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The EU Commission publishes guidance and expands its jurisdiction by capturing transactions below the jurisdictional thresholds of national and EU merger control regimes

MERGERS, PHARMACEUTICAL, MERGER NOTIFICATION, ALL BUSINESS SECTORS, EUROPEAN UNION, MERGER (REFERRAL BACK TO THE NCA), THRESHOLDS, REFORM, COOPERATION BETWEEN NCAS, INTERNET, COMPETITION POLICY, ONLINE PLATFORMS

EU Commission, *Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, C(2021) 1959 final, 26 March 2021

Matthew G. Rose | Orrick, Herrington & Sutcliffe (London)
Douglas Lahnborg | Orrick, Herrington & Sutcliffe (London)
Saira Henry | Orrick, Herrington & Sutcliffe (London)
Marie-Laure Combet | Orrick, Herrington & Sutcliffe (Paris)

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The European Commission ("Commission") is expanding its jurisdiction over transactions by encouraging national competition authorities ("NCAs") of the EU Member States to 'refer' certain transactions to it that fall below the thresholds for mandatory notification at the EU and the national level. On 26 March 2021, the Commission published guidance ("Guidance") setting out referrals that are 'encouraged' and how and when it will accept such referrals. This development has not required legislative changes (which would have taken some time and also required unanimity among EU Member States) but rather the Commission is resuscitating an existing provision, the so-called "Dutch clause", namely Article 22 of the EU Merger Regulation ("EUMR").

The Commission hopes to remedy what it perceives as an enforcement gap under the turnover-based thresholds for notification. In particular, this change in policy aims to catch transactions that would otherwise fall outside its jurisdiction as the turnover thresholds would not be met, but the parties otherwise have an important competitive position that is not reflected in their turnover, including so-called "killer acquisitions". The Commission considers this to be a particular issue in the digital economy, pharmaceutical sector, and other 'innovation-driven' sectors.

Only a couple of Member States (Austria and Germany) have implemented transaction value-based thresholds to catch acquisitions of companies with low turnover and high valuation. The Guidance allows the Commission to enable a more systematic EU-wide response.

The substantive test remains unchanged: the Commission will continue to assess whether there is a risk of significant impediment to effective competition (the "SIEC test").

Transactions falling within the new policy

According to the Guidance, Article 22 referrals will be encouraged for transactions where the turnover of at least one party does not reflect its actual or future "*competitive potential*." A non-exhaustive list of examples includes acquisitions of: (i) promising start-ups, (ii) "*important innovators*," (iii) an "*actual or potential important competitive force*," (iv) companies having access to key raw materials, infrastructure, data or IP rights, and (v) companies providing key inputs for other industries.

Whether a transaction is eligible for an Article 22 referral depends on two legal requirements: the transaction must (i) affect trade between Member States, and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request. The Commission provides examples of the relevant factors for the assessment of these criteria:

- Trade between Member States could be considered affected, for example, based on the location of potential customers, data collection, or likely future commercialisation of IP rights.

- The requirement of a threat to "*significantly affect competition*" within the relevant territory will be met if a preliminary assessment reveals a real risk that the transaction could result in the creation or strengthening of a dominant position, the elimination of an important competitive force (in particular, a new important innovator), the foreclosure from a market or supplies, and leveraging a strong market position from one market to another through exclusionary practices. The preliminary assessment conducted to verify this second criterion is without prejudice to the subsequent formal assessment of the transaction if the Commission accepts the referral.

Procedure/timing

The Commission intends to play an active role in the enforcement of the new policy. It is willing to "cooperate closely" with NCAs to identify transactions that would fall within the scope of this new policy, or even invite NCAs to invoke Article 22 in certain cases. Third parties are encouraged to contact the Commission or NCAs, if they consider a transaction appropriate for referral, provided they have sufficient evidence to enable a preliminary assessment.

The timing for referral is as follows:

- In cases where there is no mandatory filing at a national level, NCAs have 15 working days to request referral, starting from the date on which the transaction is made known to them (according to the Guidance, this is when sufficient information is available to make a preliminary assessment);

- The Commission will inform the other NCAs of the referral request "*without delay*";

- Other NCAs then have 15 working days to join the initial request (direct communication between NCAs is also encouraged by the Commission); and

- After 10 additional working days, the Commission will be deemed to have adopted a decision to examine the

transaction, if it has not already done so.

While the referral is subject to the deadlines set out above, the Commission is willing to accept Article 22 referrals up to six months after completion of the transaction or the transaction having become known in the EU (whichever is the later), or even later in "*exceptional situations*".

Implications for parties to corporate transactions

Standstill effect and risk of gun jumping: The obligation not to close a transaction applies to transactions that have not completed at the date on which the Commission informs the parties that an Article 22 referral request has been made, after which the parties risk substantial gun-jumping fines if they decide to close. The standstill obligation ceases if the Commission subsequently decides not to examine the concentration. The standstill obligation does not apply to transactions that have already completed before the Article 22 referral process is initiated such that no gun-jumping fines can be incurred. The Commission will inform the parties as soon as possible if a referral is being considered to allow the parties to refrain from completing the transaction.

Duty to notify: Once the Commission has accepted Article 22 jurisdiction, the acquirer will be under a duty to notify the transaction under the standard notification procedure under the EUMR.

Potential effects on the transaction and risk of sanctions: Once the Commission has accepted jurisdiction, the transaction will be reviewed based on the standard substantive and procedural EUMR rules, which for transactions that raise concerns include the risk of remedies and in the worst-case scenario, a prohibition decision. If the transaction has not yet completed, there will be no real difference with the standard rules for notifiable transactions, although a decision to apply Article 22 adds to the timetable and may delay closing. However, effective remedies could prove difficult to implement for transactions that have already closed depending on the degree to which the acquired business has been integrated, particularly remedies requiring structural changes (e.g. full or partial divestment) to restore the situation pre-transaction.

The end of the "one stop shop" within the EU?: While under Article 22, the territorial jurisdiction is in theory limited to the EU Member States that have either referred the concentration to the Commission or joined the initial referral(s), the Commission takes into account the effects of a transaction in the rest of the EU whenever a relevant market has a geographic dimension larger than the referring Member State(s). This is likely to be the case in many digital and innovation markets potentially covered by the new policy and tech companies with global ambitions should assume that the Commission will investigate the effect of the transaction on an EU-wide basis.

The Guidance states that if a transaction has already been notified in one or more EU Member States that did not request a referral or join such referral request, this could be a factor against accepting a referral. However, for the purposes of legal certainty and considering potential for inconsistencies, in particular in relation to any remedies, we encourage the NCAs and the Commission to maintain a high level of cooperation to avoid overlapping investigations.

Our recommendations in light of the new policy

This is a major change to the Commission's merger control policy. With this new policy, which is not limited to "Big Tech" or the digital economy (which has driven recent policy shifts or discourse relating to such shifts), EU merger control no longer provides for the legal certainty resulting from turnover-based notification thresholds. Several

months of delay could be added between signing and closing, remedies could be imposed after the implementation of a transaction, and completed acquisitions might have to be unwound, all for transactions which prior to this policy change would not have faced any merger control review in the EU.

In light of this, transaction parties should consider:

Assessing the risk of falling within the scope of the new policy: Transaction parties should consider if a transaction falls within the categories of potential Article 22 referrals set out above. They should also consider if the transaction is likely to raise competition concerns – including through the strengthening of dominance/market power, access to advanced/innovative technology, R&D or data, or if the transaction involves a highly concentrated market, a target with a substantial user base or high projected growth, or meets merger control thresholds outside the EU. The rationale of the transaction and projected market developments will also be relevant factors in assessing if an Article 22 referral is likely.

Allocating risk and adapting transaction documents: Transaction agreements should be revised to take into account the risk of an Article 22 referral. In particular, agreements should allocate the risk of an Article 22 referral between buyers and sellers and include, or not include, as a condition precedent the absence of an Article 22 referral in the time period between signing and closing. If a transaction is likely to be referred, the acquirer may insist on having received from the Commission or NCAs confirmation that the transaction will not get referred under Article 22.

Strategically informing NCAs: At a national level, it might be beneficial to provide NCAs with enough information to allow a preliminary assessment of whether Article 22 referral is appropriate. Providing a sufficient level of detail should trigger the 15 working day deadline vis-à-vis the NCAs that have been provided with such information. It remains to be seen what level of cooperation will be achieved among NCAs; at this stage, it is not certain that informing one NCA would be regarded as informing all NCAs.

Reaching out to the Commission: While it is not yet clear what type of "comfort letter" the Commission is willing to provide, early communication with the Commission should help clarify whether a transaction is outside the scope of Article 22 referral, provided that sufficient information is made available to the Commission to make such assessment. This option should be particularly attractive in a competing bid scenario, or where competitors or other third parties otherwise may use the new Article 22 policy to scupper or delay a transaction.