentive to leverage a strong market position from one market to another. The EC clarifies that the prima facie assessment made by the referring Member State is without prejudice to the outcome of a full investigation—but it also emphasizes that the prospective nature of the merger control assessment ought to be taken into account when deciding on a referral request.

The Role of Member States

The choice to make a referral request belongs to the Member States. The EC, however, is not precluded from playing an active role. Under Article 22(5), the EC may inform one or several Member States that it considers that a transaction fulfils the criteria for a referral and accordingly invite Member States to request a referral—as it did in the Illumina/GRAIL case.

By referring a transaction to the EC, a Member State declines to exercise its competencies in relation to that transaction. More than that, pursuant to Article 22(3), third subparagraph, the referring Member State undertakes to no longer apply its national legislation on competition to the transaction. It should also be noted here that the lodging of a referral request by some Member States does not preclude other Member States, who have not chosen to join in the referral, from conducting their merger assessment. For example, a number of Member States made a referral request for the EC to review the acquisition of Kustomer by Facebook. The German Federal Cartel Office, however, did not join in this request, arguing that its general practice is that a referral requires a transaction to be subject to notification based on national competition law.[6] The German Federal Cartel Office later determined that the transaction was reviewable under German law and eventually cleared it, having regard to the findings of the EC's conditional clearance decision.

Illumina/GRAIL Under Transatlantic Review—Effect of the Article 22 Policy Update on the FTC's Illumina/GRAIL Administrative Process

The EC's revision of the Article 22 policy became directly relevant to Illumina's plans to buy GRAIL, both U.S. companies that operate in the field of genomics and cancer detection. Illumina is a leading provider of next generation sequencing (NGS) systems, which are used to analyse genetic and genomic data. GRAIL, a spin-off from Illumina in 2016, develops tests that rely on NGS systems to detect multiple types of cancer at an early stage. In September 2020, Illumina agreed to buy GRAIL for $8 billion in cash and stock, plus future royalties based on revenues.

The Illumina/GRAIL merger first appeared on the FTC's radar in late 2020—the parties had signed an agreement in September and shortly thereafter filed the necessary premerger notification to the agency under the Hart-Scott-Rodino Act. In November 2020, the FTC issued a "second request," seeking more information and time to determine whether the merger would have anticompetitive effects.

The deal was not notified in Europe as GRAIL did not have European turnover and did not trigger the EUMR thresholds or any national filing requirements. However, in December 2020, the EC received a complaint against the deal and discussed it with the German, Austrian, Slovenian, and Swedish competition authorities, who could potentially review the deal under their national laws. In line with its evolving policy, the EC decided that the deal would be an appropriate candidate for referral under the newly updated Article 22 guidance. On February 19, 2021, the European Commission invited Member States to refer the merger for review under Article 22.

On March 30, 2021, the FTC sued to block the merger, alleging a violation of Section 7 of the Clayton Act on a vertical innovation theory of harm, even though GRAIL and its competitors had yet to commercialize the relevant product.[7] According to the FTC's complaint, Illumina is the dominant provider of NGS platforms that multi-cancer early detection (MCED) test developers like GRAIL need to commercialize MCED tests.[8] The FTC alleged that post-acquisition, Illumina could use its control over NGS platforms to harm GRAIL's competitors by raising prices, denying technical assistance, or refusing or delaying license agreements required to sell in vitro diagnostic (IVD) versions of MCED tests.[9]

In regular fashion, in addition to the administrative complaint, the FTC also sought a preliminary injunction to prevent the parties from merging until the merits of the case could be decided—a fairly quick remedy.[10] All of this was, to a degree, business as usual for the FTC. The Illumina/

GRAIL merger only becomes unusual when viewed in parallel with actions across the Atlantic.

On April 19, three weeks after the FTC sued to block the merger, the European Commission accepted the Article 22 referral, a decision that was ultimately upheld by the EU's General Court and is currently pending before the EU Court of Justice.[11]

A few weeks later still, on May 21, the FTC withdrew its request for a preliminary injunction, which was now moot in light of the EC's investigation and proceeded in its own administrative court, explaining that "[n]ow that the European Commission is investigating, Illumina and GRAIL cannot implement the transaction without obtaining clearance from the European Commission."[12] The FTC proceeded only with suit in its administrative court. There is no evidence that the FTC asked the EC to intervene with an investigation, though the Wall Street Journal's Editorial Board speculated at the time—"[w]hy do that?" and then commented, "[p]erhaps the FTC worried it would lose. Instead the FTC appears to have asked the Europeans to stop the acquisition while the FTC tried the case in its administrative tribunal where it almost always wins."[13]

Proceeding only in administrative court would not have been an option if the U.S. Department of Justice's Antitrust Division was reviewing the transaction, as the DOJ can only challenge transactions in federal court. The FTC and DOJ share merger review jurisdiction and decide the reviewing agency "on a case-by-case basis depending on which agency has more expertise with the industry involved."[14] This leads to some merging parties arbitrarily facing a more daunting administrative process, whereas other merging parties face a more familiar process in the federal judiciary, purely on the basis of the relevant industry and the agencies' black-box decision-making process.

Why did the FTC choose this path? The FTC had sued in federal court three weeks before the Article 22 referral had been accepted, and, moreover, receiving preliminary injunctions in federal court is a fairly quick remedy. A decision could have been reached in federal court well in advance of a U.S. administrative court or in the EU. Though the FTC's request for a preliminary injunction was mooted by the EC's investigation, there are two other potential factors working behind the scenes of this decision. The first is that the FTC enjoys a unique confluence of power that bestows upon it the roles of investigator, prosecutor, and judge. In fact, the agency has at least a 90 percent win rate over the past twenty-five years in its own administrative court.[15] A quicker, uncertain decision in federal court is perhaps undesirable when compared to a longer, statistically probable victory that could grind down opposing parties. The second factor is that the EC's review of Illumina-GRAIL had the potential to bolster the FTC's own case.

A decision was first reached in the U.S., seventeen months after the FTC had first filed its administrative complaint, with the FTC's own in-house administrative law judge dismissing the FTC's complaint on September 1, 2022.[16] The judge found that Illumina's position as the only viable supplier of NGS platforms already existed and was not a consequence of the transaction and that Illumina had no incentive to harm GRAIL's rivals post-transaction.[17] Furthermore, the judge reiterated that absent proof of harm in the reasonably near future, harm to "existing innovation and future commercial competition" runs afoul of Section 7's requirement that any substantial lessening of competition be probable and imminent.[18]

The Commission was not far behind, though it diverged from the FTC process. On September 6, the EC blocked the merger, and Illumina/GRAIL found itself with a win and loss simultaneously. According to the EC, Illumina would have "clear incentives" to foreclose GRAIL's rivals via sales of NGS platforms.[19] Although the EC acknowledged that Illumina's sale of NGS platforms to GRAIL rivals represented a small proportion of its sales, the market was expected to grow significantly by 2035. Additionally, the EC rejected the uniqueness of any first-mover advantage associated with GRAIL's Galleri test, which at the time was the only MCED test commercially available for purchase, and maintained that other cancer detection tests were poised to "closely compete with Galleri in the near future" absent the transaction.[20]

The authorities realigned when in early April 2023 the FTC overruled its administrative law judge, issuing an opinion finding that the acquisition may substantially lessen competition in the U.S. for the research, development, and commercialization of MCED tests and ordering Illumina to divest GRAIL.[21] Contrary to the administrative law judge, the FTC found that the acquisition of GRAIL would increase Illumina's incentive to foreclose competition in the MCED market, ignoring that Illumina's ability to foreclose competition in the MCED market, such as by price discrimination, already existed given its position as a critical supplier of NGS platforms.[22] The FTC reasoned that Illumina's incentives to foreclose competition would increase because it stood to profit substantially by owning 100 percent of GRAIL in an MCED market that is expected to grow significantly. The FTC also pointed to Illumina's prior revocation of special pricing terms for GRAIL when it previously reduced its ownership in 2016.[23] Accordingly, the FTC concluded that because Illumina's acquisition of GRAIL would impair its incentive to support other MCED developers in innovation efforts and increase its foreclosure incentives, the transaction is likely to cause harm to competition.[24] Illumina is, as expected, appealing, and an expedited decision is expected in late 2023 or early 2024.

Interestingly, just one week after the FTC overruled its own administrative law judge's dismissal of the FTC staff's merger challenge, the Supreme Court, in *Axon Enterprise, Inc. v. FTC,* greenlit constitutional challenges to the FTC's administrative proceedings where the FTC acts as both

prosecutor and adjudicator. The FTC Commissioners' overruling of the FTC administrative judge in Illumina/GRAIL goes right to the heart of the legitimacy of the FTC's in-house administrative process in which, as Supreme Court Justice Gorsuch stated in his *Axon Enterprise, Inc.* concurrence, the "FTC combine[s] the functions of investigator, prosecutor, and judge under one roof. They employ relaxed rules of procedure and evidence –rules they make for themselves."[25]

Furthermore, the Wall Street Journal's accusation that a U.S. regulator may be pursuing its enforcement agenda abroad and in its own administrative court to avoid the federal judiciary is a serious accusation that raises important legitimacy and accountability questions.

Illumina/GRAIL Raises Questions about FTC's Administrative Process That Are Currently Being Challenged

It is worth speculating whether the FTC would have overruled its own administrative law judge if the EC had not also blocked the Illumina/GRAIL merger. The two agencies, at least based on timelines, initiated long administrative actions in multiple jurisdictions. Illumina did not succumb and completed its acquisition anyways, and, as seen recently, it paid the price—a record €432 million gun-jumping fine imposed by the EC that Illumina is challenging in court.[26]

While Illumina's appeal of the FTC's order is still ongoing, its fate raises serious concerns about the administrative state of the U.S.—some of which were recently addressed in the Supreme Court's decision in *Axon Enterprise, Inc.* and may soon be taken up again in *Securities and Exchange Commission v. Jarkesy*.[27] Faced only with the question of where constitutional challenges to administrative processes should be heard, the Supreme Court in *Axon Enterprise, Inc.* held that litigants can bring structural constitutional challenges in federal district court against the FTC without first fully exhausting administrative proceedings.

However, the Supreme Court appeared receptive to substantive claims of unconstitutionality that the FTC improperly acts as prosecutor, judge, and jury in determining liability and remedies for violations of the FTC Act, some of which are currently being raised by Illumina/GRAIL in the Fifth Circuit. For example, in his concurring opinion, Justice Thomas expressed "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end."[28] And, Justice Gorsuch observed that "the bulk of agency cases settle," often with settlement terms that could not be lawfully obtained in every other way, because the administrative agencies are aware "that few can outlast or outspend the federal government" in dragged out administrative proceedings.[29]

To see how parties embroiled in the FTC's administrative process can be negatively affected by these constitutional claims one need not look any further than Illumina/GRAIL. In Illumina/GRAIL, because of the ongoing EC proceedings, the FTC did not need to obtain a preliminary injunction to prevent the parties from closing and was able to opt for home-court advantage by keeping its merger challenge in-house, where some claim that the FTC has not lost a proceeding in 25 years.[30] The FTC's overturning of one of its administrative law judges on a novel vertical innovation theory of harm did nothing to quell claims that the FTC's administrative process is tilted to favor the FTC to the detriment of merging parties. In fact, the same four FTC Commissioners who voted to issue the Illumina/GRAIL complaint then overruled an administrative law judge's dismissal of that very complaint. To make matters worse, if the EC had not used Article 22 to review the transaction or if the DOJ had reviewed the transaction instead of the FTC, the parties would have found themselves in front of a federal judge at the outset. Although the FTC can continue pursuing an in-house challenge to a transaction even after being denied a request for a preliminary injunction, the FTC generally abandons its administrative challenge if it loses its appeal.

In light of *Illumina v. FTC* and possibly *Jarkesy*, a substantive constitutional challenge to the FTC's administrative process at the Supreme Court could be on the horizon. If so, parties finding themselves in the same position as Illumina and GRAIL in the future may be afforded a more level playing field when their transactions are challenged domestically and abroad. ■

---

[1] *But see* Complaint, *Fed. Trade Comm'n v. Intercontinental Exchange, Inc. et al.,* No. 3:23-cv-01710 (N.D. Cal. Apr. 10, 2023) (requesting preliminary injunction where transaction was imminently scheduled for closing); Complaint, *Fed Trade Comm'n v. Microsoft et al*., No. 3:23-cv-02880 (N.D. Cal. June 12, 2023) (requesting preliminary injunction where transaction was imminently scheduled for closing).

[2] 452 F. Supp. 3d 882 (D. Ariz. 2020) (holding FTC Act barred district court jurisdiction over actions against agency insofar as Act provided for administrative proceedings subject to appellate court review), *rev'd and remanded*, Axon Enterprise, Inc. v. FTC, 598 U.S. 175 (2023).

[3] Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases, 2021 O.J. (C 113).

[4] Commission Notice on Case Referral in Respect of Concentrations, 2005 O.J. (C 56) 2, 44.

[5] Eur. Comm'n, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 5; Eur. Comm'n, Guidelines on the Assessment of Non-horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6.

[6] Press Release, German Federal Cartel Office, Bundeskartellamt Examines Whether Facebook / Kustomer Merger is Subject to Notification (July 23, 2021).

[7] Complaint, Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401 (Mar. 30, 2021), https://www.ftc.gov/system/files/do=cuments/cases/redacted_administrative_part_3_complaint_redacted.pdf.

[8] *Id.* at ¶ 49.

[9] *Id.* at ¶ 49.

[10] Complaint, FTC v. Illumina, Inc., et al., No. 1:21-cv-00873 (D.D.C. Mar. 31, 2021).

[11] *See* Case C-625/22—GRAIL LLC v Commission, 2022 O.J. (2022 C451/13).

[12] Press Release, Fed. Trade Comm'n, Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case (May 20, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/05/statement-ftc-acting-bureau-competition-director-maribeth-petrizzi-bureaus-motion-dismiss-request; *see also* Plaintiffs Ex Parte Application to Dismiss the Complaint without Prejudice, FTC v. Illumina, Inc., et al., No. 1:21-cv-00800 (S.D. Cal. Mar. 31, 2021).

[13] Wall Street Journal Editorial Board, *The FTC's Antitrust Collusion*, Wall St. J. (Feb. 23, 2023), https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-Grail-acquisition-a78e03d0.

[14] Fed. Trade Comm'n, *How Mergers Are Reviewed*, Fed. Trade Comm'n, https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review.

[15] Axon Enter., Inc. v. FTC, 598 U.S. 175, 216 (2023) (Gorsuch, J., concurring).

[16] Initial Decision, Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401 (Sept. 9, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf.

[17] *Id.* at 171–72, 178.

[18] *Id.* at 193.

[19] Press Release, Eur. Comm'n, Mergers: Commission Prohibits Acquisition of GRAIL by Illumina (Sept. 6, 2022) (IP/22/5364).

[20] *Id.*

[21] Opinion of the Commission, Illumina, Inc. and GRAIL, Inc., FTC Docket No. 9401 (Apr. 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

[22] *Id.* at 49.

[23] *Id.* at 49–50, 52–53.

[24] *Id.* at 60.

[25] Axon Enter., Inc., 598 U.S. at 215 (Gorsuch, J., concurring).

[26] Press Release, Eur. Comm'n, Mergers: Commission Fines Illumina and GRAIL for Implementing Their Acquisition Without Prior Merger Control Approval (July 12, 2023) (IP/23/3773).

[27] 34 F. 4th 446 (5th Cir. 2022) (finding SEC administrative enforcement process violated Articles I and II of Constitution), *cert. granted*, Securities and Exchange Commission v. Jarkesy, 143 S. Ct. 2688 (2023).

[28] Axon Enter., Inc., 598 U.S. at 196 (Thomas, J., concurring).

[29] *Id.* at 216 (Gorsuch, J., concurring).

[30] *Id.*