



C-611/22 P & C-625/22 P

Illumina & GRAIL v/ Commission

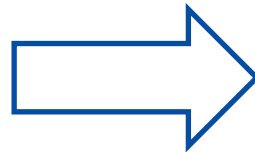
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Disclaimer: the views presented are those of the author and do not represent the official position of the European Commission.

Background

Background: the revised approach towards referrals under Article 22 EUMR

2016 Evaluation found enforcement gap *where certain acquisitions, e.g. of innovative start-ups with no or little turnover escaped merger control at EU and national level*



Solution: revised approach to Article 22 *to encourage referrals by Member States even without competence under national merger control rules*

- **11 September 2020:** [EVP Vestager announced](#) the revised approach to Article 22 at the IBA's 24th annual conference
- **26 March 2021:** [results of Evaluation](#) published in the Commission [Staff Working Document](#).
- **31 March 2021:** Commission [published the Guidance](#) on the application of Article 22.
- **12 December 2021:** Commission publishes [Q&A document](#)

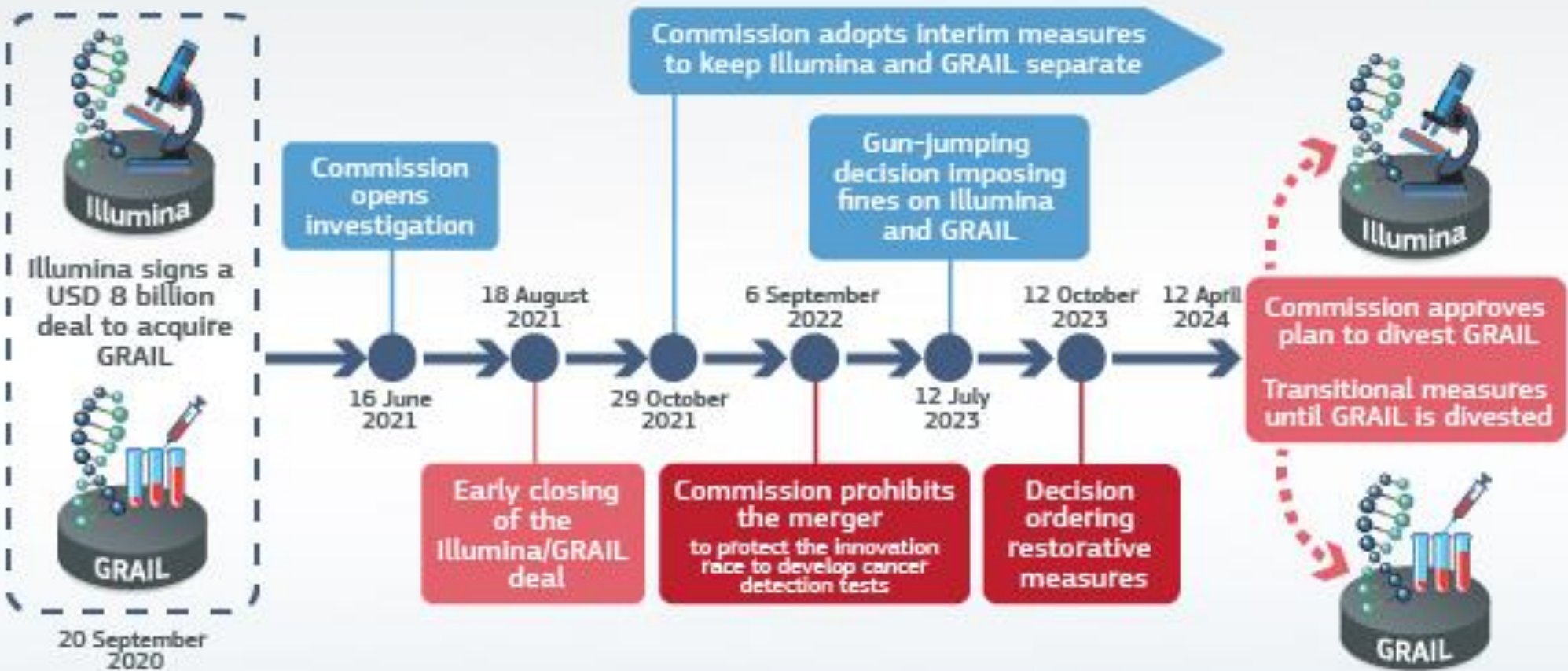
Article 22 EUMR - Referral to the Commission

1. One or more Member States may request the Commission **to examine any concentration as defined in Article 3** that does not have a Community dimension within the meaning of Article 1 but
 - **affects trade between Member States** and
 - **threatens to significantly affect competition within the territory of the Member State** or States making the request.
 - Such a request shall be **made at most within 15 working days of the date on which the concentration was notified**, or if no notification is required, **otherwise made known** to the Member State concerned.
2. (...)

Illumina/GRAIL – start of proceedings

- On **20 April 2021**, the European Commission accepted the referral requests pursuant to Article 22 EUMR submitted by Belgium, France, Greece, Iceland, the Netherlands, and Norway to assess the proposed acquisition of GRAIL by Illumina under the EU Merger Regulation.
- **None of the referring countries** had **jurisdiction** according to their **national** merger control rules,
- but the Commission found that the transaction would **affect trade within the single market** and threaten to **significantly affect competition** within the territory of the Member States making the request.

Procedures in Illumina/GRAIL



The jurisdictional litigation

Procedure

- On 28 April 2021, Illumina brought the **action for annulment** in front of the General Court (“GC”). GRAIL acted as intervener.
- Three pleas: (1) **question of principle** re scope of application of Article 22 EUMR, **case specific pleas** that (2) referral decisions were **out of time**, and (3) that the Commission **breached** the principles of the protection of **legitimate expectations** and of legal certainty.
- On 13 July 2022, GC rejected all pleas and upheld the Commissions referral decisions.
- On 22 and 30 September 2022, respectively, Illumina and Grail brought their appeals against the GC’s judgement to the CJEU.

Main question put to test in Illumina/GRAIL

Can the revised approach to Article 22 EUMR be used as a tool to close the **enforcement gap**? Can Member States with a national merger control regime and without competence per these rules request a referral under Article 22 EUMR?

Main takeaways of the CJEU judgment



Literal interpretation Article 22(1): inconclusive

- Main argument Legal Service: wording of Article 22(1) is clear
- Court of Justice: ***“first subparagraph of Article 22(1) of Regulation No 139/2004 [...] does not, however, make it possible to determine [...] precisely which concentrations that do not meet the thresholds set out in that regulation may be scrutinised by the Commission in accordance with Article 22 thereof.”***

Therefore:

- *“[...] General Court was fully entitled to hold that it could not confine itself to an isolated reading of the – both concise and general – wording [...]” (para.128)*

→ **Historical / contextual / teleological interpretation required**



Historical interpretation (paras. 145,146)

- Travaux préparatoires for EUMR '89 and '04 envisage **Article 22** outside national rules:
 - **not as corrective mechanism** for turnover thresholds
 - **but as 'Dutch clause'**



Contextual interpretation (paras. 178-180)

- Unlike Article 4(5) where transaction gets an EU dimension, **Article 22 EUMR allows Commission to *replace* (a) Member State(s)** for review of a Transaction for its jurisdiction
- This **presupposes that**, where Member State has **national merger control regime**, that regime **has not precluded** it from having **competence**, by having determined thresholds which the transaction does not meet



Teleological interpretation

- Recital 15 EUMR on Article 22 referrals states:
 - **Commission acquires power to review “on behalf of” Member State**
 - *“other Member States which are also competent to review the concentration”*, which makes sense only if **competence of Member State is prerequisite to be able to request referral or join such request (para. 198)**
- Revised approach to Article 22 undermines effectiveness, predictability and **legal certainty (para. 206)**



Conclusions (1)



Article 22 is **not a mechanism to correct** alleged **deficiencies stemming from** rigidity of **thresholds** laid down in EU and national law



Article 22 has **two main objectives**

- **Dutch clause**, to allow review in stead of Member States without national merger control regime, and
→ *Member States without national merger control regime (Luxembourg) can initiate and join Article 22 EUMR referrals*
- **One-stop-shop**, to allow review of concentration notifiable in several Member States
→ *Member States not competent per national merger control regime cannot initiate or join Article 22 EUMR referrals*



Conclusions (2)

- EUMR forms part of **legislative whole**, which includes:
 - Possibility for Member State to review below-threshold mergers under **Article 102 TFEU**, as confirmed in *Towercast* ([para. 214](#))
 - **Article 1(5) EUMR** provides specific legislative procedure allowing threshold review by QMV at Council or introduction of “safety mechanism” ([paras. 183 & 216](#))

Implications for the Illumina / GRAIL cases

Implications for *Illumina/GRAIL*

For the transaction

- Article 22 referral **decisions annulled**.
- GRAIL became an **independent** public company on 24 June 2024
- US **FTC withdrew its litigation** against Illumina as a result on 15 August 2024

For the EC decisions

On 6 September, the Illumina decisions were withdrawn:

- | | |
|--|---------------------------------|
| • Art 6(1)(c) opening Phase II | • Art 8(3) prohibition |
| • Art 8(5)(a) and (c) interim measures | • Art 8(4) restorative measures |
| | • Art 14 gun jumping fine |

For the Court litigation

Various **ongoing** cases:

Active

- Art 8(3) prohibition (T-709/22)
- Art 8(4) restorative measures (T-1190/23)

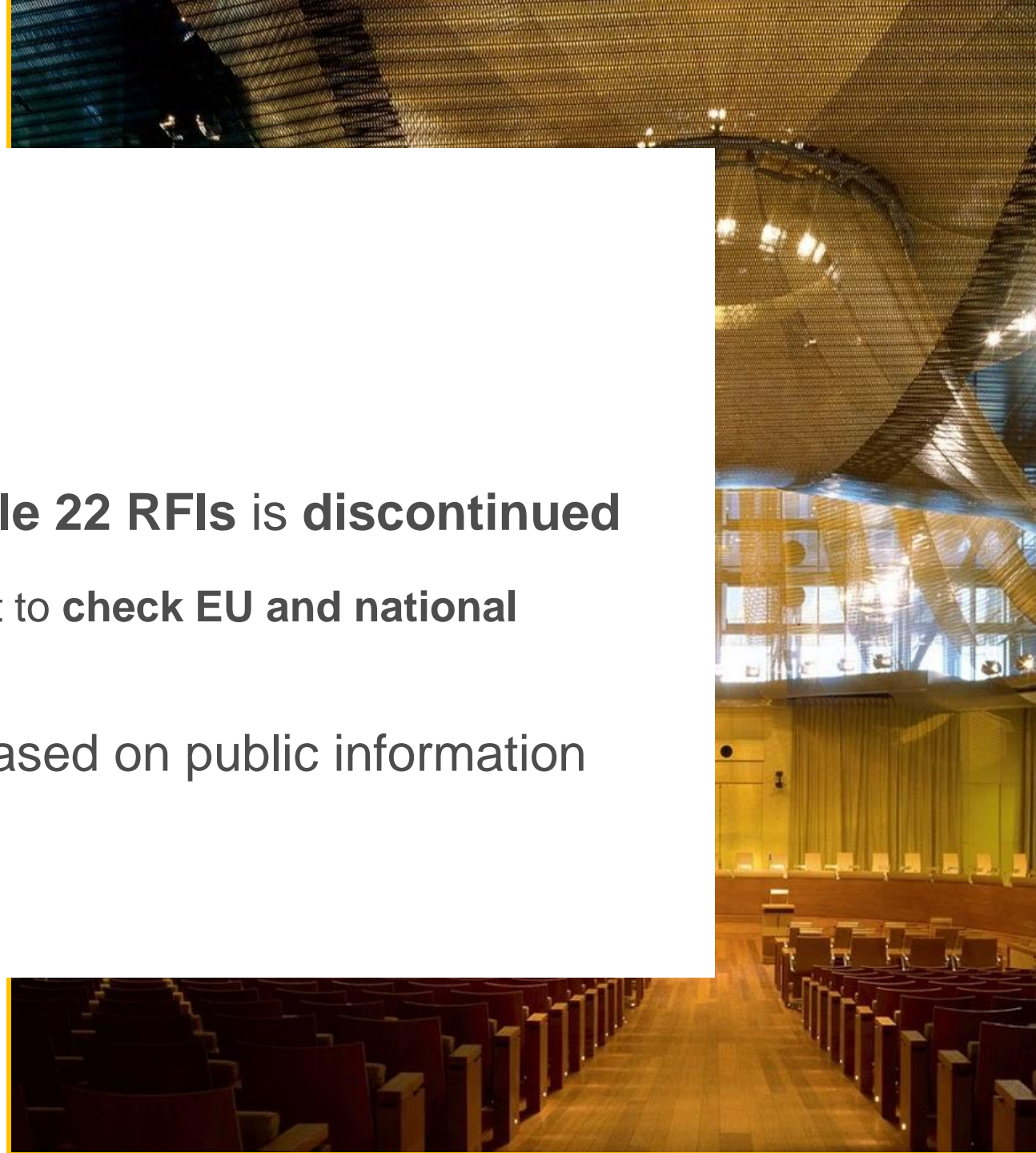
Stayed pending CJEU

- Art 8(5)(a) Interim measures (T-755/21 & T-23/22)
- Art 8(5)(c) Interim measures (T-5/23)
- Art 14 gun jumping fine (T-591/23)

➡ Arguably all **devoid of purpose**, to be determined by the Court.

Policy implications

Policy implications (1/3)



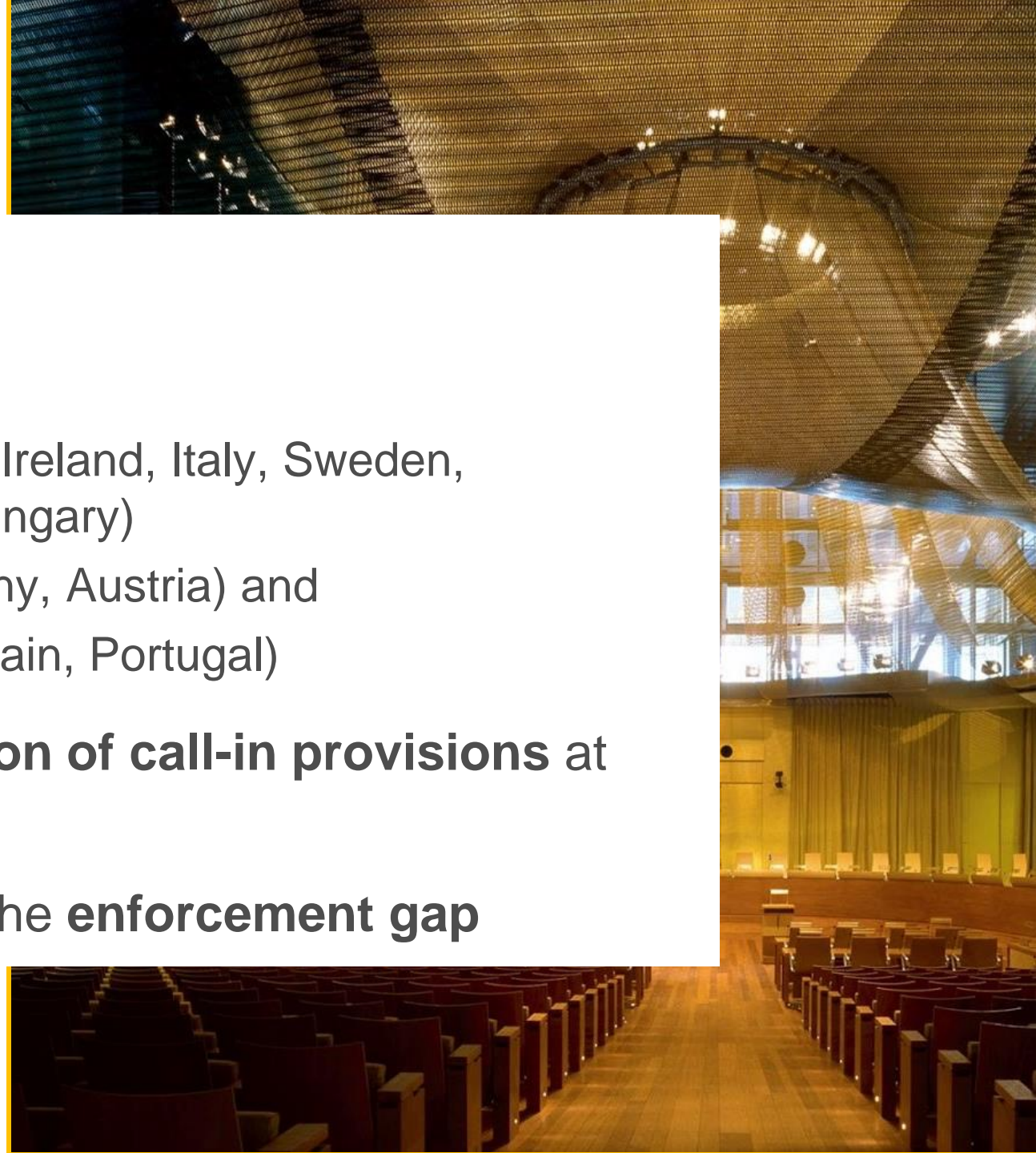
• Short term

- Practice of sending **Article 22 RFIs** is **discontinued**
 - RFIs can however be sent to **check EU and national jurisdiction**



Monitoring continues based on public information

Policy implications (2/3)



- Medium term



- Rely on Member States
 - **call-in provisions** (Denmark, Ireland, Italy, Sweden, Slovenia, Lithuania, Latvia, Hungary)
 - **deal size thresholds** (Germany, Austria) and
 - **market share thresholds** (Spain, Portugal)



- Possible **additional introduction of call-in provisions** at MS level

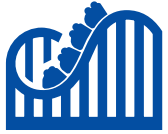


Reflect on **efficiency** to cover the **enforcement gap**

Policy implications (3/3)



- Longer term



Potential **revision of EUMR** to change thresholds and/or include a safeguard mechanism?



- Introducing an ***ad hoc*** mechanism?



Questions?