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EU Merger Control

European Commission Extends Jurisdiction to Non-Reportable Transactions

INTRODUCTION

Through a simple policy change, the European Commission ("Commission") now has greater scope to assert jurisdiction over transactions that fall below the EU or Member States merger filing thresholds. In combination with the United Kingdom's expansive interpretation of its "share of supply" jurisdictional test, the Commission's new policy turns European merger control into an increasingly unpredictable risk factor in cross-border deals that fall below the bloc's filing thresholds. This is a noteworthy development in one of the most prominent merger control regimes.

On March 26, 2021, the Commission published guidance on its revised approach to merger referrals under Article 22 of the EU Merger Regulation ("EUMR"), which applies with immediate effect and without prior public consultation.[1] Article 22 EUMR allows Member States to request the Commission to examine mergers that affect trade between them and "threaten to significantly affect competition" within their territory. This provision was originally enacted in 1989 to allow Member States that did not have a merger control regime to refer problematic mergers to the Commission. Since all Member States (except Luxembourg) have subsequently adopted merger control rules, the original rationale for this provision disappeared, and the Commission's practice was, therefore, while keeping Article 22 as a legal basis for referral, to discourage Member States from referring transactions that did not meet their national notification thresholds, even though that remained legally possible.

In September 2020, Competition Commissioner Margrethe Vestager however signaled a change in the Commission's approach, announcing that the Commission would "*start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves*."[2] Facing such a discretionary assertion of jurisdiction over M&A deals, including potentially for an indeterminate period after closing, the

Commission's guidance paper ("Guidance Paper") was eagerly awaited as a means of improving predictability.

While the Commission's Guidance Paper provides some clarification, it preserves Member States' and the Commission's discretion to make and accept transaction referrals, and largely restates the content of Article 22 EUMR and the existing Notice on Case Referral,[3] as well as previous informal declarations. The added legal uncertainty is in itself a noteworthy development in EU merger control, which was traditionally based on clear and predictable notification thresholds. From now, no M&A deal with any discernable market impact in the EU will be immune from EU merger review, and exposure to an Article 22 referral will become a more significant factor for a wide array of mergers.

COMMISSION GUIDANCE PAPER

The Guidance Paper aims to describe suitable candidates for a referral absent any merger filing obligation, and the criteria that the Commission may take into account when prompting or accepting such referrals.[4] The Commission justifies the new approach in view of recent market developments resulting in a higher number of acquisitions of targets with a significant actual or potential competitive role but with little or no turnover. Such transactions, in the Commission's view, fall outside turnover- or market share-based jurisdictional thresholds, creating a blind spot in the EU and Member States' merger control regimes.

In reality, the Guidance Paper provides limited additional directions compared to the text of Article 22 EUMR and the Commission's Notice on Case Referral. While the first legal condition of Article 22 EUMR (*i.e.*, an effect on trade between Member States) is easily met through any "*discernible influence on the pattern of trade between Member States*,"[5] the assessment will in practice turn on the second condition (*i.e.*, a threat to significantly affect competition within the territory of the referring Member State). In line with the Notice on Case Referral, Member States will need to demonstrate that "*there is a real risk that the transaction may have a significant adverse impact on competition*" based on *prima facie* evidence of potential horizontal effects (*e.g.*, creating or strengthening a dominant position, eliminating an important competitive force, raising entry barriers, or fostering collusion), vertical effects (*i.e.*, hampering competitors' access to input or customers), or conglomerate effects (*i.e.*, leveraging a strong market position from one market to another).[6]

The Guidance Paper also adds a little on the specific considerations that "may" speak in favor of a referral absent any merger filing obligation. Such considerations include the situation in which a target's (low) turnover does not reflect its competitive potential, which is often revealed by a disproportionately high purchase price. The Guidance Paper cites a small number of examples, such as a start-up or recent entrant, an important innovator, a critical asset holder, or an "important competitive force," but does not elaborate further.[7] While the Guidance Paper specifically points at the digital and pharmaceutical sectors, the Commission does not limit the new approach to any particular activity.[8]

The most far-reaching (soft) commitment by the Commission is perhaps its willingness to avoid accepting referrals when more than six months have elapsed since closing of the transaction was made public. The Guidance Paper specifies, however, that the Commission may exceptionally accept referrals beyond that period, for example based on the magnitude of the competition concerns.[9] The Guidance Paper also notes that the Commission is, on balance, more likely to reject a referral request if one or more Member States that received a mandatory merger notification under their national laws do not make or join the referral request.[10]

In practical terms, the new approach means that the Commission and the Member States will cooperate closely to identify potential referral candidates. In that context, the Commission may request Member States to trigger the referral procedure (potentially after receiving a third-party complaint).

Of course, merging parties are welcome to approach the Commission proactively to seek informal comfort on the Commission's intention to accept or reject a referral, or to approach the 27 Member States in order to voluntarily trigger the 15-working-day window after which a referral request is no longer possible.[11] For that purpose, the Notice on Case Referral and the Guidance Paper specify that companies must provide "*sufficient information to make a preliminary assessment*" regarding the need for a referral.[12] It is however unclear what information requirements will effectively trigger the 15-working-day period, and Member States could take the position that the period does not start running until the parties have complied with their requests for additional information.

The overall referral procedure from the initial Member State receiving a notification of, or information on, the transaction until the Commission's referral decision would typically take up to 40 working days.[13] This is before the actual substantive merger review begins.

As stated in Article 22 EUMR, absent a mandatory filing at the national level, the bar on closing applies only as of the working day following the time the Commission informs the parties that a referral request has been made (to the extent the transaction has not already been implemented by that time). This could prompt merging parties to accelerate closing before the Commission takes the case, although this approach carries the risk of the merger review ultimately resulting in remedies or prohibition.

COMMENT

As the Guidance Paper puts it, "*the Member States and the Commission retain a considerable margin of discretion in deciding whether to refer cases or accept referrals*."[14] This highlights that mergers that do not meet the EU filing thresholds now face less legal certainty in the EU than previously, which is noteworthy given how legal certainty featured prominently in the Notice on Case Referral[15] and justified the Commission's restrictive interpretation of Article 22 EUMR, refusing referrals below filing thresholds.

While the Guidance Paper provides some clarity on the Commission's criteria for referral, such criteria nevertheless remain relatively vague. This will give the Commission broad discretion to select a small number of cases every year that it considers to be particularly problematic, while avoiding the unnecessary burden of examining non-problematic mergers.

On the other hand, the impact on merging parties is potentially significant in view of the effective number of transactions in which the parties will need to address the referral risk when assessing execution timing and risk, and negotiating the terms of the merger. If parties fail to do so, they will run the risk of having to deal with unforeseen effects on the economics of the merger, as well as its timeline to closing or even its viability given the potential for merger reviews to be protracted and result in burdensome remedies. At the same time, the uncertainty of the referral risk will make it difficult to impose contractually on sellers or acquisition targets as a closing condition or a timeline parameter, especially in competitive bidding processes. As a discretionary "pick-and-choose" approach is becoming prevalent in merger control and foreign investment regimes around the world, M&A transactions will face increasingly thorny issues for negotiation and higher execution risk, making deal negotiation a particularly challenging exercise to navigate.

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ENDNOTES

[1] 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). The Commission often submits revised merger notices to public consultation (*see*, *e.g.*, the Market Definition Notice, the Remedies Notice, the Jurisdictional Notice, the Horizontal Merger Guidelines, and the Non-Horizontal Merger Guidelines).

[2] Commissioner Vestager, "The future of EU Merger Control," International Bar Association 24th Annual Competition Conference, September 11, 2020, *available at* https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

[3] Commission Notice on Case Referral (2005/C 56/02).

[4] Guidance Paper, para. 12.

[5] Notice on Case Referral, para. 43.

[6] Notice on Case Referral, paras. 43-44, and Guidance, para. 15.

[7] Guidance Paper, para. 19.

[8] In a Webinar organized by the French Competition Authority on March 23, 2021, Director General of DG COMP, Olivier Guersent, additionally mentioned acquisitions of rating agencies as potential candidates for the new approach to merger referrals.

[9] Guidance Paper, para. 21.

[10] Guidance Paper, para. 22.

[11] Guidance Paper, para. 24.

[12] Notice on Case Referral, footnote 43, and Guidance Paper, para. 28.

[13] Under Article 22 EUMR, Member States must make their referral request within 15 working days of receiving a transaction notification or appropriate information about the transaction. The Commission must then inform the remaining Member States, which have 15 working days to decide whether to join the referral and have the case examined in their territory. Finally, the Commission has 10 working days to decide whether to accept the referral request.

[14] Guidance Paper, para. 3.

[15] Notice on Case Referral, para. 13 ("*Due account should* […] *be taken of the importance of legal certainty regarding jurisdiction over a particular concentration, from the perspective of all concerned*"). *See also* para. 7 ("*having regard in particular to the importance of legal certainty, it should be stressed that referrals remain a derogation from the general rules which determine jurisdiction based upon objectively determinable turnover thresholds*").

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