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EU Merger Control: The Closing of a Safe Harbor

The European Commission's Guidance on the Art. 22 EUMR Referral Mechanism

On 26 March 2021, the European Commission ("Commission") has published its Guidance on the application of the long standing merger control referral mechanism between Member States and the Commission set out in Article 22 of the EU Merger Regulation ("EUMR")¹ allowing for mergers that fall below the national filing thresholds to be referred to the Commission.² The Guidance closes the safe harbour of not having to notify and aims at capturing acquisitions that fall below turnover-based thresholds but may nevertheless impede effective competition. While the Guidance focuses on the digital, pharmaceutical and biotechnology sectors, its application may go far beyond. In consequence, the Commission's policy brings about uncertainties for transactions that would normally remain outside of the scope of merger control.

Background

Art. 22 EUMR provides a mechanism whereby Member States may – individually or jointly – request the Commission to examine a concentration that does not have an EU dimension, i.e. falls below the EU turnover thresholds.

Back in 1989, Art. 22 EUMR, also known as the "Dutch clause", was introduced at the request of those Member States, such as the Netherlands, which did not have a national merger control regime in place but wanted certain transactions to be reviewed from a competition law perspective. Since all Member States with the exception of Luxembourg now have national merger control regimes, Art. 22 EUMR somehow lost its *raison d'être*. In the last years, the Art. 22 EUMR referral was only rarely used. In fact, the Commission has developed a practice of discouraging Member States from requesting the referral of transactions under Art. 22 EUMR – at least where

Member States did not have original jurisdiction over the transaction at stake.

The Commission's Art. 22 Guidance

By its Art. 22 Guidance, the Commission now reappraises its previous approach with regard to the application of the Art. 22 referral mechanism – and puts a long-discarded tool to a new use. A small fraction of modern era mergers, in particular in the digital and pharma sector, involving firms that play or may develop into playing a significant competitive role despite generating little or no turnover are challenging the 'old' rules. Turnover-based thresholds may simply fail to allow for these cases to be scrutinized under merger control rules.

The Commission is now seeking to close this enforcement gap through the use of the Art. 22 EUMR referral mechanism. In doing so, the Commission intends to encourage and accept, under certain circumstances, referrals in cases where the referring Member State does not have initial jurisdiction over the case.

Cases "appropriate" for a referral case

Under Art. 22 EUMR Member States may request the Commission to examine a concentration if it (i) affects trade within the internal market and (ii) – prima facie – threatens to significantly affect competition within the territory of the requesting Member State. For the first criterion it can be sufficient that the transaction affects a market covering the whole or substantial part of the territory of a Member State.

The Art. 22 Guidance now lists a number of categories of cases which the Commission will consider "appropriate" for a referral case. All these cases have in common that they concern transactions where the (low) turnover of at least one of the companies involved does not reflect its actual or future competitive potential. In the Commission's view, this could be the case, for example, if the company (i) is a start-up or recent entrant with significant competitive potential, (ii) is an important innovator or is conducting potentially important research,

¹ Council Regulation (EC) No 139/2004 of 20/01/2004.

² [Communication of the Commission of 26/03/2021](#), Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021/C 113/01) ("**Art. 22 Guidance**").

(iii) has access to competitively important assets (such as access to data), or (iv) provides products or services that are key components for other industries.

Although the category of cases cited by the Commission appears to be tailored to digital and pharmaceutical industry cases, the Commission emphasizes that the referral mechanism is not limited to any particular industry.

Notably, the Commission expressly states that a transaction may be referred to the Commission even after closing of the transaction. Moreover, the fact that the transaction has already been notified in one or more Member States shall not prevent any other Member States to refer the case to the Commission.

Procedural aspects

From a procedural point of view, national competition authorities can request the referral of a case within 15 days after the transaction is “made known”. However, the Commission is very vague about the circumstances under which this criterion is met. According to the Art. 22 Guidance this will depend on whether “sufficient information” for a preliminary assessment of the referral criteria is available to the national competition authority.

After a further 15 days, during which other Member States may join the initial request, the Commission can decide within 10 working days whether it considers the case “appropriate” for review. In the affirmative, the Commission will examine the case, which means that the parties cannot implement the transaction before notifying and obtaining clearance from the Commission.

Comment

The Art. 22 Guidance creates great uncertainty for parties to a transaction as both the substance and timing of their transaction may be affected. Irrespective of whether the transaction triggers a filing requirement, it may now be subject to merger review – even after it has been closed. In the absence of a clear cut definition for cases qualifying for a referral, the Art. 22 Guidance fails – at least from the parties' perspective – to achieve its actual purpose as a “guidance”.

From a legal point of view, it is questionable whether reforming the merger control system – through the back door of a new interpretation of Art. 22 EUMR and thus bypassing a legisla-

tive procedure – is the right way to go. Furthermore, and at least from a German perspective, it is doubtful whether the German Federal Cartel Office (“**FCO**”) can refer a case to the Commission even if the national filing requirements are not met. The decision of the German legislator to subject only transactions to merger control that meet the requirements set out in the German Act Against Restriction of Competition, would be circumvented if the FCO could refer cases to the Commission for scrutiny that fall below these thresholds. This is all the more true as the German legislator introduced a notification obligation based on the transaction value in order to cover precisely the cases in the crosshair of the Commission.

Nevertheless, the question remains on how parties should deal with this new legal uncertainty. In cases that have the potential to affect competition, parties have to be aware of the risk of a potential “Art. 22 referral”. In order to gain clarity, parties could trigger the 15-day referral deadline by informing the national competition authority of the proposed transaction. Alternatively, parties can ask for an “early indication” from the Commission, as provided for in the Art. 22 Guidance, as to whether their case qualifies for the referral mechanism, i.e. whether the Commission would accept the case for review, if opted for by one Member State. In any case, the potential risk of an Art. 22 referral should be taken into account when setting up the timeline of a transaction and drafting the transactional documents.



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