COURT OF JUSTICE
OF THE EUROPEAN UNION

“CHALLENGES RELATING TO JUDICIAL REVIEW OF MERGER DECISIONS”

20 YEARS SINCE HU ACCESSION – 20 YEARS WITH EU MERGER CONTROL UNDER REGULATION NO 139/2004

Sport as an economic activity

- In so far as it constitutes an *economic activity*, the practice of sport is subject to EU law applicable to such activity (Art 45, 49, 56, 63, 101 and 102 TFEU) (*Walrave and Koch*, 36/74, para 4 ; *Olympique Lyonnais*, C-325/08, para 27)

- Specific rules adopted solely on *non-economic grounds* are extraneous to any economic activity (*Bosman*, C-415/93, paras 76 and 127 ; *Deliège*, C-51/96, paras 43, 44, 63, 64 and 69)

- Rules adopted by sporting associations (FIFA, BWF and others) in order to govern paid work or the performance of services by professional or semi-professional players may come within the scope of Art 45 and 56 ; Art 49 and even Art 63 (*European International Skating Union v Commission*, C-124/21P, para 94 ; *European Superleague*, C-333/22, para 85)

- Rules and the conduct of sporting associations must respect Art 101 and 102 TFEU

Modern anti-trust laws

Trifecta of provisions:

- Rules on agreements and concerned practices
- Rules on unilateral conduct (abuse of dominance)
- Rules on merger control

EX ANTE REVIEW	EX POST REVIEW
Rules on merger control (Regulation No 139/2004) • Preventive in nature • Predicting the effects of the concentration on the structure and competitive dynamics of the markets concerned • Evaluation in the shortest possible timeframe • Notification and suspension awaiting clearance	**Rules on agreements/concerted practices (Article 101 TFEU)** **Rules on abuse of dominant position (Article 102 TFEU)** • *Towercast* (C-449/21) – certain concentrations ("killer acquisitions") may escape an *ex ante* control and be subject to an *ex post* control under Article 102 TFEU • Not a double assessment of a concentration

Four main points

Challenges for judges when reviewing merger decisions / concentrations:

I. **EU Commission jurisdiction**, Art. 1 of Regulation No 139/2004
II. **Substantive assessment**, Art. 2 of Regulation No 139/2004
III. **Standstill obligation**, Art. 7 of Regulation No 139/20023 – "*Gun Jumping*"
IV. **Procedural challenges** before the General Court

Conclusion: Celerity as a global challenge

I. EU Jurisdiction – “EU dimension”

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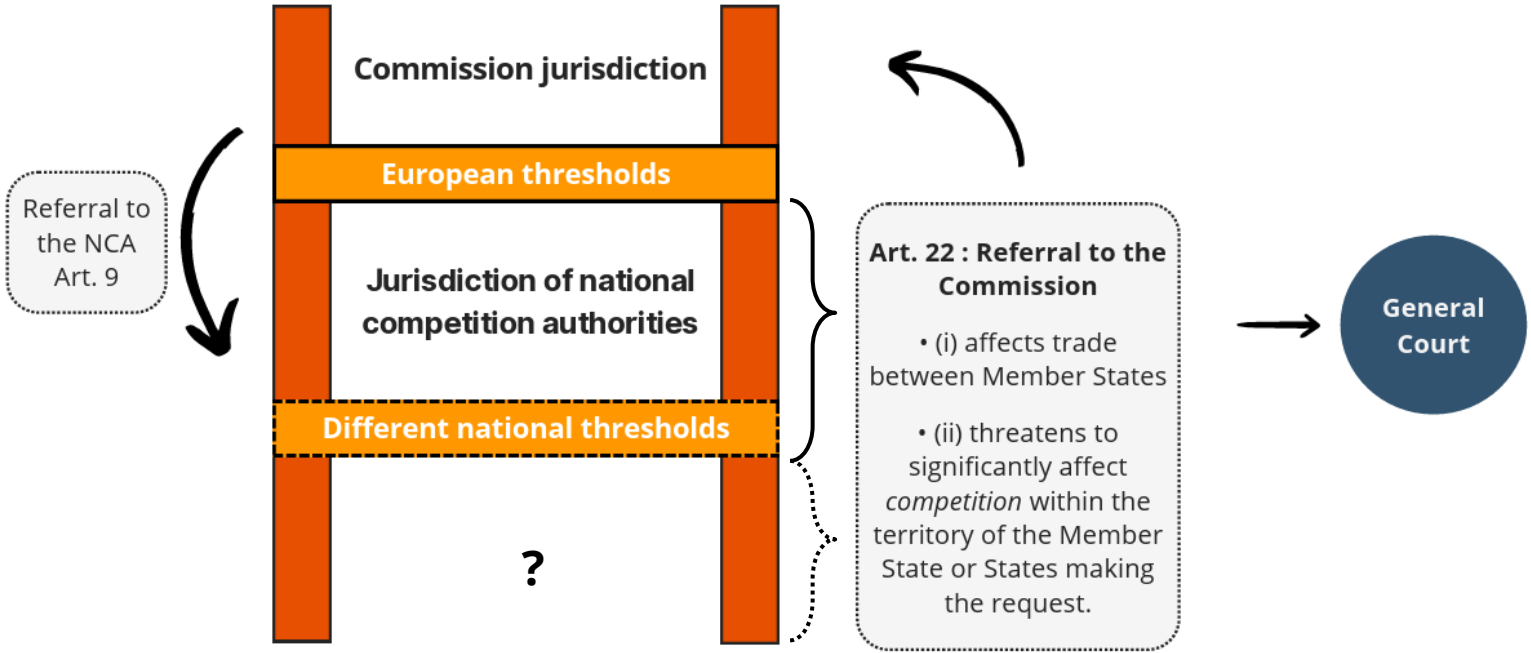
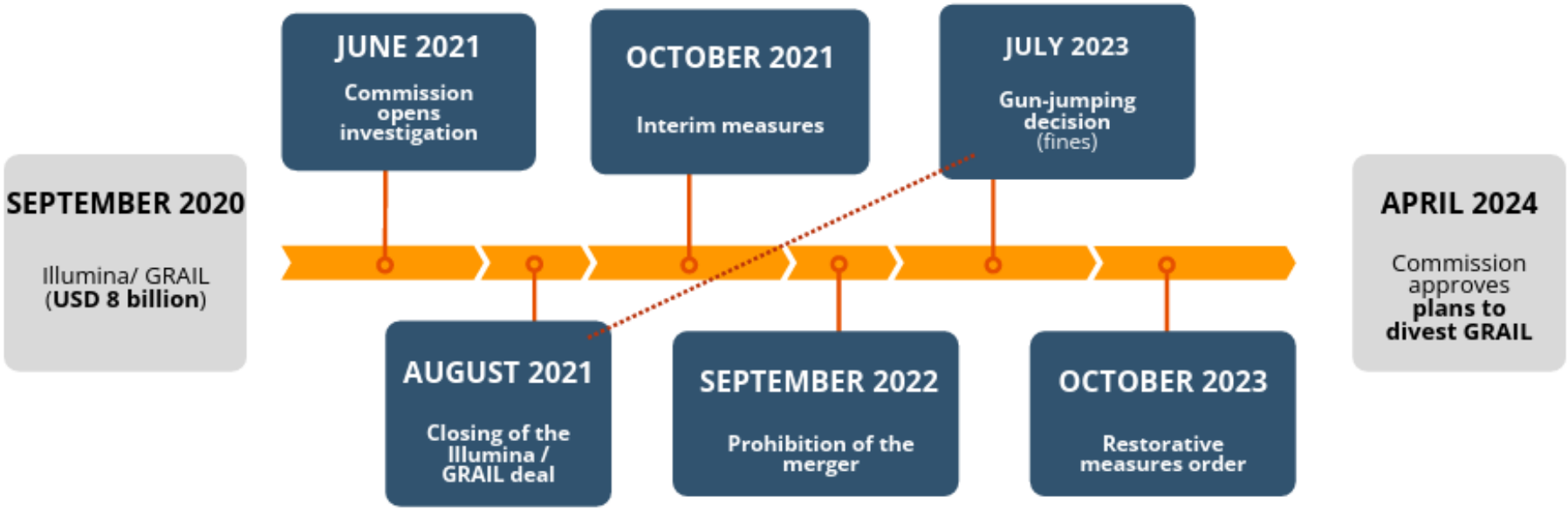
“One-stop shop” system based on quantitative thresholds



I. EU jurisdiction ? – US merger below EUMR notification obligations and below thresholds in MS



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I. Key players: Commission, MS and EU Courts

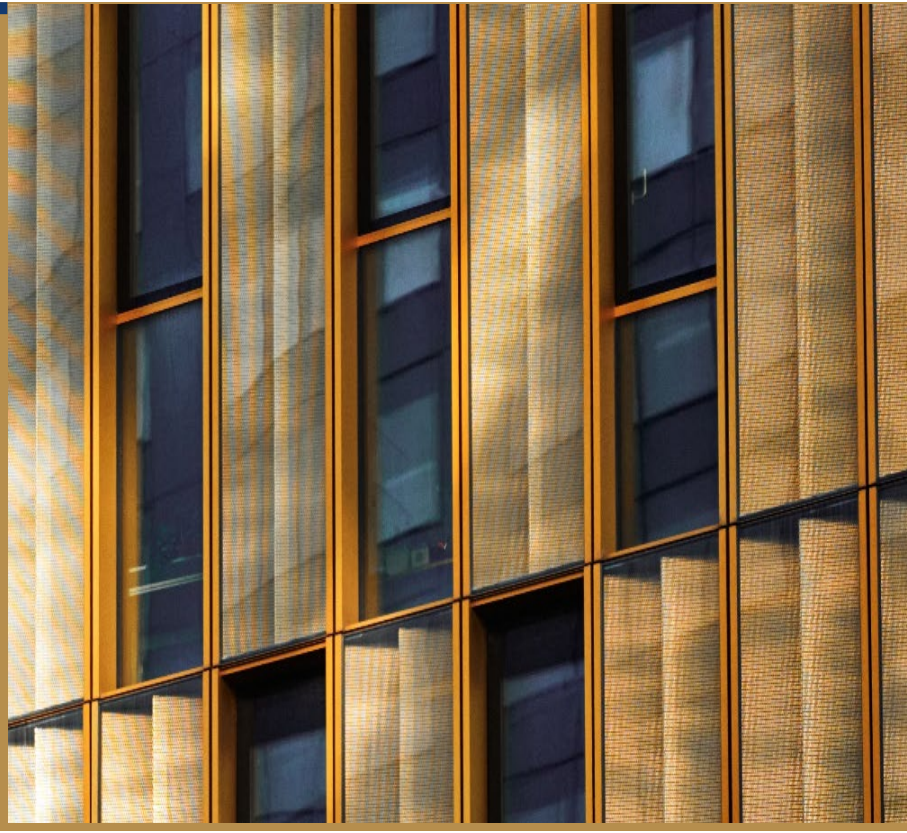
- EC Article 22 guidance to certain categories of cases (OJ 2021 C 113, p. 1) – Referral regardless of "quantitative dimension" – review despite not being initially competent

- Reform aimed at "killer acquisitions" by powerful companies of small innovative start-up like ones where turnover does not reflect competitive potential

- Case T-227/21, Illumina v Commission : "*The Threefold error of the EU General Court*" (Concurrences No 4-2022, David Bosco) – a legal error, an economic error and a political one

- AG proposes to annul the GC's judgment – ECJ to rule later this year (Opinion of 21 March 2023 in Joined Cases C-611/22 P and C-625/22 P)

II. Substantive assessment

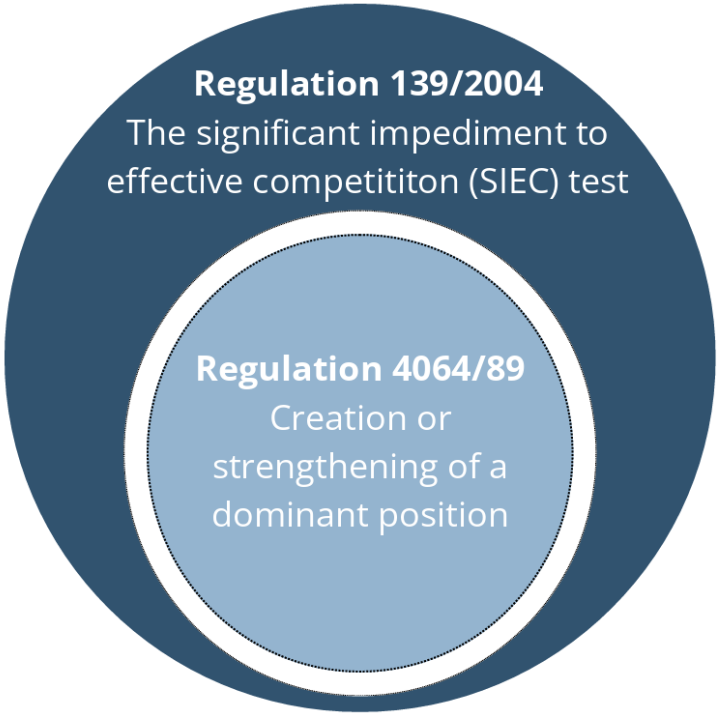


II. Substantive assessment – Legal test

Recital 25

The notion of SIEC [...] should be interpreted as extending, **beyond the concept of dominance**, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings **which would not have a dominant position on the market concerned**

→ elimination of a possible enforcement "gap"

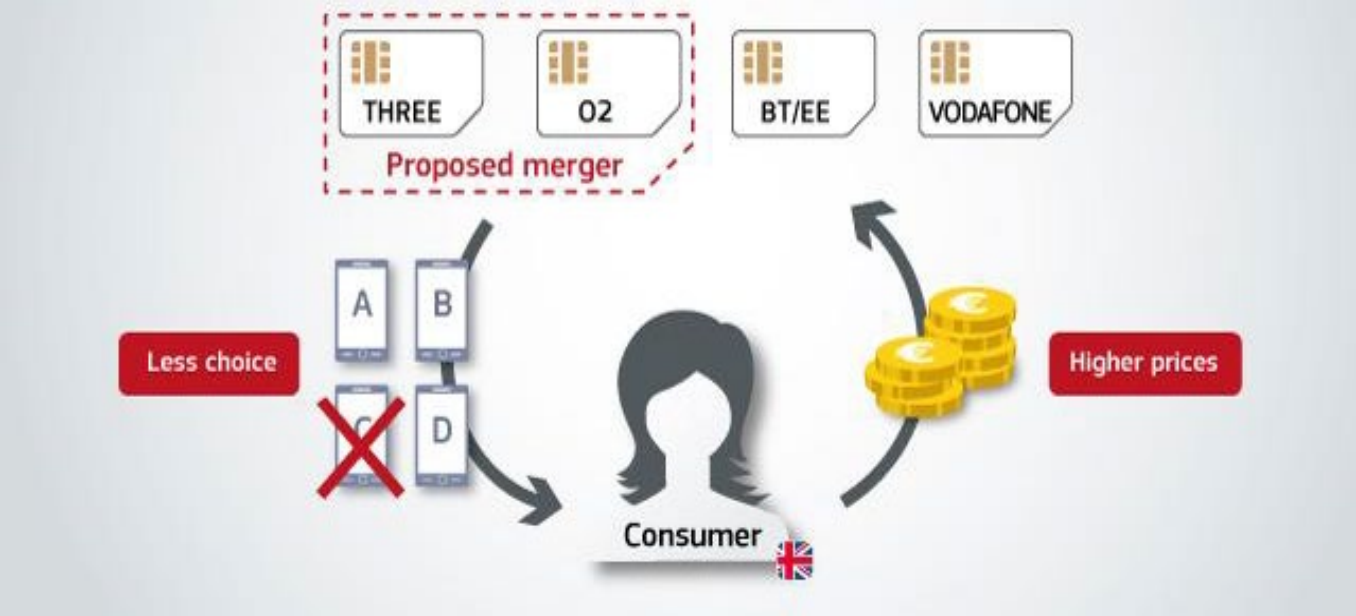


II. Substantive assessment - CK Telecoms

- 2016, Commission Decision declaring the CK concentration incompatible

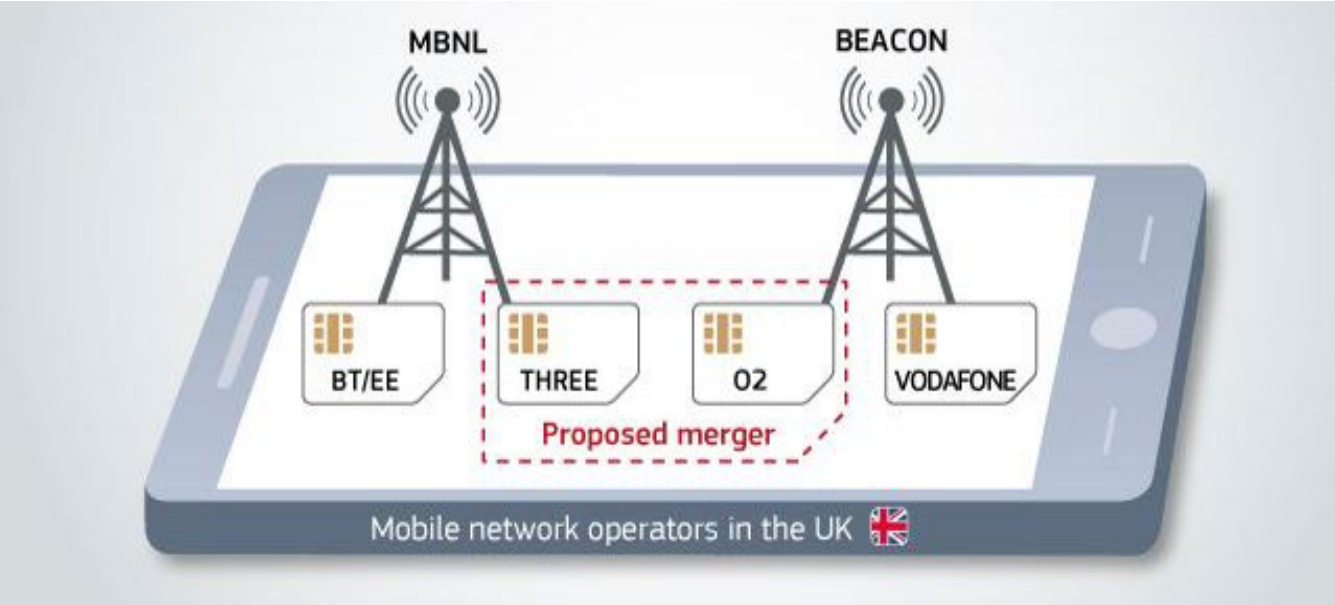
  - Prohibition of a "**4** to **3** merger"
  - No creation or strengthening of a dominant position – the merged entity had between 30% and 40% of the market
  - Commission's theories of harm based on the existence of **non-coordinated effects on an oligopolistic market**
    I. Elimination of important competitive constraints on the retail market
    II. Network sharing agreement
    III. Wholesale market

II. ”4 to 3 merger” – First theory of harm



Source : Commission, IP/16/1704

II. ”4 to 3 merger” – Second theory of harm



Source : Commission, IP/16/1704

II. Substantive assessment – *CK Telecoms*

“The burden of proof and standard of proof in relation to concentrations”

- General Court (Case T-399/16)
  - Strong probability required to demonstrate the existence of significant impediments (para 118)
  - Stricter standard of proof *in the present case …* (para 118)
- Court of Justice (Case C-376/20 P)
  - Standard of proof, for the purpose of identifying a SIEC, does not vary either according to the *type of concentration* or according to the complexity of a theory of harm (para 79)
  - The prospective nature of the economic analysis (*ex ante review*) precludes a requirement for the Commission to meet a particularly high standard of proof in order to demonstrate that a concentration would (or would not) significantly impede effective competition (para 86)
  - Sufficient to demonstrate that it is “*more likely than not*” that the concentration would (or would not) significantly impede effective competition (para 87)
- General Court (Case T-399/16 RENV, pending)

II. Substantive assessment – *CK Telecoms*

Judicial review of non-coordinated effects on oligopolistic markets

- Advocate General Kokott
  - The scope of judicial review as regards application of the concept of SIEC, which is a *concept of law*, must be the same irrespective of the type of concentration concerned which may give rise to such an impediment (para 50)

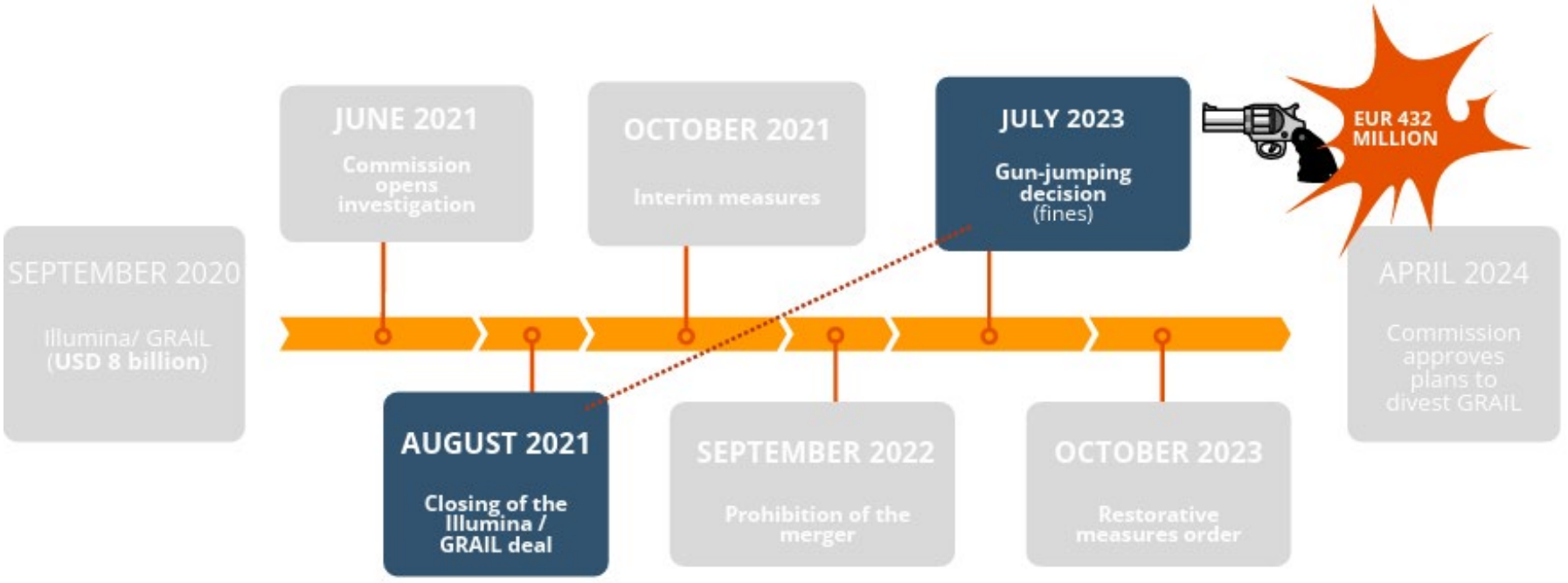
- Court of Justice (C-376/20 P)
  - In the exercise of an *ex ante* review of concentrations, the Commission has a margin of discretion when determining whether a SIEC exists or not (para 82) – it's a prospective economic analyses
  - The review by the EU Courts of a Commission decision relating to concentrations is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment (para 84 with reference to *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P)

III. Standstill obligation – “Gun jumping”

III. Standstill obligation

- Prior notification obligation, Art. 4 of Regulation No 139/2004
- Standstill obligation, Art. 7 of Regulation No 139/2004 (”A concentration with EU dimension […] shall not be implemented […] until it has been declared compatible […]”)
- Fines, Art. 14(2)(b) – 10% of aggregate turnover when the concentration is implemented in breach of Art. 7
- When a Member State requests the Commission to examine a concentration, the standstill obligation applies to the extent that the concentration has not been implemented

III. Gun jumping – Case T-591/23



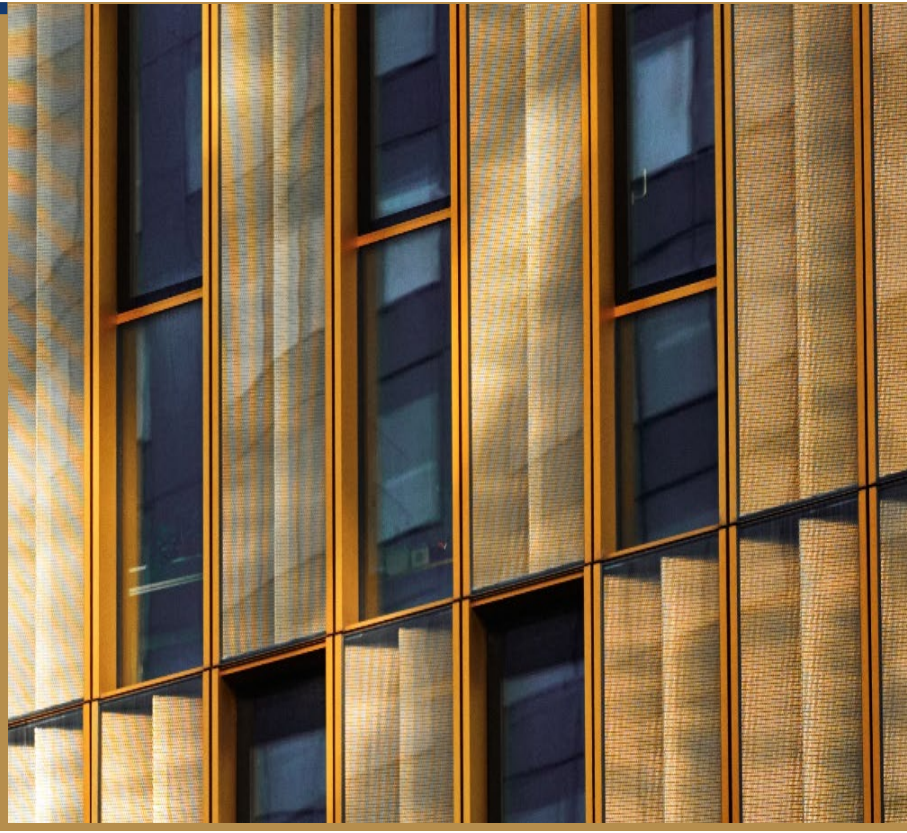
III. Standstill obligation – Level of fine

- Record fine hitting the limit of 10% of the aggregated turnover of companies

- Commission's grounds for fining :
  - Serious and intentional violation – Illumina was weighing up the risk of a gun-jumping fine against the risk of having to pay a high break-up fee if failing to takeover Grail;
  - Grail played an active role – symbolic fine of 1 000 EUR on the target company

- Decision and grounds contested before the General Court (case pending)

IV. Procedural challenges before the General Court



IV. Intervention and confidentiality

- Any person establishing an interest in the result of a case submitted to the Court may intervene in that case (Art. 40 of the Statute of the CJEU)

- Right to intervene in favour of representative professional associations [Order of the Vice-president of the ECJ in Case 523/23 P(I)]

- Number of interveners have an impact on confidentiality issues before the EU Courts

Conclusion: Celerity as a global challenge

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- **“Within a reasonable time”, Art. 47 Charter**
  - Clear, solid and complete answers in cases involving an *ex ante review* of factually and legally complex questions

- **Future**
  - Letta report – Call for increased concentration in key markets such as telecommunications
  - Commission – “Like a tall and towering tree, the merger regulation has stood its ground firmly rooted in the rule of law for 20 years”
  - ECJ – decision on Jurisdiction and the Commission’s recent Article 22 policy