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Article

Re-Prioritising Referrals under Article 22 EUMR: Consequences for Third Parties and Mutual Trust between Competition Authorities

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I. Introduction

Merger regulation is a fundamental instrument by which competition authorities control the structure of an industry. Despite its relevance, the EU Treaties contain no rules on merger control. From the Commission's first initiative to regulate concentrations at the EU level in 1966, it has taken more than 20 years of negotiations between the Member States and the European Commission to reach an agreement on EU legislation to control concentrations. The history of the European Merger Regulation reflects differing national views of the Member States and EU institutions on the necessity or the rejection of controlling concentrations and positions its legislative process and the various contradicting national interests of Member States against the apps and flows of EU integration throughout the 1960s, 70s, and 80s. At the core of this 'protracted trench warfare'[2] lied the delegation of enforcement powers to an already-powerful Commission, which the Member States initially opposed to. Capturing or delegating jurisdiction, hence, the distribution of administrative and enforcement authority between the national and EU authorities remained one of the most contentious issues during the bitterly fought negotiations. A similarly fierce and heated discussion on the distribution of administrative and enforcement powers across national authorities and the EU Commission has surfaced since the adoption of the European Commission Guidance on the referral mechanism under Article 22 in 2021[3] and the General Court's judgment in Illumina/GRAIL[4] and the Commission's prohibition decision in 2022. Article 22 is a corrective mechanism of the Merger Regulation, which allows for one or more Member States to request the Commission to examine, for those Member States, any concentration that does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Born out of a political compromise, Article 22 of the European Merger Regulation has been characterised as a 'late bi-product of the negotiations to create a merger control regime' at the EU level and as 'a mechanism

Key Points

- This article assesses the distribution of enforcement powers across national authorities and the European Commission, in light of the Commission's Guidance on the referral mechanisms under Article 22 in 2021 and the General Court's judgment in Illumina/GRAIL[1] and the Commission's prohibition decision in 2022.
- The Article shows how the issue of delegation of enforcement powers between the Member States and the EU institutions has always been at the heart of the negotiation processes of the Merger Regulation, and though implemented through compromises, such as Article 22, this question may not have been entirely resolved.
- The article critically analyses two specific consequences of the way the Commission re-prioritised cases eligible for Article 22 referrals: the consequences of the Commission's new policy for third parties and the principles of effective competition law enforcement including the principle of loyal cooperation and mutual trust.

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1 Case T-227/21 *Illumina/Grail*, ECLI:EU:T:2022:447

2 Morten Broberg, 'Reforming the Merger Control Regulation's Article 22 Referral Mechanism: On the Member States' Access to Refer Mergers to the European Commission' (2012) 33 European Competition Law Review 5, 215.

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

4 *Illumina/Grail* (n 2)

riddled with gaps and uncertainties'.[5] After more than 20 years of low enforcement and largely decreased relevance of what has been initially nicknamed the 'Dutch-clause', these gaps and uncertainties are at the centre of extensive and heated debates about the way the Commission has announced to revigorate this enforcement mechanism.

In this article, I first show how the issue of delegation of enforcement powers between the Member States and the EU institutions have always been at the heart of the (difficult) negotiation processes of the Merger Regulation, and though implemented through compromises, such as Article 22, this question may not have been entirely resolved. Second, I analyse the underlying rationale and development of the enforcement mechanism of Article 22 from the adoption of the first Merger Regulation in 1989 until the recently adopted Guidance of the Commission and the Court's judgment in Illumina/GRAIL to provide a deeper interpretation of the referral mechanism laid down in Article 22 and to show the policy shift from discouraging to encouraging referrals. Third, I discuss two specific aspects of the new policy as enshrined in the 2021 Guidance and the mechanism currently underlying referrals under Article 22 EUMR that have so far been overlooked: the consequences of the radical re-prioritisation of referrals and the Commission's policy under Article 22 for third parties and for the effective functioning of the (close) cooperation between the Commission and the NCAs. I argue that on the one hand, the Commission's re-prioritisation of cases eligible for Article 22 referrals has re-written and largely eliminated procedural rights for third parties as established in the EU Merger Regulation. On the other hand, by re-activating the referral mechanism of Article 22, the Commission needs to reconsider the mechanism currently enshrined under Article 22. These procedures and mechanisms follow the enforcement logic and jurisdictional principles laid down in Regulation 1/2003, and accordingly, the same principles of effective enforcement including the General Court's recent Sped-Pro[6] ruling should apply to these mechanisms, notably the principle of loyal cooperation and mutual trust.

II. The history of the system of referrals in EU merger control

The evolution of merger control in the EU was not a straight path. It has been one with critical stages reflecting the interaction between Member States and EU institutions at crucial junctures of the integration process.[7] The supranational regulation of mergers has first been enacted by the Treaty of Paris in 1951 for the coal and steel sectors,[8] whilst the EC Treaty implemented by the Rome Treaty of 1958 remained silent on merger control. In the years when the EC Treaty was negotiated, the then Member States lacked national merger control regimes. In fact, the prevailing view in those years was that mergers were desirable and Member States implicitly or explicitly encouraged industrial consolidation of strategic sectors.[9] Oligopolisation of strategic industries was seen as a tool for national industries to stand the challenges of regional and global competitiveness. Another reason explaining the lack of merger control rules in the Treaties was the nature of the Treaty of Rome as *traite-cadre*:[10] a framework law that set out the general aims and goals but did not lay down a fully articulated agreement leaving further details to secondary legislation.[11] Nevertheless, the European Commission sought to explore whether a merger regime and an EU-level central authority within the existing jurisdictional remit of the EU back then existed. The first expression of this strategy was its 1966 *Memorandum on the Problems of Concentration in the Common Market,*[12] where the Commission explained its view that merger activity should form part of the Commission's oversight as an important area of competition. This was the first clear statement of what the Commission viewed as the relationship between its existing competition authority and merger control. The Commission explained that it intended to use the powers granted to it by Regulation 17/62, which, at that time, already provided extensive enforcement powers to Directorate-General for Competition of the Commission (formally DG IV, now DG COMP), by establishing it as a centralised, independent, quasi-judicial authority.[13] In

5 Chris Bright and Mikael Persson, 'Article 22 of the EC Merger Regulation: an opportunity not to be missed' (2003) European Competition Law Review, 24 (10)491.

6 Case T-791/19 *Sped-Pro v Commission* ECLI:EU:T:2022: 67

7 Simon Bulmer, 'Institutions and policy change in the European Communities: The case of merger control' (1994) Public Administration, 72, 426.

8 The coal and steel, where merger control provisions sought to prevent a re-concentration of economic power in what were strategically important and politically sensitive industries, no corresponding rationale for other industrial sectors existed. Thomas Doleys, 'Incomplete Contracting, Commission Discretion and the Origins of EU Merger Control' (2009) Journal of Common Market Studies 47: 483–506.

9 Thomas Doleys, The logic of delegation: Explaining the evolution of EU merger control, Paper prepared for the sixth ESCA Sixth Biennial International Conference, (1999) 4. http://aei.pitt.edu/2258/ accessed 29 June 2023.

10 Bulmer (n 8) 423

11 Doleys (n 10) 4. See also Bulmer (n 8) 423–444.

12 *Concentration of firms in the Common Market. Information Memo P-1/66, January 1966* http://aei.pitt.edu/15718/1/P_1_66.pdf (accessed 29 June 2023).

13 Lorenzo Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-fought Compromise' in Kiran K Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law*, (OUP 2013) 66.

the European Commission, DG IV stood out amongst other DGs because of its autonomy, judicial functions, and the direct influence it could exert on the economy in the common market.[14] However, the 1966 Memo was merely a policy statement and the Commission did not manage to build sufficient support for the controlling mergers and to grant authority of oversight to the Commission.[15] Still, it 'helped to convert the treaty from a text that granted limited authority based on literal readings and original intent, into one that, through expansive reading, could be interpreted as granting broad-based, discretionary authority to govern, to make decisions, and to interpret the Treaty of Rome for the good of the European Community as a whole'.[16] Notwithstanding repeated expressions of concern throughout the late 1960s and into the early 1970s about the impact of rising industrial concentration, Member States took no action to intervene in any mergers during the era.[17]

The significant milestone in the history of merger control was the Commission's decision in *Continental Can*,[18] where it advanced and successfully tested an unorthodox interpretation of Article 102 TFEU (then Article 86 EC). In its *Third Report on Competition*, the Commission noted, that Article 102 enabled it to intervene ex *post* in cases of concentrations which result from a strengthening of market dominance, and which substantially impair competition.[19] The Commission, however, acknowledged difficulties posed by its newly-found authority and hence, a merger control regime based solely on Article 102 TFEU. In order to address these limitations, the Commission took the step of legislative initiative.[20] The first proposal for a Regulation was drafted by the Commission in 1973, in which it tried to expand its legal authority to mergers through legislative action.[21] The Proposal had three main elements: scope of merger control delineating the reach of its control mechanism, criteria against which a merger can be evaluated to be compatible with the common market (based on market principles focusing on their effect on competition) and the administration of mergers, which gave the Commission exclusive competence.[22]

The 1973 Proposal met fierce disagreement in the Council on various grounds from all Member States. The two most important issues were the scope of the regulation and the distribution of administrative and enforcement authority between the national and Community authorities. France, Italy, and the UK opposed the proposal and Community-based regime because of its market orientation. They feared that the Europeanisation of merger rules would undermine the ability to pursue national industrial, regional, or public interest goals. They also opposed centralisation of decision-making authority: there was a reluctance to delegate further power to the Commission.[23] Germany was in favour of the proposal as it reflected the market-oriented philosophy that guided its own (then) newly cast domestic merger law, but it was reluctant to cede authority to the Commission. Smaller states such as the Benelux countries, where there was no domestic legislation to prohibit mergers, supported low thresholds, as no national competence was at stake.[24] One difficult aspect of the negotiations was determining the relationship between the European and national-level authorities. Transferring enforcement powers similar to those granted by Regulation 17/62 for the enforcement of Articles 101 and 102 TFEU and sole authority to the Commission was strongly opposed by some Member States, such as France and Italy. They feared that the Commission would take decisions that could harm vital domestic industries.[25] As a consequence, the legislation stalled.[26]

After this first proposal, it took another 16 years to reach agreement on the EU's merger control regime and opposition in the Council largely and was repeatedly split along the above described lines and across these countries. Disagreements remained concerning the interrelated issues of regulatory scope and administrative authority continued to weigh on negotiations.[27] The Commission's failed proposals for a merger regulation in the 1970s and early 1980s were finally successful due to the new economic and political environment of the mid-1980s that hardened governmental attitudes

14 Pace and Seidel (2013) 66. This highly centralised and independent institutional decision-making as established in 1962 as well as the extensive enforcement powers of the Commission guaranteed uniformity and coherence; it provided legal certainty for firms and proved valuable for developing experience, expertise, and authority in a sensitive supranational setting. Carol Harlow, and Richard Rawlings, *Process and Procedure in EU Administration*, (Oxford: Hart Publishing, 2014) 199.

15 The unanimity requirement for the decision-making, namely, that each and every then Member State should have agreed to delegate powers to the Commission, proved a crucial stumbling block. Doleys (n 10) 7–8.

16 E Schwartz, 'Politics as Usual: The History of European Community Merger Control' (1993) Yale Journal of International Law Vol. 18, No. 2, 616.

17 Doleys (n 9) 494.

18 C-6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* ECLI:EU:C:1973:22

19 Third Report on Competition Policy (addendum to the 'Seventh General Report on the Activities of the Communities). For year 1973. May 1974, 14. http://aei.pitt.edu/31203/ accessed 29 June 2023.

20 Doleys (n 9) 495.

21 Proposal for a Council regulation on the control of concentrations between undertakings, [1973] COM/73/1210 final, *OJ C 92, 1–7*

22 Doleys (n 10) 14.

23 Doleys (n 10) 14.

24 Bulmer (n 8) 434.

25 Doleys (n 10) 17.

26 Doleys (n 9) 496.

27 Doleys (n 10)

towards potentially anticompetitive concentrations.[28] The drive to complete the single market in the late 1980s gave the Commission's merger control agenda a much-needed impetus. Linking merger control to the benefits of a single market became a '*leitmotif*' in Commission communications.[29] The commitment to create the single European market was of critical importance. Although the Merger Regulation was not proposed in the White Paper on completing the internal market,[30] their connection can be understood along two lines. Firstly, companies were starting to restructure, partly in anticipation of the single EU market, and as the 1980s progressed, their cross-border mergers and acquisition activity increased and they became the most vigorous supporters of the additional certainty that would be afforded by the 'one-stop shop' rather than the multiple referrals that were necessary in its absence.[31] The second change of context was at the governmental level, where government heads had agreed in 1985 to the completion of the single market by the end of 1992. As a result, it was difficult for the governments to continue with opposing the merger regulation, for the commitment to the single market made supranational regulation of mergers more compelling. Hence, it was the relevance of competition policy to the single-market objective that provided the main rationale underpinning the construction of this new European regime. If the single market was intended to generate more intense competition within the Community, this objective could be frustrated if firms found ways of restricting competition at the same time. The need for a strong European competition policy was clear, as well as the fact that the European Commission competence for regulating mergers was partial and unsatisfactory.[32] The Merger Regulation was finally agreed on 21 December 1989 and entered into force as Regulation 4064/89.[33]

28 Michelle Cini, 'The European Merger Regime: Accounting for the Distinctiveness of the EU Model' (2002) Policy Studies Journal Vol. 30, No. 2, 247.

29 Doleys (n 9) 497. European Court of Justice also provided a compelling, if negative reason for European-level regulation. In its Philip Morris judgment, the Court ruled that under certain circumstances (Article 85, now Article 101), the treaty provision ostensibly aimed at preventing restrictive practices by two or more firms might be of use in regulating mergers. Cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities* ECLI:EU:C:1987:490

30 Completing the internal market, White Paper from the Commission to the European Council, COM C 85310 final (Brussels, 14 June 1985).

31 Bulmer (n 8)

32 Cini (n 29)

33 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. [1989] OJ, L395/1–12

III. Jurisdictional issues: distribution of enforcement powers

The Regulation has been amended in 2004, and the new Regulation entered into force as Regulation 139/2004.[34] From its inception in 1989, the Regulation laid down rules for allocating jurisdiction for controlling mergers between Member States and the EU Commission by reference to quantitative criteria.[35] In cases where these thresholds are met, the merger has a 'Union dimension' and falls within the exclusive competence of the Commission and Member States will not apply their national competition laws.[36] Conversely, the Commission has no competence under the Merger Regulation where the concentration does not have a Union dimension. This so-called one-stop-shop principle creates a system of mutually exclusive jurisdiction: where a transaction constitutes a merger, as defined in Article 3 of the Regulation, and where this merger has a 'Union dimension', the Regulation applies.[37] The quantitative thresholds, which remained unchanged throughout the years, had the aim to provide clear and easily applicable dividing line between the Union jurisdiction and that of the Member States. This 'clear division of tasks' was to avoid concurrent jurisdiction between the EU and national jurisdictions. According to Article 21(3) of the Regulation, the division of powers is based on the principle of subsidiarity. However, this allocation of jurisdiction is subject to three corrective mechanisms and exceptions: the so-called two-third rule in Article 1(2–3) of the Regulation and referrals from, and to, the Member States under Articles 4 and 22. In the following, the article will focus only on Article 22, the so-called Dutch clause.

A. The legal requirements of referrals from member states to the Commission pursuant to Article 22

Article 22(1) of Regulation No 139/2004 sets out four cumulative conditions for authorising referral of a concentration from a Member State to the Commission. First, the referral request must be made by one or more Member States; second, the transaction that is the subject of that request must satisfy the definition of concentration set out in Article 3 of that regulation without meeting the thresholds for a European dimension laid down in Article 1 of

34 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] *OJ L/24, 1–22*

35 Criteria are based on both the worldwide and Community aggregate turnover thresholds of the merging parties. See Article 1 (2) Regulation 139/2004.

36 The so-called 'exclusivity principle'. Article 21 Regulation 139/2004.

37 Broberg (n 3)

that regulation; third, the concentration must affect trade between Member States; and, fourth, the concentration must threaten to significantly affect competition within the territory of the Member State or States that made the referral request.[38]

As to the third criterion, a concentration fulfils this requirement to the extent that it is liable to have some discernible influence on the pattern of trade between Member States. As to the fourth criterion, a referring Member State or States is/are required in essence to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition and thus that it deserves close scrutiny. Such preliminary indications may be in the nature of prima facie evidence of such a possible significant adverse impact, but would be without prejudice to the outcome of a full investigation.

1. Article 22: the Dutch clause

In the final legal text of Regulation 4064/89, the Commission offered accommodations to both sides of the opposition amongst the Member States. In exchange for Germany's willingness to accept turnover thresholds lower than it desired, the Commission included a provision allowing Member State governments to conduct their own investigation where a prospective merger had substantial effects on a market *within* a Member State. This so-called 'German Clause' would be complemented with one for those countries that felt the turnover threshold remained too high. The so-called 'Dutch clause', Article 22 allowed Member States to invite the Commission to investigate mergers that fell below the agreed turnover thresholds. This proved useful in cases where national competition laws lacked merger control, such as the Netherlands in this period of time, or were weaker than those at the European level or where national authorities were seeking guidance from Brussels.

Originally, Article 22 was a 'late biproduct of the negotiations' leading to the creation of an EU level merger control regime.[39] Article 22 was born out of a compromise, which allowed countries such as the Netherlands to use the Regulation's mechanism in relation to domestic issues. It was created as an extraordinary measure, and hence, no detailed consideration was given to the way Article 22 references would work in practice.[40] Since the adoption of the Regulation, most Member States (except Luxembourg) have adopted national merger control regimes, and the original need for Article 22 disappeared. Hence, there has been little enforcement practice under Article 22.[41] In terms of numbers, Article 22 has been rare, a total 48 cases as of June 2023.[42] Nevertheless, it has been argued that its main function continues to be to connect NCAs and the Commission to ensure that the system of merger control as a whole, can work 'without failed connections, short circuits and overload'.[43]

Over the years, the Commission, by making use of its discretion in interpreting and applying Article 22, developed a practice of discouraging referrals from NCAs to the Commission.[44] In its 2001 Green Paper, the Commission has pointed out that the potential scope for use of Article 22 in its original form became very limited due to the fact that most Member States adopted legislation on merger control rules.[45] Accordingly, the Commission considered changing the scope of Article 22,[46] but has eventually declined to do so. Two important changes, however, need to be noted for the later discussion, that took place with the adoption of the new Merger Control Regulation in 2004. First, the current test of Article 22 (1) introduced the notions of effect on trade between Member States as a requirement for one or more Member States to be able to request the Commission to review a concentration that does not have an EU dimension and threatens to significantly affect competition within the territory of the Member State(s) making the request.[47] Second, concerning Article 22(5) the current wording gives the Commission the opportunity to inform one or several Member States that a concentration meets the criteria set out in Article 22(1) and the Commission may

38 Commission Notice on Case Referral in respect of concentrations [2005] C 56/02, point 42–44.
39 Bright and Persson (n 6) 491.
40 Bright and Persson (n 6) 491.
41 Bright and Persson (n 6) 491.
42 Search results on Commission website, case register. https://competition-cases.ec.europa.eu/search?caseInstrument=M&decisionTypesM=~139_2004:201310&pageNumber=2&sortField=caseLastDecisionDate&sortOrder=DESC accessed 23 June 2023. See also Nicholas Levy, Andris Rimsa, and Bianca Buzatu, 'The European commission's new merger referral policy: creative reform or an unnecessary end to "brightline" jurisdictional rules?' (2021) European Competition and Regulatory Law Review 5(4), 367.
43 Bright and Persson (n 6) 491.
44 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 1959 final.
45 Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001)0745 final, para 85.
46 In its White Paper 2014, the Commission contemplated further altering the scope of the provisions of Article 22. For example, in its 2014 White Paper, the Commission actually suggested that only Member States that are competent to review the transaction under their national law could request a referral. White Paper Towards more effective EU merger control, COM (2014) 449 final.
47 Anne Looijestijn-Clearie, Catalin Rusu, and Maarten Veenbrink, 'In search of the Holy Grail? The EU Commission's new approach to Article 22 of the EU Merger Regulation' (2022) Maastricht Journal of European and Comparative Law 29(5), 552.

invite those Member State(s) to make a referral request, through a so-called invitation letter.[48]

In the consultation the Commission launched in 2008, with NCAs and third parties concerning the division of powers between the Commission and national competition authorities, the Commission concluded that the existing framework had 'considerably enhanced the efficiency and jurisdictional flexibility of merger control in the EU', 'substantially improved the allocation of cases between the Commission and the Member States', and had, in most cases, been effective in distinguishing cases that have a Community relevance from those with a primarily national nexus.[49] Another consultation in 2016 about the possibility to change the Regulation's thresholds, in light of the Commission's lack of jurisdiction over competitively significant transactions that were of high value but generated insufficient turnover to meet the thresholds, the Commission similarly concluded that there was no need for change.[50]

In 2019, however, the Commission started to focus on its lack of jurisdiction on so-called killer acquisitions of innovative start-ups, for example, in the pharma and digital sectors that could have exercised strong competition, but due to the acquisition, often, their innovations were terminated or integrated in the acquiring firm and hence, avoided competition. In March 2021, the Commission adopted a Guidance Paper, which fundamentally changed its own policy discouraging Article 22 referrals. Before moving on to discuss the Guidance more in-depth, a brief note on the case and referral request that reached the Commission in April 2021.

2. Illumina/GRAIL and the General Court's interpretation of Article 22

After an initial complaint, the Commission received concerning the proposed transaction between Illumina and Grail,[51] the Commission informed several Member States by sending them an invitation letter in accordance with Article 22(5) of the Regulation for referral.[52] A referral request was sent by France, joined by Belgium, Greece, Iceland, the Netherlands, and Norway, to assess the proposed acquisition of GRAIL by Illumina under the EU Merger Regulation. The proposed transaction did not meet the turnover thresholds of the EU Merger Regulation, and was not notified in any Member State, but met the criteria for referral under Article 22 of the EU Merger Regulation. The Commission found that the proposed transaction would affect trade within the single market and threatened to significantly affect competition within the territory of the Member States that made the referral request and that a referral was appropriate because GRAIL's competitive significance is not reflected in its turnover.

Illumina appealed the Commission decision accepting the referral in 2020 by arguing that the Commission could not accept a referral request from an NCA in jurisdictions where a merger review law exists, but the referred transaction does not meet the thresholds for notification. It argued that the Commission's interpretation was contrary to the Regulation's 'one-stop-shop' principle and the principles of legal certainty, subsidiarity, and proportionality. On 13 July 2022, the General Court rejected these arguments and provided an extensive analysis of the literal, contextual, historical, and teleological interpretations of Article 22 EUMR.

In its judgment, the Court merely mentioned the Guidance as a document, which was 'published after the adoption of the Merger Regulation and hence, not relevant to the historical interpretation of that regulation and, consequently, to the outcome of the dispute'.[53] Nevertheless, the Court confirmed that Article 22 of Regulation 139/2004 was aimed at making the referral system more flexible and effective in order to ensure that a concentration would be dealt with by the authority best placed to analyse its competitive effects and, where appropriate, to restore effective competition, whilst taking account of the principles of subsidiarity and the 'one-stop shop' as well as maintaining legal certainty to the utmost extent possible.[54]

The General Court contained[55] that from the wording, the legislative history, and the purpose of Article 22 of the Merger Regulation, as well as from the Commission's enforcement practice, it was clear that Article 22 is applicable to all concentrations.[56] Hence, referral may be made for a concentration that does not fall within the scope

48 Looijestijn-Clearie, Rusu, and Veenbrink (n 48) 553.
49 Staff Working Paper accompanying the Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, SEC (2009) 808 final/2, para 14.
50 Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, July 2017 https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf accessed 23 June 2023. See also Levy, Rimsa, Buzatu, B. (n 43) 367
51 *Illumina/Grail* (n 2) para 11.
52 *Illumina/Grail* (n 2) para 12.
53 *Illumina/Grail* (n 2) paras 115, 197.
54 Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation, https://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf accessed 30 September 2023, Commission Notice on Case Referral in respect of concentrations (n 39)
55 *Illumina/Grail* (n 2) paras 89–151.
56 Commission Notice on Case Referral in respect of concentrations (n 39) point 6.

of the merger control rules of the Member State that requested its referral.[57]

In the Court's interpretation of Article 22, the Commission may review a concentration that threatens significantly to affect competition within the territory of a Member State and affects trade between Member States, which would not be subject to any examination, either by the national authorities or by the Commission and hence, concerns an action that cannot be achieved by the Member States. In that situation, it is essential to act at the EU level.[58] As stated in recital 11 of Regulation 139/2004, Article 22 constitutes an effective corrective mechanism in the light of the principle of subsidiarity by protecting the interests of the Member States. In light of that principle and in accordance with recital 14 of that Regulation, a case will be dealt with by the most appropriate authority.[59] As demanded by the principle of subsidiarity, re-attribution of jurisdiction should only take place to another competition authority in circumstances where the latter is the more appropriate for dealing with a merger, having regard to the specific characteristics of the case as well as the tools and expertise available to the authority. Particular regard should be had to the likely locus of any impact on competition resulting from the merger.[60]

Decisions regarding the referral of cases must take due account of all aspects of the application of the principle of subsidiarity, including the benefits inherent in a 'one-stop-shop' system, and the importance of legal certainty with regard to jurisdiction. When considering whether to exercise their discretion to make or accede to a referral, the Commission and Member States should bear in mind the need to ensure effective protection of competition in all markets affected by the transaction.

The General Court also confirmed that situations in which concentrations are not notified but merely made known to the Member State concerned, either because they do not fall within the scope of that system or because no such system exists also fall within Article 22 (1).[61] Hence, Article 22(1) of Regulation 139/2004 enables a Member State, irrespective of the scope of its national merger control rules, to refer to the Commission concentrations that do not meet the turnover thresholds in Article 1 of that Regulation, but that may have significant cross-border effects.[62]

Finally, the General Court explained that referral mechanisms are an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds that, because of its rigid nature, is not capable of covering all concentrations that merit examination at the European level. Those mechanisms therefore create, as emphasised by the expression 'corrective mechanism' used in recital 11 of Regulation No 139/2004, a subsidiary power of the Commission that confers on it the flexibility necessary to achieve the objective of that regulation, which is to permit the control of concentrations likely significantly to impede effective competition in the internal market.[63]

IV. The Commission 2021 guidance on referrals

The 2021 Guidance is an expression of the Commission's administrative discretion it enjoys concerning policy choices.[64] According to the General Court in MyTravel, 'the Commission enjoys a discretion in maintaining control over Community competition policy'[65] and, in particular, with regard to case referrals under merger control, the Courts confirmed that the Commission has broad discretion as to whether or not to refer a concentration.[66] According to point 7 of the Notice on Case Referral, both the Commission and Member States retain a considerable margin of discretion in deciding whether to refer cases falling within their 'original jurisdiction' or whether to accept to deal with cases not falling within their 'original jurisdiction', pursuant to Article 22.

The Guidance reiterates these principles, whilst providing substantive and procedural guidance on the application of Article 22. The Commission's choice to reinterpret the scope of Article 22 EUMR has been fiercely contested arguing that the Commission is severely expanding its competence: '[f]rom a rarely used explicit provision for Member States without domestic merger control legislation in 1989, to the missing piece of the puzzle in merger

57 *Illumina/Grail* (n 2) para 109
58 *Illumina/Grail* (n 2) para 163.
59 *Illumina/Grail* (n 2) para 165.
60 Notice on Case Referral in respect of concentrations (n 39) point 9.
61 *Illumina/Grail* (n 2) para 130.
62 *Illumina/Grail* (n 2) para 116.
63 *Illumina/Grail* (n 2) para 142.
64 For a distinction between technical and political discretion see Opinion of AG Léger in Case C-40/03 P, Rica Foods v. Commission, para 45. Andriani Kalintiri, 'What's in a name? The marginal standard of review of "complex economic assessments" in EU competition enforcement' (2016) 53 Common Market Law Review, Issue 5, pp. 1283–1316. Joana Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) The Modern Law Review, 80: 443–472.
65 Case T-212/03, *MyTravel v. Commission*, ECLI:EU:T:2008:315, para 83. See also Case T-24/90 *Automec Srl v Commission* EU:T:1992:97, para 73.
66 T-346/02 and T-347/02 *Cableuropa SA v Commission* ECLI:EU:T:2003:256215.

control more than 30 years later' [67] and that the Guidance is 'a soft law that effectively amends the Regulation or at least the spirit of the Regulation'.[68]

In the following, I discuss two specific aspects of the Guidance and the mechanism currently underlying referrals under Article 22 EMUR that have so far been overlooked. First, I argue that, with the adoption of the Guidance, the Commission has not only significantly re-prioritised cases eligible for Article 22 referrals and changed its established policy based on discouraging referrals, but it has also re-written the procedural rights for third parties as established in the Merger Regulation. Whilst administrative authorities must prioritise due to budget rationalisation,[69] prioritisation practices must comply with general principles of EU law and principles of good governance that keep oversight over arbitrary use of discretionary powers by administrative authorities.[70] Second, by re-activating the referral mechanism of Article 22, the Commission should reconsider the enforcement framework currently enshrined under Article 22 EUMR. This framework stands on the basis of close and constant liaison between the Commission and the NCAs according to Article 19(2) of the Merger Regulation. Cooperation and dialogue between the Commission and the NCAs, and between the NCAs themselves, are particularly important in the referral system set out in the Merger Regulation. Moreover, and on the basis of Recital 14 to the Merger Regulation, they 'form together a network of public authorities, applying their respective competences in close cooperation'. Hence, these procedures and mechanisms breathe the spirit of cooperation under Regulation 1/2003 and follow the enforcement logic and jurisdictional principles laid down in that Regulation. Most notably, the application of the notion of effect on trade between Member States and requiring a close cooperation between NCAs and the Commission under Article 22 is a proof of such reading. Accordingly, the same principles of effective enforcement as established by the European legislator and recently confirmed by the General Court in its Sped-Pro ruling should apply to this framework, such as the principle of loyal cooperation and mutual trust.

A. Third parties' participation in administrative procedures of the merger regulation

In accordance with the bilateral structure of these procedures, the EU Courts have characterised the procedural rights of third parties—complainants included—as a right to be associated to the procedure. This can be generally designed as a right to participate in the administrative procedure, qualitatively different from the right to be heard as a right of the defence of the targeted undertakings.[71]

The Commission's enforcement procedure is similar but not identical to the administrative procedures pursuant to Articles 101 and 102 TFEU as laid down under Regulation 1/2003. In merger proceedings, parties need to notify their transactions *ex ante* to the Commission for review and may only implement their transaction after the Commission's approval. Under Articles 101 and 102 TFEU, undertakings self-assess their behaviour and the Commission may only *ex post* investigate their conduct. Hence, the procedural status and participation of third parties in these procedures differ as well. Nevertheless, in Regulation 139/2004, third parties have a considerable role in the proceedings. They can contribute to the Commission's investigation by means of replies to requests for information according to Article 11 of the Merger Regulation, and they can provide information and comments they consider relevant for the assessment of a given transaction. DG Competition may also invite third parties for meetings to discuss and clarify specific issues raised.[72]

According to Article 18 (4) Regulation 139/2004, third parties who can demonstrate a *sufficient interest* shall be entitled, upon application, to be heard.[73] According to Article 11c, of the Commission's Implementing Regulation 1269/2013, third parties are natural or legal persons including customers, suppliers, and competitors, who are able to demonstrate a sufficient interest, such as consumer associations, where the proposed concentration concerns products or services used by final consumers and members of the administrative or management bodies of the

67 https://stek.com/en/new-guidance-on-article-22-of-the-european-unions-merger-regulation-the-end-of-legal-certainty-in-merger-control/ accessed 29 June 2023.

68 https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/article-114-tfeu-as-a-legal-basis-for-strengthened-control-of-acquisitions-by-digital-gatekeepers.pdf?__blob=publicationFile&v=5 accessed 29 June 2023.

69 Or Brook and Kati Cseres, 'Policy Report: Priority Setting in EU and National Competition Law Enforcement' https://ssrn.com/abstract=3930189 or http://dx.doi.org/10.2139/ssrn.3930189 accessed 30 September 2023.

70 Joana Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour' (2009) 131(3) Revue française d'administration publique 555. Pablo Ibáñez Colombo, Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law. (2022) Cambridge Yearbook of European Legal Studies 24, 165.

71 Case T-17/93, *Matra Hachette*, ECLI:EU:T:1994:89 para. 34; Case T-65/96, *Kish Glass*, ECLI:EU:T:2000:93 para. 34; Case T-5/97, *Industrie des poudres sphériques SA v Commission*, ECLI:EU:T:2000:278, para 229.

72 See also Regulation 139/2004 DG Competition Best Practices on the conduct of EC merger proceedings [2004]

73 Article 18 (4) Regulation 139/2004.

undertakings concerned or the recognised representatives of their employees.[74]

Article 18 (4) means that third parties may submit their written observations within a time limit that has been set by the Commission.[75] Subsequently to having received the written observations by the third parties in question, the Commission may also afford them the opportunity to participate in a hearing.[76] At the same time, as the Court has previously confirmed that 'the procedural position of third parties [...] cannot be equated with that of the interested persons, undertakings and associations of undertakings referred to in the first three paragraphs of' Article 18.[77] „Whilst the persons interested by the concentration in question, namely the parties to the draft concentration submitted for examination by the Commission, enjoy the specific guarantees laid down in those provisions in order to ensure that their rights of defence are observed in the course of the administrative procedure, Article 18(4), in contrast, gives to third parties, since they are merely liable to suffer the incidental effects of the decision, only the right to be heard by the Commission, provided that they have so requested and have shown that they have a sufficient interest for that purpose.[78]

Additionally, the Commission may, in the interest of the investigation, in appropriate cases, provide third parties that have shown a sufficient interest with a non-confidential version of the Statement of Objections, in order to allow them to make their views known on the Commission's preliminary assessment of the concentration.[79] However, the Commission retains full discretion in the determination whether such third parties are indeed granted access to the Statement of Objections.[80] As a consequence, a *right* to access to this document does not exist. Moreover, the documents that have been delivered to third parties are only to be used for the purposes of the relevant proceedings pursuant to Regulation 139/2004.[81] Hence, 'the procedural rights of third parties are not as extensive as the rights granted to the interested persons in order to ensure their rights of defence, it is nevertheless the fact that, in so far as they show a sufficient interest, qualifying third parties have a right under Article 18(4) of Regulation No 4064/89 to be heard if they have so requested'.[82]

Whilst these procedural rights are limited, especially in comparison with the procedures laid down under Articles 101 and 102 TFEU,[83] they still provide substantial procedural position and rights to third parties. Concerning the 2021 Guidance, point 25 largely removes these procedural rights (right to be heard and possibility to access to the non-confidential version of the file) and narrows them down to the possibility to contact the Commission or the competent authorities of the Member States, and inform them of a concentration that, in their opinion, could be a candidate for a referral under Article 22.[84] However, this does not impose any obligation on the competent authorities of the Member States or on the Commission to take any action following a contact by a third party. Whilst excluding any meaningful participation by third parties in the referral procedure is understandable in terms of keeping the procedure effective, swift, and efficient,[85] such a step raises fundamental questions of legitimacy, transparency, and accountability.

Third parties are not merely important 'watchdogs' who can assist competition authorities in monitoring the good functioning of markets. The actual participation of third parties is mostly grounded on this instrumental function of their intervention as they provide information that might be relevant to achieve an accurate representation of the factual situation that will enable the decision-maker to issue a materially correct decision in correspondence with the truth of the facts.[86] Unlike the persons interested by the concentration in question, namely, the parties to the draft concentration submitted for examination by the Commission, who intervene in the quality of defendants, third parties do not need to defend their personal legal sphere.[87] Still, they have an interest in its outcome: the ensuing decisions might affect their economic interests, even if not always in a direct way. They

74 Article 11 (c) (i) and (ii) Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings Text with EEA relevance, *[2013] OJ L 336, 1–36*.
75 Article 16 (1) and (3) Implementing Regulation 1269/2013
76 Article 16 (3) Implementing Regulation 1269/2013
77 Case T-290/94, *Kaysberg SA v. Commission*, ECLI:EU:T:1997:186, para. 105.
78 *Kaysberg SA* (n 78) para. 105.
79 Article 16 (2) Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2013] *OJ L 336, 1–36*
80 Article 11 (c) (ii) Implementing Regulation 1269/2013
81 Article 16 (2) Implementing Regulation 1269/2013
82 *Kaysberg SA* (n 78) para. 110.
83 Katalin Cseres and Joana Mendes, 'Consumers' access to EU competition law procedures: Outer and inner limits' (2014) 51 Common Market Law Review, Issue 2, 483–521.
84 'To enable the Commission and the competent authorities of the Member States to assess whether or not the transaction may be a candidate for referral, such contact should include sufficient information to make a preliminary assessment as to whether the criteria for referral are met, to the extent such information is available to the third party'. Commission Notice on Case Referral in respect of concentrations (n 39) 25.
85 On trade-offs between efficiency and transparency and accountability, see Brook and Cseres (n 70).
86 Joana Mendes, *Participation in EU Rule-Making: A Rights Based Approach* (Oxford University Press, Oxford 2011) 32–33.
87 *Kaysberg SA* (n 78) para. 110.

are 'merely liable to suffer the incidental effects of the decision',[88] which places them in a different procedural position.

For example, with regard to consumer associations as qualified third parties under Article 11 c, of the Implementing Regulation, the General Court in *Association belge des consommateurs test-achats* confirmed that 'the fact that those effects may be secondary in nature does not deprive the applicant of its right to be heard. The Commission cannot interpret Article 11(c), second indent, of Regulation No 802/2004 in restrictive terms which limit the application of that provision, in essence, to cases in which a merger has direct effects on markets concerning ultimate consumers. That is, *a fortiori*, the case since, first, point (b) of the second subparagraph of Article 2(1) of Regulation No 139/2004 provides that, as regards appraisal of concentrations, the Commission must take into account, inter alia, the interests of the intermediate and ultimate consumers'.[89] The Court added that 'under Article 153(2) EC, which essentially has the same wording as Article 12 TFEU, consumer-protection requirements must be taken into account in defining and implementing other EU policies and activities. Furthermore, Article 38 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1) provides that EU policies must ensure a high level of consumer protection'.[90]

Third parties' participation in administrative procedures is an important aspect of transparency and accountability that enhances the legitimacy of the proceedings and the final decision-making. Third parties' participation functions as a complement to judicial review because third parties are given the opportunity to contradict the possible decision of the competition authority, invoking errors, flaws, or mistakes that could ultimately lead to the illegality of the final decision.[91] These important procedural safeguards have been removed by the Guidance in the referral procedure, making amongst others, impossible for third parties to bring a case to the Commission in case an NCA is unwilling to do so as will be explained below.

B. Close and consistent cooperation and mutual trust

As mentioned above, one of the conditions of triggering Article 22 is that the concentration must affect trade between Member States. This is an exceptional jurisdictional condition in the enforcement framework of the Merger Regulation, as all other mechanisms depend on the quantitative thresholds defined in Article 1. As stated in paragraph 43 of the Referral Notice, a concentration fulfils the criterion of effect on trade between Member States laid down in Article 22 if it is liable to have some discernible influence on the pattern of trade between Member States. Concerning this notion, explicit reference is made in the Case Referral Notice to the Commission's Guidelines on the effect on trade concept contained in Articles 101 and 102 TFEU.[92]

Additionally, the referral mechanism heavily rests on close and constant liaison between the Commission and the NCAs and cooperation and dialogue. Similarly, to the European Competition Network formed for enforcing Articles 101 and 102 TFEU under Regulation 1/2003, the NCAs and the Commission 'form together a network of public authorities, applying their respective competences in close cooperation' under the Merger Regulation. At the same time, the referral mechanism of Article 22 depends on the willingness of NCAs to cooperate. The Commission can invite Member States to refer planned mergers to the Commission as the most appropriate authority to review the merger, but it cannot force them to do so. It is the sole discretion of the Member States whether they refer to a matter to the Commission.[93] This means that, whilst the Guidance requires close cooperation between NCAs and the Commission, it leaves a broad margin of discretion to the NCAs deciding whether to refer a case. Where NCAs might be unwilling to refer a case to the Commission, third parties cannot do more than inform the Commission as explained above. Such a close resemblance with the jurisdictional notion and enforcement cooperation of Regulation 1/2003 raises the question whether the same principles of effective enforcement as the ones underlying Regulation 1/2003 should be applicable to Article 22 referrals.

Under those principles, and in light of the decentralised enforcement of Articles 101 and 102 TFEU, and the

88 *Kaysberg SA* (n 78) para. 107.

89 Case T-224/10, *Association belge des consommateurs Test-achats ASBL v. Commission,* ECLI:EU:T:2011:588 para 43.

90 In the case at hand, the Court concluded that the Commission cannot reject the claim of a consumer association that seeks to be heard as a third party demonstrating a sufficient interest in a merger without providing that association with an opportunity to show in what respect consumers may be concerned by the merger at issue (see, to that effect and by analogy, Case T-256/97 *BEUC* v *Commission* ECLI:EU:T:2000:21 para 77. *Association belge des consommateurs Test-achats ASBL* (n 90) para. 44.

91 Joana Mendes, *Participation in EU Rule-Making: A Rights Based Approach* (Oxford University Press, Oxford 2011) 32–33.

92 Notice to the Commission's Guidelines on the effect on trade concept [2004] OJ C/101, 81.

93 Commission Press Release No IP/99/344 of 25 May 1999, Case IV/M.1395—The Coca-Cola Company/Cadbury Schweppes. Gianni De Stefano, Rita Motta, and Susanne Zuehlke, 'Merger Referrals in Practice—Analysis of the Cases under Article 22 of the Merger Regulation' Journal of European Competition Law & Practice, 2, (2011) 537–50.

principle of procedural and institutional autonomy,[94] the NCAs remain subject to a number of fundamental obligations under EU law. First, Member States must use their sovereign powers to maximise the effectiveness of enforcing Articles 101 and 102 TFEU.[95] The principle of effectiveness, which is a central element of Regulation 1/2003 and Directive 2019/01, requires Member States not to render the implementation of EU law impossible in practice or excessively difficult. Moreover, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU.[96] The principle of effectiveness also forms a legal basis to adopt independence requirements in EU law concerning competition and other regulatory authorities as can be seen in the ECN+ Directive.[97] Accordingly, competition authorities' power to challenge conduct deemed hostile to competition, particularly when that conduct is by politically powerful actors, is an essential measure of their political standing. Consequently, even if competition authorities' formal independence is guaranteed, Member States should be barred from adopting legislative or other measures that *de facto* eliminate the independence of its NCA.[98]

The Courts have on various occasions emphasised the obligations Member States have on the basis of the principle of effectiveness, which 'demands the availability of *sufficiently robust* [emphasis added] national enforcement structures so that Member States can discharge their overarching obligation to secure the meaningful application of EU law within the domestic system'.[99]

Second, their obligation of cooperation with the Commission and other NCAs, which is 'founded on equality, respect, and solidarity and especially on the idea that Member States accept that their enforcement systems differ but nonetheless *mutually recognize* (emphasis added) the standards of each other's system as a basis for cooperation'.[100] The decentralised system rests on the implicit safeguarding of mutual trust and sincere cooperation,[101] in which they all trust each other in making use of their investigative and fining powers in order to deter uncompetitive conduct.[102]

This principle, has now been confirmed by the General Court in competition law in its judgment Sped-Pro,[103]where the Court addressed rule of law issues to be taken into consideration when assessing whether a national competition authority is capable of effectively enforcing competition law and adequately safeguarding third parties' complainant rights. In its *Sped-Pro* judgment, a case also concerning principles of case allocation between the Commission and the NCAs, the General Court confirmed that compliance with the fundamental values of Article 2 TEU applies to the EU's competition law enforcement mechanisms under Articles 101 and 102 TFEU.[104] In this judgment, the General Court for the first time established a direct link between systematic deficiencies in the legal order of a Member State and the ability of its competition authority to investigate and take enforcement action under EU law and properly protect a complainant's rights. The General Court addressed issues of rule of law as an element of effective competition law enforcement and the case allocation principles between the Commission and NCAs under the decentralised enforcement system of Regulation 1/2003.[105]

By referring to its own case law developed in the area of the European Arrest Warrant (EAW),[106] the General Court found that, just as in the area of freedom, security, and justice, the cooperation between the Commission, the competition authorities of the Member States, and

94 Case 33/76, *Rewe-Zentralfinanz eG* and *Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, ECLI:EU:C:1976:188, para. 5.

95 Case C-429/07 X EU: C; 2009:359. para 21, 34–39. On the link between effective enforcement and loyal cooperation. M Sousa Ferro, Institutional Design of National Competition Authorities: EU Requirements (November 01, 2017). SSRN: https://ssrn.com/abstract=3077495 accessed 30 September 2023.

96 Case C-453/99, *Courage*, ECLI:EU:C:2001:465 para 29. C-308/19 *Consiliul Concurenței* ECLI:EU:C:2021:47 para 46, *Pfleiderer*, C-360/09, EU:C:2011:389, para 24

97 Sousa Ferro (n 95) 118. Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019]*OJ L 11, 3–33*

98 For a detailed discussion on how *de facto* independence has been undermined in Hungary. Katalin Cseres, 'Rule of Law Challenges and the enforcement of EU competition law, A case-study of Hungary and its implications for EU law' (2019) Competition Law Review, Vol. 14, No. 1, 75–101.

99 Niamh Dunne 'Convergence in competition fining practices in the EU' (2016) CMLR 466. The authorities designated under Article 35(1) of Regulation No 1/2003 must ensure that those Treaty articles are applied effectively in the general interest. C-439/08, *VEBIC*, EU:C:2010:739, para 56. In *Schenker*, the Court considered the circumstances in which an NCAs can decline to impose fines for the violation of Article 101 TFEU. Case C-681/11, *Schenker*, ECLI:EU:C:2013:404, paras 46–47, 49.

100 Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43, para 72.

101 The decentralised enforcement framework, relies heavily on the principle of 'sincere cooperation' laid down in Article 4(3) TEU and imposed on national courts and governments acting as agents of EU law.

102 Opinion 2/13 of the Court of Justice of the European Union (Full Court) [2014] ECLI:EU:C:2014:2454. paras 167–168

103 *Sped-Pro* (n 7)

104 *Sped-Pro* (n 7) 85.

105 Katalin Cseres and Karolina Hwija, Sped-Pro: The Impact of Rule of Law Backsliding on the Enforcement of (EU) Competition Law, Bialystok Legal Studies, 2023 forthcoming.

106 To recall, the mutual recognition and execution of EAW's was always based on 'the high degree of trust and solidarity between the Member States' that national authorities would dutifully execute EU law. More simply put, the act of accession to the EU constitutes an act of recognition and acceptance of the values of the EU and, in equal measure, a promise that these values will be respected whenever EU law is enforced. Case C-216/118 *LM v Ireland* [2018] EU:C:2018:586.

the national courts for the purposes of applying Articles 101 and 102 TFEU is based on the principles of mutual recognition, mutual trust, and loyal cooperation.[107] By virtue of those principles, each of those authorities and courts must presume that all other authorities and courts respect Union law unless for exceptional circumstances, and, more specifically, the fundamental rights recognised by that law.[108]

According to the General Court, for the purposes of determining which competition authority is the best placed to examine a complaint, the Commission had to consider Poland's compliance with the requirements of the rule of law as a relevant factor.[109] According to the Court, the protection of the complainant's rights and the Commission's decision-making power are closely linked. Hence, this judgment demands the Commission to investigate whether its decision to reject complaints puts complainants at risk of being subjected to investigations by national authorities compromised by rule of law backsliding.[110] The judgment demands that the Commission must take account of the additional condition of rule of law concerns when deciding on rejecting complaints and allocating cases.[111]

Hence, in this case, the Court effectively created a new condition that 'obliges the Commission, before rejecting a complaint for lack of EU interest, to satisfy itself that the national authorities are capable of adequately safeguarding the rights of the complainant'.[112] The judgment is significant because it openly questions whether a 'high degree of trust and solidarity'[113] actually exists between the NCAs and the Commission and whether their cooperation can be based on mutual trust, mutual recognition, and fair cooperation.

By analogy, with these principles underlying enforcement and cooperation under Regulation 1/2003 and the General Court's judgment in Sped-Pro, and on the basis of the close resemblance between the principles underlying Article 22 referrals and Regulation1/2003, I argue that the Commission should take account of the additional conditions of effective competition law enforcement and rule of law backsliding concerns when referrals are decided upon. Such an approach would require amendment to the Guidance in a way that referrals do not exclusively depend on the discretion and willingness of NCAs to refer cases. The lack of independence of NCAs, analogous with the lack of judicial independence of authorities issuing the EAW, could justify the suspension of cooperation between Member States and the Commission and that the case should be dealt with by the Commission.[114] This is even more so considering the fact that the European Commission and NCAs have 'court-like' functions[115] as they protect the legal position of undertakings as well as citizens' rights to economic activity and free choice in markets.[116] As such, effective enforcement of competition law not only is crucial for safeguarding undistorted competition within the internal market but also forms part of effective judicial protection as laid down in Article 19 of the Charter of Fundamental Rights (CFR), relevant to both defendants and victims in the competition context.[117]

This could be especially the case when a Member State systematically exempts mergers from its own merger control regime seriously undermining effective competition in the Member State and in the internal market. This is exactly the same situation, as in the formative years of the Merger Regulation, when certain Member States had no merger control, that triggered the initial adoption of the Dutch clause. This is precisely the reason why the Dutch clause was enacted and maintained. Leaving such situations unaddressed ignores the original and current objective of merger control, namely to control corporate re-organisations in a way that it does not result in lasting damage to competition in the internal market and to permit effective monitoring of all concentrations with a view of their effects on the structure of competition in the EU[118] and prevent significant impediment to effective

107 *Sped-Pro* (n 7) 81–88.
108 *Sped-Pro* (n 7) 88.
109 *Sped-Pro* (n 7) 92.
110 T 458/04 *Au Lys de France SA v Commission of the European Communities*, ECLI:EU:T:2007:195 83.
111 Commission had to take into account rule of law in determining the most appropriate competition authority to investigate a complaint and before rejecting a complaint for lack of an EU interest, to ensure that the national authorities are in a position adequately to safeguard the complainant's rights. *Sped-Pro* (n 7) 92.
112 *Sped-Pro* (n 7) 90.
113 Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, ECLI:EU:C:2007:261, 57.
114 See, for example, Hungary: KJ Cseres, 'EU Competition Law and Democracy in the Shadow of Rule of Law Backsliding (February 11, 2022). Forthcoming in: The Evolving Governance of EU Competition Law in a Time of Disruptions: a Constitutional Perspective, C Colombo, M Eliantonio, and K Wright (eds) Hart Publishing 2022., Amsterdam Law School Research Paper No. 2022–05, Amsterdam Centre for European Law and Governance Research Paper No. 2022–01, https://ssrn.com/abstract=4032499
115 Kathryn Wright, 'The "judicial", the "administrative" and consistent application after the decentralisation of EC antitrust enforcement' (2009) European Union Studies Association Eleventh Biennial International Conference; Imelda Maher, 'Juridification, Codification and Sanction in UK Competition Law' (2000) 63 Modern Law Review 544.
116 In Germany, this originated from the private law orientation of competition law that viewed competition law as a matter of rights and individual freedoms. David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 2001) 286.
117 Article 19 Charter of Fundamental Rights of the European Union [2000] OJ C364/1, Dunne (n 100) 453.
118 Regulation 4064/89 Preamble, See also recital 5 and 6 Regulation 139/2004.

competition in the common market or in a substantial part of it.[119]

V. Conclusions

In her Opinion in Towercast, AG Kokott recalled that 'the introduction of a merger control regime was intended to fill gaps in the system of protection against distortions of competition in relation to concentrations'.[120] She further argued that 'a gap in protection has emerged in recent years in the coverage and control, under competition law, of acquisitions of innovative start-ups, for example in the fields of internet services, pharmaceuticals or medical technology ("killer acquisitions")'.[121] To fill this gap, the Commission has now reactivated its so-far underused enforcement mechanism enshrined in Article 22 of the Merger Regulation. By doing so, the Commission as an administrative decision-maker validly reacts to the need of modern administration to be equipped with necessary discretionary powers in order to address and efficiently solve complex socio-economic, technical, and scientific problems. As EU policy areas, including competition law, are subject to rapid changes and uncertainty, their effective regulation requires efficient and often fast procedures accompanied with a wide margin of discretion on the side of the administrative decision-maker.[122] Nevertheless, as the EU, and the European Commission in particular, is facing ever-more-complex policy problems, these not only require comprehensive solutions but also wide acceptance and legitimacy. Hence, administrative decision-making must be transparent and accountable and reflect on notions of procedural justice and pluralist interest participation.[123] This article argued that third parties' participation in administrative procedures is a crucial aspect of transparency and accountability that enhances the legitimacy of competition authorities' final decision-making. Significantly reducing the procedural standing and procedural rights of third parties in the referral procedure leaves the discretionary powers of the Commission and especially of the NCAs unrestrained. This questions whether the Commission's referral procedure complies with the rule of law, in the sense of a set of substantive and procedural rules that limit the exercise of public power. Whilst third parties to the referral procedure cannot invoke guarantees identical to those granted to interested persons and, in particular, the rights of defence,[124] the scope of that regulatory action, that may have considerable impact on their legal sphere, should be delineated by administrative law as a tool to control the exercise of public power vis-à-vis private persons.[125]

With the adoption of the 2021 Guidance of encouraging referrals from Member States under Article 22, which would fall outside of their merger control regime, the Commission has not only reacted to compelling reasons for safeguarding procedural efficiency but also re-opened long-standing and contradictory views of Member States and the EU institutions on which mergers in national markets require national or EU-level scrutiny at the intersection of national interest, industrial policies, and the protection of effective competition. By tracing back the historical emergence and development of Article 22 and its original rationale, this article argued that the encouragement of Article 22 referrals must seriously revisit the cooperation mechanisms and its procedural safeguards as it has developed under the enforcement regime of Regulation 1/2003, where cooperation is a fundamental building block of effective competition law enforcement. By doing so, the Commission should not just one-sidedly consider the rapid changes in markets and the new challenges it poses to administrative decision-making but also seriously reflect on the constitutional changes in certain Member States that equally risk undermining the effective protection of competition in the internal market. The General Court's recent judgment in Sped-Pro is instrumental in rethinking the safeguards of effective referrals and case allocation and hence effective enforcement of competition laws between Member States and the Commission. The jurisdictional allocation in merger control between the Commission and the Member States will only remain effective and legitimate if also Member States remain committed to the internal market and recognise and accept the EU's values and its objectives such as an undistorted competition in the internal market.

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119 Article 2 Regulation 139/2004.
120 Opinion of Advocate General Kokott delivered on 13 October 2022. ECLI:EU:C:2022:777, para 44
121 Opinion of Advocate General Kokott in Towercast, (n 121) para 48
122 HP Nehl, Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union in: *EU executive discretion and the limits of law*, J Mendes (ed.) OUP, 2019.170.
123 Nehl (n 123) 171
124 *Kaysberg* (n 78) para. 107.
125 Joana Mendes, 'Participation in EU Rule-making: A Rights-based Approach' (OUP, 2011), 3, 18.