Double Dutch: Illumina/GRAIL, Article 22 and the General Court

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Abstract: This article explores the jurisdictional issues underlying the decision of the European Commission to review Illumina’s acquisition of GRAIL. It marked the first time the Commission investigated an acquisition where the target had no activities in the EU; nor indeed any nexus to any individual Member State. The decision to review a concentration where the target had no EU revenues was premised on a re-interpretation of Article 22(1) of the EU Merger Regulation, which allows Member States to request the Commission to examine a concentration. This interpretation is intended to expand the jurisdictional reach of the regulation to capture transactions involving companies with low turnover, but high competitive potential in the internal market, in cases where neither EU nor any Member State merger control thresholds are met. The General Court upheld the Commission’s position on Article 22 jurisdiction, but the judgment is on appeal to the Court of Justice. This article argues that the Court should overturn the earlier ruling on the basis that the GC was mistaken in its approach to Article 22, in view of its history and purpose. It also considers that flaws in the conduct of the procedure which deprived the merging parties of due process warranted an annulment of the decision to open an investigation. Moreover, this article calls out the incompatibility of the Commission’s application of Article 22 in Illumina/GRAIL with international law concepts of comity, fairness and sovereignty.

Keywords: Illumina, GRAIL, merger control, EUMR, killer acquisitions, Article 22 EUMR, jurisdiction, competence, local nexus

1. Introduction

The assertion of competent jurisdiction by the European Commission to review Illumina’s acquisition of GRAIL has been a topic of fascination in European antitrust circles, representing as it does a seismic shift in EU merger control practice.¹ The General Court (GC) has upheld the Commission’s position on Article 22 jurisdiction, but the matter is on appeal to the Court of Justice. This article will argue that the Court should overturn the earlier ruling on the basis that the GC was mistaken in its approach to Article 22, in view of its history and purpose.

Indeed Sir Leon Brittan, Competition Commissioner in the early days of the ECMR, would have been more than a little surprised at the attempt to deploy Article 22 as a catch-all tool. He wrote in 1991 that Article 22 was ‘narrowly defined and would not permit the [Commission] to deal with mergers below the threshold on a general basis, even if we were inclined to evade the spirit of the threshold provision in this way’.²

The decision to review the concentration was premised on a re-interpretation of Article 22 of the EU Merger Regulation,³ the so-called Dutch clause. It is an interpretation seeking to equip the Commission to catch so-called ‘killer acquisitions’⁴ – a current concern, but not one in any way connected to the purpose for which Article 22 was called into being.

Rather, in 1989, at the time of the adoption of the EUMR, Article 22 was conceived as a tool to enable a...
Member State that was concerned about the local effects of a concentration, but with no merger control rules, to refer that case to the Commission for review where it affects trade between Member States.\(^5\) Progressively, though, Member States almost all adopted such rules; and consistent with the raison d’être of Article 22, the Commission has never before reviewed a concentration where the referral request was initiated by a Member State where national controls existed but a deal fell below its jurisdictional thresholds.

**What sets Illumina/GRAIL apart is that it was the first time the Commission used its new interpretation of Article 22 to review a concentration that fell below the merger filing thresholds of the EU and of every Member State, and the Commission did so in relation to an acquisition where the target had no activities in the EU, nor indeed any nexus to any individual Member State**

Article 22 was later given an extended function in the 1997 amendments to the EUMR, to address a quite different situation arising after most Member States had adopted national controls: Article 22 references could serve as a mechanism to re-allocate cases to the Commission, in place of parallel national reviews. Inherent in this is the triggering of national filing thresholds. But without any comparable legislative amendment, the recent re-interpretation of Article 22 in Illumina/GRAIL purported to extend its application to a situation where no national controls were triggered and there was no question of avoiding parallel reviews in Member States.

Just as a review of the legislative history and purpose speaks against the attempt to redeploy Article 22 as an all-purpose tool capable of catching non-notifiable deals anywhere on the planet, so too does an examination of the practical mechanics. Whereas the EUMR has bright lines identifying notifiable deals, and procedures to match, it is not fit for purpose in relation to deals outside the intended notification net. As written Article 22 anticipates an initiative from a Member State to seek the Commission’s involvement, but the new policy conceives instead a process by which the Commission issues an invitation addressed to all the Member States, seeking to elicit an Article 22 request.\(^6\) Expanded in that way the process becomes rife with legal uncertainty, not least the absence of timing constraints, indeed the freedom to call in deals already lawfully implemented.

International law, and principles of comity, are also in play. Guiding principles of the International Competition Network (ICN) and Organisation for Economic Co-operation and Development (OECD) require any exercise of jurisdiction to be based on a material nexus between transaction and territory. But the requesting Member States, led by France, had no such nexus. Fiji was equally concerned.

Beyond these several issues of high principle, the particular fact pattern in Illumina/GRAIL was egregious in the premature application of rules not yet made public. It was on 19 February 2021 that the Commission wrote to Member States inviting them to make an Article 22 referral regarding the deal, so preceding the Commission’s adoption in late March of its new Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation.\(^7\) The possibility of such a reform was not unknown: notably EVP Margrethe Vestager gave a significant speech about it, at an International Bar Association event, on 11 September 2020.\(^8\) But she gave assurances that any revised policy would not be implemented before mid-2021 and in any event not before the Commission had issued clear guidance.

Illumina has vigorously contested the legality of the Commission’s repurposing of Article 22. The Commission’s decision to accept the referral it had invited, and

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\(^6\) Article 22(5) EUMR foresees that the Commission may invite one or several Member States to make a referral request where it considers a concentration fulfills the criteria in Article 22(1), i.e., the transaction affects trade between Member States and threatens to significantly affect competition within the territory that or those Member State(s). It follows that invitations to make referral requests should be targeted to Member States specifically concerned, rather than scattergun.

\(^7\) Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (Communication) C (2021) 1959 final (Article 22 Guidance), para 8.

request the notification of the transaction, was swiftly appealed to the GC, on 28 April 2021. In its judgment delivered on 13 July 2022, the GC upheld the Commission’s competent jurisdiction to accept the referral. The Judgment has been challenged and is currently before the Court of Justice. In parallel, the Commission prohibited the transaction on 6 September 2022 following an in-depth investigation. The prohibition decision is itself the subject of a separate appeal to the GC.

This article is divided into five sections. Section 2 demonstrates that the Judgment’s historical, contextual and teleological interpretation of Article 22 is defective and fundamentally at odds with the original purpose of the Merger Regulation, which was to put in place an ex-ante merger control regime, and one applying only to the largest concentrations. Section 3 highlights the lack of due process including the unreasonable delay in sending the Invitation Letter which should have led to the annulment of the Commission’s decision to open an investigation; and with the breach of the Parties’ rights of defence. Section 4 examines the practical effects of the new interpretation of Article 22 which effectively gives rise to a de facto obligation to notify concentrations falling below EU and Member State thresholds, thus saddling merging parties with a disproportionate regulatory burden and engendering commercial uncertainty. Section 5 considers that sending the Invitation Letter prior to the adoption of the Article 22 Guidance amounted to the premature implementation of a new practice in violation of the Parties’ legitimate expectations. Section 6 calls out the fact that the absence of a material nexus between the transaction and the EU conflicts with ICN/OECD recommended practices which are grounded in the international law concepts of comity, fairness and sovereignty.

2. Flawed interpretation of Article 22 EUMR

The Judgment is based on a flawed approach to Article 22, leading the GC to err in upholding the Commission’s assertion of jurisdiction to review the transaction. In particular, there is no support in law for the GC’s endorsement of the Commission’s view that the EUMR was intended ‘to permit the control of concentrations likely significantly to impede effective competition in the internal market’, irrespective of whether a given concentration qualifies for review under EU or national merger control thresholds. Reflecting that misconception, the GC considers that the EUMR referral mechanisms, including Article 22, were intended to constitute ‘effective corrective mechanisms’ to remedy ‘deficiencies inherent in a system based principally on turnover thresholds’; and thus allow the Commission to review all concentrations ‘likely to significantly impede effective competition in the internal market’.

In fact the primary purpose of Article 22 of the European Community Merger Regulation (ECMR) was much simpler and altogether less ambitious: it was to allow smaller concentrations, impacting given Member States, to be reviewed at EU level where the Member State in question had no national system of merger control. And changes to Article 22 when the ECMR was amended in 1997 were for the specific limited purpose of preventing multiple national reviews – a situation that inherently pre-supposes the existence of national review powers. Neither purpose justifies the conclusion that Article 22 somehow constitutes an all-purpose tool in the way suggested by the GC.

The GC was correct to consider the historical perspective as to the intention of the EU legislature when it enacted Article 22, taking into account a

9 The appeal to the GC was preceded by unsuccessful appeals against the decisions of the PCA and the Netherlands Authority for Consumers and Markets to refer the transaction. See Conseil d’État, Illumina-GRAIL v Autorité de la concurrence, order Nos 450878 and 450881, Judgment No. 31C/09/695262 Rechtbank Den Haag, Illumina Inc.- GRAIL Inc. v De Staat der Nederlanden.
11 Illumina v Commission Case C-411/21 P, EU:C:2023:295; GRAIL v Commission and Illumina Case C-625 P.
12 Case COMP/M.10188 Illumina/GRAIL, Commission Decision of 6 September 2022 (Commission, ‘Mergers: Commission prohibits acquisition of GRAIL by Illumina’ (6 September 2022) available at: https://ec.europa.eu/competition/presscorner/detail/en/ip_22_5364 (accessed 10 July 2023)). The decision to block the deal was preceded by the imposition of interim measures pursuant to Article 8(4) EUMR following Illumina’s announcement that it had completed its acquisition of GRAIL while maintaining its autonomy pending regulatory reviews (Commission, ‘Mergers: Commission adopts interim measures to prevent harm to competition following Illumina’s early acquisition of GRAIL’ (29 October 2021) available at: https://ec.europa.eu/competition/presscorner/detail/en/ip_21_5661 (accessed 7 July 2023)). In July 2022, the Commission issued Illumina with a statement of objections alleging that Illumina breached the standstill obligation by implementing the transaction prior to the receipt of clearance (Commission, ‘Mergers: Commission alleges Illumina and GRAIL breached EU merger rules by early implementation of their acquisition’ (19 July 2022) available at: https://ec.europa.eu/competition/presscorner/detail/en/ip_22_4604 (accessed 7 July 2023)).
14 Judgment (fn 10), para 142.
15 ibid.
teleological and contextual interpretation of the provision.\textsuperscript{18} In doing so, the Court recognized that the interpretation of Article 22 must go further than a literal reading of its text.\textsuperscript{19} This is consistent with the recent Court of Justice judgment in \textit{Towercast} where the Court held:

According to settled case-law, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of the context in which it occurs, as well as the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (emphasis added).\textsuperscript{20}

Unfortunately the GC’s account of the legislative history is incomplete and mistaken, and the overly expansive interpretation of Article 22 upheld by the GC is contradicted by a correct historical, contextual and teleological examination.

2.1. Historical interpretation

There are multiple shortcomings in the GC’s analysis of the legislative history of Article 22. This stems largely from the fact that the Judgment relies on only three documents, all of them authored by the Commission (1996 Green Paper,\textsuperscript{21} 2001 Green Paper\textsuperscript{22} and 2003 Proposal\textsuperscript{23}); whereas the \textit{travaux préparatoires} for the original ECMR, the 1997 ECMR and the EUMR comprise more than 270 documents, of diverse origins. It follows that the GC failed to consider the overwhelming majority of the relevant materials. In addition, all documents relied on by the GC to support its interpretation of Article 22 ECMR were published \textit{after} the adoption of the ECMR; indeed all but one of the documents post-dated the 1997 ECMR. This is wholly inconsistent with the standard historical interpretation method which requires the determination of the intent of the legislature at the time an act was adopted.

A rigorous and thorough examination of the \textit{travaux préparatoires} compels the conclusions outlined below.

First, at the time of its adoption, Article 22 had one sole purpose, namely enabling Member States with no merger control rules to request the Commission to review concentrations falling below the ECMR thresholds, but affecting competition in that State. There is no indication that Article 22(3) ECMR was intended to have multiple or wider purposes.

Article 22 ECMR was the result of protracted discussions on the relationship between the future ECMR and Articles 85 and 86 of the Treaty of Rome (now Articles 101 and 102 of the Treaty on the Functioning of the European Union\textsuperscript{24}) – in particular in relation to concentrations falling below the future ECMR thresholds. On two occasions the Commission proposed to solve this issue by rendering Articles 101 and 102 inapplicable to concentrations falling below the ECMR thresholds, either by disapplying Articles 101 and 102 TFEU through a block exemption;\textsuperscript{25} or issuing a declaration that such concentrations could not affect trade between Member States (one of the threshold criteria of Articles 101 and 102 TFEU).\textsuperscript{26}

Both proposals drew opposition from the Netherlands, which at the time did not have a national merger control regime. Instead it suggested an alternative solution that would enable the referral to the Commission of concentrations causing concern in that State.\textsuperscript{27}

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\textsuperscript{18} La Commission déclare qu’elle n’a pas normalement l’intention d’appliquer les articles 85 et 86 du Traité instituant la Communauté économique européenne aux concentrations telles que définies à l’article 3 autrement que par l’intermédiaire du présent règlement. [...]
\textsuperscript{19} Elle n’a pas en tout cas l’intention d’intervenir à l’égard d’opérations se situant au-dessous d’un niveau de chiffre d’affaires mondial de 2 milliards d’Ecs ou au-dessous d’un niveau de chiffre d’affaires minimal communautaire de 100 Mecus, considérant qu’au-dessous de tels niveaux, une opération de concentration ne serait normalement pas susceptible d’affecter sensiblement le commerce entre États membres. (emphasis added)
\textsuperscript{20} See also Letter of Sir Leon Brittan (Commission Vice President and Commissioner for Competition) – 30 March 1989, SG (89) IV/D4008, p. 6: “Articles 85 and 86 share a jurisdictional principle which divides national from Community Law: both apply only where trade between [Member States] is affected. The proposed Regulation gives effect to this principle in respect of concentrations by establishing threshold criteria. Mergers below the thresholds can reasonably be regarded as having insufficient impact on trade between [Member States] for Articles 85 and 86 to be regarded as not applying to such mergers.” (emphasis added).
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\textsuperscript{21} Judgment (fn 10), para 95.
\textsuperscript{22} Moreover, the Judgment undertakes only a limited literal exploration of Article 22, with no comparison of different language versions of the EUMR.
\textsuperscript{23} Towercast v Autorité de la Concurrence Case C-449/21, EU:C:2023:207, para 31.
\textsuperscript{29} Rapport du Groupe des Conseillers économiques au Comité des Représentants Permanents, 9 novembre 1989, Doc 9672/89 (RC 41), Annex 1, p. 3.
The Dutch proposed solution attracted the support of other Member States without national merger control rules, including Belgium and Italy. Indeed veterans of the early days of the ECMR still refer to Article 22 as the ‘Dutch clause’.

No ‘other’ purpose is ever mentioned in the travaux préparatoires leading to the adoption of Article 22 ECMR. Notably, any notion of Article 22 addressing ‘deficiencies inherent in a system based principally on turnover thresholds’ is conspicuously absent from the travaux préparatoires.

The following statement by Lord Brittan – the then Commissioner for Competition who attended the Council meetings during which the ECMR proposal was discussed – illustrates these points clearly (emphasis added), notably stressing that Article 22 was a tool for Member States with no national merger control rules:

[...] Below [the thresholds], the [Member States’] jurisdiction is in principle exclusive and the [Commission] will not interfere. Here too there is one exception, inserted at the request of Italy, the Netherlands and Belgium. Article 22(3) provides that if the [Commission] finds at the request of a [Member State] that a concentration without Community-dimension creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within that [Member State’s] territory, the [Commission] may, if the concentration affects trade between [Member States], take the decisions provided for in the Regulation to safeguard competition. This provision was necessary because some [Member States] have no effective merger control system either because their economies are so open that most competition problems have a large element of extraterritoriality or for other political reasons. In any case, the [Commission] may intervene only at the request of a [Member State], and not of its own motion. Furthermore, our involvement will be limited to ensuring that competition is safeguarded; a [Member State] can ask us to oppose a merger which endangers competition in its territory, not to allow one which it favours to proceed. This provision is therefore narrowly defined and would not permit the [Commission] to deal with mergers below the threshold on a general basis, even if we were inclined to evade the spirit of the threshold provision in this way. It is consequently one which is also likely to be infrequently applied.\(^{28}\) (emphasis added)

As to the purpose of the ECMR more generally, the travaux préparatoires clearly show that the objective was only to enable the ex-ante review of concentrations with a significant impact on the internal market, i.e., those defined as having an EU dimension. Accordingly, the EU legislature decided to define turnover thresholds as a proxy for such significant effect within the EU – set at a level deemed appropriate by the Member States to achieve that goal and subject to future review.

Second, the travaux préparatoires for the 1997 ECMR and the EUMR reveal that only one purpose was added to Article 22, namely reducing the risk of parallel reviews by Member States of the same concentration. The importance of the establishment of a one-stop shop is underlined in the 1996 Green Paper:

[...] The Merger Regulation has two goals: first, to prevent anti-competitive transactions and, second, to provide a single framework within which concentrations with a Community dimension are assessed within a definite and foreseeable timetable. The “one-stop shop” principle, whereby concentrations with a Community dimension are only controlled at Community level, facilitates the accomplishment of the second goal. [...] The application of the “one-stop shop” principle to concentrations with a Community dimension is related to the notion of subsidiarity: exclusive control at Community level is justified in view of the scale and effects

\(^{28}\) Brittan (fn 2), pp. 41–42.
of such transactions. It is also based on efficiency considerations. As an alternative to multiple national controls, the single “stop” of the Regulation simplifies administrative procedures and enables businesses to minimize the costs of restructuring in a single market.\(^{29}\) (emphasis added)

The EU legislature sought to extend the benefit of the one-stop shop in order to minimize the administrative burden associated with multiple filings by enabling competent NCAs to refer concentrations to the Commission if they considered that the Commission was better placed to act. This is reflected in paragraph 86 of the 2001 Green Paper which clearly states:

\[\text{[t]he amendments that took effect in 1998 were intended to give Article 22(3) a new function as a means of allowing two or more \{Member States\} to make joint referrals to the [EC] where they felt that the [EC] was better placed to act. Thus, the intention was to strengthen the application of Community competition law in cases with cross-border effects, to strengthen the one-stop shop principle and to alleviate the problem of multiple filings. In a sense this amendment can be seen as complementary to the introduction, at the same time, of the Article 1(3) thresholds, which was likewise intended to address the same issues. (emphasis added)}\]

2.2. Contextual interpretation

The GC does not seek to reconcile its interpretation of Article 22 with several provisions of the regulation. In particular, for the reasons provided below, the wording of other provisions in the EUMR is clearly framed by reference to a given concentration qualifying for review at EU level or in one or more Member States.

First, consider Article 22(2)\(\text{63}\), which was introduced in the 1997 revision of the regulation. It states that ‘All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined’ (emphasis added). This provision, and in particular the reference to national time limits and the word ‘where’, implies that original jurisdiction exists either at EU level or under national merger control rules. And of course that interpretation is wholly consistent with the travaux préparatoires discussed above, focusing as they do on the problem of multiple filings.

Second, Article 22(3)\(\text{63}\) states that ‘The \{Member State or Member States\} having made the request shall no longer apply their national legislation on competition to the concentration.’ (emphasis added) Once again, this provision, and in particular the words ‘no longer’, clearly indicate that national merger control law must otherwise apply to the concentration in question.

Third, Recital 15 of the Preamble to the EUMR is also at odds with the interpretation of Article 22 posited by the Commission. This recital is where the EU legislature addresses referrals from the Commission to the Member States and from the Member States to the Commission. The recital describes the latter mechanism of referral as follows: ‘A [Member State] should be able to refer to the [Commission] a concentration which does not have a Community dimension but which affects trade between [Member States] and threatens to significantly affect competition within its territory. Other [Member States] which are also competent to review the concentration should be able to join the request’ (emphasis added). The phrase ‘also competent’ only makes sense if original jurisdiction is a pre-requisite for Member States to make a referral request. However, the GC refrains in the Judgment from addressing the meaning of the phrase and notably fails to provide an alternative interpretation to the obvious one flowing from the ordinary meaning of the words.\(^{31}\)

Neither the 1997 ECMR nor the EUMR extended Article 22’s purpose to providing an ‘effective corrective mechanism’ for the ‘deficiencies’ of the turnover thresholds.

In particular, paragraph 94 of the 2001 Green Paper clearly indicates that the term ‘effective corrective mechanism’ – which was added to Recital 11 EUMR on which the Judgment heavily relies to substantiate its teleological findings\(^{30}\) – reflects a different, narrower and more specific situation, namely the EU legislature’s intent to enhance Article 22 ‘in order to make Article 22(3) operational as a generally applicable corrective mechanism to the multiple filing problem.’ (emphasis added)

Finally, the travaux préparatoires of the 1997 and 2004 regulations are devoid of any suggestion that the newly amended merger regulation was henceforth intended to capture all potentially problematic concentrations in the internal market regardless of the turnover thresholds.


\(^{30}\) Judgment (fn 10), paras 117, 141–142 and 165.

\(^{31}\) Judgment (fn 10), para 150.
Fourth, the GC’s interpretation that Article 22 was intended to capture all potentially problematic concentrations regardless of the turnover thresholds is incompatible with the fact that the EU legislature had already included a corrective mechanism in the EUMR. Article 1(4) and (5) EUMR provide the possibility for the Council, acting on a proposal from the Commission, to adjust the EU jurisdictional thresholds to capture additional concentrations within the EUMR through additional criteria and/or different thresholds. But the Judgment is entirely silent on this corrective mechanism.32

Fifth, more generally, if the purpose of Article 22 had been from the beginning to tackle all potentially problematic concentrations and therefore allow Member States with merger control rules to refer a given concentration which does not meet its jurisdictional thresholds, this begs the question why the EU legislature decided to include the wording in Article 22(2) and Article 22(3). Those provisions only make sense if Member States are in fact competent to review a concentration under their national merger control rules.

A provision in the drafting of the ECMR that granted national competition authorities the power to initiate referral requests to the Commission for transactions falling below thresholds set by their own national legislatures would surely have drawn attention and debate. The absence of any mention of such a referral right in the travaux préparatoires strongly indicates it was never contemplated let alone intended.

2.3. Teleological interpretation
The Judgment’s teleological interpretation is fundamentally flawed. In short, the notion that the referral mechanisms in the EUMR are intended to remedy control deficiencies in a primarily turnover-based system, so as to allow the review of all potentially problematic concentrations, is without basis and entirely unsubstantiated.

First, it is apparent from the travaux préparatoires that each iteration of the merger regulation only enabled the review of concentrations with sufficient impact in the internal market, i.e., those with an EU dimension pursuant to turnover thresholds. The EU legislature decided to rely on turnover thresholds as a proxy for such significant effect within the EU – set at a level considered appropriate by the Member States to achieve that goal and subject to future review. It is stated on various occasions in the travaux préparatoires that the purpose of these thresholds was to clearly delineate the competence of the Commission and NCAs.33 This is further confirmed explicitly by Recital 9 EUMR: ‘The scope of application of this Regulation should be […] limited by quantitative thresholds in order to cover those concentrations which have a Community dimension.’ (emphasis added). The Commission’s broad interpretation of Article 22 which enables it to review all potentially problematic concentrations finds no support in the travaux préparatoires or the case law of the EU courts.

Second, at no point do the travaux préparatoires mention or even indirectly suggest that Article 22 was intended to constitute an ‘effective corrective mechanism’ for the ‘deficiencies’ of the EU turnover thresholds. The error of the Judgment is confirmed explicitly by Recital 11 EUMR (the only Recital where the expression ‘corrective mechanism’ is used): The rules governing the referral of concentrations from the [EC] to [Member States] and from [Member States] to the [EC] should operate as an effective corrective mechanism in the light of the principle of subsidiarity’ (emphasis added). Recital 11 clearly treats referrals as a corrective mechanism only for purposes of identifying the best placed authority in a given case, not for purposes of correcting any presumed deficiency in the turnover threshold. Accordingly there is no reference to any turnover thresholds deficiency, and the ‘corrective mechanism’ serves solely as a means of allocating the concentration to the best placed authority on the basis of existing competences to review.

Further, elevating the question of interpretation to the level of constitutional principle, the Commission attempts an expansive reading of Article 22, which is however a provision derogating from the general rules that determine jurisdiction based on objective


33 Brittan (fn 2), pp. 33 and 43: ‘The Regulation […] divides responsibility for the “control of concentrations” between the [EC] and the [Member States] on the basis of turnover thresholds. Our responsibility is for concentrations with a [EC] dimension […] The turnover threshold is a necessarily arbitrary way of defining which concentrations have sufficient impact on the [EC] as a whole to merit decision by the [EC] rather than by [Member States]. Alternative tests have been considered over the years, but the turnover test is the only one which is both reasonably certain in its application and not excessively complex. […] The fundamental policy objective is clear: to set up a simple, predictable and clear [EC] merger control system with the [EC] responsible for cases above the thresholds and the [Member States] below.’
thresholds. Such derogations should be read restrictively, not widely. This was confirmed by the judgment of the GC in Royal Philips Electronics v Commission where it was called upon to consider the proper interpretation of Article 9 ECMR, which enables the referral by the Commission to Member States of concentrations with a Community dimension and thus falling within its exclusive jurisdiction.\(^{34}\) In doing so, the Court held: ‘the referral conditions laid down in Art. 9(2)(a) and (b) of Regulation No 4064/89 should be interpreted restrictively so that referrals to national authorities of concentrations with a Community dimension are limited to exceptional cases’.\(^{35}\) (emphasis added)

The GC’s reasoning that its interpretation of Article 22 is consistent with the above principle is circular and unconvincing. It argued that its interpretation is correct since it recognizes that Article 22 is a subsidiary power and its use restricted to concentrations where the four cumulative conditions in Article 22(1) are met; and that such cases are in any event limited in number.\(^{36}\) But this approach runs counter to Royal Philips which requires a restrictive interpretation of the ‘referral conditions’. The GC fails in the Judgment to apply its own earlier ruling and does not address the quite separate issue of interpreting the referral conditions themselves. Its broad interpretation converts Article 22 into a catch-all corrective tool, whereas Royal Philips explicitly calls for a restrictive interpretation.

3. The unreasonable delay by the Commission warrants an annulment

The GC held that the Commission took an ‘unreasonable period of time’ to send the Invitation Letter to Member States concerning the transaction.\(^{37}\) Indeed, 47 working days elapsed between the receipt of the complaint by the Commission and the sending of the Invitation Letter to the Member States.\(^{38}\) Accordingly the Commission was found to have infringed the right to have one’s affairs handled within a reasonable time, which is enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union.\(^{39}\)

In addition, the Commission decided not to contact the Parties at any point during the 47-working day-period. Moreover, the GC entirely overlooks the fact that the Commission did not provide the Parties with a copy of the Invitation Letter until 16 March 2021 (despite several earlier requests), i.e., one week after the Commission received a referral request from the FCA.

Notwithstanding the Commission’s failure to observe the reasonable time principle, which should in itself suffice to annul the decision, the GC concluded that the legality of the Commission’s decision was unaffected. For the reasons provided below, there is no support in law for the Commission to be able to infringe a general principle of EU law without attracting any consequences.

First, the GC did not draw a distinction between the consequences which stem from the Commission breaching the reasonable time principle during an administrative procedure, on the one hand, and the Commission breaching the reasonable time principle in the opening of an administrative procedure, on the other. Although it is established case law of the EU courts that an infringement of the reasonable time principle during a procedure will only lead to annulment if it leads to a violation of the parties’ rights of defence,\(^{40}\) this does not apply to a failure to adhere to the reasonable time principle in initiating an administrative procedure. Indeed, the EU courts have consistently held that the Commission can no longer claim competence after the expiry of a time limit to commence a procedure.\(^{41}\) In this regard, the principles of legal certainty and legitimate expectations require that if the Commission does not commence administrative proceedings within a reasonable period after the relevant triggering event, such proceedings are time barred. In such circumstances, the affected undertakings do not need to show a violation of their rights of defence during the administrative procedure.\(^{42}\)

Article 10 EUMR prescribes that the Commission can no longer investigate a concentration once the time limits included in the EUMR have expired: ‘[w]here the


\(^{35}\) Ibid. This principle is reflected in para 7 of the Commission Notice on Case Referral in respect of concentrations ([1998] OJ C260/2) which, having regard to the importance of legal certainty, clearly states: ‘it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds’. (emphasis added).

\(^{36}\) Judgment (fn 10), para 182.

\(^{37}\) Ibid paras 223–237.

\(^{38}\) Ibid paras 223–237.


\(^{40}\) Judgment (fn 10), para 223.


\(^{42}\) Riccardo Nencini v Parliament Case C-447/13 P, EU:C:2014:2372, para 48: ‘where the applicable texts are silent, the principle of legal certainty requires the institution concerned to [act] within a reasonable time’; see also para 39.
[Commission] has not taken a decision […] within the time limits […], the concentration shall be deemed to have been declared compatible […].’ The same consequence should flow from the Commission’s failure to act in a timely fashion in Illumina/GRAIL, in the absence of properly defined procedures specific to Article 22. In other words, the unreasonable delay to initiate proceedings is in itself sufficient grounds for the annulment of the Commission’s decision, without the need for the Parties to demonstrate a violation of their rights of defence.

Second, even if it were necessary to establish harm to the rights of defence for a violation of the reasonable time principle to warrant the annulment of a decision, the GC incorrectly held that the Commission did not violate the Parties’ right of defence prior to the sending of the Invitation Letter. The case law of the EU courts reflects consistently that the right to be heard requires that the Commission puts the addressees of a decision ‘in a position in which they may effectively make known their views’. In addition, in Commission v UPS, the Court of Justice held that a violation of the rights of defence should lead to the annulment of a decision if there was ‘even a slight chance that [the concerned undertaking] would have been better able to defend itself’, and there is no need to demonstrate that ‘the [decision at issue] would have been different in content’.

The EU MR is silent as to how the Commission should conduct its investigation prior to sending an invitation letter under Article 22(5). But it must go without saying that the investigation has to be conducted in line with the principle of good administration. This is reflected in the judgment of the CJEU in Schlüsselverlag J.S. Moserand v Commission in which it held that in the event of a complaint related to the competence to review a concentration, the Commission ‘is required to decide on the principle of its competence as supervising authority’. Moreover, in this context, it is incumbent on the Commission in the interest of sound administration ‘to conduct a thorough and impartial examination of the complaints’. There is no legal basis for supposing that these considerations should not apply to a decision to issue an Article 22(5) letter following a third-party complaint.

A ‘thorough and impartial’ assessment of whether to use Article 22(5) cannot be undertaken without first addressing the merging parties and hearing their views. In this regard, the failure of the Commission to contact the Parties to hear their views on the application of the criteria established in Article 22(1), whilst nevertheless actively engaging with a complainant, amounts to a direct refusal to hear the views of the Parties. Accordingly, the infringement of the reasonable time principle, in combination with the Commission’s decision not to contact the Parties prior to sending the Invitation Letter, constitutes a violation of the Parties’ rights of defence as well as the principle of good administration.

Further, the Commission’s subsequent actions were incapable of curing these procedural violations. The Commission’s conduct of the process left only five working days before the expiry of the Article 22(4) deadline for Member States to make a referral request, for the Parties to present their views to 27 Member States as to why a referral request was inappropriate. It follows that the Parties were effectively presented with a fait accompli, so denying them the opportunity to meaningfully exercise their rights of defence. Indeed, the delay is all the more problematic since: (i) there was no objective reason not to engage earlier with the Parties, and (ii) the Commission engaged actively with the complainant. It is unimaginable that there should be no consequences attached to conduct which amounts to an encroachment on the Parties’ ability to effectively exercise their rights of defence, and a glaring breach of their right to due process. But under the GC’s interpretation the Commission is able to act without any time constraints whatsoever to issue an invitation letter, since acting late would not breach the parties’ rights of defence and hence to an annulment. This is manifestly wrong.

Accordingly there are strong grounds to set aside the GC’s findings that the Parties did not have the right to be informed and meaningfully engage with the Commission before the Invitation Letter was sent, and that their rights of defence were for that reason not adversely impacted.

4. Procedural and legal uncertainty

As demonstrated above, determining jurisdiction by reference to turnover criteria was from the outset designed to provide clarity and predictability for merging companies and also for the Commission and Member
In addition, the GC’s flawed interpretation of the time limits set forth in Article 22(1) for the submission of a referral request is disproportionate and implies some form of shadow notification obligation, but one devoid of the protections and procedural guarantees associated with a formal merger review process. This stems from the GC’s extensive interpretation of the concept of a concentration being ‘made known’ to a Member State, a term used in the Regulation to trigger a deadline of 15 working days for a Member State.47

In particular, the GC held that a concentration being ‘made known’ must ‘consist of the active transmission of relevant information to the Member State concerned and, as regards its content, contain sufficient information to enable that Member State to carry out a preliminary assessment’ (emphasis added).48 In addition, in order for the information transmitted by merging parties to be deemed sufficient, it must contain information that is ‘comparable’ to that of an actual notification under national merger control rules (emphasis added).49 In practical terms, this means that merging parties could conceivably have to ‘actively transmit’ information which is ‘comparable’ to what is required in a formal merger review process to each one of the EEA Member States. In substance, this must be viewed as creating a de facto notification obligation for concentrations which is the fundamental construct of the regulation.

The GC’s robust rejection of the Parties’ arguments that the Commission’s novel interpretation of Article 22 gives rise to a de facto notification obligation is highly formalistic and self-contradictory. In one breath the GC says that Article 22 does not provide for or require informal notification and is therefore incapable of creating such an obligation;50 but in the next breath finds that the parties must provide information comparable to that needed for an actual notification, in order to satisfy the requirement for a concentration to be ‘made known’. In fact the GC’s own interpretation de facto compels engagement with as many as 29 different national competition authorities, providing each with information that would suffice to constitute a formal notification, if parties wish to achieve some measure of legal certainty that a concentration will not be called in for review.

This absurd outcome invites the broader conclusion that the EUMR is simply not fit for purpose as a general-purpose tool to address absolutely any and all deals outside the intended notification net. The EUMR has bright lines identifying notifiable deals, and procedures to match which set timing requirements and safeguard rights of the defence and legal certainty. Article 22 is annexed to that, as a tool to help a Member State specifically impacted by a given deal but without a national merger control regime. It has functioned well enough over the years, with that limited remit and specific geographic nexus. But once Article 22 is re-invented as an all-purpose tool capable of catching non-notifiable deals anywhere on the planet, with no specific nexus to any particular state, the inadequacies of the associated rudimentary EUMR procedures becomes manifest. Any of 29 national authorities can invoke Article 22 without limit in time, if and when fresh relevant information presents itself. That may be long after deals have lawfully closed. There is no formal central coordination mechanism. Nor does an informal approach to the Commission, to gauge possible interest, offer meaningful protection, let alone a solution grounded in legal principles.

A process so rife with legal and business uncertainty was plainly not the intention of the framers of the EUMR.

It contrasts starkly with the highly defined rules on jurisdiction and procedure that are the essential hallmarks of the EUMR. These considerations on procedural and legal uncertainty powerfully reinforce the central conclusion that the Commission’s attempted re-invention of Article 22 as an all-purpose tool of international jurisdiction cannot stand.

47 Judgment (fn 10), paras 196–215.
48 ibid para 204.
49 ibid para 198.
50 ibid para 170.
5. Premature implementation of future policy

The speech delivered by EVP Vestager at the International Bar Association (IBA) Annual Competition Conference confirmed the Commission’s practice of discouraging NCAs from referring cases which they were not competent to review under their national merger control rules, but signalled it was going to adopt a new approach to interpreting the Article 22 powers in the future:

So the time has come to change our approach. We plan to start accepting referrals from [NCAs] of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves. This won’t happen overnight – we need time for everyone to adjust to the change, and time to put guidance in place about how and when we’ll accept these referrals. But if all goes well, I hope we’ll be able to put this new policy into effect around the middle of next year.\(^51\) (emphasis added)

Illumina and GRAIL were though not afforded the time to ‘adjust’: the ‘guidance’ was not published until after the Invitation Letter was sent to Member States on 19 February 2021.

Thus, contrary to the assurance in the speech that any new Article 22 policy would be further articulated and run only from the middle of 2021, the Commission moved three months prematurely, so imposing on the Parties requirements that they could not have anticipated. Accordingly, the Parties argued in the GC that the Commission’s actions infringed their legitimate expectations. The GC’s reasons for rejecting that claim do not convince.

First, both the Commission and the GC misrepresented this plea by stating that the Parties have not demonstrated a ‘policy, in accordance with which the [Commission] did not accept the referral requests under Article 22 …\(^52\) – a striking argument, given the clear wording of the EVP’s statement. In any event, the Parties’ plea before the GC focused on ‘how and when’ the Commission would implement its new policy.

Second, the GC surprisingly concludes that the assurances made by EVP Vestager in her speech to the IBA did ‘not emanate from the EU administration’.\(^53\) Yet the transcript of the speech was published on the Commission’s website, where it remains available. And this holding overlooks the judgment of the CJEU in \textit{A.G.M.-COS. MET v Suomen valtio and Tarmo Lehtine} where it found that statements of officials are attributable to the authority they represent if the addressees of the statement ‘can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his office’.\(^54\) In addition, the GC has previously held that a letter sent by the most high ranking official in the [Commission]’s Competition Directorate, in that capacity […] might in principle give rise to a legitimate expectation on the part of the economic operators.\(^55\)

It was natural for the audience at the IBA conference, which was drawn from the global competition law community, to suppose that the statement made by EVP Vestager and Commissioner for Competition was not a mere personal opinion. Indeed, she did not speak in her personal capacity; and the Commission never suggested that EVP Vestager lacked the authority to make representations about the change in the Commission’s longstanding approach to Article 22. The fact that, in line with her speech, the Article 22 Guidance was subsequently adopted in March 2021 is proof enough that she was speaking on behalf of the Commission.

Third, the Judgment adds a new, restrictive condition for the finding of legitimate expectations, which is entirely at odds with the scope and purpose of the principle as interpreted by the established case-law of the EU courts. In particular, the GC held that the Parties could not rely on the speech of EVP Vestager since it ‘did not mention the concentration at issue’ and ‘could not therefore contain precise, unconditional and consistent assurances in relation to the treatment of that concentration’. This is inconsistent with previous judgments which held that assurances not addressed to specific individuals may give rise to legitimate expectations,\(^56\) including sudden and unexplained changes to administrative practice applicable in merger control law.\(^57\) Put differently,
there is no support for the GC’s position that legitimate expectations are only capable of arising where the assurances are addressed to a specific individual. It follows from the above that there is strong support for the Parties’ claim that their legitimate expectations were violated by the Commission’s decision to send the Invitation Letter.

6. Commission’s assertion of jurisdiction is incompatible with ICN/OECD standards

The ICN 2018 Recommended Practices for Merger Notification and Review Procedures recommend that competition authorities only assert jurisdiction over transactions that have a material nexus to the reviewing jurisdiction.58 Such material nexus should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction.59 These recommendations are grounded in the international law concepts of comity, fairness and sovereignty and were formulated precisely to avoid jurisdictional overreach by regulators. Moreover, the 2018 ICN Recommended Practices were supported by all members, including the Commission, which makes it all the more remarkable that it flouted the jurisdictional recommendations in Illumina/GRAIL and with its new policy.

The jurisdictional principles in the 2018 ICN Recommended Practices are reflected in the executive summary of the discussion at the 2016 OECD roundtable regarding jurisdictional nexus in merger control.60 This executive summary reflected the views expressed by participants in the roundtable who were comprised of members of the OECD Competition Committee. Notably, the Commission indicated that it would review concentrations only if they have substantial economic links with the EU and urged other countries to follow this same approach.61

Most recently, in 2021, the OECD and ICN released a joint paper discussing international co-operation in competition enforcement.62 This further illustrates that both bodies are focused on comity and the improvement of inter-agency cooperation. Historically, these are issues which the Commission actively supported, but it appears to have abandoned its previously stated positions in Illumina/GRAIL. Indeed the longstanding case-law of the EU courts recognizes that the EU ‘must respect international law in the exercise of its powers [and] that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.’63 In this regard, the assertion of jurisdiction in competition cases should have regard to the principle of comity.64 This requires the Commission to act with restraint in the exercise of extraterritorial jurisdiction.65 The turnover-based thresholds in the EUMR reflect such restraint since

59 Ibid Section II. C. The 2018 ICN Recommended Practices provide that jurisdictions may retain the ability to review transactions that do not meet the mandatory notification thresholds. However, such ‘residual jurisdiction’ should nevertheless be based on non-mandatory notification thresholds which only capture transactions with a material nexus to the jurisdiction. But the new Article 22 policy lacks any such thresholds, quite aside from the absence of nexus in the Illumina case itself.

Moreover, when a jurisdiction maintains residual jurisdiction, the 2018 Recommended Practices provide that steps should be taken to address the desire of the parties to the transaction for certainty. This may include restricting the timeframe where the competition authority’s ability to exercise residual jurisdiction after the completion of a transaction and/or authorizing the parties to submit voluntary notifications to the competition authority. Such safeguards were lacking for sure in the Illumina context, before the new Guidance was announced; nor do the Commission’s current proffered re-assurances about its (limited) deployment of the new policy measure up to these principles.

60 Executive Summary of 2016 OECD Roundtable - Jurisdictional Nexus in Merger Control Regimes, available online at: https://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm (accessed 7 July 2023). The executive summary indicated that ‘notification thresholds must have an appropriate local nexus, be clear and objective, and be easy to use and to comply with’ and that ‘local nexus is vital to a well-functioning merger control system that achieves an appropriate balance of costs and benefits’. The executive summary also highlighted that the main factor usually taken into account to determine whether a transaction has appropriate local nexus is the local activity of the target or of each of at least two parties to the transaction, usually measured by reference to material sales or assets levels within the territory of the jurisdiction concerned. The executive summary went on to state that ‘if the local turnover of only one participating undertaking was sufficient to trigger merger notification, then a very significant number of merger transactions which have no or very little impact on competition in the country would have to be notified’.

65 Intel Corporation v Commission Case C-413/14 P, EU:C:2016:788, para 283. See also the Opinion of Advocate General Darmon in Woodpulp which invoked the following passage from the judgment of the International Court of Justice in Barcelona Traction [‘international laws] involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign
they are designed to capture concentrations with a material nexus to the EU. Article 22 itself similarly relies on a nexus of competition concerns which are specific to the requesting Member State. The Judgment however validates an approach that is not grounded in restraint; and one which permitted the EUMR review of a concentration that did not satisfy any clear, objective and verifiable parameter indicative of a material nexus to the EU.

Moreover, the GC did not consider whether Illumina/GRAIL satisfied the ‘qualified effects’ test which provides that extra-territorial jurisdiction should not be exercised in respect of a concentration implemented outside the EU unless it is foreseeable that it would have immediate and substantial effect on competition in the bloc. The Judgment does not address how a target with no presence or revenue in the EEA could conceivably satisfy the immediacy limb of the test.

Article 22, in its original and authentic scope, respects the principle of material nexus. It is for the purpose of addressing concentrations that affect competition specifically in the referring Member State. The vice of the Commission’s new policy is that it invites referrals from Member States with no such specific nexus. France and the other states that joined the French request were no more specifically affected than any other Member State, or indeed other countries worldwide where GRAIL was similarly inactive. The first application of the newly reinterpreted Article 22 might have been brought in relation to a concentration in which the parties were both commercially engaged in EU, and so with plausible nexus, but the Commission chose to apply it first in a transaction where the target company plainly had no such nexus.

Although Illumina/Grail has been commonly framed in terms of Article 22 ‘jurisdiction’, for clarity of analysis it may assist to pause and focus on the distinction between ‘jurisdiction’ and ‘competence’. The ‘jurisdiction’ (more properly understood) denotes the power to act in international law; whereas ‘competence’ refers to the power to act under EU law. The actions of the Commission in Illumina/GrAIL are in breach of international law principles governing extraterritorial jurisdiction; and quite separately ultra vires as a matter of EU law in that Article 22 was not conceived as a corrective mechanism to remedy the deficiencies of turnover thresholds. Moreover, if the Commission’s interpretation of its competence were correct as a matter of EU law (quod non), the EUMR would then itself be in breach of international law.

It is therefore unsurprising that the Commission’s radical policy shift has generated significant confusion in competition law policy circles, and has attracted criticism. Indeed, Andreas Mundt, the President of the German Federal Cartel Office (FCO), publicly disagreed with the Commission’s policy rethink on its application of Article 22 and questioned how an authority without jurisdiction can give jurisdiction to another similarly lacking jurisdiction. In addition, he indicated that there would be no change to the FCO’s practice of not referring concentrations which fall below the national jurisdictional thresholds. In this regard, Mr Mundt stated that the FCO would ‘wait and see what the [Court of Justice holds] before we possibly change our practice on this point.”

7. Concluding remarks

The attempted re-purposing of Article 22 is revealed as an improper distortion of that Article’s true purpose, which the Court of Justice should uphold by reversing the ruling of the GC.

Most fundamentally the GC erred in saying that Article 22 could serve as a ‘generally applicable corrective mechanism’ to the problem of inflexible turnover thresholds. It was never conceived as such, and lacks the mechanisms necessary to enable its deployment as a roving tool to enable the Commission to net non-notifiable transactions happening anywhere in the world.

...
The policy concern underlying the novel deployment of Article 22 was that existing jurisdictional thresholds may not capture all potentially problematic concentrations, so leaving an enforcement gap: the phenomenon of so-called killer acquisitions.70 These concerns are rooted in the view that market developments have resulted in ‘a gradual increase of concentrations involving companies with low turnover, but high competitive potential in the internal market.’71 This article does not take issue with that as a legitimate area for attention. But to that end the Commission needed – and needs – to bring forward amendments to the EUMR, a process which the EUMR itself foresees. The system of the EUMR is one built on bright-line jurisdiction, clarity of procedures, due respect for the rights of the defence, and legal certainty for business. It is one in line with principles of international law and comity. If economic thinking and policy now identify a need to address transactions previously assumed to be of no interest, the law needs then to be adapted to empower the Commission to address them in a tailored and predictable way.

70 Cunningham, Ederer and Ma (fn 4).
71 Vestager (fn 8).