JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

13 July 2022 (*)

(Competition – Concentrations – Pharmaceutical industry market – Article 22 of Regulation (EC) No 139/2004 – Referral request from a competition authority not having jurisdiction under national law to examine the concentration – Commission decision to examine the concentration – Commission decisions accepting requests from other national competition authorities to join the referral request – Competence of the Commission – Time limit for submitting the referral request – Concept of 'made known' – Reasonable time – Legitimate expectations – Public statements by the Vice-President of the Commission – Legal certainty)

In Case T-227/21,

Illumina, Inc., established in Wilmington, Delaware (United States), represented by D. Beard, Barrister, and P. Chappatte, lawyer,

applicant,

supported by

Grail LLC, formerly Grail, Inc., established in Menlo Park, California (United States), represented by D. Little, Solicitor, J. Ruiz Calzado, J.M. Jiménez-Laiglesia Oñate and A. Giraud, lawyers,

intervener,

v

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

defendant,

supported by

Hellenic Republic, represented by K. Boskovits, acting as Agent,

by

French Republic, represented by T. Stéhelin, P. Dodeller, J.-L. Carré and E. Leclerc, acting as Agents,

by

Kingdom of the Netherlands, represented by M. Bulterman and P. Huurnink, acting as Agents,

and by

EFTA Surveillance Authority, represented by C. Simpson, M. Sánchez Rydelski and M.-M. Joséphidès, acting as Agents,

interveners,

APPLICATION under Article 263 TFEU seeking the annulment, first, of Commission Decision C(2021) 2847 final 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, Inc. (Case COMP/M.10188 – Illumina/Grail), 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, and third, of the Commission's letter of 11 March 2021 informing Illumina and Grail of that referral request,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of G. De Baere, President, V. Kreuschitz (Rapporteur), U. Öberg, R. Mastroianni and G. Steinfatt, Judges,

Registrar: S. Jund, Administrator,

having regard to the written part of the procedure and further to the hearing on 16 December 2021,

gives the following

Judgment

Legal context

1 Article 1 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), entitled 'Scope', provides:

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

2. A concentration has a [European] dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate [EU]-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 [EU]-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 [European] dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

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

(c) 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

(d) the aggregate [EU]-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 [EU]-wide turnover within one and the same Member State.

…'

2 In accordance with Article 3(1) of Regulation No 139/2004, a concentration is deemed to arise where a change of control on a lasting basis results from:

‘(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) 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.’

3 Article 4 of Regulation No 139/2004 provides:

‘1. Concentrations with a [European] 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 [European] 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 [European] 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.'

4 Article 9 of Regulation No 139/2004 is worded 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) a concentration threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market, or

(b) 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:

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

(b) 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 [internal] 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.

…'

5 Article 22 of Regulation No 139/2004, 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 [European] 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 not 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.’

Background to the dispute

The undertakings concerned and the concentration at issue

6 The applicant, Illumina, Inc., supplies sequencing- and array-based solutions for genetic and genomic analysis.

7 On 20 September 2020, Illumina entered into an agreement and plan of merger to acquire sole control of Grail LLC (formerly Grail, Inc.), which develops blood tests for the early detection of cancers, in which it already held a 14.5% stake (‘the concentration at issue’).

8 On 21 September 2020, Illumina and Grail (‘the undertakings concerned’) issued a press release announcing that concentration.

The lack of notification

9 Since the turnover of the undertakings concerned did not exceed the relevant thresholds, in particular given the fact that Grail did not generate any revenue in any EU Member State or elsewhere in the world, the concentration at issue did not have a European dimension for the purpose of Article 1 of Regulation No 139/2004 and was not therefore notified to the European Commission pursuant to Article 4(1) of that regulation.

10 Nor was the concentration at issue notified in the EU Member States or in States party to the Agreement on the European Economic Area (OJ 1994 L 1, p. 3), since it did not fall within the scope of their national merger control rules.

The referral request to the Commission

11 On 7 December 2020, the Commission received a complaint relating to the concentration at issue. On 17 December 2020, a videoconference meeting was held between the Commission and the complainant, at which the complainant described its concerns about that concentration. Following that meeting, the Commission had additional exchanges with the complainant and, in order to clarify their potential competence to examine that concentration, with the German, Austrian, Slovenian and Swedish competition authorities. It was also in contact with the Competition and Markets Authority (CMA) (United Kingdom), which had also received the complaint. The Commission reached the preliminary conclusion that the concentration at issue could be the subject of a referral under Article 22(1) of Regulation No 139/2004, in particular in view of the fact that Grail's importance for competition was not reflected in its turnover.

12 On 19 February 2021, the Commission informed the Member States of the concentration at issue, first, by presenting it to the national competition authorities within the framework of the Merger Working Group of the European Competition Network and, second, by sending them a letter in accordance with Article 22(5) of Regulation No 139/2004 ('the invitation letter'). In that letter, the Commission explained the reasons why it found, prima facie, that the concentration appeared to satisfy the conditions laid down in Article 22(1) of that regulation, and invited the Member States to submit a referral request under the latter provision. Subsequently, the Commission had exchanges with a number of national competition authorities in order to discuss that letter.

13 By email of 26 February 2021, the Commission contacted the applicant in order to propose a telephone conversation regarding the concentration at issue. In the course of that conversation, which took place on 4 March 2021, the Commission informed the legal representative of each of the undertakings concerned of the invitation letter and of the possibility of a referral request under Article 22(1) of Regulation No 139/2004.

14 On 9 March 2021, the Autorité de la concurrence française (French Competition Authority, 'the ACF') asked the Commission, pursuant to Article 22(1) of Regulation No 139/2004, to examine the concentration at issue ('the referral request').

15 On 10 March 2021, the Commission, in accordance with Article 22(2) of Regulation No 139/2004, informed the competition authorities of the other Member States and the EFTA Surveillance Authority of the referral request. On 11 March 2021, the Commission also informed the undertakings concerned of the referral request, reminding them that the concentration at issue could not be implemented provided that, and in so far as, the standstill obligation laid down in Article 7 of Regulation No 139/2004, read in conjunction with the second sentence of the first subparagraph of Article 22(4) of that regulation, was applicable ('the information letter').

16 By letters of 24, 26 and 31 March 2021, the Belgian, Greek, Icelandic, Dutch and Norwegian competition authorities requested to join the referral request, pursuant to Article 22(2) of Regulation No 139/2004 ('the requests to join').

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

18 On 31 March 2021, the Commission published the Guidance on the application of the referral mechanism set out in Article 22 of [Regulation No 139/2004] to certain categories of cases (OJ 2021 C 113, p. 1; 'the Article 22 guidance').

19 By decision of 19 April 2021, the Commission accepted the referral request ('the contested decision'). By decisions of the same day concerning, respectively, Belgium, Greece, Iceland, the Netherlands and

Norway, it also accepted the requests to join (referred to below together with the contested decision as ‘the contested decisions’).

The contested decisions

Compliance with the time limit of 15 working days

20 The Commission found that the referral request of 9 March 2021 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, since the concentration at issue had, by means of the invitation letter, been brought to the attention of the French Republic on 19 February 2021 (paragraphs 20 and 29 of the contested decision). According to the Commission, it was that letter, which was based on thorough research, on a targeted analysis and on information provided by the complainant, which enabled the French Republic to carry out a preliminary assessment of the conditions laid down in Article 22(1) of Regulation No 139/2004 (paragraphs 26 and 28 of the contested decision).

21 The Commission also found that the requests to join complied with the time limit laid down in the second subparagraph of Article 22(2) of Regulation No 139/2004, since the Kingdom of Belgium, the Hellenic Republic, the Republic of Iceland, the Kingdom of the Netherlands and the Kingdom of Norway had lodged those requests on 24, 26 and 31 March 2021, and therefore within a time limit of 15 working days of the date on which it had informed them, by its letter of 10 March 2021, of the referral request (paragraphs 21 and 22 of the decisions concerning Belgium, Iceland, the Netherlands and Norway and paragraphs 16 and 17 of the decision concerning Greece).

The effect on trade between Member States and the threat of a significant effect on competition

22 The Commission found that the concentration at issue was, first, capable of affecting trade between Member States (paragraphs 39 to 45 of the contested decision, paragraphs 33 to 39 of the decisions concerning Belgium, Iceland, the Netherlands and Norway, and paragraphs 28 to 34 of the decision concerning Greece), and, second, threatened significantly to affect competition in the French, Greek, Icelandic, Belgian, Norwegian and Dutch territories as parts of the European Economic Area (EEA) (paragraphs 51 and 80 of the contested decision, paragraphs 49 and 78 of the decision concerning Belgium, paragraphs 41 and 70 of the decision concerning Greece, paragraphs 46 and 75 of the decisions concerning Iceland and Norway, and paragraphs 50 and 79 of the decision concerning the Netherlands).

The appropriateness of the referral

23 The Commission found that the concentration at issue satisfied the criteria for referral under Article 22 of Regulation No 139/2004 (paragraph 109 of the contested decision, paragraph 107 of the decision concerning Belgium, paragraph 99 of the decision concerning Greece, paragraph 104 of the decisions concerning Iceland and Norway, and paragraph 108 of the decision concerning the Netherlands).

24 In the first place, the Commission found that the conditions set out in paragraph 45 of its Notice on Case Referral in respect of concentrations (OJ 2005 C 56, p. 2, ‘the referral notice’) were satisfied (paragraph 85 of the contested decision, paragraph 83 of the decision concerning Belgium, paragraph 75 of the decision concerning Greece, paragraph 80 of the decisions concerning Iceland and Norway, and paragraph 84 of the decision concerning the Netherlands). Furthermore, the NGS-based cancer sequencing tests are perceived as a major improvement in the battle against cancer, which is one of the major priorities of the Commission in the area of health. Coherent treatment of the investigative efforts made in that regard at European Union level is thus desirable (paragraph 84 of the contested decision, paragraph 82 of the decision concerning Belgium, paragraph 74 of the decision concerning Greece, paragraph 79 of the decisions concerning Iceland and Norway, and paragraph 83 of the decision concerning the Netherlands).

25 In the second place, the Commission recalled that the Article 22 guidance clarified how the criteria set out in the referral notice should be applied in cases where the national authorities were not competent to examine a concentration. According to the Commission, the concentration at issue falls within the scope of that guidance since it involves the acquisition of an undertaking whose importance for

competition is not reflected in its turnover (paragraphs 86 and 87 of the contested decision, paragraphs 84 and 85 of the decision concerning Belgium, paragraphs 76 and 77 of the decision concerning Greece, paragraphs 81 and 82 of the decisions concerning Iceland and Norway, and paragraphs 85 and 86 of the decision concerning the Netherlands).

26 In addition, the Commission stated that the concentration at issue had not been implemented or notified in other Member States (paragraph 88 of the contested decision, paragraph 86 of the decision concerning Belgium, paragraph 78 of the decision concerning Greece, paragraph 83 of the decisions concerning Iceland and Norway, and paragraph 87 of the decision concerning the Netherlands).

27 In the third place, the Commission examined the arguments of the undertakings concerned relating to compliance with the general principles of EU law and the rights of the defence (paragraph 89 of the contested decision, paragraph 87 of the decision concerning Belgium, paragraph 79 of the decision concerning Greece, paragraph 84 of the decisions concerning Iceland and Norway, and paragraph 88 of the decision concerning the Netherlands).

28 First, as regards its jurisdiction, the Commission took the view that Article 22 of Regulation No 139/2004 allowed Member States to request the referral to the Commission of a concentration case 'over which they do not have jurisdiction', provided that the legal conditions laid down in that provision were satisfied. As pointed out in the Article 22 guidance, that conclusion follows from a literal interpretation of that provision and is confirmed by its legislative history, by the purpose, general structure and contextual interpretation of Regulation No 139/2004, and by the Commission's practice.

29 In particular, Article 22 of Regulation No 139/2004, which sets out exhaustively the legal conditions which referral requests must satisfy, does not require that 'the referring Member State has jurisdiction over the [concentration concerned]', but recognises both explicitly and implicitly that that request may be made by a Member State in which notification of the concentration concerned is not required. The Commission recalled that, since the adoption of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), the objective was to enable it to review concentrations that could bring anticompetitive harm in the internal market which could not be examined by the authorities of the Member States. A restrictive interpretation of Article 22 of Regulation No 139/2004 could have the effect of preventing the review of such concentrations and their cross-border effects. A Member State lacking a merger control system could already have requested a referral to the Commission under Regulation No 4064/89, as confirmed by the judgment of 15 December 1999, *Kesko* v *Commission* (T-22/97, EU:T:1999:327). The Commission recalled that it has accepted that Member States without a merger control system join a referral request from another Member State. According to the Commission, if the EU legislature had wished to restrict the scope of application of Article 22 of Regulation No 139/2004 by excluding such Member States, it could have used the same criterion of jurisdiction as that laid down in Article 4(5) of that regulation (paragraph 90 of the contested decision, paragraph 88 of the decision concerning Belgium, paragraph 80 of the decision concerning Greece, paragraph 85 of the decisions concerning Iceland and Norway, and paragraph 89 of the decision concerning the Netherlands).

30 Second, as regards the principle of subsidiarity, as referred to in recital 8 of Regulation No 139/2004, the Commission recalled that the EU legislature had decided that a concentration case may be referred to it under the conditions laid down in Article 22 of that regulation. The principle of subsidiarity applies only to matters which do not fall within the exclusive competence of the European Union, where it is necessary to ascertain whether the proposed action cannot be sufficiently achieved by the Member States. In the absence of jurisdiction, the Member States could not have examined the concentration at issue (paragraph 92 of the contested decision, paragraph 90 of the decision concerning Belgium, paragraph 82 of the decision concerning Greece, paragraph 87 of the decisions concerning Iceland and Norway, and paragraph 91 of the decision concerning the Netherlands).

31 Third, as regards the protection of the legitimate expectations of the undertakings concerned, the Commission noted that the right of the Member States to refer, under Article 22 of Regulation No 139/2004, concentration cases to it which did not require notification in those States has always existed. Its past practice of discouraging Member States not having jurisdiction from submitting a referral request does not mean that it excluded the application of that provision to any future case. On

the contrary, in its White Paper of 9 July 2014 towards more effective [European Union] merger control (COM/2014/0449 final) ('the 2014 White Paper'), that right was explicitly confirmed. The Commission found that it had not given any precise, unconditional and consistent assurances excluding certain referral requests in the future. In her speech on 11 September 2020, the Vice-President of the Commission did not provide such assurances either, but stated that it was time to change that past practice and that that would not happen overnight (paragraph 94 of the contested decision, paragraph 92 of the decision concerning Belgium, paragraph 84 of the decision concerning Greece, paragraph 89 of the decisions concerning Iceland and Norway, and paragraph 93 of the decision concerning the Netherlands).

32 Fourth, as regards legal certainty, the Commission found that the time elapsed since the announcement of the concentration at issue and the potential adverse effects on the undertakings concerned were outweighed by the potentially significant adverse effects on competition of that concentration, which merit a review (paragraph 100 of the contested decision, paragraph 98 of the decision concerning Belgium, paragraph 90 of the decision concerning Greece, paragraph 95 of the decisions concerning Iceland and Norway, and paragraph 99 of the decision concerning the Netherlands).

33 Prima facie, the potential impact of the concentration at issue on competition in the internal market and on European consumers is significant. The Commission stated that it became aware of that concentration in December 2020 by means of the complaint. It immediately examined the circumstances of the case and, after having been informed that the concentration did not exceed the relevant thresholds of any of the Member States, sent the invitation letter to those Member States. Furthermore, in view of the fact that the concentration at issue could not be implemented because of ongoing proceedings before the United States courts, the impact on the undertakings concerned of the time elapsed was limited (paragraphs 97 to 99 of the contested decision, paragraphs 95 to 97 of the decision concerning Belgium, paragraphs 87 to 89 of the decision concerning Greece, paragraphs 92 to 94 of the decisions concerning Iceland and Norway, and paragraphs 96 to 98 of the decision concerning the Netherlands).

34 Fifth, as regards the principle of proportionality, the Commission found that the strict interpretation suggested by the undertakings concerned was contrary to the wording of Article 22 of Regulation No 139/2004 and to the purpose and general structure of that provision. Its assessment was consistent with that principle in that it took into account, inter alia, whether the concentration at issue had already been implemented, whether it had been notified in one or more Member States which had not requested its referral and whether it involved a target with a 'significant competitive potential' which was not reflected in its turnover. The Commission stated, in essence, that, of the numerous concentrations with no European dimension within the meaning of Article 1 of Regulation No 139/2004, only a small number, first, satisfied the conditions provided for in Article 22 of that regulation and, second, could be considered appropriate for a referral in accordance with the Article 22 guidance. Such cases could therefore be regarded as exceptional (paragraphs 102 and 103 of the contested decision, paragraphs 100 and 101 of the decision concerning Belgium, paragraphs 92 and 93 of the decision concerning Greece, paragraphs 97 and 98 of the decisions concerning Iceland and Norway, and paragraphs 101 and 102 of the decision concerning the Netherlands).

35 Sixth, the Commission rejected as unfounded the arguments of the undertakings concerned that their right to be heard and the principles of fairness and good administration had been infringed. It pointed out that it had informed the applicant on 26 February 2021 that its invitation letter had been sent, that is to say, before receiving the referral request. The Commission found that its approach was therefore consistent with point 27 of the Article 22 guidance, according to which, if a referral request is being considered, the Commission is to inform the parties to the transaction as soon as possible. The purpose of that paragraph is, moreover, to point out any obligation to suspend the concentration. Furthermore, the Commission informed the undertakings concerned in good time of the referral request, which was sent to them promptly after it had been received (paragraphs 104 to 108 of the contested decision, paragraphs 102 to 106 of the decision concerning Belgium, paragraphs 94 to 98 of the decision concerning Greece, paragraphs 99 to 103 of the decisions concerning Iceland and Norway, and paragraphs 103 to 107 of the decision concerning the Netherlands).

Procedure and forms of order sought

36 By application lodged at the Court Registry on 28 April 2021, the applicant brought the present action.

37 By separate document lodged at the Court Registry on the same day, the applicant requested, in accordance with Articles 151 and 152 of the Rules of Procedure of the General Court, that the present action be adjudicated under an expedited procedure. By decision of 3 June 2021, the Court granted that request.

38 By document lodged at the Court Registry on 7 June 2021, Grail, Inc. applied to intervene in these proceedings in support of the form of order sought by the applicant. By order of 2 July 2021, the President of the Third Chamber (Extended Composition) of the Court granted it leave to intervene. By way of a measure of organisation of procedure of the same date, Grail, Inc. was authorised, pursuant to Article 154(3), in conjunction with Article 145(1) and Article 89(3)(b) of the Rules of Procedure, to lodge a statement in intervention.

39 On a proposal by the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

40 By documents lodged at the Court Registry on 22 June, 6 July, 21 July and 29 July 2021 respectively, the Kingdom of the Netherlands, the French Republic, the Hellenic Republic and the EFTA Surveillance Authority sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decisions of 12 and 22 July and 6 August 2021, and by order of 25 August 2021, the President of the Third Chamber (Extended Composition) of the Court granted them leave to intervene. By measures of organisation of procedure, respectively, of 16 July, 23 July, 13 August and 25 August 2021, the Kingdom of the Netherlands, the French Republic, the Hellenic Republic and the EFTA Surveillance Authority were authorised, pursuant to Article 154(3) of the Rules of Procedure, read in conjunction with Article 145(1) and Article 89(3)(b) of those rules, to lodge a statement in intervention.

41 By document lodged at the Court Registry on 13 August 2021, the Computer & Communications Industry Association sought leave to intervene in these proceedings in support of the form of order sought by the applicant. By order of 6 October 2021, the President of the Third Chamber (Extended Composition) of the Court dismissed that application for leave to intervene.

42 By document lodged at the Court Registry on 18 August 2021, the applicant informed the Court that it had acquired, on the same day, all the shares in Grail, Inc., while putting in place a hold separate arrangement.

43 By document lodged at the Court Registry on 5 October 2021, the applicant submitted a request for measures of organisation of procedure. The Commission lodged its observations on that request on 19 October 2021. On 29 October 2021, the applicant submitted comments on those observations of the Commission.

44 The interveners each lodged their statements within the prescribed period.

45 On 7 October 2021, the Commission requested that Grail be removed as an intervener. The applicant, the Hellenic Republic and Grail submitted their observations on that request on 3 and 4 November 2021.

46 Since two members of the Chamber had ceased to hold office and a new President had been elected, the President of the Third Chamber, by decision of 19 October 2021, pursuant to Article 17(2) of the Rules of Procedure, read in conjunction with Article 27(5) of those rules, designated two other Judges to complete the formation of the Chamber.

47 On 11 November 2021, the Court (Third Chamber, Extended Composition) decided to open the oral part of the procedure.

48 On the same day, the Court, by way of measures of organisation of procedure pursuant to Article 89(3)(a) and (b) of the Rules of Procedure, put written questions to the Commission on certain aspects of the dispute. The Commission gave answers to those questions within the prescribed period.

49 By document lodged at the Court Registry on 6 December 2021, the applicant submitted a request for measures of organisation of procedure. The Commission, the EFTA Surveillance Authority, Grail, the French Republic and the Kingdom of the Netherlands lodged their observations on that request on 9 and 10 December 2021.

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

51 The applicant, supported by Grail, claims that the Court should:

– annul the contested decisions and the information letter;

– order the Commission to pay the costs.

52 The Commission, supported by the EFTA Surveillance Authority, the Hellenic Republic, the French Republic and the Kingdom of the Netherlands, contends that the Court should:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as in part manifestly inadmissible and in part unfounded;

– order the applicant to pay the costs.

Law

The request to withdraw Grail's status as intervener

53 The Commission, supported by the Hellenic Republic, submits, in essence, that, following the applicant's letter of 18 August 2021 informing the Court that, on the same day, it acquired all the shares in Grail, Inc. (see paragraph 42 above), Grail, Inc. became Grail LLC, that is to say, a new entity wholly controlled by the applicant, so that Grail lost its status as intervener which had been accorded to it by the order of 2 July 2021 (see paragraph 38 above). Thus, from both an economic and a legal point of view, the intervention has become devoid of purpose and Grail LLC's interests are now indissociable from those of the applicant, which represents them fully in the present proceedings. In the absence of a further application by Grail LLC for leave to intervene within the period laid down in Article 143(1) of the Rules of Procedure, the Commission submits that Grail's status as intervener should be formally withdrawn.

54 The applicant and Grail dispute the Commission's arguments, since Grail LLC is the legal successor to Grail, Inc., whose interest in the result of the present case subsists. According to the Commission's own statements, Grail LLC is a separate, independent and autonomous entity of the applicant, which pursues separate operations and a separate strategy under independent management.

55 First, it is sufficient to note that Grail LLC is a legal person, under United States company law, which is the legal successor to Grail, Inc. Thus, in accordance with settled case-law (see, to that effect, judgment of 21 March 2012, *Marine Harvest Norway and Alsaker Fjordbruk* v *Council*, T-113/06, not published, EU:T:2012:135, paragraphs 24 to 33), on 18 August 2021, Grail LLC succeeded Grail, Inc. as its universal successor in title.

56 In that regard, it has already been held that an action for annulment brought by a legal person may be continued by the universal successor in title, in particular in the case where a legal person ceases to exist and all its rights and obligations are transferred to another person, that universal successor in title being necessarily substituted automatically for its predecessor (see, to that effect, judgment of

21 March 2012, *Marine Harvest Norway and Alsaker Fjordbruk* v *Council*, T-113/06, not published, EU:T:2012:135, paragraph 28 and the case-law cited).

57 Second, even though Grail LLC is, admittedly, wholly controlled by the applicant, the fact remains that it is a separate legal entity having the capacity to be a party to legal proceedings and capable of establishing an interest in the result of the case in accordance with the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, read in conjunction with the first paragraph of Article 53 of that statute. That is all the more true given that the applicant has put in place a hold separate arrangement (see paragraph 42 above) and that the Commission adopted, by Decision C(2021) 7675 final of 29 October 2021 (Case COMP/M.10493 – Illumina/Grail), provisional measures under Article 8(5)(a) of Regulation No 139/2004, requiring Grail LLC to be preserved as a separate, independent and autonomous entity in respect of the applicant, pursuing separate operations and a separate strategy under independent management.

58 It follows that, in the context of the present dispute, in its capacity as universal successor in title, Grail LLC replaced Grail, Inc. as intervener, and the operative part of the order of the President of the Third Chamber (Extended Composition) of the Court of 2 July 2021 (see paragraph 38 above) is applicable. In that regard, it must be pointed out that Grail LLC retains, as the other party to the concentration at issue, its interest in the result of the case in the same way as that established by its predecessor in law, Grail, Inc. (see, to that effect and by analogy, judgment of 21 March 2012, *Marine Harvest Norway and Alsaker Fjordbruk* v *Council*, T-113/06, not published, EU:T:2012:135, paragraph 30).

59 Consequently, the Commission's request to withdraw Grail's status as intervener must be rejected.

Admissibility

60 Without formally raising an objection of inadmissibility under Article 130(1) of the Rules of Procedure, the Commission, supported by the Hellenic Republic and the French Republic, contends that the present action is inadmissible. It submits, first, that the referral request is not an act of the Commission; second, that the information letter was replaced by the contested decision; and, third, that the contested decisions are preparatory acts the illegalities of which could be raised in an action brought against the final decision on the concentration at issue.

61 The applicant, supported by Grail, submits that the present action is admissible.

62 In the first place, as regards the referral request, it is apparent from the abbreviated version of the application, in particular from the omission in paragraph 214 of the head of claim relating to that request, that, under the present expedited procedure, that request is not the subject of the action. Therefore, the Commission's arguments concerning that request are ineffective and must be rejected.

63 In the second place, as regards the contested decisions, it must be recalled that, according to the settled case-law of the Court of Justice, any measures adopted by the institutions of the European Union, whatever their form, which are intended to have binding legal effects, are regarded as challengeable acts, for the purposes of Article 263 TFEU (judgments of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 54; of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 47; and of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission*, C-572/18 P, EU:C:2021:317, paragraph 46).

64 In order to determine whether a contested measure produces binding legal effects, it is necessary to focus on its substance. Those effects must be assessed in accordance with objective criteria, such as the contents of that measure, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the measure (see, to that effect, judgments of 13 February 2014, *Hungary* v *Commission*, C-31/13 P, EU:C:2014:70, paragraph 55; of 25 October 2017, *Romania* v *Commission*, C-599/15 P, EU:C:2017:801, paragraph 48; and of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission*, C-572/18 P, EU:C:2021:317, paragraph 48).

65 In the case of an action for annulment brought by a natural or legal person, the binding legal effects of the contested measure must be capable of affecting the interests of the applicant by bringing about a

distinct change in his or her legal position (see, to that effect, judgments of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 37, and of 25 February 2021, *VodafoneZiggo Group* v *Commission*, C-689/19 P, EU:C:2021:142, paragraph 48 and the case-law cited).

66 Thus, it is in principle those measures which definitively determine the position of an institution upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, that constitute acts open to challenge, and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects. Consequently, intermediate measures setting out an assessment by the institution and whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject matter of an action for annulment (see judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, C-551/19 P and C-552/19 P, EU:C:2021:369, paragraph 39 and the case-law cited).

67 In the present case, the contested decisions were adopted in accordance with the first subparagraph of Article 22(3) of Regulation No 139/2004. It is apparent from that provision that the examination of a concentration by the Commission under that article takes the form of a decision. Under the first sentence of the fourth paragraph of Article 288 TFEU, a ‘decision shall be binding in its entirety’. Therefore, the EU legislature intended to make those decisions binding (see, to that effect and by analogy, judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 44).

68 It should also be noted that the contested decisions subject the concentration at issue to the scope of Regulation No 139/2004, even though it does not have a European dimension within the meaning of Article 1 thereof, with the result that that regulation is not applicable by default. In particular, the effect of the contested decisions is to subject that concentration, in accordance with the first subparagraph of Article 22(4) of that regulation, to Article 2, Article 4(2) to (3), and Articles 5, 6 and 8 to 21 of that regulation, which determine the criteria for assessing that concentration, the Commission’s decision-making powers and any procedure and penalties. Similarly, the standstill obligation laid down in Article 7 of Regulation No 139/2004 is, in accordance with the second sentence of the first subparagraph of Article 22(4) of that regulation, applicable to the concentration at issue by preventing its implementation until it has been declared compatible with the internal market.

69 By contrast, as the applicant submits, in the absence of the contested decisions, the concentration at issue would not be examined by the Commission in the context of Regulation No 139/2004 or be subject to the potential constraints and penalties under that regulation, including the standstill obligation, but could be implemented immediately in the European Union.

70 Therefore, having regard to the fact that each decision which entails a change in the legal rules applicable to the examination of a concentration is capable of affecting the legal situation of the parties to the transaction concerned, the contested decisions produce binding legal effects vis-à-vis the applicant which are capable of affecting its interests by bringing about a distinct change in its legal situation (see, to that effect, judgment of 30 September 2003, *Cableuropa and Others* v *Commission*, T-346/02 and T-347/02, EU:T:2003:256, paragraphs 61 and 64).

71 Furthermore, by concluding the referral procedure which was triggered by the referral request under Article 22(1) of Regulation No 139/2004, and which made it possible, in accordance with paragraph 2 thereof, for the requests to join to be submitted, the contested decisions definitively establish the Commission’s position on the referral of the concentration at issue. By those decisions, the Commission accepted those requests, taking into account the observations of the undertakings concerned, and consequently decided to examine the concentration at issue. In accordance with the procedure laid down in Article 22 of Regulation No 139/2004, the place of examination of the concentration is thus determined, which results in the transfer of competence for that examination to the Commission (see paragraphs 68 to 70 above). The definitive and irreversible nature of those decisions is confirmed, first, by the period of 10 working days laid down in the first sentence of the first subparagraph of Article 22(3), in which the Commission was required to take a decision on the referral and, second, by the fact that, if it had not adopted a position, it would, in accordance with that provision, have been deemed to have adopted such an examination decision.

72 Thus, the contested decisions bring to an end the referral procedure under Article 22 of Regulation No 139/2004, which is a special procedure distinct from that which enables the Commission to decide on the authorisation or prohibition of a concentration (see, to that effect, judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 11, and of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission*, C-572/18 P, EU:C:2021:317, paragraph 49).

73 Contrary to what is maintained by the Commission and the Hellenic Republic, the contested decisions are not comparable to a decision to initiate the formal investigation procedure under Article 6(1)(c) of Regulation No 139/2004. Since the merger control procedure consists of two stages, a decision adopted on the basis of that provision neither constitutes the culmination of the review procedure nor prejudges the final decision under Article 8 of that regulation. Thus, a decision under Article 6(1)(c) of that regulation is a preparatory step whose sole aim is to initiate enquiries intended to identify the matters which will allow the Commission to rule, by means of a final decision at the end of that procedure, on the compatibility of the transaction with the internal market (see, to that effect, orders of 31 January 2006, *Schneider Electric* v *Commission*, T-48/03, EU:T:2006:34, paragraph 79, and of 27 November 2017, *HeidelbergCement* v *Commission*, T-902/16, not published, EU:T:2017:846, paragraphs 18, 21 and 22 and the case-law cited). By contrast, the contested decisions do not form part of the examination of the compatibility of the concentration at issue with the internal market, but are intended to give final judgment on the referral of that concentration by bringing to an end the special procedure provided for in Article 22 of that regulation (see paragraphs 71 and 72 above). By those decisions, the Commission, setting out the reasons why it found that the conditions laid down in that article were satisfied, accepted the referral request and the requests to join, which has the effect of bringing that concentration within the scope of Regulation No 139/2004 (see paragraph 68 above). Those decisions do not therefore constitute intermediate measures preparing the decision on the substance of the case, but establish the final position of the Commission on the referral request.

74 Moreover, the present action does not require the EU judicature to assess either the Commission's provisional positions or the issues on which the Commission has not yet had the opportunity to state its position, with the result that they cannot anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial (see, to that effect, judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 20; of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 51; and of 15 March 2017, *Stichting Woonpunt and Others* v *Commission*, C-415/15 P, EU:C:2017:216, paragraph 45). In particular, that action is not liable to lead the Court to rule on the question of the compatibility of the concentration at issue with the internal market, which will form the subject matter of the examination procedure provided for in Article 6 of Regulation No 139/2004, but only on the lawfulness of the acceptance of the referral request and of the referral to the Commission under Article 22 of Regulation No 139/2004, and of the change in the applicable legal regime which it entails (see, to that effect and by analogy, judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 52).

75 In any event, even if it were necessary to consider that the contested decisions are intermediate measures prior to the decision terminating the examination procedure initiated under Article 6 of Regulation No 139/2004, it should be recalled that an intermediate measure which has independent legal effects may form the subject matter of an action for annulment in so far as the illegality attaching to that measure cannot be remedied in an action brought against the final decision for which it represents a preparatory step (judgment of 3 June 2021, *Hungary* v *Parliament*, C-650/18, EU:C:2021:426, paragraph 46). Contrary to what the Commission maintains, in so far as the contested decisions entail the application of Regulation No 139/2004 to the concentration at issue and, in particular, in so far as the application of Article 7 of Regulation No 139/2004, read in conjunction with the second sentence of the first subparagraph of Article 22(4) thereof, has suspensory effect (see paragraph 68 above), an action for annulment of the decision terminating the examination procedure initiated under Article 6 of Regulation No 139/2004 would not make it possible to nullify the consequences of the delay in implementing the concentration at issue due to compliance with that standstill obligation. It must therefore be possible for the contested decisions to be the subject of an action for annulment.

76 Consequently, the contested decisions constitute challengeable acts within the meaning of Article 263 TFEU.

77 That conclusion cannot be called into question by the argument which the Commission bases on the judgment of 15 December 1999, *Kesko* v *Commission* (T-22/97, EU:T:1999:327). First, in that judgment, the Court did not rule on the question whether a decision accepting a referral request from a Member State constituted a challengeable act. Second, nor was it necessary to take account of the binding legal effects of such a decision, since that judgment concerned, as the Commission itself acknowledges, an action brought against a decision on the substance, namely a declaration of incompatibility with the internal market on the basis of Article 8(3) of Regulation No 4064/89, which prevented the implementation of the concentration concerned on a permanent basis. Third, in the case which gave rise to the judgment of 15 December 1999, *Kesko* v *Commission* (T-22/97, EU:T:1999:327), the infringement of Article 22 of that regulation was relied on in order to challenge the Commission's competence to initiate proceedings under Article 6(1)(c) of that regulation, and concerned the question of whether the Commission had ascertained to the requisite legal standard that the referral request was made by a Member State. That judgment therefore addressed a specific question which was not comparable to that which arises in the present case.

78 The present action is therefore admissible in so far as it is directed against the contested decisions.

79 In the third place, as regards the information letter, it should be recalled that that letter informed the undertakings concerned of the referral request, in accordance with the first subparagraph of Article 22(2) of Regulation No 139/2004. Admittedly, that information triggers, under the first subparagraph of Article 22(4) of that regulation, the standstill obligation laid down in Article 7 of that regulation. However, as the Commission rightly submits, that letter 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 that obligation, but only provisionally in order to safeguard the effectiveness of any referral decision. That same letter was followed, in the present case, by the adoption of the contested decisions, by which the Commission accepted the referral and definitively brought the concentration at issue within the scope of that regulation, including the standstill obligation (see paragraphs 68 and 72 above). The information letter therefore constitutes only an intermediate step in the context of the referral procedure which ends with the Commission's final position on the referral request, pursuant to the first subparagraph of Article 22(3) of Regulation No 139/2004.

80 Therefore, the information letter constitutes an intermediate and preparatory measure for the contested decisions, within the meaning of the case-law cited in paragraph 66 above. Accordingly, any unlawfulness vitiating that letter may, in accordance with the case-law, be relied on in support of an action brought against those decisions, which are, for their part, challengeable acts (see, to that effect, judgments of 11 November 1981, *IBM* v *Commission*, 60/81, EU:C:1981:264, paragraph 12, and of 22 April 2021, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission*, C-572/18 P, EU:C:2021:317, paragraph 50).

81 Consequently, the present action is inadmissible in so far as it is directed against the information letter.

82 In the light of all the foregoing, the present action must be declared admissible in so far as it seeks the annulment of the contested decisions and inadmissible in so far as it is directed against the information letter.

Substance

Summary of the grounds for annulment

83 In the present expedited procedure, the applicant puts forward three pleas in law in support of its action.

84 By the first plea, the applicant claims that the Commission lacks competence to initiate, under Article 22 of Regulation No 139/2004, an investigation into a concentration which does not satisfy the conditions enabling the Member State which has requested its referral to the Commission to examine it under its national merger control rules. By the second plea, the applicant submits that the referral of the

concentration at issue was requested belatedly and, in the alternative, that the Commission's delay in sending the invitation letter undermines the principle of legal certainty and the right to good administration. By the third plea, the applicant complains that the Commission infringed the principles of legal certainty and the protection of legitimate expectations, since the Member of the Commission responsible for competition had stated that the Commission's policy would not change until the Article 22 guidance was in place.

The first plea in law, alleging lack of competence on the part of the Commission

85 The applicant, supported by Grail, submits that the Commission misinterpreted Regulation No 139/2004 by finding, in the contested decisions, that it could accept a referral request under Article 22 of that regulation in a situation where the 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. In essence, the applicant submits that, in such a situation, the residual purpose of Article 22 of that regulation only enables a Member State which does not have such a control system to submit a referral request in order to prevent a concentration affecting its territory from not being subject to any scrutiny. By contrast, where a Member State has adopted its own merger control legislation and has therefore defined the circumstances in which it scrutinises concentrations with no European dimension, that Member State would have exercised the competence enabling it to scrutinise concentrations and its interests would be adequately protected. For such a Member State, the referral requests are limited to cases falling within its control rules, the scope of which has been defined by the national legislature. A residual power to refer the examination of a concentration to the Commission is not necessary. Furthermore, the applicant and Grail submit that the Commission's position is incompatible with the 'one-stop shop' objective, based on turnover thresholds, and that of allowing the competent national authorities to delegate their power of examination to the Commission where the latter is better placed to examine a concentration. The applicant and Grail dispute the Commission's interpretation of the wording of Article 22 of Regulation No 139/2004 and complain that it failed to take account of its context. According to them, the Commission's position is also contrary to the principles of legal certainty, subsidiarity and proportionality and requires legislative amendment. Since Article 22 of that regulation is exceptional in nature, it should be interpreted restrictively.

86 The Commission, supported by the Hellenic Republic, the French Republic, the Kingdom of the Netherlands and the EFTA Surveillance Authority, contends, in essence, that the applicant fails to have regard to the primacy of the literal interpretation and disregards the clear and precise wording of the first part of the first sentence of Article 22(1) of Regulation No 139/2004. Since it is a legislative provision setting out the conditions in which the Commission has competence, a legislative amendment is not necessary. That article draws no distinction according to whether or not the Member State has a national merger control system and the applicant's interpretation cannot be reconciled with the principle of the uniform application of EU and EEA law. In requesting that a transaction be referred back to the Commission, the Member State exercises a power which has an autonomous basis in EU law. According to the Commission and the Hellenic Republic, a strict interpretation is not possible in order to resolve the question whether competence exists and does not entail the introduction of additional requirements into a provision when they are not provided for in that provision. The 'one-stop shop' system is not an objective of Regulation No 139/2004, but an important element thereof. Furthermore, the Hellenic Republic, the French Republic and the EFTA Surveillance Authority argue that the referral mechanisms operate as effective corrective mechanisms to allow effective review of all concentrations according to their effect on the structure of competition in the European Union.

87 In the context of the present plea, the Court is called upon to interpret the scope of the first subparagraph of Article 22(1) of Regulation No 139/2004, under which the ACF made its referral request. More specifically, the Court is called upon to examine the question whether, under that provision, the Commission is competent to examine a concentration which is the subject of a referral request made by a Member State which has a national merger control system, but where that concentration does not fall within the scope of that national legislation.

88 In that regard, it must be recalled that, according to settled case-law, 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 (see judgment 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). It is therefore appropriate to carry out a literal, contextual, teleological and historical interpretation of the first subparagraph of Article 22(1) of Regulation No 139/2004.

– *The literal interpretation*

89 It should be noted that, in so far as the first subparagraph of Article 22(1) of Regulation No 139/2004 provides that 'one or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a [European] 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', it sets out four cumulative conditions for authorising referral of a concentration to the Commission. First, the referral request 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; and, fourth, the concentration must threaten to significantly affect competition within the territory of the Member State or States which made the referral request.

90 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.

91 On the contrary, 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, as the Commission maintains, that a concentration may be the subject of a referral, regardless of the existence or scope of national merger control rules, provided that the cumulative conditions referred to in paragraph 89 above are satisfied.

92 By contrast, the additional condition advocated by the applicant and by Grail, that is to say that the concentration which is the subject of a referral request must fall within the scope of the merger control rules of the Member State which submitted that request, is not apparent from the wording of the first subparagraph of Article 22(1) of Regulation No 139/2004.

93 Furthermore, given that that wording does not distinguish between Member States according to whether or not they have enacted national legislation to that effect, even a Member State which does not have such a system, such as the Grand Duchy of Luxembourg, is entitled to request the referral of a concentration to the Commission under that provision, which the applicant acknowledges.

94 Therefore, 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.

95 Consequently, the Court considers it appropriate to carry out a historical interpretation, since that interpretation may 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.

– *The historical interpretation*

96 In the first place, Article 22 of the first regulation on the control of concentrations between undertakings, namely Regulation No 4064/89, provided for a mechanism enabling a concentration case to be referred to the Commission. Paragraph 3 of that article reads as follows:

'If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).'

97 That referral mechanism had in particular been designed for those Member States which did not yet have a merger control system (see paragraph 97 of the Commission Green Paper of 31 January 1996 on the review of the Merger Regulation (COM(96) 19 final); paragraph 84 of the Commission Green Paper of 11 December 2001 on the Review of Council Regulation No 4064/89 (COM(2001) 745 final) ('the 2001 Green Paper') and paragraph 21 of 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')). More specifically, it appears that that referral mechanism followed the wish of the Kingdom of the Netherlands, which did not have such a system 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' (see 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)).

98 The fact that the referral mechanism under Article 22(3) of Regulation No 4064/89 was to be used mainly for Member States which did not have their own merger control system did not, however, preclude other Member States from also having recourse to that mechanism. That is confirmed by the use of the expression 'especially' in paragraph 97 of the Commission Green Paper of 31 January 1996 on the review of the Merger Regulation (see paragraph 97 above), according to which that provision 'is generally regarded as a useful tool, especially for those Member States that do not currently have a merger control system'. There is nothing in that regulation to indicate that the EU legislature intended to reserve that mechanism for those aforementioned States or to favour them in that regard, in particular in a situation such as that in the present case. On the contrary, the term 'Member State', as used in that provision, includes all the Member States without drawing a distinction according to whether or not such a control system exists. Thus, recital 29 of Regulation No 4064/89 recognises the Commission's power to intervene 'at the request of a Member State concerned, in cases where effective competition would be significantly impeded within that Member State's territory'.

99 In view of the successive establishment of national merger control systems in the Member States and the fact that, by the date of adoption of the 2001 Green Paper, only the Grand Duchy of Luxembourg did not have such a system, the Commission found, in paragraph 85 of the 2001 Green Paper, that, 'in practice … the potential scope for use of Article 22(3) in its original form [was] very limited'. The reduction in its practical importance for the great majority of Member States, due to the fact that they had such national control systems, did not necessarily mean, contrary to the applicant's view, that their use of Article 22(3) of Regulation No 4064/89 was now precluded.

100 In the second place, the objectives of the referral mechanism provided for in Article 22(3) of Regulation No 4064/89 have been successively extended over time.

101 When the number of national merger control systems increased within the European Union, that referral mechanism was also regarded as a means of strengthening the application of Community competition law to transactions with cross-border effects and of ensuring the 'one stop shop' principle and avoiding parallel examination of the same concentration by the competition authorities of several Member States. Those objectives are reflected, as set out in paragraph 86 of the 2001 Green Paper, in the amendments introduced by Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation No 4064/89 (OJ 1997 L 180, p. 1), which made it possible for a number of Member States to submit joint referral requests (see recital 13 of Regulation No 1310/97).

102 Thus, the referral mechanism provided for in Article 22(3) of Regulation No 4064/89 was intended to enable the Member States to ask the Commission to examine a concentration with cross-border effects in a situation where the thresholds laid down in Article 1 of that regulation, which define, in principle, the scope of that regulation, were not met. Article 1 of Regulation No 4064/89 echoed that role in so far as it provided for the application of that regulation to all concentrations with a Community dimension 'without prejudice to Article 22'.

103 Contrary to the view apparently taken by the applicant by referring to the objective of Regulation No 1310/97 of avoiding multiple notifications and of permitting the examination of a concentration by the best-placed authority, and as indicated in the press release accompanying the 2003 proposal, the

various objectives pursued by the referral mechanism are not mutually exclusive but complement each other. According to paragraph 86 of the 2001 Green Paper, the legislature's intention was to strengthen the application of Community competition law to transactions with cross-border effects, to ensure the 'one-stop shop' principle and to alleviate the problem of multiple filings (see also paragraph 101 above). That is also borne out by the fact that the objectives have been successively extended over time, without any renunciation of the original objectives of that mechanism (see paragraphs 97 to 99 and 101 above).

104 Therefore, the development of the objectives of the referral mechanism provided for in Article 22(3) of Regulation No 4064/89 cannot be understood as restricting the scope of that regulation, but rather emphasises the objective of examining concentrations with cross-border effects.

105 In the third place, that interpretation is corroborated by 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.

106 First, the version proposed in 2003 of Article 22 distinguished between, on the one hand, in paragraph 1, a referral request made by one or more Member States under conditions similar to those of the present Article 22(1) of Regulation No 139/2004 and, on the other hand, in its paragraph 3, referral requests from at least three 'Member States which would be competent to review the concentration under their national legislation on competition', a situation in which a European dimension justifying the exclusive competence of the Commission was deemed to exist.

107 However, when Regulation No 139/2004 was adopted, paragraph 3 was not reproduced in Article 22, but was incorporated, in an amended version, into Article 4(5) of that regulation, which accordingly refers to concentrations which may be examined under the national competition law of at least three Member States. By contrast, the remaining part of Article 22 of the 2003 proposal, in particular paragraph 1 thereof, was taken up without major changes. Unlike the wording of Article 4(5) of Regulation No 139/2004, the EU legislature did not refer, in Article 22 of Regulation No 139/2004, to the competence of the Member State under its national legislation. That indicates that the legislature did not intend to restrict the right of that Member State to request the referral of 'any concentration' to the Commission.

108 Second, by the 2003 proposal, the Commission did not accept the idea of a 'mandatory 3+ system', consisting of automatically conferring a European dimension on concentrations notifiable in at least three Member States, as proposed in the 2001 Green Paper (see, inter alia, paragraphs 60 and 62 of that Green Paper). It considered that such a system required it to be determined whether the concentration reached the notification thresholds in at least three Member States and that basing its jurisdiction on divergent national criteria or concepts for the purposes of interpreting national notification thresholds would undermine legal certainty, particularly in view of the risk of different interpretations of national law by the Commission, the Member States and the parties to the concentration (paragraphs 13 to 15 of the 2003 proposal).

109 The Commission thus favoured greater recourse to the referral mechanisms, in particular that provided for in Article 22 of Regulation No 139/2004 (paragraph 18 of the 2003 proposal), which, unlike the 'mandatory 3+ system', did not therefore appear to require an interpretation of the national notification thresholds. That supports the view that a referral may be made for a concentration which does not fall within the scope of the merger control rules of the Member State which requested its referral. By contrast, the interpretation advocated by the applicant would specifically require a prior interpretation by the Commission of the scope of the national law of the requesting Member State and could give rise to divergent interpretations by the Commission and the Member States, an issue which is described in paragraph 59 and footnote 11 to the 2001 Green Paper. That reading therefore makes the application of that article dependent on conditions which have been expressly rejected in the context of the legislative procedure.

110 In addition, the Court held, by the judgment of 15 December 1999, *Kesko* v *Commission* (T-22/97, EU:T:1999:327, paragraph 84), that it was not for the Commission to rule on the competence of a national competition authority to submit a referral request under Article 22 of Regulation No 4064/89, but that it was required only to verify whether that request was, prima facie, that of a Member State.

111 Third, in paragraph 21 of the 2003 proposal, the Commission recalled that ‘one of the initial purposes of [that article] was to provide a possibility for Member States which do not have national merger control legislation to refer cases [to it] with an impact on trade between Member States …’. By stating that only the Grand Duchy of Luxembourg is still in such a situation, it considered that ‘the possibility for a single Member State to refer cases to the Commission should not be completely excluded’. If that shows that Article 22 of Regulation No 4064/89 was originally intended to be used primarily by those Member States which did not have its own merger control system, the reference to ‘one’ of the initial purposes confirms the finding, set out in paragraphs 98 and 99 above, that the applicability of that article is not limited to that situation, but extends to all the Member States, including those which did have such a system.

112 Fourth, in paragraph 22 of the 2003 proposal, the Commission noted that the simplified referral system which it proposed was intended, inter alia, to make the referral in Article 22 applicable at the pre-notification stage in so far as ‘the main weakness [was] that the … referral provisions [could] only be used after a [concentration] has been notified’. That finding merely describes the situation which existed before the adoption of Regulation No 139/2004, which is characterised, as also stated in that paragraph 22, by ‘a significant loss of time and administrative efficiency’, and by ‘unnecessary costs and burdens on the merging companies’, since those parties did not have the possibility of requesting a referral of a concentration at an early stage, by informing the Commission directly, without going through the national authorities. That situation therefore applies only to concentrations which can be notified at national level. The adoption of Article 4(4) and (5) of that regulation remedied that problem by allowing the parties to a concentration to request its referral prior to notification. Article 22 of that regulation, by contrast, did not differ substantially in its content (see paragraph 107 above). It should be borne in mind that the EU legislature laid down different conditions of application for the referral, under Article 22, of a concentration to the Commission by a Member State. Under that article, a Member State which does not have national merger control rules may, as is apparent from paragraph 21 of the 2003 proposal, also make a referral request (see paragraph 111 above), which necessarily precludes any prior notification in that State.

113 Fifth, paragraph 24 of the 2003 proposal explains that, ‘in … application of Article 22, Member States could refer to the Commission cases remaining below the turnover thresholds of Article 1(2) and 1(3) [of the EC Merger Regulation] but which are likely to have a significant cross-border impact’. Thus, that paragraph confirms the objective of enabling the Commission to examine cross-border concentrations which do not reach the thresholds of EU merger control rules (see paragraphs 102 and 104 above).

114 Sixth, like Article 1 of Regulation No 4064/89, Article 1 of Regulation No 139/2004 provides for the application of that regulation to all concentrations with a European dimension ‘without prejudice to Article 22’. The fact that that wording remained virtually unchanged over time and was only supplemented, in Regulation No 139/2004, by the addition of a reference to Article 4(5) of that regulation (see paragraph 121 below), indicates that Article 22 of Regulation No 139/2004 is intended to enable the Commission to examine cross-border concentrations which do not reach the thresholds of that regulation (see paragraph 102 above).

115 In the fourth place, as regards the Commission’s subsequent position regarding the referral mechanism under Article 22 of Regulation No 139/2004, as set out in the referral notice, in the report of 18 June 2009 on the operation of Regulation No 139/2004 (COM(2009) 281 final), in the 2014 White Paper, in the Commission Staff Working Document relating to the executive summary of the evaluation of procedural and jurisdictional aspects of EU merger control of 26 March 2021 (SWD(2021) 67 final), and in the Article 22 guidance, it should be recalled that those documents were published after the adoption of that regulation and could not therefore be taken into account by the EU legislature at that stage. Therefore, they are not relevant to the historical interpretation of that regulation and, consequently, to the outcome of the present dispute.

116 In the light of all the foregoing considerations, the historical interpretation confirms that the first subparagraph of Article 22(1) of Regulation No 139/2004 enables a Member State, irrespective of the scope of its national merger control rules, to refer to the Commission concentrations which do not meet

the turnover thresholds in Article 1 of that regulation, but which may have significant cross-border effects.

117 That conclusion is not called into question by the recitals relied on by the applicant to show that the transfer of powers, in the context of a referral, is not intended to be used where a Member State does not have competence to examine the concentration concerned under its own merger control system. As the Commission submits, recital 27 of Regulation No 4064/89, according to which Member States may not apply their national legislation on competition to concentrations with a Community dimension, concerns only Article 21 of that regulation, which governs the allocation of powers between the Commission and the Member States. The reference to the protection of the interests of the Member States in recital 10 of Regulation No 1310/97 underlines the objective of enabling a Member State to have a review by the Commission of concentrations having adverse effects in its territory. A similar reference is to be found in recital 11 of Regulation No 139/2004, which will be examined together with the other relevant recitals of that regulation, in the context of a teleological interpretation (see paragraphs 140 to 148 below).

– *The contextual interpretation*

118 In the first place, as regards the legal basis of Regulation No 139/2004, it is stated in its first citation that it was based on Articles 83 and 308 EC (now Articles 103 and 352 TFEU).

119 In that regard, it should be noted that, as is explained in recital 7 of Regulation No 139/2004, Articles 81 and 82 EC (now Articles 101 and 102 TFEU), while applicable 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’. Consequently, that regulation had to be based not only on Article 83 EC, but also on Article 308 EC, under which the European Union may give itself additional powers of action necessary for the attainment of its objectives.

120 Contrary to what the applicant appears to argue, the fact that Regulation No 139/2004 was also based on Article 308 EC does not affect the interpretation of Article 22 of that regulation, but merely shows that the EU legislature intended to have 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), according to which the internal market includes a system ensuring that competition is not distorted and, to that end, the Union is to, where necessary, take measures within the framework of the provisions of the Treaties, including Article 352 TFEU.

121 In the second place, Article 1(1) of Regulation No 139/2004, which defines the scope of that regulation, refers explicitly to Article 22. More specifically, it is provided in Article 1(1) that ‘without prejudice to Article 4(5) and Article 22, [that regulation] shall apply to all concentrations with a [European] dimension as defined in this Article’. A concentration has a European dimension where the turnover thresholds laid down in Article 1(2) and (3) of that regulation are exceeded.

122 Article 4(5) and Article 22(1) of Regulation No 139/2004 permit referral of a concentration ‘which does not have a [European] dimension within the meaning of Article 1 [of that regulation]’ to the Commission. Those provisions are therefore based not on turnover thresholds but on other conditions set out therein (see paragraph 126 below).

123 It follows 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.

124 Therefore, in view of the express reference to it in Article 1(1) of Regulation No 139/2004, Article 22 forms part of the provisions of that regulation which determine the Commission’s competence concerning the control of concentrations.

125 In the third place, Article 4(5) of Regulation No 139/2004, 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, is not capable of supporting the interpretation of Article 22 of that regulation put forward by the applicant and Grail.

126 The respective conditions for the application of those two provisions are fundamentally different, since the first expressly provides that the concentration which is the subject of the referral must be 'capable of being reviewed under the national competition laws of at least three Member States' while the second applies to 'any concentration … that … affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request [for referral]'. The reference in Article 4(5) of Regulation No 139/2004 to national competition law is not to be found in Article 22 of that regulation. That difference is based, on the one hand, on the EU legislature's choice not to restrict the possibility for a Member State to request referral to the Commission for examination of the concentration under Article 22 of that regulation (see paragraph 107 above) and, on the other hand, the different purposes of those provisions. Whereas Article 4(5) of Regulation No 139/2004 is intended, as the applicant itself acknowledges, to enable the parties to a concentration to request, at an early stage, its referral to the Commission in order to avoid multiple notifications to the various competent national authorities (see recital 16 of that regulation and paragraph 112 above), Article 22 of that regulation also pursues the objectives referred to in paragraphs 102, 113 and 114 above of enabling cross-border concentrations to be examined.

127 In the fourth place, Article 22 of Regulation No 139/2004 is moreover not aligned with the referral mechanisms provided for in Article 4(4) and Article 9 of that regulation, which govern the referral of a concentration with a European dimension to the competent authorities of a Member State.

128 Although, in accordance with the third subparagraph of Article 4(4) and Article 9(1) of Regulation No 139/2004, such a concentration may, at the request of the parties or on the initiative of the Commission, be referred to 'the competent authorities' of a Member State, Article 22(1) does not refer to such authorities, but to 'one or more Member States' which 'may request' referral of a concentration to the Commission. Furthermore, unlike the first subparagraph of Article 4(4) and Article 9(1), Article 22(1) does not contain the words 'prior to notification', nor does it presuppose the existence of a 'notified concentration', but is worded more openly in that it applies to 'any concentration'.

129 Consequently, Article 22 of Regulation No 139/2004 cannot be interpreted in the light of the referral mechanisms provided for in Article 4(4) and Article 9 of that regulation. That is on account, in particular, of the fact that it does not expressly require either the national competition authority to be competent to examine the concentration that is the subject of the referral or that that concentration must be notified.

130 In the fifth 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, it should be noted, first, that the second subparagraph of Article 22(1) of that regulation provides that a request for referral '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'. That provision therefore governs, on the one hand, situations in which concentrations are notified to the competent national competition authority and thus fall within the scope of the merger control system of that Member State and, on the other hand, as the Commission and the French Republic maintain, situations in which concentrations are not notified but merely made known to the Member State concerned, either because they do not fall within the scope of that system, or because no such system exists. Therefore, it cannot be inferred from that subparagraph that Article 22 of Regulation No 139/2004 applies to Member States which have national merger control systems only where the concentrations concerned are covered by that system.

131 Second, the applicant and Grail cannot 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 request received pursuant to paragraph 1 without delay', the reference to 'competent authorities' being intended only to ensure that the national authorities generally responsible for merger matters are informed by the Commission of a referral request. That information enables those authorities to take a position on whether to submit a request to join under the second subparagraph of Article 22(2) of that regulation and is therefore a precondition

for the right of joinder actually to be exercised. By contrast, the reference to those authorities makes no mention of the precise scope of their powers of examination under the applicable national legislation relating to the concentration which is the subject of the referral request which the Commission is not required to verify (see, to that effect, judgment of 15 December 1999, *Kesko* v *Commission*, T-22/97, EU:T:1999:327, paragraph 84).

132 Third, the second subparagraph of Article 22(2) of Regulation No 139/2004 provides that 'any other Member State shall have the right to join the initial [referral] request', which is 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.

133 Fourth, 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, contrary to what Grail maintains, that, if such a national time limit has begun to apply, it is to be suspended. That is necessary in order to prevent the Commission's handling of a referral request from disrupting the national merger control systems, the examination timetables of which are often very tight. By contrast, that provision has no effect on a situation in which the concentration concerned does not fall within the scope of such a national system, where such a system exists.

134 Fifth, in so far as the third subparagraph of Article 22(3) of Regulation No 139/2004 provides that 'the Member State or States having made the request shall no longer apply their national legislation on competition to the concentration', it seeks, contrary to the applicant's view, to ensure that the competition authorities of those Member States no longer express views, at a later stage, on the substance of that concentration, which contradict the decisions taken by the Commission. That risk may exist, in particular, where those authorities do not share the Commission's final conclusion. In order to avoid any contradiction, that provision is not limited to the rules on the control of concentrations, but is drafted more broadly with reference to national competition law as a whole. By contrast, it follows from that provision that Member States which have not made a referral request may continue to apply their national competition law to the concentration concerned. Therefore, having regard to its wording and objectives, it cannot be inferred from this that the third subparagraph of Article 22(3) of Regulation No 139/2004 requires that the concentration which is the subject of the referral falls within the scope of national control rules.

135 Sixth, the first subparagraph of Article 22(4) of Regulation No 139/2004 provides that the rules laid down in Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 of that regulation are to apply where the Commission examines a concentration referred to it by a Member State.

136 As regards the standstill obligation contained in Article 7 of Regulation No 139/2004, it is, under the second sentence of the first subparagraph of Article 22(4) of that regulation, 'to 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'. That provision therefore takes account of the fact that, prior to the submission of the request for referral, a concentration with no European dimension does not fall within the scope of Regulation No 139/2004 and that, consequently, that standstill obligation does not prevent its implementation. However, in order for that concentration to be capable of being implemented in the European Union, its suspension must also not be required by the national legislation concerning the control of concentrations of a Member State. It follows that the first subparagraph of Article 22(4) of Regulation No 139/2004 covers both situations in which the concentration that is the subject of the referral request falls, as in the present case, outside the scope of any national legislation, and those in which such legislation is applicable but does not provide for suspension of that concentration.

137 Seventh, 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, it does not require the concentration to fall within the scope of national merger control rules.

138 Eighth, as regards the other provisions of Article 22 of Regulation No 139/2004, it should be noted 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.

139 Accordingly, it follows from the contextual interpretation that a referral request under Article 22 of Regulation No 139/2004 may be submitted irrespective of the scope of national merger control rules.

– *The teleological interpretation*

140 In the first place, it is apparent from recitals 5, 6, 8, 24 and 25 of Regulation No 139/2004 that the objective of that regulation is to permit effective control of all concentrations with significant effects on the structure of competition in the European Union. Under the ‘one-stop shop’ principle, those concentrations are examined exclusively at EU level.

141 As was found in the context of the contextual interpretation (see paragraph 123 above), in accordance with recitals 9 to 11, that regulation seeks to make the Commission’s power of examination dependent primarily on the exceeding of the turnover thresholds which define the European dimension, while supplementing those thresholds with rules governing the referral of concentrations which must constitute ‘effective corrective mechanisms’.

142 From that point of view, referral mechanisms are an instrument intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid nature, is not capable of covering all concentrations which merit examination at European level (see also paragraphs 102, 113 and 114 above). Those mechanisms therefore create, as emphasised by the expression ‘corrective mechanism’ used in recital 11 of Regulation No 139/2004, a subsidiary power of the Commission which confers on it the flexibility necessary to achieve the objective of that regulation, which is to permit the control of concentrations likely significantly to impede effective competition in the internal market.

143 Article 22 of Regulation No 139/2004 ensures that objective in that it provides the flexibility necessary for the examination, at EU level, of concentrations which are likely significantly to impede effective competition in the internal market which, because the turnover thresholds have not been exceeded, would otherwise escape control under the merger control systems of both the European Union and the Member States.

144 Furthermore, in so far as, in a case such as the present one, where turnover thresholds are not exceeded at European and national level, it is only the Commission which, at the request of one or more Member States, becomes competent to examine that concentration, Article 22 of Regulation No 139/2004 also forms part of the objectives of protecting the interests of the Member States, subsidiarity, legal certainty, preventing multiple notifications, ‘one-stop shop’ and referral to the most appropriate authority, as set out in recitals 11, 12 and 14 of that regulation.

145 In the second place, recitals 15 and 16 of Regulation No 139/2004 reiterate, in essence, the substantive conditions which must be satisfied in order for the Commission to be authorised to refer a concentration to a Member State pursuant to Article 4(4) or Article 9 of that regulation and, conversely, a concentration may be referred from a Member State to the Commission under Article 4(5) or Article 22 of that regulation. Thus, they highlight the differences between Article 22 of Regulation No 139/2004, on the one hand, and Article 4(4) and (5) or Article 9 of that regulation, on the other hand, as set out in paragraphs 125 to 129 above.

146 More specifically, while recital 16 of Regulation No 139/2004, which concerns the referral of a concentration to the Commission before its notification, provided for in Article 4(5) of that regulation, explicitly requires that the concentration should be ‘capable of being reviewed under the national competition laws of at least three Member States’, recital 15 of that regulation, which concerns all other forms of referral of a concentration to the Commission, including the one referred to in Article 22 of that regulation, does not contain such a requirement. Recital 15 highlights that ‘a Member State should be able to refer to the Commission a concentration which does not have a [European] dimension but which affects trade between Member States and threatens to significantly affect competition within its territory’. Furthermore, it states that ‘the Commission should have the power to examine and deal with a concentration on behalf of a requesting Member State or requesting Member States’.

147 Accordingly, recitals 15 and 16 of Regulation No 139/2004 support the finding set out in paragraphs 126 and 129 above that the conditions for the application of Article 22 of that regulation are fundamentally different from those of the other referral mechanisms.

148 In the light of the foregoing, it must be concluded that a teleological interpretation confirms that a referral request under Article 22 of Regulation No 139/2004 may be submitted irrespective of the scope of national merger control rules.

149 That conclusion cannot be called into question by the reference to the effect that 'other Member States which are also competent to review the concentration should be able to join the request', as used in recital 15 of Regulation No 139/2004 and relied on by the applicant and Grail to support their position.

150 That reference merely states that other Member States may join a request for referral, in accordance with the possibility newly introduced by the second subparagraph of Article 22(2) of Regulation No 139/2004 which supplements the possibility of submitting joint requests for referral as submitted by Regulation No 1310/97 in order to avoid examination in parallel of the same concentration by several Member States (see paragraph 101 above). In that context, having regard to the fact that Regulation No 139/2004 also seeks to avoid such a parallel examination (see recitals 12 and 14 of that regulation), that reference describes a situation where the concentration concerned falls within the scope of several national merger control systems. That reading is confirmed by the remaining part of recital 15 of that regulation, which refers to the suspension of national time limits, which presupposes, as the Commission maintains, that the rules of such a national system are applicable. Therefore, as the EFTA Surveillance Authority maintains, it must be concluded that that recital must be understood as describing one of the scenarios covered by the scope of the second subparagraph of Article 22(2) of Regulation No 139/2004, namely that giving rise to the introduction of the possibility of joining a request for referral.

151 By contrast, if recital 15 of Regulation No 139/2004 were to be interpreted, contrary to the unambiguous wording of the second subparagraph of Article 22(2) of that regulation (see paragraph 132 above), as requiring the Member State to be competent under its national legislation, a Member State which does not have merger control rules, such as the Grand Duchy of Luxembourg, could never join a referral request or, if, as the applicant appears to recommend, that interpretation were extended to Article 22(1) of that regulation, that State could never submit a referral request. Such an outcome, which is contrary to the legislative history of that article (see paragraph 97 above), is not even suggested by the applicant and Grail.

– *The other arguments put forward by the applicant and Grail*

152 The other arguments put forward by the applicant and Grail cannot call into question the foregoing considerations.

153 In the first place, as regards the applicant's assertion that a Member State which has defined the conditions under which it controls concentrations with no European dimension 'has exercised its competence', so that the possibility of referring concentrations to the Commission is no longer open to it, it should be borne in mind that, as is stated in the last sentence of recital 8 of Regulation No 139/2004 and as is apparent from Article 21 of that regulation, all concentrations not covered by that regulation come, in principle, within the jurisdiction of the Member States. It follows 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 referral request under Article 22 of that regulation.

154 In that context, it must be made clear that national law can apply only to concentrations falling, in principle, within the competence of the Member States. Admittedly, where such a concentration does not fall, for example, where the necessary turnover thresholds have not been exceeded, within the scope of national merger control rules, the national competition authorities do not have the power to examine it. That does not mean, however, that the Member State has lost or declined its general competence for all concentrations with no European dimension, which it has by default, in accordance

with the principle of conferral of competences, but only that, under its domestic law, its authorities are not empowered to act in relation to that concentration at national level. The latter aspect concerns the exercise or allocation of domestic competences, so that the competence of the Member State to make a referral request under Article 22 of Regulation No 139/2004 cannot depend on it.

155 In so far as that article refers expressly to 'Member States', it directly confers on them the right to request, under the circumstances set out therein, referral of a concentration to the Commission. The applicant's argument that a Member State may lose a right conferred on it by EU law by exercising its national legislation is not only difficult to reconcile with the requirements of Article 4(1) TEU, read in conjunction with Article 5 TEU (see paragraph 153 above), but also has no basis in the case-law of the EU Courts. In addition, it precludes the uniform application of Article 22 of Regulation No 139/2004 since it places Member States which have put in place a system for the control of concentrations at a disadvantage compared with those which have not, in that the latter would be entitled to request referral of any concentration while the former could make such a request only for concentrations falling within the scope of those rules.

156 The irrelevance of national legislation for the application of Article 22 of Regulation No 139/2004 is confirmed by the judgment of 15 December 1999, *Kesko* v *Commission* (T-22/97, EU:T:1999:327). In paragraph 84 of that judgment, the Court held that, where the Commission receives a referral request under Article 22(3) of Regulation No 4064/89, it is required only to verify whether that request is, prima facie, a request made by a Member State, and not to determine the competence, under the applicable national law, of the national authority which made that request in the name and on behalf of that State.

157 In the second place, as regards the alleged breach of the principle of subsidiarity set out in Article 5(1) and (3) TEU and implemented by Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ 2016 C 202, p. 206), it should be noted that, under that principle, in areas which do not fall within its exclusive competence, the European Union is to act only if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level.

158 Thus, that principle is composed, on the one hand, of a negative test, according to which the objectives envisaged cannot be sufficiently achieved by the Member States, and, on the other hand, a positive test, according to which those objectives can, by reason of their scale or their effects, be better achieved at EU level. Those two components of the principle of subsidiarity ultimately address a single question, from two different angles, namely whether action should be taken at EU level or at national level in order to achieve those objectives (Opinion of Advocate General Kokott in *Pillbox 38*, C-477/14, EU:C:2015:854, point 165).

159 Compliance with the principle of subsidiarity is reviewed by the EU judicature (judgment of 4 May 2016, *Poland* v *Parliament and Council*, C-358/14, EU:C:2016:323, paragraph 113).

160 In the present case, the principle of subsidiarity is applicable since the merger control system established by Regulation No 139/2004 is based in part on Article 308 EC (now Article 352 TFEU) (see paragraph 118 above) and therefore does not fall within an area of exclusive competence of the European Union.

161 Since the applicant does not rely on the unlawfulness of Regulation No 139/2004, it does not dispute, as is clear from recitals 6 and 8 of that regulation, its compliance with that principle. The Court's review of that principle is therefore limited to the interpretation of Article 22 of Regulation No 139/2004, as adopted in the contested decisions, according to which a referral request under that provision may be submitted irrespective of the scope of national merger control rules.

162 In that regard, first, it should be noted that control of concentrations that affect trade between Member States can be better achieved at EU level. In particular, under Regulation No 139/2004, the Commission has, for the purpose of examining the compatibility of a concentration with the internal market, wider criteria for assessment and powers than a national competition authority whose powers are limited to the territory of a single Member State.

163 Second, the interpretation of Article 22 of Regulation No 139/2004, as adopted in the contested decisions, allows a Member State to have a concentration examined by the Commission which, as in the present case, neither falls within the scope of its national merger control rules nor has a European dimension within the meaning of Article 1 of that regulation, where it threatens significantly to affect competition within its territory and affects trade between Member States. That interpretation therefore ensures that a concentration which, despite those significant negative effects, would not be subject to any examination, either by the national authorities or by the Commission, may be examined by the Commission. It thus concerns an action which cannot be achieved by the Member States. On the contrary, in that situation, it is essential to act at EU level.

164 Furthermore, as the Commission and the French Republic maintain, respect for the interests of the Member States is also ensured by the fact that, in the context of the application of Article 22 of Regulation No 139/2004, the Commission may examine a concentration only if a referral is requested from a Member State. Those interests are furthermore protected by the limited territorial scope of the examination of the concentration provided for in the third subparagraph of Article 22(3) of that regulation. According to that provision, only a Member State that has made such a request of its own volition can no longer apply its national legislation on competition to the concentration concerned (see paragraph 134 above).

165 Therefore, the interpretation of Article 22 of Regulation No 139/2004, as adopted in the contested decisions, according to which a referral request under that provision may be submitted irrespective of the scope of national merger control rules, complies with the principle of subsidiarity. In particular, it ensures, as is stated in recital 11 of Regulation No 139/2004, that that article constitutes an effective corrective mechanism in the light of that principle by protecting the interests of the Member States. Furthermore, that interpretation 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 (see also paragraph 144 above).

166 That conclusion cannot be called into question by the applicant’s assertion that the principle of subsidiarity limits the application of Article 22 of Regulation No 139/2004 in respect of Member States that have established their own national merger control systems, since that principle governs, as stated in Article 5(1) TEU, the exercise of EU competences, but not those of the Member States. Similarly, the judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraphs 216 to 218), as relied on by the applicant, is irrelevant since it merely recalls the exercise of the review of the principle of subsidiarity by national parliaments and by the EU Courts.

167 In the third place, as regards the alleged infringement of the principle of proportionality set out in Article 5(1) and (4) TEU, it must be recalled that that principle requires that the content and form of EU action is not to exceed what is necessary to achieve the objectives of the Treaties.

168 In particular, that principle requires that acts of EU institutions should not exceed the limits of what is appropriate and necessary to attain the aim pursued, and when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments of 11 January 2017, *Spain* v *Council*, C-128/15, EU:C:2017:3, paragraph 71; of 9 December 2020, *Groupe Canal +* v *Commission*, C-132/19 P, EU:C:2020:1007, paragraph 104; and of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 113).

169 In the present case, since the applicant does not claim that Regulation No 139/2004 is unlawful in the light of the principle of proportionality, the Court’s review of that principle is limited to the interpretation of Article 22 of Regulation No 139/2004, as adopted in the contested decisions, according to which a referral request under that provision may be submitted irrespective of the scope of national merger control rules.

170 As regards, first, the alleged high number of concentrations which do not have a European dimension and do not fall within a national control system which would be affected by that interpretation, suffice it to note that this is an unsubstantiated argument which does not demonstrate that that interpretation is disproportionate with regard to the objective of examining concentrations which may significantly

impede effective competition in the internal market. Similarly, the assertion that the same interpretation implies a cumbersome procedure for undertakings in that it requires them to provide notification ‘informally’ cannot succeed, since such notification is neither provided for by Article 22 of Regulation No 139/2004 nor required by that interpretation.

171 Furthermore, the interpretation adopted in the contested decisions, according to which a referral request under Article 22 of Regulation No 139/2004 may be submitted irrespective of the scope of national merger control rules, allows the Commission to examine a concentration under that article only in certain specific cases and under very specific conditions, namely if the four cumulative conditions laid down in the first subparagraph of Article 22(1) of that regulation (see paragraph 89 above) are met. In view of those clear and precise conditions of application which significantly restrict the Commission’s freedom of action, that interpretation is not inappropriate for achieving the objective of examining concentrations which may significantly impede effective competition in the internal market.

172 Therefore, the interpretation of Article 22 of Regulation No 139/2004 adopted in the contested decisions complies with the principle of proportionality and, as the EU legislature considered in recital 6 of that regulation, does not go beyond what is necessary to achieve the objective of ensuring that competition in the internal market is not distorted.

173 In the fourth place, as regards the alleged infringement of the principle of legal certainty, it should be noted that that principle, which is one of the general principles of EU law, requires, on the one hand, that rules of law be clear and precise and, on the other, that their application must be foreseeable by those subject to them. In particular, that principle requires that legislation enables those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see judgment of 1 July 2014, *Ålands Vindkraft*, C-573/12, EU:C:2014:2037, paragraphs 127 and 128 and the case-law cited).

174 In the present case, the interpretation advocated by the applicant and by Grail, which makes the application of Article 22 of Regulation No 139/2004 conditional on the requirements of a national merger control system, while providing for a sort of exception for Member States which do not have such a system, would lead to uncertainty concerning the concentrations that fall within the scope of that provision.

175 In particular, first, that interpretation would give rise to legal uncertainty linked to the different criteria and concepts determining the scope of the merger control rules existing in the Member States. The application of Article 22 of Regulation No 139/2004 therefore depends on factors which, because of their unpredictable nature, were rejected by the Commission in its 2003 proposal (see paragraph 108 above). Furthermore, that interpretation would run counter to the case-law according to which it is not for the Commission to decide on the competence of the national competition authorities to make requests for referral (judgment of 15 December 1999, *Kesko* v *Commission*, T-22/97, EU:T:1999:327, paragraph 84). Second, that interpretation is not capable of providing greater predictability since a Member State which does not have merger control rules could always request referral of a merger case to the Commission under that article. More specifically, the applicant and Grail do not explain how legal certainty would have been greater if, in the present case, the Grand Duchy of Luxembourg, which does not have such rules, had submitted the referral request which is the subject of the contested decision rather than the French Republic.

176 By contrast, the interpretation adopted in the contested decisions, according to which a referral request under Article 22 of Regulation No 139/2004 may be made irrespective of the scope of national merger control rules, makes the application of that article conditional solely on the fulfilment of the four cumulative conditions laid down in the first subparagraph of Article 22(1), as set out in paragraph 89 above. Those conditions ensure that that provision is applied uniformly within the European Union, as the Commission maintains.

177 It is true that the application of the referral mechanism provided for in Article 4(5) of Regulation No 139/2004 depends, for its part, on the national competition law of the Member States (see

paragraph 126 above). However, that is explained by the objective of avoiding parallel examination of the same concentration by several national authorities (see also paragraph 126 above), which, as the applicant itself acknowledges, justifies '[reference] to the relevant entities to which filings would otherwise be made'. In so far as Article 22 of that regulation also pursues other objectives, in particular that of permitting effective control, as a 'corrective mechanism', of all concentrations which are capable of significantly impeding effective competition in the internal market and falling outside the scope of the merger control rules between the European Union and the Member States because the turnover thresholds have not been exceeded (see, in particular, paragraphs 102, 113, 114 and 142 above), it requires clear and precise conditions of application which are based on EU law.

178 Therefore, it is only the interpretation adopted in the contested decisions which ensures the necessary legal certainty and the uniform application of Article 22 of Regulation No 139/2004 in the European Union.

179 That finding is not called into question by the applicant's other arguments.

180 First, in so far as the applicant refers to the finding of the Court of Justice, in the judgment of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission* (C-202/06 P, EU:C:2007:814, paragraph 38), as regards the need to identify, in way which is foreseeable, the authority having competence to examine a concentration, it should be noted that the interpretation adopted in the contested decisions does not alter the clear allocation of competences between the national authorities and the European Union based on the turnover thresholds provided for in Article 1 of Regulation No 139/2004. More specifically, if those thresholds have not been exceeded, it is only the authorities of the Member States which are competent to examine the concentration concerned or to make a referral request under Article 22 of that regulation (see paragraph 153 above). The parties to such a concentration are therefore not required to notify that concentration to the Commission or to assess whether the conditions laid down in Article 22(1) of that regulation have been met. In addition, they are not likely to be subject to penalties in the event that the concentration is not actively 'made known', within the meaning of the second subparagraph of Article 22(1) of that regulation. Accordingly, the competent authority can be identified in a way that is foreseeable.

181 Second, as regards the argument that the Commission would have the possibility, in accordance with point 21 of the Article 22 guidance, to examine a concentration long after its implementation, it must be recalled that the second subparagraph of Article 22(1) of Regulation No 139/2004 provides that a referral request under that article must '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'. As is apparent from paragraph 130 above, those time limits also apply in cases where the thresholds of a national merger control system have not been reached at the time when the concentration is made known to the Member State. Therefore, since the referral request under Article 22 of that regulation is subject to specific time limits, observance of the principle of legal certainty is ensured. The same is true of the requirement of speed which applies in the context of control of concentrations, as relied on by the applicant with reference to the judgment of 14 July 2006, *Endesa* v *Commission* (T-417/05, EU:T:2006:219, paragraph 209), and the protection of the validity of transactions, referred to in the last sentence of recital 34 of Regulation No 139/2004, on which the applicant also relies in its arguments.

182 In the fifth place, the exceptional nature of referrals under Article 22 of Regulation No 139/2004, as relied on by the applicant, is preserved by the interpretation adopted in the contested decisions, 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 the referral mechanism under Article 22 of that regulation constitutes only a subsidiary power enabling, in certain specific cases and under very specific conditions (see, in particular, the four cumulative conditions for application set out in paragraph 89 above), a concentration falling outside 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'. The same applies to the application, by analogy, of the judgment of 3 April 2003, *Royal Philips Electronics* v *Commission* (T-119/02, EU:T:2003:101, paragraph 354), as relied on by the applicant, which requires that the conditions for referral laid down in Article 9 of Regulation No 139/2004 be interpreted restrictively. Moreover, as

regards the four cumulative conditions for application set out in paragraph 89 above, it appears, as the French Republic maintains, that the number of transactions capable of falling within the scope of Article 22 of that regulation remains limited.

183 In the light of all the foregoing considerations, in particular taking account of the literal, historical, contextual and teleological interpretations of Article 22 of Regulation No 139/2004, it must be held that the Member States may, under the conditions set out in therein, make a referral request under that provision irrespective of the scope of their national merger control rules.

184 Accordingly, the Commission was right, by the contested decisions, to accept the referral request and the requests to join under Article 22 of Regulation No 139/2004. Contrary to the view of the applicant and Grail, neither a legislative amendment nor a revision of the European dimension thresholds were therefore necessary for the application of that provision in the present case.

185 Consequently, the first plea in law must be rejected.

The second plea in law, alleging that the referral request was made out of time and, in the alternative, that the principles of legal certainty and 'good administration' were infringed

– *The first part, alleging that the referral request was made out of time*

186 The applicant, supported by Grail, considers that the referral request was submitted after the time limit set out in the second subparagraph of Article 22(1) of Regulation No 139/2004 had expired. It claims that the Commission erred in law in finding that, in order to find that the concentration had been made known to the Member State within the meaning of that provision, that Member State should be informed not only of the existence of the concentration but also of the information enabling a preliminary competitive analysis of the transaction to be carried out. The effect of the Commission's interpretation would be that a concentration should be notified de facto in all the Member States even if it is not subject to an obligation to notify. The applicant and Grail maintain that the concentration at issue was the subject of the press release of 21 September 2020, the CMA's preliminary examinations in November and December 2020 and the 'second request' of the US Federal Trade Commission ('the FTC') of 9 November 2020. Furthermore, at a conference on 23 March 2021, a representative of the ACF stated that the ACF monitors the market for the examination of concentrations eligible for the application of Article 22 of Regulation No 139/2004. In the light of those factors, the applicant considers that that authority would have been aware of that concentration before receiving the invitation letter. Given that that letter, the referral request and the information letter are based on information which was known to the public as early as 21 September 2020, the ACF or any other authority of a Member State could have carried out a preliminary analysis of the concentration at issue on that date and, in any event, before 19 February 2021. Grail adds that the Commission admitted having, before sending the invitation letter, initiated a dialogue with the national authorities in order to determine whether one of them was competent to make its assessment.

187 The Commission and the French Republic reply, in essence, that 'made known' within the meaning of Article 22(1) of Regulation No 139/2004 means that the Member State concerned must be sent sufficient information to make a preliminary assessment as to the existence of the substantive conditions contained in that provision. They submit that the mere public announcement of the concentration at issue by the press release relied on could not trigger the time limit laid down in that provision and, in any event, was insufficient to enable such a preliminary assessment. Otherwise, the effectiveness of the rules governing the referral of concentrations would be hindered. The undertakings concerned should have been aware of the fact that the concentration could give rise to competition concerns and, in order to obtain clarification on a possible referral, could have communicated to the competent authorities of the Member States and to the Commission the information which they had to provide to the FTC and the Department of Justice (United States). The Commission contends that the CMA was in a different situation from that of the ACF, since it was contacted by the complainant and already well informed about the applicant's activities. Nor, moreover, did examination take place within 15 working days from the announcement of the concentration at issue on 21 September 2020.

188 In the context of the first part of the second plea in law, the Court is called upon to interpret the second subparagraph of Article 22(1) of Regulation No 139/2004, in particular the phrase 'made known to the

Member State concerned', which, under that provision, constitutes the starting point of the time limit of 15 working days for submitting a referral request where no notification of the concentration is required.

189 To that end, in accordance with the case-law cited in paragraph 88 above, it is necessary to carry out a literal, contextual, teleological and historical interpretation of the second subparagraph of Article 22(1) of Regulation No 139/2004. In that context, account must be taken of the fact that EU legislation is drafted in various languages and that the different language versions are all equally authentic, which may require a comparison of those versions (see, to that effect, judgments of 14 July 2016, *Latvia* v *Commission*, T-661/14, EU:T:2016:412, paragraph 39 and the case-law cited), and of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraph 65.

190 In the first place, as regards the literal interpretation, it should be recalled that, according to the second subparagraph of Article 22(1) of Regulation No 139/2004, '[a request for referral] 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'.

191 Thus, the second subparagraph of Article 22(1) of Regulation No 139/2004 makes the start of the time limit of 15 working days dependent on two alternative conditions, namely, first, the date of notification of the concentration which is the subject of the referral request or, second, if such notification is not required, on the fact that that concentration is 'made known' to the Member State concerned.

192 As regards the second alternative condition, it should be noted that the term 'made known' gives no indication as to whether it must result from an active transmission of information or from passive knowledge of the concentration, or as to the content of the information which must be in the possession of the Member State in order for a concentration to be regarded as being 'made known'. As regards the first of those aspects, it should be noted that the different language versions are not the same. While it is apparent in particular from the terms used in the Spanish, German, English, French, Croatian, Italian, Hungarian, Dutch and Portuguese versions of the second subparagraph of Article 22(1) of Regulation No 139/2004 that the concept of 'made known' must consist of 'action', in particular a 'transmission', the Bulgarian version of that provision suggests that any knowledge of the concentration concerned is sufficient.

193 That divergence between the various language versions means that the second subparagraph of Article 22(1) of Regulation No 139/2004 must be interpreted by reference to the context and purpose of the rules of which it forms part (see, to that effect, judgments of 28 April 2016, *Borealis Polyolefine and Others*, C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 90, and of 26 January 2021, *Hessischer Rundfunk*, C-422/19 and C-423/19, EU:C:2021:63, paragraph 65 and the case-law cited).

194 As regards the second aspect mentioned in paragraph 192 above, in view of the silence of all the language versions on the extent and content of the concept of 'made known' to the Member State concerned, that information must be determined by other methods of interpretation.

195 Nor, in the second place, does the historical interpretation provide clarification of the wording of the second subparagraph of Article 22(1) of Regulation No 139/2004.

196 First, the term 'made known', as used in the initial version of Article 22(4) of Regulation No 4064/89, corresponds to the term 'made known' used in the second subparagraph of Article 22(1) of Regulation No 139/2004. Second, the expression 'to make known to a Member State', as inserted by Regulation No 1310/97 in Article 22(4) of Regulation No 4064/89, was, as set out in paragraphs 91, 92 and 98 of the 2001 Green Paper, as imprecise and ambiguous as the expression 'made known to the Member State concerned'. Third, despite the intention pursued by the 2003 proposal to clarify the procedural rules governing referral under Article 22 of Regulation No 4064/89 (see paragraph 27 of that proposal), no such clarification was provided by Regulation No 139/2004.

197 Furthermore, as regards, first, the referral notice and the Article 22 guidance, which require sufficient information to be provided to make a preliminary assessment of the criteria for referral (see footnote 43 to that notice and point 18 of that guidance) and, second, the 2014 White Paper, which requires mere awareness of the concentration (see point 69 of that White Paper), it should be borne in mind that those

documents are not relevant for the purposes of a historical interpretation since they were adopted after the adoption of Regulation No 139/2004 (see paragraph 115 above).

198 In the third place, as regards the contextual interpretation, first, the fact that notification and a concentration's being 'made known' are alternatives entailing, under the second subparagraph of Article 22(1) of Regulation No 139/2004, the same legal consequences, namely the triggering of the time limit of 15 working days (see paragraph 191 above), in itself indicates that their content must be comparable.

199 Second, as the French Republic submits, the second subparagraph of Article 22(1) of Regulation No 139/2004, in so far as it refers, in the first part of the sentence, to the '[referral] request', must be read in the light of the first subparagraph of that provision, which sets out the conditions for a referral request (see paragraph 89 above). It must be inferred from the link between those two subparagraphs that a concentration's being 'made known' must, as the Commission maintains, allow the Member State concerned to carry out a preliminary assessment of those conditions and to assess whether it is appropriate to make a referral request. If that were not the case, that Member State could be obliged, as a precaution and for the sole purpose of complying with the time limit of 15 working days, to make a referral request for concentrations, even though it is not certain that those conditions have been satisfied.

200 Third, the other mechanisms contained in Article 4(4) and (5) and Article 9 of Regulation No 139/2004 provide, like the second subparagraph of Article 22(1) of that regulation, that the Member States concerned have 15 working days to adopt a position on referral. The triggering of that time limit depends on the transmission either of a copy of the notification or of a reasoned submission which must, in accordance with Article 6(1) of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1), as amended by Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 (OJ 2013 L 336, p. 1), contain a minimum amount of equivalent information to enable that Member State to assess whether the conditions for referral are satisfied. Even though the conditions for the application of Article 22(1) of Regulation No 139/2004 differ from those of the other mechanisms for referral (see paragraphs 125 to 129 above), it appears consistent, in the context of a harmonised interpretation of that regulation, for it to be considered that the term 'made known', as used in the second subparagraph of Article 22(1) of that regulation, implies the active transmission of information enabling those conditions for application to be assessed.

201 Fourth, the second subparagraph of Article 22(2) of Regulation No 139/2004, which governs requests to join, also provides for a period of 15 working days within which to make such requests. That period starts to run, according to that provision, from the date 'of [the competent authorities of the Member States] being informed by the Commission of the initial request'. The starting point for that time limit therefore also depends on the active transmission of relevant information.

202 Fifth, the other rules governing the EU merger control system are also based on the principle of active transmission of relevant information. Thus, concentrations with a European dimension within the meaning of Article 1 of Regulation No 139/2004 must, under Article 4 of that regulation, be notified to the Commission prior to their implementation and before the time limit for examination starts to run, in accordance with Article 10(1) of that regulation, only 'on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information'.

203 By relying, for the purposes of triggering the period laid down in the second subparagraph of Article 22(1) of Regulation No 139/2004, on the moment when the concentration at issue was made public, in particular by means of press releases and media coverage, the applicant refers to an element extraneous to the EU merger control system in general and to its mechanisms for referral in particular, in which neither the Commission nor the competition authorities of the Member States are required to seek information actively on concentrations which may be examined under that system.

204 Therefore, in view of the context set out in paragraphs 198 to 203 above, it must be concluded that the concept of a concentration's being 'made known' within the meaning of the second subparagraph of

Article 22(1) of Regulation No 139/2004 must, as regards its form, consist of the active transmission of relevant information to the Member State concerned and, as regards its content, contain sufficient information to enable that Member State to carry out a preliminary assessment of the conditions laid down in the first subparagraph of Article 22(1).

205 In the fourth place, that assessment is also confirmed by a teleological interpretation of the second subparagraph of Article 22(1) of Regulation No 139/2004.

206 It is apparent from recitals 11 and 14 of Regulation No 139/2004 that the referral of concentrations should be made in an efficient manner. That precludes, as the Commission and the French Republic maintain, an interpretation of the second subparagraph of Article 22(1) of that regulation to the effect that the Member States are required, first, to keep under constant review public announcements concerning concentrations in order to identify those which may be the subject of a referral under that article, and, second, in order to comply with the period of 15 working days, to make a pre-emptive referral request of concentrations in respect of which it is not certain that the conditions for the application of that article have been satisfied.

207 Furthermore, only that interpretation ensures, in the interests of legal certainty, that the starting point of the time limit is clearly defined and or the same for all concentrations capable of falling within the scope of Article 22 in the event that notification is not required. A concentration's being 'made known' through active transmission of sufficient information prevents the starting point of the time limit from being dependent on unforeseeable and uncertain circumstances, such as the extent of media coverage or the level of detail in press releases. It also guarantees, also in that interest, that, from that point in time, the Member State concerned has only 15 working days to submit a request for referral.

208 In the fifth place, only the interpretation set out in paragraph 204 above is compatible with the principle of legal certainty, which requires, as is apparent from the case-law set out in paragraph 173 above, on the one hand, that rules of law be clear and precise and, on the other, that their application be foreseeable by those subject to them. In particular, that principle requires that legislation enables those concerned to know precisely the extent of the obligations which are imposed on them, and that those persons are able to ascertain unequivocally what their rights and obligations are and take steps accordingly.

209 That interpretation makes the application of the second subparagraph of Article 22(1) of Regulation No 139/2004 foreseeable by those subject to it, in that it makes the start of the period of 15 working days conditional on the active transmission of relevant information enabling the Member State concerned to make a preliminary assessment of whether the conditions of the first subparagraph of that paragraph have been satisfied. Thus, it ensures that the starting point of that period and the obligations of the parties to a concentration are clearly defined (see also paragraph 207 above). In particular, those authorities may, by transmitting that information, be sure that that time limit has been triggered and that the submission of a referral request is no longer possible after its expiry.

210 By contrast, the applicant's position does not allow for such foreseeability or clarity. First, the applicant appears to make the triggering of the period of 15 working days dependent on information relating solely to the existence of the concentration. Mere knowledge of the existence of the concentration does not allow a Member State to carry out a preliminary assessment of the conditions for the application of the first subparagraph of Article 22(1) of Regulation No 139/2004. The effect of that would be that the Member State concerned would have to, where it does not succeed in gathering sufficient information for that assessment, make a referral request as a precaution, with the sole objective of complying with that time limit, without even knowing whether those conditions were satisfied (see also paragraphs 199 and 206 above). Second, the applicant refers to the time when the Member State could have become aware of the concentration, which implies, in reality, as the Commission and the French Republic submit, that the Member States are obliged, in order not to miss a concentration capable of falling within the scope of Article 22 of that regulation, to carry out continuous and diligent monitoring of the press and public announcements throughout the world (see also paragraph 206 above). In that context, they would be exposed to press releases and media coverage, the extent, accessibility, language, degree of detail or other characteristics of which may vary significantly (see also paragraph 207 above). Therefore, the interpretation advocated by the applicant is

too ambiguous to enable those subject to the application of that provision to ascertain clearly what their rights and obligations are. Furthermore, on account of the considerable administrative burden it presents and its lack of effectiveness, that interpretation would deprive the referral mechanism, referred to in Article 22 of that regulation, of its practical effect.

211 In the light of all the foregoing considerations, and having regard, in particular, to the context and purpose of Regulation No 139/2004 and to the principle of legal certainty, the concept of 'made known to the Member State concerned', as set out in the second subparagraph of Article 22(1) of that regulation, must be interpreted as meaning that it requires the relevant information to be actively transmitted to that Member State, enabling it to assess, in a preliminary manner, whether the conditions for a referral request under that article have been satisfied. Consequently, according to that interpretation, the period of 15 working days laid down in that provision starts to run, where notification of the concentration is not required, from the time when that information was transmitted.

212 In the present case, it is common ground that the undertakings concerned never actively passed any information concerning the concentration at issue to the ACF or to the competition authorities of the Member States which made the requests to join. The applicant and Grail have not shown that, before receiving the invitation letter, those authorities obtained relevant information enabling them to carry out a preliminary assessment of the conditions for the application of the first subparagraph of Article 22(1) of Regulation No 139/2004 by other sources or means, but merely assumed that the ACF 'would have been aware' of the concentration at issue before that date. It is apparent from paragraph 25 of the contested decision that the ACF confirmed to the Commission, in its email of 29 March 2021, that that was not the case. The French Republic also pointed out, in its observations of 6 December 2021 on the applicant's request for measures of organisation of procedure, that the ACF was not aware of that concentration until 19 February 2021, the date on which the Commission sent the invitation letter and submitted that concentration to the national competition authorities in the context of the Merger Working Group of the European Competition Network (see paragraph 12 above). As regards the authorities of the other Member States, it is apparent from the Commission's reply to a written question from the Court that, before that date, it had had exchanges only with the German, Austrian, Slovenian and Swedish competition authorities, in order to determine whether they were competent to examine the concentration at issue (see also paragraph 11 above). Those exchanges are irrelevant to the outcome of the present dispute since those authorities did not submit either a referral request or a request to join under Article 22(1) and (2) of Regulation No 139/2004.

213 Furthermore, in the absence of evidence of the active transmission of relevant information, either by the undertakings concerned or by other sources or means, to the ACF or to the competition authorities of the Member States that made the requests to join, the question whether the invitation letter, the referral request and the information letter were based on information which was known to the public on 21 September 2020 is irrelevant. The same is true of the fact that the CMA examined the concentration at issue in November and December 2020.

214 Therefore, as the French Republic points out and as is apparent from paragraph 20 of the contested decision, in the present case it was the invitation letter which enabled those authorities to carry out a preliminary assessment of the conditions for the application of the first subparagraph of Article 22(1) of Regulation No 139/2004 and which therefore constitutes the concentration's being 'made known' within the meaning of the second subparagraph of that paragraph. Since that letter was dated 19 February 2021 and the referral request was submitted on 9 March 2021 (see paragraphs 12 and 14 above), the period of 15 working days laid down in that provision was complied with and that letter cannot be regarded as out of time.

215 Consequently, the first part of the second plea in law is unfounded and must be rejected.

– *The second part, alleging breach of the principles of legal certainty and 'good administration'*

216 In the second part of this plea, the applicant submits that, even if it were considered that the concentration at issue had been 'made known' by the invitation letter to the French authorities or to the authorities which requested to join the referral request, the Commission's delay in sending that letter

was contrary to the fundamental principle of legal certainty and to the obligation to act within a reasonable time under the principle of 'good administration'.

217 The applicant maintains that on the date on which the information letter was sent, the Commission had been aware of the existence of the concentration at issue for several months on account of information from the public domain, the FTC and a third party. The Commission and the FTC would keep one another informed about concentration transactions, in particular before the issue by the FTC, as in the present case, on 9 November 2020, of a 'second request'. It is apparent from the contested decision that, following the lodging of a complaint, the Commission was aware of that concentration and of the potential competition concerns which it raised in December 2020 and had conducted discussions with another unnamed competition authority, which the applicant assumes was the CMA, which had carried out a preliminary assessment of that concentration in November and December 2020.

218 The applicant and Grail submit, in reliance on the judgment of 5 October 2004, *Eagle and Others* v *Commission* (T-144/02, EU:T:2004:290, paragraphs 57 and 58), that the Commission is required to act within a reasonable time. Since the EU legislature imposed short time limits for the control of concentrations, in particular, in the context of Article 22 of Regulation No 139/2004, the fact that the Commission waited several months before sending the invitation letter is contrary to good administration and the fundamental principle of legal certainty, which prevented the undertakings concerned from knowing, as soon as possible, which competition authorities were competent to examine the concentration at issue. In that regard, the Commission is required to act with the utmost speed in accordance with the time limit of 15 working days and to exercise its powers with the greatest care and diligence. Grail maintains, in essence, that the judgment of 5 October 2004, *Eagle and Others* v *Commission* (T-144/02, EU:T:2004:290, paragraphs 57 and 58), covers situations in which the legal provisions do not expressly prescribe a time limit, so that the reasonable period for sending an invitation letter under Article 22(5) of Regulation No 139/2004 should be interpreted in the light of that case-law. The Commission took action and informed the undertakings concerned of its intention to apply its new approach concerning Article 22 of Regulation No 139/2004 to the concentration at issue, excessively slowly, which infringed the principle of legal certainty. According to Grail, the Commission cannot have more time to send such a letter than that available to the Member States to determine whether the conditions laid down in Article 22(1) of that regulation have been satisfied, which is also required by the objective that referrals should be decided as soon as possible. At the hearing, in response to an oral question put by the Court, the applicant and Grail stated, in essence, that, in so doing, the Commission also infringed their rights of defence, in particular because the lack of opportunity to submit observations in good time deprived them of the possibility of correcting significant factual errors, as noted in the minutes of the hearing.

219 The applicant and Grail consider that the Commission was aware or could have had sufficient knowledge of the facts as from September 2020 in order to send an invitation letter. The relevant information had been in the public domain since the announcement of the concentration at issue, which is confirmed by the fact that the evidence cited in the invitation letter dated from no later than that month and the Commission mentions, in its defence, a report of 21 September 2020. Even after receiving the complaint, the Commission waited almost two months before sending that letter. Grail disputes the diligent nature of the investigation carried out by the Commission during that period, in so far as it merely verified publicly available information and the complainant's allegations, without contacting the undertakings concerned. Furthermore, the argument put forward by the Commission to justify the time which elapsed before the invitation letter was sent, namely the 'in-depth' analysis of the potential consequences of the concentration at issue, contradicts its assertion that that letter contained only a preliminary conclusion.

220 The Commission, supported by the Hellenic Republic, disputes the applicants' arguments. In particular, it submits that it was not informed by the FTC of its investigation before receiving the complaint on 7 December 2020, or by the CMA of its investigation of the concentration at issue. In any event, it acted within a reasonable time after receiving that complaint. The period of 15 working days applies only after the concentration has been 'made known' to the Member State concerned, whereas an invitation letter, pursuant to Article 22(5) of Regulation No 139/2004, can be issued where the concentration has not been 'made known'. The applicant does not call into question the factual developments set out in paragraphs 5 to 7 of the contested decision which show that, after being

contacted by the complainant, the Commission acted diligently and without undue delay, in particular in order to verify its allegations and to examine in detail the potential consequences of the concentration at issue. In addition, it initiated a dialogue with the national authorities to determine whether one of them was competent to assess that concentration, so that the duration of its assessment was compared favourably with that of the CMA's assessment of the possible impact of the concentration at issue in the United Kingdom alone. The Commission also disputes the applicant's arguments concerning the principle of legal certainty. In particular, it submits that the applicant does not explain how the alleged delay affected the content of the contested decision or the legal situation of the undertakings concerned. At the hearing, it noted that the applicant and Grail had failed to show that their rights of defence had been infringed on account of the unreasonable nature of the time limit and the Commission's delay in acting, as required by the case-law, and to specify the reasons why such an infringement allegedly took place.

221 Article 22 of Regulation No 139/2004 does not lay down any express time limit for the Commission to inform the Member States, pursuant to paragraph 5, of a concentration that satisfies the criteria for a referral.

222 Article 22(5) of Regulation No 139/2004 merely states that 'the Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1' and that 'in such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1'.

223 However, the need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of EU law which is incorporated, in Article 41(1) of the Charter of Fundamental Rights of the European Union, whose observance is ensured by the EU Courts. However, infringement of the reasonable time principle may justify the annulment of a decision only in so far as it also constitutes an infringement of the rights of defence of the undertaking concerned (see, to that effect, judgments of 4 February 2009, *Omya* v *Commission*, T-145/06, EU:T:2009:27, paragraph 84 and the case-law cited, and of 17 December 2015, *SNCF* v *Commission*, T-242/12, EU:T:2015:1003, paragraphs 392 and 393 and the case-law cited). Furthermore, the fundamental requirement of legal certainty, which precludes the Commission from being able, in the absence of a time limit laid down in the applicable legislative act, to postpone the exercise of its powers indefinitely, means that the EU judicature has to assess whether the progress of the administrative procedure indicates excessively belated action on the part of that institution (see, to that effect, judgments of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 140 and 141, and of 22 April 2016, *Italy and Eurallumina* v *Commission*, T-60/06 RENV II and T-62/06 RENV II, EU:T:2016:233, paragraphs 180 and 182 and the case-law cited).

224 Where the duration of a procedure is not set by a provision of EU law, the reasonableness of the period of time taken by the institution to adopt a measure at issue is to be appraised in the light of all the circumstances specific to each case, such as its complexity and the importance of the case for the person concerned (see, to that effect, judgments of 25 January 2007, *Sumitomo Metal Industries and Nippon Steel* v *Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 116; of 28 February 2013, Review of *Arango Jaramillo and Others* v *EIB*, C-334/12 RX-II, EU:C:2013:134, paragraphs 28 and 29, and of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 82).

225 In the light of those case-law principles, where, as in the present case, the Commission receives information by means of a complaint enabling it to assess whether a concentration fulfils the conditions for the application of Article 22 of Regulation No 139/2004, it cannot postpone informing the Member States of its intentions under paragraph 5 of that provision indefinitely. On the contrary, in such a case, it is required to adopt a position, if necessary after carrying out the necessary verifications and preliminary analyses, within a reasonable period of time as regards whether the conditions for a referral request have been satisfied and whether it is necessary to inform the Member State or Member States concerned accordingly.

226 In accordance with the case-law cited in paragraph 224 above, for the purposes of applying Article 22(5) of Regulation No 139/2004 in the light of the reasonable time principle, account must be taken of the fundamental objectives of effectiveness and speed underlying that regulation (see paragraphs 206 and 207 above), and of the fact, correctly pointed out by the applicant, that the EU legislature intended to make a clear allocation between the interventions to be made by the national and by the EU authorities, and that it wished to ensure a control of mergers within deadlines compatible with both the requirements of good administration and the requirements of the business world (see, to that effect, judgment of 18 December 2007, *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:814, paragraph 37 and the case-law cited), and, therefore, the issues raised by the merger control procedure for the undertakings concerned. Similarly, in order to ensure maximum legal certainty as well as sound and efficient administrative activity within brief periods, the competition authority competent to examine a given concentration must be capable of being identified at the earliest possible moment (see, to that effect, Opinion of Advocate General Kokott in *Cementbouw Handel & Industrie* v *Commission*, C-202/06 P, EU:C:2007:255, point 44).

227 In the light of the case-law principles set out in paragraphs 223 to 226 above, the Court considers it appropriate to examine, first, whether, in applying Article 22(5) of Regulation No 139/2004 in the present case, the Commission complied with the requirements arising from the reasonable time principle and, second, whether any failure to comply with that principle led to an infringement of the applicant's rights of defence.

228 In the first place, as regards observance of the reasonable time principle, it is apparent from the additional information provided by the Commission in reply to a written question from the Court that the Commission became aware of the existence of the concentration at issue on 7 December 2020 after a complaint was lodged (see paragraph 11 above). From that date, a period of 47 working days therefore elapsed until the invitation letter was sent on 19 February 2021 (see paragraph 12 above).

229 During that period, as is apparent, in particular, from paragraphs 5 and 6 of the contested decision and from the answers given to a written question from the Court, the Commission held a videoconference with the complainant on 17 December 2020 concerning the concentration at issue, had further exchanges with the complainant, carried out market research and was in contact with the potentially competent competition authorities of four Member States and with the CMA, which had also received the complaint (see paragraph 11 above).

230 As regards the information on the concentration at issue, it is apparent from the invitation letter that the Commission relied in particular on press releases, reports, prospectuses and presentations which were publicly available on the internet and had been published by 21 September 2020 at the latest (see footnotes 1 and 5 to 9 to that letter), the date on which the concentration at issue was publicly announced (see paragraph 8 above). It is also stated therein that that concentration was examined by the FTC, whose 'second request', according to the information provided following the Court's written question, was brought to its attention during the videoconference of 17 December 2020, and reference is made to the 'S-4' form of the Securities and Exchange Commission (United States) of 24 November 2020, as completed by the applicant (see footnote 11 to that letter).

231 As regards, in particular, the assessment of the criteria relating to the effect on trade between Member States and the threat of a significant effect on competition in their respective territories, the Commission, with the exception of a meeting document the origin of which is unclear (see footnote 28 to the invitation letter), used similar information (see footnotes 12 to 15, 24, 26 and 27 to that letter), of which the most recent concerns the acquisition of one of Grail's competitors in January 2021 (see footnote 15 to that letter). Mention is also made of the competition concerns raised, with regard to the concentration at issue, by the FTC and the CMA on their websites (see footnote 17 to that letter), as well as the CMA's report of 24 October 2019 concerning the provisional findings relating to another proposed acquisition by the applicant, which is also available on the internet (see footnotes 18, 22, 25 and 29 to the letter in question). As the Commission confirmed in reply to a written question from the Court, it was not aware of CMA's investigation before 7 December 2020.

232 It follows that the Commission used information most of which was publicly available when it received the complaint. As is shown by the content of the invitation letter, it was therefore in a

position, after verification of certain aspects with the complainant, in particular during the videoconference of 17 December 2020, to make the necessary bilateral contacts relatively quickly with the four competition authorities that were potentially competent to examine the concentration at issue, and to investigate the essential characteristics of that concentration in order to enable it to make a preliminary assessment as to whether that concentration was capable of satisfying the conditions for the application of Article 22(1) of Regulation No 139/2004 and whether it was appropriate to inform the Member States under paragraph 5 of that provision.

233 In that context, having regard to the fundamental objectives of effectiveness and speed pursued by the EU merger control system (see paragraph 226 above) and the circumstances of the present case, a period of 47 working days, which elapsed between receipt of the complaint and the sending of the invitation letter, does not appear to be justified.

234 First, it is apparent from Article 10(1) of Regulation No 139/2004, read in conjunction with Article 6(1) of that regulation, that the period of the preliminary examination phase of a concentration is 25 working days, during which the Commission is required to take a decision on whether that concentration raises serious doubts as to its compatibility with the internal market. In view of the fact that the Commission must, where appropriate, carry out a fairly comprehensive substantive examination of the concentration during that phase, it can reasonably be expected that an examination preceding the sending of an invitation letter under Article 22(5) of Regulation No 139/2004, which implies only a preliminary assessment of the criteria set out in paragraph 1 of that article, does not exceed such a period of 25 working days.

235 Second, as stated in paragraphs 212 to 214 above, account must be taken of the fact that the invitation letter merely constitutes a concentration's being 'made known' under the second subparagraph of Article 22(1) of Regulation No 139/2004, which, in the absence of a prior notification or 'making known', triggers the period of 15 working days for the submission of a referral request by the Member State or Member States concerned. When such an request is made, any other Member State is to have the right to join it within 15 working days (Article 22(2) of that regulation). It is only on the expiry of that period that the Commission may, within 10 working days, decide to examine the concentration (Article 22(3) of that regulation). Thus, the sending of an invitation letter under Article 22(5) of that regulation triggers several other relatively short time limits preceding the adoption of a decision by the Commission to examine the concentration concerned. Thus, in the present case, a period of 90 working days elapsed between the receipt of the complaint on 7 December 2020 and the adoption of the contested decisions on 19 April 2021.

236 Third, it should be borne in mind that, under Article 4(1) of Regulation No 139/2004, a concentration which does not have a European dimension within the meaning of Article 1 of that regulation need not be notified to the Commission. However, the parties to such a concentration would suffer a considerable disadvantage compared with the parties to a concentration which has to be notified if the period between, first, informing the Commission, if necessary by means of a complaint, on the existence of the concentration and, second, the adoption by the Commission of the decision on the acceptance of a referral request was, as in the present case, the same length as the detailed examination phase under Article 8(1) to (3) of Regulation No 139/2004, which involves complex economic assessments as to the compatibility of a concentration with the internal market, for which Article 10(3) of that regulation provides, in principle, for a time limit of 90 working days.

237 Fourth, in the present case, the Commission cannot justify a period of 47 working days between receipt of the complaint and the sending of the invitation letter on account of the 2020 end-of-year holidays, 24 December 2020 to 1 January 2021 being a period of public holidays under Article 1 of Commission Decision of 28 January 2019 on public holidays for 2020 for the institutions of the European Union (OJ 2019 C 38, p. 4) and Article 1 of Commission Decision of 2 March 2020 on public holidays for 2021 (OJ 2020 C 69, p. 8). Furthermore, following the lodging of the complaint, the Commission could have contacted the four potentially competent national competition authorities much more quickly, and in parallel, namely the German, Austrian, Slovenian and Swedish authorities, in order to ascertain whether the competence thresholds under the respective national legislation were likely to be met, which, as is apparent from its reply to a written question put by the Court, it did not do until January and February 2021.

238 Therefore, in view of the short nature of the time limits laid down by Regulation No 139/2004, in particular in Article 22 thereof, the mere fact that the Commission has demonstrated continuous activity in the investigation of the case during the relevant period from 7 December 2020 to 19 February 2021, as is apparent from the table annexed to its reply to a written question put by the Court, is not sufficient for it to be considered that that period constituted a reasonable period of time.

239 It follows that the invitation letter was sent within an unreasonable period of time.

240 However, it must be recalled that infringement of the reasonable time principle, justifies the annulment of a decision taken at the end of an administrative procedure concerning competition only in so far as it also constitutes an infringement of the rights of defence of the undertaking concerned. By contrast, where it has not been established that the undue delay has adversely affected the ability of the undertakings in question to defend themselves effectively, failure to comply with the reasonable time principle cannot affect the validity of that administrative procedure (see, to that effect, judgments of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2006:592, paragraphs 42 and 43; of 8 May 2014, *Bolloré* v *Commission*, C-414/12 P, not published, EU:C:2014:301, paragraphs 84 and 85; and of 9 June 2016, *PROAS* v *Commission*, C-616/13 P, EU:C:2016:415, paragraph 74), but the sanction must be an action for damages brought before the General Court (see, to that effect, judgment of 8 May 2014, *Bolloré* v *Commission*, C-414/12 P, not published, EU:C:2014:301, paragraphs 106 and 109).

241 In the present case, the applicant maintained, at the hearing, that its rights of defence had been breached by the exceeding of the reasonable time limit, on the ground, in particular, that the Commission should have contacted the undertakings concerned and heard their views during the period preceding the sending of the invitation letter in order to enable them to submit comments and to correct certain significant factual errors, a formal note of which was recorded in the minutes of the hearing.

242 However, those vague explanations are not sufficient to establish an infringement of the applicant's rights of defence. In that regard, the Commission rightly argued at the hearing, first, that the invitation letter was merely a preparatory act in the context of the procedure leading to the adoption of a decision under the first subparagraph of Article 22(3) of Regulation No 139/2004 and, second, that the undertakings concerned were in a position effectively to make known their views before it was adopted.

243 First, intermediate measures, such as the invitation letter, whose aim is merely to prepare the final decision, are not intended to produce binding legal effects such as to affect the interests of the applicant and, therefore, to adversely affect him or her separately, where the alleged illegality may be relied on with regard to the final decision for which they constitute a preparatory act, which is why, in accordance with settled case-law, such measures are not open to challenge (see, to that effect, judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 50 to 54 and the case-law cited).

244 Furthermore, the applicant was not capable of specifying, to the requisite standard, the alleged 'significant factual errors' vitiating the contested decision which formerly vitiated the invitation letter and could therefore have had a decisive influence on the content of the referral request of the ACF. In so far as it claims that that letter wrongly stated, in paragraph 26 thereof, like the contested decision, that Grail had 'rivals' on the market, it is sufficient to note that neither that letter nor that request is based on such a categorisation. On the contrary, the referral request justifies the existence of a significant risk of harm to competition, in particular by the fact that, on the one hand, 'in the cancer screening tests sector, Grail will face several operators who have already launched their products … or who are preparing to do so' and that, second, 'the new entity will have the capacity to restrict or increase access to its NGS, to the detriment of Grail's potential competitors in the cancer screening sector' and therefore by the existence of potential competition between Grail and those operators in the event of the implementation of the concentration at issue.

245 Second, given that it is the contested decisions, and not the invitation letter, which adversely affect them, the undertakings concerned had the right to be heard, which is one of the rights of the defence, guaranteeing them the opportunity to make known their views effectively during the administrative

procedure leading to the adoption of those decisions (see, to that effect, judgment of 28 October 2021, *Vialto Consulting* v *Commission*, C-650/19 P, EU:C:2021:879, paragraph 121), but not at the stage prior to the sending of that letter as an intermediate measure. The applicant and Grail do not dispute that they could have submitted their observations before the adoption of the contested decisions but merely complain that they were not granted that option much earlier. It is common ground that the undertakings concerned were informed that the invitation letter had been sent on 4 March 2021 (see paragraph 13 above), that is to say six working days before the expiry of the period laid down in the second subparagraph of Article 22(1) of that regulation, within which the Member States are required to submit a referral request. The Commission also informed them, by the information letter of 11 March 2021, of the referral request (see paragraph 15 above) and they submitted their observations on 16 and 29 March 2021 (see paragraph 17 above). The undertakings concerned were therefore informed long before the contested decisions were adopted, which took place on 19 April 2021, and had several opportunities to make known their views during the administrative procedure leading to the adoption of those decisions.

246 In those circumstances, the argument alleging infringement of the applicant's rights of defence must be rejected.

247 Accordingly, the second part of the second plea must be declared unfounded, with the result that the second plea must be rejected in its entirety.

248 Similarly, it is necessary to reject the requests of 6 October and 6 December 2021 by which the applicant requested the adoption by the Court of measures of organisation of procedure seeking to obtain information concerning, first, the exchanges between the Commission and the ACF and the Commission's knowledge of the concentration at issue (first request) and, second, the date on which the Commission mentioned that concentration for the first time with regard to the French Republic and the documents provided by the Commission to the Member States referring to that concentration (the second request).

249 As is clear from the foregoing considerations the Court, first, was able to carry out its review of the allegedly late nature of the referral request (see paragraphs 212 to 214 above), as relied on in the first part of the plea, and, second, was able to establish that the period taken to send the invitation letter was unreasonable (see paragraphs 228 to 239 above), as relied on in the second part of the plea, on the basis of the pleadings and documents lodged by the parties during the proceedings, in particular by taking into consideration the Commission's answers to the Court's written question of 11 November 2021 and the observations of the French Republic of 6 December 2021.

250 Furthermore, the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it (see judgment of 26 January 2017, *Mamoli Robinetteria* v *Commission*, C-619/13 P, EU:C:2017:50, paragraph 117 and the case-law cited; judgment of 12 November 2020, *Fleig* v *EEAS*, C-446/19 P, not published, EU:C:2020:918, paragraph 53).

The third plea in law, alleging breach of the principles of the protection of legitimate expectations and of legal certainty

251 The applicant, supported by Grail, claims that the contested decisions infringe the principles of protection of legitimate expectations and legal certainty. In essence, it submits that, according to its policy at the time when the undertakings concerned had agreed on the concentration at issue, the Commission did not accept referral requests for concentrations that did not fall within the scope of national merger control rules. It is clear from the speech of the Vice-President of the Commission of 11 September 2020 that that policy continued to apply until it was amended by the publication of new guidance towards the middle of 2021. According to Grail, that shows that the Commission was aware of the importance of its change of approach, which contradicts the findings and recommendations of the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD). The applicant and Grail emphasise the clear and unconditional nature of that speech, in particular as regards the process and timing of the implementation of the new referral policy. In addition, the applicant points out that the Article 22 guidance was adopted after the invitation letter was sent and without public consultation.

252 The Commission, supported by the Hellenic Republic, considers that the applicant's allegations of breach of the principle of legal certainty are not substantiated. As regards the principle of the protection of legitimate expectations, the applicant has not demonstrated that the Commission had given precise, unconditional and consistent assurances, but merely made vague reference to an alleged decision-making practice. In particular, the Commission expressly confirmed, in the 2014 White Paper, that the Member States could request referral of a concentration not covered by their national merger control rules. That possibility was not ruled out by any official document and the Commission has already accepted the referral of such concentrations. The speech of the Vice-President of the Commission of 11 September 2020 is a general political statement on its future practice confirming that the Commission did not in principle rule out dealing with such concentrations. The French Republic recalls, in particular, that economic operators cannot have a legitimate expectation that an existing situation which is capable of being altered in the exercise of that discretion will be maintained and that the Commission accepted the referral of the concentration at issue only after the publication of the Article 22 guidance. The Commission adds that there was nothing to prevent the applicant from making contact with it or with the national competition authorities. Furthermore, the applicant has not demonstrated that it acted on the basis of alleged assurances given by the Commission.

253 As a preliminary point, it should be noted that, even though the applicant relies, in the context of the third plea, on both the principle of legal certainty and the principle of the protection of legitimate expectations, its arguments relate, as the Commission maintains, in reality, exclusively to that second principle.

254 In accordance with settled case-law, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union (see 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 144 and the case-law cited). That right applies to any individual in a situation in which an EU institution, body or agency, by giving that person precise assurances, has led him or her to entertain well-founded expectations. Precise, unconditional and consistent information constitutes such assurances, in whatever form it is given (see judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132 and the case-law cited), provided that it complies with the applicable rules (see, to that effect, judgment of 19 December 2019, *Probelte* v *Commission*, T-67/18, EU:T:2019:873, paragraph 109 and the case-law cited).

255 In the present case, in order to demonstrate the alleged policy, in accordance with which the Commission did not accept referral requests under Article 22 of Regulation No 139/2004 for concentrations that did not fall within the scope of national merger control rules, the applicant relies on paragraph 5 of the invitation letter, paragraph 94 of the contested decision, paragraph 7 of the referral notice and on the Vice-President of the Commission's speech of 11 September 2020. Grail also refers to the findings and recommendations of the ICN and OECD.

256 In the first place, it is sufficient to note that those findings and recommendations do not emanate from the EU administration and therefore do not satisfy the conditions of the case-law cited in paragraph 254 above.

257 In the second place, as regards the documents relied on by the applicant, it must be borne in mind that, by the invitation letter, the Commission considered, as a preliminary point, that the concentration at issue could be the subject of a referral under Article 22(1) of Regulation No 139/2004 (see paragraph 12 above), a position which it confirmed by accepting the ACF's referral request by the contested decision (see paragraphs 19 and 21 to 35 above). In the light of that position that the Commission adopted specifically with regard to the concentration at issue, the applicant cannot rely on those documents to prove that specific assurances that an alleged policy to the contrary would be maintained was provided to it. Furthermore, given that, first, point 5 of the invitation letter and paragraph 94 of the contested decision contain a mere description of the earlier situation and that, second, those documents did not yet exist when the agreement and merger plan were concluded, that is to say, on 20 September 2020 (see paragraph 7 above), the undertakings concerned could not base legitimate expectations on them.

258 As regards paragraph 7 of the referral notice, it is stated therein that ‘the Commission and Member States retain a considerable margin of discretion in deciding whether to refer cases falling within their “original jurisdiction” or whether to accept to deal with cases not falling within their “original jurisdiction”, pursuant to … Article 22 [of Regulation No 139/2004]’.

259 Thus, that paragraph merely emphasises, first, the wide discretion which the Commission enjoys in the context of competition policy (see, to that effect, judgment of 12 July 2018, *Furukawa Electric* v *Commission*, T-444/14, not published, EU:T:2018:454, paragraph 222 and the case-law cited), and, second, the division of powers between the Member States and the Commission, as set out in paragraph 153 above. On the other hand, none of those factors substantiates the existence of the Commission’s alleged policy on which the applicant relies. That finding is confirmed by paragraphs 42 to 45 of the referral notice, which, as the French Republic submits, must be read in conjunction with paragraph 7 of that notice and which set out precisely the relevant criteria governing a referral under Article 22 of Regulation No 139/2004, without mentioning such an alleged practice.

260 In the third place, as regards the speech of the Vice-President of the Commission, it must be borne in mind that that speech concerned ‘The Future of EU Merger Control’ delivered at the International Bar Association’s 24th Annual Competition Conference on 11 September 2020. It is common ground that that speech concerned the Commission’s general policy on concentrations and did not mention the concentration at issue, for which the agreement and the merger plan were concluded at a later date, namely 20 September 2020 (see paragraph 7 above). That speech could not therefore contain precise, unconditional and consistent assurances in relation to the treatment of that concentration.

261 As regards that general policy, the Vice-President of the Commission did indeed state in her speech of 11 September 2020 that, in the past, ‘the Commission has had a practice of discouraging national authorities from referring cases to [it] which they didn’t have the power to review themselves’. However, it does not follow that the referral of such concentrations was precluded as a matter of principle, but, as the term ‘discouraged’ demonstrates, the Commission was merely seeking to persuade the Member States not to submit a referral request in such a situation. As the Commission maintains, the Vice-President of the Commission even emphasised that ‘that practice was never intended to stop [the Commission] from dealing with cases that could seriously affect competition in the single market’.

262 Even if the undertakings concerned could rely on that practice, the Commission was nevertheless able to consider that the concentration at issue was likely to have a significant effect on competition in the internal market and, for that reason, send the invitation letter and accept the referral request and examine it. Consequently, the announcement, in the speech of the Vice-President of the Commission, of a ‘change [of] approach’ in the future and an approximate timetable for its implementation is irrelevant and the arguments of the applicant and Grail relating to non-compliance with that announcement must be rejected as ineffective. The same applies to the arguments based on the fact that the Article 22 guidance was adopted after the invitation letter was sent.

263 Accordingly, the applicant, which does not claim to have obtained any precise, unconditional and consistent assurances from the Commission in relation to the treatment of the concentration at issue, has also failed to demonstrate the existence of such assurances in relation to concentrations that did not fall within the scope of national merger control rules in general. On the contrary, as the Commission and the French Republic claim, it is apparent from the 2014 White Paper that that article applies to such concentrations (see footnote 45 to the 2014 White Paper).

264 That assessment is confirmed by the fact that the Commission recently accepted, as it rightly submits, referring to its decisions of 6 February 2018 (Case M.8788 – Apple/Shazam), of 15 March 2018 (Case M.8832 – Knauf/Armstrong), of 26 September 2019 (Case M.9547 – Johnson &Johnson/Tachosil), and of 2 April 2020 (Case M.9744 – MasterCard/Nets), several requests to join under the second subparagraph of Article 22(2) of Regulation No 139/2004 from Member States whose authorities were not competent, under their national merger control rules, to examine the concentrations covered by those requests.

265 In any event, in accordance with the case-law referred to in paragraph 254 above, the applicant cannot rely on documents or statements which, if given the interpretation it seeks, seek to restrict the right of Member States to request a referral under Article 22 of Regulation No 139/2004 under the conditions set out therein (see paragraph 155 above). Similarly, in so far as it is apparent from the first plea that the contested decisions were based on a correct interpretation of the scope of that article, the applicant cannot rely on the reorientation of the Commission's decision-making practice (see, to that effect and by analogy, judgment of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 163).

266 In light of the foregoing, the third plea in law must therefore be rejected as unfounded.

267 Consequently, since none of the pleas in law put forward by the applicant in support of its action is well founded, the action must be dismissed in its entirety.

Costs

268 Under Article 134(1) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

269 Article 138(1) of the Rules of Procedure provides that Member States and institutions which have intervened in the proceedings are to bear their own costs. Paragraph 2 of that article provides that the States other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, are similarly to bear their own costs if they have intervened in the proceedings. In accordance with paragraph 3 of those rules, the Court may order an intervener other than those referred to in paragraphs 1 and 2 to bear its own costs.

270 Consequently, the Hellenic Republic, the French Republic, the Kingdom of the Netherlands, the EFTA Surveillance Authority and Grail shall bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Illumina, Inc. to bear its own costs and to pay those incurred by the European Commission;

3. Orders the Hellenic Republic, the French Republic, the Kingdom of the Netherlands, the EFTA Surveillance Authority and Grail LLC to bear their own costs.

De Baere Kreuschitz Öberg

Mastroianni Steinfatt

Delivered in open court in Luxembourg on 13 July 2022.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.