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JUDGMENT OF THE COURT (Grand Chamber)

3 September 2024 (*)

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In Joined Cases C-611/22 P and C-625/22 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 and 30 September 2022, respectively,

Illumina Inc., established in Wilmington (United States), represented by D. Beard, Barrister-at-Law, and J. Holmes, Barrister, and by P. Chappatte, advocaat, F.E. González Díaz, abogado, G.C. Rizza and M. Siragusa, avvocati, T. Verheyden, avocat, and L. Wright, advocate,

appellant in Case C-611/22 P,

supported by:

Biocom California, established in San Diego (United States), represented by B. Amory, É. Barbier de La Serre, A.S. Perraut and L. Van Mullem, avocats,

intervener in the appeal,

the other parties to the proceedings being:

European Commission, represented by G. Conte, N. Khan and C. Urraca Caviedes, acting as Agents,
defendant at first instance,
Hellenic Republic, represented by K. Boskovits, acting as Agent,
French Republic, represented initially by T. Stéhelin and N. Vincent, acting as Agents, and subsequently by R. Bénard, T. Lechevallier and T. Stéhelin, acting as Agents,
Kingdom of the Netherlands, represented by E.M.M. Besselink, M.K. Bulterman, A. Hanje and P.P. Huurnink, acting as Agents,
EFTA Surveillance Authority, represented by C. Simpson, M. Sánchez Rydelski and M.-M. Joséphidès, acting as Agents,
Grail LLC, established in Menlo Park (United States), represented by A. Giraud, avocat, J.M. Jiménez-Laiglesia Oñate, abogado, D. Little, Solicitor, J. Ruiz Calzado, abogado, and S. Troch, advocaat,
interveners at first instance,
and
Grail LLC, established in Menlo Park (United States), represented by A. Giraud, avocat, J.M. Jiménez-Laiglesia Oñate, abogado, D. Little, Solicitor, J. Ruiz Calzado, abogado, and S. Troch, advocaat,
appellant in Case C-625/22 P,
supported by:
Republic of Estonia, represented by N. Grünberg, acting as Agent,

intervener in the appeal,

the other parties to the proceedings being:

Illumina Inc., established in Wilmington, represented initially by D. Beard, Barrister-at-Law, and J. Holmes, Barrister, and by B. Cullen, Barrister-at-Law, F.E. González Díaz, abogado, G.C. Rizza and M. Siragusa, avvocati, and subsequently by D. Beard, Barrister-at-Law, and J. Holmes, Barrister, and by J. Blanco Carol, and F.E. González Díaz, abogados, A. Magraner Oliver, avocate, G.C. Rizza and M. Siragusa, avvocati, and T. Verheyden, avocat,
applicant at first instance,

European Commission, represented by G. Conte, N. Khan and C. Urraca Caviedes, acting as Agents,
defendant at first instance,

Hellenic Republic, represented by K. Boskovits, acting as Agent,
French Republic, represented initially by T. Stéhelin and N. Vincent, acting as Agents, and subsequently by R. Bénard, T. Lechevallier and T. Stéhelin, acting as Agents,
Kingdom of the Netherlands, represented by E.M.M. Besselink, M.K. Bulterman, A. Hanje and P.P. Huurnink, acting as Agents,
EFTA Surveillance Authority, represented by C. Simpson, M. Sánchez Rydelski and M.-M. Joséphidès, acting as Agents,
interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos and F. Biltgen, Presidents of Chambers, S. Rodin, P.G. Xuereb, L.S. Rossi, N. Jääskinen, N. Wahl (Rapporteur), I. Ziemele and J. Passer, Judges,
Advocate General: N. Emiliou,
Registrar: A. Lamote, Administrator,
having regard to the written procedure and further to the hearing on 12 December 2023,
after hearing the Opinion of the Advocate General at the sitting on 21 March 2024,
gives the following

Judgment

By their respective appeals, Illumina Inc. (Case C-611/22 P) and Grail LLC (Case C-625/22 P) seek that the judgment of the General Court of the European Union of 13 July 2022, *Illumina v Commission* (T-227/21, EU:T:2022:447; 'the judgment under appeal'), be set aside; by that judgment, the General Court dismissed Illumina's action seeking the annulment, first, of Decision C(2021) 2847 final of the European Commission of 19 April 2021, accepting the request of the Autorité de la concurrence française (French Competition Authority) for the Commission to examine the concentration relating to the acquisition by Illumina of sole control over Grail (Case COMP/M.10188 – Illumina/Grail) ('the decision at issue'), second, of Commission Decisions C(2021) 2848 final, C(2021) 2849 final, C(2021) 2851 final, C(2021) 2854 final and C(2021) 2855 final of 19 April 2021, accepting the requests of the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities to join that referral request (together with the decision at issue, 'the decisions at issue'), and third, of the Commission's letter of 11 March 2021 informing Illumina and Grail of that referral request ('the information letter').

Legal context

Recitals 5 to 8, 11, 14 to 16, 24 and 25 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1) state:

... it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.

A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. [Council] Regulation (EEC) No 4064/89 [of 21 December 1989 on the control of concentrations

between undertakings (OJ 1989 L 395, p. 1)] has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 [EC], this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

Articles 81 and 82 [EC], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the [EC] Treaty. This Regulation should therefore be based not only on Article 83 [EC] but, principally, on Article 308 [EC], under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the [EC] Treaty.

The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. ...

The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in the light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the "one-stop shop" principle.

The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

The Commission should be able to refer to a Member State notified concentrations with a Community dimension which threaten significantly to affect competition in a market within that Member State presenting all the characteristics of a distinct market. Where the concentration affects competition on such a market, which does not constitute a substantial part of the common market, the Commission should be obliged, upon request, to refer the whole or part of the case to the Member State concerned. A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States which are also competent to review the concentration should be able to join the request. In such a situation, in order to ensure the efficiency and predictability of the system, national time limits should be suspended until a decision has been reached as to the referral of the case. The Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States.

The undertakings concerned should be granted the possibility of requesting referrals to or from the Commission before a concentration is notified so as to further improve the efficiency of the system for the control of concentrations within the Community. ... Upon request by the undertakings concerned, the Commission should be able to refer to a Member State a concentration with a Community dimension which may significantly affect competition in a market within that Member State presenting all the characteristics of a distinct market; the undertakings concerned should not, however, be required to demonstrate that the effects of the concentration would be detrimental to competition. A concentration should not be referred from the Commission to a Member State which has expressed its disagreement to such a referral. Before notification to national authorities, the undertakings concerned should also be able to request that a concentration without a Community dimension which is capable of being reviewed under the national competition laws of at least three Member States be referred to the Commission. ...

In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, Regulation [No 4064/89] established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.

In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation [No 4064/89] as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear

that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.'

Article 1 of Regulation No 139/2004, entitled 'Scope', provides:

'1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:
the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

4. On the basis of statistical data that may be regularly provided by the Member States, the Commission shall report to the Council on the operation of the thresholds and criteria set out in paragraphs 2 and 3 by 1 July 2009 and may present proposals pursuant to paragraph 5.

5. Following the report referred to in paragraph 4 and on a proposal from the Commission, the Council, acting by a qualified majority, may revise the thresholds and criteria mentioned in paragraph 3.'

Under Article 3(1) of that regulation:

'A concentration shall be deemed to arise where a change of control on a lasting basis results from:

the merger of two or more previously independent undertakings or parts of undertakings, or

the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.'

Article 4 of that regulation, entitled 'Prior notification of concentrations and pre-notification referral at the request of the notifying parties', provides:

'1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

...

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

...

4. Prior to the notification of a concentration within the meaning of paragraph 1, the persons or undertakings referred to in paragraph 2 may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that Member State.

The Commission shall transmit this submission to all Member States without delay. The Member State referred to in the reasoned submission shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to refer the case. Where that Member State takes no such decision within this period, it shall be deemed to have agreed.

Unless that Member State disagrees, the Commission, where it considers that such a distinct market exists, and that competition in that market may be significantly affected by the concentration, may decide to refer the whole or part of the case to the competent authorities of that Member State with a view to the application of that State's national competition law.

The decision whether or not to refer the case in accordance with the third subparagraph shall be taken within 25 working days starting from the receipt of the reasoned submission by the Commission. The Commission shall inform the other Member States and the persons or undertakings concerned of its decision. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to refer the case in accordance with the submission made by the persons or undertakings concerned.

If the Commission decides, or is deemed to have decided, pursuant to the third and fourth subparagraphs, to refer the whole of the case, no notification shall be made pursuant to paragraph 1 and national competition law shall apply. Article 9(6) to (9) shall apply *mutatis mutandis*.

5. With regard to a concentration as defined in Article 3 which does not have a Community dimension within the meaning of Article 1 and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission by means of a reasoned submission that the concentration should be examined by the Commission.

The Commission shall transmit this submission to all Member States without delay.

Any Member State competent to examine the concentration under its national competition law may, within 15 working days of receiving the reasoned submission, express its disagreement as regards the request to refer the case.

Where at least one such Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the case shall not be referred. The Commission shall, without delay, inform all Member States and the persons or undertakings concerned of any such expression of disagreement.

Where no Member State has expressed its disagreement in accordance with the third subparagraph within the period of 15 working days, the concentration shall be deemed to have a Community dimension and shall be notified to the Commission in accordance with paragraphs 1 and 2. In such situations, no Member State shall apply its national competition law to the concentration.

...'

Article 9 of Regulation No 139/2004, entitled 'Referral to the competent authorities of the Member States', reads as follows:

'1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within 15 working days of the date of receipt of the copy of the notification, a Member State, on its own initiative or upon the invitation of the Commission, may inform the Commission, which shall inform the undertakings concerned, that:

a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

a concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists, either:

it shall itself deal with the case in accordance with this Regulation; or

it shall refer the whole or part of the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist, it shall adopt a decision to that effect which it shall address to the Member State concerned, and shall itself deal with the case in accordance with this Regulation.

In cases where a Member State informs the Commission pursuant to paragraph 2(b) that a concentration affects competition in a distinct market within its territory that does not form a substantial part of the common market, the Commission shall refer the whole or part of the case relating to the distinct market concerned, if it considers that such a distinct market is affected.

...'

Article 22 of that regulation, entitled 'Referral to the Commission', is worded as follows:

'1. 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 within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay.

Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request.

All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end.

3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request.

The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4.

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

4. Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made. Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3.

5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.'

The Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement') contains Protocol 24 on cooperation in the field of control of concentrations. The second subparagraph of Article 6(3) of that protocol provides that one or more European Free Trade Association (EFTA) States may join a request addressed to the Commission by a Member State pursuant to Article 22 of Regulation No 139/2004 where the concentration affects trade between one or more Member States and one or more EFTA States and threatens to significantly affect competition within the territory of the EFTA State or States joining the request.

Background to the dispute

The background of the dispute was set out in paragraphs 6 to 35 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

The undertakings concerned and the concentration at issue

Illumina is a company established in the United States which supplies sequencing- and array-based solutions for genetic and genomic analysis.

On 20 September 2020, Illumina entered into an agreement and plan of merger to acquire sole control of Grail (formerly Grail Inc.), which is also a company established in the United States and which develops blood tests for the early detection of cancers, in which Illumina already held a 14.5% stake ('the concentration at issue').

On 21 September 2020, Illumina and Grail issued a press release announcing that concentration.

The lack of notification

Since the turnover of Illumina and of Grail did not exceed the relevant thresholds, in particular given the fact that Grail did not have any turnover either in the European Union or elsewhere in the world, the concentration at issue did not have a European dimension for the purposes of Article 1 of Regulation No 139/2004 and was not therefore notified to the Commission pursuant to Article 4(1) of that regulation.

Nor was the concentration at issue notified in the EU Member States or in other States party to the EEA Agreement, since it did not fall within the scope of their national merger control rules.

The referral request to the Commission

On 7 December 2020, the Commission received a complaint relating to the concentration at issue.

On 19 February 2021, the Commission sent the Member States and the other States party to the EEA Agreement, pursuant to Article 22(5) of Regulation No 139/2004, a letter informing them of the concentration at issue, explaining to them the reasons why it found that that concentration appeared to meet the criteria laid down in Article 22(1) of that regulation and inviting them to submit to it a referral request under the latter provision for it to examine that concentration ('the invitation letter').

On 4 March 2021, the Commission informed Illumina and Grail that the invitation letter had been sent to the Member States and to the other States party to the EEA Agreement and that those States had the possibility of sending a referral request to it under Article 22(1) of Regulation No 139/2004.

On 9 March 2021, the French national competition authority asked the Commission, on the basis of that provision, to examine the concentration at issue ('the referral request').

On 10 March 2021, the Commission, in accordance with Article 22(2) of Regulation No 139/2004, informed the national competition authorities of the other Member States and of the other States party to the EEA Agreement as well as the EFTA Surveillance Authority of the referral request. On 11 March 2021, the Commission sent the information letter to Illumina and to Grail, by which it informed them of that request, reminding them that, pursuant to Article 7 and the second sentence of the first subparagraph of Article 22(4) of that regulation, they could not implement the concentration at issue before the Commission had rejected that request or declared that concentration compatible with the internal market.

On 16 and 29 March 2021, Illumina and Grail submitted observations to the Commission opposing the referral request. On 2, 7 and 12 April 2021, Illumina responded to the requests for information that the Commission had sent to it on 26 March and 8 April 2021.

By letters of 24, 26 and 31 March 2021, the Icelandic, Norwegian, Belgian, Dutch and Greek national competition authorities requested to join the referral request, on the basis of Article 22(2) of Regulation No 139/2004 and, in the case of the Icelandic and Norwegian national competition authorities, on the basis of Article 6(3) of Protocol 24 to the EEA Agreement ('the requests to join').

On 31 March 2021, the Commission published the Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (OJ 2021 C 113, p. 1).

The decisions at issue

By the decisions at issue, the Commission accepted the referral request and the requests to join.

First, the Commission found that the referral request had been submitted within the time limit of 15 working days laid down in the second subparagraph of Article 22(1) of Regulation No 139/2004, as from the date on which it had, by the invitation letter, brought the concentration at issue to the attention of, *inter alia*, the French Republic.

Second, the Commission also found that the requests to join had been made by the Icelandic, Norwegian, Belgian, Dutch and Greek national competition authorities within the time limit of 15 working days, laid down in the second subparagraph of Article 22(2) of that regulation, of the date on which it had, by its letter of 10 March 2021, informed those authorities of the referral request.

Third, the Commission found that the concentration at issue met the criteria set out in Article 22(1) of Regulation No 139/2004, with the result that the Member States could request it to examine that concentration, even though it did not have a European dimension.

The Commission took the view, in that regard, that the Member States could request it to examine any concentration 'over which they do not have jurisdiction', provided that the conditions laid down in Article 22 of that regulation were satisfied.

The procedure before the General Court

By application lodged at the General Court Registry on 28 April 2021, Illumina brought the action registered as Case T-227/21.

By order of 2 July 2021, the President of the Third Chamber (Extended Composition) of the General Court granted Grail leave to intervene in the proceedings in support of the form of order sought by Illumina.

By decisions of 12 and 22 July and of 6 August 2021, and by order of 25 August 2021, the President of the Third Chamber (Extended Composition) of the General Court granted the Kingdom of the Netherlands, the French Republic, the Hellenic Republic and the EFTA Surveillance Authority, respectively, leave to intervene in the proceedings in support of the form of order sought by the Commission.

By document lodged at the General Court Registry on 18 August 2021, Illumina informed the Court that it had acquired, on the same day, all the shares in Grail, but that it had put in place a hold separate arrangement in respect of the assets in such a way as to ensure that it did not exercise control over that company.

On 7 October 2021, the Commission requested the General Court to remove Grail as an intervener, in the light of that acquisition.

The parties presented oral argument and replied to questions put by the General Court at the hearing on 16 December 2021.

The judgment under appeal

In the judgment under appeal, after having rejected the Commission's request to withdraw Grail's status as an intervener (paragraphs 53 to 59) and ruled that the action should be declared, first, inadmissible in so far as it was directed against the information letter, and second, admissible in so far as it sought the annulment of the decisions at issue (paragraphs 60 to 82), the General Court examined the three pleas in law relied on by Illumina in support of its action. The first of those pleas alleged that the Commission lacked competence to examine a concentration which did not fall within the scope of the national merger control rules of the Member State which requested it to carry out that examination. The second plea alleged that the referral request, which had not been submitted within the time limit laid down in the second subparagraph of Article 22(1) of Regulation No 139/2004, had been made out of time, and that the principles of legal certainty and of good administration had been infringed, in view of the Commission's delay in sending the invitation letter. The third plea alleged breach of the principles of the protection of legitimate expectations and of legal certainty, on the ground that, at the time when Illumina and Grail had agreed on the concentration at issue, the Commission's decision-making practice consisted of refusing to examine concentrations falling outside the scope of national merger control rules.

Finding that none of those pleas in law was well founded, the General Court dismissed that action in its entirety.

In the first place, as regards the plea alleging lack of competence on the part of the Commission, the General Court held, following a literal, historical, contextual and teleological interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004, that Member States could, under the conditions set out in that provision, request the referral of a concentration which does not have a European dimension, irrespective of the existence or scope of their national rules on the *ex ante* control of concentrations. It inferred from that that the Commission was right, by the decisions at issue, to accept the referral request and the requests to join (judgment under appeal, paragraphs 183 and 184).

The General Court held, in that regard, that the arguments put forward by Illumina and by Grail were not such as to call that interpretation into question.

First, the General Court rejected Illumina's assertion that a Member State which has adopted national merger control rules in respect of concentrations that do not have a European dimension does not have the possibility of referring such concentrations to the Commission where they are not covered by those rules. The General Court held, in particular, that, in accordance with the principle of conferral of competences referred to in Article 4(1) TEU, read in conjunction with Article 5 TEU, a concentration which, where the turnover thresholds laid down in Article 1 of Regulation No 139/2004 have not been exceeded, does not fall within the scope of that regulation, falls, by default, within the competence of the Member States. Therefore, they are, from the point of view of EU law, always entitled to submit a request under Article 22 of that regulation (judgment under appeal, paragraphs 153 to 156).

Second, the General Court held that the interpretation of Article 22 of Regulation No 139/2004, as adopted in the decisions at issue, according to which a Member State may request referral of a concentration under that provision irrespective of the existence or scope of its national rules on the *ex ante* control of concentrations, complies with the principle of subsidiarity. In particular, that interpretation ensures that that provision constitutes an 'effective corrective

mechanism' in the light of that principle, within the meaning of recital 11 of that regulation, by protecting the interests of the Member States. Furthermore, it ensures, in accordance with recital 14 of that regulation, that a case will be dealt with by the most appropriate authority, in the light of that principle (judgment under appeal, paragraphs 157 to 166).

Third, the General Court held that that interpretation complies with the principle of proportionality and, as the EU legislature stated in recital 6 of Regulation No 139/2004, does not go beyond what is necessary to achieve the objective of ensuring that competition in the internal market is not distorted. The General Court stated, *inter alia*, that the interpretation of Article 22 of that regulation adopted in the decisions at issue allows the Commission to examine a concentration under that article only in certain specific cases where the four cumulative criteria laid down in the first subparagraph of Article 22(1) of that regulation are satisfied (judgment under appeal, paragraphs 167 to 172).

Fourth, the General Court found that the interpretation of Article 22 of Regulation No 139/2004 advocated by Illumina and Grail, which makes the application of that provision conditional on the scope of national merger control rules while providing for an exception for Member States which do not have such rules, would lead to uncertainty concerning the concentrations which are covered by that provision. By contrast, the interpretation adopted in the decisions at issue makes the application of that article conditional solely on the fulfilment of the four cumulative criteria laid down in the first subparagraph of Article 22(1) of that regulation, which ensure the uniform application of Article 22 in the European Union, in compliance with the principle of legal certainty (judgment under appeal, paragraphs 173 to 178).

Fifth, the General Court held that the exceptional nature of referrals under Article 22 of Regulation No 139/2004, as relied on by Illumina, is preserved by the interpretation adopted in the decisions at issue, in so far as the Commission's power of examination continues to depend mainly on the exceeding of the turnover thresholds laid down in Article 1 of that regulation, and that the referral mechanism under Article 22 of that regulation constitutes only a subsidiary power enabling, in certain specific cases and under very specific conditions, a concentration not exceeding those thresholds despite its cross-border effects also to be examined by the Commission at the request of one or more Member States, which takes into account the function of Article 22 as a 'corrective mechanism' (judgment under appeal, paragraph 182).

In the second place, as regards the plea in law alleging that the referral request had been made out of time and that the principles of legal certainty and of good administration had been infringed, the General Court held, first, that that request had been submitted within 15 days of the invitation letter being sent, which constituted its being 'made known', within the meaning of the second subparagraph of Article 22(1) of Regulation No 139/2004 (judgment under appeal, paragraph 214). It held, second, that, although that letter had been sent by the Commission within an unreasonable period of time, that fact alone was not sufficient to establish an infringement of the rights of the defence (judgment under appeal, paragraphs 239 and 242).

In the third and last place, as regards the plea in law alleging breach of the principles of the protection of legitimate expectations and of legal certainty, the General Court rejected it on the ground, in particular, that Illumina had failed to demonstrate that the Commission had given it precise, unconditional and consistent assurances concerning the treatment of concentrations not falling within the scope of national merger control rules (judgment under appeal, paragraph 263).

Procedure before the Court of Justice and forms of order sought

The joinder

By documents lodged at the Registry of the Court of Justice on 22 and 30 September 2022, respectively, Illumina and Grail brought the present appeals.

In accordance with Article 54(2) of the Rules of Procedure of the Court of Justice, the President of the Court of Justice decided, on 21 December 2022, to join the present cases for the purposes of the oral part of the procedure and of the judgment.

The applications to intervene

By decision of the President of the Court of 14 February 2023, the Republic of Estonia was granted leave to intervene in Case C-625/22 P in support of the form of order sought by Grail.

By order of the President of the Court of 10 March 2023, *Illumina v Commission* (C-611/22 P, EU:C:2023:205), Biocom California was granted leave to intervene in Case C-611/22 P in support of the form of order sought by Illumina.

By order of the President of the Court of 10 March 2023, *Grail v Commission* (C-625/22 P, EU:C:2023:227), the applications to intervene submitted by the association française des juristes d'entreprise (AFJE) (French Association of In-House Lawyers (AFJE)) and by the European Company Lawyers Association (ECLA) were, by contrast, dismissed.

The requests for an expedited procedure

By separate documents lodged at the Registry of the Court of Justice on 8 and 20 December 2022, the Commission requested that the present cases be determined pursuant to the expedited procedure provided for in Articles 133 to 136 of the Rules of Procedure, applicable to appeals pursuant to Article 190(1) of those rules.

In support of its requests, the Commission argued, in essence, that the decisions relating to the concentration at issue, in particular Commission Decision C(2022) 6454 final of 6 September 2022 declaring a concentration to be incompatible with the internal market and the functioning of the Agreement on the European Economic Area, taken pursuant to Article 8(3) of Regulation No 139/2004, the decisions under Article 8(5)(a) and (c) of that regulation, and any future decision requiring that concentration to be dissolved pursuant to Article 8(4) of that regulation and imposing fines for infringement of Article 7(1) of that regulation, are or will be based on the premiss that the Commission is competent to examine that concentration. According to the Commission, it is thus in the interest both of that institution

and of Illumina and Grail, and more generally of the good administration of justice, that the issue of the Commission's competence, which it is for the Court to decide, be resolved as soon as possible.

Article 133(1) of the Rules of Procedure provides that, at the request of the applicant or the defendant, the President of the Court may, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be decided pursuant to an expedited procedure where the nature of that case requires that it be dealt with within a short time.

On 10 January 2023, the President of the Court decided, after hearing the other parties, the Judge-Rapporteur and the Advocate General, not to grant the Commission's requests.

In view of their sensitive and complex nature, the present cases did not lend themselves easily to the application of an expedited procedure, given, in particular, that it did not appear appropriate to shorten the written part of the procedure before the Court (see, by analogy, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 103 and the case-law cited).

It was all the more inappropriate to deal with the cases under the expedited procedure since, in addition to the systemic importance and the difficulty of the issues raised, serious objections had been made by Illumina and Grail, which had not, at that stage, had the opportunity to acquaint themselves with the Commission's responses and should not, a priori, be deprived of the opportunity to lodge replies.

In that regard, the interest of the EU institutions, while legitimate, in determining as quickly as possible the scope of their rights and prerogatives under EU law is not in every case such as to establish the existence of an exceptional circumstance capable of justifying a case being determined pursuant to the expedited procedure (see, to that effect, judgment of 14 July 2022, *Commission v Poland (Protocol No 36)*, C-207/21 P, EU:C:2022:560, paragraph 40 and the case-law cited).

However, in view of the importance of the present cases, the President of the Court decided to give them priority over others, on the basis of Article 53(3) of the Rules of Procedure (see, to that effect, order of the President of the Court of 18 October 2017, *Weiss and Others*, C-493/17, EU:C:2017:792, paragraphs 13 and 14, and judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 41).

Forms of order sought by the parties to the appeals

By their respective appeals, Illumina (Case C-611/22 P) and Grail (Case C-625/22 P) claim that the Court should: set aside the judgment under appeal;

annul the decisions at issue, the referral request and the information letter; and

order the Commission to pay the costs of the present appeal proceedings and of the proceedings before the General Court.

The Commission contends that the Court should:

dismiss the appeals; and

order Illumina and Grail to pay the costs.

The French Republic contends that the Court should dismiss the appeals.

The Kingdom of the Netherlands contends that the Court should:

dismiss the appeals; and

order Illumina and Grail to pay the costs.

The EFTA Surveillance Authority contends that the Court should:

dismiss the appeals; and

order Illumina and Grail to pay the costs.

Biocom California, which has intervened in support of Illumina (Case C-611/22 P), claims that the Court should:

set aside the judgment under appeal;

annul the decisions at issue, the referral request and the information letter; and

order the Commission to pay the costs of the present appeal proceedings, including Biocom California's own costs.

The Republic of Estonia, which has intervened in support of Grail (Case C-625/22 P), has not lodged a statement in intervention.

The appeals

In support of its appeal in Case C-611/22 P, Illumina puts forward three grounds of appeal.

By its first ground of appeal, Illumina submits that the General Court erred in law in interpreting Article 22(1) of Regulation No 139/2004 as empowering a Member State with national merger control rules to request the Commission to examine a concentration that does not qualify for review under those rules. By its second ground of appeal, Illumina claims that the General Court erred in law in rejecting the plea in law alleging that the referral request had been made out of time and that the principles of legal certainty and of good administration had been infringed. The third ground of appeal relied on by Illumina alleges errors of law in the General Court's assessment of Illumina's claim that the principles of legitimate expectations and of legal certainty had been infringed, in the light of the precise, unconditional and consistent assurances Illumina claims had been given by the Executive Vice-President of the Commission.

In support of its appeal in Case C-625/22 P, Grail also puts forward three grounds of appeal, alleging, respectively, an error of law in the interpretation of Article 22 of Regulation No 139/2004, an error of law concerning the Commission's unreasonable delay, and an error of law in the assessment of the plea in law based on legitimate expectations and legal certainty; those grounds of appeal overlap to a large extent with those put forward by Illumina.

It is appropriate, first of all, to examine together the first ground of the appeals, alleging errors in the interpretation of Article 22 of Regulation No 139/2004, and in particular of paragraph 1 of that article.

Arguments of the parties

Illumina submits that the General Court's interpretation according to which Article 22(1) of Regulation No 139/2004 allows a Member State to request referral to the Commission of a concentration which its own national merger control rules do not allow it to scrutinise is incorrect.

In the first place, according to Illumina, the General Court failed to take proper account of the principles of legal certainty, proportionality and subsidiarity.

First of all, Illumina claims that the scheme of Regulation No 139/2004 embodies the principle of legal certainty through the use of objective turnover thresholds to define concentrations with a European dimension falling within the competence of the Commission and of strict time limits for examining concentrations. Illumina submits that the General Court's interpretation, in particular in paragraphs 174 and 175 of the judgment under appeal, gives rise to obvious legal uncertainty, inasmuch as it makes it possible to scrutinise concentrations both below the European dimension turnover thresholds and outside national merger control thresholds. That additional potential scrutiny outside the schemes of that regulation and of national legislation increases the uncertainty faced by merging parties as to whether that merger might face scrutiny and, accordingly, be subject to prohibition, modification or delay.

In Illumina's submission, the General Court's interpretation also creates legal uncertainty in so far as the rules on competence which it defines are based exclusively on the qualitative criteria set out in the first subparagraph of Article 22(1) of Regulation No 139/2004, in disregard of the approach adopted in other provisions of that regulation and in the national merger control rules adopted by the Member States.

According to Illumina, that interpretation, which does not impose any time limit on the Member States to request the referral of concentrations to the Commission, creates also temporal uncertainty and risks of delay in the examination of those concentrations.

Next, as regards the principle of proportionality, Illumina submits that the General Court's assessments in paragraphs 167 to 172 of the judgment under appeal are also vitiated by errors of law. Illumina argues, in particular, that the General Court's interpretation requires parties to concentrations that fall below the turnover thresholds laid down in Regulation No 139/2004 or the national merger control thresholds to notify those concentrations, in the interests of legal certainty, to each of the Member States, which, in turn, are required to process those notifications.

Lastly, according to Illumina, the General Court erred in its examination, in paragraphs 160 to 166 of the judgment under appeal, of the principle of subsidiarity and the power of the Commission, by allowing it to circumvent the legislative procedure and to amend de facto the competence thresholds laid down by Regulation No 139/2004. Illumina claims that the Commission is attempting, with the approval of the General Court, to fill alleged gaps in the merger control rules of the European Union and the Member States by allowing the scrutiny of concentrations that fall below the European dimension turnover thresholds and the national merger control thresholds, thereby bypassing the fundamental statutory requirements for modification of the relevant EU law and domestic rules.

In the second place, Illumina asserts that the General Court incorrectly identified and examined the object of Regulation No 139/2004 and of Article 22 thereof.

According to Illumina, paragraphs 140 and 142 of the judgment under appeal misunderstand the recitals of that regulation and distort the approach to interpretation that the General Court should follow. Illumina claims, first, that it is not correct to state that concentrations with significant effects on the structure of competition in the European Union are examined exclusively at EU level. Second, in Illumina's submission, that regulation does not provide for a comprehensive scheme to ensure that all mergers affecting the structure of competition in the European Union are scrutinised. Rather, deficiencies should be corrected only through legislative action. Third, according to Illumina, the General Court's statement in paragraph 142 of the judgment under appeal that Regulation No 139/2004 contains mechanisms to remedy deficiencies inherent in the use of turnover thresholds fails to take account of the fact that those thresholds were the subject of extensive debate in the establishment of Regulation No 4064/89 and then of Regulation No 139/2004. Illumina maintains that, by using objective turnover thresholds, rather than qualitative assessment criteria, the EU legislature provides legal certainty to merging parties and to the Member States, which reflects the compromise reached between the Member States and the Commission.

According to Illumina, the General Court's characterisation of the object of Regulation No 139/2004 led it to adopt an unduly broad interpretation of the 'corrective mechanisms' laid down, in particular, in Article 22 of that regulation, such as to alter the allocation of competences between the Member States and the European Union, in favour of the latter. Furthermore, in its teleological assessment, the General Court gave no consideration to the question of how, according to the EU legislature, Article 22 of that regulation had to be interpreted in order to identify 'the most appropriate' authority to deal with the case, within the meaning of recital 14 of that regulation, where neither the national competition authorities nor the EU authorities have competence to consider a merger.

In the third place, Illumina, relying in particular on the judgment of 3 April 2003, *Royal Philips Electronics v Commission* (T-119/02, EU:T:2003:101, paragraph 354), submits that the General Court did not, in paragraph 182 of the judgment under appeal, correctly assess the nature of Article 22 of Regulation No 139/2004 as a derogation or comply with the rule that a derogating provision should be construed strictly.

In the fourth place, according to Illumina, the General Court failed correctly to apply the principles of literal, historical, contextual and teleological interpretation in its analysis of Article 22(1) of Regulation No 139/2004.

Grail also submits that the General Court made an error of interpretation in holding that Article 22 of Regulation No 139/2004 conferred competence on the Commission to examine a concentration that lacks a European dimension and that is referred to the Commission by a Member State which does not itself have competence, under its national

merger control rules, to review that concentration. None of the interpretative methods, correctly applied, supports that interpretation by the General Court.

In the first place, Grail submits that the General Court's literal interpretation incorrectly assigns great value to the word 'any' that precedes the word 'concentration' in the English-language version of Article 22 of Regulation No 139/2004 (judgment under appeal, paragraphs 91 and 94) and that it fails to take account of the other language versions of that regulation.

In the second place, according to Grail, there are many shortcomings in the historical interpretation of the General Court. First of all, that interpretation relies on only three documents, all drawn up by the Commission, and overlooks other interpretative material, including the *travaux préparatoires* for Regulation No 4064/89, for Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation No 4064/89 (OJ 1997 L 180, p. 1), and for Regulation No 139/2004. Next, all documents on which the General Court relied to interpret the original purpose of Article 22 of Regulation No 4064/89 (judgment under appeal, paragraph 96) were published after that regulation was adopted, even though it is necessary to refer to information on the intent of the legislature at the time it adopted that regulation. Moreover, several key paragraphs of the historical reasoning followed by the General Court are inconclusive as they fail to answer the key question whether, under Article 22 of Regulation No 139/2004, the Commission is competent to examine a concentration which is referred to it by a Member State that has national merger control rules, but which does not fall within the scope of those rules. Furthermore, none of the limited sources cited in the judgment under appeal supports the historical interpretation adopted by the General Court, which is based on the idea that that provision pursues an objective other than that of allowing Member States that do not have national merger control rules to refer concentrations to the Commission. Lastly, Grail claims that that interpretation contains manifestly wrong statements, in particular in paragraphs 107 to 109 of the judgment under appeal.

Grail submits that a proper analysis of the *travaux préparatoires* leads to the conclusion that, at the time of its adoption, Article 22 of Regulation No 4064/89 did not apply to Member States with national merger control rules, but to Member States without such rules so that they could request the Commission to review and, where appropriate, prohibit concentrations that do not reach the turnover thresholds laid down in that regulation. The successive amendments to that provision, in 1997 and in 2004, merely added to that purpose that of reducing the risk of parallel review of the same concentration by the Member States by enabling Member States competent to examine a concentration to refer that concentration to the Commission if they considered that the Commission was better placed to act.

Grail maintains that the *travaux préparatoires* do not therefore support the conclusions of the General Court in the judgment under appeal but contradict them.

In the third place, according to Grail, the General Court's contextual interpretation also contains significant flaws. The arguments made, in particular, in paragraphs 126 to 130 and 132 of the judgment under appeal are therefore inconclusive. In addition, the General Court erred in refusing to take into account a number of documents, including the Commission Notice on Case Referral in respect of concentrations (OJ 2005 C 56, p. 2), which are, however, relevant for the contextual interpretation.

Furthermore, Grail submits that several provisions of Regulation No 139/2004 were largely ignored by the General Court and are incompatible with the General Court's reading of Article 22 of that regulation. Grail refers more specifically to Article 1(4) and (5) of that regulation and to the third subparagraph of Article 22(2) and the third subparagraph of Article 22(3) of that regulation. Grail also submits that the wording of recital 15 of that regulation, which uses the expression 'also competent', contradicts the interpretation adopted by the Commission and endorsed by the General Court.

In the fourth place, according to Grail, the General Court's teleological interpretation is equally flawed. First, the General Court's assertion that the objective of Regulation No 139/2004 is to permit control of 'all concentrations' affecting competition in the European Union regardless of the turnover thresholds (judgment under appeal, paragraphs 140 to 143) is not substantiated. Second, the General Court's assertion that the referral mechanisms constitute an 'effective corrective mechanism' for remedying deficiencies inherent in the turnover thresholds is unprecedented and entirely unsubstantiated (judgment under appeal, paragraph 142).

According to Grail, the General Court's reasoning with regard to the teleological interpretation leads to outcomes that are incompatible with Regulation No 139/2004. First, that interpretation triggers the possibility of an *ex post* review of concentrations by the Commission, as explicitly admitted by the Commission in paragraph 21 of its Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. It is thus at odds with the objective of setting up an *ex ante* review system, which requires that concentrations be reviewed within strict deadlines, and represents a 'Copernican change' in the EU merger control system. Second, Grail submits that, unless rectified, that interpretation will have huge practical consequences for undertakings and national competition authorities, undermining the principles of efficiency and legal certainty which have underpinned EU merger control for more than 30 years. Third, it claims that that interpretation makes it possible to circumvent the turnover thresholds laid down by Regulation No 139/2004 and thus undermines the predictability of the merger control system established by that regulation, with serious consequences for legal certainty. Fourth, Grail states that if the intention of the EU legislature were to allow the Commission to review all concentrations, which is not at all apparent from the *travaux préparatoires* for that regulation, it would then be legitimate to question the rationale of a system based on uncertain referrals from the Member States rather than a direct right of the Commission to examine all potentially problematic concentrations, irrespective of the European and national turnover thresholds.

Biocom California, which is intervening in support of Illumina in Case C-611/22 P, also states that the interpretation of the General Court according to which a request under Article 22 of Regulation No 139/2004 may be submitted and can

be accepted irrespective of the scope of the national merger control rules is not consistent with the fundamental principles of legal certainty and proportionality.

The Commission disputes the arguments put forward by Illumina and Grail in support of the first ground of their appeals.

As regards Illumina's first ground of appeal, the Commission states, as a preliminary point, that it is based on two fundamental fallacies as regards the nature of Regulation No 139/2004. The first fallacy relates to the fact that Illumina is incorrectly invoking the 'one-stop shop' system established by that regulation, which refers only to concentrations with a European dimension, whereas it is common ground that the judgment under appeal does not concern such a concentration. The second fundamental fallacy is Illumina's misconception that the rights granted to Member States under that regulation depend on national merger control rules. It is possible to use Article 308 EC (now Article 352 TFEU), on the basis of which Regulation No 139/2004 was adopted, as a basis 'for creating new rights superimposed on national rights'. The Commission submits that Illumina ignores the very existence of Article 22 of that regulation, which is 'an example of an EU law right superimposed on national rights', and the right that, by virtue of Article 352 TFEU, it confers on Member States to refer a concentration to the Commission, notwithstanding the fact that they are not competent to examine that concentration.

According to the Commission, Illumina's first ground of appeal is ineffective. The Commission states that Illumina offers no challenge to paragraphs 90 to 94 of the judgment under appeal, in which the General Court held, following a literal interpretation of Article 22 of Regulation No 139/2004, that the clear wording of that provision is sufficient to support the Commission's argument. The Commission submits, in that regard, that in so far as paragraph 95 of the judgment under appeal is to be understood as meaning that it was nevertheless necessary to rely on other interpretative techniques in order to make the finding in paragraph 183 of that judgment, the General Court erred in law. It therefore claims that it is necessary for the Court of Justice to substitute the reasoning in the judgment under appeal on that point and to hold that a literal interpretation of Article 22(1) of Regulation No 139/2004 is sufficient to reject the first plea in law in the application at first instance. In those circumstances, the Commission submits that, given that all of the arguments raised in the context of Illumina's first ground of appeal rely on interpretative techniques other than a literal interpretation, that ground of appeal is ineffective and should not be considered.

In the alternative, the Commission contends that that first ground of appeal is unfounded. Even if the interpretative techniques relied on in the appeal need to be considered, Illumina does not explain in that appeal why its claims based on those alternative techniques have sufficient force to displace the clear meaning of Article 22(1) of Regulation No 139/2004.

According to the Commission, the general assertion that the judgment under appeal creates legal uncertainty rests on fundamental fallacies, inasmuch as it overlooks the fact that that provision confers on Member States a right to make a referral, which is superimposed on national merger control regimes. As regards the argument that competence under Article 22 of Regulation No 139/2004 is not circumscribed by any form of objective turnover threshold, the Commission submits that it is inadmissible on the ground that it is a new argument. That argument is, moreover, wrong in law and in fact, in particular since it has not been established that every threshold determining competence in respect of merger control should be based on turnover. According to the Commission, the complaint concerning the absence of a time limit within which a Member State can trigger a referral under Article 22 of Regulation No 139/2004 is based on a biased reading of paragraph 181 of the judgment under appeal.

As regards observance of the principle of proportionality, the Commission submits that Illumina did not raise before the General Court any plea in law that, at the time of the decision at issue, the concentration at issue was not one that might significantly impede effective competition in the internal market. There is therefore no basis on which Illumina, in the appeal, could challenge the proportionality of the decision at issue. In any event, assuming the Court of Justice were to consider it necessary to examine the appeal on that point, the Commission submits that the allegations made by Illumina are irrelevant and unsubstantiated.

As regards the alleged breach of the principle of subsidiarity, the Commission submits that the General Court erred in law in holding that it had jurisdiction to respond to the arguments put forward by Illumina concerning the application of that principle. It submits, first, that Illumina did not claim that Article 22 of Regulation No 139/2004 is inapplicable on the ground that it is incompatible with the principle of subsidiarity. It states, second, that Illumina was not entitled to challenge the compatibility of the decision at issue with that principle, since that principle is not engaged in the review of the legality of measures adopted under that article. The Commission therefore submits, primarily, that there was no basis for the General Court to examine the arguments alleging breach of the principle of subsidiarity and that the Court of Justice should substitute the reasoning on that point by dismissing Illumina's arguments as irrelevant.

In any event, assuming the Court of Justice were to consider it necessary to examine those arguments, the Commission maintains that they contradict the arguments put forward in the application before the General Court, that they are unfounded as regards a referral request made by a Member State, and that they fail to have regard to the very nature of Article 22 of Regulation No 139/2004.

As regards the purpose of Regulation No 139/2004 and of Article 22 thereof, the Commission claims that Illumina misrepresents the scope of paragraphs 140 and 142 of the judgment under appeal and disregards the fact that, far from pursuing a different objective from that of that regulation, the Commission's interpretation permits an 'effective control of all concentrations in terms of their effect on the structure of competition in the [European Union]', in line with the objective stated in recital 6 of that regulation.

As regards the nature of Article 22 of Regulation No 139/2004 as a derogation, the Commission submits that, even if Illumina's argument were not ineffective, it would be unfounded. In particular, Illumina incorrectly attempts to compare

the present cases to that which gave rise to the judgment of 3 April 2003, *Royal Philips Electronics v Commission* (T-119/02, EU:T:2003:101, paragraph 354).

As regards the arguments specifically put forward in Grail's first ground of appeal, the Commission submits that they should also be rejected.

By way of introduction, the Commission states that the General Court's assessment, in paragraph 142 of the judgment under appeal, that the objective of Regulation No 139/2004 is 'to permit the control of concentrations likely significantly to impede effective competition in the internal market' is consistent with recitals 6 and 7 of Regulation No 4064/89, according to which Articles 85 and 86 of the EC Treaty (subsequently Articles 81 and 82 EC, now Articles 101 and 102 TFEU) are not sufficient 'to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty' and that, therefore, legislation based on Article 235 of the EC Treaty (subsequently Article 308 EC, now Article 352 TFEU) was required, '[permitting] effective control of all concentrations from the point of view of their effect on the structure of competition in the Community'. The Commission claims that Grail completely fails to address the implications of that use of Article 352 TFEU. According to the Commission, the power conferred on Member States by Article 22 of Regulation No 139/2004 to request the referral of a concentration is an example of the exercise of a right conferred by EU law superimposed on national rights.

The Commission submits that Grail's first ground of appeal is ineffective for two reasons. First, Grail makes no identifiable challenge to paragraphs 183 and 184 of the judgment under appeal, by which the General Court held that the Member States may request the referral of a concentration irrespective of the existence or scope of their national rules on the *ex ante* control of concentrations and that, therefore, the Commission, in the decision at issue, had not erred in accepting the referral request submitted to it. The Commission states that it is essential that the pleas in law and legal arguments relied on identify precisely those points in the grounds of the judgment of the General Court which are contested. The Commission contends that, in view of the fact that paragraphs 183 and 184 of the judgment under appeal have not been challenged, the arguments directed at intermediate stages of the General Court's reasoning are ineffective. Second, according to the Commission, in so far as Grail, like Illumina, makes no admissible challenge to the literal interpretation of Article 22(1) of Regulation No 139/2004 adopted in the judgment under appeal, Grail's first ground of appeal, which is based entirely on the claim that the clear and precise wording of that provision is insufficient to support the Commission's interpretation, is rendered ineffective.

In the alternative, the Commission contends that Grail's first ground of appeal is unfounded, since Grail does not explain in its appeal how the historical, contextual and teleological methods of interpretation on which it relies are capable of justifying an interpretation that departs from the clear meaning of the words of Article 22(1) of Regulation No 139/2004.

As regards, first, the historical interpretation, the Commission submits that Grail's criticism that the General Court's examination of the *travaux préparatoires* for Regulation No 139/2004 is deficient is ineffective and, in any event, largely inadmissible. The Commission claims that Grail does not simply contest the General Court's interpretation of documents, such as green papers, that had been submitted to the General Court, but also adduces a vast amount of fresh evidence that had not been submitted to that Court.

The Commission therefore claims that Grail's first ground of appeal, in so far as it is based on the *travaux préparatoires* adduced in the appeal or subsequently, is inadmissible. In addition, the Commission, relying on the judgment of 2 October 2019, *Crédit mutuel Arkéa v ECB* (C-152/18 P and C-153/18 P, EU:C:2019:810, paragraph 39), asserts that the interpretative material that is annexed to the appeal and that had been submitted to the General Court is only admissible to the extent that it is also set out in the actual body of that appeal or is, at the very least, sufficiently explained in it.

According to the Commission, the argument that the General Court overlooked anything in its historical interpretation cannot be accepted, unless that Court is required to request the institutions systematically to provide it with all the *travaux préparatoires* for any act at issue before it. The Commission claims, furthermore, that Grail has overlooked the fact that, in the judgment under appeal, the General Court responded to the arguments at first instance by which Illumina interpreted Regulation No 4064/89 by reference to a subsequent document. According to the Commission, contrary to what is stated in Grail's appeal, the historical interpretation set out in the judgment under appeal reveals no 'demonstrably wrong statements'. It is therefore unnecessary for the Court of Justice to examine that appeal further. In any event, the Commission claims that Grail, which merely makes a laconic, generalised reference to the documents annexed to its appeal, has not shown how a careful study of the *travaux préparatoires* would show that the General Court erred in law in its historical interpretation.

Second, as regards the contextual interpretation, the Commission asserts that Grail's arguments are not such as to support its case. Grail has thus failed to show precisely why the findings made by the General Court in its examination of the context of Article 22 of Regulation No 139/2004 were, as that company maintains, inconclusive.

Third, as regards the teleological interpretation of that provision, the Commission states that the objective of Regulation No 139/2004 is to permit control of all mergers affecting competition in the European Union regardless of the turnover thresholds referred to in Article 1 of that regulation, given that that regulation is without prejudice to the right of the Member States to maintain national merger control rules and to determine the thresholds above which they are competent to exercise their control under those rules. The fact that the Commission has primary competence only over mergers with a European dimension is without prejudice to its competence to accept the referral of concentrations under the referral mechanisms provided for in Regulation No 139/2004. The Commission asserts that Article 22 of that regulation provides, as stated in recital 11 thereof, 'an effective corrective mechanism in the light of the principle of

subsidiarity' because it allows the objective of that regulation to be achieved, whilst limiting the Commission's primary competence to mergers falling within the thresholds set by Article 1 of that regulation.

Fourth, the Commission submits that, contrary to Grail's arguments, the judgment under appeal does not lead to outcomes that are incompatible with Regulation No 139/2004. According to the Commission, Grail's arguments are, in essence, a 'self-serving manifesto' for how it thinks that an EU merger control regime should function, which is not an issue which falls within the jurisdiction of the Court.

The French Republic, the Kingdom of the Netherlands and the EFTA Surveillance Authority also contest the claims made by Illumina and by Grail. According to those parties, Illumina and Grail fail to have regard, in particular, to the primacy of the literal interpretation and disregard the clear and precise wording of the first part of the sentence of the first subparagraph of Article 22(1) of Regulation No 139/2004, which draws no distinction according to whether or not the Member State has national merger control rules. Referral mechanisms operate as 'corrective mechanisms' to permit effective control of all concentrations in terms of their effects on the structure of competition in the European Union.

Findings of the Court

By the first ground of their appeals, Illumina and Grail submit that the General Court made several errors in its interpretation of Article 22 of Regulation No 139/2004, and in particular paragraph 1 thereof, which was specifically referred to in the first plea in law raised at first instance, alleging lack of competence on the part of the Commission.

In the examination of that plea, the General Court held, in the first place, that it was apparent from the literal, historical, contextual and teleological interpretations of the first subparagraph of Article 22(1) of Regulation No 139/2004 that the Commission could, as it had found in the decisions at issue, accept the referral of a concentration under Article 22 in a situation where the Member State requesting that referral is not entitled, under its national merger control rules, to examine that concentration.

In the second place, the General Court found that that assessment could not be called into question by the arguments put forward by Illumina and Grail alleging, respectively, that it is not possible to refer concentrations to the Commission where a Member State has defined the conditions under which it scrutinises concentrations without a European dimension, that the principles of subsidiarity, proportionality and legal certainty had been infringed, and that referrals under Article 22 of that regulation are exceptional in nature.

In that context, the General Court held, in particular in paragraph 177 of the judgment under appeal, that that provision established a 'corrective mechanism' intended to permit effective control of all concentrations which are capable of significantly impeding effective competition in the internal market and fall outside the scope of the merger control rules between the European Union and the Member States because the turnover thresholds have not been exceeded.

In that regard, in accordance with settled case-law and as the General Court recalled in paragraph 88 of the judgment under appeal, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of its context, and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (judgments of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 47, and of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 37 and the case-law cited).

Illumina and Grail submit, however, that the General Court's application of those methods of interpretation is vitiated by several errors and that a correct application thereof should have led the General Court to rule that the Commission is not competent, under the first subparagraph of Article 22(1) of Regulation No 139/2004, to examine a concentration where that concentration is referred to it by a Member State which has national merger control rules and that concentration does not fall within the scope of those rules.

At the outset, it is necessary to reject the Commission's objection that the first ground of the appeals is ineffective inasmuch as the appellants are alleged to have referred to certain general considerations concerning the merger control system and to have failed to challenge the findings made by the General Court in certain passages of the judgment under appeal. In that regard, the Commission claims that the wording of Article 22(1) of Regulation No 139/2004 is sufficient to warrant the General Court's interpretation of that provision.

For a ground of appeal to be declared ineffective, it must be shown that, even if it were held to be well founded, it would not be capable of leading to the judgment under appeal being set aside (see, to that effect, judgment of 13 July 2023, *Commission v CK Telecoms UK Investments*, C-376/20 P, EU:C:2023:561, paragraph 96 and the case-law cited). It appears that, by the first ground of their appeals, the appellants set out, with the requisite precision, the grounds on which they claim that the General Court misinterpreted the nature and scope of the referral mechanism provided for in Article 22 of Regulation No 139/2004, with the result that the Commission was not entitled to examine the concentration at issue. If that ground of appeal were well founded, it would be capable of leading to the judgment under appeal being set aside, or, as the case may be, to the decisions at issue being annulled.

Consequently, it is necessary to assess the merits of the General Court's interpretation, by following, to that end, the various stages of its reasoning.

The literal interpretation

In paragraph 89 of the judgment under appeal, the General Court, recalling the wording of the first subparagraph of Article 22(1) of Regulation No 139/2004, observed that that provision sets out four cumulative conditions for authorising referral of a concentration to the Commission. First, the request to the Commission to examine a concentration must be made by one or more Member States. Second, the transaction which is the subject of that request must satisfy the definition of concentration set out in Article 3 of that regulation without meeting the thresholds for a European dimension laid down in Article 1 of that regulation. Third, the concentration must affect trade

between Member States. Fourth, that concentration must threaten significantly to affect competition within the territory of the Member State or States which made that request.

The General Court concluded from that, in paragraph 90 of the judgment under appeal, that 'it does not therefore follow from the wording of that provision that, in order for a concentration to be referred by a Member State to the Commission, that concentration must fall within the scope of the merger control rules of that Member State, or that the latter must have such a control system'. According to the General Court, the expression 'any concentration', as used in the first part of the sentence of the first subparagraph of Article 22(1) of Regulation No 139/2004, indicates, on the contrary, that a concentration may be the subject of a referral, regardless of the existence or scope of national rules on the *ex ante* control of concentrations, provided that the cumulative criteria referred to in paragraph 89 of the judgment under appeal are satisfied.

The General Court therefore ruled, in paragraph 94 of the judgment under appeal, that, 'without giving a definitive conclusion, a literal interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004 makes it clear that a Member State is entitled to refer any concentration to the Commission which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules'.

Accordingly, as is apparent from paragraph 95 of the judgment under appeal, the General Court considered it appropriate to carry out a historical interpretation, since that interpretation could provide clarification as to the intention of the EU legislature when it enacted Article 22 of Regulation No 139/2004, which must be taken into account in the contextual and teleological interpretations of that provision.

Those findings are not vitiated by any error.

It is true that it follows from settled case-law that an interpretation of a provision of EU law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness (judgments of 25 January 2022, *VYSOČINA WIND*, C-181/20, EU:C:2022:51, paragraph 39, and of 13 October 2022, *Gmina Wieliszew*, C-698/20, EU:C:2022:787, paragraph 83).

The Courts of the European Union are not however deprived of the possibility of having recourse in certain situations to methods of interpretation which they consider appropriate in order to clarify the exact scope of a provision of EU law that appears to be clear, its being understood that every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied (judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 20, and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi*, C-561/19, EU:C:2021:799, paragraph 46).

In the circumstances of the present case, where it appears that numerous factors were brought to the attention of the General Court with a view to clarifying the scope of the allegedly clear wording of the first subparagraph of Article 22(1) of Regulation No 139/2004, the General Court was fully entitled to hold that it could not confine itself to an isolated reading of the – both concise and general – wording of that provision and refrain from a contextual and teleological interpretation, as informed by the legislative history of that provision.

The historical interpretation

The historical interpretation, set out in paragraphs 96 to 117 of the judgment under appeal, was envisaged, as is apparent from the wording used by the General Court, as being able to 'provide clarification as to the intention of the EU legislature when it enacted Article 22 of Regulation No 139/2004, which must be taken into account in the teleological and contextual interpretations of that provision' (judgment under appeal, paragraph 95). It is therefore apparent from the scheme of that judgment that that historical interpretation is of particular importance in the General Court's reasoning, since it forms the basis of the findings which it made in the context of the teleological and contextual interpretations.

In essence, the General Court held that the historical interpretation indicates that the first subparagraph of Article 22(1) of Regulation No 139/2004 enables a Member State, irrespective of the existence or scope of its national rules on the *ex ante* control of concentrations, to refer to the Commission concentrations which do not meet the turnover thresholds laid down in Article 1 of that regulation but which may have significant cross-border effects.

Before examining the merits of the appellants' arguments directed against the various parts of the General Court's assessment, it is appropriate to rule on the admissibility of the evidence submitted by Grail in that context.

– The admissibility of the evidence submitted by Grail

In its response in Case C-625/22 P, the Commission calls into question the admissibility of the evidence put forward by Grail in support of its complaints concerning the historical interpretation. The Commission submits that, although it had devoted only two paragraphs to that interpretation in its statement in intervention at first instance, Grail refers in its appeal to a vast amount of documents that were drawn up in the context of the *travaux préparatoires* for the adoption of Regulation No 4064/89, Regulation No 1310/97 and Regulation No 139/2004, which Grail has annexed to that appeal. The Commission states that those documents, which were largely not published in any way, were not brought to the attention of the General Court and were therefore not aired before it.

In that regard, it is well established that to allow a party to put forward for the first time before the Court of Justice a plea and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the General Court (judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 126 and the case-law cited).

That being so, where the General Court's interpretation of a provision of EU law is at issue, the *travaux préparatoires*, which relate directly to the scope of the applicable EU legislation, cannot be analysed as purely factual matters which

should have been raised at first instance. The determination of the meaning of that legislation comes within the exclusive jurisdiction of the Court of Justice. Where, as in the present cases, the interpretation of a provision of secondary law is called into question, the EU judicature must be able to examine, whether of its own motion or on the basis of evidence that has been properly submitted for its assessment, the documents drawn up in the context of the *travaux préparatoires* that may provide indications as regards the intention of the EU legislature.

– *Substance*

The considerations taken into account by the General Court in the context of the historical interpretation relate, first, to the fact that it had not been originally ruled out that the mechanism for the referral of a concentration to the Commission, initially provided for in Article 22(3) of Regulation No 4064/89, although originally designed for those Member States which did not yet have a merger control system, could also be used by Member States with such a system (judgment under appeal, paragraphs 96 to 99); second, to the fact that the objectives of that mechanism have 'been successively extended over time' with a view to strengthening the application of EU competition law to concentrations between undertakings with cross-border effects (judgment under appeal, paragraphs 100 to 104); third, to the action taken following the Commission's proposal for a Council Regulation on the control of concentrations between undertakings ('The EC Merger Regulation') (OJ 2003 C 20, p. 4; 'the 2003 proposal') in the context of the recast of Regulation No 4064/89 and the adoption of Regulation No 139/2004 (judgment under appeal, paragraphs 105 to 114); and fourth, to the irrelevance of the documents published by the Commission after the adoption of Regulation No 139/2004 (judgment under appeal, paragraph 115).

In the first place, as regards the General Court's assessment that it was not originally ruled out that the mechanism for the referral of a concentration case to the Commission, initially provided for in Article 22(3) of Regulation No 4064/89, could be used not only by those Member States which did not have national merger control rules, but also by those with such rules, it must be stated that that assessment is based on several documents drawn up by the Commission, namely the Commission Green Paper of 31 January 1996 on the review of the Merger Regulation (COM(96) 19 final), the Commission Green Paper of 11 December 2001 on the Review of Council Regulation No 4064/89 (COM(2001) 745 final), and the 2003 proposal.

It is true that documents drawn up by the Commission itself may provide precise indications as to the legislature's intention when it drew up the successive regulations on the control of concentrations and, accordingly, have a certain interpretative value as regards the meaning and scope of the first subparagraph of Article 22(1) of Regulation No 139/2004. In the present case, however, the documents referred to in the preceding paragraph do not contain any precise information capable of resolving the question of interpretation that lies at the heart of the plea in law alleging that the Commission lacked competence to adopt the decisions at issue.

In that regard, the General Court was entitled to state, in paragraph 98 of the judgment under appeal, that it was apparent from paragraph 97 of the Commission Green Paper of 31 January 1996 on the review of the Merger Regulation (COM(96) 19 final) that the referral mechanism was generally regarded as a useful tool, especially for those Member States that did not have national merger control rules, but that recourse to it was in no way reserved to them.

That statement does not, however, provide an answer to the question whether Article 22 of Regulation No 139/2004 allows Member States that have such rules to refer to the Commission transactions which are not covered by those rules and which are therefore not subject to notification at national level.

The same is true of the reference made, in paragraph 99 of the judgment under appeal, to the fact that, by the date of adoption of the Commission Green Paper of 11 December 2001 on the Review of Council Regulation No 4064/89 (COM(2001) 745 final), only the Grand Duchy of Luxembourg did not have such rules, which led the Commission to state, in paragraph 85 of that green paper, that, 'in practice ... the potential scope for use of Article 22(3) [of Regulation No 4064/89] in its original form [was] very limited'. As the Advocate General observed in point 87 of his Opinion, that passage from paragraph 85 of that green paper admittedly suggests that the fact that most Member States had enacted a domestic system of merger control implied that they had a more limited interest in referring a concentration to the Commission for assessment. By contrast, it contains no indication, even implicit, that the Commission is competent to examine transactions which are referred to it by a Member State that has enacted such a domestic system regardless of whether those transactions are covered by that system.

In the second place, as regards the fact that the objectives of that mechanism have been 'successively extended over time' with a view to strengthening the application of EU competition law to concentrations between undertakings with cross-border effects, the considerations set out in that respect in paragraphs 100 to 104 of the judgment under appeal are indeed based on correct findings. However, they also do not support the approach advocated by the Commission in the present cases with regard to the scope of the referral mechanism provided for in Article 22 of Regulation No 139/2004.

In particular, although it is true, as the General Court held in paragraph 102 of the judgment under appeal, that that mechanism was intended to enable Member States to ask the Commission to examine a concentration where the thresholds laid down in Article 1 of that regulation are not met, that clarification is not conclusive for the purpose of determining whether Article 22 of that regulation allows Member States with national merger control rules to refer transactions that are not covered by those rules.

In the third place, as regards the reference, in paragraphs 105 to 114 of the judgment under appeal, to the action taken following the 2003 proposal in the context of the recast of Regulation No 4064/89 and the adoption of Regulation No 139/2004, that reference also does not support the interpretation advocated by the Commission. Although the changes to the referral mechanism resulting from that proposal show that the Commission favoured greater recourse to that mechanism and wanted its objectives to be progressively extended, those changes do not provide any indication as to the type of concentrations that may be the subject of a referral.

In the fourth place, as the General Court noted in paragraph 115 of the judgment under appeal, the Commission documents published after the adoption of Regulation No 139/2004 could not be taken into account by the EU legislature and are therefore irrelevant for the historical interpretation of Article 22 of that regulation.

It follows from all those considerations that the matters referred to in paragraphs 96 to 116 of the judgment under appeal are not such as to support the General Court's assessment of the legislative history of Article 22 of Regulation No 139/2004.

An examination of the *travaux préparatoires* for the successive regulations on the control of concentrations, in particular the historical documents relating to the adoption of Regulations No 4064/89 and No 139/2004, tends, on the contrary, to contradict that assessment inasmuch as, as the Advocate General observed in particular in points 102 and 105 of his Opinion, none of those documents attests to the EU legislature's intention to use the referral mechanisms provided for in Article 22(3) of Regulation No 4064/89 and in Article 22 of Regulation No 139/2004, respectively, to remedy alleged deficiencies stemming from the rigidity of the thresholds laid down in Article 1 of each of those regulations.

In that regard, as the General Court itself stated in paragraph 97 of the judgment under appeal and as all the parties agree, the referral mechanism, originally established in Article 22(3) of Regulation No 4064/89, followed the wish of the Kingdom of the Netherlands, which did not have national merger control rules at the time, to have the Commission examine concentrations having adverse effects in its territory, provided that those concentrations also affected trade between Member States, which is why that mechanism was referred to as the 'Dutch clause' (paragraph 133 of the Commission Staff Working Paper accompanying the Communication from the Commission to the Council – Report on the functioning of Regulation No 139/2004 of 30 June 2009 (SEC(2009) 808 final/2)). In other words, that mechanism had become necessary above all because some Member States did not have a system of preventive (*ex ante*) merger control.

It is thus apparent from the documents and from the *travaux préparatoires*, some of which emanate from the Council of the European Union, relating to the initial version of Regulation No 4064/89 to which the parties refer, that, as the Advocate General observed in particular in point 101 of his Opinion, the EU legislature took account of the fact that, regardless of the type and amount of the thresholds chosen, certain concentrations which could affect the internal market would, in any event, escape an *ex ante* review by the Commission under that regulation. None of those documents envisages the referral mechanism provided for in Article 22(3) of that regulation as a 'corrective mechanism' which would allow a referral to the Commission of any concentration satisfying the conditions of paragraph 1 of that article irrespective of whether that concentration falls within the national merger control system of the Member State making the request.

Nor do the historical documents relating to the adoption of Regulation No 1310/97 and to that of Regulation No 139/2004 support the General Court's assessments concerning the EU legislature's intention to use the referral mechanism set out in Article 22 of Regulation No 139/2004 to remedy alleged deficiencies stemming from the rigidity of the thresholds laid down in Article 1 of that regulation.

It follows from all those considerations that, contrary to what the General Court held in paragraph 116 of the judgment under appeal, the historical interpretation does not lead to the conclusion that the first subparagraph of Article 22(1) of Regulation No 139/2004 confers on the Commission the competence to examine a concentration which does not meet the turnover thresholds laid down in Article 1 of that regulation irrespective of the scope of the rules of the Member State that has made a referral request in the field of merger control.

The contextual interpretation

In support of its contextual interpretation that a Member State may request the referral of a concentration under Article 22 of Regulation No 139/2004 irrespective of the scope of its national rules on the *ex ante* control of concentrations, the General Court set out a number of considerations in paragraphs 118 to 138 of the judgment under appeal. They relate, first, to the legal basis for that regulation, second, to the fact that Article 1(1) of that regulation, which defines its scope, refers explicitly to Article 22 of that regulation, third, to the finding that the conditions for the application of the latter provision are fundamentally different from those laid down in Article 4(5) of Regulation No 139/2004 – a provision which also allows, at the request of the parties and before notification, referral of a concentration that does not have a European dimension from a Member State to the Commission –, fourth, to the fact that the referral mechanism provided for in Article 22 of that regulation differs from those provided for in Article 4(4) and Article 9 of that regulation – provisions which govern the referral of a concentration with a European dimension to the competent authorities of a Member State – and, fifth, to the relationship between the first subparagraph of Article 22(1) of that regulation and the other provisions of that article.

It is necessary, first, to examine those various factors specifically considered by the General Court, and second, to examine whether, as the appellants submit, the General Court failed to take account of other contextual factors capable of providing clarification as regards the scope of the referral mechanism set out in Article 22 of Regulation No 139/2004.

– The contextual factors taken into account by the General Court

As regards, in the first place, the fact that the legal basis for Regulation No 139/2004 is not only Article 83 EC (now Article 103 TFEU), but also Article 308 EC (now Article 352 TFEU), the General Court held, in essence, that the reference made to the latter article, under which the European Union may give itself additional powers of action necessary for the attainment of its objectives, provided no indication on the proper meaning and scope of the first subparagraph of Article 22(1) of that regulation. The General Court thus dismissed Illumina's contention that the legal bases successively chosen when the regulations on the control of concentrations were adopted supported Illumina's proposed interpretation of that provision.

The General Court held, in particular, in paragraph 120 of the judgment under appeal, that the fact that Regulation No 139/2004 was also based on Article 308 EC merely shows that the EU legislature envisaged having recourse to a sufficiently broad legal basis for the EU merger control system, which is consistent with Protocol (No 27) on the internal market and competition (OJ 2016 C 202, p. 308), which provides that the internal market is to include a system ensuring that competition is not distorted and that, to that end, the European Union is to take, if necessary, measures within the framework of the provisions of the Treaties, including Article 352 TFEU.

That assessment of the General Court is not vitiated by any error of law. It is apparent from the seventh recital of Regulation No 4064/89 and from recital 7 of Regulation No 139/2004, and from the *travaux préparatoires* for Regulation No 4064/89, that the EU legislature took the view that Article 103 TFEU – which permits the adoption of legislation intended ‘to give effect to the principles set out in Articles 101 and 102 [TFEU]’ – was, taken alone, insufficient to establish a merger control system which sought to prevent the mere creation of dominant positions and also caught concentrations on the market for agricultural products that, under Article 38(3) TFEU and Annex I to the FEU Treaty, could be subject to a specific legal regime which included exceptions from the full application of EU competition rules.

That said, it has not, conversely, been established that Article 352 TFEU provides the basis for competence on the part of the Commission to review a concentration that does not have a European dimension even where the Member State which has made a request to that effect on the basis of Article 22 of Regulation No 139/2004 has national rules meaning that it does not itself have the competence to scrutinise that concentration.

In the second place, the reference made, in paragraphs 121 to 124 of the judgment under appeal, to Article 1 of Regulation No 139/2004 – which defines the thresholds above which a concentration is deemed to have ‘a Community dimension’ and must thus become subject to the mandatory regime of notification to the Commission, and which makes clear that those thresholds are ‘without prejudice to Article 4(5) and Article 22’ – cannot be regarded as decisive.

Although the General Court correctly inferred from Article 1 that ‘the scope of Regulation No 139/2004 and, consequently, the Commission’s competence to examine concentrations depend primarily on the exceeding of the turnover thresholds defining the European dimension and, in the alternative, on the referral mechanisms provided for in Article 4(5) and Article 22 of that regulation, which supplement those thresholds by authorising the examination, by the Commission, of certain concentrations that do not have a European dimension’ (judgment under appeal, paragraph 123), that consideration does not provide any precise indication of the type of concentration not meeting the thresholds of that regulation that may be reviewed by the Commission in accordance with Article 22 of that regulation.

In the present case, it is common ground that the first subparagraph of Article 22(1) of Regulation No 139/2004 allows the Commission to scrutinise certain concentrations that do not meet the thresholds laid down in Article 1 of that regulation. That finding does not, however, make it possible to determine, as the present cases require, precisely which concentrations that do not meet the thresholds set out in that regulation may be scrutinised by the Commission in accordance with Article 22 thereof.

In the third place, the General Court was also entitled to hold, in paragraph 129 of the judgment under appeal, that Article 22 of Regulation No 139/2004, which does not expressly require either the national competition authority requesting referral of the concentration to the Commission to be competent to examine the concentration that is the subject of the referral or that that concentration must be notified, cannot be interpreted in the light of the referral mechanisms provided for in Article 4(4) and Article 9 of that regulation. Nor do those provisions support the position advocated by the Commission in the present cases.

In the fourth place, as regards the relationship between the first subparagraph of Article 22(1) of Regulation No 139/2004 and the other provisions of that article, which was examined in paragraphs 130 to 137 of the judgment under appeal, the General Court took account of seven factors.

First, the General Court held, in paragraph 130 of the judgment under appeal, that it cannot be inferred from the wording of the second subparagraph of Article 22(1) of that regulation that that article applies to Member States which have national merger control rules only where the concentrations concerned are covered by those rules.

As the Advocate General observed in point 124 of his Opinion, the wording of the second subparagraph of Article 22(1) of Regulation No 139/2004, which provides that a referral must be requested at most within 15 working days of the date on which the concentration was ‘notified’ or, if no notification is required, otherwise ‘made known’ to the Member State concerned, does not mean that the first subparagraph of Article 22(1) of that regulation governs situations in which concentrations are not notified, but merely made known to the Member State concerned, either because they do not fall within the scope of those rules or because no such rules exist.

The use of the term ‘made known’ in that provision was necessary precisely in order to enable Member States which do not have national merger control rules to request the Commission to scrutinise concentrations that may have adverse effects in their territory, where those concentrations also affect trade between Member States.

Furthermore, the General Court’s conclusion referred to in paragraph 162 above fails to take account of the situation in which the second subparagraph of Article 22(1) of Regulation No 139/2004 is applicable where a Member State has national merger control rules, but does not make concentrations covered by those rules subject to a notification obligation, which was precisely the case with regard to the United Kingdom of Great Britain and Northern Ireland.

Second, the General Court held, in paragraph 131 of the judgment under appeal, that Illumina and Grail could not rely on the fact that the first subparagraph of Article 22(2) of Regulation No 139/2004 provides that ‘the Commission shall inform the competent authorities of the Member States and the undertakings concerned of any [referral] request received pursuant to paragraph 1 [of that article] without delay’, since the reference to ‘competent authorities’ is intended only to ensure that the national competition authorities are informed by the Commission of such a request.

That assessment must be endorsed, since that general reference, taken by itself, appears inconclusive for the purpose of determining the meaning and scope of the first subparagraph of Article 22(1) of Regulation No 139/2004.

Third, the General Court held, in paragraph 132 of the judgment under appeal, that the second subparagraph of Article 22(2) of Regulation No 139/2004 – which provides that ‘any other Member State shall have the right to join the initial [referral] request’ – was ‘consistent with Article 22(1) and confirms that any Member State may submit a request for referral or joinder under that article, irrespective of the scope of its national merger control rules’. It must be stated that that assessment is in no way borne out by the wording of that article.

Fourth, the General Court held, in paragraph 133 of the judgment under appeal, that the fact that, according to the third subparagraph of Article 22(2) of Regulation No 139/2004, ‘all national time limits relating to the concentration shall be suspended’, means only that, if such a national time limit has begun to apply, it is to be suspended. That provision gives no indication, either in support of the appellants or of the Commission, as regards the exact identification of the concentrations that may be referred to the Commission under that article.

Fifth, as regards the reference to the third subparagraph of Article 22(3) of Regulation No 139/2004, which provides that ‘the Member State or States having made the request shall no longer apply their national legislation on competition to the concentration’, the General Court did not err in finding, in paragraph 134 of the judgment under appeal, that that provision did not support the appellants’ arguments, given that, by referring to ‘national legislation on competition’, that provision refers not only to national merger control rules but also to national provisions relating to anticompetitive agreements and abuses of a dominant position. That said, that finding does not support the argument put forward by the Commission, either.

Sixth, the General Court examined, in paragraphs 135 and 136 of the judgment under appeal, the first subparagraph of Article 22(4) of Regulation No 139/2004, according to which Article 2, Article 4(2) and (3), and Articles 5, 6 and 8 to 21 thereof apply where the Commission examines a concentration referred and according to which Article 7 of that regulation applies ‘to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made’. The Commission inferred from the wording of Article 7 that the standstill obligation laid down therein applied both to situations in which the concentration whose referral is requested is not covered by national merger control rules and to those in which such rules are applicable but do not provide for the suspension of that concentration.

Although the General Court was entitled to state that the standstill obligation laid down in Article 7 of Regulation No 139/2004 applies to all concentrations whose referral to the Commission has been requested, in order to ensure the effectiveness of the control system established by that regulation and prevent distortions of competition taking place before it is decided whether the Commission will examine the case, the wording of the first subparagraph of Article 22(4) of that regulation does not support the interpretation advocated by the Commission in the present cases.

Seventh, the General Court stated, in paragraph 137 of the judgment under appeal, that, in accordance with Article 22(5) of Regulation No 139/2004, ‘the Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1 [of that article]’. Since that wording refers only to those criteria, the General Court took the view that that provision does not require the concentration whose referral is requested to fall within the scope of national merger control rules.

That provision merely provides that the Commission may inform the Member States of a concentration and invite them to submit a request on the basis of Article 22(5) of that regulation. Since that provision refers to Article 22(1) of that regulation and it has been found in paragraph 128 above that the wording of Article 22(1) does not support either the interpretation advocated by the Commission or that advocated by Illumina and Grail, a similar finding must be made with regard to Article 22(5).

It follows from all those considerations that, although the factors specifically considered by the General Court in its contextual interpretation do not necessarily support the position advocated by the appellants, they are also inconclusive in order to determine whether the Commission was competent to adopt the decisions at issue.

It is also necessary to examine whether, as the appellants maintain, the General Court disregarded other contextual factors capable of contradicting its interpretation.

– *Other contextual factors that may be relevant*

In the first place, as regards Article 4(5) of Regulation No 139/2004, which provides for another referral mechanism, allowing the parties to a concentration which does not have a European dimension and which is capable of being reviewed under the national competition law of at least three Member States to request that that concentration be examined by the Commission, it is true that the General Court was entitled to find, in paragraph 126 of the judgment under appeal, that that provision and Article 22 of that regulation differ significantly as regards their respective conditions for application and purposes.

However, it must be noted that, unlike concentrations that do not initially have a European dimension but are capable of acquiring such a dimension under the conditions laid down in the fifth subparagraph of Article 4(5) of Regulation No 139/2004, concentrations examined by the Commission on the basis of Article 22 of that regulation are not deemed to have a European dimension. In keeping with that finding, it is only the Member State or States that have made a request under Article 22 of that regulation which, in accordance with the third subparagraph of Article 22(3), are deprived of the possibility of applying their national competition law to the concentration concerned.

Under that mechanism, as regards a request made by one or more Member State or States with national rules on the *ex ante* control of concentrations, the examination of the transaction in question by the Commission thus replaces that which, where appropriate, would have been carried out in that or those Member States, that replacement being without prejudice to any examination of that transaction in other Member States. By contrast, under the referral mechanism provided for in Article 4(5) of Regulation No 139/2004, the fact that the concentration at issue is deemed

to have a European dimension and that it must be notified to the Commission in accordance with Article 4(1) and (2) of that regulation means that no Member State is applying its national competition law to that concentration.

That difference militates in favour of the interpretation of Article 22 of that regulation advocated by Illumina and Grail. As regards a referral request made by a Member State that has national rules on the *ex ante* control of concentrations, the competence conferred by that provision on the Commission to examine the transaction in question is based on it being appropriate for the Commission to replace one or more national authorities, despite the fact that that transaction is not deemed to have a European dimension. Such a replacement nevertheless presupposes that, where the requesting Member State has such rules, the authority responsible for the *ex ante* control of concentrations within that State is not precluded by those rules from having competence, in particular on the ground of the transaction in question falling below the control thresholds which it defines.

In the second place, as regards the provisions of Article 22 of Regulation No 139/2004, the General Court found, in paragraph 138 of the judgment under appeal, that they contain no relevant information capable of casting further light on the content of the first subparagraph of Article 22(1) of that regulation.

However, that consideration disregards one of the conditions for application set out in the latter provision, according to which the concentration in question must threaten significantly to affect competition 'within the territory of the Member State or States' requesting the referral of that concentration. That condition indicates that the referral mechanism set out in Article 22 of Regulation No 139/2004 is intended to permit the scrutiny of concentrations that could distort competition in a Member State that either does not have national merger control rules or considers that such scrutiny is to be carried out by the Commission in view of the need, clearly referred to when Regulation No 4064/89 was amended by Regulation No 1310/97, and subsequently reinforced by the adoption of Regulation No 139/2004, to extend the 'one-stop shop' principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national level.

In the third place, as regards the other provisions of Regulation No 139/2004, the General Court erred in failing to take account of the fact that Regulation No 139/2004, like Regulation No 4064/89, provides for a simplified procedure with a view to reviewing the thresholds which define the scope of those regulations. Thus, Article 1(4) and (5) of Regulation No 139/2004 enables the Council, on a proposal from the Commission, to revise the thresholds and criteria which, under that article, define the scope of that regulation on 'the basis of statistical data that may be regularly provided by the Member States' and subsequent to a report to the Council by 1 July 2009.

The EU legislature therefore expressly provided, in Regulation No 139/2004, for the possibility of a rapid adjustment of the scope of that regulation if the competence criteria in use become, because of market developments, no longer apt to capture concentrations with potentially harmful effects.

– *Conclusion on the contextual interpretation*

It follows from all those considerations that the General Court thus erred in holding, in paragraph 139 of the judgment under appeal, that it followed from the contextual interpretation that a referral request under Article 22 of Regulation No 139/2004 could be submitted irrespective of the existence or scope of national rules on the *ex ante* control of concentrations.

The teleological interpretation

Both Illumina and Grail criticise the reasoning of the General Court relating to the objective of Regulation No 139/2004 and of Article 22 thereof. They thus claim that the General Court erred in finding that that regulation provides for 'corrective mechanisms' to remedy control deficiencies, which are allegedly inherent in a system using turnover thresholds, in order to attribute competence to the Commission, and that it adopted an excessively broad interpretation of those mechanisms. According to them, in reality, that regulation was designed to ensure a high degree of predictability and legal certainty and to ensure, as stated in recital 14 of that regulation, that concentrations are dealt with by the most appropriate authority.

In that regard, it must be noted that, in paragraphs 140 to 151 of the judgment under appeal, the General Court carried out a teleological interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004, referring mainly to the wording of the recitals of that regulation.

In particular, the General Court held, in paragraphs 140 to 144 of the judgment under appeal, that recitals 5, 6, 8, 24 and 25 of that regulation indicate that its objective is 'to permit effective control of all concentrations with significant effects on the structure of competition in the European Union'. The General Court considered, in that regard, that it is apparent from recital 11 of Regulation No 139/2004 that the referral procedures create a 'corrective mechanism', which indicates that they give rise to 'a subsidiary power of the Commission which confers on it the flexibility necessary to achieve the objective of that regulation'.

In addition, the General Court held, in paragraphs 145 to 147 of the judgment under appeal, that recitals 15 and 16 of Regulation No 139/2004 support the finding that the conditions for the application of the referral mechanism provided for in Article 22 of that regulation are fundamentally different from those of the other referral mechanisms, and in particular from the mechanism provided for in Article 4(5) of that regulation, which explicitly requires that the concentration referred to the Commission should be 'capable of being reviewed under the national competition laws of at least three Member States'.

On the basis of those considerations, the General Court held, in paragraph 148 of the judgment under appeal, that a teleological interpretation confirms that a request under Article 22 of Regulation No 139/2004 may be submitted irrespective of the existence or scope of national rules on the *ex ante* control of concentrations.

That conclusion is incorrect in several respects.

In the first place, the General Court erred in holding that that article had, as is, according to it, apparent from recital 11 of that regulation, to be regarded as a 'corrective mechanism' intended to remedy deficiencies in the merger

control system, by enabling the scrutiny of transactions that do not meet either the EU or the national thresholds. As is apparent from the statement of reasons for Regulation No 139/2004 and as the Advocate General observed in point 179 of his Opinion, recital 11 refers to a mechanism having a corrective function in terms of allocation of competences between the Commission and the national competition authorities, taking into account the need for legal certainty for the undertakings concerned and the 'one-stop shop' principle.

On that point, it should be noted that recital 11 did not appear in Regulation No 4064/89, but that it was inserted in the statement of reasons for Regulation No 139/2004 only in order to address the concerns arising from the possibility, recognised since 1997, of multiple notifications. It cannot therefore be inferred from that that the referral mechanism set out in Article 22 of Regulation No 139/2004 is intended to fill a gap in the merger control system, which is based on a principle of precise allocation of competences between the Commission and the national competition authorities, by allowing the Commission to examine concentrations falling below the thresholds defined both at EU and national level.

Furthermore, the fact that some recitals of that regulation, in particular its recitals 6 and 24, refer to effective control of 'all concentrations' also does not support the position advocated by the Commission, since that wording relates only to concentrations with a European dimension (see, to that effect, judgment of 4 March 2020, *Marine Harvest v Commission*, C-10/18 P, EU:C:2020:149, paragraph 108 and the case-law cited), which are not at issue in the present cases.

It is important, in that regard, to point out that the reference in those recitals to 'all' concentrations, which already appeared in recitals 6 and 7 of Regulation No 4064/89, relates to the EU legislature's desire to make clear that Regulation No 139/2004 is the only procedural instrument applicable to the prior and centralised examination of concentrations which, as stated in recital 6 thereof, must permit effective control of all concentrations in terms of their effect on the structure of competition. Under the 'one-stop shop' system introduced by that regulation, that regulation is a specific procedural instrument intended to apply exclusively to concentrations of undertakings involving significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State, as is apparent from recital 8 of that regulation (judgment of 16 March 2023, *Towercast*, C-449/21, EU:C:2023:207, paragraphs 36 and 37 and the case-law cited).

In the second place, the General Court erred in holding, in paragraphs 147 and 148 of the judgment under appeal, that recitals 15 and 16 of Regulation No 139/2004 supported the interpretation that a request under Article 22 of that regulation may be submitted irrespective of the scope of national rules on the *ex ante* control of concentrations.

Recital 15 of that regulation, which deals with all referral mechanisms, states that the Commission acquires the power to examine and deal with a concentration 'on behalf of' a requesting Member State or requesting Member States. The language of that recital is hard to reconcile with the interpretation advocated by the Commission and adopted by the General Court, according to which that article confers competence on the Commission to scrutinise certain concentrations that affect competition in the 'internal market' in general, regardless of the condition referred to in paragraph 182 above that the concentration for which referral is sought must threaten significantly to affect competition 'within the territory of the Member State or States' making that request.

In addition, it should be pointed out that recital 15 refers to 'other Member States which are also competent to review the concentration'. That reference makes sense only if the competence of a Member State to scrutinise a concentration is a prerequisite for that Member State to be able to request the referral of that concentration to the Commission or for it to join such a request.

In the third place, both the historical interpretation and the contextual interpretation of Regulation No 139/2004 reveal that the referral mechanism now set out in Article 22 of that regulation pursues only two primary objectives. The first objective which prompted the introduction of the referral mechanism in Regulation No 4064/89, referred to at the time as the 'Dutch clause', was to permit the scrutiny of concentrations that could distort competition locally, where the Member State in question does not have any national merger control rules. The second objective, introduced when Regulation No 4064/89 was amended by Regulation No 1310/97 and then reinforced by the adoption of Regulation No 139/2004, is, as has been pointed out in paragraphs 192 and 193 above, to extend the 'one-stop shop' principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national level and thereby to enhance legal certainty for undertakings.

By contrast, it has not been established that that mechanism was intended to remedy deficiencies in the control system inherent in a scheme based principally on turnover thresholds, which is, by definition, incapable of covering all potentially problematic concentrations.

It follows from those considerations that the General Court erred in inferring from the recitals of Regulation No 139/2004 that Article 22 of that regulation constitutes a 'corrective mechanism' for the effective control of all concentrations with significant effects on the structure of competition in the European Union.

That interpretation is, moreover, inconsistent with a number of objectives which Regulation No 139/2004, taken as a whole, seeks to pursue.

Viewed from a systemic perspective, it can be inferred from the recitals of Regulation No 139/2004 that, although that regulation seeks to establish 'a specific legal instrument ... to permit effective control of all concentrations in terms of their effect on the structure of competition' (recital 6), it seeks also to establish an effective and predictable control system, taking into account the need for legal certainty and based on the 'one-stop shop' principle (recitals 8 and 11). That system is based both on a clear allocation of the tasks assigned to the Commission and the Member States and on a precise definition of the notification and suspension conditions imposed on the parties to a concentration (see, to that effect, judgment of 18 December 2007, *Cementbouw Handel & Industrie v Commission*, C-202/06 P, EU:C:2007:814, paragraphs 35 to 37 and the case-law cited).

To that end, similar to Regulation No 4064/89, the initial regulation on the control of concentrations, Regulation No 139/2004 contains provisions which, for reasons of legal certainty and in the interests of the undertakings concerned, have the purpose of limiting the duration of the control procedures which the Commission must carry out. In that regard, the EU legislature wished to ensure a control of mergers within deadlines compatible with both the requirements of sound administration and the requirements of the business world (see, to that effect, judgment of 22 June 2004, *Portugal v Commission*, C-42/01, EU:C:2004:379, paragraphs 51 and 53 and the case-law cited).

The interpretation of Article 22 of Regulation No 139/2004 advocated by the Commission, as endorsed by the General Court, is liable to upset the balance between the various objectives pursued by that regulation.

In particular, that interpretation undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration.

Although Regulation No 139/2004 does in fact seek to establish a control system in respect of concentrations of undertakings that are potentially harmful to competition, it seeks at the same time to establish, first, a clear allocation of powers between the Commission and the national competition authorities, and second, an effective and predictable system of prior control for the undertakings concerned. It is by taking account of all those objectives and striking a balance between them that all the provisions of that regulation and, in particular, the referral mechanism set out in Article 22 thereof must be considered.

In that context, it must be borne in mind that, in the scheme of the systems of prior control of concentrations of undertakings successively envisaged at EU level, the thresholds set for determining whether or not a transaction must be notified are of cardinal importance. Undertakings that are potentially subject to notification and standstill obligations must be able easily to determine whether their proposed transaction must be the subject of a preliminary examination and, if so, by which authority, and when a decision of that authority relating to that deal may be expected.

Determining the competence of the national competition authorities by reference to criteria relating to turnover is an important guarantee of foreseeability and legal certainty for the undertakings concerned, which must be able easily and quickly to identify to which authority they must turn, and within what time limit and in what form, particularly as regards the language and content of the information required, they must refer the matter to the Commission when they participate in a concentration.

As the Advocate General observes, in essence, in points 206 to 213 of his Opinion, first, an informal notification of a concentration to each of the national competition authorities in the Member States and in the other States party to the EEA Agreement, as suggested by the Commission, would be inconsistent with the objective of effectiveness pursued by Regulation No 139/2004. Second, if the interpretation of Article 22 of that regulation envisaged by the Commission were to be accepted, the procedural requirements to which undertakings would be subject would be particularly difficult to define, which would not be consistent with the objective of that regulation of taking into consideration the need of undertakings for legal certainty.

In the fourth place, the need to permit effective control of all concentrations with significant effects on the structure of competition in the European Union cannot, in any event, lead to the scope of Regulation No 139/2004 being extended.

In that regard, it is important to point out that, since the adoption of Regulation No 4064/89, which was succeeded by Regulation No 139/2004, the European Union has had specific rules applicable to concentrations that may significantly impede effective competition in the internal market or in a substantial part of it.

Those regulations, based on Articles 103 and 352 TFEU (formerly Articles 83 and 308 EC), provide, more specifically, for prior control, based on a system of mandatory notification, of all concentrations exceeding the prescribed thresholds. Those regulations thus form part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is not distorted in the internal market of the European Union (judgment of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 31).

However, as the Court has held, Article 21(1) of Regulation No 139/2004 does not preclude the competition authority of a Member State from regarding a concentration of undertakings which has no European dimension within the meaning of Article 1 thereof, and which is below the thresholds for mandatory *ex ante* control laid down in national law, as constituting, for example, an abuse of a dominant position prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope. Regulation No 139/2004 cannot preclude a concentration operation with a non-European dimension, such as the concentration at issue, from being subject to a control by the national competition authorities and by the national courts, on the basis of the direct effect of Article 102 TFEU, having recourse to their own procedural rules (judgment of 16 March 2023, *Towercast*, C-449/21, EU:C:2023:207, paragraphs 50 and 53).

In the fifth and last place, as the Advocate General observed, in essence, in points 216 and 218 of his Opinion, it is apparent that the broad interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004 adopted by the General Court, which potentially entails an extension of the scope of that regulation and of the Commission's competence to review concentrations, is at odds with the principle of institutional balance, characteristic of the institutional structure of the European Union, deriving from Article 13(2) TEU, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions (judgment of 9 April 2024, *Commission v Council (Signing of international agreements)*, C-551/21, EU:C:2024:281, paragraph 62 and the case-law cited).

As has been pointed out in paragraph 183 above, a specific legislative procedure was provided for with a view to revising the thresholds which define the scope of that regulation. Therefore, even if the effectiveness of the thresholds determining competence on the basis of turnover provided for in Regulation No 139/2004 were to prove insufficient to scrutinise some transactions capable of significantly affecting competition, it is for the EU legislature alone to review those thresholds or to provide for a safeguard mechanism enabling the Commission to scrutinise such a transaction.

Moreover, even assuming that the developments observed in some markets, involving, in particular, innovative undertakings which play or are capable of playing an important competitive role despite the fact that they generate little or no turnover at the time of the concentration, warrant extending the sphere of transactions that merit prior examination, it is open to the Member States to revise downwards their own thresholds determining competence based on turnover as laid down by national legislation.

It follows from all those considerations that the General Court erred in law in its interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004, by holding that the Member States may, under the conditions set out therein, make a request under that provision irrespective of the scope of their national rules on the *ex ante* control of concentrations. The General Court therefore erred in holding that the Commission had been right, by the decisions at issue, to accept the referral request and the requests to join under Article 22 of Regulation No 139/2004.

Having regard to the fact that the first ground of the appeals is well founded, the judgment under appeal must be set aside, without there being any need to examine the other grounds of appeal.

The action before the General Court

In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, in the event that the decision of the General Court is quashed, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

That is so in the present case, since the pleas in law of the action seeking the annulment of the decisions at issue and of the information letter were the subject of an exchange of arguments before the General Court and examining them does not require the adoption of any additional measure of organisation of procedure or of inquiry.

In that regard, it is sufficient to note that, for the reasons set out in paragraphs 121 to 218 above, the decisions at issue must be annulled, since the Commission could not rely on Article 22 of Regulation No 139/2004 to examine the concentration at issue. The Commission misinterpreted Regulation No 139/2004 by finding, in those decisions, that it could accept a request under Article 22 of that regulation in a situation where Member States making that request are not entitled, under their national merger control rules, to examine the concentration which is the subject of that request.

The claim for annulment of the referral request and of the information letter must, by contrast, be rejected.

As regards, in the first place, the information letter, which does not set out the Commission's final position on the examination of the concentration at issue and does not definitively subject that concentration to the standstill obligation laid down in Article 7 of Regulation No 139/2004, must be regarded as an intermediate and preparatory measure *vis-à-vis* the decisions at issue, which is not open to challenge.

In the second place, as regards the referral request, it must also be declared inadmissible, in the absence of any head of claim directed against it in the action at first instance.

Costs

Under Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

Article 138(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

Since the Commission has essentially been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by Illumina and Grail, relating, in accordance with the forms of order sought by them, to both the proceedings at first instance and the appeal proceedings. The Commission must also be ordered to pay the costs incurred by Biocom California in connection with its intervention in Case C-611/22 P, in accordance with the form of order sought by it.

Under Article 140(1) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) thereof, the Member States and EU institutions which have intervened in the proceedings are to bear their own costs. In accordance with that provision, the Republic of Estonia, the Hellenic Republic, the French Republic and the Kingdom of the Netherlands must be ordered to bear their own costs.

According to Article 140(2) of those rules, also applicable to appeal proceedings by virtue of Article 184(1) thereof, the EFTA Surveillance Authority is to bear its own costs if it has intervened in the proceedings.

Consequently, as an intervener in the present appeals, the EFTA Surveillance Authority must bear its own costs. On those grounds, the Court (Grand Chamber) hereby:

Sets aside the judgment of the General Court of the European Union of 13 July 2022, *Illumina v Commission* (T-227/21, EU:T:2022:447);

Annuls Decision C(2021) 2847 final of the European Commission of 19 April 2021, accepting the request of the Autorité de la concurrence française (French Competition Authority) to examine the concentration relating to the acquisition by Illumina Inc. of sole control over Grail LLC (Case COMP/M.10188 – Illumina/Grail);

Annuls Commission Decisions C(2021) 2848 final, C(2021) 2849 final, C(2021) 2851 final, C(2021) 2854 final and C(2021) 2855 final of 19 April 2021, accepting the requests of the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities to join that referral request;

Dismisses the appeals as to the remainder;

Orders the European Commission to pay, in addition to its own costs, those incurred, first, by Illumina Inc. and Grail LLC at first instance and in the appeal proceedings and, second, by Biocom California in the appeal proceedings in Case C-611/22 P;

Declares that the Republic of Estonia, the Hellenic Republic, the French Republic, the Kingdom of the Netherlands and the EFTA Surveillance Authority are to bear their own costs.

Lenaerts Bay Larsen Prechal

Jürimäe Lycourgos Biltgen

Rodin Xuereb Rossi

Jääskinen Wahl Ziemele

Passer

Delivered in open court in Luxembourg on 3 September 2024.

A. Calot Escobar K. Lenaerts

Registrar President

* Language of the case: English.