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A Merging of Principles: Article 22 EUMR, Call-in Powers and the Limit of Commission Jurisdiction

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Summary

This master's thesis seeks to determine the legality of using Article 22 EUMR for concentrations below the mandatory notification thresholds. It does so against the background of a general proliferation of national call-in powers allowing National Competition Authorities (NCA) to require notification of concentrations below the ordinary thresholds. While NCAs increasingly equip themselves with such powers, uncertainty remains as to whether this development constitutes an appropriate solution to perceived enforcement gaps, and whether it is fully compatible with the legal framework of the EUMR.

The study begins with a brief presentation of merger control in the European Union, followed by an exposé of Article 22 EUMR and its legislative history. More recent developments are then outlined, notably the growing concern that certain concentrations escape effective scrutiny under existing turnover-based thresholds. Particular attention is paid to the Commission's response to this perceived enforcement gap, embodied by the 2021 Guidance on Article 22 referrals. The study further examines the judgment that brought this practice to an end and concludes with observations on the present legal position following the Court's clarification of Article 22.

To enhance the reader's understanding of Article 22's purpose and context, the study proceeds with a presentation and analysis of the relevant principles of EU law. By applying the Court's established methods of interpretation, key principles underlying the EUMR are identified and their significance in the present context drawn out. Particular attention is given to the balance between effective enforcement and the principle of legal certainty. The analysis leads to a synthesis concerning how merger control ought to be structured in order to remain compatible with principles of EU law.

Drawing on these findings, the study then analyses national systems of call-in powers in Italy, Denmark and Sweden. Their design, application, and rationale are examined using of previous practice. The comparison demonstrates that the systems are highly heterogeneous, both in their legal construction and use, contributing to a fragmented landscape that reduces foreseeability for undertakings operating across multiple jurisdictions.

In the final part of the study, conclusions are drawn on the basis of the preceding analysis. Article 22 EUMR, the jurisprudence of the Court of Justice, and the relevant principles of EU law are taken together in order to assess the legality of employing national call-in powers as a basis for referrals to the Commission. The study concludes that the legality of such referrals cannot be determined solely by the formal existence of national jurisdiction. Rather, the design and application of national call-in powers must also be considered in light of the EUMR's underlying general principles.

Sammanfattning

Examensarbetet undersöker användandet av koncentrationsförordningens artikel 22 för företagskoncentrationer under tröskelvärdena. Det tar sin utgångspunkt i den växande skara nationella konkurrensmyndigheter som fått befogenhet att kräva anmälan av koncentrationer under tröskelvärdena genom så kallade ”call-in powers”. Samtidigt som konkurrensmyndigheterna i större utsträckning utrustar sig med dessa befogenheter kvarstår osäkerhet kring om utvecklingen bemöter dagens utmaningar på ett ändamålsenligt sätt, och om det sker på ett sätt som är förenligt med de rättsliga principer som koncentrationsförordningen vilar på.

Uppsatsen inleds med en kort presentation av kommissionens förvärvskontroll, följt av en redogörelse för artikel 22 och dess historik. Därefter behandlas senaste tidens utvecklingar, särskilt den växande oron över att vissa koncentrationer undgår effektiv kontroll inom ramen för de befintliga tröskelvärdena. Särskild uppmärksamhet ägnas åt kommissionens svar, vilket tog sig uttryck i 2021 års vägledning om hänskjutanden enligt artikel 22. Vidare analyseras den dom från EU-domstolen som satte punkt för kommissionens praxis. Kapitlet avslutas med observationer om nuvarande rättsläge efter domstolens klargörande dom.

Uppsatsen behandlar även relevanta EU-rättsliga principer. Genom tillämpning av domstolens tolkningsmetoder identifieras de principer som ligger till grund för EU:s förvärvskontroll och deras betydelse i det aktuella sammanhanget. Vikt läggs vid en balansgång mellan effektiv förvärvskontroll, rättssäkerhet och förutsebarhet. Därefter följer en syntes om hur förvärvskontroll bör utformas för att förbli förenlig med principerna.

Mot bakgrund av föregående slutsatser analyseras nationella call-in powers i Italien, Danmark och Sverige. Deras rättsliga utformning, tillämpning och syfte undersöks med stöd av tidigare praxis. Jämförelsen visar att medlemsstaternas lösningar skiljer sig väsentligt, både till rättslig konstruktion och till praktiskt bruk, vilket skapar ett fragmenterat landskap som minskar förutsebarheten för företag verksamma i flera jurisdiktioner.

I uppsatsens sista del dras slutsatser på grundval av föregående analys. Hänsyn tas till artikel 22, EU-domstolens praxis och relevanta unionsrättsliga principer för att avgöra rättsenligheten av att använda nationella call-in-befogenheter som grund för hänskjutanden till Kommissionen. Slutsatsen är att rättsenligheten inte enbart kan avgöras utifrån den formella existensen av nationell jurisdiktion. I stället måste även utformningen och tillämpningen av nationella call-in-powers bedömas mot bakgrund av de EU-rättsliga principerna.

Förord

För knappt sex år sedan började jag läsa juridik i Lund. Ett beslut som slumpartat fattades under den dåvarande pandemin. Jag har haft sex fina år.

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Abbreviations

NCA	National Competition Authority
AG	Advocate General
CJEU	Court of Justice of the European Union
EU	The European Union
EUMR	Regulation (EC) No 139/2004 (EU Merger Regulation)
ICA	Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*)
SCA	Swedish Competition Authority (*Konkurrensverket*)
DCCA	Danish Competition and Consumer Authority (*Konkurrence- og Forbrugerstyrelsen*)
ICL	Italian Competition Law (*Legge 10 Ottobre 1990 n. 287*)
DCL	Danish Competition Law (*Konkurrenceloven LBK nr 1150 af 03/11/2024*)
SCL	Swedish Competition Law (*Konkurrenslagen, SFS 2008:579*)
Commission	The European Commission
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

EU merger control is built around a jurisdictional allocation where concentrations meeting the turnover thresholds in the EU Merger Regulation (EUMR) fall within the exclusive competence of the European Commission, while those below the thresholds are subject to national merger control by the Member States' competition authorities (NCAs). Article 22 EUMR is an exception to this division of competence. It allows one or more Member States to request that the Commission examine a below-threshold concentration that affects trade between Member States and threatens to significantly affect competition within the requesting State, even if it does not meet the turnover thresholds.

Article 22 was originally intended for Member States lacking their own merger control regimes. In 1997 it was reworked into a mechanism for reallocation of cases to the authority best positioned to handle them. From 2020 onwards, the Commission deployed the provision against concentrations below the EU thresholds, particularly against so-called “killer acquisitions” in digital and pharmaceutical sectors.[1] The shift was expressed in the now-withdrawn 2021 Guidance, which encouraged referrals of sub-threshold transactions even from NCAs that lacked national jurisdiction over the concentration.[2]

In Joined Cases C-611/22 P and C-625/22 P (hereinafter: *Illumina/Grail*), the Court of Justice (CJEU) rejected the Commission’s policy shift, holding that an NCA may not refer a concentration under Article 22 unless it is itself legally entitled to examine the concentration under its own merger control law.[3] The judgment may have closed the door to an expansion of the Commission’s jurisdiction below the thresholds, but still left a window open. Where an NCA acquires jurisdiction over a sub-threshold concentration through a national “call-in power”, the formal condition that *Illumina/Grail* imposed is fulfilled. Whether that is enough for a lawful Article 22 referral is the question now before the General Court in *Nvidia*,[4] where the applicant has challenged the Commission's acceptance of a referral from the Italian Competition Authority

[1] *Cf.* Colleen Cunningham, Florian Ederer and Song Ma, ‘Killer Acquisitions’ (2021) 129 Journal of Political Economy 649 <https://doi.org/10.1086/712506>.

[2] European Commission, ‘Guidance on the Application of the Referral Mechanism Set out in Article 22 of the Merger Regulation to Certain Categories of Cases’ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021XC0331(01)> accessed 28 January 2026.

[3] Joined Cases C-611/22 P and C-625/22 P *Illumina/Grail* [2024] CJEU ECLI:EU:C:2024:677.

[4] T-15/25 *Nvidia v Commission* [2025] (Action Brought on 10 January 2025).

on the basis that the underlying call-in power is "*loosely defined, ex post, and discretionary*."[5]

Meanwhile, a number of Member States are introducing or strengthening their call-in powers, sometimes expressly with Article 22 in mind. The cumulative effect of national legislative choices and the Commission's acceptance practice could effectively reshape the practical reach of EU merger control without amendment of the EUMR. Whether, and on what conditions, this is compatible with the principles on which the EUMR rests is the subject of this study.

1.2 Aim and research questions

This study aims to critically assess the current framework of European merger control with respect to the examination of sub-threshold concentrations. In particular, it examines the role of Article 22 in enabling the review of transactions that fall below the Union's turnover thresholds but may nonetheless raise competition concerns.

To this end, it analyses the interpretation of Article 22 in the case law of the Court of Justice, assesses the compatibility of call-in-based referrals with the general principles of EU law, particularly subsidiarity, institutional balance, legal certainty and the one-stop shop, and evaluates how differences in national call-in powers affect the functioning of the EU merger control system.

In order to fulfil this aim and to support the central argument, the following research question and sub-questions are used.

Research question:

To what extent can, and should, the Commission exercise competence under Article 22 over concentrations referred by national competition authorities on the basis of national call-in powers, in light of the interpretative framework of the Court of Justice and the requirements of EU law?

Sub-questions:

How does the Court of Justice's interpretation of Article 22 determine the conditions for referral and the exercise of Commission competence?

How do the principles of EU law, in particular subsidiarity, institutional balance, legal certainty and the one-stop shop, affect the legality of Article 22 referrals based on national call-in powers?

[5] *Nvidia* (n 4).

How do differences in national call-in powers affect the predictability and scope of merger control under Article 22?

1.3 Delimitations

Several delimitations follow from the doctrinal focus of this study. The study does not engage with the law-and-economics literature on merger control. Empirical and theoretical work on whether sub-threshold concentrations cause measurable competitive harm is referred to only where it informs the legal debate, since the research question concerns the legal conditions under which the Commission may exercise jurisdiction, not the empirical case for doing so.

The substantive standard for assessing harm to competition, i.e. the test under which a concentration is cleared, prohibited, or cleared subject to remedies, is not addressed in the study. This is because the study focuses on the formal questions determining jurisdiction, rather than how it is exercised.

Ex post control of completed below-threshold concentrations under Article 102 TFEU, revived by the Court of Justice in *Towercast*,[6] is referred to only to exemplify alternative routes of enforcement. The study does not assess whether or when *ex post* review under Article 102 TFEU can complement *ex ante* control under the EUMR.

1.4 Methodology

1.4.1 EU Legal Method

This study applies the EU legal method to assess the legality of Article 22 referrals of below-threshold concentrations. It examines whether national call-in regimes that enable such referrals comply with the binding norms of primary EU law and general principles, bearing in mind that the Article 22 mechanism may ultimately be subject to review by the CJEU.[7] The central assessment is to what extent national legislation enabling the review of below-threshold concentrations, thereby facilitating Article 22 referrals, is compatible with general principles of law, primary EU law and the division of competences between the EU and its Member States.[8]

It will be analysed in light of the constitutional principles governing the EU legal order. As established in the case law of the CJEU, the EU legal order

[6] C-449/21 *Towercast* [2023] CJEU ECLI:EU:C:2023:207; For more information, *see*: 'European Court of Justice Confirms That National Authorities Can Review Ex-Post Below-Threshold Mergers Under Abuse of Dominance Rules | Kluwer Competition Law Blog' <https://legalblogs.wolterskluwer.com/competition-blog/european-court-of-justice-confirms-that-national-authorities-can-review-ex-post-below-threshold-mergers-under-abuse-of-dominance-rules/> accessed 19 February 2026.

[7] *Cf.* Article 19(1) TEU.

[8] *Cf.* C-283/81 *CILFIT*. p. 20 and C-561/19 *Consorzio Italian Management*. p. 46.

constitutes an autonomous legal order[9] which enjoys the principle of primacy, as confirmed in *Costa v ENEL*.[10]

Even Member States' authorities, when implementing EU law, are bound by its general principles and must ensure that national measures comply with it.[11] These doctrines ultimately require that national law, including merger control call-in rules, respect the uniform and correct application of EU law, also in the interaction between national law and EU law.[12]

Within the hierarchy of norms, compliance is first assessed against primary law, including the allocation of competences and Article 19 TEU, which entrusts the Court of Justice with ensuring that the law is observed. At the secondary law level, Council Regulation (EC) No 139/2004 ("EUMR") provides the framework for merger control and establishes Article 22 as the legal basis for the referral of concentrations *without a union dimension*.[13] That provision is interpreted in light of the Regulation's structure, including the principles of subsidiarity, legal certainty, institutional balance, and the one-stop shop principle. According to Hettne and Otken Eriksson, general principles of EU law enjoy a strong status as primary sources of EU law, as demonstrated in *Chernobyl*.[14] It is also supplemented by the 2005 Notice on Case Referral in respect of Concentrations (hereinafter: Case Referral Notice), which is a *soft law* instrument intended to clarify the interpretation of Article 22.[15] As Competition Law is marked by a prevalence of non-binding soft law instruments, relevant acts, such as the Case Referral Notice and the now-withdrawn 2021 Guidance, will be considered as contextual material.[16] Reference will also be made to academic literature, which enables a better understanding and critical evaluation of the field of law.[17]

The interpretation of EU law follows the Court's established methods: literal, systematic, teleological and, where appropriate, historical interpretation.[18]

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[9] C-26/62 *Van Gend en Loos* [1963] CJEU ECLI:EU:C:1963:1; *See also*: *Opinion 2/13* [2014] CJEU ECLI:EU:C:2014:2454 paras. 166–167.

[10] C-6/64 *Costa v ENEL* [1965] CJEU ECLI:EU:C:1964:66.

[11] C-103/88 *Costanzo* [1989] CJEU ECLI:EU:C:1989:166 para. 31; C-198/01 *Consorzio Industrie Fiammiferi* [2003] CJEU ECLI:EU:C:2003:430 para. 49.

[12] C-617/10 *Åkerberg Fransson* [2013] CJEU ECLI:EU:C:2013:105 para. 19.

[13] Jörgen Hettne and Ida Otken Eriksson, *EU-Rättslig Metod: Teori Och Genomslag i Svensk Rättstillämpning* (Norstedts Juridik 2011). pp. 41-44. *See also*: EUMR, Art. 22(1).

[14] ibid. p. 44.

[15] Soft law in the EU system consists of recommendations and opinions with no legally binding force, yet they may still have practical and legal effects. For more, *see*: Oana Ștefan, 'Soft Law and the Enforcement of EU Law' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) <https://doi.org/10.1093/acprof:oso/9780198746560.003.0012> accessed 17 May 2026.

[16] Hettne and Otken Eriksson (n 13) pp. 46-48.

[17] ibid. p. 120.

[18] Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing, 2013) p. 64.

Literal reading concerns the clear and precise wording of a provision, which must not be deprived of its effectiveness.[19] When the exact scope of a clear and precise provision needs clarification, the Court may, however, resort to other methods outlined above.[20] The CJEU often resorts to teleological interpretation,[21] which signifies a broader technique than a purely legal-intention-led interpretation.[22] Teleological interpretation in the EU law context refers to a purpose-driven reading of individual provisions as well as to a systemic understanding of the EU legal order as a whole. This involves interpreting rules in light of both the *telos* of the specific provision and the broader constitutional *telos* of the Union's legal order.[23] Meanwhile, the Court may apply several other interpretation techniques, such as comparative, analogous, *e contrario*, and systematic interpretation.[24] Systematic (also referred to as contextual[25]) interpretation is especially relevant, as it involves determining the function of a provision within its wider legislative context.[26] It is used particularly where textual interpretation of a provision of EU law does not permit its precise scope to be assessed.[27] Finally, the origins of a provision may need to be considered to determine its interpretation, using historical interpretation.[28]

1.4.2 Comparative method

The study concerns national legislation in three EU Member States. As it describes, analyses, and compares the divergent solutions chosen to respond to similar concerns, it draws on a theoretical legal framework – in this case, the comparative method, often simply called *comparative law*. Comparative law consists of systematic application of comparison to law.[29] Comparative law involves three stages according to W.J. Kamba, of which mainly the first two will be used: a *descriptive phase* in which the norms, concepts, and institutions of the legal systems concerned are described.[30] Secondly, an *identification phase* "concerned with the identification and discernment of differences and similarities between systems under comparative consideration."[31] Third, the *explanatory phase* accounts for divergencies and resemblances.[32] In

[19] C-698/20 *Gmina Wieliszew* [2022] CJEU ECLI:EU:C:2022:787 para. 46.

[20] C-283/81 *CILFIT* para. 20; and C-561/19 *Consorzio Italian Management* para. 46.

[21] Miguel Poiares Maduro, 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism' (Social Science Research Network, 3 June 2008) <https://doi.org/10.2139/ssrn.1134503> accessed 21 April 2026. p. 5.

[22] *See*: ibid. p. 3.

[23] ibid. p. 5.

[24] Hettne and Otken Eriksson (n 13) pp. 159-170.

[25] Lionel Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell 2000) p. 335.

[26] ibid. p. 335.

[27] C-248/16 *Austria Asphalt* [2017] CJEU ECLI:EU:C:2017:643 para. 20.

[28] C-621/18 *Wightman* [2018] CJEU ECLI:EU:C:2018:999 para. 47.

[29] WJ Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 The International and Comparative Law Quarterly p. 486.

[30] Kamba (n 29) pp. 511-512.

[31] ibid.

[32] ibid.

presenting the and comparing Italian, Danish and Swedish law this study uses the comparative law method.

1.5 Disposition

Section 2 provides an overview of the EU merger control regime as currently applied by the Commission. It focuses on the jurisdictional framework of the EUMR and the role of Article 22, tracing its historical use, the shift following the *Illumina/Grail* judgment, and the legal *status quo* after the withdrawal of the 2021 Guidance.

Section 3 examines the general principles of EU law relevant to the operation of Article 22. This section focuses on the principles of subsidiarity, institutional balance, legal certainty, and the one-stop shop. The section ends with a synthesis of how the principles apply to the EU merger control regime.

Section 4 first explains the notion of a call-in power. Then it analyses the design and operation of national call-in powers in three EU Member States. The three case studies illustrate how differences in national regimes affect legal certainty for merging parties. They also illustrate how treating all call-in powers the same will lead to a more fragmented legal landscape.

Section 5 brings together the interpretative and comparative analyses to assess the conditions under which the Commission may rely on Article 22 in cases involving national call-in powers. It concludes with a brief outlook.

2 The Jurisdictional Framework of Article 22

2.1 The EU merger control system

The modern EU merger control regime was established by the first Merger Regulation in 1989[33] and recast in the EU Merger Regulation ("EUMR") of 2004.[34] Adopted after the current-day articles 101 and 102 TFEU, the merger regulation was first adopted on the basis of the flexibility clause in Article 352 TFEU in order to close gaps in the system of protection against distortions of competition resulting from corporate reorganisations (broadly speaking: mergers and acquisitions – M&A).[35] The regulation serves to maintain effective competition in the Single Market, and extends to the EEA.[36] One of its key characteristics is the principle of "double exclusivity"[37] which gives the Commission sole competence over concentrations with an EU dimension, while those without one remain subject to national merger control regimes.[38] The allocation reflects a compromise between the Union and the Member States regarding the appropriate limits of supranational merger enforcement.[39] The requirement of an EU dimension serves to delimit Commission authority *vis-à-vis* the Member States, ensuring that supranational review is reserved for transactions of cross-border significance.[40]

The EU dimension is determined by turnover-based thresholds set out in Article 1 of the EUMR. Two alternative sets of thresholds determine the EU dimension. They each contain cumulative global, EU-wide and national turnover criteria, bounded by the so-called two-thirds rule.[41] The thresholds operate as bright-line rules,[42] meaning that where they are met, the parties to the

[33] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. (No longer in force).

[34] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[35] C-449/21 *Towercast* [2023] CJEU ECLI:EU:C:2023:207 para. 40.

[36] Agreement on the European Economic Area 1994, Article 57(2)a.

[37] Opinion of AG Kokott in Case C-202/06 P *Cementbouw* [2007] ECLI:EU:C:2007:255 para. 31.

[38] EUMR, recital 8. *See also*: Katalin J Cseres, 'Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities' (2023) 14 Journal of European Competition Law & Practice 410 <https://doi.org/10.1093/jeclap/lpad044>.

[39] EUMR, arts 1 and 8; Sven Völcker, 'Back to the Future: Merger Review Outside the Merger Regulation' (Social Science Research Network, 3 December 2023) <https://doi.org/10.2139/ssrn.4657311> accessed 18 February 2026.

[40] ibid.

[41] *See*: EUMR, art. 1(2-3).

[42] *Cf.* International Competition Network, 'Recommended Practices for Merger Notification and Review Procedures' (ICN, 2018) https://www.internationalcompetitionnetwork.org/portfolio/merger-notification-procedures-recommended-practices/ accessed 17 February 2026 p. 5.

concentration must notify the Commission directly pursuant to Article 4 EUMR. If they are not met, the concentration in principle falls outside the scope of the EUMR and is instead subject to national merger control.[43] The EU thresholds are supplemented by four referral mechanisms in Articles 4(4), 4(5), 9, and 22 EUMR, which enable reallocation of competence in defined circumstances.[44] The most important of these for now is Article 22, the so-called *Dutch clause*.

2.2 The evolution and function of Article 22

Article 22 provides that one or more Member States may request the Commission to examine a concentration without an EU dimension when it affects trade between Member States and threatens to significantly affect competition.[45] This is a derogation from the rule that only mergers with an EU dimension are examined by the Commission. This is underlined by art. 1 EUMR: "*without prejudice to […] Article 22, this Regulation shall apply to all concentrations with a [EU] dimension as defined in this article*."

Four cumulative conditions must be satisfied for a referral under Article 22(1) of the EUMR.[46] First, the request must be made by one or more Member States. Second, the transaction in question must fulfil the definition of a concentration set out in Article 3 EUMR and must lack an EU dimension as defined in art. 1 EUMR.[47] Third, it must affect trade between Member States.[48] Fourth, the concentration must threaten to significantly affect competition within the territory of the Member State(s) that made the request.[49] The last two conditions serve as a substantive filter, ensuring that referrals pursuant to Article 22 are anchored in an interest to preserve effective competition.[50] When a concentration lacking an EU dimension is assessed by the Commission, it does not acquire an EU dimension; rather, the referral permits the Commission to examine it on behalf of the requesting Member State(s).[51] The Commission may also invite a Member State to refer a concentration to it,

[43] Richard Whish and David Bailey, *Competition Law* (Eleventh edition, Oxford University Press 2024) <https://doi.org/10.1093/he/9780198906032.001.0001> p. 935.

[44] Cseres (n 38), p. 413; The exceptions are found in the two-thirds rule found in art 1(2-3) and in the referrals to and from member states: arts. 9 and 22.

[45] EUMR, art. 22.

[46] *Illumina/Grail* (n 3) para. 121.

[47] Art. 3 EUMR defines a concentration as a change in control on a lasting basis caused by a merger, an acquisition, or by the creation of an autonomous joint venture.

[48] According to Whish and Bailey, The Commission's *Notice on the notion of effect on trade concept contained in Articles [101] and [102] of the Treaty* OJ (2004) C 101/81 may provide guidance on the application of this expression. *See*: Whish and Bailey (n 43) p. 952.

[49] The third and fourth conditions are explained in the Case Referral Notice, para. 42-44: "*a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of prima facie evidence of such a possible significant adverse impact but would be without prejudice to the outcome of a full investigation.*"

[50] Cseres (n 38) pp. 410-411.

[51] ibid.

where it considers that it fulfils the criteria for referral.[52] The scope of Article 22 is defined by its four cumulative conditions, but also by its legislative history and the different purposes it has been used for.[53]

When Article 22 [then Article 22(3)] was introduced in Regulation 4064/89,[54] the rationale was to allow Member States lacking national merger control regimes to address competition concerns caused by concentrations, by letting the Commission "step into its shoes."[55] This is generally understood to be the provision's original purpose, for which it was named the Dutch clause.[56] Since then, as nearly all Member States have adopted regimes to examine mergers, the function attributed to the provision has evolved.[57] It now also forms part of a mechanism allowing the NCAs and Commission to allocate the merger to the authority best positioned to examine it, forming a second, later-understood function.[58] This second function allows the best-placed authority to examine the merger in compliance with the principle of subsidiarity,[59] and also reduces multiple filings and supports administrative efficiency by ensuring that concentrations need not be notified in every single Member State – a one-stop shop.[60] From 2020 onwards, the Commission sought to use Article 22 more flexibly.[61] However, this approach was later rejected by the Court of Justice.[62]

Article 22 has long been a contested provision because it concerns the allocation of authority between Member States and the Union in merger control.[63] The Treaties contain no rules on merger control, and it took more than twenty years of negotiation between 1966 and 1989 for the Member States and the

[52] EUMR, art. 22(5).

[53] Cseres (n 38) p. 411; See also *Illumina/Grail* (n 3) para. 141.

[54] Originally the provision was contained in Article 22(3) of Regulation 4064/89.

[55] Green Paper on the Review of Council Regulation (EEC) No 4064/89 2001 [COM(2001) 745 final] point 84.

[56] It is also the namesake of the provision, as the Netherlands lacked its own merger control regime. *See*: Cseres (n 38).

[57] Luxembourg is the only member state without a national merger control regime. A legislative proposal is currently pending before the Luxembourg parliament: Draft Law No. 8296 (*Dossier parliamentaire 8296*). *See also*: Green Paper on the Review of Council Regulation (EEC) No 4064/89 2001 [COM(2001) 745 final] p. 85.

[58] *See*: *Illumina/Grail* (n 3) para. 193; *See also*: EUMR, recital 11 as interpreted by the Court of Justice in *Illumina/Grail* (n 3) at paras. 186-192.

[59] *Cf.* recitals 11-12 EUMR.

[60] Aurelien Portuese, 'Making Sense of EU Merger Control: The Need for Limiting Principles' (2023) *CPI Antitrust Chronicle* 13 p. 4.

[61] *See*: Margrethe Vestager, 'The Future of EU Merger Control' (2020). The strategy was formulated in the now-withdrawn 2021 Guidance: European Commission, 'Guidance on the Application of the Referral Mechanism Set out in Article 22 of the Merger Regulation to Certain Categories of Cases' (n 2).

[62] *Illumina/Grail* (n 3) para. 217.

[63] Cseres (n 38) p. 410; Nora Lampecco, 'Article 22 EUMR Referral in the Absence of National Competition Authorities' Jurisdiction: Joined Cases C-611/22 P and C-625/22 P Illumina' (2025) 16 Journal of European Competition Law & Practice <https://doi.org/10.1093/jeclap/lpae077> p. 298.

Commission to reach agreement on the first Merger Regulation.[64] Morten Broberg has characterised this process as one of "*protracted trench warfare*."[65] At the heart of this warfare was the question of whether enforcement powers should be delegated to the Commission, which was already perceived to be powerful.[66] Successive proposals from 1973 onwards all failed because of the same recurring disagreements. France, Italy and the United Kingdom resisted the proposals, because they were perceived as a threat to national industrial policy. Germany supported the regime but was reluctant to cede authority to the Commission.[67] Smaller Member States like the Benelux countries, which lacked domestic merger control, wanted lower thresholds.[68] Regulation 4064/89 was therefore a compromise which contained high quantitative turnover thresholds and also referral mechanisms permitting reallocation of cases.[69] Article 22(3) in Regulation 4064/89 was a product of those negotiations which allowed Member States lacking national merger control regimes, most prominently the Netherlands, to draw on Commission expertise.[70] In practice, the provision has seen modest use, as most Member States have adopted their own merger control regimes. As of June 2026, only 53 referral requests have been made under Article 22 since 1990, of which 48 were accepted by the Commission.[71]

2.3 Merger control in dynamic markets

From the late 2010s onwards, it has been recognised that traditional competition tools are under strain from digital and pharmaceutical sectors.[72] Three landmark reports from 2019 diagnosed that existing frameworks struggle to address the challenges posed by market concentration in dynamic sectors, caused *inter alia* by network effects, data-driven advantages, and the rise of

[64] Cseres (n 38) p. 410; 'Commission Staff Working Paper Accompanying the Communication from the Commission to the Council - Report on the Functioning of Regulation No 139/2004 COM(2009) 281 Final' p. 14.

[65] Morten Broberg, 'Reforming the Merger Control Regulation's Article 22 Referral Mechanism: On the Member States' Access to Refer Mergers to the European Commission' (2012) 33 European Competition Law Review, 215.

[66] ibid.

[67] *See for example*: Article 9 EUMR is sometimes referred to as the German clause, and acts as the inverse of the Dutch clause in reallocating jurisdiction to an NCA which is better placed to examine a concentration.

[68] Cseres (n 38) p. 412.

[69] Green Paper on the Review of Council Regulation (EEC) No 4064/89 (n 55) paras. 3-4.

[70] ibid. para. 48.

[71] As of May 2026, there have been 53 requests for referral pursuant to Article 22 (and 22(3) of the old Merger Regulation) of which 48 were successful (with five refusals pursuant to Article 22(3)). *See*: European Commission, 'Statistics on Mergers Cases' (*Competition Policy*, 1 April 2026) <https://competition-policy.ec.europa.eu/mergers/statistics_en> accessed 24 May 2026.

[72] *See*: OECD Handbook on Competition Policy in the Digital Age (2022), www oecd org/en/publications/2022/02/oecdhandbook-on-competition-policy-in-the-digital-age_50b6e951 html accessed 24 May 2026.

"gatekeeper" platforms. The reports are commonly known as the Stigler Report,[73] the Furman Report,[74] and the Vestager (Crémer) Report.[75]

As a response to the increased dynamism of competition, the Commission has devised several tools, among them the Digital Markets Act ("DMA") for the largest digital companies (gatekeepers).[76] The DMA addresses the conduct of the gatekeepers generally and also imposes on them a duty to notify concentrations.[77] The Court of Justice's ruling in *Towercast* has also caused a resurgence of *ex post* merger control against the abusive practices of dominant undertakings.[78] Both of these developments, while important, are intentionally excluded from further commentary in order to focus on the use of Article 22 to address concentrations where competitive significance lies in future potential rather than current revenue.[79]

The framing under which the Commission's renewed interest in Article 22 was justified emerged from the academic literature alongside the policy reports. Cunningham, Ederer and Ma's 2018 study of pharmaceutical acquisitions coined the term '*killer acquisition*'.[80] The term describes the situation where an incumbent acquires a nascent competitor specifically in order to discontinue its innovation projects and to remove the competitive threat it poses.[81] These transactions take place disproportionately just below the merger control thresholds.[82] Although Cunningham et al.'s study concerns the pharmaceutical sector, it is widely used to describe sub-threshold mergers in dynamic markets, with Tzanaki describing it as a "*schlager hit*" of competition law.[83] The Commission also invoked the concern in its 2021 Evaluation

[73] Stigler Committee on Digital Platforms, 'Stigler Committee on Digital Platforms: Final Report (Stigler Report)' (University of Chicago Booth School of Business 2019) <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

[74] Digital Competition Expert Panel, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (HM Treasury 2019) CP 102 <https://assets.publishing.service.gov.uk/media/5c88f02840f0b633f5d3a82e/unlocking_digital_competition_furman_review_web.pdf>.

[75] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (European Commission 2019) <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=51725>.

[76] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ L 265.

[77] DMA, Article 14.

[78] C-449/21 *Towercast* (n 6).

[79] *See*: Vestager, 'The Future of EU Merger Control' (n 61).

[80] Cunningham, Ederer and Ma (n 1) p. 34.

[81] ibid. p. 1.

[82] ibid. p. 1.

[83] Anna Tzanaki, 'Dynamism and Politics in EU Merger Control: The Perils and Promise of a Killer Acquisitions Solution Through a Law & Economics Lens' (2023) 87 *Antitrust Law Journal* 173 <https://dx.doi.org/10.2139/ssrn.4574948> p. 178.

Results, and even mentioned the term explicitly in a 2024 report by the Directorate-General for Competition on pharmaceutical markets.[84]

2.4 Enforcement gap

The EUMR's jurisdictional system rests primarily on the quantitative criteria set out in Article 1 EUMR,[85] which provides undertakings considering mergers and acquisitions with clear, predictable bright-line rules.[86] This brings its own disadvantages. The threshold system struggles to capture acquisitions of firms that have not yet generated a large turnover, as an acquisition will tend to take place below the thresholds for merger control.[87] The system also requires that *at least two* of the transaction parties concerned meet the relevant turnover thresholds.[88] Consequently, acquisitions of small but strategically important targets may escape scrutiny entirely.[89] The limitations are inherent to virtually any threshold-based system, but they are compounded by the general constraints of *ex ante* merger control, which must operate within strict procedural time limits and faces difficulties in establishing reliable counterfactuals about future market dynamics.[90]

One of the clearest empirical articulations of the enforcement gap came from the aforementioned study by Cunningham, Ederer and Ma, which identified a disproportionate number of acquisitions clustered just below the thresholds for merger control, frequently targeting innovative companies in the pharmaceutical and digital sectors, whose competitive significance was not reflected in their current turnover.[91] Their findings are suggestive of strategic behaviour. Incumbents may time or structure acquisitions specifically to remain below review thresholds. The *Illumina/Grail* transaction examined in section 2.5 illustrates this same phenomenon at the European level.

Empirical support for actual harm to effective competition from such acquisitions is perhaps not as robust as the policy debate might suggest, however.

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[84] 'Mergers: Commission Announces Evaluation Results and Follow-up Measures on Jurisdictional and Procedural Aspects of EU Merger Control' (European Commission 2021) Text IP/21/1384 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384> accessed 27 March 2026; 'Ex-post evaluation, EU competition enforcement and acquisitions of innovative competitors in the pharma sector leading to the discontinuation of overlapping drug research and development projects : final report and appendices.' (European Commission & Lear 2024) https://data.europa.eu/doi/10.2763/3714497 accessed 24 May 2026.

[85] The exceptions to this rule are the three exceptions outlined in Section 2.1.

[86] *Cf.* ICN Recommended Practices for Merger Notification and Review Procedures (n 42) p. 5.

[87] Cunningham, Ederer and Ma (n 1) pp. 43-44.

[88] Tzanaki (n 83) p. 195.

[89] ibid. p. 193.

[90] Pierre Régibeau, 'Killer Acquisitions? Evidence and Potential Theories of Harm' *Research Handbook on the Law and Economics of Competition Enforcement* (Edward Elgar Publishing 2022) <https://www.elgaronline.com/edcollchap/book/9781789903799/book-part-9781789903799-22.xml> accessed 27 March 2026 pp. 311–312, 314.

[91] Cunningham, Ederer and Ma (n 1) p. 43.

An empirical study from 2024 found limited evidence that sub-threshold acquisitions systematically harm effective competition.[92] A more recent study into innovation effects in the pharmaceutical industry has found, by contrast, that certain mergers can lead to potentially significant effects on consumer welfare.[93] In general, the studies reflect the inherent difficulty of identifying counterfactuals in dynamic markets.[94] The empirical debate surrounding killer acquisitions and enforcement gaps will not be pursued further in this study, as it chooses to focus purely on the legal responses. Notwithstanding the empirical debate, the Commission identified the *gap* as a policy priority and turned to Article 22 as one of the instruments to address it.[95]

2.5 The Commission's policy shift and the 2021 Guidance

The Commission's response to the perceived enforcement gap was a shift in enforcement policy. From 2020 onwards, the Commission argued that Article 22 could be used to capture certain below-threshold transactions, particularly in digital and pharmaceutical markets, where turnover was considered a poor gauge of competitive significance.[96] In a speech in 2020, Commissioner Vestager announced that the Commission would no longer discourage referrals from Member States that lacked jurisdiction under national law over the concentration.[97] This new approach was subsequently formalised in the Commission's 2021 Guidance.[98] The idea was that Article 22 could function as a flexible corrective mechanism for transactions that fell outside both EU and national thresholds but nonetheless appeared capable of harming competition.[99] Three concentrations were assessed by the Commission under this policy: *Qualcomm/Autotalks*,[100] *EEX/Nasdaq Power*,[101] and *Illumina/Grail*.[102] The Commission's policy shift placed considerable pressure on the jurisdictional architecture of the EUMR, especially with regard to the principles of

[92] Marc Ivaldi, Nicolas Petit and Selçukhan Unekbas, 'Killer Acquisitions: Evidence from European Merger Cases' (2024) 86 Antitrust Law Journal 647.

[93] Carmine Ornaghi and Lorenzo Cassi, 'Acquisitions, Inventors' Turnover, and Innovation: Evidence from the Pharmaceutical Industry' (2026) 184 European Economic Review 105263 <https://doi.org/10.1016/j.euroecorev.2026.105263>.

[94] Régibeau (n 90).

[95] Vestager, 'The Future of EU Merger Control' (n 61).

[96] Cseres (n 38).

[97] Vestager, 'The Future of EU Merger Control' (n 61).

[98] Communication from the Commission Guidance on the Application of the Referral Mechanism Set out in Article 22 of the Merger Regulation to Certain Categories of Cases 2021/C 113/01 p. 11.

[99] European Commission, 'Guidance on the Application of the Referral Mechanism Set out in Article 22 of the Merger Regulation to Certain Categories of Cases' (n 2); Margrethe Vestager, 'Digital Mergers: Moving with the Curve' (2024) <https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1243> accessed 7 April 2026.

[100] M.11212 *Qualcomm/Autotalks* (Commission Decision of 17 August 2023) C(2023) 5709 final.

[101] M.11241 *EEX/Nasdaq Power* (Commission Decision of 26 June 2024) C(2024) 3231.

[102] M.10188 *Illumina/Grail*. (Commission Decision of 19 April 2021) C(2022) 248.

institutional balance, subsidiarity, and legal certainty. It ultimately became the central issue in *Illumina/Grail*.[103]

2.6 The *Illumina/Grail* judgment

Illumina/Grail concerned the acquisition of GRAIL by Illumina. The concentration did not exceed relevant merger thresholds and was not notified in any EU member state. Following the Commission's policy of encouraging referral of concentrations despite a lack of national jurisdiction, the Commission invited the Member States and EEA countries to refer the concentration. Finally, on 9 March 2021, the transaction was referred by the French Competition Authority, later being joined by other NCAs. In April 2021, Illumina brought an action for annulment against the Commission's acceptance of the referral, pleading a lack of competence. The General Court upheld the Commission's decision, but the General Court's judgment was finally appealed in September 2022. In the *Illumina/Grail* appeal, the Court of Justice (Grand Chamber) followed Advocate General (AG) Emiliou in finding that the General Court's interpretation – which endorsed the Commission's view – was untenable.[104] The Court held that an NCA cannot refer a concentration to the Commission under Article 22(1) EUMR if it is not legally entitled to examine that concentration under national law.[105] The judgment also rejected the broader reading of Article 22 advanced by the Commission from 2020 onwards, as it could no longer be seen as a last-resort safety net when neither national law nor European law was applicable to the concentration in question.[106]

To arrive at this conclusion, the CJEU relied on a comprehensive interpretative analysis, using literal (paras. 121-128), historical (129-150), contextual (151-185), and teleological (186-219) interpretation. These interpretative methods were not treated equally in terms of weight. While a literal reading can rely on the wording "any concentration" found in Article 22 to suggest that the provision could apply to any concentration whatsoever, neither the General Court nor the Court of Justice found this to be conclusive, choosing instead to rely on further interpretative methods for clarification.[107] Normally, the Court will not depart from wording that is genuinely clear, unless further

[103] The policy shift also raised procedural questions, especially as to when the referral period under Article 22 begins to run where no mandatory notification is required. Those questions become particularly important in the context of national call-in powers and are examined in section 4.2.

[104] Opinion of AG Emiliou in Joined Cases C-611/22 P and C-625/22 P *Illumina/Grail* para. 234.

[105] *Illumina/Grail* (n 3) para. 217.

[106] This was the express purpose outlined in Margrethe Vestager's speech at the 24th Annual Conference of the International Bar Association. *See*: Vestager, 'The Future of EU Merger Control' (n 61).

[107] *Illumina/Grail* (n 3) para. 127.

interpretative methods are required.[108] Both Courts concurred on this point. A historical interpretation of the provision also proved important. By examining the *travaux préparatoires* for Regulations 4064/89, 1310/97, and 139/2004, the Court of Justice concluded that none of those documents support the view that Article 22 was intended to serve as a corrective mechanism for enforcement gaps in the turnover thresholds.[109] Article 22 was specifically introduced for the Member States lacking domestic merger control regimes.[110] The Court found historical support for the original Dutch clause, and for the later reallocation function created in Regulation 1310/97, but it did not find support for the Commission's "corrective mechanism" interpretation from 2021.[111] By its systematic analysis of in particular EUMR recital 15's reference to Member States "also competent" to review a concentration, the Court of Justice found it hard to reconcile the Commission's interpretation with the overall EUMR system.[112] The following teleological analysis then identified three objectives that the EUMR seeks to balance: the establishment of an effective system for controlling concentrations liable to harm competition; a clear allocation of competences between the Commission and the NCAs; and an effective and predictable *ex ante* control framework.[113] The Court of Justice held that the Commission's expansive interpretation of Article 22 disturbed this balance by prioritising the first objective at the expense of the second and third objectives.[114] As stated by the Court, that interpretation "*undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration*."[115] The point of divergence between the General Court and the Court of Justice lies especially in the relative weight granted to the principle of legal certainty in the systematic and teleological interpretations.[116] This three-objective balance and the values of legal certainty and foreseeability that underpin it form the foundation of the framework developed in section 5.

The reasoning of the Court of Justice on effectiveness, foreseeability, and legal certainty applies in the specific case concerned, but it also reads as a substantive judgment about the EU merger control system as envisioned by the EU legislature.[117] A threshold-based system reflects a legislative balance

[108] C-181/20 *VYSOČINA WIND* para. 39; C-283/81 *CILFIT* para. 20; and C-561/19 *Consorzio Italian Management* para. 46.

[109] *Illumina/Grail* (n 3) paras. 146-150.

[110] Green Paper on the Review of Council Regulation (EEC) No 4064/89 (n 55) p. 84.

[111] *Illumina/Grail* (n 3) paras. 148–150.

[112] ibid. paras. 197–198.

[113] ibid. para. 203.

[114] ibid. para. 207.

[115] ibid. para. 206.

[116] Pablo Ibáñez Colomo, 'Judicial Review in EU Merger Control: Towards Deference on Issues of Law?' (2025) 4 European Law Open 441 <https://doi.org/10.1017/elo.2025.10016>.

[117] *Illumina/Grail* paras. 203, 205-210.

between effective enforcement and legal certainty.[118] The Court of Justice suggests that the EU legislature accepted that certain concentrations would escape scrutiny under a threshold-based system in order to preserve predictability and legal certainty.[119] Those values are treated as inherent to European merger control, in the sense that merging parties must be provided with a sufficient degree of certainty as to whether a transaction will be scrutinised and, where relevant, by which authority.[120] In essence, systematically privileging effective competition control over clear competence allocation and predictable *ex ante* control disturbs the balance intended by the legislature.[121] From this one may reasonably infer that the constraints the Court placed on the use of Article 22 are also relevant to future invocations of the provision, including where national jurisdiction is established through call-in powers rather than mandatory notification thresholds.

2.7 The scope of Article 22 post-*Illumina/Grail*

As noted by Claudel, the story did not necessarily end with *Illumina/Grail.*[122] This was made evident in practice by the Commission's acceptance of the call-in-based referral in *Nvidia/Run:AI*.[123] Whilst *Illumina/Grail* confirmed to businesses and legal practitioners that the strategy pursued by the Commission in the 2021 Guidance should be discontinued, the Court of Justice had not answered the question of how Article 22 applies where an NCA refers a case on the basis of jurisdiction acquired through a national call-in power.[124] In this case, the Commission's competence derives from national jurisdiction, but of a different kind than through ordinary thresholds.

Following *Illumina/Grail*, the Commission withdrew the 2021 Guidance but did not abandon its quest to use Article 22 to examine below-threshold mergers.[125] Instead, the Commission turned to encouraging referrals from NCAs with jurisdiction under national rules. Then Commissioner for Competition Vestager stated this explicitly on the day of the judgment in *Illumina/Grail*.[126] She also pointed to Member States that had already adopted national call-in

[118] *See*: Article 1 *and* recitals 6, 8 and 11 EUMR; *See also*: paras. 7 and 11 of the Case Referral Notice.

[119] *Illumina/Grail* (n 3). para. 148

[120] Opinion of AG Emiliou in *Illumina/Grail* (n 104) para. 194 and ibid. para. 206

[121] ibid. paras. 207 and 218.

[122] Emmanuelle Claudel, 'Pas de requiem pour l'article 22' [2025] Revue Concurrences Art. N° 128787, www.concurrences.com

[123] *See:* 'M.11766 - *Nvidia/Run:AI*' (Commission Decision of 20 December 2024) C/2024/7203.

[124] *Illumina/Grail* (n 3) paras. 217 and 222

[125] *See*: Communication from the Commission Concerning the Withdrawal of Act 2021/C 113/01 (C/2024/7190); Margrethe Vestager, 'Statement by Executive Vice-President Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions' <https://ec.europa.eu/commission/presscorner/detail/cs/statement_24_4525> accessed 2 February 2026.

[126] Vestager, 'Statement by Executive Vice-President Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions' (n 125).

powers.[127] Her successor, Executive VP Teresa Ribera, has likewise acknowledged that the Commission will continue to accept referrals from Member States exercising their call-in powers.[128]

There have been two Article 22 referrals since *Illumina/Grail*, once successfully in *Brasserie Nationale/Boissons Heintz*[129] from the Luxembourg NCA, and once unsuccessfully (see below). In *Brasserie Nationale/Boissons Heintz*, referred on 22 March 2024, the Commission affirmed that the "Dutch clause" function is alive and well in the case of the Luxembourg NCA (the only NCA without a domestic merger control regime).[130] The General Court upheld the Commission's view in *Brasserie Nationale*, but it is currently subject to an appeal on other points of law.[131]

Vanderlande/Siemens Logistics is the latest concentration to be unsuccessfully referred. The transaction was first notified to the German *Bundeskartellamt* in 2024, but was later restructured, leading to Germany no longer having jurisdiction. Two years later, it was notified in Spain and Portugal. The Portuguese NCA requested referral to the Commission pursuant to Article 22, and the request was joined by the Spanish and Italian NCAs. The Commission denied their request for referral on 13 May 2026, stating that a referral would be "inappropriate".[132] According to the Commission, it would be inappropriate to review the concentration, as it has already been implemented for more than a year. Meanwhile, the Commission continues to consider that the NCAs are well-placed to review the transaction. This signals restraint on behalf of the Commission regarding *ex post* review of concentrations, which will become relevant in later sections. In deferring review to the NCAs, the Commission may signal that it holds itself to a higher "standard of temporality" than that of the NCAs. It could also be the case that the

[127] Vestager, 'Statement by Executive Vice-President Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions' (n 125).

[128] 'Answer given by Executive Vice-President Ribera on Behalf of the European Commission' https://www.europarl.europa.eu/doceo/document/E-10-2025-001387-ASW_EN.html accessed 24 May 2026.

[129] M.11485 *Brasserie Nationale/Boissons Heintz* [2025] European Commission C(2025) 5128 final.

[130] European Commission, 'Commission Approves Brasserie Nationale's Acquisition of Boissons Heintz, Subject to Conditions' (*European Commission Press Corner*, 17 July 2025) <https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1845> accessed 14 March 2026.

[131] T-289/24*, Brasserie Nationale and Munhowen SA v Commission* [2025] GCEU ECLI:EU:T:2025:655; *See also*: the case on appeal: C-572/25 P *Brasserie Nationale (Appeal Brought on 29 August 2025)* CJEU ECLI:EU:C:2025:863.

[132] European Commission, 'Commission Rejects Referral Request to Assess Acquisition of Siemens Logistics by Vanderlande' (*European Commission Press Corner*, 13 May 2026) <https://ec.europa.eu/commission/presscorner/detail/en/mex_26_1076> accessed 14 May 2026.

Commission regards Article 22 primarily as an *ex ante* tool and prefers to use the *Towercast* Article 102 TFEU framework for *ex post* review.[133]

[133] *Cf.* Statements of previous Director-General of DG COMP, Olivier Guersent: 'Guersent: EU Will Deploy Article 102 If ECJ Thwarts Article 22 Approach' (10 April 2024) <https://globalcompetitionreview.com/article/guersent-eu-will-deploy-article-102-if-ecj-thwarts-article-22-approach> accessed 14 May 2026.

3 Principles of merger control

The preamble to the EUMR and the Commission's 2005 Notice on Case Referral in respect of Concentrations ("Case Referral Notice") expressly state that Article 22 must operate consistently with fundamental EU law principles.[134] Accordingly, the guiding principles limit how the Commission may use the provision, including in relation to call-in-based referrals after *Illumina/Grail*.[135] The Commission's competence in merger control must therefore be assessed against primary EU law and the general principles of EU law, in keeping with the EU legal order's established hierarchy of norms.[136] The four principles addressed in detail are subsidiarity, institutional balance, legal certainty, and the one-stop shop. Together they constitute the main principles against which the Commission's strategy of accepting call-in-based referrals must be assessed.[137]

When Member States or their authorities exercise power under provisions of EU law, their action brings it within the same scrutinous review as the Court of Justice as applies to actions of the institutions.[138] As Article 22 referrals constitute an example of the implementation of EU law, they must therefore be subjected to the same scrutiny as the actions of the institutions. Furthermore, the action of an institution in accepting such a referral will also be subjected to this principled scrutiny.

General principles of EU law have a central role in the EU legal order, constituting a defined source of EU law alongside the primary and secondary law of the EU.[139] They are different from primary law in that they may be invoked as a standard for review of Union acts.[140] General principles of EU law are both general – operating at a level of abstraction distinguishing them from specific rules – and carry added weight.[141] The relevant principles are chosen because the Court of Justice makes reference to them and their role in merger

[134] EUMR, Recitals 6-14; Case Referral Notice p. 8.

[135] *See*: Christophe Carugati, 'How Member States and the Commission Use Call-in Power Mechanisms' [2025] Concurrences Review.

[136] Hettne and Otken Eriksson (n 13) pp. 41-44.

[137] The limitation to these four principles is made in an effort to effectively utilise the limited time and space available. It does not reflect an idea that these four principles are the only ones relevant in this context.

[138] C-5/88 *Wachauf* [1989] CJEU ECLI:EU:C:1989:321 para. 19; C-271/06 *Netto Supermarkt* [2008] CJEU ECLI:EU:C:2007:638 para. 18.

[139] Bruno De Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in Ulf Bernitz and others (eds), *General principles of European community law: reports from a conference in Malmö, 27 - 28 August 1999* (Kluwer Law Internat 2000), p. 143.

[140] ibid. p. 143.

[141] Takis Tridimas, 'The General Principles of Law in the European Union Legal Order' in Takis Tridimas (ed), *The General Principles of EU Law* (Oxford University Press 2006) <https://doi.org/10.1093/oso/9780199258062.003.0001> accessed 21 April 2026.

control in *Illumina/Grail*, as well as in other cases.[142] In his Opinion in *Illumina/Grail*, AG Emiliou identifies the principles of institutional balance, subsidiarity, legal certainty and territoriality.[143] Another legal scholar, Aurélien Portuese, argues that the referral rules are governed by three main principles: subsidiarity, legal certainty, and the one-stop shop.[144] All of the aforementioned principles will be presented and contextualised below.

Principles of EU law are different in nature, and many classifications have been made.[145] Subsidiarity and institutional balance can be conceived as institutional principles of EU law, regulating relations between institutions rather than serving the legal position of the individual.[146] Legal certainty, on the other hand, can be classified as an operative principle – one that may be invoked by individuals as a standard for the review of Community acts.[147] Finally, the one-stop shop is an outlier in that it is a functional principle specific to merger control, GDPR, and other regulatory activities.

Principles of EU law are used by the CJEU to fulfil its role as the final arbiter on the interpretation and application of EU law.[148] As they are largely derived from the national legal orders and other international legal instruments, the Court has generally distilled EU legal principles from a shared legal heritage.[149] They serve distinct functions in CJEU reasoning.[150] First, they operate as an interpretive tool, allowing the Court to interpret or even disapply secondary legislation in conformity with legal principles.[151] Second, they operate as a standard of review: in principle, all acts of the institutions may be reviewed by the CJEU.[152] Third, they may perform the function of a gap-filler, supplementing the rule where a provision itself appears insufficient to decide

[142] The Court of Justice refers to the principle of institutional balance at para. 215, legal certainty and foreseeability at 186, 192, 199, 203 and to one-stop shop at 192, 195, 199, 203 in *Illumina/Grail* (n 3). The Court does not refer explicitly to the principle of subsidiarity, but it is still included as it is crucial in understanding the operation of the other principles mentioned.

[143] Opinion of AG Emiliou in *Illumina/Grail* (n 104) para. 6.

[144] Portuese (n 60) p. 4.

[145] Several scholars have engaged in classification into distinct types of principles in EU law and explored the impact of such classification. This study does not attempt to give a satisfactory overview of the principles themselves but instead chooses to regard principles in light of their function in the present case. For a broader account of the classification and function of general principles in EU law, *see*: Xavier Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a Jus Commune Europaeum?* (Faculty of Law, Lund University 2020) pp. 12-16.

[146] De Witte (n 139) p. 143.

[147] Groussot (n 145) pp. 23-27; operative principles according to Groussot also encompass the principles of equality and proportionality.

[148] TEU, Article 19(1).

[149] Groussot (n 145) p. 2.

[150] Tridimas (n 141); Koen Lenaerts and Jose A Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 Common Market Law Review p. 1629.

[151] Lenaerts and Gutiérrez-Fons (n 150) p. 1629.

[152] C-294/83 *Les Verts* [1986] CJEU ECLI:EU:C:1986:166 para. 23.

a question.[153] In practice, as illustrated by *Illumina/Grail*, principles can operate as tools for teleological and contextual interpretation. In the case, legal certainty and institutional balance were invoked by the Court to show that the Commission's expansive reading of Article 22 could not be accepted because it would undermine the very values the EUMR's threshold system was designed to protect.[154] In the end, the Court's judgment was highly influenced by the weight assigned to legal certainty as it constituted the "central consideration in its analysis."[155] Each of the four principles and their specific relevance to Article 22 referrals based on national call-in powers will be addressed below.

3.1 Subsidiarity

The principle of subsidiarity, enshrined in Article 5 TEU and Protocol No 2, governs the exercise of Union powers and seeks to ensure that action is taken at the most appropriate level.[156] It does so by setting functional criteria to decide whether the EU or the Member States should act in a given field.[157] In the field of EU merger control, which forms part of the EU's exclusive competence in competition law,[158] subsidiarity does not operate in the same way as in areas of shared competence.[159] Its relevance is rather primarily as a structural principle governing the functioning of the EUMR.

This relevance is made clear by the EUMR itself. The preamble states first, that concentrations with cross-border implications should, as a general rule, be reviewed at Union level in compliance with subsidiarity;[160] second, that the referral rules must operate as an effective allocative mechanism in light of subsidiarity;[161] and third, that cases should be dealt with by the most appropriate authority in the light of subsidiarity.[162] This is also reinforced by recital 15 in EUMR, under which the Commission examines the concentration "on behalf of" the requesting Member State, which suggests a derivative nature of the EU's competence to examine concentrations upon referral.[163] In the EUMR, subsidiarity is the principle guiding the allocation and re-allocation of cases between NCAs and the Commission. The Commission's

[153] Tridimas (n 141) and Lenaerts and Gutiérrez-Fons (n 150) p. 1629.

[154] *Illumina/Grail* paras. 203, 206-210, 218; *See also* Section 2.5 regarding the Court's teleological and systematic interpretation in the case.

[155] Colomo (n 116).

[156] TEU, Article 5(1) and 5(3) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality 2012.

[157] Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) <https://doi.org/10.1093/oso/9780199533770.003.0009> accessed 12 April 2026.

[158] *Cf.* TFEU art. 3(1)b and Protocol No 2.

[159] Fabbrini (n 157).

[160] EUMR, Recital 8

[161] EUMR, Recital 11.

[162] EUMR, Recital 14.

[163] EUMR, Recital 15; *See also Illumina/Grail* (n 3) paras. 196-199.

interpretation of Article 22 violated the principle by creating a general gap-filling function allowing the Commission to assume jurisdiction whenever the turnover thresholds left a transaction outside review.[164]

The Commission's interpretation violated the principle of subsidiarity by transferring review to the EU where no national law establishing jurisdiction existed in the first place.[165] In *Illumina/Grail*, this created a "competence sandwich", in which the Commission could examine concentrations both above the EUMR thresholds and below national thresholds, with NCAs examining those in between.[166] The later adoption of national call-in powers may weaken that objection, since Commission review is no longer triggered in the complete absence of national jurisdiction. Subsidiarity remains relevant as Article 22 still concerns the allocation of cases between the Commission and the Member States, and that allocation is intertwined with the one-stop shop principle, which will be elaborated below. At present, the issue is no longer the absence of national competence, but whether broad and discretionary call-in powers remain compatible with coherent case allocation in light of the principle of subsidiarity. Compatibility may also be assessed with reference to other principles, such as proportionality and equal treatment.[167]

3.2 Institutional balance

The principle of institutional balance is a fundamental principle of EU law set out in art. 13(2) TEU concerning the allocation of power of EU institutions *vis-à-vis* other institutions.[168] The principle is closely tied with the principle of conferral, but conceptually distinguished from it.[169] Whereas conferral regards the distribution of competences in a static sense, preventing institutions from acting outside their powers, institutional balance instead takes aim at the inter-institutional negotiated balance.[170] It requires that institutions such as the Commission exercise only those powers that the legislature has conferred on it, specifically in an inter-institutional context: that it may not alter the jurisdictional settlement laid down in the legislative acts. The term

[164] *Illumina/Grail* (n 3) para. 200.

[165] Opinion of AG Emiliou in *Illumina/Grail* (n 104) paras. 200-201.

[166] Völcker (n 39). This argument was described by Sven Völcker as a 'jurisdictional sandwich': "[a system] in which the Commission is responsible for scrutinizing the very largest and the very smallest mergers, and the NCAs mergers of intermediate size – seems inherently odd". AG Emiliou referenced Völcker by evoking the oddity of a 'competence sandwich' at para. 199 in his Opinion in *Illumina/Grail* (n 104).

[167] *Cf.* Opinion of AG Emiliou in *Illumina/Grail* (n 104) paras. 224-226.

[168] Ben Smulders and Katharina Eisele, 'Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon' (2012) 31 Yearbook of European Law 112 <https://doi.org/10.1093/yel/yes014>.

[169] Sébastien Platon, 'The Principle of Institutional Balance: Rise, Eclipse and Revival of a General Principle of EU Constitutional Law' *Research Handbook on General Principles in EU Law* (Edward Elgar Publishing 2022) <https://www.elgaronline.com/edcollchap/edcoll/9781784712372/9781784712372.00015.xml> accessed 9 April 2026. p. 11

[170] *See*: ibid. at p. 11 referring to Brunessen Bertrand, 'Le Principe de l'équilibre Institutionnel : La Double Inconstance' [2016] Europe 5.

institutional balance was first alluded to in *Meroni*[171] and made explicit in *Chernobyl*: "*observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions.*"[172] It did not, however, enjoy a clear position as a principle until 1996.[173] According to Lenaerts and Verhoeven, the principle can be understood as a "check and balance" on the power of the institutions.[174] A broader principle of institutional balance is now reflected in the Lisbon Treaty's Article 13(2) TEU, which holds that an institution such as the Commission may not transgress against the balance of powers *vis-à-vis* the other institutions.[175] The principle also protects legal accountability by ensuring that discretionary powers remain anchored in the institutional framework laid down by the Treaties.[176] While *Meroni* concerned delegation in a narrow sense, the principle that each of the institutions must exercise its powers with due regard for the powers of the other institutions has since become the commonly accepted principle, as reflected *inter alia* in later cases *Commission v Council (Accession to the Geneva Act)* and *EPSU v Commission.*[177]

In *Illumina/Grail*, the principle of institutional balance played a key role. The EUMR's threshold system reflects a deliberate legislative balance between effective enforcement and legal certainty.[178] The Case Referral Notice acknowledges this, describing Article 22 as a corrective mechanism designed for a small number of cases.[179] Article 22 referrals are exceptional by design as shown. The Commission's own soft law therefore seems unsuitable as an instrument for expanding its competence beyond the threshold architecture. According to Sacha Prechal: "*as soon as the adoption of soft-law instruments amounts to an attempt to circumvent the normal procedures, to bypass the Council and the European parliament and to expand the Commission's own role, then there is obviously a problem of institutional balance.*"[180]

To be clear, the issue here is not conferral in the strict sense,[181] as Article 22 does confer jurisdiction in defined circumstances.[182] Moreover, a clear and

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[171] C-9/56 *Meroni* [1958] CJEU ECLI:EU:C:1958:7.

[172] C-70/88 *European Parliament v Council (Chernobyl)* [1990] para. 22.

[173] Bertrand (n 170).

[174] Koen Lenaerts and Amaryllis Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press 2002) <https://doi.org/10.1093/acprof:oso/9780199246083.003.0002> accessed 10 February 2026.

[175] Smulders and Eisele (n 168) p. 4.

[176] C-9/56 *Meroni* (n 171) para. 152.

[177] C-24/20 *Commission v Council (Accession to the Geneva Act)* [2022] para. 83; C-928/19 P *EPSU v Commission* [2021] CJEU EU:C:2021:656. para. 48.

[178] *See*: Section 2.2.

[179] Case Referral Notice p. 13.

[180] Sacha Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents' in Ton Heukels, Niels Blokker and Marcel Brus (eds), *The European Union after Amsterdam* (Kluwer Law International 1998) pp. 290-291.

[181] *Cf.* TEU, art. 5.

[182] *Cf.* The four cumulative conditions outlined in Section 2.2.

meaningful distinction between the principle of conferral and the principle of institutional balance is not easily made.[183] As this study concerns whether the provision may be used in a way that functionally alters the jurisdictional settlement chosen by the legislature, it will focus on institutional balance rather than conferral.[184] AG Emiliou reasoned at paragraph 220 of his Opinion that the Commission was using enforcement policy to achieve an extension of its jurisdiction, which would otherwise have required legislative amendment by the other institutions.[185] This concern is also reflected in the Court's judgment, which rejected the Commission's attempt to use Article 22 in a way that upsets the legislative balance of the EUMR.[186]

Another area where institutional balance may be violated is in the territorial application of Article 22. It has been stated by AG Emiliou that opening Article 22 to NCAs lacking jurisdiction (in the pre-*Illumina/Grail* context) "*creates significant potential for cases in which a conflict with the principle of territoriality of EU law might arise*."[187] These conflicts follow from unlimited territorial reach, which, taken to its extreme, could mean that any concentration would be assessable by the Commission regardless of effects on the EU market. It is mitigated, in principle, by the "qualified effects test", as given by *Intel* and *Gencor*.[188] The qualified effects test is also tied to the substantial conditions of Article 22(1): that concentrations must affect trade between Member States.[189]

Article 22 is a derogation from the EUMR's ordinary jurisdictional rules and must be interpreted restrictively per *Royal Philips*.[190] An expansion of the provision's reach requires legislative action through proper channels, as occurred when Article 22 evolved from its initial, rather limited function (Dutch clause), to its second, more structural function through the 1997 amendment.[191] Equivalent expansion through enforcement policy alone (*soft law*) is incompatible with the principle of institutional balance and the derogatory status of the provision.

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[183] Inge Govaere, 'To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' p. 4.

[184] *See* the General Court's judgment in T-227/21 *Illumina v Commission* [2022] paras. 153-154 for a thorough examination of the principle of conferral in this context. The General Court's findings in this regard were not questioned by the Court of Justice in the judgment on appeal.

[185] Opinion of AG Emiliou in *Illumina/Grail* (n 104) para. 220.

[186] *Illumina/Grail* (n 3) para. 207.

[187] Opinion of AG Emiliou in *Illumina/Grail* (n 104) para. 221.

[188] C-413/14 P *Intel v Commission* [2017] CJEU ECLI:EU:C:2017:632 paras. 40-47; T-102/96 *Gencor v Commission* [1999] CFI EU:T:1999:65 para. 243.

[189] *Cf.* n 50.

[190] Case Referral Notice p. 7; T-119/02 *Royal Philips* [2003] CJEU ECLI:EU:T:2003:101 para. 354.

[191] Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

3.3 Legal certainty and foreseeability

Legal certainty is a general principle of EU law that was first explicitly recognised by the Court of Justice in cases *SNUPAT*[192] and *Bosch.*[193] It requires that rules of law be clear, precise, and predictable in their effects, especially where they may have adverse consequences for individuals or undertakings.[194] It also requires that the rules enable those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons must be able to ascertain what their obligations are and take steps accordingly.[195] In the present context, the aspect of legal certainty that matters most is foreseeability: whether undertakings can determine, with reasonable confidence and reference to clear and precise rules, whether a transaction is liable to trigger merger review.[196]

Legal certainty has been described as an umbrella principle because it encompasses related ideas such as legitimate expectations, vested rights, and non-retroactivity.[197] In merger control, however, its central practical function is more specific. It allows undertakings to plan transactions against a framework of predictable jurisdictional rules and procedural deadlines.[198] Legal certainty in this setting refers to the existence of a clear legal basis for intervention but covers the whole wider "umbrella."[199] Foreseeability is the specific concern for how that legal basis is applied, meaning the clarity of the criteria, the breadth of administrative discretion, and importantly, the existence of a sufficient material territorial nexus.[200] Unforeseeable merger rules can have negative effects such as under-investment in mergers that would have been beneficial, and disappointed expectations through prohibition of mergers that have already been invested into.[201]

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[192] Joined Cases C-42/59 and 49/59 *SNUPAT* [1961] CJEU ECLI:EU:C:1961:5.

[193] C-13/61 *De Geus en Uitdenbogerd/Bosch* [1962] CJEU ECLI:EU:C:1962:11.

[194] *See*: Joined Cases C-72/10 and C-77/10 *Costa and Cifone* (CJEU) para. 74; *See also:* Aurelien Portuese, Orla Gough and Joseph Tanega, 'The Principle of Legal Certainty as a Principle of Economic Efficiency' (2017) 44 European Journal of Law and Economics 131 <https://doi.org/10.1007/s10657-014-9435-2> p. 132.

[195] C-156/21 *Hungary v Parliament and Council* [2022] CJEU ECLI:EU:C:2022:97 para. 223.

[196] C-345/06 *Heinrich* [2009] CJEU ECLI:EU:C:2009:140 para. 44; *Also*: C-201/08 *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* [2009] CJEU ECLI:EU:C:2009:539. para. 46.

[197] Groussot (n 145) pp. 49, 57.

[198] Felipe Irrarázabal Philippi, 'Merger Control Procedure' in *Competition Law Dictionary,* Concurrences Art. 12342, <https://www.concurrences.com/en/dictionary/merger-control-procedure> accessed 22 March 2026.

[199] Groussot (n 145) p. 49.

[200] Regarding the importance of a material nexus to the reviewing jurisdiction for legal certainty, *see*: 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42) pp. 3-5; and OECD, 'Recommendation of the Council on Merger Review' (2025) p. 7.

[201] Stefan Voigt and André Schmidt (eds), *Making European Merger Policy More Predictable* (Springer US 2005) <https://doi.org/10.1007/1-4020-3090-8> pp. 1-3.

These concerns are important because the EUMR is built around a threshold-based allocation of jurisdiction. Turnover thresholds give transaction parties an indication on whether their concentration should be examined at the EU level, at the national level, or not at all.[202] The EUMR's time constraints similarly provide increased legal certainty.[203] As the Court recognised in *Cementbouw*, the EUMR contains provisions intended, "*for reasons of legal certainty and in the interest of the undertakings concerned*" to limit the duration of Commission proceedings.[204] The Court linked those time limits to the legislature's intention to ensure that merger control is conducted within deadlines compatible both with sound administration and with the needs of the business world.[205] The threshold system and the procedural timetable of the EUMR jointly express the essential nature of predictability. That also explains the key importance of temporal rules. In *CK Telecoms*, the CJEU described speediness as paramount – preferring the approval of a harmful merger over the postponement of a decision.[206] As specifically affirmed in *Sumitomo*, long postponement of legal intervention erodes legal certainty.[207] Furthermore, the issue of different timetables grows larger when paired with the national element of Article 22 as illustrated in *Brasserie Nationale*.[208]

The case law of the Court of Justice has established that principles (e.g. legal certainty) bind not only the EU institutions but also Member States when they exercise powers conferred on them by EU law.[209] In the Article 22 context, referring Member States participate in a procedure that displaces the ordinary jurisdictional settlement of the EUMR. It is therefore crucial that such an exercise remains compatible with the principle of legal certainty.[210]

The practical importance of legally certain merger rules was illustrated clearly by AG Emiliou in *Illumina/Grail*. He demonstrated that, if the General Court's interpretation had been upheld, parties to a non-notifiable transaction would have faced uncertainty at several levels: which authorities could trigger

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[202] According to the International Competition Network: "*competition authorities, the business community, and capital markets are best served by clear, understandable and easily administrable bright-line tests*.": ICN Recommended Practices for Merger Notification and Review Procedures (n 42) p. 5.

[203] Voigt and Schmidt (n 201) p. 3.

[204] C-202/06 P *Cementbouw Handel & Industrie v Commission* [2008] CJEU ECLI:EU:C:2008:730 paras. 35-37.

[205] ibid. paras. 35-37.

[206] C-376/20 P *CK Telecoms* [2023] CJEU ECLI:EU:C:2023:561 para. 72; *See also* C-42/01 *Portugal v Commission* [2004] CJEU ECLI:EU:C:2004:379 paras. 51-53.

[207] T-22/02 *Sumitomo* [2005] GCEU ECLI:EU:T:2005:349 para. 82.

[208] T-289/24 *Brasserie Nationale* [2025] GCEU ECLI:EU:T:2025:655 paras. 63-66. It is the latest successful referral from a Member State to the Commission pursuant to Article 22 (as of June 2026) and illustrates clearly how debate around the referral mechanism persists post-*Illumina/Grail*. The case is currently subject to appeal before the Court of Justice. *See*: C-572/25 P *Brasserie Nationale*.

[209] C-5/88 *Wachauf* (n 138); C-271/06 *Netto Supermarkt* (n 138) para. 18; C-617/10 *Åkerberg Fransson* (n 12) para. 49.

[210] *Cf.* Illumina/Grail para. 206.

a referral, what information would be required, in which language it should be submitted, and whether the 15-working-day period would run in a reliable and predictable way or instead be extended through endless information requests.[211] He described the pre-referral phase as a legal "no man's land", in which neither the EUMR nor national procedural rules governed the parties' position.[212] His analysis, which was later essentially affirmed by the Court of Justice, illustrates in concrete terms how adequate legal certainty and foreseeability are an essential conditions for the effective operation of the referral mechanism in Article 22.[213]

3.4 One-stop shop

The one-stop shop principle or system (the terms are used interchangeably by the CJEU) ensures that concentrations reviewed by the Commission do not need to also be cleared by Member State NCAs, forming a "one-stop shop".[214] It is best understood as a structural feature of EU merger control.[215] That structure rests on a clear allocation of powers between national and Union authorities, and the need to ensure legal certainty.[216] The centralisation of merger review at Union level is a means to ensure that concentrations with cross-border effects in the single market are assessed in a single procedure by a single authority, to ensure coherence, consistency and predictability in enforcement across the internal market.[217] It benefits both undertakings and competition authorities by reducing multiple filings and inconsistent review.[218]

Before the adoption of the first Merger Regulation in 1989, large cross-border concentrations were subject to review by multiple national authorities applying divergent national laws. The costs imposed on undertakings were high and the fragmentation of enforcement was incompatible with an integrated internal market.[219] The Commission's exclusive competence over concentrations with an EU dimension was the EUMR's response to the problem posed by cross-border transactions reviewed in multiple jurisdictions. It is the concrete expression of the one-stop shop system and reflects the Regulation's aim of avoiding multiple filings.[220] Recital 8 frames the one-stop shop as a principle of EU merger control: concentrations with impacts beyond the

[211] Opinion of AG Emiliou in *Illumina/Grail* (n 104) paras. 207-213.

[212] ibid. para. 209.

[213] *Illumina/Grail* (n 3) para. 210.

[214] EUMR, Recital 8.

[215] *See for example*: Whish and Bailey (n 43) p. 935.

[216] C-170/02 P *Schlüsselverlag JS Moser* [2003] CJEU ECLI:EU:C:2003:501 para. 32; *Illumina/Grail* (n 3) para. 203.

[217] Whish and Bailey (n 43) pp. 947-949; *Cf.* EUMR, Recitals 8 and 11.

[218] Case Referral Notice p. 11-12; Portuese (n 60) p. 3.

[219] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, preamble. Green Paper on the Review of Council Regulation (EEC) No 4064/89 (n 55) pp. 72-97.

[220] EUMR, Recitals 8 and 12 and Article 21(2-3). *See also*: Case Referral Notice, para. 11.

national borders of any one Member State "should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system…"[221] The absence of a one-stop shop leads to inefficient multiple filings. This was one of the primary motivations for the reform in Regulation 1310/97, as well as the adoption of the EUMR in 2004.[222]

The one-stop shop system works in synergy with the thresholds, as the thresholds permit undertakings to self-assess whether they can draw on the benefits of one-stop merger control.[223] The importance of the one-stop shop in combination with clear thresholds was illustrated by AG Emiliou in *Illumina/Grail*. He observed that a party to a non-notifiable merger that wished to obtain certainty against a future referral would, under the Commission's expansive interpretation of Article 22, be compelled to file informal notifications with all thirty national competition authorities in the EEA.[224] This is an outcome fundamentally at odds with the one-stop shop's objective, or as Portuese put it: "*a mockery of the one-stop shop principle*".[225]

Article 22 is an exception to the one-stop shop principle.[226] The supranational threshold system cannot capture every concentration with significant cross-border effects, which warranted its creation.[227] As an exception to the one-stop shop, Article 22 must be read narrowly and applied in a manner that preserves the coherence and predictability the one-stop shop exists to guarantee.[228] The extent to which this one-stop shop can be departed from is illustrated by Article 22(3) third subparagraph of the EUMR, which provides that the Member State or States making the referral request "shall no longer apply their national competition law to the concentration" once the Commission assumes jurisdiction.[229] This provision extends the one-stop shop to Article 22: once the Commission examines a concentration on behalf of the requesting Member States, those Member States are precluded from conducting parallel national proceedings. Yet, as noted by Whish and Bailey, Article 22(3) does not preclude Member States that have *not* joined the referral from applying their own national laws to the same concentration.[230] This leads to a limitation of the principle in Article 22 cases.[231] It also shows that Article 22 preserves

[221] EUMR, Recital 8.

[222] Green Paper on the Review of Council Regulation (EEC) No. 4064/89 COM(2001) 745 final, para. 94, as cited in the Opinion of AG Emiliou in *Illumina/Grail* (n 104) at para. 181.

[223] *Cf.* 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42) p. 5.

[224] Opinion of AG Emiliou in *Illumina/Grail* (n 104) para. 225.

[225] Portuese (n 60) p. 9.

[226] Whish and Bailey (n 43) pp. 948-954.

[227] This is illustrated by the enforcement gap described in Section 2.3.

[228] See Section 3.1 concerning *Royal Philips* (n 190).

[229] EUMR, Article 22(3) third subparagraph.

[230] See cases *M7054 Cemex/Holcim Assets* [2014] European Commission C(2014) 6299 final. and *M5828 Procter & Gamble/Sara Lee Air Care* [2010] European Commission C(2010)4232. as cited in Whish and Bailey, *Competition Law* at p. 952.

[231] *See*: Whish and Bailey (n 43) pp. 952-953.

the one-stop shop as far as possible, but retains some shortcomings as parallel proceedings remain possible. As such, the one-stop shop, which was conceived as a response to the numerous disadvantages of multiple proceedings, may in practice only provide partial relief from those disadvantages.[232]

3.5 Synthesis

Principles guide the actions of the institutions and also the Member States when applying EU law.[233] Taken together, the principles outlined above support the view that Article 22 must conform to the principles underlying the EUMR by ensuring fast, predictable, and effective merger control in respect of the principle of subsidiarity.[234] Furthermore, it is to be understood as a derogation from the ordinary rules, and should as such be interpreted narrowly.

The Court of Justice stated as much in *Illumina/Grail*. In its teleological analysis, it treated the EUMR as pursuing three objectives at once: effective control of concentrations liable to harm competition, a clear allocation of competences, and a predictable framework of *ex ante* review.[235] It found that the Commission's interpretation of Article 22 upset that balance, by prioritising effective enforcement over other objectives.[236] As discussed in Section 2.5, that reasoning is the basis for the Court of Justice's curtailment of the Commission's expansive interpretation of Article 22.

Call-in-based referrals present the issue in a different form. Unlike in *Illumina/Grail*, the referring Member State does have national jurisdiction. But, against the background developed in Section 3, formal national competence may not be enough. If the call-in power is not foreseeable, legal certainty suffers. If it lacks a meaningful territorial connection, the risk of fragmentation increases. If it allows the Commission to reach transactions that the threshold system, by design, left outside EU jurisdiction, that will lead to an institutional imbalance. It seems ultimately that national jurisdiction is a necessary condition for a lawful Article 22 referral, but not necessarily a sufficient condition.[237]

The following sections address the question of which other conditions may exist. Building on the principles illustrated above, they examine whether national call-in powers are sufficiently foreseeable in their trigger conditions, sufficiently constrained in their exercise, and sufficiently connected to the referring Member State to support Commission jurisdiction under Article 22.

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[232] Portuese (n 60) p. 3.
[233] *Cf.* C-5/88 *Wachauf* (n 138).
[234] *See, for example*: C-202/06 P *Cementbouw* (n 204) paras. 35-37.
[235] *Illumina/Grail* para. 207.
[236] *Illumina/Grail* para. 218.
[237] *Cf. Illumina/Grail* para. 217.

4 National Call-in Powers

4.1 From *Illumina/Grail* to Call-in Powers

Jurisdiction refers to an NCA's mandate to examine a concentration. The ordinary route is through mandatory notification triggered by a quantitative threshold. All Member States except Luxembourg require notification on such a basis, following the ICN's best practices of objectively quantifiable criteria.[238] As outlined in Section 2.3, however, quantitative criteria cannot capture every concentration with detrimental effects on competition, which creates an enforcement gap. The Court of Justice's judgment in *Illumina/Grail* definitely halted the Commission's expanded Article 22 practice as expressed in the 2021 Guidance. It does not mean that the Commission cannot still use it to enforce mergers below the thresholds.[239] As the Court clearly stated, an NCA may only refer a concentration to the Commission if it is legally entitled to examine that concentration under its own merger law.[240] If national law were to permit examination of the concentrations that were previously out of reach for the NCA, then that could also mean that they would be referable to the Commission. This is where call-in powers enter the picture. Commissioner Vestager alluded to this on the day of the judgment, pointing to national provisions allowing NCAs to require notification below ordinary thresholds as the way forward.[241] Despite their recent surge in popularity, call-in powers are not a post-*Illumina/Grail* invention. For example, Sweden has had one since 1997.[242] The aftermath of *Illumina/Grail* has seen them become a widely adopted instrument of sub-threshold enforcement at the national level, and seemingly also at the EU level. Understanding their design is therefore a precondition for understanding the current scope of Article 22.

4.2 Defining a call-in power

Call-in powers work by giving an NCA the mandate to require notification[243] by the parties to a concentration in a situation where the concentration would usually not require notification.[244] Call-ins are therefore exceptional by

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[238] 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42). p. 6.

[239] *See*: Claudel (n 122).

[240] *Illumina/Grail* (n 3) para. 217.

[241] Vestager, 'Statement by Executive Vice-President Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions' (n 125); *See also*: Statements by Olivier Guersent in *Global Competition Review*: 'EU "Actively Encouraging" Member States to Adopt Call-in Powers, Guersent Says' (26 November 2024) <https://globalcompetitionreview.com/article/eu-actively-encouraging-member-states-adopt-call-in-powers-guersent-says> accessed 21 May 2026.

[242] It was added through amendment of the previous Swedish Competition Law (SFS 1997:221) and has existed since 1 July 1997.

[243] The terms *call in* and *request notification* are treated synonymously in this study.

[244] Call-in powers have emerged both prior to and following the Commission's 2021 policy shift in the wake of Illumina/Grail. Sweden and Lithuania, for example, introduced such

nature, in serving as a complementary regime where the ordinary regime (threshold) is seen as insufficient. Broadly, a call-in power contains the following elements (i) a quantitative threshold, (ii) a competition-based substantive test, (iii) the option for voluntary notification, and (iv) a defined timeframe within which the NCA must exercise its powers.[245] Even this quite broad definition has its exceptions.[246] The OECD's latest recommendations recognise that NCAs may adopt call-in powers, but urges NCAs to employ them with deference to legal certainty – especially in terms of territorial nexus requirements.[247]

A particular feature of most call-in powers is their nature as exceptions to the ordinary regime. As they enable NCAs to request notification where no notification would ordinarily be needed, they often occur at a later stage in the concentration than an ordinary mandatory notification. This is so because the NCA cannot request notification before the concentration has been *made known* to it.[248] For the call-in power to be effective arguably necessitates allowing NCAs to intervene later than in the case of mandatory notification, sometimes even *ex post* (after the transaction has been completed). Late intervention is a contentious element of most call-in powers, as it reduces the ability for parties to a transaction to manage or allocate risk. Before closing a transaction, the parties may allocate risk through contractual means.[249] These same possibilities do not exist post-closing, which means that the regulatory risk taken by merging undertakings increases. To mitigate some uncertainty, most NCAs allow for informal pre-concentration contacts or voluntary notification.[250] As a consequence of a wide territorial reach or low turnover

mechanisms in 1997 and 2004 respectively. They are not a recent innovation. Today, a substantial proportion of national competition authorities possess some form of call-in power; s*ee*: Darach Connolly and others, 'Predictably Uncertain: Managing Merger Control Call-in Risk at Local Level in the EU | Kluwer Competition Law Blog' <https://legalblogs.wolterskluwer.com/competition-blog/predictably-uncertain-managing-merger-control-call-in-risk-at-local-level-in-the-eu/> accessed 15 February 2026.

[245] Carugati (n 135).

[246] In Ireland for example, there is no quantitative condition for call-ins. In Cyprus, the Government itself may require notification. *See*: 'Reinforcing EU Merger Control against the Risks of Acquisitions by Big Tech' (*Bruegel | The Brussels-based economic think tank*, 13 November 2025) <https://www.bruegel.org/policy-brief/reinforcing-eu-merger-control-against-risks-acquisitions-big-tech> accessed 30 January 2026.

[247] OECD (n 200).

[248] EUMR, Article 22(1). Different jurisdictions interpret "made known" differently, causing some divergence. The General Court has recently interpreted the term and chose to side with the Commission and Luxembourg NCA in holding it should be interpreted restrictively, and in holding that NCAs are not under an obligation to seek information about a concentration once the NCA has received information about the concentration. T-289/24 *Brasserie Nationale* (n 131) paras. 72, 90-91. The judgment is the subject of an ongoing appeal. *See*: C-572/25 P *Brasserie Nationale (Appeal Brought on 29 August 2025)*.

[249] IV Coates, 'Allocating Risk Through Contract: Evidence from M&A and Policy Implications' (Social Science Research Network, 22 August 2012) <https://doi.org/10.2139/ssrn.2133343> accessed 23 May 2026. p. 1.

[250] Certain NCAs allow for voluntary notification, for example the Swedish: Konkurrensverket, 'Konkurrensverkets vägledning för anmälan och prövning av

requirements, such informal contacts may need to be had with a high number of NCAs.[251] This in effect leads to a result which is quite the opposite of a one-stop shop.

Most NCAs have also complemented their statutory powers with soft law instruments, indicating to the undertakings in their respective markets how the call-in power will be used. The instruments flesh out the procedural and substantive aspects of the use of the call-in powers, giving examples of when they can expect to be employed and when they will not. This serves to alleviate legal uncertainty for undertakings.

4.3 Call-in powers and Article 22: a gateway

The purpose of having a call-in power is to allow examination of concentrations that would not otherwise be scrutinised, as they do not reach the ordinary threshold.[252] Such powers may also provide the jurisdictional basis for referral to the Commission under Article 22.[253] The Commission does not itself acquire jurisdiction under that provision. Instead, the jurisdiction is derived from the referring Member State(s) when the Commission "steps into its shoes"[254] and examines the concentration "on their behalf".[255] When the Commission wears the shoes of the NCA, it also inherits the legal characteristics of the NCA's call-in power. The potential scope of review, both with regard to territoriality and temporality, thus depends fully on the scope of the call-in power. Since the competence to assess the concentration comes from the NCA, the Commission's examination will also depend on the administrative discretion available to the NCA. Recall also that Article 22 must operate consistently with the principles of EU law.[256]

4.4 Case study choices

Italy, Denmark and Sweden are selected because they represent three distinct models of sub-threshold merger control. Using these three case studies allows for an illustration of the range of national call-in designs without undertaking a full comparative-law analysis of all Member States with such powers. Italy represents an expansive model characterised by broad discretion. Denmark represents a more structured model combining low thresholds with defined

företagskoncentrationer [Swedish Competition Authority's Guidance on Notification and Review of Concentrations]' (Konkurrensverket 2025) p. 34.

[251] *Cf.* Opinion of AG Emiliou in *Illumina/Grail* (n 104) para. 201.

[252] See for example: The reasoning in the Swedish parliamentary proposal instituting the call-in power. 'Ändrade regler för anmälan av företagsförvärv enligt konkurrenslagen (Proposition 1996/97:82) [Changed rules for notification of concentrationsGovernment Bill 1996/97:82]' <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/proposition/andrade-regler-for-anmalan-av-foretagsforvarv_gk0382/> accessed 7 April 2026 pp. 9-11.

[253] It has only occurred once, in: M.11766 *Nvidia/Run:AI*.

[254] Green Paper on the Review of Council Regulation (EEC) No 4064/89 (n 55) p. 84.

[255] *Cf.* EUMR, Recital 15; Case Referral Notice, paras. 42-44.

[256] *See* Section 3.5.

constraints. Sweden is distinctive in that it is both the oldest model and one that has been used only sparingly in practice.

Each country section follows the same structure. It begins with the legal basis of the call-in power, then evaluates the regime in light of the legal principles discussed in section 3 and concludes with an interim assessment. This makes it possible to identify and assess differences in legal design across the selected jurisdictions in a "micro-comparison."[257] The case studies then provide the foundation for the doctrinal discussion in section 5.

4.5 Italy

4.5.1 Call-in power design

The Italian call-in power is set out in Article 16(1-bis) of the Italian Competition Law ("ICL"),[258] introduced by a 2022 reform.[259] It allows the Italian Competition Authority ("ICA")[260] to require notification of a below-threshold concentration where one national turnover threshold is met,[261] or where the parties' aggregate worldwide turnover exceeds EUR 5 billion, provided that the transaction gives rise to concrete risks to competition in the national market[262] and that no more than six months have elapsed since closing.[263] The three preceding conditions are cumulative.[264] Even though the call-in power was introduced to address killer acquisitions, it can be applied generally.[265] The ICA has published a three-page notice which provides some guidance on its application.[266] Voluntary notification is possible in Italy: parties to a sub-threshold concentration may notify the ICA in advance.[267] The ICA should

[257] *Cf.* Kamba (n 29) pp. 508-509.

[258] Law No. 287/1990.

[259] The 2022 reform was enacted in Law No. 118/2022 modifying Law No. 287/1990.

[260] Full name: Autorità Garante della Concorrenza e del Mercato.

[261] The ordinary notification thresholds require combined Italian turnover exceeding EUR 595 million and individual Italian turnover of at least two merging undertakings exceeding EUR 36 million. These thresholds are updated annually: 'AGCM — Soglie di fatturato' (ICL, Article 16).

[262] From Italian: *concreti rischi per la concorrenza nel mercato nazionale*.

[263] ICL, Article 16(1-bis). A notification request must be replied to within 30 days by the undertakings concerned; the request encompasses both the acquiror and the acquired entity.

[264] Autorità Garante della Concorrenza e del Mercato, 'Comunicazione relativa all'applicazione dell'articolo 16, comma 1-bis, della legge 10 ottobre 1990, n. 287 [Communication on the application of Article 16(1-bis) of Italian Law 287/1990]' (AGCM 2024) Provvedimento n. 31090. The Notice clarifies that the three cumulative conditions are: first, the temporal limit of six months; second, satisfaction of either the national threshold or the EUR 5 billion worldwide turnover limb; and third, the existence of concrete risks to competition.

[265] Cf. Section 2.3 on the enforcement gap; Saverio Valentino and Matteo Negrinotti, 'AGCM's New Clothes: Merger Control Call-in, Market Investigations, and Other Recent Reforms of Italian Competition Law (Italy)' [2025] Journal of European Competition Law & Practice lpaf034 <https://doi.org/10.1093/jeclap/lpaf034> pp. 2-3.

[266] Autorità Garante della Concorrenza e del Mercato (n 264).

[267] Autorità Garante della Concorrenza e del Mercato (n 264), section on voluntary communications.

then indicate within 60 days whether it intends to require notification.[268] That deadline is not binding on the ICA, however, and silence from the ICA may not be conclusive either.[269] This means that voluntary notification cannot provide full certainty for parties.

4.5.2 Assessment

The turnover thresholds are formally clear and self-assessable by the parties. Two aspects about the Italian call-in power stand out. First, the second of the three conditions, requiring "concrete risks to competition", appears quite open-ended.[270] The ICA guidance provides a long list of factors that are relevant to its assessment.[271] Also, the "safe harbours" illustrated in the ICA's guidance are expressly non-binding.[272] Secondly, the ICL has a very long window to examine concentrations, which has been criticised by practitioners.[273] It is best illustrated by the fact that the ICA may intervene up to 6 months post-closing, and that the total timeframe available for the examination of the transaction can reach 8 months.[274] The ICA has exercised its power on several occasions in the three and a half years since its creation.[275]

The territorial nexus requirement is a stand-out aspect of the Italian call-in power. As stated earlier, the ICA may require notification where only one of its national turnover requirements are fulfilled. The third turnover requirement (EUR 5B+) is not national, however, allowing the ICA to assert jurisdiction over a concentration anywhere in the world, with little or no present Italian turnover, provided a competitive risk in the national market through e.g. users, assets, R&D, or prospective entry into the Italian market.[276] This

[268] 60-day window from receipt of a complete voluntary communication. *See*: Autorità Garante della Concorrenza e del Mercato (n 264).

[269] Gian Luca Zampa, Alessandro Di Gio and Gabriele Maria Polito, 'The Italian Competition Authority Publishes Merger Guidance on Its Powers to Review Below-Threshold Mergers' [2022] e-Competitions Platforms, Art. 110496. The authors observe that the 60-day deadline is not binding on the ICA and that the Notice does not specify the consequences of non-response.

[270] Italian legal practitioners have criticised the ICA for using its call-in powers too discretionarily with regard to e.g. market definitions. *See*: Lembo F and Anglani P, 'Brief Update on the Below-Threshold Merger Review in Italy' (BonelliErede, Competition/Antitrust Practice 2025) Newsletter p. 3.

[271] The factors being: (i) the structure of the markets; (ii) the characteristics of the undertakings concerned; (iii) the nature of the activity carried out and its importance for consumers or other undertakings; (iv) the importance of innovative activity; and (v) the competitive constraint exercised irrespective of market share.

[272] Autorità Garante della Concorrenza e del Mercato (n 264).

[273] Lembo F and Anglani P, 'Brief Update on the Below-Threshold Merger Review in Italy' (BonelliErede, Competition/Antitrust Practice 2025) Newsletter p. 4.

[274] ibid.

[275] Elisabetta Freni notes ten call-in decisions since 2022. *See*: Elisabetta Freni, 'Le Concentrazioni Sotto Soglia Tra Realtà e Falsi Miti: Alcuni Spunti Dalla Prassi Applicativa' [Below Threshold Concentrations between Reality and False Myths: Some Lessons from Practice] [2025] *Rivista della Regolazione dei Mercati* 69.

[276] Autorità Garante della Concorrenza e del Mercato (n 264). The Notice indicates that a material nexus in Italy may be established through the presence of users or customers in Italy,

power was utilised in the case of *Nvidia/Run:AI*, where neither party had Italian turnover exceeding EUR 10 million.[277] The case was promptly referred to the Commission. Officials at the ICA have characterised this function of the power as an expression of loyal cooperation under Article 4(3) TEU.[278] It can be characterised as such, because the willingness of the ICA to refer gives the EU power not only to enforce sub-threshold concentrations, but also to enforce sub-threshold concentrations anywhere in the world (provided risks to competition in the Italian market).

4.6 Denmark

4.6.1 Call-in power design

With effect from 1 July 2024, Section 12(6) of the Danish Competition Law ("DCL")[279] empowers the Danish Competition and Consumer Authority ("DCCA")[280] to require notification below the ordinary turnover thresholds where the undertakings concerned have combined annual turnover in Denmark of at least DKK 50 million (approximately EUR 6.7 million) and there is a risk that the merger may significantly impede effective competition.[281] The mechanism is intended to be used exceptionally, two to three times per year. That is made clear by the DCCA's guidance, as well as the *travaux préparatoires*.[282] The DCCA's guidance spans 21 pages and contains information for transaction parties, as well as many well-explained hypothetical situations an undertaking may find itself in.[283] The DCCA may not call in a transaction later than three months *ex post*, meaning three months after the agreement has been concluded or a controlling interest been acquired.[284] The three month limit applies even if the DCCA had not been made aware, with extension to six months being possible if the parties acted in bad faith.[285] Once

assets or R&D activities located in Italy, or evidence of prospective market entry by the target into Italian markets.

[277] *See*: *M.11766 - Nvidia/Run:AI* (n 123).

[278] Loyal cooperation is achieved through enabling the Commission to examine concentrations it would otherwise not have been able to examine. Whether this argument holds up to legal scrutiny is addressed in Section 5. *See*: Valentino and Negrinotti (n 265) p. 4.

[279] Konkurrenceloven [Danish Competition Law] (Consolidated Act No 1150 of 3 November 2024).

[280] Danish: *Konkurrence- og Forbrugerstyrelsen.*

[281] Konkurrence- og Forbrugerstyrelsen, 'Vejledning om fusioner under de almindelige omsætningstærskler [Guidelines on mergers below the ordinary turnover thresholds]' (Konkurrence- og Forbrugerstyrelsen 2024) pp. 5-6.

[282] ibid. pp. 4, 9; Lovforslag nr. L 121 (2023-24), Forslag til lov om ændring af konkurrenceloven [Bill to amend the Danish Competition Law] p. 5.

[283] Konkurrence- og Forbrugerstyrelsen (n 281).

[284] Konkurrence- og Forbrugerstyrelsen (n 281) pp. 7-9.

[285] Examples include: When the DCCA has requested information from a party to enable it to assess whether the concentration may be required to be notified, but the undertaking has not responded to it within the prescribed deadline, or when a submission from the merger parties or a market participant is sent to the DCCA shortly before the expiry of the three-month deadline, and therefore the DCCA is not able to decide within the three-month

the DCCA is properly *made aware*, it has 15 days to require notification.[286] 15 working days is also the period within which the DCCA must decide whether to refer to the Commission pursuant to Article 22(1) EUMR.

Transaction parties cannot notify on a voluntary basis in Denmark. The DCCA's guidance does mention, however, that parties who are uncertain about whether the call-in power will be used can still proactively provide it with relevant information to "start the clock".[287] Furthermore, there is no standstill obligation for sub-threshold concentrations. If the DCCA does decide to require notification, then an obligation enters into force.[288] In the case of post-closing call-ins, it does not mean that the transaction is unwound automatically, but the DCCA may still order divestment if the concentration is prohibited.[289]

4.6.2 Assessment

The Danish model offers a comparatively higher degree of legal certainty than the Italian one. The quantitative threshold provides a clear and objective filtering function, deliberately set to exclude the vast majority (97%) of Danish undertakings while capturing strategically important transactions.[290] One source of uncertainty is the DCCA's own power to determine when it has received sufficient information to be made aware[291] but it is mitigated by the DCCA's guidance which shows undertakings what information is normally required.

Even though the Danish regime may appear more heavily restrained than the Italian one, it retains some discretionary elements. The call-in power is bound by a domestic turnover floor, albeit a low one, and it does have much stricter deadlines for intervention than the Italian call-in power.[292] However, the first two call-in decisions have shown that the DCCA can apply its powers beyond the standard killer acquisition scenarios mentioned in the *travaux*

deadline whether the merger is to be notified. *See*: Konkurrence- og Forbrugerstyrelsen (n 281) p. 5.

[286] DCL, Section 12(6); Konkurrence- og Forbrugerstyrelsen (n 281) pp. 9-10.

[287] Konkurrence- og Forbrugerstyrelsen (n 281) p. 8. See also Kromann Reumert, 'Regulatory Guide on Merger Control – Denmark' (2025) <https://kromannreumert.com/en/knowledge/articles/regulatory-guide-on-merger-control-denmark> accessed 18 February 2026. The lawyers at Kromann Reumert clarify that media coverage or a press release does not suffice to trigger the 15-working-day deadline, parties should instead provide sufficient information to the DCCA, *Cf. Brasserie Nationale* (n 131) para. 63.

[288] Konkurrence- og Forbrugerstyrelsen (n 281). p. 19.

[289] ibid.

[290] Lovforslag nr. L 121 (2023-24), Forslag til lov om ændring af konkurrenceloven [Bill to amend the Danish Competition Law] (n 282) p. 23.

[291] Danish: *Gjort bekendt med.*

[292] *See also*: The DCCA expressly states that any concentration fulfilling the criteria for simplified procedure will not be called in. Konkurrence- og Forbrugerstyrelsen (n 279) p. 9.

préparatoires.[293] Regarding the two first cases, *Uber/Dantaxi* concerned Uber's acquisition of the largest Danish taxi company Dantaxi.[294] *OneMed/Hardam* concerned a certain sector of pharmaceuticals.[295] Neither case involved a nascent or particularly innovative company.[296] This leads Cesko to the conclusion that the Danish regime all in all resembles the overall trend of expanding sub-threshold enforcement well.[297]

Domestic turnover is a firm requirement of the Danish regime, but only an aggregate turnover of EUR 6.7 million is required.[298] That means that although deploying a call-in requires a domestic footprint, that footprint may be relatively light. The design appears proportionate to the regime's stated objective of catching domestically significant concentrations that escape the ordinary thresholds, but many other concentrations could hypothetically also be caught due to the low turnover threshold for call-in. Denmark's call-in model is structured and exceptional in design, but broader in practical application than the preparatory works might have led undertakings to expect. Temporal discipline and domestic turnover still make it suitable as a design standard fulfilling the best practices for a call-in power to function as a lawful Article 22 gateway.

4.7 Sweden

4.7.1 Call-in power design

The Swedish Competition Authority[299] ("SCA") exercises merger control under Chapter 4 of the Swedish Competition Law ("SCL").[300] It has held the power to call in transactions since 1997, making it the oldest call-in power in the EU.[301] A concentration must be notified where the undertakings concerned together had Swedish turnover exceeding SEK 1 billion in the previous financial year and at least two undertakings each had Swedish turnover exceeding SEK 200 million.[302] Where only the first threshold is met, the SCA may request notification where this is justified by "particular grounds"[303] to assume that the concentration may significantly impede effective competition.[304] The SCA has 25 working days post-notification to decide whether to

[293] Kathrine Søs Jacobsen Cesko, 'The Danish Merger Control Call-in Power: Early Cases and Implications for EU Law' [2026] Journal of European Competition Law & Practice lpag004 <https://doi.org/10.1093/jeclap/lpag004>.
[294] *See case*: 25/05780 *Uber/Dantaxi* [2025] at Konkurrence- og Forbrugerstyrelsen.
[295] Case 25/06813 *OneMed/Hardam* [2025] at Konkurrence- og Forbrugerstyrelsen.
[296] Cesko (n 293).
[297] ibid. p. 4.
[298] DCL, Section 12(6).
[299] Swedish: Konkurrensverket.
[300] Konkurrenslagen [Swedish Competition Law] (SFS 2008:579).
[301] Law SFS 1997:221 in force from 1 July 1997.
[302] SCL, Chapter 4, Section 6.
[303] Swedish: *Särskilda skäl*.
[304] SCL, Chapter 4, Section 7.

approve the concentration or proceed to a phase II examination.[305] The sub-threshold mechanism is not a separate regime but a supplementary jurisdictional gateway built into the ordinary Swedish merger control system. The SCA published its latest guidance on the application of the call-in power in 2025.[306] Like in Italy, there is a formal option for voluntary notification. Parties that fulfil the SEK 1 billion threshold but not the SEK 200 million threshold may notify the SCA, and thereby start the review period that applies to mandatory filings.[307] The SCA has received voluntary notifications in each recent year (two in 2022, one in 2023, two in 2024).[308] In contrast with Italy, however, there is a standstill requirement associated with merger control, but unlike in Denmark, the SCA's guidance does not explain how it applies in case of a called in concentration.[309]

Merger control has historically been understood as an exceptional occurrence in Sweden.[310] As the call-in power is understood as an exception to ordinary merger control, it can be described as doubly exceptional, or as a derogation to an exception. This is visible from the SCA's sparing practice of the provision; it has only been exercised on seven occasions since 1997, almost never in innovative sectors.[311] It should be noted, however, that the legislature chose the more open-ended term ”particular grounds” over the stricter term ”extraordinary grounds”[312] as a substantive standard.[313]

4.7.2 Assessment

The legal basis is clear and precise: unless the aggregate Swedish turnover of the undertakings exceeds SEK 1 billion, the call-in power will not be exercised. The guidance identifies the “particular grounds” in relevant factors such as high market shares, close competitors, important vertical relationships, serial acquisitions, and cases where transaction value is high relative to turnover, and by establishing a “soft safe harbour” below a 30% combined market share.[314] Despite this, the SCA is not bound by its guidance, and call-

[305] Konkurrensverket (n 250) pp. 53-61.

[306] Konkurrensverket (n 250).

[307] SCL, Chapter 4, Section 7; Konkurrensverket (n 250).

[308] Philip Thorell, ‘International Comparative Legal Guides’ (*Merger Control Laws and Regulations Sweden 2026*, 10 December 2025) <https://iclg.com/practice-areas/merger-control-laws-and-regulations/sweden> accessed 1 March 2026.

[309] Konkurrensverket (n 250) p. 62.

[310] Prop. 1992/93:56 Ny konkurrenslagstiftning [Bill 1992/93:56 New Competition Legislation] (1993) p. 40.

[311] As of 16 April 2026. For the decisions see Konkurrensverket dnr. 597/2005 (*DFDS/Cobelfret*), dnr. 660/2009 (*TT/Retriever*), dnr. 176/2010 (*Bonnier/Pocketgrossisten*), dnr. 289/2012 (*Bonnier/Pocketshop*), dnr. 4/2013 (*Assa/Prokey*), dnr. 530/2019 (*Easypark/Inteleon*) and dnr 736/2021 (*S:t Eriks/Meag VA-System*). The most recent case, *S:t Eriks/Meag VA-System*, concerned the Swedish market for concrete products used in water and sewage infrastructure.

[312] Swedish: *Synnerliga skäl*.

[313] ‘Ändrade regler för anmälan av företagsförvärv enligt konkurrenslagen (Proposition 1996/97:82)’ (n 252) p. 12.

[314] Konkurrensverket (n 250) pp. 27-34.

ins have occurred even with undertakings with turnovers below the SEK 25-30 million threshold.[315]

While the SCA has applied its call-in power very selectively over three decades, it may still utilise other tools to enforce problematic concentrations. This is illustrated by *Retriever/Infomedia*[316] where the SCA applied *ex post* examination to a concentration by using provisions on abuse of dominant position (Article 102 TFEU) established by *Continental Can*[317] and revived by *Towercast.*[318]

Lastly, the Swedish model rests on a strong territorial nexus requirement. The call-in mechanism is only applicable where the undertakings together exceed SEK 1 billion in Swedish turnover, presupposing a substantial Swedish footprint for the parties.[319] In fact, the territorial requirement is that a concentration must significantly impede effective competition within Sweden as a whole, or in a *substantial part of it*, which means that small and local markets are out of reach.[320] This seems likely to change in the future, however.[321] Curiously, the SCA's guidance explicitly confirms that Article 22 referrals may be based on a call-in under national law – acknowledging that call-in powers may serve a function on a European scale.[322]

All in all, the Swedish call-in regime appears to be designed with foreseeability for undertakings in mind. Especially two factors support this. It can only be used when the concentration in question has a high aggregate turnover which affects a significant part of the country. Furthermore, voluntary notification and pre-notification contacts along with the SCA's historically selective use will reassure undertakings that their chances of being examined are low.

Looking ahead, that could be subject to change. The current SEK 1 billion threshold may be lowered or even removed following recommendations from

[315] 'Ändrade regler för anmälan av företagsförvärv enligt konkurrenslagen (Proposition 1996/97:82)' (n 250) p. 16; Johan Karlsson and Trine Osen Bergqvist, *Konkurrensrätt: En Handbok* (6th edn, Norstedts Juridik 2022).

[316] *Retriever/Infomedia* [2025] Konkurrensverket Dnr 669/2024.

[317] C-6/72 *Continental Can* [1973] CJEU ECLI:EU:C:1973:22

[318] C-449/21 *Towercast* (n 6).

[319] *See*: Section 4.7.1.

[320] SCL, Chapter 4 Section 1.

[321] The SCA has petitioned the government for a change permitting intervention even in small or isolated markets. *See*: 'Konkurrensverket föreslår ändringar i konkurrenslagens regler om företagskoncentrationer' <https://www.konkurrensverket.se/informationsmaterial/nyhetsarkiv/2025/konkurrensverket-foreslar-andringar-i-konkurrenslagens-regler-om-foretagskoncentrationer/> accessed 21 April 2026.

[322] Konkurrensverket (n 250) p. 46.

the SCA and the Swedish Government's Productivity Commission, which could alter the assessment above.[323]

4.8 Conclusions

The three country studies reveal a spectrum of national call-in designs. The diversity of national call-in designs produces a diversity of Article 22 "jurisdictional profiles", depending on which Member State makes the referral. As established in 4.3, Commission competence under Article 22 is derivative in nature. Accordingly, equivalent treatment, as the Commission's current approach seems to do, produces different legal consequences depending on which Member State makes the referral.

At one end of the spectrum, we arguably find the Italian regime. It combines the possibility of six-month *ex post* intervention with the possibility to examine any concentration in the world, provided concrete risks to competition in Italy. This appears incompatible with various statements of the Court of Justice, such as the concern for speed in *CK Telecoms* and the issues caused by prolonged indeterminacy in *Sumitomo*.[324] Accepting Article 22 referrals based on such a call-in power without further scrutiny risks reconstructing legal uncertainty similar to what *Illumina/Grail* tried to eliminate.

At the opposite end of the spectrum, we see a different kind of issue. The Swedish call-in power relies on a domestic turnover threshold which is equivalent to the ordinary merger control regime. It has also only been exercised seven times in nearly thirty years.[325] If the SCA were to refer a called-in concentration, then it would in fact appear more foreseeable than many of the ordinary mandatory notification regimes currently in place across the EU.[326] Equal treatment of different call-in powers such as the Italian and Swedish

[323] Konkurrensverket, 'Konkurrensverkets remiss till Produktivitetskommissionens betänkanden Goda möjligheter till ökat välstånd och Fler möjligheter till ökat välstånd' [SCA response to the Productivity Commission's Committee report "Opportunities for increased welfare"]. <https://www.konkurrensverket.se/om-oss/vara-remissvar/produktivitetskommissionens-betankanden-goda-mojligheter-till-okat-valstand-och-fler-mojligheter-till-okat-valstand/> accessed 25 February 2026.

[324] *See*: *CK Telecoms* (n 206) para. 72; T-22/02 *Sumitomo* (n 207) para. 82.

[325] See Section 4.7.2.

[326] The comparison can be made with the Iberian countries in particular. Portugal's mandatory notification regime includes a pure market share threshold under which notification is required where a concentration creates or reinforces a market share of 50% or more in any relevant national market. *See*: Lei No. 19/2012 Novo Regime Jurídico da Concorrência, Article 37. Spain also applies a market-share threshold which means that a concentration must be notified to the CNMC where it results in a combined market share of 30% or more in any relevant national or regional market, although subject to a *de minimis* carve-out where the target's Spanish turnover is below EUR 10 million and the resulting share does not exceed 50%. *See:* Ley 15/2007 de Defensa de la Competencia, Article 8. The Swedish condition of SEK 1 B turnover, in contrast, appears far more easily predictable for undertakings. *For a better overview, see*: Mario Mariniello, 'Reinforcing EU Merger Control against the Risks of Acquisitions by Big Tech' (Bruegel 2025) 11/2025 <https://www.bruegel.org/policy-brief/reinforcing-eu-merger-control-against-risks-acquisitions-big-tech>.

leads to unequal outcomes. It also appears difficult to support that conclusion on the basis of *Illumina/Grail*, which although it did not directly address call-in powers did emphasise the importance of legal certainty and deadlines compatible with the requirements of the business world.[327] The Swedish call-in power exhibits such careful design and practice that it cannot be said to threaten to undermine the principle of legal certainty as expressed in the EUMR.

The Danish call-in power, also adopted after 2021, represents a more measured model than Italy, whose structural design directly addresses some concerns identified in *Illumina/Grail*. A domestic turnover precondition anchors jurisdiction in a measurable national footprint. A three-month intervention window (extendable only in cases of bad faith) defines the moment at which legal certainty for the merging parties is restored.[328] The 15 working-day decision clock runs concurrently with the Article 22 referral period, ensuring that national and EU procedural timelines are aligned rather than compounded.[329]

Understanding the spectrum is important because the Commission derives its jurisdiction to examine concentrations below the EU dimension thresholds in Article 22 cases from the Member States. If the Commission treats the three call-in regimes outlined above as equivalent gateways, then that will create different legal consequences depending on the referring NCA. Seeing all national call-in powers as legally equivalent brings implications that may be incompatible with the EUMR and its underlying principles.

[327] *Illumina/Grail* (n 3) para. 204.
[328] Section 4.6.2
[329] DCL, Section 12(6); EUMR, Article 22(3).

5 A minimum-quality standard for call-in-based referrals

5.1 Which questions remain unsettled?

Illumina/Grail settled that national jurisdiction is a necessary condition for referral under Article 22. A Member State may not refer a concentration to the Commission unless it is itself legally entitled to examine that concentration under national law. The Court did not, however, decide whether the existence of national jurisdiction is a sufficient condition. It remained silent on whether all national legal bases are to be treated as equivalent, or whether the Commission may need to consider the legal design and application of the national law that creates the jurisdiction.

This question is brought to the fore in T-15/25 *Nvidia*. The applicant have raised the question of whether a referral based on a call-in power may be accepted without any scrutiny of the quality of that power. The Commission's current approach appears to treat all different call-in powers as legally equivalent – in other words, it is *agnostic* to their individual quality.[330] In this study, the word *quality* refers to the national call-in power, and whether its design and use align with the principles governing EU merger control. The assessment concerns whether they are foreseeable, both in theory and in practice. That means looking at the conditions for use and the degree of discretion given to the NCA; especially concerning the temporal scope and territorial nexus. Quality is used then to refer to the factors outlined here and does not reflect a judgment on either the merits or the legitimacy of the legislation. Against that backdrop, the Court has the opportunity to decide whether the Commission can remain agnostic, or whether it must examine certain features of the call-in power before accepting a referral. Guidance on what such a standard requires in practice can be drawn from the recommended practices of the ICN and OECD, which provide widely accepted benchmarks for the design of merger notification regimes.[331]

5.2 The pilot case

[330] The term *agnostic* is used here in the sense of legal indifference as to the mechanism by which jurisdiction is established. Völcker uses the term to describe the EUMR's neutrality as to whether Member States address below-threshold concentrations through national merger control rules or through the residual application of Article 102 TFEU. By analogy, the Commission's post-*Illumina/Grail* approach may be described as agnostic, where it treats all national call-in powers as equivalent Article 22 gateways without assessing their qualitative design. *See*: Völcker (n 39) p. 1245.

[331] 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42); OECD (n 200).

The first case to address the new developments is the pending case *Nvidia*. On one side, Nvidia (supported by Chamber of Progress)[332] is seeking annulment of the Commission's decision to examine the concentration between Nvidia and Run:AI under Article 263 TFEU. On the side, the Commission, supported by several EU Member States (and Norway),[333] argues that the Commission was legally entitled to examine the concentration.

Nvidia's arguments are based explicitly on the outcome of *Illumina/Grail*. According to its first plea in law, a below-threshold concentration cannot be brought within Commission jurisdiction through a loosely defined, ex post and discretionary national mechanism without violating the Court's judgment in *Illumina/Grail*.[334] Further arguments are based on the legislative scheme of Article 22 and the general principles of institutional balance, legal certainty, proportionality, and equal treatment.[335] The plea effectively frames the case as a question of the legal quality of the Italian national jurisdiction.

Provided that the General Court finds Nvidia's action well-founded, it may have to decide on the Commission's right to maintain its agnostic position. The Court could decide that any national merger-control jurisdiction is enough to justify referrals. Alternatively, it could decide to annul the decision to accept the referral from the ICA. This may be because the Commission did not assess the legal basis for the Italian jurisdiction over the concentration. It could also limit its judgment by saying that the Italian call-in power does not meet the criteria of legal certainty enshrined in the EUMR and emphasised in *Illumina/Grail*. Another alternative would be the Court finding that the call-in power was not exercised with sufficient respect for the relevant principles in the case, without addressing the statutory power as a whole.[336]

5.3 The appeal of agnosticism

The Commission and supporting Member States, such as Italy, the Netherlands, and France, will likely argue that their interpretation of Article 22 and *Illumina/Grail* is legally sound. The interpretation does not violate a literal reading of the Court's judgment in *Illumina/Grail*; it does not create a new function for Article 22 either, relying instead on the ability for the best-placed authority to examine the concentration. Furthermore, it appears difficult to argue that the institutional balance has been disturbed in a meaningful way.

[332] 'Chamber of Progress Goes to European Court to Protect Startup Investment: Court Recognises Chamber of Progress' Interest in Case T-15/25 - Chamber of Progress' (27 June 2025) <https://progresschamber.org/news/chamber-of-progress-goes-to-european-court-to-protect-startup-investment/> accessed 21 March 2026.

[333] T-15/25 *Nvidia v Commission* Order of the 26 June 2025.

[334] ibid., Action Brought on 10 January 2025 p. 1.

[335] ibid.

[336] *See*: Section 5.5.

Lastly, it seems that accepting referrals based on call-in powers is fully compliant with the substantive requirements in Article 22.

In paragraph 222 of *Illumina/Grail*, the Court of Justice held that the Commission erred in law by accepting a referral from Member States that were not themselves entitled, under their national merger control rules, to examine the concentration in question.[337] If the absence of national jurisdiction renders acceptance unlawful, then its presence, in whatever form, could perhaps render the acceptance lawful. This amounts to an *e contrario* reading of paragraph 222 in the case. It seems to be the reading adopted by the Commission.[338] The Court of Justice's *ratio decidendi* addressed the existence of national jurisdiction and not its form or design in *Illumina/Grail*.[339] The Court's operative finding was, however, confined to the situation where no national jurisdictional basis existed at all. As national call-in powers supply a jurisdictional basis, it allows the Commission and allied Member States to arrive at a binary conclusion: where national jurisdiction exists, Article 22 may be used; where it does not exist, it may not be used. The Court's judgment in *Illumina/Grail* does not directly contradict such a conclusion, although it is questionable whether the Commission can rely on a purely literal interpretation at this stage.[340]

Turning to historical and systematic arguments, it can also be argued that Article 22 referrals based on call-in powers do not represent a new function of Article 22. Call-in powers have existed in Sweden since 1997, which is the same year that Regulation 1310/97 created the re-allocation function of today's Article 22.[341] Furthermore, Article 22(1) even accommodates call-in powers in the wording: "*if no notification is required*".

It appears then that even if the possibility of a call-in based referral has existed since 1997, it has grown into an issue mostly because the Commission has encouraged the Member States to adopt them for use in conjunction with Article 22.[342] The Court's historical analysis in *Illumina/Grail* examined the *travaux préparatoires* for Regulations 4064/89, 1310/97, and 139/2004 and concluded that those documents did not support the Commission's gap-filling interpretation as expressed in the 2021 Guidance.[343] That conclusion was directed at referrals from NCAs without any national jurisdiction. Call-in powers are a legal instrument that existed throughout the legislative history the

[337] *Illumina/Grail* (n 3) para. 222 second sentence.

[338] Vestager, 'Statement by Executive Vice-President Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions' (n 125).

[339] *Illumina/Grail* para. 222.

[340] *See, for example*: *VYSOČINA WIND* (n 108) para. 39.

[341] Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings.

[342] *See*: 'EU "Actively Encouraging" Member States to Adopt Call-in Powers, Guersent Says' (n 241).

[343] *Illumina/Grail* (n 3) para. 146-150.

Court examined, and to which the Court made no reference. Disqualifying referrals on a purely formal ground therefore appears formalistic.

From a substantive perspective, there are some difficulties relating to arbitrariness. The most "restrained" call-in powers produce a jurisdictional basis that is functionally indistinguishable from an ordinary notification threshold. As demonstrated in Section 4.7, the Swedish call-in power can be used only where the parties' aggregate Swedish turnover exceeds SEK 1 billion, the same turnover criterion that governs the ordinary mandatory notification regime, applied in the specific situation where one of the two ordinary conditions is satisfied but not both.[344] The SCA has exercised this power seven times in nearly thirty years. If the General Court finds that a referral based on this power cannot enable Commission jurisdiction under Article 22, it would effectively be stating that the label of a national call-in power determines the legality of the referral, regardless of its substantive characteristics. That conclusion has no basis in the text of Article 22, which, according to *Illumina/Grail*, requires only that the referring Member State be competent to examine the concentration under national law, along with the two substantive criteria.[345] It would also appear unreasonably formalistic if the same transaction, examined by the same NCA on the basis of the same turnover criterion, would ground a lawful Article 22 referral if jurisdiction arose under the ordinary regime but not if it arose under the call-in provision. Nothing in the structure or purpose of Article 22 supports that distinction.

Another argument supporting the Commission's acceptance of *Nvidia/Run:AI* is that the Commission has adopted no new legislative or soft-law instrument to expand its jurisdiction. It is simply accepting referrals as it always has, from NCAs that now happen to have call-in powers. The institutional balance critique of *Illumina/Grail*, where the Commission used enforcement policy to circumvent legislative procedure and the other institutions, does not apply the same here.[346] For the Commission's conduct to violate the principle of institutional balance would reasonably require an exercise of its mandate. Whether accepting Article 22 referrals based on call-in powers, which has theoretically been possible since 1997 as demonstrated above, amounts to such an exercise, is a key point of contention in this context. As there is currently no similar soft law instrument to the 2021 Guidance governing the

[344] SCL. Chapter 4 Articles 6-7. *See also*: Section 4.7.1.

[345] *Illumina/Grail* (n 3) para. 222; EUMR, Article 22(1). The Court required that the referring Member State be entitled to examine the concentration under national merger control rules. It did not impose a requirement as to the design or form of the national legal basis conferring that entitlement.

[346] Whereas the adoption of the soft law instruments to circumvent legislative processes (such as the 2021 Guidance) fits the pattern of a violation of the principle of institutional balance according to Sacha Prechal, the situation is not the same today due to the fact that it is largely national legislatures that are changing the institutional balance through the adoption of call-in powers. *Cf.* Prechal (n 180) pp. 290-291.

exercise of Article 22 giving the Commission expanded powers, the *status quo* arguably implies the same institutional balance as existed before 2021.

The one-stop shop principle could potentially be brought to support an agnostic position. The EUMR centralises review at the Commission level where concentrations have cross-border significance, and thereby avoids multiple filings and inconsistent outcomes.[347] A concentration may lack an EU dimension whilst still raising competition concerns across the Union, notably in the case of killer acquisitions.[348] In such cases, call-in-based referrals can serve a one-stop shop rationale by allowing a single Commission procedure to replace multiple national filings. *Nvidia/Run:AI* is a good example of this. Absent the ICA's call-in and subsequent referral, a transaction with potential significance for AI infrastructure markets in the EU may have escaped examination at the EU level (even if *Nvidia/Run:AI* was eventually unconditionally approved).[349] Such a use of the one-stop shop principle is limited by the fact that only those Member States that decide to join the referral request are bound by a one-stop shop.[350] There is also an inverse argument regarding the one-stop shop: in encouraging all Member States to adopt call-in powers, the Commission itself erodes the one-stop shop principle by forcing undertakings to voluntarily notify in multiple jurisdictions for maximum legal certainty. It should be kept in mind that this erosion takes place below the thresholds for an EU dimension. In that regard, it must also be kept in mind that the one-stop shop principle does not apply to all concentrations, but only to those with an EU dimension.[351] All in all, the outcome seems to be that expansion of effective enforcement of below-threshold mergers using Article 22 takes place to the detriment of the one-stop shop principle, but that the displacement is not fully assignable to the conduct of the Commission.

Contextual analysis may also lend credence to the agnostic position. Article 22 is subject to two substantive conditions: that the referred concentration must affect trade between Member States, and that it must threaten to significantly affect competition within the territory of the Member State(s) which made the request.[352] Substantive conditions ensure that referrals can only happen when there is a genuine concern on a European level, it likewise ensures that there is even a territorial interest for the EU to intervene.[353] They act as a

[347] EUMR, Recital 11; Case Referral Notice p. 8.

[348] *See*: Section 2.4.

[349] M.11766 - *Nvidia/Run:AI* (n 123). This is what Valentino and Negrinotti refer to as "loyal cooperation" between the ICA and the Commission. *See*: Valentino and Negrinotti (n 265).

[350] *See*: the last paragraph in Section 3.4.

[351] *See*: C-10/18 P *Marine Harvest* [2020] CJEU ECLI:EU:C:2020:149 para. 108.

[352] EUMR, Article 22(1).

[353] *Cf.* Opinion of AG Emiliou in *Illumina/Grail* (n 104). para. 221; *See also*: cases C-413/14 P *Intel v Commission* (n 188) paras. 40-47. and T-102/96 *Gencor v Commission* (n 188) para. 314.

filter barring the Commission from examining concentrations lacking relevance for the internal market.

Regarding administrability, requiring the Commission to assess the quality behind every referral would turn the Commission's examination of the referral into an assessment of national merger law. For it to determine whether the national rules comply with principles of EU law governing merger control implies a time-consuming and politically sensitive endeavour. The Commission's deadline of 10 working days would be stretched thin, and the review may become abstract in the absence of a codified standard for review of national legislation.

The Commission may ultimately argue that it is impossible to draw the line of admissibility between national call-in powers. On one hand, the SCA's regime is formally known as a call-in power although its trigger for use is connected to the ordinary merger control regime. There are also strict time limits. Treating it differently than an ordinary regime such as the Spanish or Portuguese, simply because it is triggered by request rather than mandatorily, appears highly formalistic.[354] Conversely, if the Swedish call-ins are admissible, but the Italian ones are not, that would require a qualitative standard for national call-in powers which does not exist at the present moment. By choosing an agnostic perspective, the Commission avoids this trouble. Simply put, the Commission should be able to accept a referral when the Member State is legally entitled to examine the concentration under national law, provided that the substantive conditions of Article 22 are satisfied.[355]

5.4 The case for quality

The opposite view is that national jurisdiction is a necessary but not always sufficient condition for an Article 22 referral. *Illumina/Grail* did not settle whether every form of national jurisdiction can be treated as equivalent.[356] Where national jurisdiction is created through a call-in power, the design of that power determines the conditions under which EU competence may be derived. Therefore, in order to sufficiently respect the principles of EU law enshrined in the EUMR, call-in powers must be sufficiently foreseeable, constrained, temporally bounded, and territorially grounded. The Commission should not review national merger law in the abstract. It must, however, be kept in mind that when a national call-in power is deployed as the basis for an Article 22 referral, its use forms part of the referral mechanism and must satisfy the general principles of EU law governing Article 22 and the EUMR.

5.4.1 The basis for quality assessment

[354] *See* note 326.
[355] *Illumina/Grail* (n 3), paras. 217, 222.
[356] *See*: Section 2.5.

In *Illumina/Grail*, the Court of Justice held that the EUMR pursues three objectives simultaneously: effective control of concentrations liable to harm competition, a clear allocation of competences between the Commission and the Member States, and an effective and predictable system of *ex ante* merger control.[357] The Commission's 2021 interpretation of Article 22 was rejected because it prioritised the first objective at the expense of the second and third. That reasoning reflects the idea that effective merger control is an important objective, but it cannot be pursued in a manner that irrevocably undermines legal certainty.[358] Concretely, while a call-in power may facilitate the first objective of effective merger control, it may come into conflict with the third objective, especially as *ex post* merger control with unlimited territorial scope is unpredictable, and the opposite of *ex ante*.[359]

It is reinforced by a systematic reading of Article 22 within the EUMR. Article 22 does not confer ordinary jurisdiction on the Commission. It enables the Commission to examine a concentration *on behalf of* the referring Member State or States.[360] As the competence is derivative, it follows that the national legal basis is more than a preliminary condition that can be ignored once a referral has been made. It is also the condition that enables the exercise of EU competence, where it normally would not be the case.[361] If the national rule is designed in a manner incompatible with EU law, then the Commission should not be able to make use of it *on behalf of* the Member State in question.

Building on the systematic argument – that EU central enforcement adopts legal characteristics of national legislation – means that the applicant *Nvidia* may rely on the operative principles of EU law to support their case.[362] The EUMR is built around thresholds and deadlines in accordance with the principle of legal certainty and the one-stop shop because undertakings must be able to assess whether a transaction is notifiable and to which authority it must be notified.[363] Foreseeability for undertakings will almost always be reduced by the existence of a call-in power, as they allow for intervention below ordinary notification thresholds and at a later stage in the process. For undertakings that want to mitigate the lack of foreseeability, they can turn to voluntary notification or informal pre-transaction contacts, but that creates a higher burden on the undertakings than otherwise would have been the case. When best practices are not followed, and the call-in powers depart from objective thresholds and strict deadlines, that compounds the legal certainty. This

[357] *Illumina/Grail* (n 3) para. 207
[358] ibid.
[359] *See:* Section 4.8.
[360] EUMR, Recital 15.
[361] *Cf.* Section 3.1 about the principle of subsidiarity.
[362] See Section 3; Groussot (n 145) pp. 23-24.
[363] EUMR, Recitals 8, 11; Case Referral Notice, p. 8.

fundamentally appears difficult to square with the Court's emphasis on that principle in *Illumina/Grail*.[364]

A further argument, invoked by Nvidia alongside arguments concerning legal certainty, concerns the operative principles of equal treatment and proportionality.[365] As identified by AG Emiliou in *Illumina/Grail*, permitting referrals regardless of national jurisdiction places non-EU undertakings in a materially worse position than those subject to ordinary thresholds in the EU.[366] Even if the question of national jurisdiction appears to be settled, a large proliferation of call-in powers that can be used with Article 22 may lead to the same consequences regarding equal treatment, as they are unable to benefit from the one-stop shop which concentrations with an EU dimension may benefit from. It is problematic with regard to proportionality, as the burden placed on the undertakings (voluntary notification in up to 30 EU and EEA states) is excessive in relation to the objective sought to be achieved (certainty regarding whether the transaction will be reviewed).[367] An agnostic approach ignoring the quality of the national call-in power likely causes legal uncertainty as well as unequal and disproportionate exposure for non-EU parties. As an aside, one intervening party also argues that it hampers the EU's start-up policy agenda.[368]

Lastly, although the present situation does not amount to a classic violation of institutional balance as identified by Prechal, it may still involve indirect violation.[369] The EUMR's threshold system reflects a legislative settlement where concentrations with an EU dimension fall under Commission jurisdiction, while those without one remain primarily for national law, subject to the referral mechanisms laid down in the Regulation. Article 22 is one such mechanism, but it is a derogation from the ordinary allocation of competence – one that must be interpreted narrowly.[370] If any national call-in power, however broad, can serve as an Article 22 gateway, Member States and the Commission may together expand the practical reach of EU merger control without amendment of the EUMR. In this case, not as a result of Commission soft law, but as a result of Member State legislation, encouraged by the

[364] *See*: Colomo (n 116).

[365] T-15/25 *Nvidia v Commission* (n 4) Action Brought on 10 January 2025.

[366] Opinion of AG Emiliou in *Illumina/Grail* (n 104), paras. 224–226. See also Section 3.3 above on the procedural "no man's land" condemned in the same Opinion at para. 209.

[367] C-547/14 *Philip Morris v Secretary of State for Health* [2016] CJEU ECLI:EU:C:2016:325 para. 165.

[368] Chamber of Progress, a self-described "tech industry coalition" has intervened in support of by Nvidia's position in T-15/25 *Nvidia v Commission*. Leave to intervene in the case was granted on the 10th of June 2025. The Chamber of Progress argues that "*loosely defined ex-post merger powers*" would make it harder for start-ups to access capital. 'Chamber of Progress Goes to European Court to Protect Startup Investment: Court Recognises Chamber of Progress' Interest in Case T-15/25 - Chamber of Progress' (n 332).

[369] *Cf.* Prechal (n 180) pp. 290-291.

[370] T-119/02 *Royal Philips* (n 190) para. 354.

Commission.[371] The practical effect appears similar. Commission jurisdiction would expand through the cumulative effect of national legislative choices and Commission acceptance practice. A quality assessment is therefore necessary to preserve the institutional settlement rather than allow it to be altered indirectly.[372]

5.4.2 A minimum quality standard

Section 4 has demonstrated the diversity in national call-in powers. They differ significantly *inter alia* in their trigger conditions, temporal limits, degree of administrative discretion, and territorial nexus. Sweden represents a restrained model, Denmark represents a structured residual model, and Italy represents a more expansive model. If the Commission were to treat them the same, undertakings would be subjected to supranational review on a hypothetically infinite variety of legal grounds. To prevent this, the gateway's quality should matter. This standard can be improved by several factors.

One such factor is that the undertakings should be able to calculate whether a transaction qualifies for review by call-in power.[373] Foreseeability is generally increased by the factors just named, but also by consistent and transparent decision making practices, for example through guidance documents.[374] While call-in decisions are always subject to some discretionary practice of the NCA in question, the harm caused to foreseeability can be minimised by clear deadlines.[375] Although *ex post* control using call-in powers is less foreseeable than *ex ante* control, the Court contended in *Towercast* that *ex post* control remains possible within the EUMR.[376] Prolonged exposure to uncertain administrative discretion will undermine legal certainty, however.[377] Ultimately, a call-in regime that defines clearly and preferably conservatively when the authority may intervene and when the parties can treat the transaction as safe from call-in is more consistent with the EUMR's concern for speed and predictability.[378]

Both the ICN and OECD further recommend that merger control rely on an adequate material territorial nexus.[379] Article 22 requires that the concentration threaten to significantly affect competition within the territory of the

[371] 'EU "Actively Encouraging" Member States to Adopt Call-in Powers, Guersent Says' (n 241).

[372] *See*: C-70/88 *European Parliament v Council (Chernobyl)* (n 172) para. 22.

[373] *Cf.* OECD (n 200) p. 7.

[374] 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42) p. 5.

[375] *Cf.* Voigt and Schmidt (n 201) p. 3.

[376] C-449/21 *Towercast* (n 6) para. 41.

[377] T-22/02 *Sumitomo* (n 207) para. 82.

[378] C-376/20 P *CK Telecoms* (n 206) para. 72; C-202/06 P *Cementbouw* (n 204) paras. 35-37.

[379] 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42) pp. 3-4; OECD (n 200) p. 7.

referring Member State.[380] That formulation may create some contention, as it appears broad enough to enable NCAs to require notification of concentrations with a weak territorial link to the Member State if measured by turnover. The national jurisdictional trigger itself should be applied through a meaningful connection to the referring Member State, preferably through turnover but it could also be determined through other means like local users or local assets.[381] Without regard to quality through an assessment of the factors listed here (but not limited to them), Article 22 could become a general enforcement tool for concentrations, rather than a limited referral mechanism. Such an expansion is one of the main reasons why the 2021 Guidance was found incompatible with EU law.[382]

5.5 Other options

Many jurisdictions are currently considering adopting call-in powers, and many are in the process of adopting them.[383] The legal consequences of call-in powers can no longer be avoided, and look to be tested in *Nvidia*. The agnostic and quality-based readings analysed in Sections 5.3 and 5.4 are not, however, the only conceivable resolutions. An intermediate option deserves consideration, as does the residual possibility of legislative amendment or soft law. None of these alternatives are fully developed in the existing literature, but each address a specific weakness in either the agnostic or the quality-based approach and may shape how the General Court frames its eventual ruling in *Nvidia*.[384]

A feasible alternative would be a conduct-based review. Rather than examine the design of the call-in power, the Court could require the Commission to consider whether the power was exercised, in the case at hand, in a manner consistent with the principles of EU law.[385] In this version, broad national call-in powers do not preclude a referral if the NCA exercised the power in a way that respected the limits posed by the principles of EU law. A broadly drafted statute, such as the Italian one, could create a lawful Article 22 referral where the ICA's exercise of the power was sufficiently foreseeable, timely, and territorially anchored.

A conduct-based approach has the advantage of addressing some of the issues of administrability raised in Section 5.3: the Commission would review the details of the NCA's conduct in the specific referral before it, instead of the legal basis itself. The Commission in fact already assesses some procedural

[380] EUMR, Article 22(1).

[381] 'ICN Recommended Practices for Merger Notification and Review Procedures' (n 42) pp. 4-5; OECD (n 200).

[382] *Illumina/Grail* (n 3) para. 200-202.

[383] Half of the NCAs in the EU Member States have adopted call-in powers during the last half-decade. Other Member States, like Belgium and France, are actively considering it. *See*: Connolly and others (n 244).

[384] T-15/25 *Nvidia v Commission* (n 4).

[385] Section 5.4.

criteria regarding the 15 working day time-limit.[386] It is still a weakness of the approach that it retains labour-intensive scrutiny of an NCA decision within its tight deadlines.[387] Overall, it could still help shield undertakings from the worst legal uncertainty arising from long *ex post* interventions if the Commission were to apply a strict standard for *ex post* intervention. Some elements of such an approach may have been evident in the rejection of the referral of *Vanderlande/Siemens Logistics*, where the Commission considered one year *ex post* intervention to be "inappropriate" due to the time elapsed since closing.[388]

Another possibility is legislative amendment of the EUMR itself. A resolution of the questions raised in this study would be to clarify in the Regulation whether and on what conditions a national call-in power may serve as the basis for an Article 22 referral. A future revision of the EUMR could specify, for example, minimum requirements for a call-in power in conjunction with Article 22, or a formal mechanism for the Commission to verify quality before accepting a referral.

Executive Vice-President and Commissioner for Competition Teresa Ribera, has also alluded to the concept of a European call-in power, although that would only be possible with the unanimity of all 27 Member States.[389] She has suggested that legislative reform of the referral system is not on the current agenda.[390] As no reform is currently being pursued, the resolution of the issues raised in *Nvidia* will fall to the General Court, and the choice between the agnostic, quality-based, and conduct-based readings analysed above may continue to shape Commission practice.

5.6 Concluding remarks

The Commission can exercise competence under Article 22 EUMR over concentrations referred on the basis of national call-in powers, but should only do so conditionally. Whereas the question of whether national jurisdiction is a necessary condition for an Article 22 referral has been put to rest in *Illumina/Grail*, questions remain on how call-in powers should be treated. Where an NCA's jurisdiction is created through a call-in power, the design of that power will condition the legality of the resulting referral. An approach that is agnostic to that design should be incompatible with the principles underlying the EUMR.

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[386] *See for example*: points 30-39 of the Commission's decision M.11766 (n 123).

[387] EUMR, Article 22(3).

[388] European Commission, 'Commission Rejects Referral Request to Assess Acquisition of Siemens Logistics by Vanderlande' (n 132); *See also*: Section 2.6 regarding *Vanderlande/Siemens Logistics*.

[389] 'Answer given by Executive Vice-President Ribera on Behalf of the European Commission' (n 128).

[390] ibid.

The Court of Justice's interpretation of Article 22 and the EUMR in general has shown how crucial legal certainty and foreseeability for undertakings are, and that all exercise of Commission competence must respect this. Where the Commission's practice violates any one of the principles of EU law underlying the EUMR to a sufficient degree, that practice must be discontinued. That practice can take shape through the acceptance of an NCA decision.

There is a large divergence between national call-in regimes. The Italian, Danish, and Swedish regimes occupy different positions on a spectrum defined by foreseeability, administrative discretion, temporal boundedness, and territorial nexus. Treating them as legally equivalent gateways produces different legal consequences depending on the Member State referring and exposes undertakings to materially unequal risk in a manner difficult to reconcile with the aforementioned general principles of EU law, likely with the addition of the principles of equal treatment and proportionality.

As shown in the final section of this study, the unanswered questions from *Illumina/Grail* will take centre stage in the case at hand, *Nvidia*. The Italian call-in power, as exercised in the case of *Nvidia/Run:AI*, sits at the unfavourable end of this study's legal quality spectrum. This does not mean that the General Court must hold that call-in powers are categorically incapable of grounding an Article 22 referral. It would be sufficient to hold that this particular national basis, used in this way, does not satisfy the general principles of EU law underlying the EUMR. A categorical answer in either direction, stating that *any* national jurisdiction suffices, or conversely, that *no* call-in power can be used in conjunction with Article 22, would disregard the varying quality of call-in powers. The 1997 function of Article 22 can accommodate call-in powers by insisting that those powers meet the same standards of foreseeability, restraint, temporal boundedness, and territorial nexus that the EUMR itself is built around. This means that in the end, Article 22 EUMR should remain largely a tool for *ex ante* merger control.

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