

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)¹

I. Introduction

On 26 March 2021, the Commission adopted a [Communication providing Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases](#) (the “Article 22 Guidance”).² The Commission intends, in certain circumstances, to encourage and accept referrals in cases where the referring Member State does not have initial jurisdiction over the case, where the criteria of Article 22(1) of [Council Regulation \(EC\) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings](#) (the “Merger Regulation”) are met.

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.

The Article 22 Guidance explains that merging parties may voluntarily come forward with information about their intended transactions (paragraph 24). Where appropriate, the Commission may in such cases give an early indication that it does not consider that a concentration would constitute a good candidate for a referral under Article 22 of the Merger Regulation, if sufficient information to make such a preliminary assessment has been submitted.

Further, the Article 22 Guidance sets out that third parties may also contact the Commission or the competent authorities of the Member States (for ease of reference, referred to hereafter as “NCAs”³) to inform them of a concentration that, in their opinion, could be a suitable candidate for a referral under Article 22 of the Merger Regulation (paragraph 25). The Commission may exchange information to that effect with the NCAs.

¹ The replies to the frequently asked questions may be subject to updates, building on (i) the Commission’s experience with the application of the Article 22 Guidance and/or (ii) future case law of the EU Courts. The Commission also welcomes comments by all stakeholders on this Q&A document.

² This complements the guidance provided in the Commission Notice on Case Referral (the “Notice on Case Referrals”).

³ For the purpose of this document, ‘competent authorities of the Member States’ has been abbreviated as “NCAs”, because in most instances the competent authority is the national competition authority.

This Q&A document builds on the Article 22 Guidance and intends to provide to merging parties and third parties practical information with respect to the application of Article 22 of the Merger Regulation.

II. Assessment of candidate cases for Article 22 referral

1. What types of cases does the Commission consider as suitable candidates for an Article 22 referral in situations where the transaction is not notifiable under the laws of the referring Member States?

A case is a suitable candidate for an Article 22 referral in situations where the transaction is not notifiable under the laws of the referring Member State(s) when:

- a. It affects trade between Member States;
- b. It threatens to significantly affect competition within the territory of the Member State making the request;⁴

In its assessment the Commission may also take into account, amongst other elements, whether the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential and/or other factors are present (e.g., the factors set out in paragraphs 19 and following of the Article 22 Guidance and paragraph 45 of the Notice on Case Referrals).

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.⁶

In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the

⁴ Items (a) and (b) are the legal criteria set out in Article 22(1) of the Merger Regulation. These legal criteria are explained in paragraphs 42 and following of the Notice on Case Referrals, and paragraphs 13 and following of the Article 22 Guidance. Per paragraph 44 of the Notice on Case Referrals, *“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.”*

⁵ Article 22 Guidance, paragraph 22.

⁶ EU Merger Regulation, recital 11 and Notice on Case Referrals, paragraph 11.

current turnover of the target, as it could be an indication that the turnover of the target does not reflect its actual or future competitive potential.⁷

On 19 April 2021, the Commission accepted an Article 22 referral from France (joined by Belgium, Greece, Iceland, the Netherlands and Norway) to assess the acquisition of GRAIL by Illumina, although France did not have jurisdiction to review this transaction under French merger control rules (Case M.10188 – *Illumina/GRAIL*).⁸ The Commission found that the case met the criteria of Article 22(1) of the Merger Regulation. Accepting the referral request in this case, the Commission also noted the following:

- a. the concentration threatened to significantly affect competition in markets that were likely wider than national;⁹
- b. a coordination of investigative efforts at EU level was desirable, as the concentration concerned detection of cancer, a priority of the Commission in the area of health;¹⁰
- c. while the target did not generate revenues from the sale of products, one of its products in development was expected to capture a significant share of the addressable market;¹¹
- d. the target had raised significant amounts in equity financing by investors;¹²
- e. the value of the deal was particularly high compared to the turnover of the target at the time of the transaction;¹³ and
- f. the concentration had not been implemented and had not been notified in any Member State.¹⁴

Set out below are additional, hypothetical examples of cases that the Commission may consider as suitable candidates for a referral based on the

⁷ Article 22 Guidance, paragraph 19.

⁸ The General Court of the EU upheld the Commission’s decisions accepting France’s request for referral and the requests to join by Greece, Belgium, Iceland, Netherlands, and Norway. The General Court of the EU stated: “*taking account of the literal, historical, contextual, and teleological interpretations of Article 22 [of the Merger Regulation], it must be held that the Member States may [...] make a referral request under that provision irrespective of the scope of their national merger control rules*” (Judgment of 13.07.2022, Case T-227/21, *Illumina v. Commission*, paragraph 183).

⁹ Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL* (Article 22(3) decision – France), paragraph 83.

¹⁰ Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL* (Article 22(3) decision – France), paragraph 84.

¹¹ Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL* (Article 22(3) decision – France), paragraph 87(a).

¹² Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL* (Article 22(3) decision – France), paragraph 87(a).

¹³ Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL* (Article 22(3) decision – France), paragraph 87(b).

¹⁴ Commission decision of 19 April 2021, Case M.10188 – *Illumina/GRAIL* (Article 22(3) decision – France), paragraph 88.

Article 22 Guidance. In none of these examples, the turnover thresholds of Articles 1(2) and 1(3) of the Merger Regulation are met nor do these transactions require notification under national merger control rules of the Member States. Moreover, the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential.

- a. Undertaking A, a multi-national company offering a social networking solution, proposes to acquire undertaking B, which launched a social networking solution focusing on video content one year before the transaction was announced. A's solution has significantly more monthly active users ("MAU") than B's. But B's MAU base is growing much faster than A's and than the MAU base of other players in the market.
- b. Undertaking C, a multi-national company developing and commercialising pharmaceuticals, proposes to acquire undertaking D. C's best-seller is an injectable drug for disease X. D was founded several years before the proposed transaction and focuses on research and development for pharmaceuticals. D does not have any revenue as none of its pipeline projects have reached the market. But it has an advanced pipeline project for a new injectable drug which could also target X. C's product and D's Phase III pipeline project have different but comparable modes of action.
- c. Undertaking E proposes to acquire undertaking F. Both E and F supply DNA sequencing systems. E's systems are the most widely used in the market. F's systems are based on a different technology than E's and they are more expensive and less accurate. However, in the two years before the transaction, F made significant improvements to its systems and going forward, customers could consider migrating from E to F.
- d. Undertaking G, which offers one of the top digital music distribution services, proposes to acquire undertaking H, which offers a popular music recognition app. H collects data regarding the preferences of its users but this data was not commercialised or made available to other companies for commercial use. This data could be relevant for G's business model. G could use the data to target directly H's users and encourage them to switch to its own music distribution service.
- e. Undertaking I, a multi-national company which offers laboratory equipment including high-precision microscopes, proposes to acquire undertaking J. J supplies cameras and filters which constitute a key input for high-precision microscopes. The relevant market for high-precision microscopes is concentrated and I is the largest player. J is one of the few players which offer cameras and filters as inputs for high-precision microscopes.

III. Practical guidance on interactions between merging parties and the Commission

2. As set out in paragraph 24 of the Guidance, merging parties may voluntarily come forward with information about their intended transactions. How should merging parties contact the Commission to get its views on whether a transaction is a suitable candidate for a referral under Article 22 of the Merger Regulation?

Merging parties seeking guidance on whether their transaction could be a suitable candidate for a referral under Article 22 of the Merger Regulation are invited to submit a case team allocation request to the Merger Registry by email or via fax (see information page [here](#)).

The assessment of the case will be assigned to a team in one of DG Competition's operational merger units. DG Competition will then communicate the contact details of the case team members to the merging parties. Merging parties are invited to provide the case team with targeted information about the deal (see reply to question 3 below).

Before submitting a case team allocation request seeking guidance under Article 22 of the Merger Regulation, merging parties should consider whether the concentration may be referred to the Commission under Article 4(5) of the Merger Regulation.

3. What information should the merging parties provide when contacting the Commission regarding a potential candidate for referral under Article 22 of the Merger Regulation? Is there a specific form to be completed?

There is no specific form to be submitted by the merging parties who seek indications as to whether their transaction would be a suitable candidate for an Article 22 referral.

The merging parties should provide to the case team information allowing the Commission to assess whether their transaction would meet the criteria of Article 22(1) of the Merger Regulation. The parties should also provide information about other factors which may allow the Commission to assess whether a case will be appropriate for referral such as indications that the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential and/or other factors are present, e.g., the factors

set out in paragraphs 19 and following of the Article 22 Guidance and paragraph 45 of the Notice on Case Referrals.

To that end, merging parties may in particular submit a short briefing paper addressing the following points, as applicable:

a. General information:

- A concise description of the parties, the transaction, its value, its rationale and whether or not it has already been implemented or completed.
- A confirmation that the transaction falls within the definition of a concentration in Article 3 of the Merger Regulation.
- The turnover of the parties in the most recent full financial year at worldwide and EEA level, and, if available, in each EEA Member State.
- Information on the status of the acquisition and the envisaged timing.¹⁵

b. Substantive information:

- Information concerning the relevant markets and the competitive situation allowing answering the following questions:
 - Does the transaction affect trade between Member States?
 - Are there any elements that could suggest on a preliminary basis that the transaction would (not) threaten to significantly affect competition within the territory of one or more Member States?
 - What is the turnover of all undertakings concerned in the relevant markets and does this turnover properly reflect the firms' actual or future competitive potential in these markets?
 - Are any other factors present among the factors listed in paragraphs 19 and following of the Article 22 Guidance and paragraph 45 of the Notice on Case Referrals?

This assessment should be substantiated by data and evidence, including on (product and geographic) market definition and the competitive landscape in the relevant markets.

¹⁵ This includes key steps in the transaction (if applicable, dates when the acquisition was (planned to be) announced, list of key transaction documents signed and dates for the completion of the transaction).

c. Interactions with other national competition authorities:

- Whether the transaction is notifiable, or has been notified, in any EEA or non-EEA jurisdiction.
- Whether the merging parties have had contacts with NCAs.
- Whether the parties are willing to provide a waiver regarding the exchange of confidential information provided by the merging parties between the Commission and the NCAs. The format proposed by the International Competition Network (“ICN”) model waiver is recommended (available [here](#)).

d. Transaction documents:

The merger or purchase agreement (or any equivalent document) and any other documents the Parties consider appropriate in line with Article 4 of the Merger Regulation.¹⁶

Further to the receipt of the merging parties’ briefing paper, the case team may ask the merging parties for additional information relevant to the assessment.

4. When can the merging parties contact the Commission about a proposed transaction? Can they contact the Commission about a hypothetical transaction they are contemplating?

Merging parties may contact the Commission for guidance following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Alternatively, merging parties may contact the Commission where they can demonstrate a good faith intention to conclude an agreement (e.g., after signing a letter of intent or memorandum of understanding) or, in the case of a public bid, where they have publicly announced an intention to make such a bid (Article 4 of the Merger Regulation).

The Commission will however not assess or provide guidance on purely hypothetical transactions.

¹⁶ This may include internal documents (e.g., assessing or analysing the concentration, the potential for sales growth or expansion, and/or general market conditions). To the extent the merging parties have such internal documents readily available, they may include them already as annexes to the briefing paper.

5. Can the parties implement a transaction before or during their contacts with the Commission regarding a potential referral under Article 22 of the Merger Regulation?

Under Articles 22(4) and 7(1) of the Merger Regulation, merging parties can implement transactions that do not have a Union dimension up until the moment they are informed by the Commission that a Member State has made a referral request based on Article 22 of the Merger Regulation.

Paragraphs 27 and 28 of the Article 22 Guidance provide further information on this and the timelines as set out in Article 22(4) of the Merger Regulation. If no notification is required, a referral request must be made at most within 15 working days of the date on which the concentration is otherwise made known to the Member State concerned.¹⁷

If, following contact with (a) Member State(s), the Commission has clear indications that a referral request is likely to be made, the Commission will inform the parties to the transaction as soon as possible. Merging parties are not obliged to take or refrain from any action regarding the implementation of the concentration when they are made aware that a referral request is considered, but they may decide to delay the transaction's implementation until it has been decided whether a referral request will be made.¹⁸

6. When and how will the Commission reply to a request for guidance made by the merging parties?

While there is no legal deadline for the Commission to finalise its assessment, in accordance with DG Competition's Best Practices (see [here](#)), the Commission would normally strive to carry out a first review of the information provided by the merging parties within five working days from receipt.

At the expiration of these five working days, the Commission would normally either request follow-up information to the merging parties, or confirm that it does not have further questions at that stage and provide an indication of the approximate timeframe within which the Commission will revert to the merging

¹⁷ The concept of a concentration's being 'made known' within the meaning of the second subparagraph of Article 22(1) of the Merger Regulation must, as regards its form, consist in the active transmission of relevant information to the Member State concerned and, as regards its content, contain sufficient information to enable that Member State to carry out a preliminary assessment of the criteria laid down in the first subparagraph of Article 22(1). See Judgment of 13.07.2022, Case T-227/21, *Illumina v. Commission*, paragraph 204.

¹⁸ See Article 22 Guidance, paragraph 27.

parties on their request for guidance. This timeframe depends on the complexity of the transaction and the completeness of the information provided by the merging parties.

Where the merging parties so request, the Commission's services may provide an early indication that a transaction does not appear to be a suitable candidate for referral based on Article 22 of the Merger Regulation. Such early indications do not constitute a decision of the Commission and are not binding on Member States. They reflect only the opinion of the Commission's services at a given date, based on the information provided by the merging parties. These early indications are without prejudice to a possible subsequent referral request by the Member States.

IV. Practical guidance on interactions between third parties and the Commission

7. Paragraph 25 of the Article 22 Guidance states that third parties may contact the Commission or the NCAs and inform them of a concentration that, in their opinion, could be a referral candidate. How should third parties contact the Commission about a proposed or closed transaction? What information are third parties supposed to provide when contacting the Commission? Is there a specific form to be completed?

Third parties can contact the Commission about a transaction that they consider to be a suitable candidate for a referral based on Article 22 of the Merger Regulation.

Third parties can contact the Head of Unit of the merger unit in charge of the relevant industry/sector (i.e., Units COMP/B.4, COMP/C.5, COMP/D.5, COMP/E.4 or COMP/F.4 – for the allocation of industries and sectors, see DG COMP organisation chart [here](#)). Third parties may also copy the functional mailbox of the merger policy and case support unit, namely, COMP-A2-MAIL@ec.europa.eu.

To enable the Commission and the NCAs to examine whether or not the transaction is a suitable candidate for referral, third parties should include all the information available regarding the criteria of Article 22(1) of the Merger Regulation and the other factors set out in the Article 22 Guidance and the Notice on Case Referrals (to the extent such information is available to the third party).

There is no specific form that the third party should complete. Third parties are advised to submit a short briefing paper addressing (some or all of) the points listed in the reply to question 3 above.

8. Does the Commission have an obligation to act when it is informed about a transaction by third parties? Will third parties receive feedback from the Commission?

Third parties may contact the Commission (or the NCAs) and provide information about a concentration that, in their opinion, could be a suitable candidate for a referral under Article 22 of the Merger Regulation. But this does not impose any obligation on the Commission (or on the NCAs) to take specific action.

The Commission will acknowledge receipt of the third party's submission and, where needed, send follow up questions to understand better the third party's claims.

Article 22 of the Merger Regulation does not set a time limit for the Commission to inform the Member States, pursuant to Article 22(5), of a concentration that fulfills the criteria of Article 22(1). However, where the Commission obtains sufficient information enabling it to assess whether the criteria of Article 22(1) of the Merger Regulation are fulfilled, it will adopt a position within a reasonable period of time regarding (i) the criteria of Article 22(1) and (ii) whether it is appropriate to inform one or more Member States accordingly.¹⁹

V. Practical guidance on the cooperation between the NCAs of the EEA Member States and the Commission in the context of requests for guidance by merging parties and interactions with third parties

9. How will the Commission liaise with NCAs (and *vice versa*)? To know whether a transaction is a suitable candidate for an Article 22 of the Merger Regulation referral, should merging parties and third parties only contact the Commission, or only the NCAs, or both?

The Commission can invite one or more Member States to request a referral under Article 22(5) of the Merger Regulation. It is then for the Member State(s) to request the referral. The referral ultimately takes place if the Commission accepts the referral request.

¹⁹ See Judgment of 13.07.2022, Case T-227/21, *Illumina v. Commission*, paragraphs 221-225.

It is for the merging parties and the third parties to decide whether to contact the Commission and/or one or more NCAs. For example, third parties (and sometimes merging parties) may choose to contact directly the NCA(s) who will eventually decide whether to make a request. However, merging parties and third parties may also find it most efficient to contact the Commission, in view of the central coordinating role that it plays under the Article 22 Guidance and its ultimate discretion to accept or reject referral requests by Member States.

10. How will the Commission protect confidential information provided by the merging parties and/or third parties, when liaising with competition authorities (including competition authorities outside the EEA), in particular if the transaction is not made public?

As a general principle, all information submitted in the context of a merger consultation or pre-notification contacts is protected by Article 17 of the Merger Regulation. All the contacts between the Commission and the merging parties/third parties are thus kept confidential.

The referral mechanism in Article 22 of the Merger Regulation requires close cooperation between the Commission and NCAs. In its assessment of Article 22 referral candidates, the Commission may need to exchange information received from merging parties and/or third parties with the NCAs. In such exchanges, confidential information will be protected in accordance with the applicable laws, as set out in paragraphs 57-58 of the Notice on Case Referrals.

When submitting a [case team allocation request](#), the merging parties are asked to indicate whether the transaction in itself is highly market sensitive and would require additional protection.

In the interest of procedural efficiency, merging parties and third parties are invited to provide a waiver regarding the exchange of their confidential information between the Commission and the NCAs. The format proposed by the ICN model waiver is recommended (available [here](#)).