Client Alert

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New guidance on merger control: practical impacts on Luxembourg M&A transactions

In brief

Since 26 March 2021, the European Commission (EC) has encouraged the national competition authorities of member states to submit to the EC for assessment mergers that fall below the national turnovers thresholds but that impact trade between Member States and threaten competition within the territory of the applicant Member State.

On 29 April 2021, the Luxembourg Competition Council confirmed its willingness to follow the EC's new approach. Certain transactions occurring in Luxembourg may therefore be submitted to the EC for review, notwithstanding the absence of local merger control mechanism.

Considering the cross-border component inherent to most Luxembourg transactions, dealmakers must carefully assess the risks of a merger control review even if the national merger thresholds are not met. To shed more certainty on the applicable procedure and timeline, the local M&A market may opt to insert detailed contractual remedies in the M&A documentation.

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Expanded merger control

What's the new interpretation of Article 22 of the Merger Regulation?

The EC has published new guidance on the application of the referral mechanism set out in Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("**Merger Regulation**") where the EC claims to adopt a new approach. The new guidance complements the Commission Notice on Case Referral in respect of concentrations issued in 2005.

Such a new approach allows the EC to control concentrations that fall below the European and national thresholds. It aims to ensure that additional transactions which would have previously escaped scrutiny are controlled by the EC as they may have negative significant impacts on competition, particularly the so-called "killer acquisitions" involving targets that do not yet have significant revenues in the digital, pharma or biotech sectors for example.

The EC also confirmed that a referral remains possible when the requesting Member State has not implemented a specific national merger control regime, as is the case for Luxembourg. Should the Luxembourg Competition Council decide to use such a referral mechanism, it will have to make a preliminary analysis demonstrating that there is a real risk that the transaction may affect the trade between Member States and may have a significant adverse impact on competition within Luxembourg.

Which concentrations qualify for a referral?

In accordance with Article 22 of the Merger Regulation, concentrations that do not have an EU dimension must:

- Affect trade between Member States; and
- Threaten to significantly affect competition within the territory of the Member State(s) making the request to be referred to.

The new guidance describes the categories of cases targeted in situations where the transaction is not notifiable under the laws of the referring Member State(s) that consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential.

A list of examples is provided in the new guidance to understand what criteria the EC may take into account in exercising its discretion to accept such referrals, it being expressly confirmed that a considerable margin of discretion in deciding whether to refer cases or accept referrals, respectively shall remain applicable. This would include cases where the target meets any of the following criteria:

1. Is a start-up or recent entrant with significant competitive potential (even though it has not yet generating revenues). In that respect, the EC explains that the value of the consideration received by the seller may be taken into consideration if particularly high compared to the current turnover of the target,
2. Is an important innovator or is conducting potentially important research,
3. Is a an actual or potential important competitive force,
4. Has access to competitively significant assets (such as raw materials, infrastructure, data, or intellectual property rights),
5. Provides products or services that are key inputs/components for other industries.

The new guidance also makes clear that the Member State(s) may also request a referral for transactions that already closed. The EC further indicates that it would generally not consider a referral appropriate when a transaction has been closed for more than six months. If the closing is not publicly known, the six-month period will start as of the date material facts about the transaction have been made public in the EU. Hopefully, future case-law will further clarify the concept of "material facts about the transaction" as such clarifications might be instrumental for the activation of the referral procedure itself.

Finally the EC leaves the door open to accepting later referrals (i.e., more than six months after the deal has closed) considering for example the magnitude of the potential competition concerns and of the detrimental effect on consumers.

Main procedural aspects

What's the deadline for a referral?

- The Member State(s) must request a referral within 15 working days of the date on which the transaction is "made known" to the relevant Member State(s)

Who may initiate a review process?

- Merging parties may voluntarily present their planned transaction(s) to the EC and receive an "early indication" that the intended transaction(s) would not constitute a good candidate for a referral under Article 22 of the Merger Regulation.
- Third parties may also identify to the EC or the national competent authorities a specific transaction that, in their opinion, could be a candidate for a referral under Article 22 of the Merger Regulation.

What are the consequences for merging parties?

- Referral request made
  - The EC will inform the national competent authorities of the Member States (i.e., the Luxembourg Competition Council for Luxembourg) and the merging companies without delay once a referral request has been made. At that stage other Member States may join the initial request within 15 working days of being informed by the EC of the initial request.
  - Once informed, the merging parties must suspend the closing of the transaction (if not already closed or implemented). The suspension obligation may however cease if the EC subsequently decides not to examine the transaction.
  - Thus, if no referral request is accepted whether directly or indirectly, the parties are entitled to proceed with implementing the transaction.
- Decision to examine the transaction
  - No later than 10 working days after the expiry of the 15-working-day period for Member States to join the referral request, the EC may decide to accept the request and review the transaction.
  - If no decision is taken within the abovementioned period, the EC will be deemed to have accepted the referral request and to have scrutinized the transaction in accordance with the request.

- Decision of the EC
  - The envisaged transaction is compatible with the common market, or subject to modifications by the merging parties (the EC may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the EC), or is incompatible with the common market.
  - The already implemented transaction is incompatible with the common market: the EC may:
    - require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the EC may take any other measure appropriate to achieve such restoration as far as possible,
    - order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In all cases, the EC must notify its decision to the undertakings concerned and the competent authorities of member states without delay.

Practical implications on the Luxembourg M&A strategy

Following the new guidance, the companies must carefully assess the risks of a merger control review even though the national merger thresholds have not been met.

From this perspective, competition law advice should be sought by the parties from the outset of the transaction. The parties may, in advance of closing, tailor the risk assessment of whether an EC filing is required in voluntarily providing information to the EC or the Luxembourg Competition Council (for the transactions affecting the Luxembourg market) about their transaction. Any confidentiality undertakings or specificities of the transaction should also be reassessed in light of a potential referral request procedure.

The parties may further intend to counterbalance the uncertainty of the recent legislative developments through detailed contractual provisions aiming to clarify some of the areas of interest, such as:

- submitting the implementation of the transaction to a condition precedent related to obtaining the authorization of the competition authorities with respect to the transaction;
- specific clauses allocating between the parties the specific obligations triggered in case of a referral procedure, as well as undertakings for cooperation in case of merger review and possible referral process;
- long stop date provisions considering the impact that the suspensory effect of an EC merger investigation may have on the timing of closing and integration planning;
- indemnity provisions and termination provisions in case the deal is declared incompatible with the common market and is aborted/terminated, in order to ensure (i) a clear cut reversal process and (ii) an anticipation of any damages incurred by the parties in such a scenario.

In addition, considering the fact that the competition authorities may have access to the transaction documents, the parties should ensure that no provisions harm competition law. In particular, provisions covering the following items must be carefully drafted or reviewed:

- any required actions or cooperation from the parties between signing and closing or post-closing resulting for example in the buyer exercising decisive influence over the target before receiving the green light from the authorities;
- any non-compete, non-solicitation and confidentiality provisions.

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For further information and to discuss what this development might mean for you, please get in touch with your usual Baker McKenzie contact.

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