

Catch Them if You Can: Designing an Effective Call-In Power for Sub-threshold Mergers in the Netherlands



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Abstract

This thesis explores how the Netherlands should develop a call-in power to address the enforcement gap following the *Towercast* and *Illumina-Grail* case law, while adhering to the principles of the rule of law, legal certainty, and proportionality, and to the practical requirement of effectiveness. The thesis combines doctrinal analyses of the EU context and Dutch legislative developments with a normative principle-based assessment, stakeholder input following a public consultation, responses from the ACM, the RvS's advice, and a comparative study of Italy's call-in regime.

The analyses conclude that, while the Dutch Bill shows significant progress regarding adherence to the principle framework, most notably through the introduction of the asymmetric turnover threshold, it still leaves significant room for improvements, e.g., through jurisdictional triggers, information burdens for parties, and interaction with the ex post route of abuse.

The Italian example shows how developing and updating guidance on open-textured norms, introducing non-binding safe-harbour screens, and creating an attractive voluntary notification route can reduce unpredictability in practice. However, it also highlights the limitations of open-textured norms, sector targeting, and market-definition discretion.

Based on these findings, this thesis recommends: (i) conducting a rapid impact assessment to quantify the enforcement gap and improve legislative transparency; (ii) creating clearer, objective definitions for jurisdictional triggers; (iii) managing RFIs through setting a cap and introducing declining time limits; (iv) implementing a sequencing rule between the call-in power and the abuse route; (v) creating an attractive channel for voluntary notifications; (vi) addressing possible interoperability with Commission intervention through Article 22 EUMR; and (vii) establishing binding ACM guidance, e.g., on triggers and safe harbours.

If properly executed, the Dutch legislator can create a call-in power that effectively closes the enforcement gap of modern merger control without compromising fundamental legal principles.

Key words: call-in power; sub-threshold concentrations; rule of law; legal certainty; proportionality; effectiveness; Illumina/Grail; Towercast; ACM; AGCM.

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Introduction

In the European Union (EU) and within Member States, jurisdiction over concentrations is allocated and determined by turnover thresholds. However, recent case law has tested the limits of this threshold-based system. In *Towercast*,¹ the European Court of Justice (ECJ) confirmed a limited, residual role for Article 102 of the Treaty on the Functioning of the European Union (TFEU)² in merger contexts. The ECJ held that while Article 102 TFEU can be used to review certain mergers, its ex post character and high evidentiary threshold make it not an ideal route for scrutinising mergers. In the *Illumina/Grail* rulings,³ the ECJ overturned the General Court's (GC) broad reading of Article 22 of the Council Regulation on the control of concentrations between undertakings (EUMR),⁴ significantly narrowing down the use of this provision's referral mechanism: Member States cannot refer a concentration to the Commission without having national jurisdiction to review the concentration themselves anymore. This greatly limits the Commission's ability to assist in reviewing sub-threshold concentrations.

These developments have created a perceived 'enforcement gap' for sub-threshold acquisitions that can pose significant impediments to effective competition (SIEC).⁵ An example of this is a 'killer acquisition,' where an established company acquires a promising start-up, possibly preventing a significant future competitor from emerging.⁶ Since the start-up only shows promise and has not yet generated substantial turnover, the turnover thresholds have not been met. Consequently, authorities cannot review these acquisitions, while these acquisitions can significantly affect (future) competition.

¹ Case C-449/21 *Towercast SA SU v Autorité de la concurrence* [2023].

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

³ Case T-227/21 *Illumina Inc v Commission* [2022]; Joined Cases C-611/22 P and C-625/22 P *Illumina Inc v Commission* [2024].

⁴ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

⁵ Wolf Sauter and Jotte Mulder, 'Merger jurisdiction in EU competition law after Illumina/Grail: What's next?' (2025) 13(1) *JAE* 218 <<https://academic.oup.com/antitrust/article/13/1/215/8045483>> accessed 12 October 2025; Max van Iersel, 'Article 22 EUMR Referrals Post-Illumina: Back to the Drawing Board?' (*European Law Blog*, 23 September 2024) <<https://www.europeanlawblog.eu/pub/y0p0xu3q/release/2>> accessed 9 October 2025; Alan Riley, 'Illumina/Grail: What is the Solution for Killer Acquisitions Now?' (*Kluwer Law Competition Blog*, 15 October 2024) <<https://legalblogs.wolterskluwer.com/competition-blog/illuminagrail-what-is-the-solution-for-killer-acquisitions-now/>> accessed 9 October 2025.

⁶ Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129(3) *JPE* 649–650 <<https://www.journals.uchicago.edu/doi/epdf/10.1086/712506>> accessed 9 October 2025.

Since Article 22 EUMR is limited and Article 102 TFEU remains a restricted alternative, the responsibility to address this gap has shifted to Member States, resulting in several Member States adopting new or strengthening existing powers to review such transactions.⁷ The Netherlands is among them and is currently legislating a call-in power, through which sub-threshold concentrations can be ‘called in’ if the concentration is deemed potentially harmful for competition. The legislative process has brought a proposal for the call-in power (the Proposal),⁸ followed by a consultation, and subsequently a revised bill (the Bill).⁹ On 6 October, the Dutch Council of State (*Raad van State* (RvS)) published an advice on the Bill,¹⁰ thoroughly questioning its elements.

The call-in power presents practical and legal problematique. Open-textured elements and low thresholds for a call-in power are attractive because they allow NCAs to target many potentially harmful sub-threshold concentrations. However, these features also risk undermining principles like legal certainty and proportionality, which are vital for businesses and a country's investment climate. These conflicting interests are a key point of critique in responses to the Proposal's consultation and highlight areas for improvement.

To address the problematique in a normative manner, the thesis employs a framework based on three fundamental legal principles: the rule of law, legal certainty, and proportionality, together with the practical assessment of the power's effectiveness. The rule of law requires accessible, stable rules and reasoned, reviewable decisions. Legal certainty ensures foreseeability for companies, for example, through clear timelines and guidance. Proportionality adjusts the burden and scope according to the risks to competition involved. Effectiveness examines whether the power, in practice, achieves its objective: reliably identifying genuinely harmful sub-threshold concentrations without overreach.

⁷ Michael Engel and others, ‘Think you are below the radar? EU competition authorities expand scrutiny of below-threshold M&A deals’ (*White & Case Insight Alert*, 17 April 2025) <<https://www.whitecase.com/insight-alert/think-you-are-below-radar-eu-competition-authorities-expand-scrutiny-below-threshold>> accessed 6 October 2025.

⁸ Tweede Kamer der Staten Generaal, ‘Voorstel van wet van de leden Bushoff en Danielle Jansen tot wijziging van de Mededingingswet ter uitbreiding van het concentratietoezicht (Wet inroepbevoegdheid ACM)’ (2024–2025) (Proposal).

⁹ Tweede Kamer der Staten Generaal, ‘Voorstel van wet van het lid Bushoff tot wijziging van de Mededingingswet in verband met de uitbreiding van het concentratietoezicht (Wet inroepbevoegdheid ACM)’ Kamerstuk 36 774, nr 2 (2024–2025) (Bill).

¹⁰ Afdeling advisering van de Raad van State, *Advies over het wetsvoorstel Wet inroepbevoegdheid ACM* (1 October 2025) <<https://www.raadvanstate.nl/actueel/nieuws/oktober/advies-over-wet-inroepbevoegdheid-acm/>> accessed 27 October 2025.

This combination is chosen because it aligns closely with the primary concerns highlighted in the literature and policy debate on call-in powers: (un)certainty, discretion and the need for safeguards. These elements are discussed in literature in terms of legal certainty, the rule of law, proportionality and effectiveness. This thesis employs these same key elements and terms to align with the discussion substantially and ensure coherence on terminology. Taken together, the framework is normatively complete, doctrinally anchored for legal scrutiny, and sufficiently operational to result in concrete design choices.

In this light, this thesis examines how the Netherlands should design a call-in power for sub-threshold mergers, which effectively addresses the enforcement gap on one hand, but also respects legal principles on the other hand. This design task aims to keep flexibility while restoring predictability.

To do so, this thesis uses Italy as a comparative example to observe how a call-in power functions in practice and to derive lessons for the Dutch legislator. Four elements make Italy a strong comparative example: (i) its relatively long-standing and active regime provides an extensive practice, on which the call-in power can be assessed; (ii) procedurally, the Italian power largely aligns with the Dutch legislative plans; (iii) the rationale behind the Italian power resembles the Dutch rationale; and (iv) the Italian power has already been used for a referral request, post-*Illumina/Grail*, which shows how Article 22 EUMR can still be used in combination with a call-in power. However, as Italy is only one Member State, its institutions, practices, and context will not mirror every other Member State. Italy is therefore used to illustrate how the design can work, but not to claim EU-wide conclusions.

The thesis contributes to current debates on the call-in power by: (i) systematising the legal-doctrinal constraints on the Dutch call-in power, i.e., identifying where effectiveness gains are traded against legal certainty and administrative burdens; (ii) bringing into view national enforcement gaps that the discussion at the EU-level has possibly overlooked or left implicit; (iii) deriving practical lessons from the Italian experience to improve the Dutch design; and (iv) adding to a highly timely topic, as the call-in power is currently in a legislative stage, in which possible improvements can still be done. This fourth contribution simultaneously forms the societal goal of the thesis; by adding to the legislative debate on the call-in power, it tries to help shape a more effective and better-balanced tool, that safeguards fair competition for businesses and consumers, thereby benefitting society as a whole.

Methodologically, the thesis combines: (i) a doctrinal analysis of EU and Dutch law; (ii) a doctrinal-normative framework built on the discussed legal principles and the requirement of effectiveness; (iii) stakeholder analyses from consultation responses, input from the Netherlands Authority for Consumers and Markets (*Autoriteit Consument & Markt*, ACM)), the RvS advice; and (iv) the comparative study.

Structure: Chapter 1 sets the EU context (*Towercast*, *Illumina/Grail*, and the enforcement gap). Chapter 2 analyses the Dutch context: the Proposal for the Dutch call-in power, the subsequent Bill, and the Dutch debate. Chapter 3 assesses the call-in power in light of the framework. Chapter 4 provides the Italian comparison. Chapter 5 formulates recommendations. Chapter 6 concludes.

1. *Towercast*, *Illumina/Grail* and the Enforcement Gap

1.1 Introduction

This chapter provides an overview of the European legal framework, within which the call-in debate developed. It explains turnover thresholds and Article 22 EUMR, then analyses the *Towercast* and *Illumina/Grail* rulings, which respectively demonstrate the limits of Article 102 TFEU for merger control and the Commission's restricted ability to review sub-threshold cases. It concludes by showing how these rulings created the perceived enforcement gap that triggered Member States to consider national call-in powers.

1.2 EU Merger Control and Article 22 EUMR

EU merger control relies on turnover thresholds determining whether the Commission or National Competition Authorities (NCAs) review a concentration. Articles 1(2)-(3) EUMR set EU-level thresholds; transactions above these thresholds are reviewed by the Commission, and below these EU thresholds but above national thresholds are reviewed by NCAs.

Whilst turnover thresholds aim to capture the most impactful transactions, they can miss acquisitions of innovative, fast-growing companies, even when these may cause SIECs, like killer acquisitions. Recent Court of Justice of the European Union (CJEU) rulings on Articles

102 TFEU and 22 EUMR have reshaped how such sub-threshold concentrations are addressed, making these cases and their interpretative effects central to the current debate.

1.3 *Towercast*

Towercast amplified concerns about the adequacy of existing competences and a possible enforcement gap. Here, Télédiffusion de France (TDF), a French broadcaster, acquired Itas. The concentration stayed below turnover thresholds and was not referred to the Commission. Towercast, TDF's only remaining competitor, complained to the French Competition Authority (*Autorité de la concurrence*, ADLC), that the acquisition constituted an abuse of TDF's dominance. The ADLC rejected the complaint and declined to investigate. Towercast appealed before the French Court of Appeal (*Cour d'appel de Paris*), which referred to the ECJ, asking whether Article 21(1) EUMR prevents treating a non-notifiable, non-referred concentration as abuse.¹¹

The ECJ confirmed that, in principle, non-referred sub-threshold acquisitions can be scrutinised under Article 102 TFEU,¹² but ex ante merger control should remain the primary mechanism for concentrations, safeguarding legal certainty.¹³ Advocate General (AG) Kokott likewise warned that applying Article 102 TFEU to transactions already subject to merger control, parties would face a 'double assessment', undermining legal certainty.¹⁴ By contrast, using Article 102 TFEU for cases where no ex ante scrutiny had occurred (possibly because turnover thresholds were not met), Kokott found no issues relating to legal certainty.¹⁵ She even specifically mentioned that Article 102 TFEU could protect effective competition against killer acquisitions.¹⁶

Nonetheless, Article 102 TFEU faces hurdles; merely demonstrating that an acquisition strengthened a dominant position is not enough to prove abuse; the authority must also establish that the resulting level of dominance would impede competition to such an extent

¹¹ *Towercast* (n 1), paras 17–29.

¹² *ibid* para 52–53.

¹³ *ibid* para 40; Damien Gerard and Elisabeth Marescaux, 'Non-notifiable Concentrations and Residual Merger Control Under Article 102 TFEU: Case C–449/21 *Towercast*' (2023) 14(7) *JECLAP* 428 <<https://academic.oup.com/jeclap/article/14/7/427/7243021>> accessed 19 September 2025.

¹⁴ Case C–449/21 *Towercast SA SU v Autorité de la concurrence* [2022], Opinion of AG Kokott, paras 55–60.

¹⁵ *ibid* paras 63–67; The ECJ confirmed this in *Towercast* (n 1), paras 52–53.

¹⁶ *ibid* para 48.

that only firms dependent on the dominant firm would remain in the market.¹⁷ Kyle and others note that, since authorities must prove more than an increased market share post-merger (namely, dependence on the merged entity), this will likely only be the case when the merger creates such high entry barriers that all market participants become dependent on the merged entity. They found that this threshold is rarely met, as finding a causal link ex post requires differentiating between factors that were and were not caused by the transaction, making it a ‘formidable exercise.’¹⁸

Gerard and Marescaux argue that, given the high evidentiary threshold and the unpredictability of Article 102 TFEU, it should only be used as a ‘residual form’ of merger control.¹⁹ Bostoen adds that ex post merger review comes with ‘serious costs in terms of legal certainty,’ due to loss of ex ante predictability, uncertainty over its legal tests and remedies regarding mergers, and the practical difficulty of undoing completed transactions (‘unscrambling the eggs’).²⁰

Kyle and others highlight that as *Towercast* increases the perceived risk of ex post scrutiny of completed deals, firms faced with this risk will clearly be incentivised to voluntarily pre-notify the NCAs or the Commission, thereby bringing transactions into the ex ante channel. By doing so, the concentration will not be challenged under *Towercast* hereafter: once a concentration has been reviewed (or waived) ex ante, Article 102 TFEU will not be invoked.²¹ Therefore, *Towercast* will only matter in exceptional situations, such as when parties do not notify or when a transaction somehow escapes ex ante review.

Taken together, Article 102 TFEU remains available but is not suited as a primary tool for sub-threshold concentrations. This leaves uncertainty about when Article 102 TFEU will be used and how sub-threshold concentrations will otherwise be scrutinised.

¹⁷ *ibid* para 52.

¹⁸ Margaret Kyle, Omar Shah and Vivek Mani, ‘Hot tub time machine? What role for Towercast in EU merger control’ (2024) 15(6) *JECLAP* 441–443 <<https://academic.oup.com/jeclap/article-abstract/15/6/436/7775386>> accessed 7 October 2025.

¹⁹ Gerard and Marescaux (n 13).

²⁰ Friso Bostoen, ‘Reviewing Mergers Under Article 102 TFEU: *Proximus/EDPnet (Belgium)*’ (2024) 15(4) *JECLAP* 260–262 <<https://academic.oup.com/jeclap/article/15/4/258/7608640?searchresult=1>> accessed 11 October 2025.

²¹ Kyle and others (n 17) 442.

1.4 *Illumina/Grail*

On 3 September 2024, the ECJ delivered its judgment in *Illumina/Grail*,²² wherein it overturned the previous GC ruling.²³ This case revolved around the interpretation of Article 22(1) EUMR, which states that: ‘One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension...’

Before *Illumina/Grail*, Article 22 EUMR was widely applied to allow Member States to refer any concentration to the Commission for review, even if the referring authority lacked national jurisdiction under their own (turnover) thresholds. The Commission’s 2021 guidance endorsed this reading, stating that market developments and Article 22 EUMR’s corrective function allow NCAs to refer concentrations to the Commission without requiring NCAs to have national jurisdiction to review those concentrations.²⁴

This also happened in *Illumina/Grail*: although the parties’ turnovers did not exceed any of the thresholds (Grail did not even generate any turnover within the EU or worldwide), the concentration between Illumina and Grail was referred to the Commission by the French Competition Authority (*Autorité de la concurrence française*) after the Commission invited it to submit such a referral.²⁵ The Commission accepted the referral,²⁶ opened an in-depth investigation,²⁷ and later prohibited the concentration.²⁸

Before the GC, they argued that the Commission’s interpretation of Article 22 EUMR and subsequent jurisdiction departed from the provision’s wording, purpose, and history, and breached fundamental legal principles. They argued that Article 22 EUMR was historically for Member States without national merger control, to refer to the Commission to scrutinise a

²² *Illumina* (CJEU, 2024) (n 3).

²³ *Illumina* (GC, 2022) (n 3).

²⁴ European Commission, ‘Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases’ [2021] OJ C 113/1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2021_113_R_0001> accessed 2 October 2025.

²⁵ *ibid* paras 9, 12 and 14; para 16 notes that this referral was later joined by five other Member States.

²⁶ *ibid* para 19.

²⁷ European Commission, ‘Mergers: Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina’ (*Commission Press Release*, 22 July 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3844> accessed 25 June 2025.

²⁸ European Commission, ‘Mergers: Commission prohibits acquisition of GRAIL by Illumina’ (*Commission Press Release*, 6 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364> accessed 25 June 2025.

merger that affected their territory but otherwise would not be subject to any scrutiny. Thus, Article 22 EUMR is not a residual catch-all provision for Member States that already operate merger control but nevertheless identify below-threshold cases as potentially harmful. Furthermore, they argue that the Commission's interpretation conflicted with the 'one-stop-shop' principle.²⁹ Overall, they find that the Commission's interpretation did not consider the provision's context and conflicts with the principles of legal certainty, subsidiarity, and proportionality.³⁰

Ultimately, the GC rejected the pleas. Among others, the GC used a literal interpretation of Article 22 EUMR to explain that 'any concentration' can be referred to the Commission.³¹ Through a teleological approach, the GC found that the provision acts as a 'corrective mechanism' for all concentrations capable of significantly impeding effective competition and falling outside the scope of the merger control rules.³² Regarding the historical interpretation, the GC found that while the referral mechanism was indeed adopted to help Member States that lacked a national merger control regime, the mechanism is not limited to such cases.³³ These conclusions, along with findings on the contextual and teleological approaches, made the GC rule in favour of the Commission's interpretation, finding that the Commission had jurisdiction to review such concentrations under Article 22 EUMR.³⁴

However, the ECJ overturned the GC's judgment, annulling the Commission's decisions. For this, the ECJ used different teleological, contextual, and historical interpretations. Inter alia, the ECJ held that the goal of Article 22 EUMR was not to serve as a corrective measure for concentrations falling between the gaps of merger regimes but to address concerns arising from multiple regimes having jurisdiction at the same time.³⁵ Moreover, the ECJ ruled that Article 22 EUMR's historical context revealed that the provision was established to provide compensation to Member States that lacked a merger control system of their own. It found no

²⁹ *Illumina* (GC, 2022), paras 84–85; Wolf Sauter, 'De ACM als kruimeldief? Of: een inroepbevoegdheid voor concentratiecontrole als onderdeel van nieuw mededingingstoezicht' (December 2024) *AA* 20241023 <<https://research.vu.nl/en/publications/de-acm-als-kruimeldief-of-een-inroepbevoegdheid-voor-concentratie>> accessed 9 September 2025, defines the 'one-stop shop' principle as ensuring that merging parties have to obtain clearance from only one authority: concentrations above EU thresholds ought to be cleared by the Commission, while concentrations below these thresholds ought to be cleared by NCAs. This is to ensure legal certainty for merging parties. This principle is subject to the exemption of referrals between the levels.

³⁰ *Illumina* (GC, 2022) (n 3), paras 84–85.

³¹ *ibid* paras 91–95.

³² *ibid* paras 142–143 and 148.

³³ *ibid* paras 96–117.

³⁴ *ibid* para 183.

³⁵ *Illumina* (CJEU, 2024) (n 3), paras 192–193.

evidence that Article 22 EUMR was meant as a ‘corrective mechanism’ or as a means to address deficiencies in a rigid, turnover-based, EU-wide merger control regime.³⁶

Overall, the ECJ found that the Commission’s and GC’s interpretations risked upsetting the balances between various objectives pursued by the EUMR (notably effectiveness, predictability and legal certainty), i.e., the EUMR does not only aim to effectively control problematic concentrations, but also to ensure predictability and legal certainty, through transparent competence allocation and the ‘one-stop-shop principle’ anchored in turnover thresholds.³⁷ In this respect, Lindeboom notes that if Article 22 EUMR could be invoked regardless of national jurisdiction, virtually any below-threshold deal could be subject to review at any time, which would blur the lines of who reviews what and when, contrary to the EUMR’s objectives. According to his view, the Court required national competence to act as a gatekeeper for referrals.³⁸ Due to the discrepancy between the EUMR’s original objectives and Article 22 EUMR’s reading, the ECJ held that the GC’s ruling could not stand.³⁹ Shortly thereafter, the Commission withdrew its 2021 guidance.⁴⁰

1.5 Enforcement Gap

Following *Illumina/Grail*, neither the Commission nor NCAs can rely on a broad interpretation of Article 22 EUMR. Some authors, therefore, identify an enforcement gap: potentially harmful below-threshold concentrations now fall outside the scope of merger control.⁴¹ *Towercast*’s confirmation of Article 102 TFEU as an inadequate alternative reinforces this view.

With Article 22 EUMR curtailed, the responsibility to address the gap shifts to Member States,⁴² who are seeking alternatives to address potentially harmful sub-threshold

³⁶ibid paras 146-150; Sauter and Mulder (n 5) 217.

³⁷ *Illumina* (CJEU, 2024) (n 3), paras 202–207.

³⁸ Justin Lindeboom, ‘Illumina/Grail: flawed originalism and the judicial hunch’ (2025) 13 *JAE* 227–228 <<https://academic.oup.com/antitrust/article/13/1/223/8029829>> accessed 9 October 2025.

³⁹ *Illumina* (CJEU, 2024) (n 3), paras 205–218.

⁴⁰ European Commission, ‘Communication from the Commission concerning the withdrawal of act 2021/C 113/01’ [2024] OJ C/2024/7190 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202407190> accessed 2 October 2025.

⁴¹ Sauter and Mulder (n 5) 218; van Iersel (n 5); Riley (n 5).

⁴² The ECJ also implied this, stressing that Member States are free to lower their national thresholds, ex *Illumina* (CJEU, 2024) (n 3), para 217.

concentrations.⁴³ Many have reformed or are reforming their merger control frameworks to be able to review these concentrations.⁴⁴

These reforms indicate a substantial shift in the regulatory landscape of merger control. It also shows a growing consensus that regular merger control is insufficient for addressing modern issues. Against this backdrop, Chapter 2 turns to the Netherlands: the path to the legislation of the Dutch call-in initiative, its design, and initial responses.

2. The Dutch Context: The ACM's Calls for Below-Threshold Scrutiny and Subsequent Policy Developments

2.1 Introduction

This chapter shifts from the EU framework to the Dutch context. It traces the path from the Proposal to the Bill, and discusses responses from the consultation and the ACM. As §1.4 explains, *Illumina/Grail* showed that Article 22 EUMR is not a general corrective measure for sub-threshold concentrations; national law must now determine how sub-threshold concentrations are scrutinised. Against this backdrop, this chapter investigates the Dutch context to identify national needs the call-in power must meet: §2.2 outlines the Proposal; §2.3 sets out the ACM's calls for a call-in power; §2.4 examines how the Bill responded to critique, including the introduction of a turnover threshold; §2.5 considers the role Article 24 Dutch Competition Act (*Mededingingswet*, Mw),⁴⁵ post-*Towercast* in relation to a call-in power.

2.2 The Proposal

The Netherlands is one of the Member States that acted after *Illumina/Grail* and *Towercast*. Members of parliament Bushoff and Jansen submitted the Proposal for a call-in power,⁴⁶

⁴³ Riley (n 5).

⁴⁴ European Commission, 'Statement by Executive Vice-President Margrethe Vestager on the Judgment of the Court of Justice in Case C-611/22 P (*Illumina/Grail*)' (*Commission Press Release*, 3 September 2024) <https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525> accessed 9 September 2025; Darach Connolly and others, 'Predictably Uncertain: Managing merger control call-in risk at local level in the EU' (*Kluwer Law Blog*, 1 April 2025) <<https://legalblogs.wolterskluwer.com/competition-blog/predictably-uncertain-managing-merger-control-call-in-risk-at-local-level-in-the-eu/>> accessed 9 September 2025.

⁴⁵ *Mededingingswet*, Stb. 1997, 242.

⁴⁶ Proposal (n 8).

introducing Articles 49a-49e Mw. These articles allow the ACM to request information on a concentration ('calling in a concentration') even below thresholds, where it has reason to believe it may cause SIECs on the Dutch market or part thereof.

A call-in must occur before the earliest of three 'triggers': (i) four weeks after parties make their intention to concentrate public, (ii) four weeks after the ACM becomes aware of the intended concentration, or (iii) six months after the agreement establishing the concentration takes effect.⁴⁷

If the ACM has concerns that the called-in concentration may pose SIECs, it can, within four weeks after receiving the information, order a 'standstill period' of another four weeks, during which the parties must notify.⁴⁸ Once notified, the ACM has four weeks to assess this notification. If concerns remain, the ACM can require a permit, entering Phase II.⁴⁹ If these concerns persist in Phase II or no permit is requested within four weeks, the ACM refuses the permit and orders the deal to be undone within thirteen weeks.⁵⁰ Exemptions and fines mirror the Mw's regular track,⁵¹ ensuring procedural consistency.

2.3 The ACM's calls for action

The proposed call-in power follows multiple calls by ACM president Martijn Snoep for additional competences to address market failures falling between the gaps in the existing Dutch merger regime.⁵² Following *Illumina/Grail*, the ACM renewed its call with increased urgency, arguing that the ruling emphasised the need for a call-in power.⁵³

⁴⁷ Proposal (n 8), art 49b.

⁴⁸ *ibid* art 49c (1)–(2): during a 'standstill period', parties cannot implement a deal and have to wait for approval.

⁴⁹ *ibid* art 49d.

⁵⁰ *ibid* art 49e (2).

⁵¹ Tweede Kamer der Staten-Generaal, 'Memorie van toelichting, Voorstel van wet van de leden Bushoff en Jansen tot wijziging van de Mededingingswet ter uitbreiding van het concentratietoezicht (Wet inroepbevoegdheid ACM)' (2025) (Explanatory Memorandum to Proposal) 9.

⁵² Martijn Snoep, 'Small mergers, big problems' (*ACM Blog*, 6 November 2023)

<<https://www.acm.nl/en/publications/blog-martijn-snoep-small-mergers-big-problems>> accessed 6 September 2025; Martijn Snoep, 'Updating competition enforcement' (*ACM Blog*, 7 November 2024)

<<https://www.acm.nl/en/publications/blog-martijn-snoep-updating-competition-enforcement>> accessed 12 September 2025; Martijn Snoep, 'Big companies, big risks' (*ACM Blog*, 12 April 2024)

<<https://www.acm.nl/en/publications/blog-martijn-snoep-big-companies-big-risks>> accessed 29 August 2025.

⁵³ Autoriteit Consument & Markt, 'ACM: European Court of Justice takes away opportunity to assess acquisition by Microsoft, new power is needed' (*ACM Blog*, 19 September 2024) <<https://www.acm.nl/en/publications/acm-european-court-justice-takes-away-opportunity-assess-acquisition-microsoft-new-power-needed>> accessed 25 June 2025; Bart de Rijke, Helen Gornall, Stephanie The, Wessel Geursen, 'Dutch competition authority widens powers to call in M&A transactions' (*Kluwer Competition Law Blog*, 28 Maart 2025)

Snoep emphasises addressing not only killer acquisitions, but also ‘roll-up strategies’ or ‘bead stringing’, where large corporations (often private equity firms) pursue a strategy of multiple takeovers that individually fall below merger control thresholds, but collectively impede competition. In niche or local markets, such strategies can particularly give rise to concerns.⁵⁴ The Proposal’s explanatory memorandum echoes this: while SIECs in these markets are not directly attributable to roll-up strategies, the absence of relevant competence to review these strategies makes it impossible to properly investigate.⁵⁵

The Dutch Proposal explicitly targeting roll-up strategies suggests that the approach is not only a reaction to *Illumina/Grail*, but is also tailored to domestic market dynamics and distinctive from other Member States. Examining the Dutch jurisdiction highlights additional enforcement gaps that the EU discussion has possibly overlooked or left implicit. The Dutch debate does not merely follow EU case law; it identifies distinct, nationally significant gaps that help refine the definition of ‘sub-threshold risks’ beyond the EU-level.

2.4 The Bill and the Asymmetric Threshold

Many consultation responses focused on Article 49a’s wording, which states that the ACM can call in ‘a concentration that could significantly impede effective competition in the Dutch market or part thereof.’ Respondents noted that this formulation would place any concentration with competition concerns under the call-in power’s scope.⁵⁶ The Proposal’s explanatory memorandum reinforced these concerns, stating that it is impossible to specify possible impediments beforehand and that a case-by-case analysis is preferable.⁵⁷ Some warned that this broad scope reduces legal certainty and harms the Dutch investment

<<https://competitionlawblog.kluwercompetitionlaw.com/2025/03/28/dutch-competition-authority-widens-powers-to-call-in-ma-transactions/>> accessed 20 November 2025.

⁵⁴ Snoep, ‘Small mergers, big problems’ (n 52): the ACM mentions acquisitions in the sectors of general practitioners, veterinary services and daycare centres; markets where competition mostly happens locally or regionally. It warns that deliberate inorganic growth strategies due to small acquisitions that fall below turnover thresholds can lead to higher prices and reduced quality.

⁵⁵ Explanatory memorandum to Proposal (n 51) 1–3.

⁵⁶ Vereniging voor Mededingingsrecht (mr. M Terlouw), ‘Reactie op de consultatie Wet inroepbevoegdheid ACM’ (*Internetconsultatie.nl*, 18 april 2025)

<<https://www.internetconsultatie.nl/inroepbevoegdheid/reactie/a7b87df7-70aa-4ccf-9107-91bc684d3600>> accessed 1 October 2025.

⁵⁷ Explanatory Memorandum to Proposal (n 51) 8; Maverick Advocaten N.V. (A.M. Craita) ‘Reactie op de consultatie Wet inroepbevoegdheid ACM’ (*Internetconsultatie.nl*, 18 april 2025) 3

<<https://www.internetconsultatie.nl/inroepbevoegdheid/reactie/2f928927-e4ff-42c8-add1-d85989cde78c>> accessed 4 September 2025.

climate,⁵⁸ illustrating the tensions between empowering the ACM with effective tools while preserving predictability for companies.

The ACM proposed a clearer threshold and a more concise scope via an ‘asymmetric threshold’, meaning that only one of the parties has to meet the turnover requirement. This approach aims to align the scope of the power with the power’s goal of scrutinising acquisitions of small corporations by large corporations while still respecting proportionality. Since the call-in power is aimed at large corporations acquiring smaller firms, this threshold means that generally only the acquiring party must meet the threshold.⁵⁹

Following the ACM’s response and the consultation, a Bill was submitted by Bushoff.⁶⁰ It closely aligns with the Proposal, as its only substantial difference is the inclusion of a clearer jurisdictional threshold; Article 49a Bill states that the ACM can only intervene when at least one of the parties achieves $\geq$ €30m turnover in the Netherlands, aligning with the ACM’s advice.⁶¹

This addition reflects the ECJ’s demands in *Illumina/Grail* for foreseeability regarding exposure to a notification or other obligation. Quantitative thresholds are crucial for this foreseeability and the subsequent legal certainty.⁶²

While Bushoff took over the ACM’s advice on the asymmetric threshold, the Bill did not adopt the ACM’s suggestion of an (asymmetric) threshold for global turnover. The Bill’s explanatory memorandum explicitly states that adopting the asymmetric threshold of the Dutch turnover is based on the advice of the ACM,⁶³ yet it does not clarify why the global turnover threshold is omitted, raising questions about why this was left out and whether the Bill’s scope remains too broad.

⁵⁸ VvM (n 56) 4.

⁵⁹ Autoriteit Consument & Markt, ‘Reactie Autoriteit Consument en Markt op internetconsultatie van de Initiatiefwet’ 2 <<https://www.acm.nl/system/files/documents/reactie-acm-op-internetconsultatie-initiatiefwet-inroepbevoegdheid.pdf>> accessed 13 October 2025.

⁶⁰ Bill (n 9): the Proposal named Bushoff and Jansen as proposers. The Bill only listed Bushoff as the proposer; no public explanation for Jansen’s absence was identified.

⁶¹ Tweede Kamer der Staten Generaal, ‘Memorie van toelichting, Voorstel van wet van het lid Bushoff tot wijziging van de Mededingingswet in verband met de uitbreiding van het concentratietoezicht (Wet inroepbevoegdheid ACM)’ Kamerstuk 36 774, nr 3 (2024–2025) 13 (Explanatory Memorandum to Bill).

⁶² *Illumina* (CJEU, 2024) (n 3), paras 208–209.

⁶³ Explanatory Memorandum to Bill (n 61) 13.

2.5 Abuse post-*Towercast* and the Call-in Power

Towercast clarified that non-notifiable concentrations can, in principle, be challenged ex post under Article 102 TFEU. In response, the Dutch legislator repealed Article 24(2) Mw, which had excluded concentrations from national abuse control,⁶⁴ thereby reopening Article 24(1) Mw for ex post scrutiny and aligning the Mw with the ECJ's interpretations.

However, the Bill's explanatory memorandum maintains that a call-in remains the preferred tool for sub-threshold risks. It argues that the abuse route's ex post punitive character, and the high evidentiary threshold, provide less legal certainty than the call-in's quicker, ex ante process.⁶⁵ This assessment mirrors the academic commentary of §1.3, where Bostoen, Gérard and Marescaux characterise Article 102 TFEU as a residual and exceptional, preferring an alternative.

Thus, even with the abuse route reopened, Dutch policymakers still prefer introducing an ex ante call-in tool.

3. Assessing the Dutch Proposal and Bill: Legal Critiques on Call-in Powers and Respondents to the Dutch Version

3.1 Introduction

With the European and Dutch context in place, this chapter assesses the Bill against three fundamental legal principles: rule of law, legal certainty, proportionality, and the practical requirement of effectiveness. It identifies where the Bill and Proposal meet these standards and where gaps remain. It builds on Chapter 1's EU-level developments and debates and Chapter 2's Dutch context, preparing the field for Chapter 5's improvements.

⁶⁴ Eerste Kamer der Staten Generaal 'Wijziging van de Kaderwet EZK- en LNV-subsidies in verband met actualisering van enkele bepalingen ten behoeve van een betere aansluiting op de gewenste en gangbare praktijk, alsook enkele wijzigingen van ondergeschikte aard en herstel van wetstechnische gebreken in andere wetten op het terrein van het Ministerie van Economische Zaken en Klimaat (Wijziging van de Kaderwet EZK- en LNV-subsidies en enkele andere wetten op het terrein van EZK 20..)' (2025) 5 <https://www.eerstekamer.nl/behandeling/20250130/gewijzigd_voorstel_van_wet/document3/f=/vmkpk1qdifzw_opgemaakt.pdf> accessed 21 September 2025.

⁶⁵ Explanatory Memorandum to Bill (n 61) 3.

3.2 The Rule of Law

The rule of law sets the instrument's outer boundary. Tridimas defines it as the exercise of public powers being subject to substantive and procedural limitations. He finds that other fundamental principles, including legal certainty and proportionality, have been derived by the ECJ from the fundamental premise of this rule of law. The rule of law and principles derived from it refer primarily to the relationship between individuals and authorities,⁶⁶ structuring judicial control and constraining discretion.

For Raz, this principle means that law should guide conduct through general, public, transparent and relatively stable rules, applied with congruence between the rule and subsequent official action. Discretion is not illegitimate in itself, but when the legislature replaces clear boundaries with more open-textured discretionary standards, these require safeguards of publicity, prospectivity, and the possibility of judicial review.⁶⁷

Cseres connects these virtues to the competition law's constitutional role as the 'market's equivalent of the separation of powers,' limiting private and public economic power and defending the rule of law. Enforcement requires independent authorities with embedded autonomy and reviewable reasoning, based on effectiveness, mutual trust and sincere cooperation.⁶⁸ Against this framework, the call-in power should make independence and legality evident in the legislation itself, restricting discretion through transparent criteria and enforceable deadlines. Furthermore, boundaries between ex ante and ex post routes are needed to preserve neutrality and predictability. Using publicly articulated factors and time-bound standards will align the power with Cseres' rule-of-law benchmark.

Although the Bill introduced a jurisdictional turnover threshold, it still leaves significant ACM discretion. For Raz, the more the regime relies on administrative triage, the greater the need for published criteria, predictable timeframes, and a sequencing rule for overlapping legal bases, so firms can use the law as a 'guide to action.' Tridimas' view on the rule of law as shaping the exercise of public powers by substantive and procedural constraints would

⁶⁶ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 4.

⁶⁷ Joseph Raz, *The authority of law: Essays on law and morality*, (OUP 1979) 212–218.

⁶⁸ Katalin Cseres, *European competition law, an overlooked element of the EU's rule of law toolbox* (November 2024) *SIEPS* 2, 5–9 <https://sieps.se/media/h4gje2gg/2024_23epa.pdf> accessed 8 September 2025.

mean, in this case, that when such constraints are vague or merely internal policy, the risk for arbitrary intervention would increase.

Two features are problematic. First, certainty is delegated to non-binding future guidance (e.g., SIEC-indicators and pre-notification route), which the ACM claims would address concerns regarding the call-in power's administrative burden.⁶⁹ However, these measures appear only in the explanatory memorandum, rather than in the binding text. For Raz, this is insufficient: where rules are open-textured, criteria structuring discretion must be clearly recognised in law. They should be publicly issued, stable and open to judicial scrutiny.

Second, the Bill preserves parallel routes (Article 24 Mw vs. call-in),⁷⁰ without a clear public sequencing rule on when the ACM will use each route. Without such rule, this choice remains a matter of internal policy rather than law. This violates Raz's clarity requirements and Cseres' transparency and predictability requirements. The Vereniging voor Mededingingsrecht (VvM) also warns that this enables the ACM to bypass the call-in's clear-cut timelines and procedural guarantees by taking the abuse route.⁷¹

VNO-NCW/MKB-NL add that an unclear power risk politically or socially driven decisions.⁷² VvM requests stricter timelines and more explicit open norms, such as what constitutes 'reasonably necessary' information, as in Article 49a(1) Bill. It also argues that, in principle, the ACM's ability to issue Requests for Information (RFIs) under Article 49b(4) Bill is currently unlimited, which is especially problematic as each RFI puts the ACM's assessment period on hold,⁷³ creating prolonged uncertainty for businesses.

Read together, these respondents translate Raz's virtues of generality, clarity, prospectivity and congruence into concrete improvements, and operationalise Cseres's view of competition law as a rule-of-law safeguard: transparent, reviewable criteria to limit discretion and ensure

⁶⁹ ACM, 'Reactie Autoriteit Consument en Markt op internetconsultatie van de Initiatiefwet' (n 59) 2.

⁷⁰ Explanatory Memorandum to Bill (n 61) 2–3.

⁷¹ VvM (n 55) 3–4.

⁷² VNO-NCW/MKB-Nederland (E.R. ter Brake) 'brief reactie internetconsultatie Initiatiefwet inroepbevoegdheid ACM' (*internetconsultatie.nl*, 18 April 2025) 2
<<https://www.internetconsultatie.nl/inroepbevoegdheid/reactie/c09c3e8b-9eca-4681-81ea-52f7b803f71e>>
accessed 8 September 2025.

⁷³ VvM (n 55) 6–8; Article 49c(3) Bill.

independent, effective enforcement. Finally, the improvements would ensure more legally bound instead of policy-driven enforcement, aligning with Tridimas' view.

3.3 Legal Certainty

Legal certainty, required by *Illumina/Grail* for parties to a concentration,⁷⁴ translates rule-of-law baselines into foreseeability for businesses. This is achieved when companies can self-assess their exposure.

The Bill improves jurisdictional clarity and predictability by adding the asymmetric threshold.⁷⁵ Another improvement is fixed time limits for: (i) triggers for calling in concentrations, (ii) ordering a notification, (iii) Phase I and Phase II, and (iv) unwinding deals. Furthermore, the ACM's proposed guidance and a short voluntary pre-notification form will provide clarity at an early stage. Even so, while the Bill's explanatory memorandum finds that these improvements remove issues of legal certainty,⁷⁶ respondents argue that the power still results in unforeseeability.

First, Article 49b(2) Bill's triggers ('made public,' 'ACM becomes aware,' and 'agreement takes effect'), as discussed in §2.2, are considered vague by VvM and the RvS, who call for more precise definitions to improve temporal clarity.⁷⁷ Combined with the jurisdictional clarity provided by the asymmetric threshold, this will significantly enhance businesses' ability to self-assess their exposure.

Second, VNO-NCW/MKB-NL notes that the RFI's stop-the-clock nature can extend the initial four-week period during which the ACM decides whether a notification and a standstill period are necessary to over a year.⁷⁸ VvM also criticises the length of the ACM's time limits; the ACM has three four-week periods: (i) to call in, (ii) to decide whether a notification is

⁷⁴ *Illumina* (CJEU, 2024) (n 3), paras 206–209.

⁷⁵ A national or local nexus requires a sufficient connection between the activities of a business and a particular jurisdiction, to screen out concentrations that are unlikely to appreciably affect competition within a jurisdiction. Explained in: Daniela Lukáčová, 'Local nexus in merger control regimes' (2017) 1(1) *Bratislava Law Review* 155–156 <<https://doaj.org/article/6347c34998f84bb3be291798ea092fdc>> accessed 9 October 2025.

⁷⁶ Explanatory Memorandum to Bill (n 61) 13–14.

⁷⁷ VvM (n 55) 7–8; Raad van State (n 10) 8.

⁷⁸ VNO-NCW/MKB-Nederland (n 72) 1–2.

required, and (iii) to assess that notification. It considers these periods too long and inconsistent with Draghi's call for NCAs to make quicker, more predictable decisions.⁷⁹

Third, Linklaters argues that having parallel routes would interfere with legal certainty and proportionality. Linklaters prefers the route of a well-designed call-in power, as the abuse route offers parties less legal certainty, predictability and procedural guarantees.⁸⁰ Since their response, the abuse route has been codified by repealing Article 24(2) Mw, as discussed in §2.5. This makes it unclear what Linklaters' stance would currently be: to continue drafting a well-designed call-in power to use instead of the abuse route, or to stop creating the call-in power to prevent parallel possibilities for the ACM and only have the lesser abuse option remain?

The RvS finds uncertainty about which ACM decisions within a call-in procedure are appealable. It expects that the initial call-in decision to request information on the concentration will not be appealable, as it is a preparatory decision. However, as this is not clear, the RvS advises the legislator to expand on this.⁸¹

Finally, from an EU perspective, the Dutch call-in power will operate within a multi-jurisdictional framework once adopted. VNO-NCW/MKB-NL warns against a 'patchwork' of divergent national call-in schemes. This would hinder cross-border deals, undermining the EU's goal of a uniform European market with clearly national merger regimes.⁸² A patchwork would force firms to pre-notify multiple jurisdictions to minimise the risks of being called in, raising costs for businesses and increasing pressure on NCAs.⁸³

Maverick underlines the possible practical impact of a vague call-in power on Dutch businesses: increased compliance costs, negative investor sentiment and long-term damage to

⁷⁹ VvM (n 55) 6; Mario Draghi, *The Future of European Competitiveness: In-Depth Analysis and Recommendations (Part B)* (European Commission 2024) 304.

⁸⁰ Linklaters LLP (Partner L Prompers), 'Reactie op de consultatie Wet inroepbevoegdheid ACM' (*Internetconsultatie.nl*, 18 april 2025) 2
<<https://www.internetconsultatie.nl/inroepbevoegdheid/reactie/5168f7c1-a96b-4437-a108-83f238c95f51>>
accessed 15 September 2025.

⁸¹ Raad van State (n 10) 10.

⁸² VNO-NCW/MKB-Nederland (n 72) 5.

⁸³ Riley (n 5).

the Dutch investment climate.⁸⁴ A poorly designed call-in power can thus outweigh the intended benefits, resulting in a negative societal impact.

3.4 Proportionality

Proportionality concerns the material scope and procedural footprint: the measure must be suitable and necessary to achieve the aim without imposing a disproportionate burden (*stricto sensu*).

Materially, the Bill's asymmetric threshold narrows the scope and anchors a Dutch nexus, avoiding de minimis cases and partly addressing the consultation's frequent calls to limit discretion. However, as discussed in §2.4, the legislator omitted a global turnover limb without explanation.

Additionally, the ACM proposed pairing the call-in power with higher general turnover thresholds to limit administrative burdens.⁸⁵ Similar to the global turnover threshold omission, the Bill did not adopt this part of the advice. This time, however, the legislator did provide an explanation: (i) the asymmetric threshold already improves legal certainty and limits the administrative burden, (ii) changing the regular turnover thresholds is outside the scope of his Bill, and (iii) the Dutch Minister of Economic Affairs is separately examining a general-threshold increase, which the Bill should not pre-empt.⁸⁶

While this reasoning may be valid for legislative housekeeping, it is inadequate for policy design. First, the asymmetric threshold alone is unlikely to effectively reduce the administrative burden; the ACM proposed it together with a general-threshold increase precisely to achieve that effect. Adopting only the asymmetric threshold and not the general increase will have less impact.⁸⁷ Second, reliance on the separate ministerial track is conditional: if this track fails or stalls, the premise of the burden mitigation fails. Third, even if the track succeeds, an interim gap will result in a (temporary) cumulative burden; the interim period will have a call-in power without a simultaneous threshold increase.

⁸⁴ Maverick (n 57) 3.

⁸⁵ Snoop, 'Updating competition enforcement' (n 52); ACM, 'Reactie Autoriteit Consument en Markt op internetconsultatie van de Initiatiefwet' (n 59) 2.

⁸⁶ Explanatory Memorandum to Bill (n 61) 14.

⁸⁷ Raad van State (n 10) 4.

VvM likewise urges a general-threshold increase, citing the ACM's statement: raising from $\geq$ €30m to $\geq$ €50m will cut above-threshold notifications from 130 to 75, while hardly any problematic concentrations slip away from scrutiny. This decrease will mitigate the administrative burden for businesses and allow the ACM to reallocate resources.⁸⁸ Linklaters agrees, adding that the general turnover thresholds have never been indexed; an increase, even without the introduction of a call-in, would be timely. This increase, followed by reallocation, will also enhance the ACM's capability to handle pre-notifications.⁸⁹ Sauter views that the concentrations pushed below the increased threshold otherwise would have been cleared through the ACM's simplified merger review process anyway; these concentrations falling outside of scrutiny therefore matter little for enforcement. The extra capacity created by this increase could allow the ACM to review 5-10 call-ins annually.⁹⁰

The RvS considers that, although the explanatory memorandum stresses the call-in power's necessity for the veterinary, general practice and day care centre sectors, the power will apply to all sectors, creating an unnecessarily broad scope,⁹¹ raising serious questions about jurisdictional proportionality.

Procedurally, the Bill mirrors the standard framework: short front-end for the information request from the earliest trigger, a call-in/standstill if concerns persist, a four-week Phase I with Phase II if needed, and a 13-week unwind/comply period for closed deals. This seems suitable for targeting sub-threshold intervention while maintaining familiar guardrails. Its necessity and balance depend on how (tightly) the timelines are used in practice.

Respondents identified three main pressure points. First, clocks and clock-stops: VvM endorses short, clear timelines but urges a two-week first window to request information, arguing that this first stage requires only a brief initial assessment. Also, as discussed in §3.2, VvM argues for a tighter framework RFI to prevent drawn-out reviews; multiple RFIs may increase the process's precision (suitability) but their clock-stopping undermines necessity and overall balance.⁹² Second, Linklaters proposes a 15-working-day first decision instead of

⁸⁸ VvM (n 55) 2.

⁸⁹ Linklaters (n 80) 5.

⁹⁰ Sauter (n 29).

⁹¹ Raad van State (n 10) 3.

⁹² VvM (n 55) 6–8.

four weeks, to make the voluntary pre-notification more attractive. Moreover, it finds the six-month trigger excessive, citing Snoep's three-month alternative.⁹³

The Bill's procedural design appears suitable in this record. But, as with the earlier principles, proportionality depends on how open-ended terms, the ACM's guidance, and the voluntary pre-notification route are operationalised. Clear, time-bound, and reviewable rules can meet the measure's necessity and balance burdens. Alternatively, vague or slow rules risk a heavier-than-needed regime. Necessity and balance depend on implementation choices left open by the Bill and its explanatory memorandum. Tightening these levers will ensure proportionality's elements of necessity and balance are met. Otherwise, cumulative burdens may outweigh the expected enforcement gains.

3.5 Effectiveness

Effectiveness asks whether the call-in power will close the enforcement gap identified in Chapters 1 and 2. On paper, the Bill addresses these: creating a short front-end screen, a standstill if concerns persist, then routing the case similar to regular merger control, with an option to unwind concentrations. VvM also recognises this potential, finding the call-in power a quicker and more effective tool than alternatives.⁹⁴

However, respondents see room for improvement. Maverick and VNO-NCW/MKB-NL question whether an enforcement gap even exists: the Bill and its explanatory memorandum do not clarify the scale of the problem, as a prior substantive investigation is needed to determine the extent of the perceived enforcement gap that the power addresses. They argue that without a prior assessment, the criterion of a well-considered process, appropriate to such a far-reaching measure, is not met.⁹⁵

Other respondents tie effectiveness to the ACM's capacity and the power's front-end design. Linklaters links a shorter initial timeframe (to stimulate the pre-notification channel) to reallocating its resources so that the ACM can handle these pre-notifications. It finds that effectiveness depends on the ACM's capability to reallocate its resources effectively.⁹⁶ The RvS expects not only more ACM investigations but also more complexity, arguing that this,

⁹³ Linklaters (n 80) 4–5; Snoep, 'Small mergers, big problems' (n 52).

⁹⁴ VvM (n 55) 1.

⁹⁵ Maverick (n 57) 1; VNO-NCW/MKB-Nederland (n 72) 2.

⁹⁶ Linklaters (n 80) 4–5.

coupled with the decision not to simultaneously raise general turnover thresholds, will seriously pressure the ACM's resources.⁹⁷

VvM similarly stresses reallocation and calls for more precise terms and a clear framework for 'reasonably necessary information,' which is necessary for the initial screen. It also argues that the patchwork of multiple national call-in regimes will harm EU merger control, in which quickness is a prerequisite.⁹⁸

In sum, the Bill's architecture seems to align with the perceived enforcement gap. However, this gap has not been quantified, leaving the scope of the problem and the necessity of the power unclear. Effectiveness again depends on the practical workability of some of the Bill's unclear factors; otherwise, overdeterrence or underenforcement lurk.

4. A Comparative Analysis: Italy's Call-in Power

4.1 Introduction: Why Italy?

This chapter uses Italy as a comparative lens to show what works and what does not when applying open norms in practice in the Italian regime, and draws observations for the Dutch context. As explained in the introduction, Italy is chosen based on several factors. First, its relatively active and mature call-in has allowed the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM) to call in nine concentrations between December 2022 and December 2024.⁹⁹ This practice gives us a large dataset of decisions, timelines, and screening rationales to test against the normative framework. Second, the procedural similarities between the Italian and Dutch regime (e.g., the SIEC-test, turnover thresholds, Phases I and II, and guidance from the AGCM). Third, the similarities in underlying rationales.¹⁰⁰ Fourth, NVIDIA/Run:ai, which shows a post-*Illumina/Grail* way to

⁹⁷ Raad van State (n 10) 4.

⁹⁸ VvM (n 55) 1–2.

⁹⁹ Saverio Valentino and Matteo Negrinotti, 'AGCM's New Clothes: Merger Control Call-In, Market Investigations, and the Italian Competition Authority's Evolving Toolkit' (2025) *JECLAP* 1-2, 3 <<https://academic.oup.com/jeclap/advance-article/doi/10.1093/jeclap/lpaf034/8109166>> accessed 17 September 2025; also available at the open data page of the AGCM: <<https://dati.agcm.it/dataset/operazioni-di-concentrazione-2020-2024>> accessed 18 September 2025.

¹⁰⁰ AGCM, *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021* (Proposal AS1730, 22 March 2021), 53–54; in this proposal, reasons for introducing the call-in power were given, namely: killer acquisitions and roll-up strategies.

refer to the Commission under Article 22 EUMR, offering procedural insights.¹⁰¹ Taken together, Italy is relatively similar to the Dutch design and offers an existing comparator, making it a strong comparative example for Dutch legislative choices.

Accordingly, §4.2 outlines the regime's legislative design and evolution through guidelines, §4.3 summarises the first wave of cases and operational patterns, §4.4 examines NVIDIA/Run:ai, and §4.5 evaluates the Italian regime against the framework. The chapter's objective is to identify Italian insights and limitations that support Chapter 5's recommendations for the Dutch legislative design.

4.2 The Design and Evolution of the Italian Call-In Power

Law No 118/2022,¹⁰² added Article 16(1-bis) to the Italian Competition Act (Law No 287/1990),¹⁰³ allowing the AGCM to call in sub-threshold concentrations where (i) concrete risks to competition arise in the Italian market or a relevant part thereof, (ii) a threshold of Article 16(1) Competition Act is met,¹⁰⁴ or the parties' combined aggregate turnover exceeds €5b, and (iii) the call-in occurs within six months after closing. Freni described these criteria as substantial, dimensional and temporal, respectively.¹⁰⁵

On 13 December 2022, the AGCM published a communication (the 2022 Communication)¹⁰⁶ to clarify aspects of the power. Critics argued that clarity remained limited: vague terms made it difficult for companies to identify when the AGCM views transactions as possibly raising

¹⁰¹ European Commission, 'Commission approves acquisition of Run:ai by NVIDIA' (*Commission Press Release*, 20 December 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_6548> accessed 17 September 2025.

¹⁰² Article 32(1)(b) Law No 118 of 5 August 2022 (Italy).

¹⁰³ Law No 287 of 10 October 1990 containing Rules on Protection of Competition (Italy).

¹⁰⁴ *ibid* art 16(1) states that the turnover thresholds are ≥€492m combined aggregate turnover achieved in Italy, or ≥ €30m aggregate turnover achieved in Italy by at least two parties. These thresholds are indexed yearly.

¹⁰⁵ Elisabetta Freni, 'Below threshold concentrations between reality and false myths: some lessons from practise' (2025) 1 *Rivista della Regolazione dei mercati*, 72 <https://www.rivistadellaregolazioneideimercati.it/Article/Archive/index_html?ida=330&idn=24&idi=-1&idu=-1> accessed 2 October. Freni wrote "tre requisiti cumulativi di natura temporale, dimensionale e sostanziale", which roughly translates to three cumulative requirements of a temporal, dimensional and substantive nature.

¹⁰⁶ AGCM, *Comunicazione relativa all'applicazione dell'articolo 16, comma 1-bis, della legge 10 ottobre 1990, n. 287* (Resolution No 30407 13 December 2022).

SIECs.¹⁰⁷ Also, the criterion of ‘concrete risks to competition’ remained unclear.¹⁰⁸

Furthermore, the AGCM expanded only slightly on the situations with $\geq$ €5b worldwide aggregate turnover but no Italian turnover and how such cases still pose concrete risks to competition in Italy. Also, while the AGCM listed factors for when an Italian nexus could be found, e.g., by user reach in Italy, it did not set quantitative thresholds or explain how these factors would be assessed.¹⁰⁹

On 27 February 2024, the AGCM published an updated 2024 Communication,¹¹⁰ partly addressing earlier concerns. First, it lists factors to identify ‘concrete risks’: market structure, value of the transaction, parties’ activities, innovative potential not yet reflected in turnover, parties’ access to key assets such as IP and data, and the deal's value compared to the target’s revenue.¹¹¹

Second, to find an Italian nexus without Italian turnover, it adds criteria: consumer reach, physical presence in Italy, Research & Development (R&D) relevant to Italy and concrete entry plans for Italy.¹¹² These partly address earlier concerns by improving predictability, but still lack quantitative thresholds. Possibly, these criteria are deliberately ‘only’ qualitative, improving foreseeability without having quantitative thresholds that restrict discretion.

Third, indicate when transactions were likely to be called in, the AGCM introduced quantifiable benchmarks based on market shares (e.g., $\leq$ 25% horizontal share; $\leq$ 30% non-

¹⁰⁷ Sabrina Borocci and Aurora Muselli, ‘Italy: The evolution of competition law’ (2024) 1 *Concurrences Competition Law Review* 199 <https://www.concurrences.com/IMG/pdf/08.concurrences_1-2024_international_italy.pdf?121915/bb4ff682bfe796fe37b02b97c7263f878a211ad3f9f2bb7d80e454c6263f87db> accessed 17 September 2025.

¹⁰⁸ Valerio Cosimo Romano, ‘Italian Competition Law, Newsletter’ (*Clearly Gottlieb Newsletter*, March-April 2024), 5 <<https://www.clearlygottlieb.com/-/media/files/italian-comp-reports/italian-competition-law-newsletter-march-april-2024.pdf>> accessed 17 September 2025.

¹⁰⁹ Borocci and Muselli (n 107), 199.

¹¹⁰ AGCM, *Comunicazione relativa all’applicazione dell’articolo 16, comma 1-bis, della legge 10 ottobre 1990*, n. 287 (Resolution No 31090, 27 February 2024).

¹¹¹ AGCM, *Comunicazione relativa all’applicazione dell’articolo 16, comma 1-bis, della legge 10 ottobre 1990*, n. 287 (Resolution No 30407 13 December 2022), 2–3; Romano (n 108) 5–6.

¹¹² Sara Lembo and Francesco Anglani, ‘Brief update on the below-threshold merger review in Italy’ (*BonelliErede client note*, 25 June 2025), 2 <<https://ddfzdmww8urne.cloudfront.net/wp-content/uploads/sites/2/2025/06/25095324/FT-PE-Brief-update-on-the-below-threshold-merger-review-in-Italy11639071.1.pdf>> accessed 17 September.

horizontal share with an HHI¹¹³ of less than 2,000), based on which, the AGCM is unlikely to call in concentrations. Although these screens add clarity, they remain non-binding.¹¹⁴

Fourth, procedurally, the voluntary notification threshold was lowered from when a concentration ‘is likely to create concrete risks to competition’ to ‘can have an effect on competition.’ The 2024 Communication also introduced a two-month deadline for voluntary notifications, after which the AGCM has 60 days to call in the concentration.¹¹⁵ This made the voluntary route more attractive, as (i) the eligible set of concentrations is larger, so more parties can use this route, and (ii) even if parties submit a voluntary notification at the latest (two-month post-closing), the AGCM’s response within 60 days will still come before the regular call-in deadline of six months.¹¹⁶ This reduces the risk of a late call-in surprise and possibly untangling a deal already in effect.

Taken together, the 2022 and 2024 Communications show how the power transforms from a legal shell into a developed practice-ready framework. By responding to criticism with publishing guidance on vague elements and creating a more attractive voluntary channel, the AGCM increased predictability for businesses while keeping flexibility for itself. Remaining open-textured elements leave discretion to the AGCM but also uncertainty for businesses.

4.3 The Call-in Power’s First Cases

The first years of Italy’s below-threshold control show how the AGCM applies the call-in power, and how it interprets open norms such as ‘concrete risks’ and the Italian nexus. Two sources provide an overview: first, Valentino and Negrinotti (both from the AGCM) provide an overview of the first nine call-ins up to December 2024 and the AGCM’s policy logic.¹¹⁷ Second, a practitioner brief outlines outcomes and key critiques.¹¹⁸

¹¹³ European Commission, ‘Glossary, Herfindahl Hirschman Index (HHI)’ (*Eurostat/Statistics Explained*, no date) <<https://ec.europa.eu/eurostat/statistics-explained/index.php?oldid=542766>> accessed 17 September 2025: the HHI is a common measure of market concentration in a market, reflecting the size of firms relative to their industry. It is used to determine market competitiveness and is calculated by squaring the market share of each competing firm in the industry and then adding up the resulting numbers. The market shares are expressed as fractions or points. The result is proportional to the average market share, weighted by market share. As such, it can range from 0 to 1.0. An HHI increase generally indicates a decrease in competition and an increase in market power, whereas an HHI decrease indicates the opposite.

¹¹⁴ Romano (n 108) 5–6.

¹¹⁵ *ibid* 6.

¹¹⁶ Lembo and Anglani (n 112) 3.

¹¹⁷ Valentino and Negrinotti (n 99).

¹¹⁸ Lembo and Anglani (n 112).

Before 31 December 2024, the AGCM had investigated nine sub-threshold transactions: three following voluntary communications, five following complaints (often anonymous), and one following its own monitoring. The transaction's outcomes included five Phase I clearances, one concentration abandoned shortly after entering Phase II, two cases approved in Phase II with conditions, and the referral of the NVIDIA/Run:ai acquisition to the Commission under Article 22 EUMR.¹¹⁹ A subsequent practitioner update of June 2025 counted another called-in and finished procedure (Phase I) and four more that were still under review.¹²⁰

Interestingly, most call-ins arose in traditional sectors (e.g., in concrete production and wood processing) instead of the innovative sectors (tech and pharma) originally envisaged by the Italian legislator.¹²¹ Freni likewise found that risks to innovation were considered in only 20% of cases; in the remainder, the non-innovative characteristics of the sectors made innovation analysis irrelevant.¹²² This contrast between the power's rationale and practice should temper Dutch expectations on sector targeting.

As discussed in §4.2, the 2024 Communication added the 'unlikely-to-call-in' screens and qualitative indicators of an Italian nexus. However, critics argue that the market share criterion is not a clear screen for these categories, as the AGCM has shown that in call-in cases, it departs from its market definition practice, narrowing the market and thereby pushing market shares above safe screens.¹²³ Here, predictability gains from the 2024 Communication, in light of the rule of law and legal certainty, were (partly) offset by using different market definitions.

Overall, early practice shows a workable but flexible regime: the AGCM has complemented the power with updated guidance, on a voluntary route and clarifications on open-textured norms. These moves mitigate ex ante uncertainty, but the non-binding market- and HHI-based screens, and the qualitative criteria for a nexus show that unpredictability still exists.

¹¹⁹ Valentino and Negrinotti (n 99) 3 and references cited therein.

¹²⁰ Lembo and Anglani (n 112) 3 and references cited therein.

¹²¹ *ibid* 4; AGCM, *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza anno 2021* (Proposal AS1730, 22 March 2021) 53.

¹²² Freni (n 105) 78.

¹²³ Lembo and Anglani (n 112) 3: gives examples of C.12586 – *Ignazio Messina/Terminal San Giorgio* and C.12583 – *IGPDecaux/Clear Channel Italia*, in which the AGCM modified its approach to market definitions, resulting in the parties not falling within the (non-binding) safe screen/category of market shares.

4.4 NVIDIA/Run:ai: the Italian Power in Full Effect

NVIDIA/Run:ai illustrates Italy's call-in in a multi-jurisdictional setting: from national screening to a Commission referral, and eventual clearance. In August 2024, the AGCM required notification of NVIDIA's acquisition of the Israeli start-up Run:ai under Article 16(1-bis).¹²⁴ Despite minimal Italian revenue, the AGCM found 'concrete risks' to competition within Italy, pointing, e.g., to qualitative Italy-links and concerns that NVIDIA may strengthen its position, have an incentive to foreclose competition, and raise entry/expansion barriers for competitors.¹²⁵ NVIDIA notified on 11 September 2024.¹²⁶ The AGCM referred the deal on 30 October 2024, the Commission accepted it on 31 October 2024,¹²⁷ and cleared it unconditionally on 20 December 2024.¹²⁸

In its 2024 annual presentation, the AGCM's President called the case 'systematically important' and stated that it showed the EU-level significance of Article 16(1-bis): a national call-in enabled an EU review in the post-*Illumina/Grail* landscape.¹²⁹ Valentino and Negrinotti agreed, presenting NVIDIA/Run:ai as an example of the 'synergistic and complementary' interaction between Articles 16(1-bis) and 22 EUMR. According to them, the national competence (a precondition after *Illumina/Grail*) created by the call-in power served as a lawful bridge to EU review.¹³⁰

This case highlights the power's practical application and alignment with the normative framework. Regarding legal certainty, the referral worked because of a clear statutory basis of Article 16(1-bis) and the 2024 Communication's guidance on qualitative Italy-links. This combination made the AGCM's rationale public and reviewable, and resulted in the

¹²⁴ *NVIDIA/Run:AI* (Case M.11766) Commission Decision [2024], not published in Official Journal (31 October 2024), para 1 <<https://competition-cases.ec.europa.eu/cases/M.11766>> accessed 22 September 2025. The AGCM's decision and referral request are not publicly available. Therefore, the Commission Decision's summary of the facts is used.

¹²⁵ *ibid* para 33.

¹²⁶ *ibid* para 8.

¹²⁷ *ibid* para 168.

¹²⁸ *NVIDIA/Run:ai*, Case M.11766 Commission Decision [2025] OJ C/2025/2919, para 229; Even though the concentration was cleared in Phase I, NVIDIA lodged an action before the GC in January 2025 challenging the Commission's decision to accept the referral request. NVIDIA's primary argument is that the Commission has misinterpreted Article 22 EUMR. NVIDIA argues that the Commission's decision to accept the AGCM's referral, based on the AGCM's 'loose, ex post, discretionary call-in power,' breaches general principles, including legal certainty and proportionality, ex Case T-15/25 *NVIDIA v Commission* [2025].

¹²⁹ AGCM, *Relazione annuale - Presentazione del Presidente R. Rustichelli* (Annual report, 15 April 2025) 6–9.

¹³⁰ Valentino and Negrinotti (n 99) 3.

Commission finding Italy competent to review the transaction under Article 16(1-bis).¹³¹

However, as the criteria are qualitative, some argue they remain too vague and discretionary for companies to reliably self-assess.¹³²

Regarding effectiveness, NVIDIA/Run:ai demonstrates that a national call-in can lead to an EU review post-*Illumina/Grail*. Thereby, EU oversight of sub-threshold acquisitions can be preserved, without having to lower general turnover thresholds. The call-in power identified a case involving minimal local revenue, established a national nexus and achieved a prompt EU outcome: precisely the ‘gap-filling’ intended for the call-in. While a single case cannot prove overall effectiveness, it sets a strong precedent.

4.5 A Comparative Synthesis: What Italy Can Teach the Dutch Legislator

The Italian record provides a rich practice and legally sound source for evaluating a call-in power, especially in the context of how open-textured norms operate in practice. Assessing this regime against the framework provides valuable lessons for the Dutch legislator.

On the rule of law, Italy shows how an open-norm structure is made reviewable through (updated) guidance. The evolution of the 2022 and 2024 Guidances shows the AGCM operationalising triggers, soft-law screens, and nexus criteria. However, the Italian practice also highlights that remaining open norms (e.g., on market share screens, HHI screens, and market definitions) leaves concerns on the room for discretion. This underscores the necessity of ensuring that the Dutch call-in power is paired with a statutory duty to not only publish and review guidance, but also that the guidance contains certain elements.

Concerning legal certainty, the introduction of safe-harbour elements and soft-law market shares are good examples of clarifying when parties fall within the power’s reach. These elements reduce material uncertainty. However, the practice consisting of many cases in non-innovative sectors, and the use of different market definitions, demonstrate that certainty in practice is not immediately ensured by a clear power. This should encourage the Netherlands to use more objective and time-stamped elements in its guidance.

¹³¹ *NVIDIA/Run:AI* (Case M.11766) Commission Decision [2024], not published in Official Journal (31 October 2024), para 39 <<https://competition-cases.ec.europa.eu/cases/M.11766>> accessed 5 October 2025.

¹³² Lembo and Anglani (n 112) 3.

Regarding proportionality, the Italian practice shows a flexible power with procedural safeguards. The voluntary channel and its 60-day response period remove the risk of late interventions, thereby stimulating voluntary notification and increasing procedural proportionality. At the same time, the six-month window creates a relatively long scrutiny window and subsequent uncertainty for businesses, raising questions regarding the Italian balance between flexibility and procedural proportionality. This teaches the Netherlands that proportionality does not merely consist of substantive thresholds, but also of clear and possibly reviewable rules on timeframes.

On effectiveness, the AGCM has successfully shown how to address killer acquisitions and roll-ups, and how to allow for a lawful bridge for Commission intervention. The AGCM is able to use its flexible criteria to detect cases that would otherwise avoid screening. However, the case mix, and especially the sectors of the cases, show that the power's practice can differ from the power's rationale. For the Dutch legislator, this suggests the need for an evidence-based investigation into the expected cases, and internal policy on how to actually address the relevant sectors.

Overall, the Italian experience shows that a call-in power with open norms can indeed be made workable for the AGCM and predictable for businesses, through updated guidance, a transparent and attractive voluntary channel, and objective criteria. At the same time, it shows how reliance on qualitative criteria can result in wide discretion. The practice shows the potential as well as the limits of an open-textured design, and highlights that thoughtfully operationalising the power can result in a regime that adheres to the framework. These comparative insights will support Chapter 5's targeted recommendations.

5. Policy Recommendations: Improving the Dutch Design

5.1 Introduction

This chapter translates previous analyses into concrete recommendations, designing a Dutch call-in power that closes the enforcement gap while respecting legal certainty, proportionality, the rule of law, and effectiveness. The design targets killer acquisitions and roll-up strategies, without chilling ordinary M&A. Recommendations draw on consultation responses, the RvS advice, academic literature, EU case law, and comparative lessons from Italy. Each subsection explains the rationale, improvement design, and how it aligns with the framework's principles and requirement of effectiveness.

5.2 Strengthening the Rationale

VNO-NCW/MKB-NL argues that the legislative process lacks ‘due process’ without a (published) prior impact assessment.¹³³ Maverick adds that the absence of such an assessment creates uncertainty regarding the scale of the enforcement gap that the power needs to fill.¹³⁴ The RvS notes that the Bill’s necessity should be clearly shown, and has not been done sufficiently yet.¹³⁵

To address these concerns, the legislator should publish a rapid impact assessment (RIA) and a supplementary explanatory memorandum, linking the RIA findings to concrete drafting choices. This clarifies the power’s necessity and adheres to due process. It directly addresses the RvS’s criticism regarding the scope: the issues raised for general practitioners, veterinary services, and childcares do not warrant an economy-wide scope.¹³⁶ An RIA could either substantiate the broad scope by showing the necessity for other sectors or recommend limiting it to specific sectors.

The RIA should cover substance and procedure. Firstly, map recent below-threshold deals (sectors, deal volumes, deal sizes) that could have been called-in, had the call-in power at the time, identifying killer acquisitions and possible roll-up strategies. Secondly, survey companies and law firms on the power’s expected burdens (RFI cost/time, time/effort to pre-assess likelihood of a call-in, etc.) Thirdly, compare with other national call-in powers regarding, e.g., local nexus, timeframes and sector-specific rules to identify workable approaches. Fourthly, sketch caseload scenarios on how the ACM will handle 5, 10 or 15 call-ins annually. Furthermore, explain why the global turnover threshold, discussed in §2.4, was not adopted in the Bill.

Notably, the RIA does not have to rely solely on newly generated evidence, as there is quite extensive evidence and literature covering the enforcement gap. For example, the legislator

¹³³ VNO-NCW/MKB-Nederland (n 72) 2; Government of the Netherlands, ‘Aanwijzingen voor de regelgeving’ (*Guidance for regulations*) (Ministry of Justice and Security and Ministry of the Interior and Kingdom Relations, 2024), Guidance 2.6.

¹³⁴ Maverick (n 57) 1.

¹³⁵ Raad van State (n 10) 3.

¹³⁶ *ibid* 3.

can draw on the analysis of killer acquisitions from Ivaldi, Petit and Ünekbaş.¹³⁷ For roll-up strategies, it can draw on Oxera's report for the Dutch Ministry of Economic Affairs.¹³⁸

The RIA and supplementary explanatory memorandum enhance the rule of law by improving legislative transparency and adherence to due process, making reasoning more reviewable, in line with Cseres' view, explained in §3.2. Legal certainty is raised by creating transparency on the ACM's SIEC priorities. Quantifying the gap will illustrate the SIEC risks and the necessity for the power, thereby supporting proportionality. Effectiveness increases as an RIA forces the legislator to align legislative design with the practice.

5.3 Clarifying Triggers

VvM and the RvS flagged vagueness in the triggers ('made public,' 'ACM becomes aware, and 'agreement takes effect') that start the call-in window.¹³⁹ This uncertainty invites disputes around timing and prevents companies from self-assessing their exposure windows. Guidance should therefore define these triggers, enhancing foreseeability. VvM referred to the UK's Competition and Markets Authority (CMA), which defines 'made public' as when material facts (facts necessary to determine CMA jurisdiction) 'are publicised as to be generally known or readily ascertainable.' 'Publicised' includes press coverage or party press releases.¹⁴⁰ When the ACM becomes 'made aware,' can be clarified by keeping a log of when it receives information. 'Agreement takes effect' should mean closing, following the Italian model,¹⁴¹ removing uncertainty regarding whether 'taking effect' means signing or closing.¹⁴² Objective, time-stamped events enable businesses to self-assess exposure windows, raising legal certainty. Improving this temporal clarity addresses the post-*Illumina/Grail* demands, explained in §3.3. It safeguards proportionality by preventing open-ended exposure. The rule of law is supported by reviewable criteria for the clocks, rather than discretion. Finally, objective timers improve effectiveness by forcing the ACM to strengthen its internal planning.

¹³⁷ Marc Ivaldi, Nicolas Petit and Selçukhan Ünekbaş, 'Killer Acquisitions: Evidence from EC Merger Cases in Digital Industries' (2025) 86(3) *ALJ* 647–695 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4407333> accessed 17 November 2025.

¹³⁸ Oxera, *Economische aspecten van onderdrempelige transacties en een inroepbevoegdheid* (Report for Ministry of Economic Affairs and Climate, 17 April 2025).

¹³⁹ VvM (n 55) 7.

¹⁴⁰ CMA, 'Mergers: Guidance on the CMA's jurisdiction and procedure', (*CMA Guidance*, 2 January 2025), para 4.49 <https://assets.publishing.service.gov.uk/media/67d41b981b26cbdf9b851d9b/CMA2_Mergers_-_guidance_on_the_CMA_s_jurisdiction_and_procedure.pdf> accessed 24 September 2025.

¹⁴¹ Lembo and Anglani (n 112) 1–3.

¹⁴² VvM (n 55) 8.

5.4 RFIs and Clock-Control

VvM argued that open-ended RFIs, with their stop-the-clock effect, can create administrative drag and risk time-buying by the ACM.¹⁴³ The RFI system should be disciplined on content and timing. First, defining ‘reasonably necessary’ information helps parties understand what information to submit upfront, reducing the need for follow-up RFIs. Second, limiting RFIs to ‘information that is reasonably necessary and proportionate to the preliminary SIEC inquiry,’ prevents unnecessary information requests. Third, using a declining stop-the-clock effect (e.g., 10 days for the first RFI, 5 days for the second RFI) will encourage the ACM to issue one comprehensive RFI and only issue a second for substantial material gaps. This can be combined with a maximum of two RFIs.

These features improve legal certainty by making information burdens and timelines predictable. Proportionality is strengthened by aligning the information demands with what is strictly necessary. Limiting discretion also supports the rule of law. Effectiveness increases by pushing the ACM to use RFIs effectively.

5.5 Route Sequencing between Call-in and Abuse

The consultation record repeatedly raised concerns about the interaction between the call-in power and Article 24(1) Mw. Businesses can face an ex ante call-in screen and, if not called in, a later ex post abuse investigation for the same facts. This creates no clear endpoint to review, risks duplicated burdens, and leaves room for inconsistent, strategic, and political ACM decisions.

A route-sequencing rule would solve this, while preserving ACM intervention when new information emerges. A possible rule: if a concentration falls within the call-in power and the ACM chooses not to call in a transaction within the window, they should, as a matter of policy, refrain from a later abuse investigation, unless: (i) new material facts arise that were not (reasonably) available during the call-in window; or (ii) there is credible evidence of concealment or misrepresentation.

This sequencing enhances legal certainty by creating a clear endpoint. It improves proportionality by preventing double procedures for the same facts. A public, reasoned policy with narrow, reviewable exceptions safeguards the rule of law and aligns with Cseres’

¹⁴³ *ibid* 8.

neutrality and predictability benchmark for the rule of law. It improves effectiveness by forcing early internal decision-making and better allocation of ACM resources.

5.6 Creating an Attractive Voluntary Channel

Italy showed how a well-designed voluntary channel can be made attractive for businesses, improve information flow to the authority, and allow for quicker case handling. Three elements are key: (i) a low threshold to voluntarily notify, (ii) clear criteria on when to voluntarily notify, what/how to notify, and how the ACM will assess, and (iii) a commitment to swift preliminary feedback.

An attractive voluntary channel will allow parties seeking legal certainty to avoid late intervention and potential untangling. This encourages parties to approach the ACM proactively, instead of waiting for ACM-initiated investigations. Less ACM-investigations can partly balance the extra strain on the ACM's resources due to the increased notifications. A faster (and thus a more attractive) voluntary track would also address Dahan and Klein's concern that businesses may be reluctant to pre-notify in case it is misinterpreted as an admission of guilt to the ACM.¹⁴⁴

Creating clarity in the voluntary channel will improve legal certainty for notifying parties. Proportionality rises as parties can cut their window for scrutiny by voluntarily notifying. Effectiveness increases as voluntary notifications will support earlier risk detection.

5.7 Addressing Possible Interoperability with Article 22 EUMR

NVIDIA/Run:ai shows that a referral under Article 22 EUMR is still possible post-*Illumina/Grail*, but also highlights remaining uncertainty regarding the interoperability of national call-in powers and referrals to the Commission.

The Dutch call-in power should be designed to complement, not conflict with, Article 22 EUMR. Italy provides a model: the AGCM first established jurisdiction via a call-in, then referred the case when the competitive effects were clearly cross-border. The Dutch framework should take two steps to capture these benefits and preserve predictability. Firstly, the ACM should clarify when a referral will be considered after a call-in decision. Indicative criteria could include: (i) overlaps or theories of harm that span multiple Member States, and

¹⁴⁴ Raph Dahan and Timo Klein, 'Kleine overnames vereisen grotere bevoegdheden' (*ESB Article*, 28 November 2024) 4 <<https://esb.nu/kleine-overnames-vereisen-grotere-bevoegdheden/>> accessed 11 October 2025.

(ii) specific markets characterised by an EU-wide network or data effects, such as social networks, app stores and (cloud) platforms, where user numbers and data reinforce the product's quality and adoption. Publishing criteria allows companies to foresee when an EU referral is likely and plan accordingly. Secondly, the ACM should impose time limits on referral decisions. Where the ACM is considering a referral, it should notify the parties promptly after the call-in decision (within ten working days, for example) and file within the statutory timeframe if it decides to pursue a referral. If the ACM chooses not to refer, it should communicate this and proceed nationally.

It should be noted that even if the call-in power broadens ACM competence, Article 22 EUMR also requires that the concentration affects trade between Member States, which will be unlikely for small, local 'bead-stringing' deals according to the RvS.¹⁴⁵ Referrals will therefore mostly concern killer acquisitions.

These measures raise legal certainty through clear ex ante criteria, early signalling, and defined timelines. It preserves proportionality by avoiding parallel tracks. They serve the rule of law by providing a transparent and reviewable basis for ACM decisions and improve effectiveness by ensuring a clear division of labour and faster convergence for cross-border cases. This keeps an EU referral available when needed, but prevents procedural surprises for parties.

5.8 Codifying Strong Guidance

Promised ACM guidance should become a statutory obligation. The law should require the ACM to adopt binding guidance (*beleidsregels*, ex Articles 4:81–4:84 *Algemene wet Bestuursrecht*)¹⁴⁶ shortly after entry into force and to review this guidance periodically (e.g., every two years). Italy shows how guidance can improve predictability and effectiveness by updating to align with practice.

The guidance should include the previously discussed points of: (i) trigger definitions of §5.3, (ii) RFIs clarity of §5.4, (iii) the sequencing rule of §5.5, (iv) the voluntary channel of §5.6, and (v) the interoperability with Article 22 EUMR of §5.7.

Another lesson drawn from Italy is an 'unlikely-to-call-in' section comprising non-binding, specific criteria indicating when a deal is usually not called in: horizontal overlaps below

¹⁴⁵ Raad van State (n 10) 4.

¹⁴⁶ *Algemene wet bestuursrecht* (*General Administrative Law Act*) (Netherlands) (Stb 1992, 315).

modest market shares/HHI levels, non-horizontal overlaps with limited foreclosure plausibility and local roll-ups under set thresholds. This can be coupled with qualitative factors that can still trigger scrutiny, such as nascent/rival/innovative status of the parties, and the combination of multiple serial acquisitions. As in Italy, the idea is self-assessment: businesses can see *ex ante* when they are unlikely to be a priority, while the ACM retains discretion for exceptional cases.

Another route follows the RvS's proposal of creating a statutory or general administrative order (*Algemene Maatregel van Bestuur*) instead of non-binding guidance to secure foreseeability for businesses.¹⁴⁷

Guidance in general raises legal certainty by publishing important information for parties in one place. Proportionality improves as information burdens and case selection are channelled through templates and thresholds. The rule of law is upheld by turning promises into public, self-binding standards. These self-binding, transparent and reviewable improvements align the power with Raz's and Cseres' views. Effectiveness improves because: (i) a statutory duty to publish guidance (with required content) informs businesses, reducing precautionary behaviour and accelerating screening, and (ii) a mandatory periodic review keeps guidance aligned with practice and increasingly targeted.

6. Conclusion

This thesis explored the design of a call-in power for sub-threshold mergers in the Netherlands, driven by recent CJEU developments and the resulting enforcement gap. *Towercast* and *Illumina/Grail* have significantly influenced this landscape: while *Towercast* confirmed the continued applicability of Article 102 TFEU for mergers, it highlighted the route's limited possibility due to its evidentiary threshold and other legal challenges. *Illumina/Grail* limited the Commission's competence to accept referrals under Article 22 EUMR, preventing Member States without national jurisdiction from referring under the provision's mechanism. Consequently, the responsibility for addressing harmful below-threshold concentrations, particularly killer acquisitions and roll-up strategies, shifted to Member States. In response, the Netherlands introduced a Proposal and a Bill for a call-in power. However, this solution presented its own legal and policy challenges.

¹⁴⁷ Raad van State (n 10) 9.

To assess the Proposal and the Bill, this thesis employed a normative framework consisting of three key legal principles: the rule of law, legal certainty, and proportionality, and the practical requirement of effectiveness. These elements formed a framework for assessing the potential impact of the call-in power on broader legal values. The analysis showed that although the Bill made notable progress (particularly by the asymmetric jurisdictional threshold), it still leaves considerable scope for ACM discretion, lacks clarity on vital procedural elements, and raises concerns about administrative burdens and foreseeability for companies.

The thesis conducted a comparative analysis of Italy's call-in regime to draw conclusions from a (relatively) mature and active practice. The analysis considered Italy a valuable case study, not only because of the structural similarities in legislative design and underlying motivations, but also due to its practical implementation and evolving guidance. The Italian experience demonstrated how transparency, non-binding safe harbours, and procedural guidance can enhance predictability and reduce administrative burdens. However, it also emphasised the limits of open-ended terms, NCA discretion, the challenges of sector targeting, and the importance of binding frameworks to ensure consistency over time. Notably, the NVIDIA/Run:ai case illustrated how a national regime can offer a solution for Article 22 EUMR referrals, thereby reintroducing Commission intervention post-*Illumina/Grail*.

The thesis built on these analyses by proposing reforms to improve the Bill's alignment with its aims and the normative standards. A key recommendation is the RIA, which not only substantiates the necessity of the call-in power and its scope but also enhances democratic legitimacy by creating legislative transparency. Regarding the power itself, improvements include clarifying the legal triggers for calling in a concentration, implementing a strict RFI regime, codifying formal guidance, expanding the guidance to information on safe harbours and priority factors, creating an attractive voluntary channel, addressing interoperability with European intervention, and establishing a transparent sequencing rule between the ex ante and the ex post routes.

In conclusion, the Dutch call-in power can offer an effective response to the challenges of modern-day merger control, especially in sectors characterised by rapid innovation and strategic consolidation combined with local competition. However, its success depends not only on its capacity to address enforcement gaps but also on how it does so in a manner that

respects the normative framework. By embedding the power within the framework, the Netherlands has the chance to lead in creating a national merger control tool that is both effective and principled. This makes the tool sufficiently flexible to respond to changing market conditions while upholding core legal values.

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