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Between Legal Dogma and Counterfactual Analysis

Exploring Jurisdictional Shifts in EUMR Post Article 22 Guidance

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Summary

The jurisdiction of the European Commission ('Commission') to review concentrations under the provisions of the European Union Merger Regulation ('EUMR') is established either by the turnover thresholds or the case referral system. In both of these cases, jurisdiction is established through quantitative criteria, with the exception of the case referral mechanism provided for in Article 22 EUMR.

Historically, Article 22 EUMR was designed to enable Member States that do not have a national merger regulation to request the Commission to, on their behalf, review concentrations that are competitively significant within their territory. However, through the re-appraisal of Article 22 EUMR, that article has now been 'made' available for all Member States regardless of the existence or scope of national merger control regulation.

With this new approach, the Commission has managed to *de* facto expand the jurisdictional scope of the EUMR: virtually all M&A transactions can now be subject to scrutiny by the Commission – as illustrated by the case of *Illumina/GRAIL*. Had the re-appraisal of Article 22 EUMR not taken place, this would not have happened.

With the re-appraisal of Article 22 EUMR, the Commission has managed to 'close' the enforcement gap. Instead of opting for a reform of the turnover thresholds, the Commission opted for flexibility as its recourse in handling jurisdictional challenges. With the flexibility provided by that article, there is no longer a need to fear that anti-competitive concentrations, such as 'killer acquisitions', may escape regulatory scrutiny. However, this flexibility comes with the price of legal certainty.

The re-appraisal of Article 22 EUMR is considered to have overhauled the threshold-based system of the EUMR. The safe harbour that once was provided by the turnover thresholds now no longer exists. The current state of the EUMR landscape is characterised by unprecedented uncertainties.

However, considering that the EUMR is still in the early stages of entering this new era, one cannot yet draw definite conclusions. If the case of *Illumina/GRAIL* serves as an indication, one can be sure that the straightforward and objective mechanism once provided by the EUMR is no more.

Sammanfattning

Den Europeiska Kommissionens (’Kommissionen’) jurisdiktion att granska koncentrationer enligt bestämmelserna i koncentrationsförordningen (’EUMR’) fastställs antingen av omsättningsbaserade trösklarna eller systemet för hänskjutande av ärenden. I båda dessa fall fastställs jurisdiktionen genom kvantitativa kriterier, med undantag för hänskjutandemekanismen som föreskrivs genom Artikel 22 EUMR.

Historiskt sett har Artikel 22 EUMR utformats för att möjliggöra för medlemsstater som inte har en nationell förvärvskontrollagstiftning att begära att kommissionen åt deras vägnar granskar koncentrationer som är konkurrenskraftiga inom deras territorium. Med den nya tillämpningen av Artikel 22 EUMR har den artikeln nu ’gjorts’ tillgänglig för alla medlemsstater oavsett existens eller omfattning av nationell förvärvskontrollagstiftning.

Med detta nya tillvägagångssätt har Kommissionen lyckats utöka EUMR:s jurisdiktionsomfattning *de facto*: praktiskt taget alla M&A-transaktioner kan nu bli föremål för granskning av Kommissionen – vilket illustreras av fallet *Illumina/GRAIL*. Hade Artikel 22 EUMR inte getts en ny tolkning hade det här aldrig inträffats.

Med den nya tillämpningen av Artikel 22 EUMR har Kommissionen lyckats 'stänga' det *enforcement gap*. I stället för att ändra de omsättningsbaserade trösklarna valde Kommissionen att öka dess flexibilitet. Genom den nya tillämpningen av Artikel 22 EUMR finns det inte längre någon anledning att befara att konkurrensbegränsande koncentrationen, såsom ’*killer acquisitions’*, kan undgå granskning. Den här flexibiliteten kommer dock på bekostnad av rättssäkerhet.

Den nya tillämpningen av Artikel 22 EUMR anses ha totalt omvandlat det omsättningsbaserade tröskelsystemet för EUMR. Den trygga zonen som en gång tillhandahölls av de omsättningsbaserade trösklarna existerar nu inte längre. Det nuvarande tillståndet för EUMR-landskapet kännetecknas av osäkerhet utan motstycke.

Men med tanke på att EUMR fortfarande är i ett tidigt skede av att gå in i den här nya eran, kan man ännu inte dra säkra slutsatser. Om fallet *Illumina/GRAIL* fungerar som en indikation kan man vara säker på att den enkla och objektiva mekanismen som tillhandahölls av EUMR inte längre finns.

Abbreviations

CJEU	Court of Justice of the European Union
EUMR	European Union Merger Regulation
EU	European Union
FTC	Federal Trade Commission
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of European Union
M&A	Mergers and Acquisitions

1 Introduction

1.1 Background

For over thirty years, the European Union Merger Regulation ('EUMR') has served as the regulatory framework for overseeing mergers within the European Union ('EU').[1] However, in recent years, there has been growing concern about an enforcement gap within the EUMR, particularly regarding its rigid thresholds based on turnover.[2] Critics argue that the thresholds are ill-equipped to address certain transactions, such as those that invovles nascent companies whose turnover is not indicative of their competitive significance.[3] This limitation is especially troubling in the context of 'killer acquisitions', where incumbent firms target competing nascent companies with the aim of 'killing' the competitors. This would not only hurt competition but ultimately consumers will also suffer the consequences.[4]

In response to the concern, the European Commission ('Commission') launched an evaluation in 2016 regarding the procedural and jurisdictional aspects of the EUMR. In March 2021, the result of that evaluation was published.[5] Not only did the result confirm the existence of an enforcement gap, but it also introduced a rather creative way to deal with the matter. To elaborate further, the EUMR establishes a 'one-stop shop' system in allocating competence between the Commission and the Member States. This ensures efficiency in the pre-merger procedure.[6] In line with the 'one-stop shop' system, the EUMR contains a corrective mechanism in the form of case referrals.[7] This mechanism reallocates jurisdiction between the Commission and the Member States, allowing the best-placed authority to review cases for which it did not initially have jurisdiction.[8]

The result of the evaluation concluded that the turnover-based thresholds are partially to blame for the enforcement gap. This, however, does not neces-

[1] The first merger control in the European Union (Council Regulation (EEC) No 4064/89) was adopted on 21 December 1989 and entered into force on 21 September 1990; Council Regulation (EC) No 139/2004 ('EUMR').

[2] In 2015, the European Parliament's Committee on Economic and Monetary Affairs commissioned a report titled "Challenges for Competition Policy in a Digitalised Economy," advocating for revised European jurisdictional thresholds based on user numbers and network effects.

[3] See Borreau and de Streel (2019) noting that supplementing the current thresholds with a threshold based on transaction value could mitigate the limitations of the turnover-based thresholds in capturing certain anti-competitive transactions, such as 'killer acquisitions'; See also Broberg (2014).

[4] See Cunningham, *et al.* (2021); the concept of 'killer acquisitions' is elaborated further in Chapter 4.1.

[5] SWD(2021) 66 final ('2021 Evaluation').

[6] EUMR, Recital 8; See also COM(2014) 449, p. 15, para. 19.

[7] See EUMR, Articles 4(4), 4(5), 9, and 22.

[8] EUMR, Recitals 11-16.

sarily mean that the EUMR is ill-equipped to deal with certain anti-competitive transactions, such as 'killer acquisitions'.[9] The corrective mechanism was implemented specifically to address the shortcomings of the turnover-based thresholds. However, its effectiveness has been limited due to the Commission's approach, particularly in the application of Article 22 EUMR.[10] Thus, the evaluation urged the Commission to be more accepting and encouraging of case referrals under that article, to ensure that competitively significant transactions are reviewed when necessary.[11] Following this, the Commission published a guidance on the application of Article 22 EUMR ('Article 22 Guidance').[12]

The aim of the new guidance is to facilitate and clarify the application of Article 22 EUMR in certain categories of appropriate cases.[13] Fundamentally, what have changed with the application of Article 22 EUMR is that the Commission now accepts case referrals under that article, from Member States that, based on their national merger regulation, lacks initial jurisdiction – as evident in the case of *Illumina/GRAIL*.[14] In 2020, the U.S.-based company Illumina announced its intention to acquire GRAIL, another U.S.-based company that lacks any business presence or operations in the EU.[15] The proposed acquisition did not fall within the jurisdictional scope of either the EUMR or any Member State. However, it was made subject to a pre-merger review by the Commission, upon request from France.[16]

In an uphill battle, Illumina contested the Commission's decision to accept the referral request to the General Court arguing that the Commission, *inter alia*, lacked competence and erred in interpreting Article 22 EUMR.[17] The General Court, however, considered the Commission's interpretation of Article 22 EUMR to be correct and thus affirmed its competence to review the proposed acquisition.[18] Pending a ruling from the Court of Justice, this decision introduces more uncertainty than certainty.

According to both the Commission and the General Court, this shift in approach towards Article 22 EUMR aligns with the objectives and core principles of the EUMR. As per their assessment, there has been no expansion of

[9] 2021 Evaluation, p. 36, para. 113.

[10] Ibid., p, 28, para. 90 and p. 36, para. 114.

[11] Ibid., p. 74, para. 267f.

[12] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final ('Article 22 Guidance').

[13] Article 22 Guidance, p. 1, para. 1.

[14] See Case T-227/21 ('Illumina/GRAIL').

[15] Press Release, *Illumina to Acquire GRAIL to Launch New Era of Cancer Detection*, 21 September 2020.

[16] Press release, *Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*, 22 July 2021.

[17] See Illumina/GRAIL.

[18] Ibid.

the jurisdictional scope of the EUMR. [19] Critics beg to differ, especially considering that Article 22 EUMR was originally designed for use by Member States lacking their own national merger control regulation.[20] These critics argue that the re-appraisal of that article has broadened the jurisdictional scope of the EUMR to virtually include all M&A transactions and brings with it uncertainties.[21]

Within the realm of jurisdictional scrutiny, the case of *Illumina/GRAIL*, despite its unsuccessful appeal on the General Court, has unearthed intriguing facets that warrant in-depth exploration and analysis. This study, focusing on the intricacies of the EUMR and the re-appraisal of Article 22 of that regulation, is driven by the overarching goal of determining whether recent developments signify an expansion of the EUMR's jurisdictional scope.

1.2 Purpose

The purpose of this thesis is to discern whether the jurisdictional scope of the EUMR has been expanded through the Commission's re-appraisal of Article 22 of that regulation. Recent developments have given rise to conflicting views. To provide clarity on this matter, the study examines the key aspects of the jurisdictional provisions of the EUMR as well as the surrounding issues, such as the debate on thresholds reform, Article 22 Guidance, and the case of *Illumina/GRAIL*.

To achieve the purpose, the following questions are discussed:

1. Has the re-appraisal of Article 22 EUMR expanded the jurisdictional reach of the European Union Merger Regulation to also include non-notifiable concentrations?[22]

2. How can the re-appraisal of Article 22 EUMR contribute to overcoming challenges related to the current application of the EUMR? In exploring this, what challenges can be identified with the re-appraisal of Article 22 EUMR?

1.3 Delimitations

As apparent from the background and purpose, this thesis focuses solely on EU competition law, particularly the EUMR and the jurisdictional aspects of

[19] Article 22 Guidance, p. 3, para. 11; See also Illumina/GRAIL, para. 153-155.

[20] COM(96) 19 final, para. 97; COM(2001) 745 final, para. 84; and OJ 2003 C 20, p. 4, para. 21.

[21] See Carugati (2022) noting that the Commission can now review any merger, even those below national merger thresholds and that the application of Article 22 EUMR does not rely on clear and objective criteria; See also Podszun (2023); and Van Rompuy (2021).

[22] In this context, 'non-notifiable concentrations' refers to concentrations that fall below either the thresholds set by either EUMR or national merger control regulations and, as a result, are not required to be notified to competition authorities.

that regulation. Jurisdiction of the EUMR, as is explained in the forthcoming chapters, can be established in one of two ways, either by the turnover thresholds or the case referral system. Thus, there are two main focuses in this study: the turnover thresholds and the case referral system. The thesis explains the purpose and objectives of these two aspects. However, regarding the case referral system, the thesis only elaborates on the case referral mechanisms provided for in Article 22 EUMR.

It is important to note that this study does not explore the substantive assessment of the EUMR. Jurisdiction established under the EUMR is based on quantitative criteria. However, as is explained in the forthcoming chapters, the re-appraisal of Article 22 EUMR has made it possible to establish jurisdiction based on substance (i.e. qualitative criteria). Thus, while the theory of 'killer acquisitions' fall under the substantive assessment, its inclusion is limited to its relevance within the broader discourse on thresholds-reform.

In the realm of EU competition law, there are currently two significant cases that are considered to have fundamentally changed the regulatory landscape, namely *Illumina/GRAIL* and *Towercast,* this study will focus solely on the former.[23] While the latter also concerns the application of the EUMR, it does so in a broader context, specifically addressing how the EUMR relates to the application of Article 102 TFEU. While it touches on the jurisdictional scope of the EUMR to some extent, its primary focus lies on the jurisdiction provided by Article 102 TFEU.

Finally, since this thesis is written at advanced level, it is assumed that the reader possesses a basic understanding of EU law. Concepts specific to competition law, such as the concept of 'concentrations', are explained to the extent that they are relevant to the understanding of the legal framework. The fundamental legal principles in EU law are not discussed within the scope of this thesis, as it is presumed that the reader already has a foundational understanding of the principles. However, given that this thesis explores the details of the *Illumina/GRAIL* case, the fundamental principles are explained to the extent that they form part of the General Court's reasonings.

1.4 Methodology and Materials

The primary research method that is applied in this thesis is the legal dogmatic method. This method aims to identify, describe, and systematise the principles, rules, and concepts of a particular legal field to establish the present law. Moreover, this method includes an analysis of the relationship between these

[23] See Mulder and Sauter (2023); See also Illumina/GRAIL; and Case C-449/21 *Towercast.*

principles, rules, and concepts to solve gaps and ambiguities in the existing law.[24]

In this context it is therefore important to explain the nature of EU laws that are relevant to this thesis. [25] The hierarchy of the EU legislative documents are categorised as primary law, international agreements, and secondary law. Secondary law consists of legislative acts, such as regulations and directives, and non-legislative acts, such as opinions and recommendations.[26] Non-legislative acts are non-binding and sometimes referred to as 'soft law'. Soft laws have legal effects, such as binding the enacting institution and creating an expectation that the enacting institution will comply with the rules it has laid down in soft law instruments. Article 22 Guidance is an example of such a soft law instrument. Moreover, it is essential to acknowledge the CJEU as the sole actor with authority to deliver binding interpretations on EU law.[27] The *Illumina/GRAIL* case, while it bears some importance in the future of EU merger control, has not reached a definitive conclusion at CJEU level yet. Thus, the judgement of the General Court should be considered with due caution. However, the outcome may have been foreshadowed by the *Towercast* case.[28]

The secondary research method that is applied in this thesis is counterfactual analysis. In the context of EU competition law, to establish whether a merger is compatible with the internal market, the Commission is required to assess the merger in the context of the position that would exist were the merger not to be completed: the 'counterfactual'.[29] This involves evaluating the market position that would exist if the merger were not to proceed, essentially predicting a potential future scenario.[30] However, the focus of this study differs from a standard merger assessment. Instead, the counterfactual analysis in this research involves a unique comparison: comparing the current state of the jurisdictional scope of the EUMR under the re-appraisal of Article 22 EUMR with how it would have looked in the past. In other words, it examines how the jurisdictional scope of the EUMR would appear if the re-appraisal of Article 22 EUMR had not taken place.

The synergy between these two methodologies is pivotal to addressing the research questions and the overarching purpose of the thesis. The legal dogmatic method ensures an in-depth examination of the legal provisions and provides a solid foundation for the analysis. At the same time, the counterfactual analysis introduces a dynamic and historical dimension, allowing this thesis to assess changes or continuities in the jurisdictional landscape. This

[24] Smits (2015), p. 5.
[25] EUR-Lex, *EU hierarchy of norms*.
[26] EUR-Lex, *Sources of European Union Law.*
[27] TEU, Article 19.
[28] Mulder and Sauter (2023), p. 552.
[29] Jones and Sufrin (2019), p. 1110; See also Whish and Bailey (2021), p. 912.
[30] Whish and Bailey (2021), p. 865.

dual approach contributes to a nuanced understanding of the impact of the re-appraisal of Article 22 EUMR on the development of EU merger control.

This thesis mainly explores secondary sources of EU law, particularly the EUMR and associated soft laws. It is important to note that, given the primary focus on Article 22 Guidance in this thesis and its relatively recent adoption, the case-laws related to it are currently limited to the *Illumina/GRAIL* case. Additionally, taking into account the exact limitations established by this thesis, specifically focusing on the jurisdictional aspects, academic literature and commentary on the subject are scarce. Where they do exist, discussions on jurisdictional aspects are brief. To the extent these types of commentary is used, it should be kept in mind that they likely are written from the perspective of businesses and clients. It should also be taken into consideration that the current state of the EUMR landscape, due to the re-appraisal of Article 22 EUMR, is largely uncharted. Furthermore, given that the CJEU has yet to rendered judgement on this matter, certain aspects remain speculative, or at the very least, not yet legally established.

With regards to the discourse on thresholds reform, the material is somewhat abundant. Particularly, there have been several studies focusing on anti-competitive acquisitions, such as 'killer acquisitions'. These studies suggest several ways that merger control regimes can be adjusted to address such anti-competitive acquisitions. However, in the context of jurisdictional thresholds, the popular suggestion appears to be introducing a threshold based on transaction value. Thus, in this aspect, this thesis only takes this suggestion into consideration. It is important to note that these discussions should be understood in a broader context, as most studies focus on anti-competitive acquisitions globally or outside the EU.

When it comes to EU material in the context of thresholds reform, the Commission has provided for several evaluation reports. This thesis focuses primarily on the recent evaluation that was published in March 2021, as it concerns the re-appraisal of Article 22 EUMR.[31] The issue regarding whether a Member State should be able to make a referral under Article 22 EUMR without having jurisdiction on the case was discussed in 2009, when the Commission evaluated how the EUMR's jurisdictional thresholds and their corrective mechanisms have operated since its entry into force.[32] However, it's worth noting that this particular issue does not appear to have received much attention in later discussions of the EUMR.[33] Furthermore, no changes were made to the regulation in light of that report. This thesis thus considers that the 2009

[31] See 2021 Evaluation.
[32] SEC(2009) 808 final/2, p. 38-41.
[33] See COM(2009) 281 final; and COM(2014) 449 final.

report holds little relevance. It wasn't until 2021, with the re-appraisal of Article 22 EUMR, that this issue was revisited and discussed again.[34]

1.5 Outline

Chapter two serves as the legal framework of this thesis. This chapter focuses on merger control, specifically the EUMR. Key elements such as the jurisdictional scope and the Case Referral System are explored. A spotlight is cast on Article 22, known as 'The Dutch Clause,' exploring its legal requirements, procedural intricacies, and criteria for case referral. The historical evolution of Article 22 sets the stage for its subsequent re-appraisal. The chapter concludes with an in-depth examination of the Re-Appraisal of Article 22, uncovering the objectives behind Article 22 Guidance and providing insights into adjustments or complementarities that the guidance provides. This comprehensive overview aims to illuminate the dynamic landscape of merger control, emphasizing the evolving facets of Article 22 EUMR.

In chapter three, the focus shifts into the case of Illumina/GRAIL and explores its intricate details. The chapter begins with the background and continues to explore the referral request. The focus then shifts to the appeal, offering insights into key findings, which are presented in bulleted form for quick reference. The findings of the General Court are presented in a detailed but brief manner, so not to recount the whole case while still keeping the relevant information.

Chapter four explores the rationale behind the re-appraisal of Article 22 EUMR. Beginning by explaining the concept of ‘killer acquisitions’, the chapter then contend that the re-appraisal is driven by recent market developments indicating a rise in anti-competitive acquisitions, particularly 'killer acquisitions. The discussion then shifts to how the Commission deems the re-appraisal more appropriate than reforming the jurisdictional thresholds of the EUMR. The focus then shifts into discussing why the Commission considers the re-appraisal more suitable than reforming the jurisdictional thresholds of the EUMR. The chapter ends by presenting an overview of the potential implications arising from this re-appraisal.

In chapter five the discussion links the findings to the core research questions. This chapter aims to weave together insights, offering a clearer picture of the regulatory framework's expansion and its broader implications for our research questions.

Chapter six present a brief conclusion that sums up the main points from chapter five. This closing chapter aims to give a straightforward overview of the regulatory landscape and the broader importance of the study's findings.

[34] See 2021 Evaluation; Article 22 Guidance; and Illumina/GRAIL.

2 Merger Control

2.1 The Importance of Merger Control

Competition law exists to regulate competition in a free-market economy.[35] The ideal of a free-market economy is that governments should not meddle with artificial obstacles, such as price controls, and instead allow competition to flourish on its own, guided by an 'invisible hand'.[36] There is, however, a strong argument that laws ought to be placed to ensure that the market functions properly: there is a tendency of those operating within the market to combine or collude in ways which are profitable to them but are harmful to society as a whole (e.g. through price cartels or market monopoly). Hence, realising the ideal free-market economy is deemed unachievable.[37]

In light of the considerations above, competition law and policy sought to achieve effective economy, where firms are subject to a reasonable degree of competitive constraints, to establish a balance that promotes competition and prevents harmful practices.[38] One way to ensure the achievement of effective competition is by preventing mergers which lead to concentrations in market power with anti-competitive consequences.[39]

A merger typically involves two or more undertakings merging entirely into a new single entity. However, the expression of 'merger' used in competition policy includes a broader range of corporate transactions, thus every jurisdiction has their own definition of what constitutes a merger. [40] The EUMR, for instance, uses the term 'concentrations'.[41] The motivations behind mergers vary, whether it is to increase market power, improve efficiency, or exit an industry.[42] While most mergers cause no harm to competition, there are cases where it can be predicted that the merger will change the structure of the market in ways that provide the merged entity with the incentive and the ability to exercise market power that could potentially be harmful to both the competition and to consumers.[43]

Various theories have been developed regarding the potential harms to the competition brought about by mergers, commonly referred to as 'theories of harm'.[44] With the help of these theories, merger control aims to enable competition authorities to regulate changes in market structure by deciding

[35] Jones and Sufrin (2019), p. 2.
[36] Ibid., p. 3; See also Adam Smith (1776).
[37] Whish and Bailey (2021), p. 10-15; See also Jones and Sufrin (2019), p. 3f.
[38] Ibid., p. 16f; See also Jones and Sufrin (2019) p. 3f.
[39] Jones and Sufrin (2019), p. 4.
[40] Whish and Bailey (2021), p. 852; See also Jones and Sufrin (2019), p. 1059.
[41] EUMR, Article 3. The definition of 'concentrations' is explained in Chapter 2.2.2.
[42] Whish and Bailey (2021), p. 856-858; See also Jones and Sufrin (2019), p. 1060f.
[43] Ibid., p. 861; See also Jones and Sufrin (2019), p. 1061.
[44] Whish and Bailey (2021), p. 861-866: See also Jones and Sufrin (2019), p. 1061-1066.

whether two or more companies may merge, combine, or consolidate their businesses into one.[45] Merger control is necessary, as mergers create a more permanent and lasting change to the market. Its objective is not only to prevent future abuses but also maintain competitive markets that lead to better outcomes for consumers.[46]

2.2 European Merger Control

2.2.1 The European Union Merger Regulation

The EUMR is the merger control regime within the EU. It came into force in early 2004 and replaced its predecessor.[47] EUMR is supplemented by several Notices published by the Commission to provide guidance to the interpretation of its provisions. These documents are non-binding but often have a clear normative effect.[48]

The EUMR aims to ensure that mergers do not result in lasting damage to competition and, ultimately, to ensure effective competition.[49] Likewise the importance of merger control, the application of the EUMR is intended to prevent mergers that could have adverse effects to competition in the EU.[50]

As mentioned earlier, the EUMR defines ‘mergers’ as ‘concentrations’. Specifically, it addresses concentrations with a 'Community dimension’, a concept which determines not only the applicability of that regulation, but also the allocation competence between the Commission or the national competition authority of the Member States.[51] The EUMR implements a ‘one-stop shop’ system which grants the Commission exclusive competence to apply the provisions of the EUMR to concentrations falling within that regulation’s purview. Accordingly, concentrations that are not covered by the EUMR fall, in principle, within the jurisdiction of the Member States.[52] Furthermore, the ‘one-stop shop’ system aims to avoid multiple review procedures of one and the same transaction, as it could increase legal uncertainty, effort, cost, and may lead to conflicting assessments.[53]

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[45] Jones and Sufrin (2019), p. 1059.

[46] Ibid.; See also Whish and Bailey (2021), p. 859.

[47] The original Merger Control Regulation was replaced by the current EUMR following a comprehensive review, which brought by wide-ranging changes to its substantive, procedural, and jurisdictional provisions; See COM(2001) 745 final; COM(2002) 711 final; and OJ [2003] C20/4.

[48] Jones & Sufrin (2019), p. 1069; See also, *inter alia,* Commission Consolidated Jurisdictional Notice (2008/C 95/01) (‘the Jurisdictional Notice’) and Commission Notice on Case Referral (2005/C 56/20) (‘Case Referral Notice’).

[49] EUMR, Recitals 5, 8 and Article 2.

[50] Ibid., Recitals 24 and 25.

[51] Ibid., Recital 8 and Articles 1 and 3; the definition of ‘concentrations’ and ‘Community dimension’ is explained further in Chapter 2.2.2.

[52] EUMR, Recitals 8 and 17.

[53] Ibid., Recital 12; See also COM(2014) 0449, p. 15, para. 59.

The EUMR requires that concentrations with a Community dimension be notified to the Commission.[54] Typically, they must be suspended until a final decision has been made.[55] Moreover, if a concentration falls under the jurisdiction of the EUMR, the application of other national or EU competition law are to be suspended until a decision by the Commission has been made.[56] The EUMR imposes strict time limits on the Commission to make a decision.[57] There is a right of appeal of the Commission's decisions to the General Court and appeal on a point of law to the Court of Justice.[58]

2.2.2 The Jurisdictional Scope of the EUMR

As previously established, the EUMR applies to concentrations with a Community dimension. Thus, the jurisdictional scope of the EUMR is dependent on the fulfilment of two prerequisites: 'concentrations' and 'Community dimension'.[59]

The concept of 'concentrations' is used to describe a change of control on a lasting basis resulting from mergers, acquisitions, and the creation of a joint venture.[60] The concept of concentration refers to transactions which bring about a lasting change in, not only, the control of the undertakings concerned, but also the structure of the market.[61] The existence of a concentration is, to a great extent, determined by qualitative criteria, which is explained further in the Jurisdictional Notice.[62]

Concentrations have a 'Community dimension' whenever the turnover-based thresholds, as set out in Article 1 EUMR, are exceeded.[63] There are two sets of thresholds set out in Article 1 EUMR, the first can be found in Article 1(2) EUMR. According to that article, concentrations have a community dimension where the combined aggregate worldwide turnover of all the undertakings concerned is more than 5 billion euros and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than 250 million euros.[64] However, a concentration is not considered to have a community dimension if two-thirds of the aggregate Community-wide turnover of each of the undertakings concerned is achieved within one and the same Member State (commonly referred to as the 'two-thirds rule').[65]

[54] EUMR, Article 4.
[55] Ibid., Article 4 and 7.
[56] Ibid., Recital 8 and Article 21(1) and (3).
[57] Ibid., Article 10.
[58] Ibid., Recitals 17 and 43 and Articles 11 and 16.
[59] Ibid., Article 1(1).
[60] Ibid., Article 3.
[61] Ibid., Recital 20.
[62] The Jurisdictional Notice, p. 4–30, at p. 4, para. 7.
[63] EUMR, Recital 10 and Articles 1(2) and 1(3).
[64] EUMR, Article 1(2) a – b.
[65] Ibid., Article 1(2) second subparagraph; See also, The Jurisdictional Notice, para. 125.

The second set of thresholds is found in Article 1(3) EUMR. This set of thresholds is somewhat akin to the ones provided for in Article 1(2) EUMR. Just like Article 1(2) EUMR, Article 1(3) EUMR addresses the determination of a Community dimension based on turnover criteria, factoring in worldwide and Community-wide turnovers of the undertakings involved.[66] Similarly, Article 1(3) EUMR also provides for a two-thirds rule.[67] However, unlike Article 1(2) EUMR, Article 1(3) EUMR introduces lower turnover thresholds, which are meant to capture concentrations falling short of Article 1(2) EUMR requirements, but which would still have a significant impact on the market of at least three Member States.[68]

As is apparent from both Article 1(2) and 1(3) EUMR, the scope of application of the EUMR is based on the geographical area of activity of the undertakings involved, yet it does not require that the undertakings carry out the concentrations are primarily active within the EU, only that they have significant operations in the EU.[69] It is also apparent from those articles that the scope of application of the EUMR is limited by quantitative thresholds.[70]

The thresholds are designed solely to govern jurisdiction, not to assess the market position of the undertakings nor the impact of the operation.[71] They aim to provide a straightforward and objective mechanism that can be easily managed by the companies involved in a merger to determine whether their transaction has a Community dimension.[72]

2.2.3 The Case Referral System

Jurisdiction can also be established through the case referral system provided for in the EUMR. This system allows for the transfer of cases between the Commission and Member States under specified conditions. [73] The receiving authority thus assumes jurisdiction to review the referred case – provided that the requirements are fulfilled.[74] This system aims to further ensure the benefits of the 'one-stop shop' system while also serving as an effective corrective mechanism, in line with the principle of subsidiarity.[75]

The Commission emphasises the importance to carefully consider the principle of subsidiarity, the benefits of a 'one-stop shop' system, and the importance of legal certainty regarding jurisdiction in the application of the case

[66] EUMR, Article 1(3) a – d.

[67] Ibid., Article 1(3) second subparagraph; See also, The Jurisdictional Notice, para. 125.

[68] Article 1(3) EUMR particularly addresses competitively significant concentrations that are notifiable in, at least, three Member States.

[69] EUMR, Recitals 9 and 10.

[70] Ibid., Recital 9.

[71] The Jurisdictional Notice, p. 31, para. 127.

[72] Ibid.

[73] EUMR, Articles 4(4), 4(5), 9 and 22.

[74] EUMR, Article 4(4) fifth subparagraph, Article 4(5) fifth subparagraph, Article 9(3), and Article 22(3); See also, EUMR, Article 1(1) and Article 21(3).

[75] Ibid., Recitals 11 and 12; See also Treaty on European Union ('TEU'), Article 5.

referral system.[76] Particularly, jurisdiction should only be re-attributed from one competition authority to another when the latter is better suited to assess the referred concentrations based on the specific attributes of the case and the authority's tools and expertise.[77] Fragmentation of cases through referral should also be avoided.[78]

To ensure legal certainty, the Commission recommends that referrals at the post-notification stage should only be made when there are compelling reasons to deviate from the original jurisdiction.[79] Whereas referrals at the pre-notification stage should be limited to cases where the determining key factors, such as the geographic market scope and potential competitive impact, are relatively straightforward.[80]

The EUMR provides for four different case referral mechanisms. Both Article 4(4) and Article 9 EUMR allow for a re-attribution of jurisdiction concerning concentrations with a Community dimension. Article 4(4) EUMR gives parties to a concentration the possibility to request a re-attribution from the Commission to a more appropriate Member State, while Article 9 EUMR gives the Member States the possibility to refer a concentration to the Commission.[81]

Article 4(5) and Article 22 EUMR addresses the re-attribution of jurisdiction concerning concentrations *without* a Community dimension.[82] Article 4(5) EUMR provides parties to a concentration that is capable of being reviewed by at least three Member States, with the possibility to request the Commission to review it, rather than remaining under the purview of several Member States.[83] This provision is beneficial both to the parties to a concentration and the Member States, as it simplifies what otherwise would be a complex merger review procedure.[84] Article 22 EUMR, on the other hand, holds a unique status within the context of this thesis and is discussed further in the forthcoming chapter.

2.3 Article 22 – 'The Dutch Clause'

Article 22 EUMR was introduced at the initiative of the Netherlands, hence the term 'Dutch clause'.[85] One of its initial purposes was to allow Member States that do not have national merger control legislation to refer certain

[76] Case Referral Notice, p. 4, para. 8.
[77] Ibid., p. 4, para. 9 and 10.
[78] Ibid., p. 5, para. 12.
[79] Ibid., p. 5, para. 13.
[80] Ibid., p. 5, para. 14.
[81] EUMR, Article 4(4) first subparagraph and Article 9(1).
[82] Emphasis added.
[83] EUMR, Article 4(5) first subparagraph.
[84] Jones and Sufrin (2019), p. 1125f.
[85] SEC(2009) 808 final/2, para. 113; See also Broberg (2012), p. 215.

cases to the Commission.[86] This chapter explores the different aspects of Article 22 EUMR, such as the legal requirements, the referral procedure, and the development of that article.

2.3.1 The Legal Requirements of Article 22

Article 22(1) EUMR reads as follows:

'*One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request*.'

Thus, that article establishes two legal prerequisites for making a referral request: the referred concentration must affect trade between Member States *and* must threaten to significantly affect competition within the territory of the Member State(s) making the request.[87]

Regarding the first criterion, a concentration is considered to affect trade between Member States when it is liable to have some discernible influence on the pattern of trade between Member States.[88] When it comes to the second criterion, referring Member State(s) are required to demonstrate, based on a preliminary analysis, that there is a real risk that the transaction may have a significant adverse impact on competition.[89]

Alternatively, the Commission can inform Member State(s) that a certain concentration fulfils the legal requirements provided for in Article 22(1) and the Commission may invite the Member State(s) to make a request.[90]

2.3.2 The Article 22 Procedure

Member State(s) that are making a referral request under Article 22 EUMR are required to make the request within 15 working days from the date on which the concentration was notified.[91] Alternatively, if the concentration is

[86] OJ 2003 C 20, p. 4, para. 21; See also, COM(96) 19 final, para. 97; COM(2001) 745 final, para. 84.

[87] EUMR, Article 22(1); Emphasis added.

[88] Case Referral Notice, p. 11, para. 43.

[89] Ibid., p. 11, para. 44; The Commission emphasises that the outcome of a full investigation will not be influenced by the preliminary indications of a possible significant adverse provided by the referring Member State(s).

[90] EUMR, Article 22(5).

[91] EUMR, Article 22(1) second subparagraph.

not required to be notified, the 15 working-day deadline starts when the concentration is made known to the Member State(s) concerned.[92]

When a request is submitted, the Commission is obligated to inform the competent authorities of all the Member States as well as the undertakings concerned of the request without delay.[93] Any other Member State(s) can then opt to join the initial request within 15 working days after being informed by the Commission.[94]

When a request is submitted, all applicable national time limits relating to the concentration are suspended until it has been decided where the concentration shall be examined.[95] The standstill obligation provided for in Article 7 EUMR also applies to the concentration concerned if it has not yet been implemented.[96]

After the initial 15 working-day time-limit has expired, or, if other Member State(s) opted to join the initial request, after the additional 15 working-day, the Commission have 10 working days to decide whether or not to review the referred concentration.[97] If the Commission does not make a decision within this time limit, it is deemed to have made a decision to investigate the concentration.[98]

2.3.3 Appropriate Cases for a Referral under Article 22 EUMR

Considering that a post-notification referral could entail additional costs and time delay for the merging parties, it should therefore be limited to cases which appear to present a real risk of negative effects on competition.[99] The Commission has therefore provided for categories of cases normally most appropriate for a referral pursuant to Article 22, these are:[100]

- Cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets.

- Cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of

[92] EUMR, Article 22(1) second subparagraph.
[93] Ibid., Article 22(2) first subparagraph.
[94] Ibid., Article 22(2) second subparagraph.
[95] Ibid., Article 22(2) third subparagraph.
[96] Ibid., Article 22(4); See also EUMR, Article 7.
[97] Ibid., Article 22 (3).
[98] Ibid.
[99] Case Referral Notice, para. 45.
[100] Ibid.

Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

2.3.4 The Development of Article 22 EUMR

As explained at the beginning of this chapter, Article 22 EUMR was originally designed to allow Member States without a national merger control legislation to ask the Commission to "step in" and review certain concentrations, ensuring that competitively significant concentrations do not go unscrutinised.[101] Since the adoption of Article 22 EUMR up until November 2023, the Commission has received a total of 45 case referrals under that article.[102]

In the present day, the majority of Member States have enacted their own national merger control regulation, with the exception of Luxembourg.[103] As a result, the potential scope of Article 22 EUMR is very limited.[104] Furthermore, the Commission has developed a practice of discouraging case referrals under that article from Member States that do not have the competence, under their national law, to review the case. This practice was based on the notion that such transactions were of a limited size and were generally not competitively significant.[105] However, in 2021, that article has been 'revived'.[106]

In a speech held in September 2020, Margrethe Vestager, the European Commissioner for Competition, responsible for overseeing and managing competition policy within the EU, announced that the Commission is set to publish the full report of the evaluation of the procedural and jurisdictional aspects of the EUMR – an evaluation that started back in 2016.[107] The evaluation was prompted by the need to adapt to a rapidly changing world, particularly to deal with globalisation and digitisation.[108] In March 2021, the result was published.[109]

The evaluation concluded that the turnover-based thresholds have generally proved effective in capturing significant transactions *when* complemented

[101] See Chapter 2.3.

[102] European Commission, *Merger Statistics*, updated compilation of concentration cases at the Commission (https://competition-policy.ec.europa.eu/system/files/2023-12/Merger_cases_statistics.pdf).

[103] At the time of writing, Luxembourg has not yet implemented a merger control system, however, there are plans in place to establish one in the near future; See, Draft Bill No. 8296 (https://www.chd.lu/en/dossier/8296).

[104] COM(2001) 745 final, para. 84; See also Broberg (2012), p. 4.

[105] 2021 Evaluation, p. 19, para. 56; See also Vestager (September 2020).

[106] See Article 22 Guidance.

[107] Vestager (September 2020); See also Vestager (March 2016).

[108] Vestager (September 2020); See also 2021 Evaluation, p. 3f, para. 9.

[109] Press release, *Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control*, 26 March 2021.

with the case referral mechanisms.[110] However, the Commission's practice of discouraging referrals under Article 22 EUMR has limited the effectiveness of the referral mechanisms as a corrective mechanism to the turnover-based thresholds, which results in a number of competitively significant transactions not being reviewed at all.[111] The evaluation thus recommends that the Commission adopt a more receptive approach and actively encourage case referrals under Article 22 EUMR. This is so that the Commission would be able to review certain concentrations with a cross-border impact in the EU where the turnover alone was not indicative of the competitive significance of the merging companies.[112]

2.4 The Re-Appraisal of Article 22

Following the recommendation, the Commission subsequently adopted a new guidance on the application of Article 22 EUMR, complementing the Case Referral Notice.[113] This chapter will explore the objectives of the new guidance and examine how it relates to the Case Referral Notice, specifically in the context of Article 22 EUMR.

2.4.1 The Aims of Article 22 Guidance

The Article 22 Guidance aims to facilitate and clarify the application of Article 22 EUMR by providing insights into the types of cases that could be considered suitable for a referral under that article.[114] By doing so, this guidance aims to increase transparency, predictability, and legal certainty.[115]

In the Article 22 Guidance, the Commission addresses how its approach of discouraging referral requests under Article 22 EUMR is no longer appropriate considering how the market has developed in recent years.[116] There has been a growing trend of concentrations involving firms that, despite having little or no turnover at the time of the concentration, may evolve to play a significant competitive role in the market(s) at stake. This trend is especially evident in the digital and pharmaceutical sectors.[117] Against this backdrop, the Commission aims to promote and endorse referrals in cases where the referring Member State lacks initial jurisdiction over the case but where the criteria of Article 22 EUMR are met.[118]

[110] 2021 Evaluation, p. 74, para. 266; Emphasis added.
[111] Ibid., p. 74, para. 267 and 268.
[112] Ibid., p. 74, para. 268.
[113] Article 22 Guidance.
[114] Article 22 Guidance, p.1-3, para. 1, 3 and 12.
[115] Ibid., p. 3, para. 12.
[116] Ibid., p. 2f, para. 8-11.
[117] Article 22 Guidance, p. 2, para. 9.
[118] Ibid., p. 3. para 11.

2.4.2 Additional Insights: Legal Requirements

The Commission explains that re-appraisal of Article 22 EUMR is consistent with the wording of the article, as well as with its context and purpose. Thus, no amendment to the legal text is deemed necessary.[119] However, the Commission reserves the right to revise the guidance at any time in light of future developments.[120]

Since there was no amendment to the legal text, the legal requirements remain consistent. For a referral under Article 22 EUMR, the concentration must impact trade between Member States and pose a significant threat to competition within the territory of the requesting Member State(s).[121] Nevertheless, building on the guiding principles provided for in the Case Referral Notice, the guidance provides additional explanations regarding the legal requirements.[122]

When it comes to the first criterion, the Commission further elaborates that the concept of "trade" covers all cross-border economic activity and encompasses cases where the transaction affects the competitive structure of the market.[123] In particular, the Commission will evaluate transactions that may have an impact, directly or indirectly, on current or future trade patterns between Member States.[124]

Regarding the second criterion, the Commission adds that the relevant considerations may include the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, such as a recent or potential entrant or the amalgamation of two important innovators; the reduction of competitors' ability and/or incentive to compete, including potentially hindering their entry, expansion, or access to resources or market; or the ability and incentive to leverage market presence in one market to exert influence in another through tying, bundling, or other exclusionary strategies.[125]

2.4.3 Additional Insights: Appropriate Cases and Deciding Factors

In addition to the appropriate cases outlined in the Case Referral Notice, the guidance provides for categories of appropriate cases for a referral, specifically where the merger is not notifiable in the referring Member State(s) and

[119] Article 22 Guidance, p. 2, para. 6.
[120] Ibid., p. 1, para. 3.
[121] EUMR, Article 22(1) first subparagraph.
[122] Article 22 Guidance, p. 3-4.
[123] Ibid., p. 3, para. 14.
[124] Ibid.
[125] Ibid., p. 3, para. 15.

consists of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This would include, for example, cases where the undertaking:[126]

- is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model),
- 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), and/or
- provides products or services that are key inputs/components for other industries.

However, this list is solely for illustrative purposes and is not confined to any particular economic sector(s) – it should not be considered comprehensive in any way.[127] In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.[128]

The Commission further clarifies that Member States can still request a referral even after the transaction concerned has been closed. However, such requests will still be subject to the deadlines outlined in Article 22 EUMR.[129] The duration since the transaction's closure will be factored into consideration when the Commission is deciding whether to accept or reject such requests. In cases where more than six months have elapsed, a referral request is deemed appropriate only in exceptional situations.[130]

Additionally, if a transaction has been notified in one or several Member States that did not request a referral or join such a referral, it may be considered a factor against accepting the request. Nevertheless, the Commission will base its decision on a case-by-case basis.[131]

2.4.4 Additional Insights: Procedural Aspects

[126] Article 22 Guidance, p. 4, para. 19.
[127] Ibid., p. 4, para. 20.
[128] Ibid., p. 4, para. 19.
[129] Ibid., p. 4, para. 21.
[130] Ibid., p. 4, para. 21.
[131] Ibid., p. 4, para. 22.

The guidance also provides for some insights regarding the procedural aspects of the application of Article 22 EUMR. To begin with, it explains that the Commission will be working closely with the Member States to identify cases that do not meet the jurisdictional criteria under the respective national laws but are appropriate for a referral under Article 22 EUMR.[132]

Similarly, the Commission will also be open to collaborate with merging parties and other third parties to help identify appropriate cases.[133] This means that merging parties can voluntarily notify the Commission about their intended transaction to get an early indication on whether their concentration would be a good candidate for a referral under Article 22 EUMR.[134]

Ultimately, the decision to submit a request rests in the hands of the Member States.[135] If a referral request is being considered, the parties to the transaction will be informed. The Commission clarifies that this information does not oblige them to undertake or refrain from taking any actions regarding the implementation of the transactions.[136]

Lastly, the guidance clarifies that the concept of "made known", for when the 15 working days deadline starts when a concentration is not notifiable, should be interpreted as implying sufficient information to make a preliminary assessment regarding the presence of the criteria relevant for the assessment of the referral.[137]

[132] Article 22 Guidance, p. 5, para. 23.
[133] Ibid., p. 5, para. 24f.
[134] Ibid., p. 5, para. 24.
[135] Ibid., p. 5, para. 26.
[136] Ibid., p. 5, para. 27.
[137] Ibid., p. 5, para. 28.

3 The case of Illumina/GRAIL

In the wake of the re-appraisal of Article 22 EUMR, the Commission swiftly turned its attention to a proposed transaction, marking a notable shift in its approach.[138] Illumina/GRAIL emerged as the inaugural subject under this new approach – a development that is explored in this chapter.

3.1 Background

Illumina is a U.S.-based company which develops, manufactures, and commercialises next generation sequencing systems for genetic and genomic analysis.[139] In 2016, Illumina formed a new company, GRAIL, withholding less than 15 percent of the shares.[140] GRAIL was created with the aim to develop a new cancer detection test that will be able to detect cancer at an early test from a simple blood test.[141] Years later, in September 2020, Illumina decided to re-acquire GRAIL and planned to launch a new era of cancer detection.[142]

The planned acquisition was not notifiable within the EU, meaning that it did not exceed the jurisdictional thresholds of the EUMR or the jurisdictional thresholds of the Member States.[143] Normally, this would mean that the transaction would not be subject to any scrutiny. However, during this time, the Commission had signalled a more assertive approach in its merger control regime.[144] As a result, what should have been business as usual took an unexpected turn. The planned acquisition fell under intensive scrutiny and was ultimately prohibited by the Commission.[145]

3.2 The Referral Request

In December 2020, the Commission received a complaint regarding the acquisition. Within a couple of weeks, the Commission concluded, preliminarily, that the acquisition could be the subject of a referral under Article 22

[138] Daily News, *Commission to assess proposed acquisition of GRAIL by Illumina*, 20 April 2021.

[139] M.10188, Section 1.2 of Form CO, para. 2, available at: https://ec.europa.eu/competition/mergers/cases1/202125/m10188_797_3.pdf.

[140] Press Release, *Illumina Forms New Company to enable Early Cancer Detection via Blood-Based Screening,* 10 January 2016.

[141] Ibid.

[142] Press Release, *Illumina to Acquire GRAIL to Launch New Era of Cancer Detectioin*, 21 September 2020.

[143] M.10188, Section 1.2 of Form CO, para. 3, available at: https://ec.europa.eu/competition/mergers/cases1/202125/m10188_797_3.pdf; See also, Daily News, *Commission to assess proposed acquisition of GRAIL by Illumina*, 20 April 2021.

[144] See Vestager (September 2020).

[145] Daily News, *Commission to assess proposed acquisition of GRAIL by Illumina*, 20 April 2021; Press Release, *Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*, 22 July 2021; and Press Release, *Commission prohibits acquisition of GRAIL by Illumina*, 6 September 2022.

EUMR, since GRAIL's importance for competition was not reflected in its turnover.[146]

In February 2021, the Commission informed and invited the Member States to submit a referral request. The Commission explained that it had found, *prima facie*, that the acquisition appeared to satisfy the conditions laid down in Article 22.[147] A week later, the Commission informed the parties to the concentration regarding the possibility of a referral request ('the information letter').[148]

In April 2021, approximately a month after the adoption of the new Article 22 Guidance, the Commission announced that it has accepted the request submitted by several Member States to assess the proposed acquisition of GRAIL by Illumina under the EUMR.[149] The Commission explained that the request was appropriate because GRAIL's competitive significance is not reflected in its turnover and that the combined entity could restrict access to or increase prices of next generation sequencers and reagents to the detriment of GRAIL's rivals.[150]

In July 2021, the Commission announced that it had opened an in-depth investigation into the proposed acquisition.[151] Following this decision, Illumina challenged the Commission's jurisdiction to investigate the proposed acquisition under Article 22 EUMR and filed an action in the General Court of the EU seeking annulment.[152]

3.3 The Appeal

Illumina's appeal faced defeat as the General Court ('The Court') dismissed all arguments raised by Illumina, thereby upholding the Commission's authority.[153] The findings of the Court carry significant implications for the future application of EUMR, particularly with regard to the jurisdictional scope of the EUMR. This section presents the findings of the Court and outlines the considerations and reasoning that led to its conclusions. Chapter 3.3.1 provides bullet points outlining the key findings of the Court.

[146] Illumina/GRAIL, para. 11.
[147] Ibid., para. 12.
[148] Ibid., para. 13.
[149] Daily News, *Commission to assess proposed acquisition of GRAIL by Illumina*, 20 April 2021.
[150] Ibid.
[151] Press Release, *Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina*, 22 July 2021.
[152] Press Release, *Illumina is Committed to Bringing Lifesaving GRAIL Test to People Globally as European Review Process Enters Second Phase*, 22 July 2021.
[153] Illumina/GRAIL, para. 267.

3.3.1 Key Findings

- A decision to accept a case referral under Article 22 EUMR can be subject to appeal.

- A referral request under Article 22 EUMR may be submitted irrespective of the existence or scope of national merger control rules.

- The concept of 'made known to the Member State concerned' set out in Article 22(1) EUMR, which constitutes the starting point of the 15 working-day time limit, requires an active transmission of relevant information to that Member State, that enables it to make a preliminary assessment on whether the conditions for a referral request under that article have been satisfied.

- A period of 47 working days that elapsed between the receipt of the complaint and the sending of the invitation letter does not satisfy the fundamental objectives of effectiveness and speed pursued by the EUMR.

3.3.2 Admissibility

To begin with, the Court needed to judge on the admissibility of the appeal. This issue was raised because the Commission believed that the action filed by Illumina ('the applicant') was inadmissible. The Commission explained that the acceptance of the referral request ('the contested decision') is only a preparatory act and any unlawful aspects can be raised in a legal challenge against the final decision.[154]

The Court explained that, according to settled case-law, any measures adopted by the institutions of the EU, in whatever from, are regarded as challengeable acts, if they are intended to have binding legal effects that are capable of affecting the interests of the applicant by bringing about a distinct change in their legal position.[155] To determine whether the contested decision produces binding legal effects, the Court focused on its substance.[156]

An examination of a concentration based on the first subparagraph of Article 22(3) EUMR, such as the contested decision, takes the form of a decision and a decision is, according to Art. 288 TFEU, binding in its entirety.[157] Furthermore, the contested decision makes the concentration at issue subject to the scope of EUMR despite not having a community dimension.[158] Without the

[154] Illumina/GRAIL, para. 60.

[155] Ibid., para. 63 and 65; See also; *Hungary v Commission* (C-31/13 P); *Romania v Commission* (C-599/15 P); *Deutsche Post and Germany v Commission* (C-463/10 and C-475/10); and *VodafoneZiggo Group v Commission* (C-689/19 P).

[156] Ibid., para. 64; See also, *Hungary v Commission* (C-31/13 P); and R*omania v commission* (C-599/15 P).

[157] Ibid., para. 67.

[158] Ibid., para. 68.

contested decision, the concentration at issue would not be subject to the EUMR nor be subject to the potential constraints and penalties under that regulation.[159] Thus, based on these considerations, the Court concluded that the contested decision does produce binding legal effects *vis-á-vis* the applicant, which can affect its interests by bringing about a distinct change in its legal situation.[160]

The Court also explained that the contested decision does not constitute a preparatory act to establish the substance of a final decision.[161] The information letter, however, constitute such a preparatory act.[162] Thus, the Court concluded the appeal admissible in so far it is directed against the contested decision.[163]

3.3.3 The Interpretation of Article 22 EUMR

The applicant argued that the Commission erred in interpreting Article 22 EUMR and, as such, the Commission lacked the competence necessary to scrutinize the concentration. According to the applicant, only Member States which do not have a national merger control legislation can request a referral under that article. Furthermore, the applicant argued that the Commission's interpretation conflicts with the "one-stop shop" objective and other principles such as legal certainty, subsidiarity, and proportionality.[164]

The literal, historical, contextual, and teleological interpretation

To establish the correct interpretation of Article 22 EUMR, the Court considered not only its wording, but also its context, objectives, the purpose pursued by the act of which it forms part, and the legislative history.[165]

The literal interpretation

Initially, the Court clarified that the wording of Article 22(1) EUMR establishes four cumulative conditions for approving a referral request:[166]

1. The referral request must be made by one or more Member States,

[159] Illumina/GRAIL, para. 69.
[160] Ibid., para. 70-72; See also, *Cableuropa and Others v Commission* (T-346/02 and T-348/02).
[161] Ibid., para. 73; Such preparatory act is, for example, a decision based on Article 6(1)(c) EUMR.
[162] Ibid., para. 79-80.
[163] Ibid., para. 78 and 82; The appeal is, however, inadmissible in so far as it seeks to the annulment of the information letter.
[164] Ibid., para. 85.
[165] Ibid., para. 88-151.
[166] Ibid., para. 89.

2. The transaction which is the subject of that request must satisfy the definition of concentration set out in Article 3 EUMR without meeting the thresholds for a Community dimension laid down in Article 1 EUMR,

3. The concentration must affect trade between Member States, and

4. The concentration must threaten to significantly affect competition within the territory of the Member State or States which made the referral request.

Based on the wording, Article 22(1) EUMR does not require a concentration to fall within the jurisdiction of a Member State nor does it require such Member State to have a merger control regime for it to refer the concentration to the Commission.[167] On the contrary, according to the Court, the use of 'any concentration' in that article indicates that a concentration may be the subject of a referral regardless of the existence or scope of national merger control rules – provided that the other cumulative conditions are satisfied.[168]

The historical interpretation

In the initial regulation, the ECMR, the referral mechanism provided for in Article 22 EUMR had been designed for Member States which did not yet have a merger control system.[169] However, the Court explained that, as apparent in the preparatory works, this did not preclude other Member States from also having recourse to the use of that article.[170]

Over time, more and more Member States had developed their own national merger control system. For that reason, the potential scope for use of Article 22 EUMR in its original form was very limited.[171] The Court emphasised that the reduction of the practical importance of that article did not necessarily mean that those Member States were precluded from applying that article.[172]

The objectives of Article 22 EUMR have been successively extended over time. When its practical importance was limited, the provision served to bolster the application of EU competition law and to uphold the "one-stop shop"

[167] Illumina/GRAIL, para. 90.
[168] Ibid., para. 91.
[169] Ibid., para. 96f.
[170] Ibid., para. 98; See also COM(96) 19 final, para. 97, noting that that provision 'is generally regarded as a useful tool, especially for those Member States that do not currently have a merger control system'.
[171] Ibid., para. 99; See also COM(2001) 745 final, para. 85.
[172] Ibid.

principle.[173] According to the Court, the development of the objectives cannot be construed as limiting the original scope of the provision.[174]

Furthermore, the preparatory works revealed that the EU legislature did not intend to restrict the right of a Member State to request the referral of any concentration to the Commission – as evidenced by the absence of references to national competence in the of wording Article 22 EUMR.[175] They also revealed that the Commission had rejected the notion that requires a concentration to fall within the jurisdiction of at least three Member States to be eligible for a referral under Article 22 EUMR, as this would undermine legal certainty. The Commission thus favoured a greater recourse for the mechanism provided for in that article.[176] Overall, according to the Court, the legislative history confirms that a referral request under Article 22 EUMR can be made by Member State(s) irrespective of the scope of their national merger control regulation.[177]

The contextual interpretation

To begin with, the Court explained that the Commission's competence to examine concentrations depends primarily on the exceeding of the turnover-based thresholds.[178] Alternatively, its competence relies on the referral mechanism provided for in Article 4(5) and 22 EUMR, which serves to supplement the turnover-based thresholds.[179]

The Court also explained that the referral mechanism provided for in Article 22 EUMR differs significantly from the other referral mechanisms. Article 22 EUMR, unlike the other articles, does not expressly require either the national competition authority to be competent to examine the concentration that is subject to the referral or that that concentration must be notified.[180]

The Court continued to discuss the various aspects of Article 22 EUMR, which includes the notification process, the right of Member States to join referral requests, the suspension of national time limits, and the application of national competition law. These, however, failed to support the applicant's interpretation of that article, namely that a referral request under that article is contingent on the competence of the referring Member State.[181] Hence, the Court's contextual assessment of Article 22 EUMR led to the conclusion that

[173] Illumina/GRAIL., para. 101-103.
[174] Ibid., para. 104.
[175] Ibid., para. 107; See also, OJ 2003 C 20, p. 4.
[176] Ibid., para. 108-109; See also, OJ 2003 C 20, p. 4, para. 13-15, 18, 60, and 62; and COM(2001) 745 final, para. 59 and fn. 11.
[177] Ibid., para. 116.
[178] Ibid., para. 121-123; See also EUMR, Article 1.
[179] Ibid., para. 123f.
[180] Ibid., para. 125-129.
[181] Ibid., para. 131-138.

a referral request under this article may be submitted irrespective of the scope of national merger control rules.[182]

The teleological interpretation

First off, the Court explained that the objective of the EUMR is to enable effective control of concentrations with significant effects on competition in the EU.[183] However, the rigid nature of the turnover-based thresholds renders the thresholds incapable of covering all concentrations that merit examination at EU level. The referral mechanisms therefore exist to remedy control deficiencies of the turnover-based thresholds, by creating a subsidiary power with the flexibility necessary to allow the Commission to achieve the objective of the EUMR.[184]

The Court emphasises that the referral mechanism provided for in Article 22 EUMR ensures the achievement of the objective previously mentioned. This referral mechanism provides the flexibility necessary to enable the Commission to examine competitively significant concentrations that otherwise would escape scrutiny because the turnover thresholds have not been exceeded.[185]

Furthermore, Article 22 EUMR also form part of the objectives of protecting the interests of the Member State, subsidiarity, legal certainty, preventing multiple notifications, the 'one-stop shop' system, and referral to the most appropriate authority. This is because, in cases where turnover thresholds are not exceeded at both the EU and national levels, Article 22 EUMR empowers the Commission to be the sole competent authority for examining such concentrations.[186]

In conclusion, the Court believes that the teleological interpretation supports the view that a referral request under Article 22 can be made regardless of national merger control rules.[187]

How the interpretation relates to key legal principles

To begin with, the Court explained that all concentrations that are not covered by the EUMR fall within the jurisdiction of the Member States. Accordingly,

[182] Illumina/GRAIL, para. 139.
[183] Ibid., para. 140; See also, EUMR, Recitals 5, 6, 8, 24, and 25.
[184] Ibid., para. 142.
[185] Ibid., para. 143.
[186] Ibid., para. 144.
[187] Ibid., para. 148.

from the point of view of EU law, the Member States are always entitled to submit a referral under Article 22 EUMR.[188]

Moreover, the Court clarified that national law is only applicable to concentrations falling within the competence of the Member State. If a concentration falls short of meeting the national thresholds, the national competition authorities do not have the power to examine it. Regardless, this does not mean that the Member State has forfeited or renounced its competence for all concentrations lacking a Community dimension. Rather, it simply means that, under domestic law, its authorities are not empowered to take action in such cases.[189]

The Court explained further that, since Article 22 EUMR expressly refer to 'Member States', it directly grants Member States the right to request a referral.[190] The argument that a Member State might lose this right by applying its national legislation is inconsistent with EU law and lacks support in the case-law of the EU Courts.[191] Moreover, such interpretation would undermine the uniform application of Article 22 EUMR as it puts Member States with existing merger control rules at a disadvantage.[192]

Moreover, the Court explained that the Commission's interpretation ensures the principle of subsidiarity as it allows the Commission, which possesses wider criteria of assessment and powers than a national competition authority, to assess concentrations that threaten competition within the referring Member State's territory and affects trade between Member States – an action that can only be achieved by an examination at EU level.[193] Furthermore, that interpretation is in compliance with the principle of proportionality because it allows the Commission to scrutinise concentrations under Article 22 EUMR only in certain specific cases and under very specific conditions – conditions which are clear and precise.[194] The applicant's arguments that that interpretation would capture a high number of concentrations and that it would entail a cumbersome procedure for the undertakings are unsubstantiated.[195]

Lastly, the Court explained that only the Commission's interpretation ensures the necessary legal certainty and the uniform application of Article 22 as it

[188] Illumina/GRAIL, para. 153; See also EUMR, Recital 8 and Article 21; TEU, Article 4(1) read in conjunction with Article 5.

[189] Ibid., para. 154.

[190] Ibid., para. 155

[191] See *Kesko v Commission* (T-22/97) in which the Court held that, where the Commission receives a referral request under Article 22(3) of Regulation No 4064/89, it is required only to verify whether that request is, prima facie, a request made by a Member State, and not to determine the competence, under the applicable national law, of the national authority which made that request in the name and on behalf of that State.

[192] Illumina/GRAIL, para. 155.

[193] Ibid., para. 162-165.

[194] Ibid., para. 171f.

[195] Ibid., para. 170.

makes the application of that article conditional solely on the fulfilment of the four cumulative conditions laid down in Article 22(1) EUMR.[196] In contrast, an interpretation as suggested by the applicant would lead to uncertainty seeing that it would make the application of that article dependent on the different criteria and concept determining the scope of the merger control rules existing in the Member States.[197] Moreover, the applicant's interpretation would not only run counter to settled case-law but also would not be capable of providing greater predictability considering a Member State without merger control rules could always request referral of a merger case to the Commission under that article.[198]

3.3.4 The Concept of 'made known'

The applicant also argued that the referral request was submitted after the time limit set out in the second subparagraph of Article 22(1) EUMR had expired.[199] The applicant claimed that the Commission erred in law in finding that a Member State should be informed not only of the existence of the concentration but also of the information enabling a preliminary competitive analysis of the transaction to be carried out in order to find that the concentration had been made known to the Member State within the meaning of that provision. According to the applicant, this would mean that a concentration should be notified de facto in all the Member States even if it is not subject to an obligation to notify.[200] The applicant maintained that the concentration was the subject of, *inter alia,* the press release of 21 September 2020 and as such any authority of a Member State could have carried out a preliminary analysis of the concentration at issue on that date and, in any event, before 19 February 2021 – when the information letter was sent.[201]

To determine when the time limit starts, particularly when a referral request concerns a concentration that is not required to be notified, the Court was called upon to interpret the term 'made known' as stipulated in the second subparagraph of Article 22(1) EUMR.[202] To shed light on the matter, the Court was, once again, called upon to carry out a literal, contextual, teleological, and historical interpretation. [203]

[196] Illumina/GRAIL, para. 176-178; See also *Ålands Vindkraft* (C-573/12), para. 127f, in which the court established that the principle of legal certainty requires that rules of law be clear and precise and that their application must be foreseeable to those subject to them.

[197] Ibid., para. 175.

[198] Ibid.; See also *Kesko v Commission* (T-22/97).

[199] Ibid., para. 84.

[200] Ibid., para. 186.

[201] Ibid., para. 186.

[202] Ibid., para. 188.

[203] Ibid., para. 189.

The literal and historical interpretations of the term 'made known' failed to clarify what the term entails. [204] The contextual interpretation, however, revealed that, the concept of a concentration being 'made known' must consist of the active transmission of relevant information to the Member State concerned and must contain sufficient information to enable that Member State to carry out a preliminary assessment (i.e., the Court's interpretation).[205] Furthermore, the Court explained that the concept of 'made known' cannot be interpreted as the applicant suggested, namely by relying on the moment when the concentration at issue was made public. Such interpretation relies on an external factor to the EUMR and its referral mechanism, where neither the Commission nor the competition authorities of the Member States are obligated to actively seek information on concentrations under that system.[206]

The teleological interpretation also confirmed the interpretation established by the contextual interpretation.[207] Since referral should be made in an efficient manner, interpreting the concept of 'made known' like the applicant suggested would require that Member States to constantly review public announcements concerning concentrations in order to identify those which may be the subject of a referral under Article 22 EUMR and, in order to comply with the time limit, to make pre-emptive referral request without being certain that the conditions for the application of that article have been satisfied.[208]

Furthermore, only the Court's interpretation ensures that the starting point of the time limit is clearly defined and/or the same for all concentrations capable of falling within the scope of Article 22 EUMR. In contrast, the applicant's interpretation would make the starting point of the time limit contingent on unforeseeable and uncertain circumstances, such as the extent of media coverage or the level of detail in press releases.[209]

Lastly, the Court emphasises that only the Court's interpretation is compatible with the principle of legal certainty as established in case-law.[210] That interpretation makes the application of the second subparagraph of Article 22 EUMR foreseeable by those subject to it by clearly defining the starting point of the time limit.[211]

[204] Illumina/GRAIL, para. 190-195.

[205] Ibid., para. 198-204; The court clarified that the concept of "made known" and "notification", being alternatives with similar legal consequences, suggests comparable content, as indicated by the second subparagraph of Article 22(1) EUMR.

[206] Ibid., para. 203.

[207] Ibid., para. 205; See also EUMR, Recitals 11 and 14.

[208] Ibid., para. 206.

[209] Ibid., para. 207.

[210] Ibid., para. 209.

[211] Ibid.

In conclusion, if a referral request concerns non-notifiable concentrations, the 15 working-day time limit starts from the time when relevant information have been actively transmitted to the requesting Member State.[212]

3.3.5 Good Administration

The applicant also argued that the Commission had breached the principle of good administration, which requires the Commission to act within a reasonable time, because it had delayed in sending the invitation letter.[213] According to the applicant, the Commission had been aware of the existence of the concentration at issue or could have had sufficient knowledge of the facts from September 2020, when the relevant information had been made public.[214]

The Court found that, unlike what the applicant suggested, the Commission was made aware of the existence of the concentration at issue first on 7 December 2020 due to a complaint which it received.[215] The Court, however, acknowledged that the time it took for the Commission to send the invitation letter was unreasonable, particularly, considering the objective of effectiveness and speed outlined in the EUMR and the short nature of the time limits prescribed by that regulation.[216]

However, the Court explained that infringement of the reasonable time principle only justifies the annulment of a decision if the infringement also constitutes an infringement of the rights of defence of the undertakings concerned.[217] The applicant argued that the Commission should have contacted them prior to sending the invitation letter, to allow them to submit comments and correct certain significant factual errors.[218] The Court explained that, not only that the applicant failed to specify the alleged significant factual errors, but also that the invitation letter is only an intermediate measure to prepare for a final decision and is not meant to produce binding legal effects.[219] Thus, the Court concluded that the applicant's right of defence had not been infringed and emphasised that the applicant had had several opportunities to express their views during the administrative procedures leading to the contested decision.[220]

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[212] Illumina/GRAIL, para. 211.

[213] Ibid., para. 216 and 218.

[214] Ibid., para. 219.

[215] Ibid., para. 228.

[216] Ibid., para. 227-233; See also *Sumitomo Metal Industries and Nippon Steel v Commission* (C-403/04 and C405/04) and the case-laws cited in the judgement, in which it is established that, where the duration of a procedure is not set by a provision of EU law, the reasonableness of the period of time taken by the institution to adopt a measure at issue is to be appraised in the light of all the circumstances specific to each case.

[217] Ibid., para 240; See also *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (C-105/04 P).

[218] Ibid., para 241.

[219] Ibid., para. 242-244.

[220] Ibid., para. 245-246.

3.3.6 Legitimate expectations

Lastly, the applicant argued that the Commission, at the time the undertakings had agreed on the concentration at issue, had a policy of not accepting referral request for concentrations that did not fall within the scope of national merger control rules.[221] To support this view, the applicant claimed that the speech given by the Vice-President of the Commission on 11 September 2020 expresses, clearly and precisely, that that policy continued to apply until it was amended by the publication of new guidance towards the middle of 2021.[222]

According to settled case-law, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional, and consistent assurances from authorised, reliable sources have been given to the person concerned by the competent authorities of the EU which led that person to form well-founded expectations.[223]

According to the Court, that speech concerned the Commission's general policy on concentrations and did not mention the concentration at issue. Therefore, the speech could not be viewed as containing precise, unconditional, and consistent assurances in relation to the treatment of that concentration.[224] Thus the Court concluded that the applicant had failed to demonstrate that they have been given such assurances by the Commission.[225] Moreover, the Court emphasised that the recent case referrals under Article 22 EUMR that were accepted by the Commission, prior to the speech, showed that Member States, whose national thresholds were not exceeded, were not precluded from submitting case referrals under that article.[226]

[221] Illumina/GRAIL, para. 251.

[222] Ibid., para. 251.

[223] Ibid., para. 254; See also, *Commission and Council v Sequeros and Others* (C-119/19 P and C-126/19).

[224] Ibid., para. 261.

[225] Ibid., para. 263.

[226] Ibid., para. 264; In Apple/Shazam (M.8799), Knauf/Armstrong (M.8832), Johnson & Johnson/Tachosil (M.9547), and MasterCard/Nets (M.9744) the Commission accepted several requests to join the referral from Member States who were, under their national merger control rules, not competent to examine the concentrations covered by those requests.

4 The Commission v Killer Acquisitions

This section will explore the rationale behind the re-appraisal of Article 22 EUMR and its implications. In particular, this section contends that the re-appraisal of Article 22 EUMR is prompted by the recent developments in the market, which indicates an increase of anti-competitive acquisitions, particularly 'killer acquisitions'. This section then discusses how the Commission considered the re-appraisal appropriate rather than reforming the jurisdictional thresholds of the EUMR. Lastly, this section will present the implications that might be possible due to the re-appraisal.

4.1 Killer Acquisitions

The term 'killer acquisitions' is first introduced by Cunningham, Ederer and Ma to define acquisitions of an innovative, high-valued nascent company by a strong incumbent with the sole purpose of discontinuing the target's innovation projects to pre-empt future competition.[227] It is however important to note that 'killer acquisition' is to be understood as a theory of harm, and not as a category of acquisitions. As such, the label should not be seen as subjective or prejudicial any more than a decision to test a theory of harm.[228]

The phenomenon was first observed in the pharmaceutical sector. Cunningham, Ederer, and Ma found that, on an annual basis, around 46 to 63 acquisitions in the pharmaceutical sector can be characterised as 'killer acquisitions'.[229] The authors noted that these acquisitions negatively affected the industry, resulting in a reduction of over 4% in the overall drug development rate, and ultimately harms the consumers.[230] Recent studies, however, have indicated that this phenomenon can also be found in other sectors, such as the digital and biotech sectors.[231] In the digital sector, for instance, it was found that, in 2015, out of 175 acquisitions by Google, Amazon, Facebook, Apple, and Microsoft, the brands of the target firms were discontinued within a year in 105 cases.[232]

[227] Cunningham, *et al.* (2021), p. 650.

[228] OECD (2020), p. 9.

[229] Cunningham, *et al.* (2021), p. 651-655: The authors analysed over 16.000 pharmaceutical research projects over the span of 25 years and found that projects that were acquired by competing incumbents were 23.4% less likely to progress to the next stage of development and were 20.9% more likely to cease development immediately, compared to projects acquired by non-competing incumbents.

[230] Ibid., p. 654f and 694-696.

[231] OECD (2020), p. 13-17; See also Valleti and Zenger (2019), p. 6; Furman review (2019), p. 88, para. 3.26; Lear (2019), p. 10.

[232] Gautier and Lamesch (2020), p. 23-25.

In the pharmaceutical sector, Cunningham, Ederer, and Ma found that 'killer acquisitions' are less likely to be investigated by competition authorities because acquirers target firms that are still in their early stage of development.[233] The authors found that the acquisitions in their study, whose value was 5% below the U.S. turnover threshold, were approximately 11.3% more likely to be killer acquisitions than those that were 5% above the threshold.[234] In the digital sector, Google, Apple, Facebook, Amazon, and Microsoft have made over 400 acquisitions globally in the last decade. Some of these acquisitions have been exceptionally high value, yet very few of them were subject to regulatory scrutiny.[235] These findings reveal that nascent acquisitions, more often than not, are less likely to be examined by competition authorities – suggesting a risk of under-enforcement.[236] This risk is especially pronounced for competition authorities that rely on turnover to establish jurisdiction.[237]

4.2 EUMR: Gap in Enforcement

Within the EU, a debate regarding the effectiveness of the EUMR emerged in 2014, instigated by Facebook's acquisition of WhatsApp.[238] At the core of this debate lies the question of whether the turnover thresholds are capable of identifying certain transactions that can potentially have an impact on competition in the EU, particularly those involving high-value firms that had generated limited turnover at the time of the acquisition, or if there exists an enforcement gap.[239]

The result of the evaluation on the procedural and jurisdictional aspects of the EUMR, which was published in 2021, confirmed the existence of an enforcement gap in the EUMR.[240] In particular, the evaluation identified that the turnover thresholds are not, in itself, capable of capturing certain high-value transactions which involve at least one company with low turnover but with significant competitive potential.[241] Recent studies on the subject of anti-competitive nascent acquisitions suggest that merger control that relies on turno-

[233] Cunningham, *et al.* (2021), p. 685; See also OECD (2020) p. 13, noting that in the early stages, the targets tend to have low turnover as their business models concentrate on other aspects, such as creating a large user base or carrying research and development, before seeking to monetise their service or generate revenue by selling their products.

[234] Cunningham, *et al*., p. 685-687.

[235] Furman review (2019), p. 91, para. 3.44 and 3.45.

[236] Furman review (2019), p. 91, para. 3.42 and 3.43; See also Lear (2019), p. 10.

[237] OECD (2020), p. 13; See also Furman review (2019), p. 91, para. 3.42-3.46; Cunningham, *et al.* (2018), p. 697; Lear (2019), p. 44.

[238] Facebook acquired WhatsApp in 2014 for a purchase price of USD 19 billion. The transaction did not meet the turnover thresholds of the EUMR, but Facebook requested a referral of the review to the Commission which later approved the transactions unconditionally (M.7217 – Facebook/WhatsApp).

[239] See, *inter alia,* European Parliament (2015), Broberg (2014), Borreau and de Streel (2019), and Levy, *et al.* (2020)

[240] 2021 Evaluation, p. 74, para. 267.

[241] Ibid., p. 42, para. 132.

ver to establish jurisdiction should consider alternative ways to establish jurisdiction, such as by introducing a threshold based on transaction value, to allow the competition authorities to capture these anti-competitive transactions.[242] However, the Commission did not consider it necessary to change the current thresholds.[243] Instead, it considered that re-appraising Article 22 EUMR is sufficient to mitigate the shortcomings of the turnover thresholds and 'close' the gap.[244]

While the Article 22 Guidance does not explicitly mention 'killer acquisitions', it is apparent from the intended subject matter that it addresses concerns related to 'killer acquisitions'. [245] The repurposing of Article 22 EUMR aims to prevent competitively significant concentrations with a low turnover from escaping regulatory scrutiny altogether.[246] This deduction gains further support considering that the guidance specifically mentions that such concentrations particularly include transactions in the digital and pharmaceutical sectors.[247] Moreover, the categories of cases that the Commission considers appropriate for a referral under Article 22 EUMR primarily address cases involving new entrants, innovators, and entities with significant competitive potential, particularly those whose turnover might not accurately reflect their actual or future competitive significance.[248] In other words, these are cases that are particularly vulnerable to potential killer acquisitions.[249]

This deduction raises a question: if the turnover thresholds are not capable of capturing certain anti-competitive transactions, such as 'killer acquisitions' then how come the Commission considered it appropriate to only re-appraise Article 22 EUMR instead of introducing a supplementary threshold that can complements and mitigate the shortcomings of the turnover thresholds? The coming chapter discusses the advantages and disadvantages of a complementary threshold contra the referral mechanism provided for in Article 22 EUMR. The juxtaposition of the different perspectives aims to provide a nuanced analysis of the discourse.

4.2.1 Threshold Reform Contra Article 22 EUMR

As indicated earlier, recent studies consider it appropriate to complement turnover thresholds with a threshold based on transaction value. This would enable high value low turnover transactions that might pose a threat to potential competition to be investigated by competition authorities.[250]

[242] OECD (2020), p. 43-45; See also Broberg (2014); and Borreau and de Streel (2019).
[243] 2021 Evaluation., p. 43, para. 134-136.
[244] Ibid., p. 74, para. 268.
[245] Article 22 Guidance, p. 2f, para. 9-11.
[246] Ibid., p. 2f, para. 9-11.
[247] Ibid, at para. 10.
[248] Ibid, p. 4f, para. 18-20.
[249] See Chapter 4.1.
[250] OECD (2020), p. 43.

Broberg consider that a threshold based on the transaction value would be better in filtering out concentrations that are highly unlikely to impede competition since such a threshold takes into consideration the actual economic significance of the transaction.[251] He acknowledges that such a threshold based is not without flaws, nevertheless, he considers the advantages to outweigh the disadvantages.[252] Furthermore, he considers that introducing this kind of threshold as a supplement to the turnover thresholds would not only retain the advantages of a clear-cut threshold based on turnover but also address its disadvantages by effectively filtering out concentrations that don't significantly impact the competition in the EU.[253]

The Commission however, considered that introducing a supplementary threshold based on the transaction value would have increased the expenses for both the Commission and the merging parties, without necessarily capturing all relevant missing transactions.[254] However, Borreau and de Streel note that such a threshold would not substantially increase the number of concentrations subject to notification, given that in most cases, merger transaction values align with the monetary turnover of the merging firms.[255]

Levy, Mostyn, and Buzatu, likewise the Commission, considered that introducing a threshold based on the transaction value not only raises definitional issues but also presents additional difficulties. They highlighted five specific issues associated with transaction value thresholds:[256]

1. First, determining the value of a transaction can be complex, difficult, and uncertain because there exists a multitude of methods for measuring values. To illustrate, the US merger control system includes hundreds of pages of regulations, supported by a body of law comprising over 4,000 informal interpretations and 500 pages of manual of practitioners.[257]

2. Second, to implement a transaction value test that could capture nascent acquisitions requires setting the threshold at a low level. However, conceiving an EU threshold that effectively capture potentially problematic acquisitions while simultaneously avoid capturing all meaningful transaction in the economy can be challenging.

[251] Broberg (2014), p. 266f.
[252] Ibid., p. 267.
[253] Ibid., p. 268; See also OECD (2020), p. 43; and Borreau and de Streel (2019), p. 29f.
[254] 2021 Evaluation, p. 61f, para. 205-209.
[255] Borreau and de Streel (2019), p. 29f..
[256] Levy, *et al.* (2020), p. 58f; See also 2021 Evaluation, p. 41, para. 127-128 and p. 60-62, para. 203-209
[257] See FTC 'Statute, Rules and Formal Interpretations'; FTC 'Informal Interpretations'; and American Bar Association, *Premerger Notification Practice Manual,* 5th edn (2015).

3. Third, transaction values fluctuate quickly due to events that have no bearing on the value of the underlying assets (e.g., contractual earn-out provisions, fluctuating share prices, and the emergence of rival bidders).

4. Fourth, allocating transaction value geographically is difficult. A transaction value test without an EU nexus risks infringing principles of public international law and comity, as well as the EU Court's effects-based jurisprudence. On the flip side, a test with an EU nexus would be hard to apply, particularly in relation to transactions in the digital sector.

5. Fifth and final, adopting transaction value thresholds in the EU could result in a further significant increase in global merger control since the EUMR is a model for many third-country merger regimes.

The experience of Austria and Germany, which recently introduced additional jurisdictional thresholds based on transaction value in their merger control system, according to the Commission, suggest that the new transaction value thresholds have not captured additional anticompetitive transactions and appear to have captured few transactions concerning the digital sector in particular.[258] However, it is important to consider that the cases that are added may be crucial for consumer welfare. Furthermore, it's reasonable to expect that these rules would deter the regulatory 'gaming' of turnover thresholds, thereby discouraging firms from proposing such mergers. In any case, the small numbers suggest that the additional cost to business has been minimal.[259]

The result of the 2021 Evaluation showed that, while high value-to-turnover ratio may be indicative of competitively significant transactions, it is not in itself decisive. The majority of concentrations with a higher transaction value over the turnover value appear to carry little competitive significance.[260] Indeed, recent studies, have indicated that competition authorities with a more flexible recourse for establishing jurisdiction have demonstrated greater effectiveness. For instance, the share of supply test in the UK has been found to provide adequate coverage of relevant deals. However, they remain open to considering adjustments, such as a value of transaction test, if challenges arise in the future.[261] This satisfaction with flexible criteria may also indicate that the uncertainties created by thresholds and notification requirements are not as significant as sometimes suggested.[262]

[258] 2021 Evaluation, p. 43, para. 136 and p. 40f, para. 122-125
[259] OECD (2020), p. 44.
[260] 2021 Evaluation, p. 42f, para. 131-135.
[261] Furman review (2019), p. 94.
[262] OECD (2020), p. 45.

The referral mechanisms of the EUMR have been shown to provide a helpful degree of flexibility in allocating jurisdiction between the Commission and the Member State.[263] Article 22 EUMR, in particular, has been found to contribute to ensure that important transactions involving undertakings with low or no turnover, particularly in the digital and pharmaceuticals sectors, are reviewed at the EU level.[264] Its application often results in the referrals of cases which merit a deeper investigation by the Commission.[265]

Viewed in a broader context, Article 22 EUMR, in conjunction with the other referral mechanisms, plays a crucial role in fulfilling the intended purpose of the referral mechanisms. Specifically, it serves as a corrective mechanism designed to address the limitations posed by the turnover-based thresholds.[266] Limiting any of the referral mechanisms provided for in the EUMR is therefore undesirable. This is precisely why the 2021 Evaluation recommends that the Commission should start accepting and encouraging the referral of relevant transactions. This approach aims to provide flexibility to both Member States and the Commission, allowing them to target concentrations that merit review at the EU level without imposing the notification of transactions that do not.[267]

4.3 Implications of the Re-Appraisal of Article 22 EUMR

The Commission's re-appraisal of Article 22 EUMR, along with the judgement in the case of Illumina/GRAIL, is considered to have overhauled the threshold-based system of the EUMR.[268] To better understand this view, it helps to understand how the re-appraisal of Article 22 EUMR has changed the jurisdictional scope of the EUMR. The turnover thresholds of the EUMR have provided a safe harbour for concentrations that are below the thresholds and serve as a clear guidance for those above.[269] With the re-appraisal, the Commission can now establish jurisdiction through the 'backdoor': mergers that are not notifiable under national laws and, consequently, under the EUMR, become controllable if a Member State refers the case to the Commission.[270] As a result, the safe harbour that was provided now no longer exists.[271]

[263] 2021 Evaluation, p. 69, para. 238f.
[264] Ibid., p. 47, para. 147
[265] Ibid., p. 47, para. 146
[266] Ibid., p. 48, para. 150; See also EUMR, Recital 11.
[267] Ibid., p. 74, para. 268.
[268] Mulder and Sauter (2023), p.552; See also Carugati (2022), p. 22; Levy, *et al.* (2021), p. 376.
[269] Podszun (2023), p. 23-25; See also EUMR, Recitals 9 and 10; and the Jurisdictional Notice, p. 31, para. 127.
[270] Ibid., p. 20; See also Van Rompuy (2021), p. 343.
[271] Ibid., p. 24f.

Carugati considers that the Article 22 Guidance, in particular, does not rely on clear and objective criteria to identify anti-competitive transactions. Instead, it relies on theories of harm, such as 'killer acquisition', which, according to him, are impractical for identifying problematic mergers.[272] In the words of Podszun 'The European turns a 'rigid', static, formal rule into an effects-oriented tool'.[273] He questions the effectiveness of the case-by-case effects-based approach, and argues that it could eventually increase the Commission's reasoning costs.[274] Kuhn, Sakellariou-Witt, Schulz, Citron also express concern that the Commission may choose to apply a low standard for fulfilling the requirements for a referral under that article, namely by accepting referrals that are not necessarily based on robust novel theories of harm.[275]

Levy, Rimsa, and Buzatu have identified five practical implications relating to the re-appraisal of Article 22. These are the followings:[276]

1. First, given the lack of consensus among the Member States, the re-appraisal has given rise to uncertainty regarding whether a transaction may be referred to the Commission.

2. Second, the re-appraisal departs from one of EUMR's guiding principles, namely that it only applies to concentrations with a 'Community dimension, as it opens up the possibility of reviewing concentrations that generate no or minimal revenues in the EU.

3. Third, given the short nature of the deadlines and the ambiguity of the concept of 'made known', it may be difficult to determine whether national competition authorities have exhausted their rights to make a referral request.

4. Fourth, obtaining certainty that a referral will not be made is not so straightforward. Companies may need to assess the advantages and disadvantages of voluntarily notifying the Commission.[277]

[272] Carugati (2022), p. 5f

[273] Podszun (2023), p. 24.

[274] Ibid., 25; See also Bushell (2023), in which the author questions the justiciability of decision based on Article 22 EUMR and what is required to discharge it.

[275] Kuhn, *et al*. (2023).

[276] Levy, *et al.* (2021), p. 376-378

[277] See also Bushell (2023): suggesting merging parties to voluntarily notify either the Commission, to get assurance whether a proposed transaction is a candidate for a referral under Article 22 EUMR, or, to notify any Member States with a view to triggering the 15 working-day deadline; and Kuhn, *et al.* (2023).

5. Fifth and last, Article 22 Guidance permits a referral to the Commission at any time, even after closing. Thus, merging parties may have to accept the risk of post-closing review by the Commission.[278]

[278] See also Podszun (2023), p. 21: noting that the new reading of Article 22 EUMR resembles the UK system where, if companies do not notify, the competition agency may nonetheless open an investigation *ex officio*.

5 Discussion

This chapter focuses on the first research question, on whether the re-appraisal of Article 22 EUMR has expanded the jurisdictional scope of the EUMR to also include non-notifiable concentrations. The investigation is conducted through the dual methodology applied in the thesis, comprising both legal dogmatic analysis and counterfactual assessment. The focus will be on providing a conclusive answer to the central inquiry while considering both normative and empirical aspects. The second research question is of a descriptive nature and has been addressed through the investigation in Chapters 3 and 4. To provide a comprehensive context for the upcoming discussion, a summary of the findings regarding how the re-appraisal of Article 22 EUMR contributes to overcoming challenges and an identification of the challenges associated with it will be presented.

5.1 Navigating Contradictions: Unravelling the Impact of the Re-Appraisal of Article 22 EUMR on Jurisdictional Scope

The jurisdiction of the Commission to review concentrations under the provisions of the EUMR is, as explored in Chapter 2.2, established by one of two ways: through the turnover thresholds or the case referral system. In both of these cases, jurisdiction is established through quantitative criteria, with the exception of the case referral mechanisms provided for in Article 22 EUMR. While this quantitative criterion is evident in the turnover thresholds, the clarity regarding the case referral is somewhat less pronounced. Article 4 (4) and 9 EUMR applies for concentrations with a Community dimension, where the determination relies on quantitative criteria, whereas Article 4(5) applies for concentrations that are capable of being reviewed by at least three Member States.

Article 22 EUMR however, enables the Commission to establish jurisdiction based on qualitative criteria, specifically based on ‘threat’ to competition. Why? As explored in Chapter 2.3.4, historically the case referral mechanism provided for in that article was reserved for Member States that do not have a national merger regulation. This allows such Member States to request the Commission to, on their behalf, review concentrations that are competitively significant within their territory. Thus, it would not have been possible to accommodate those Member States in this way if jurisdiction through Article 22 EUMR was based on quantitative criteria. The Commission has also applied that article accordingly, by discouraging case referral from Member States, that have national merger regulation, but lacks competence under that regulation to review the case. This could imply that the Commission considered that jurisdiction under the EUMR should be established primarily, if not exclusively, based on quantitative criteria.

However, through the re-appraisal of Article 22 EUMR, that article has now been 'made' available for all Member States regardless of the existence or scope of national merger control regulation. As explored in Chapter 2.3.4, The result of the 2021 Evaluation considered that the application of Article 22 EUMR is, and never was, limited to Member States that do not have a national merger regulation. It was also explained that the Commission's tendency to discourage case referrals under that article, as mentioned previously, was based on the notion that transactions that did not fall within the jurisdiction of the Member States were of a limited size and were generally not competitively significant. However, recent market developments suggest that that approach is no longer appropriate. Moreover, according to the Commission, the re-appraisal of that article does not necessitate a regulatory reform as it is consistent with the wording, context, as well as the purpose of that article.

The re-appraisal of Article 22 EUMR was brought before the General Court in the case of Illumina/GRAIL. As explained in Chapter 3.1 and 3.2, the planned acquisition of GRAIL by Illumina was made subject to regulatory scrutiny through a referral request under Article 22 EUMR. In the General Court, as explored in Chapter 3.3.3, two contradicting views on the interpretation of that article clashes: the applicant's, who relies on that article's historical context, and the Commission's with its re-appraisal. To establish the 'correct' interpretation of that article, the General Court conducted a literal, historical, contextual, and teleological interpretation of that article. The General Court came to the conclusion that the application of Article 22 EUMR is not contingent on the existence or scope of national merger control regulation – supporting the Commission's re-appraisal. The General Court also concluded that, the Commission's re-appraisal of Article 22 EUMR complies with the general principles of the EU law. Although the General Court's judgement has been appealed, there is no compelling reason to question its validity at this point.

However, had the re-appraisal of Article 22 EUMR not taken place, the case of Illumina/GRAIL would have unfolded differently. As explained in Chapter 3.1, the planned acquisition of GRAIL by Illumina was not notifiable under the EUMR, nor was it notifiable under any national merger regulation of the Member States. Thus, neither the Commission nor the Member States would have been able to establish jurisdiction, as it had not met the necessary qualitative criteria. Nor would this planned acquisition have been referred to the Commission under Article 22 EUMR, as, prior to the re-appraisal, the Commission would have discouraged this type of referral.

Thus far, two contradicting aspects have been identified: First, the Commission's re-appraisal of Article 22 EUMR is consistent with the regulation and the general principles of EU law. Thus, the re-appraisal of Article 22 EUMR has not expanded the jurisdictional scope of the EUMR. However, the second aspect reveals that, had the re-appraisal not taken place, the acquisitions of

GRAIL by Illumina would not have been subject to regulatory scrutiny. This suggest that jurisdictional scope of the EUMR has expanded through the re-appraisal of Article 22 EUMR.

The contradictory aspects identified paint a nuanced picture. Indeed, the re-appraisal of Article 22 EUMR has brought about no changes to the EUMR. However, the practical outcome suggests a different reality. Had the re-appraisal not taken place, the acquisitions of GRAIL by Illumina would have altogether avoided regulatory scrutiny. Thus, the only feasible explanation is that, while the re-appraisal of Article 22 EUMR had not expanded the jurisdictional scope of the EUMR *de jure*, it has resulted in a *de facto* expansion.

5.2 Evaluating the Impacts of the Re-appraisal of Article 22 EUMR

5.2.1 The Role of Article 22 EUMR Re-appraisal in Overcoming Threshold Challenges

In Chapter 4, it has been explored and discussed that the re-appraisal of Article EUMR was prompted due to the existence in the EUMR, partly caused by the turnover thresholds. Specifically, it concerns the incapability of the turnover thresholds in capturing certain high-value transactions involving at least one company with low turnover but with significant competitive. This has also been confirmed by the General Court in Chapter 3.3.3, specifically in the teleological interpretation of Article 22 EUMR. In Chapter 4.2 it is deduced that the re-appraisal of Article 22 EUMR is meant to address concerns related to 'killer acquisitions'

In Chapter 4.2.1 it has been explored why, instead of introducing a supplementary threshold based on the transaction value, the Commission instead decided to re-appraise Article 22 EUMR. To elaborate, as explored in Chapter 4.1, recent studies in the subject of anti-competitive nascent acquisitions, such as 'killer acquisitions', suggest that this type of acquisitions often escapes regulatory scrutiny because the acquirer target firms that are still in the early stages of business development, thus the targets tend to have low turnover. The studies thus suggest that competition authorities that rely on turnover thresholds to establish jurisdiction, should consider introducing a supplementary threshold based on transaction value. However, as explored in Chapter 4.2.1, the Commission considered that not only would introducing such a supplementary threshold would be difficult, but experience from other EU countries also suggest that such a supplementary threshold has not proven to capture additional anti-competitive transactions.

Moreover, recent studies have shown that competition authorities that with a more flexible recourse for establishing jurisdiction have demonstrated greater

effectiveness. Furthermore, the referral mechanisms in the EUMR, particularly Article 22 EUMR, has not only provided a helpful degree of flexibility but also has been found to contribute to ensuring that important transactions, in the digital and pharmaceutical sectors, involving undertakings with low or no turnover are reviewed at the EU level. Thus, re-appraising that article would not only provide flexibility to both Member States and the Commission, but also allow them to target concentrations that merit review at the EU level without imposing the notification of transactions that do not.

This view is also supported by the General Court, as explored in Chapter 3.3.3. According to the General Court, Article 22 EUMR provides the flexibility necessary to enable the Commission to examine competitively significant concentrations that otherwise would escape scrutiny because the turnover thresholds have not been exceeded. Moreover, the General Court explained that Article 22 EUMR also form part of the objectives of protecting the interests of the Member State, subsidiarity, legal certainty, preventing multiple notifications, the 'one-stop shop' system, and referral to the most appropriate authority.

5.2.2 Issues Identified with the Re-appraisal of Article 22 EUMR

In chapter 4.3, the implications of the re-appraisal of Article 22 EUMR have been explored. To reiterate, the re-appraisal of that article is considered to have overhauled the threshold-based system of the EUMR. Particularly, this is because the safe harbour that once was provided by the turnover thresholds now no longer exists. The re-appraisal of Article 22 EUMR has made mergers that were not notifiable under national laws and, consequently, under the EUMR, controllable as long as one Member State refers the case to the Commission.

Furthermore, the re-appraisal of Article 22 EUMR is considered to have introduced a case-by-case effects-approach in establishing jurisdiction over a concentration which does not rely on clear and objective criteria to identify anti-competitive acquisitions. Instead, the re-appraisal of Article 22 EUMR has made it possible to establish jurisdiction based on theory of harms, such as 'killer acquisitions'.

Moreover, the lack of consensus among Member States creates uncertainty about when a transaction might be referred to the Commission. Additionally, the re-appraisal of Article 22 EUMR departs from one of EUMR's key principles: typically, EUMR is only applicable to concentrations with a 'Community dimension', however, as the re-appraisal extends the regulation's reach to transactions with minimal revenues in the EU. Further complicating matters are the short deadlines and the vague concept of 'made known,' making it difficult to determine if national competition authorities have exhausted their right to make a referral request. Moreover, obtaining assurance that a referral

will not be made is not straightforward, prompting companies to consider the pros and cons of voluntary notification. Lastly, the Article 22 Guidance allows a referral to the Commission at any time, even after closing, exposing merging parties to the risk of a post-closing review by the Commission.

6 Finishing Conclusion

The turnover thresholds of the EUMR are rigid and may prove to not always be capable of capturing certain anti-competitive concentrations. However, the thresholds serve an important purpose: to provide a straightforward and objective mechanism that can easily be navigated by merging parties.

The re-appraisal of Article 22 EUMR has expanded the jurisdictional scope of the EUMR, based on criteria that neither are objective nor easy to navigate. With the re-appraisal, the Commission may have managed to find the solution to the enforcement gap. Evidently, the flexibility provided by the re-appraisal of Article 22 EUMR makes it possible for the Commission to scrutinise M&A transactions whenever it sees fit.

As illustrated by the case of Illumina/GRAIL, merging parties can no longer rely on the safe harbour once provided for by the turnover thresholds. However, considering that the EUMR is still in the early stages of entering this new era, one cannot yet draw definite conclusions. If the case of Illumina/GRAIL is any indication, one can be sure that the straightforward and objective mechanism provided by the EUMR is no more.

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