THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

GW Competition & Innovation Lab Working Paper Series

No. 2024/4

MAKING SENSE OF EU MERGER CONTROL: THE NEED FOR LIMITING PRINCIPLES

Aurelien Portuese

Research Professor and Founding Director of the GW Competition and Innovation Lab at The George Washington University

The GW Competition & Innovation Lab
805 21th Street NW
Washington, DC 20052
contact@gwucic.com

For many apparent reasons, merger control in the European Union ("EU") has traditionally been centralized at the level of the European Commission. In addition to providing legal certainty, a one-stop shop precludes a Balkanization of merger control in the EU, which would have significant costs for transactions and, ultimately, innovation. Nonetheless, this commonsense approach is undermined by the European Commission itself.

The European Commission's new interpretation of Article 22 of the EU Merger Regulation ("EUMR") raises questions as to whether the objectives of centralized merger control – namely legal certainty and transaction cost minimization – are still pertinent to the European Commission. In violation of the constitutional principle of subsidiarity, the European Commission appears willing to invert the centralized merger control mechanism. Worse yet, the European Commission applies its novel interpretation of Article 22 EUMR to an inappropriate case, namely the *Illumina/Grail* merger. EU merger control needs limiting principles, or else the Commission's unprincipled approach may undermine the legitimacy of EU merger decisions due to regulatory overreach.

This article critically analyzes the Commission's new interpretation of Article 22 EUMR and demonstrates that the Illumina/Grail merger is the wrong case to apply a wrong policy. To prevent situations of overreach at the expense of mergers that promote competition, the article ends with suggestions for limiting principles to Article 22 EUMR.

I. FIXING WHAT IS NOT BROKEN: THE ARTICLE 22 EUMR REFERRAL MECHANISM

A. Appraisal of a Praised One-Stop Shop

Article 22 EUMR post-notification referral mechanism enables the European Commission to investigate mergers that are not of Community dimension, at the request of one or more Member States ("MSs").[2] Article 22 post-notification referral procedure complements the post-notification referral procedure from the European Commission to national competition authorities under Article 9 EUMR and complements the pre-notification referral mechanisms under Article 4 EUMR.[3]

Article 22 EUMR enables the European Commission to investigate mergers that do not have a Community dimension and remain subject to the laws of the relevant MSs only because the relevant MSs request the Commission's investigation.[4] A concentration is deemed to have a Community dimension if it meets the quantitative thresholds laid down in Article 1(2) and Article 1(3) EUMR.[5] Concentrations below these quantitative thresholds are subject to the laws of the relevant MSs. Therefore, Article 22 has traditionally been used as a post-notification referral mechanism for concentration which, whilst falling within the ambit of the merger laws of relevant MSs, do not have a Community dimension but the Commission's analysis is deemed valuable by the relevant MSs. As such, Article 22 is actionable only if national merger laws apply. It is the risks of parallel investigations that could detrimentally undermine the one-stop-shop principle of EU merger control that underpins Article 22 EUMR.

This is made clear from the EUMR itself: Article 22 referrals only apply to concentration without a Community dimension which "affects trade between Member States and threatens to significantly affect competition within the territory of the Member or States making the request."[6] In other words, Article 22 referrals are meant to address concentrations for which merging parties have economic activities in multiple MSs or, at least, in one MS. The objectives of this referral mechanism are clearly stated in the EUMR.

2 Council Regulation (EC) No 139/2004 on the control of concentration between undertakings [2004] OJ L 24/1 [hereinafter EUMR], having replaced Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings [1989] OJ L 395/1. See also Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2004 L 133/1. Article 22 referral request mechanism was designed for MSs who did not have their own merger control rules and Article 22(3) enabled them to request the Commission's intervention for the merger which did not have a Community dimension. Today, all MSs other than Luxembourg now have merger control rules, and given the existence of pre-notification referrals, Article 22 requests should have lost some interest, which is quite contrary to the recent Commission's Guidance. See next section I.b.

3 Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2; DG Comp Best Practices on the conduct of EC merger proceedings; DG Comp Best Practices on Cooperation in Merger Investigations, US-EU Working Group.

4 Article 22 EUMR is commonly referred as the 'Dutch clause' because the Netherlands asked for its insertion because of the absence of national merger control mechanism at the time of the adoption of the Regulation. This historical background emphasizes that national merger laws must be applicable for the Commission's referral to be compliant with the spirit of Article 22 EUMR.

5 See also Consolidated Jurisdictional Notice published on 10 July 2007.

6 Article 22(1) EUMR.

Recital 11 of the EUMR indeed states that referral rules "*should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States adequately and take due account of legal certainty and the 'one-stop shop' principle*."[7] Therefore, three principles guide referral rules: the constitutional principle of subsidiarity, the principle of legal certainty, and the one-stop-shop principle.

The EUMR in general, and the referral rules in particular, have been consistently praised by commentators as providing an adequate way to minimize transaction and innovation costs while maximizing legal certainty and predictability thanks to the pursuance of objectives embedded in the three principles of subsidiarity, legal certainty, and one-stop shop.

It has been constant that Article 22 referrals cover cases where the relevant geographic market of the concentration is at minima located in one of the MSs or more probably located in multiple MSs.[8] Article 22 referrals cover concentrations for which the "main economic impact of the concentration is connected to [one or more national or sub-national] markets".[9] This is made clear from both the European Commission's documents and the positions taken by National Competition Authorities ("NCAs"). The Commission's Notice of 2005 on case referral in respect of concentrations makes it clear that referral procedures require a relevant geographic market analysis for the referrals to be relevant.

Specifically on Article 22 referrals, the 2005 Commission Notice states that "two legal requirements must be fulfilled: i) the concentration must *affect trade between Member States*; and ii) it must *threaten to significantly affect competition within the territory of the Member State or States making the request*."[10] Regarding the first criterion, the Commission specifies that the concentration must be "liable to have some discernible influence on the pattern of trade between Member States," referring the Commission Guidelines on the effect on trade concept for further details. The Commission Guidelines discuss the three elements of the so-called 'pattern of trade'-test developed by the Court of Justice[11], which are:

a) "'A sufficient degree of probability on the basis of a set of objective factors of law or fact',[12]
b) An influence on the 'pattern of trade between Member States',[13]
c) 'A direct or indirect, actual or potential influence' on the pattern of trade."[14]

7 Recital 11 EUMR.

8 Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=PL at para. 45. ("the categories of cases normally most appropriate for referral to the Commission pursuant to Article 22 are accordingly the following: - cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration in connected to such markets, - cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case…is considered desirable, and where the main economic impact of the concentration is connected to such markets.")

9 *Ibid.*

10 *Ibid.* para 42 (emphasis in original).

11 *Ibid.* para. 42 *et sub*. See also Case 42/84 *Remia and others v. Commission* [1985] ECR 2545 para. 22 ("*it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*").

12 This first element is "based on objective factors. Subjective intent on the part of the undertakings concerned is not required." *ibid*, para. 25. The Commission further explains at para. 29 that "*some agreements and practices are by their very nature capable of affecting trade between Member States, whereas others require more detailed analysis in this respect. Cross-border cartels are an example of the former, whereas joint ventures confined to the territory of a single Member State are an example of the latter.*" It thus appears obvious that the Commission requires that the economic activities in question between located within the Community, either inside a single MS or in multiple MSs, for the very first element of the 'pattern of trade'-test to be fulfilled.

13 This second element is a "neutral" one – trade can be either increased or reduced as a result of the agreement or practice. *Ibid.* paras 34 & 35. This element enables the Commission to ensure that only agreements or practices that are "capable of having cross-border effects" are subject to the Commission's scrutiny.

14 This third and last element of the 'pattern of trade'-test include "*indirect*" or "*potentia*l" effects in the analysis of effects on trade between MSs, but the Commission's Notice makes explicit at para. 43 that such inclusion "*does not mean that the analysis can be based on remote or hypothetical effects…Hypothetical or speculative effects are not sufficient for establishing Community law jurisdiction." Ibid*. para. 43.

These elements must be assessed in light of the concept of "*appreciably.*"[15] The Guidelines refer to the *De Minimis* Notice[16] on agreements of minor importance which do not appreciably restrict competition under Treaty rules. The Commission considers that agreements and practices fall outside Community law jurisdiction whenever there is a "*weak position of the undertakings concerned on the market for the products in question.*"[17] The Commission provides further legal clarity at paras. 52 et sub when it states that:

> "The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:
>
> (a) The aggregate market of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and
> (b) In the case of horizontal agreements, the aggregate annual Community turnover for the undertakings concerned in the products covered by the agreement does not exceed 40 million euro…
> (c) In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro…"[18]

The market share threshold requires proper market analysis of the "relevant product market and the relevant geographic market."[19] The Commission further makes clear that "*with regard to the threshold of 40 million euro…the turnover is calculated on the basis of total Community sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement (the contract products).*"[20]

This settled interpretation of Article 22 referrals whereby relevant geographic markets need to be located within the Community is confirmed by the NCAs themselves.[21] To establish whether a concentration "*might be a suitable candidate for a joint referral*," NCAs will consider "*whether the relevant geographic market(s) affected by the concentration is/are wider than national in scope and whether the main competitive impact of the concentration is linked to such market/s.*"[22]

It thus appears that Article 22 referrals cover agreements or practices which are capable of appreciably affecting trade between Member States measured by sales within the Community and cross-border elements across MSs following a geographic market analysis[23], explicitly excluding hypothetical and speculative effects on trade between MSs.

Commentators have consistently praised the completion of the objectives of legal certainty, subsidiarity, and one-stop shop principles by the Article 22 referral mechanism, and more generally by the referral procedures under EUMR.[24] Referrals to the Commission pursuant to Article

15 *Ibid.* paras. 44 *et seq.*

16 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community [2001] OJ L 124/36.

17 *Ibid.* (reference omitted).

18 *Ibid.* para. 52 (reference omitted).

19 *Ibid.* para. 55.

20 *Ibid.* para. 54.

21 European Competition Authorities, *Principles on the application, by National Competition Authorities within the ECA, of Article 4(5) and 22 of the EC Merger Regulation*, January 2005, available at https://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf.

22 Ibid. para. 19. This is reiterated in para. 32 where it is said that, in their request for referrals, NCAs must address among other things "whether a relevant geographic market is wider than national" and "the possible effect of the concentration on trade between Member States". *Ibid*, para. 32.

23 The localization of the competitive effects also constrains the geographical ambit of the Commission's remedies. See Vogel & Vogel, "Referral system – EU," https://www.vogel-vogel.com/faq-items/referral-system-eu/?lang=en (*"The only limit to the Commission's intervention is of a geographical nature. It may take the measures strictly necessary to restore competition only in the territory of the States at whose request it has intervened."*)

24 See, for instance, Anne Looijestijn-Clearie, Catalin S. Rusu, Marc J.M. Veenbrink, "In Search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation," 29(5) Maastricht Journal of European and Comparative Law, 550-571 (2022) (noting at 551, "so far, the referral system has worked well."); Ioannis Lianos, Valentine Korah, Paolo Siciliani, *Competition Law. Analysis, Cases & Materials*, (Oxford: Oxford University Press, 2019) (at 1560 "…under the EUMR a bright-line test based on certain turnover thresholds are used to distinguish concentration with an EU dimension, thus subject to the Commission's exclusive jurisdiction, from those below the turnover thresholds and this subject to national merger scrutiny. This clear division of competence is known as the 'one-stop-shop' principle" which "is at the core of the Merger Regulation")

22 EUMR have been rare[25], also because the Commission has historically rejected some referrals about concentrations deemed insufficiently important.[26]

Regrettably, without consultation and proper analysis, the European Commission has recently decided to radically change its interpretation of Article 22. By doing so, it violates the three abovementioned principles with the inopportune approval of the General Court.[27]

B. A Misguided Guidance

Until the controversial *Illumina/Grail case, no initial* Article 22 request has ever been made by a MS concerning concentrations that fall below the relevant domestic merger control thresholds.[28] In fact, a MS have made Article 22 requests for concentrations that do not meet their domestic merger control thresholds not as an initial request but only when joining other MSs' requests.[29] The right of other MSs to join the initial request is irrespective of these MSs' thresholds appears in Article 22(2) EUMR.[30] In other words, the concentration to be referred under Article 22 must meet a domestic merger control threshold for that relevant MS to make an Article 22 request: additional MSs can join such request irrespective of whether or not the concentration meets their domestic merger control thresholds.

This situation has radically changed as the European Commission embraced the narrative of so-called "killer acquisitions."[31] This theory speculates that incumbents acquire nascent competitors, and discontinue the acquiree's innovations which threaten the acquirer's monopoly profits, thereby undermining competition and stifling innovation. For, the authors argue that "*our theory also predicts that incumbents have a stronger incentive to acquire and terminate overlapping innovation in ex-ante less competitive markets.*" [32] One key aspect of this theory is therefore the discontinuation of innovations post-acquisitions, otherwise, the harm to innovation and competition remains unsubstantiated.

Because these "killer acquisitions" concern nascent competitors whose turnovers fall below merger rules, antitrust agencies fail to preserve competition because these mergers remain under the agencies' radar at the expense of innovation and competition. This theory is intellectually appealing but empirically weak. For, the authors themselves consider that only 6.3 percent of the acquisitions they sampled were, in fact, killer acquisitions (i.e. when the acquirer discontinued the acquiree's innovation to thwart competition. And yet, the authors themselves acknowledge that the overall social welfare is not necessarily negative as a result of product discontinuation if efficiencies are generated and duplications are avoided.[33]

In other words, out of the approximately 6 percent of mergers identified as killer acquisitions, how many are welfare-decreasing and hence anticompetitive and anti-innovation? Not only the lack of evidence prevents from drawing hasty conclusions, but more importantly, the limited magnitude of the competition concerns reveals that the vast majority of (vertical) mergers are pro-competitive and pro-innovative.[34]

---

25 John Boyce, Dimitrios Loukas, Anny Tubs, "Merger Control," in *Bellamy & Child, European Community Law of Competition, Vol.I*, (Oxford: Oxford University Press, 2008), 623-812, at 686.

26 For instance, the European Commission rejected Portugal and Italy's Article 22 requests about the merger *Gas Natural/Endesa* on their markets. See Press Release IP/05/1356, October 27, 2005.

27 T-227/21, *Illumina Inc. v. European Commission*, ECLI:EU:T:2022:447.

28 John Boyce, Dimitrios Loukas, Anny Tubs, "Merger Control," in *Bellamy & Child, European Community Law of Competition, Vol.I*, (Oxford: Oxford University Press, 2008), 623-812, at 686.

29 This rare situation only occurred once in 2006 with the requests made by France and Sweden in Case M.3796 *Omya/JM Huber,* (July 19, 2006).

30 Article 22(2) para. 2 EUMR reads: "Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request."

31 Colleen Cunningham, Florian Ederer, Song Ma, "Killer Acquisitions," 129(3) *Journal of Political Economy*, 649-702 (2021). See also Sai Krishna Kamepalli, Raghuram Rajan, Luigi Zingales, "Kill Zone," *NBER Working Paper Series* 27146 (2020); OECD, "Start-ups, Killer Acquisitions and Merger Control – Background Note" (2020); Massimo Motta, Martin Peitz, "Big Tech Mergers," 54 *Information Economics and Policy*, (2021); Geoffrey Parker, Georgios Petropoulos, Marshall Van Alstyne, "Platform mergers and antitrust," 30 *Industrial and Corporate Change*, 1307-1336 (2021); Pauline Affeldt, Reinhold Kesler, "Big Tech Acquisitions – Towards Empirical Evidence," 12(6) Journal of European Competition Law & Practice, 471-478 (2021); Marc Bourreau, Alexandre de Streel, "Big tech acquisitions – competition and innovation effects and EU merger control," *CERRE Report*, February 2020; Michael L. Katz, "Big Tech mergers: Innovation, competition for the market, and the acquisition of emerging competitors," 54 *Information Economics and Policy* (2021),

32 Colleen Cunningham, Florian Ederer, Song Ma, "Killer Acquisitions," 129(3) *Journal of Political Economy*, 649-702 (2021), at 653.

33 *Ibid.* at 42 ("Although killer acquisitions reduce consumer surplus, they need not reduce social surplus under a welfare standard that weights consumer surplus and producer surplus equally. This can occur if the entrepreneur's product partly duplicates development costs but does not provide sufficiently large increases in consumer surplus to fully compensate for the loss in producer surplus of the existing incumbents.")

34 For a fuller discussion, see Aurelien Portuese, "Reforming Merger Reviews to Preserve Creative Destruction," (ITIF Report, September 2021), https://www2.itif.org/2021-merger-reviews.pdf

The normative conclusion of the theory of killer acquisitions is two-fold: 1) the antitrust agencies are routinely accused of lax merger enforcement; 2) the antitrust agencies are pressured to investigate acquisitions of companies that may not traditionally be subject to merger reviews under current merger rules.

Regarding the first normative conclusion, the theory of killer acquisitions unfortunately does not provide robust evidence. On the contrary, studies suggest that the merger intensity – measured by the ratio between reportable transactions and merger enforcement actions – by antitrust agencies appears to have remained stable.[35] Regarding the second normative conclusion, the theory of killer acquisitions has generated considerable pressure to pass antitrust bills and adopt regulatory reforms to tackle these allegedly anti-competitive under-the-radar mergers[36] that antitrust agencies have continuously ignored.[37]

The European Commission decided, in the absence of consultation with stakeholders[38], to change the post-notification case referral rules under Article 22 EUMR by issuing an Article 22 Guidance paper.[39] Article 22 was never designed to catch concentrations that do not meet MSs' filing thresholds – and yet, the European Commission published a Guidance paper that twists the spirit of Article 22 to opportunistically follow the misguided narrative of "killer acquisitions." The Guidance paper enabled the European Commission to change the Article 22 rules without having to go through the procedure of amending the EUMR, therefore circumventing the need to gain approval from a democratically-elected institution such as the European Parliament.

The Guidance paper reiterates the two legal requirements for Article 22 referrals – namely that the concentration must affect trade between MSs and threaten to significantly affect competition within the territory of the MS or MSs making the request – but added additional considerations which stretched the jurisdiction of the European Commission to receive Article 22 referrals. The Guidance paper states that "the categories of cases that will normally be appropriate for a referral under Article 22 of the Merger Regulation where the merger is not notifiable in the referring Member State(s) consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential."[40] The Guidance Paper lists examples of such cases, including a "start-up or recent entrant with significant competitive potential," an "important innovator," an "actual or potential important competitive force," a company having "access to competitively significant assets," a company that "provides products or services that are key inputs/component to other industries."[41] Given the breadth and

35 For example, see Aurelien Portuese, "Reforming Merger Reviews to Preserve Creative Destruction," (ITIF Report, September 2021), https://www2.itif.org/2021-merger-reviews.pdf (at 10, "merger ratios increased post-recession and, on average, remained stable."); Jeffrey T. Macher and John W. Mayo, "The Evolution of Merger Enforcement Intensity: What Do the Data Show?" *Journal of Competition Law & Economics* (2021), ("the Agencies [became] more likely to challenge proposed mergers over 1979–2017.")

36 For example, see Margrethe Vestager, "The Future of EU Merger Control," Speech at the International Bar Association 24th Annual Competition Conference, September 11, 2020 ("We've discovered that, on the whole, the existing thresholds work well. But there are a handful of mergers each year that could seriously affect competition, but which we don't get to see because the companies' turnover doesn't meet our thresholds.")

37 In the U.S., antitrust bills reforming merger laws included the Competition and Antitrust Law Enforcement Reform Act of 2021, S.225, February 4, 2021, https://www.congress.gov/bill/117th-congress/senate-bill/225/text . In Europe, Article 14 of the Digital Markets Act include lays down an obligation to inform about "any intended concentration" by designated gatekeepers in an attempt to scrutinize transactions that fall below national or EU merger threshold rules. See 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 (Digital Markets Act), October 12, 2022, L 265/1. See, Aurelien Portuese, "The Digital Markets Act: The Path to Overregulation," *Competition Policy International*, June 13, 2022; Aurelien Portuese, "Precautionary Antitrust: The Changing Nature of Competition Law," 17(3) *Journal of Law, Economics and Policy* (2022); Aurelien Portuese, "Biden Antitrust: The Paradox of the New Antitrust Populism," 29(4) *George Mason Law Review*, (2022).

38 Tilman Kuhn, Thilo-Maximilian Wienke, Jeremie Jourdan, Katarzyna Czapracka, "Catch-22: The European Commission Keeps Broadening Merger Control Intervention Powers and Gives a Glimpse of the Future," *White&Case Alert,* September 17, 2020 (Article 22 referrals "was never intended as a tool to catch cases that would otherwise escape scrutiny under existing thresholds. It was introduced to allow for a referral where a member state – like the Netherlands at the time of the adoption of the EUMR – lacked a merger control regime altogether. Using such a formally existing possibility to pursue a very different policy objective is questionable. At a minimum, a broad public consultation seems in order.")

39 First, Commissioner Margrethe Vestager delivered a speech in September 2020 where she announced that "We plan to start accepting referrals from national competition authorities 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," in Margrethe Vestager, "The Future of EU Merger Control," Speech at the International Bar Association 24th Annual Competition Conference, September 11, 2020. Second, the European Commission published a Staff Working Document in March 2021 which concluded that "the referral mechanisms of the EU Merger Regulation have generally worked effectively as a corrective tool to achieve their objectives of allocating cases to the most appropriate authority. However, the Commission's restrictive approach to accepting Article 22 referrals have limited its use and thus its effectiveness, in particular for concentration where the turnover of at least one of the undertakings concerned does not reflect its competitive potential," in European Commission, Commission Staff Working Document – Evaluation of procedural and jurisdictional aspects of EU Merger Control, SWD(2021) 66 final, March 26, 2021, at para. 150. Third, the European Commission published the Article 22 Guidance Paper on March 2021 because "a number of cross-border transactions which could potentially also have such an impact have escaped review by both the Commission and the Member States. This includes in particular transactions in the digital and pharma sectors," in European 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, March 31, 2021, at para. 10 ([hereinafter 'Guidance Paper'].

40 Guidance Paper, para. 19.

41 *Ibid.*

vagueness of these terms, any high-growth start-up trying to innovate appears susceptible to be under the Commission's merger control whenever a company or venture capital wants to acquire more than fifty percent of the start-up's shares.

The Guidance Paper is an unfortunate policy change about Article 22 referral mechanism that worked well but did not fit into the popular "killer acquisition" narrative. This quick policy reversal undermines the three principles underpinning the referral mechanisms – namely, the principle of subsidiarity, the principle of legal certainty, and the one-stop-shop principle.

The Guidance Paper Violates the Constitutional Principle of Subsidiarity. First, the Guidance Paper disregards the principle of subsidiarity.[42] Embedded in Article 5(3) of the Treaty of the EU as well as Protocol No 2, the principle of subsidiarity ensures that shared competences between MSs and the EU are exercised at the lowest level possible (i.e. MSs or sub-national levels) by default, and can only be exercised at the EU level by "reason of the scale or effects of the proposed action."[43] This means that the competence traditionally exercised by the MS (or sub-national entity) is transferred to the EU level "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States."[44] Therefore, the EU exercises a competence only because this competence is "conferred" by the MS to the EU according to the principle of conferral of Article 5(2) TEU[45] that underpins the principle of subsidiarity: There cannot be a transfer of competence from the MS to the EU if the MS did not have competence on the first place.

The MSs do not have national competence to review the concentrations referred to the EU under the Article 22 Guidance Paper. And yet, the Guidance Paper requires MSs, by making referrals, to empower the Commission with a competence that they never had – namely, to review mergers that cannot be reviewable under merger thresholds rules. It is in that regard that the Article 22 Guidance Paper violates the principle of subsidiarity: It distorts the meaning of a constitutional principle – the subsidiarity principle – by transferring competence to the EU that the MS did not have, thereby violating the principle of conferral which forms the basis of the very principle of subsidiarity.

Because MSs cannot confer a power they do not have to the European Commission, they cannot confer merger control for concentrations that are not reviewable under national merger thresholds rules. Consequently, the principle of subsidiarity is inoperable because the question, of allocation of competences that neither the MSs have nor the Commission should have, become obsolete. Therefore, the Article 22 Guidance Paper ignores the constitutional principle of conferral and, by doing so, violates the other constitutional principle of subsidiarity.

The Guidance Paper Violates the Principle of Legal Certainty. The Commission Notice on case referral recognized that "determining jurisdiction exclusively by reference to fixed turnover-related criteria provides legal certainty for merging companies."[46] The Guidance Paper precisely dismantles the reference to fixed turnover-related criteria, thereby undermining the very legal certainty and legitimate expectation businesses can rightfully expect from EU institutions.[47] The Commission Notice acknowledges the "importance of legal certainty regarding jurisdiction over a particular concentration," and accordingly, made clear that referrals "should normally only be made when there is a compelling reason for departing from 'original jurisdiction'…"[48] The Guidance Paper undermines the principle of legal certainty in multiple ways.

First, the very disparagement of the criteria of fixed turnover is, in the words of the Commission in its 2004 Notice, the opposite of providing legal certainty to merging companies. The Guidance Paper explicitly targets concentrations involving undertakings that may have "little

---

42 On this principle, see Aurelien Portuese, "The Principle of Subsidiarity as a Principle of Economic Efficiency," 17 *Columbia Journal of European Law*, 231 (2010); Gabriel A. Moens, John Trone, "The Principle of Subsidiarity in EU Judicial and Legislative Practice: Panacean or Placebo? 41(1) *Journal of Legislation*, 65-102 (2014); Mari Cahill, "Theorizing subsidiarity: Towards an ontology-sensitive approach," 15(1) *International Journal of Constitutional Law*, 201-224 (2017).

43 Article 5(3) TEU reads: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

44 *Ibid*.

45 Article 5(2) TEU reads: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." In addition Article 5(1) makes clear that "the limits of Union competences are governed by the principle of conferral."

46 Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2, para. 3. See ibid, para. 7 ("…having regard in particular to the importance of legal certainty, it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds.")

47 On the principle of legal certainty and legitimate expectations, see Aurelien Portuese, Orla Gough, Joseph Tanega, "The principle of legal certainty as a principle of economic efficiency," 44 *European Journal of Law and Economics*, 131-156 (2014); James Maxeiner, "Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy? 15 *Tulane Journal of International & Comparative Law*, 541- 607 (2007); Elina Paunio, "Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order," 10(11) German Law Journal, 1469-1493 (2009).

48 Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2, para. 13.

or no turnover".[49] For the European Commission to empower itself of jurisdiction, without any approval from a democratically-elected institution, over mergers that involve companies with "no turnover" proves to be the opposite of the principle of legal certainty and the legitimate expectations that businesses can expect. Added to the inherently discretionary nature of the referral mechanisms where the European Commission can accept or reject referrals based on obscure criteria, the Guidance Paper paves the way for merging companies (and their counsels) to be in complete darkness when it comes to predicting whether or not a specific concentration will be subject to merger control or not.

Second, the Guidance Paper shatters the principle of legal certainty since it discriminately applies to "certain categories of cases" as its title suggests.[50] What are those categories of cases and why only those categories? The Guidance Paper refers to the "digital and pharma sectors"[51], thereby fueling the "killer acquisitions" narrative. Several questions arise from these vaguely defined sectors. First, what are the "digital" and "pharma" sectors? Should retail companies with digital apps be considered digital companies? Should the gig economy be considered part of the digital economy? Should newspapers, education, and travel booking agencies be considered digital companies, since it is unthinkable for such companies to compete without being fully digitalized? Should crypto, blockchain, and every software company be considered a digital company? Similarly, should biotech, MedTech, and hospital be considered "pharma" companies? The Guidance Paper did not bother defining the "categories of cases" mentioned in the very title of the Guidance Paper, thereby generating considerable uncertainty for businesses trying to innovate through digital tools and by improving healthcare. Another question is concerning the merging companies who can safely assume they are not part of the "digital and pharma sectors": Should the Guidance Paper be influential enough and illustrate the Commission's policy on Article 22 EUMR so that they cannot exclude being subject to an Article 22 EUMR even though the concentration is not notifiable in any MS? Nothing in the Guidance Paper explicitly excludes such possibility, therefore suggesting that non-digital and non-pharma companies should take into consideration the Guidance Paper without having a clear understanding of how this Guidance Paper will ever apply to them. This further obscures the legal certainty of the EU regulatory framework applicable to merging companies wherever they are located in the world.

Third, the confusion is further increased by the European Commission itself. The Commission published in December 2022 a Frequently Asked Questions and Answers ("Q&A") document to clarify the obscure Guidance Paper.[52] One could have expected this document to define the "categories of cases". On the contrary, the Q&A document explicitly states: "The Article 22 Guidance is a targeted tool focusing on specific categories of cases, which are described in detail in the Article 22 Guidance. It is not limited to any specific economic sector."[53] This open-endedness of the applicability of the Guidance Paper not only contradicts the Guidance Paper (and its title) but also contradicts the hints the Commission provides in its Q&A document with "hypothetical examples of cases" which nevertheless all involve digital or pharma sectors writ large.[54] Should merging companies follow the Guidance Paper which suggests that only digital and pharma sectors are concerned by the policy reversal or should merging companies follow the Q&A documents which state the opposite, although suggesting only cases which relate to digital and pharma sectors? The confusion grows as the Commission attempts to clarify an unprincipled policy reversal on Article 22 referrals. In any case, the Guidance Paper undermines the once-important principle of legal certainty that the 2005 Commission Notice emphasized so unequivocally.

The Guidance Paper Violates the Principle of "One-Stop-Shop." Finally, the Guidance Paper is a mockery of the 'one-stop-shop' principle which lies "at the core" of the EUMR.[55] The purpose of the 'one-stop shop' principle is to increase "administrative efficiency," avoid "duplication and fragmentation of enforcement effort," and more generally "brings advantages to businesses, in particular merging firms, by reducing the

49 *Ibid.* para. 9.

50 European 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, March 31, 2021.

51 *Ibid.* para. 10. See also ibid, para. 9 ("In recent years, however, market developments have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration. These developments appear particularly significant in the digital economy… Similarly, in sectors such as pharmaceuticals and others where innovation is an important parameter of competition, there have been transactions involving innovative companies conducting research & development projects and with strong competitive potential…").

52 European Commission, "Practical information on implementation of the 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases'". Frequently Asked Questions and Answers (Q&A), December 2022, available at: https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf.

53 *Ibid.*

54 *Ibid.* pp. 3-4.

55 *Ibid.* p.2. See also Council Regulation (EC) No 139/2004 on the control of concentration between undertakings [2004] OJ L 24/1 recital 8 ("…in application of a 'one-stop shop' system…"), recital 11 ("…due account of legal certainty and the 'one-stop shop' principle."). See also Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2, para. 5 ("…the provision of a 'one-stop shop' for competition scrutiny of mergers…"), para.8 ("…the benefits inherent in a 'one-stop-shop' system…"), para. 11 ("Decisions on the referral of cases should also have regard to the benefits inherent in a 'one-stop shop', which is at the core of the Merger Regulation (15). The provision of a one-stop-shop is beneficial to competition authorities and businesses alike." (citation omitted)).

costs and burdens arising from multiple filing obligations…”.[56] With the Guidance Paper, the Commission violates the objectives of the 'one-stop shop' principle of EUMR and turns the principle into an irony.

First, the Commission violates the principle's objectives because those objectives are to minimize regulatory costs and administrative burdens on merging companies. But the Guidance Paper on the contrary adds considerable uncertainty, regulatory costs, and administrative burden by requiring merger filing and allowing lengthy merger scrutiny on concentrations that have never been reviewed because of the minimal (if not inexistent) turnover of one of the merging companies. How can the European Commission argue to fulfill the objectives of the one-stop-shop principle with its Guidance Paper when this document aims at increasing regulatory costs and administrative burden whereas the principle aims to achieve the opposite outcome? This contradiction appears blatant in the case of *Illumina/Grail* where the merging companies did not have to notify their merger in the EU because Grail had no turnover in the EU or elsewhere in the world. But, due to the policy reversal of the Guidance Paper, the merging companies now face protracted litigation which is both costly and inappropriate because of the lack of legal basis for such merger scrutiny. The Guidance Paper violates the one-stop-shop principle by generating *ex nihilo* regulatory costs and administrative burdens that did not exist prior to the Guidance Paper. Consequently, the Guidance Paper, which is a non-legally binding document issued by the European Commission, violates the one-stop-shop principle of the legally-binding EUMR adopted by the democratically-elected institutions in 2004.

The Guidance Paper turns the one-stop-shop principle into an irony because, when attempting to explain the Paper with the Q&A document, the European Commission wrote:

> "A circumstance where a transaction has already been notified in one or more Member States that did not request a referral or join such a referral request may constitute a factor against accepting an Article 22 referral (from a Member State where the transaction was not notified).5 This reflects the "one-stop-shop" principle, which is at the core of the EU Merger Regulation." *(citation omitted)*

This circumstance is the opposite of the one-stop-shop principle: The Commission would presumably refuse to analyze a merger that has been notified in one or multiple MSs, which may affect trade between MSs, which will lead to multiple filing with risks of fragmentation and duplication across the EU, and yet the European Commission would presumably refuse to review it, ironically in the name of the 'one-stop-shop' principle which is allegedly at the core of the EUMR. For the Guidance Paper to favor centralization of merger review for those mergers which were not notifiable increases costs and ignores the one-stop-shop principle. But for the Guidance Paper to disfavor centralization of merger review for those mergers which may have to be notified to multiple MSs increases costs and also ignores the one-stop-shop principle. It appears that the European Commission disapplies the one-stop-shop principle when it is most relevant and applies the one-stop-shop principle when it is least relevant.

A return to the sound principles laid down in EUMR and the 2005 Commission Notice appears imperative since the European Commission seems to have adopted an unprincipled approach in favor of pursuing a misguided 'killer acquisition' narrative at the expense of the three abovementioned EU general principles of law of subsidiarity, legal certainty, and one-stop shop. In that regard, the Court of Justice needs to overturn the recent decision by the General Court in *Illumina/Grail*[57] which gives a stamp of approval to the Commission's unprincipled approach in its Article 22 Guidance Paper: expansion of the Commission's competences cannot and should not take place absent clear mandate from democratically-elected institutions and in violation of EU general principles of law.

II. PITFALLS AND POTENTIAL REMEDIES TO THE MISGUIDED GUIDANCE ON ARTICLE 22 EUMR

A. The Illumina/Grail Merger: The Wrong Case to Apply a Wrong Policy

We have demonstrated that the Article 22 Guidance Paper is the wrong policy reversal. We now discuss that this wrong policy has been designed and applied to the merger case of *Illumina/Grail*. Based on three main arguments, we demonstrate that this wrong policy has been applied to the wrong case.

56 Commission Notice on case referrals in respect of concentration, OJ 2005 C56/2, para. 11.

57 T-227/21, *Illumina v. Commission*, July 13, 2022, ECLI:EU:T:2022:447 (at para. 183, who controversially, and in disregard of the abovementioned principles of EU law, that "Member States may…make a referral request under that provision irrespective of the scope of their national merger control rules.").

First, the *Illumina/Grail* merger is not the "killer acquisition" the European Commission had in mind when drafting the Article 22 Guidance Paper.[58] A "killer acquisition" is whenever an "incumbent firm may acquire an innovative target and terminate the development of the target's innovations to preempt future competition."[59] The authors of the seminal paper take the example of drug manufacturers acquiring competing drugs and discontinuing them, in the context of horizontal mergers.[60] But Illumina acquiring Grail does not have the characteristics of a "killer acquisition". First, neither company is a drug manufacturer: Illumina is a leader in next-generation sequencing ("NGS"), and Grail, founded by Illumina in 2015 before a spin-off in 2017, is a multi-cancer early detection ("MCED") company. The merger is a vertical merger where a presumption of pro-competitive effects usually applies[61]: Illumina is the supplier of a NGS platform to its customer Grail who uses Illumina's sequencing platform. Consequently, contrary to the "killer acquisition" narrative, Illumina has no incentive to discontinue Grail's MCED technology: quite the contrary, Illumina founded Grail, wants to invest in Grail with the merger, and has already made commitments that Illumina's platform will continue to be available to Grail's rivals since the platform is already available to them although Illumina maintained an equity interest of at least 12 percent in Grail since 2017.[62] Consequently, the competitive harms appear speculative – i.e. the ability or willingness to harm Grail's rivals not only would decrease Illumina's revenues, but would also violate Illumina's commitments, and would have taken place before the merger had foreclosure been profitable to Illumina since Illumina always had an equity interest in Grail.[63]

Second, the *Illumina/Grail* merger is a pro-competitive merger where the benefits are countless lives saved whereas the harms remain speculative and unsubstantiated. The purpose of the $8 billion acquisition of Grail by Illumina is to avoid Grail's royalties (the so-called elimination of the double marginalization problem which constitutes synergies in vertical mergers). Such elimination will contribute to speeding up the availability of Grail's Gallieri test by making it cheaper to commercialize, thereby saving a considerable number of lives by early detection of multiple cancers.[64] On the other hand, the competitive harms remain speculative: the "Open Offer" is a standard supply contract proposed by Illumina to all of its oncology customers to ensure that Grail's competitors are treated fairly and without discrimination. Pursuant to the Open Offer, the competitive harms appear speculative as long as antitrust authorities ensure that Illumina is compliant with its own Open Offer. This is why the FTC's administrative law judge cleared the merger.

58 This is apparent from Margrethe Vestager's speeches. For instance, see Margrethe Vestager, "Merger Control: the goals and limits of competition policy in a changing world," Speech at the International Bar Association 26th Annual Competition Conference in Florence, September 9, 2022, https://ec.europa.eu/commission/presscorner/detail/da/SPEECH_22_5423 ("[Article 22 EUMR] is a targeted tool; one which can respond to the challenges posed by these dynamic markets and the special features of some digital players. Whether for 'killer acquisitions' or other types of 'pre-emptive acquisitions', it is the dynamism of today's markets - in particular for pharma and tech - that makes this kind of targeted tool so vital.")

59 Colleen Cunningham, Florian Ederer, Song Ma, "Killer Acquisitions," 129(3) *Journal of Political Economy*, 649-702 (2021), 650 ("*the logic of killer acquisitions (i.e., shutting down competition even before there is a marketable product)…*")

60 Ibid, 651 ("documenting killer acquisitions in the pharmaceutical industry is also worthwhile, since the industry is highly innovative and the successful commercialization of innovative drugs is potentially very socially valuable.")

61 John Boyce, Dimitrios Loukas, Anny Tubs, "Merger Control," in *Bellamy & Child, European Community Law of Competition, Vol.I*, (Oxford: Oxford University Press, 2008), 623-812, at 772 ("…it is generally recognised that there is greater potential for non-horizontal mergers to offer efficiencies in the form of synergies arising from the combination of complementary assets.") See also RBB Economics, "The Efficiency-Enhancing Effect of Non-Horizontal Mergers," (2005) commissioned by the DG Enterprise and Industry, available at: https://www.researchgate.net/profile/Simon-Bishop-2/publication/265271786_The_Efficiency-Enhancing_Effects_of_Non-Horizontal_Mergers_A_report_by/links/54e46f9f0cf2dbf60696924e/The-Efficiency-Enhancing-Effects-of-Non-Horizontal-Mergers-A-report-by.pdf . See also European Commission, Guidelines on the assessment of the non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, October 18, 2008, C 265/6, (para.13 "…vertical and conglomerate mergers provide substantial scope for efficiencies.").

62 European Commission, "Mergers: Commission prohibits acquisition of GRAIL by Illumina," Press Release, September 6, 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5364. The European Commission's decision is not available yet. Most information is available from the decision of the Federal Trade Commission's administrative law judge D. Michael Chappell. See *In the Matter of Illumina, Inc., and GRAIL, Inc.*, at 194, FTC Docket No. 9401 (Sept. 09, 2022), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf , reversed in Opinion of the Commission in the Matter of Illumina, Inc., and GRAIL, Inc., at 42, FTC Docket No. 9401 (Mar. 31, 2023), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/d09401commissionfinalopinion.pdf.

63 See e.g. *the Matter of Illumina, Inc., and GRAIL, Inc.*, at 194, FTC Docket No. 9401 (Sept. 09, 2022), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/D09401InitialDecisionPublic.pdf (p.172 "Illumina's status as the only viable supplier of a necessary input for MCED test development existed before the Acquisition, and therefore, Illumina's asserted abilities to raise prices, withhold supply, or decrease the quality of products or services, also existed before the Acquisition. The evidence fails to prove these abilities are a function of the Acquisition, or have changed as a result of the Acquisition.")

64 Elise Reuter, "Illumina defends Grail acquisition before FTC amid potential divestiture order in Europe," MedTechDrive, December 15, 2022, https://www.medtechdive.com/news/illumina-grail-merger-ftc-hearing/638864/. See also Bruce H. Kobayashi, Timothy J. Muris, "Screening Out Innovation. Vertical Merger Principles and the FTC's Misapplication in the Illumina-GRAIL case," CEI Paper, https://cei.org/wp-content/uploads/2021/08/Bruce-Kobayashi-and-Timothy-Muris-Screening-Out-Innovation.pdf (p.5 "The thousands of individuals whose lives would be saved if the merger succeeds will not be alive to benefit from "more competition" in some distant future.").

Third, the *Illumina/Grail* merger decision undermines the important ongoing transatlantic antitrust cooperation. The EU and the US are committed to fostering transatlantic partnerships in trade and investments[65]. Specifically, the EU and the US are currently engaged in strengthening and improving dialogue on competition matters, especially regarding tech matters[66]. In light of these transatlantic, how can one explain that, on the one hand, the European Commission fully participates in efforts to improve competition dialogue on tech matters, while at the same time, designing radical policy shifts aimed at blocking two U.S. biotech companies from merging in Europe in absence of consultation with U.S. antitrust agencies regarding jurisdictional matters? In other words, how can such an assertive extra-territorial EU merger policy square with alleged efforts to foster transatlantic cooperation, especially so when the target company has no turnover in the EU? The European Commission's controversial policy on Article 22 EUMR illustrates an assertive Brussels' effect in the absence of cooperative efforts, not a model of transatlantic dialogue that fosters trust and inclusive decision-making processes.

In conclusion, the new policy on Article 22 EUMR is the wrong policy applied to the wrong case, *Illumina/Grail*, as this merger does not fit into the "killer acquisition" narrative underpinning the policy change, has the potential to deliver considerable non-quantifiable benefits (*i.e. saving lives), and undermine ongoing transatlantic cooperation by imprudently asserting extra-territorial effects of the EUMR that have never been discussed and envisaged at the time of amending the Regulation or subsequently. The Court of Justice should reverse the General Court's decision,[67] and the Commission should envisage limiting principles to Article 22 EUMR. We now turn to those potentially limiting principles.*

A. In Search of Limiting Principles: Subsidiarity and Efficiency of One-Stop Shop

The Court of Justice should articulate limiting principles to Article 22 EUMR. Be that as it may, the European Commission should revise its Article 22 Guidance to align its policy with the three principles underpinning Article 22 – namely, the principles of subsidiarity, legal certainty, and the one-stop shop.

These principles should be the following:

1. The principle of subsidiarity rests on the principle of conferral: To determine which level of governance is competent necessitates that multiple levels of governance are concomitantly and potentially competent. It does not mean that a lower level of governance who does not have competence can transfer competence to a higher level of governance. Accordingly, Article 22 EUMR cannot lead MSs who cannot review a specific merger under their national merger laws to transfer competence to the Commission to review a merger they cannot review. The limiting principle derived from the subsidiarity principle should therefore be the following: the MS making the referral request must have the competence to review the merger under its national merger laws, without this requirement applicable to other MSs joining the request.

2. The principle of legal certainty requires "on the one hand, that rules of law be clear and precise and, on the other, that their application must be foreseeable by those subject to them."[68] Article 22 can foster legal certainty only if companies can comply with national merger rules and EU merger rules predictably. This means that if a MS does not have merger rules, merging companies de facto comply with that MS's national laws and that MS should refer the merger to the European Commission only if the merger passes the 'pattern-of-trade' test which requires turnover in the EU[69]. Absent turnover in the EU, and absent national merger rules, merging companies should have the legitimate expectations that they comply with national/EU merger rules by lack of jurisdictional competence. In that regard, the General Court's speculative reflection about Luxembourg's lack of national merger rules fails to consider the necessary legal certainty that the "pattern-of-trade" test provides. Indeed, the General Court argues that "the applicant and Grail do not explain how legal certainty would have been greater if, in the present case, the Grand Duchy of Luxembourg, which does not have such rules, had submitted the referral request which is the subject of the contested decision rather than the French Republic."[70] This is inaccurate: Luxembourg could have referred the case to the Commission who would have reviewed it subject to the "pattern-of-trade" test which requires turnover of the target company in the EU. Absent such turnover, the Commission should have rejected the referral made by Luxembourg. In that

65 White House, Fact Sheet: U.S.-EU Trade and Technology Council Deepens Transatlantic Ties, May 31, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/31/fact-sheet-u-s-eu-trade-and-technology-council-deepens-transatlantic-ties/.

66 European Commission, Competition: EU-US Joint Technology Competition Policy Dialogue to foster cooperation in competition policy and enforcement in the technology sector, December 7, 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6671.

67 T-227/21, *Illumina Inc. v. European Commission*, ECLI:EU:T:2022:447.

68 *Ibid*. para. 173.

69 Case 42/84 *Remia and others v. Commission* [1985] ECR 2545 para. 22. See above part I.a.

70 T-227/21, *Illumina Inc. v. European Commission*, ECLI:EU:T:2022:447, para. 175.

scenario, both the effectiveness of the corrective mechanism of Article 22 EUMR is preserved (i.e. effective referral) and legal certainty is duly considered (i.e. Commission's refusal to review the merger). Therefore, the limiting principle derived from the legal certainty principle is the following: The pattern-of-trade test remains the decisional test for the Commission to accept or reject referrals, and the Court of Justice should ensure that the Commission duly applies the pattern-of-trade test when evaluating the legitimate expectations from an Article 22 case referral.

3. The principle of the one-stop shop should not be perverted: One-stop shop is a principle that is aimed at reducing the number of jurisdictional "stops" merging companies have to go through for a merger to be approved throughout the EU. Therefore, it is only designed to reduce, not increase, the number of stops. Consequently, when no MS is competent to review a merger, making the European Commission artificially competent to review the merger does not reduce the number of jurisdictional stops: It increases from zero stops to one stop. This is the exact opposite consequence of the principle of a one-stop-shop – namely, reducing the regulatory red tape, alleviating compliance costs for merging companies and speeding up the merging process. In conclusion, the limiting principle complying with the one-stop-shop principle should be the following: the European Commission cannot be competent when such competence increases the number of jurisdictional stops from zero to one.

In conclusion, Article 22 Guidance is the wrong policy applied to the wrong case, *Illumina/Grail*. This guidance needs considerable revision. Such revision should ideally come from the Court of Justice reversing the General Court's decision and articulating the limiting principle. Alternatively, such revision should come from the European Commission which better considers the unintended consequences of the Article 22 Guidance. We proposed limiting principles for Article 22 Guidance. We welcome more research and discussions in improving the Article 22 referral mechanism in ways that are fully compatible with the three fundamental principles of subsidiarity, legal certainty, and a one-stop shop. Absent such improvement, the future of the legitimacy of the EU merger control from a global perspective appears worrying given the unsustainability of assertiveness of the Brussels' effects encapsulated in the unfortunate Article 22 Guidance.

CPI COMPETITION POLICY INTERNATIONAL®

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.