EU Merger Control: A New Policy enables post-closing reviews of deals even where no national filing thresholds are met

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Executive summary

- The European Commission ("**Commission**") has issued new guidance on when it will accept referrals of merger control reviews from EU national competition authorities. The new guidance was published on 26 March 2021 with immediate effect.
- In a change of policy, the Commission will accept merger control referrals from a Member State even if the transaction falls below that Member State's filing thresholds.
- Member States can refer transactions to the Commission even if they have already closed.
- For a transaction to be referred, it must: (i) affect trade between Member States; and (ii) threaten to significantly affect competition within the Member State or States making the request.
- The Commission says that this is more likely to be the case if the turnover of the target does not reflect its actual or future competitive potential.
- The Commission anticipates that this change in policy will mostly affect transactions in the pharmaceutical, biotech and technology sectors where acquisitions of startups and small companies with low-to-no revenue regularly occur, but the new guidance applies to all sectors and all transactions.
- Parties to transactions falling below the European and national merger control filing thresholds that are economically significant (e.g., based on deal value), should now manage the risk of such referrals in their transaction documentation.

In brief

The Commission has issued new guidance on the application of Article 22 EUMR referrals ("**Article 22 Guidance**").[1] The Article 22 Guidance will complement the Commission's existing Notice on Case Referral. The Article 22 Guidance is technically not a change in law, but it is a significant change of policy by the Commission, as it will now actively encourage a Member State to refer transactions that may adversely affect competition even if they fall below the merger filing thresholds of that Member State.[2] The new Article 22 Guidance anticipates referrals of closed deals. Prior to this change in policy, the Commission discouraged such Article 22 referrals.

The Commission anticipates that this change in policy will mostly affect transactions in the pharmaceutical, biotech and technology sectors, such as acquisitions of startups and small companies with low-to-no revenues, but that could adversely affect competition. These types of transactions typically fall below the EU and Member State merger control filing thresholds. However, the Commission's revised policy is not limited to just these sectors.

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In practice, parties to transactions falling below the European and national merger control law thresholds that are economically significant (e.g., based on deal value) should now manage the Article 22 risk in their transaction documentation.

The Commission has also announced a new impact assessment to assess policy options to further simplify the Merger Implementing Regulation and the Notice on Simplified Procedure. The aim of this consultation is to identify additional cases that are highly unlikely to raise competition concerns and, therefore, could be assessed under the simplified procedure. As a first step in this process, the Commission has launched a public consultation with a deadline for submitting a response of 18 June 2021.

What is Article 22 EUMR?

Under the EU Merger Regulation (EUMR), the Commission has exclusive jurisdiction to review transactions that meet the EU merger filing thresholds, i.e., which have a Community dimension. However, in certain circumstances, Member States can refer transactions to the Commission for review, and vice versa. Under Article 22 of the EUMR, Member States can exceptionally request the Commission to examine a merger that does not have an EU dimension, "but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request."

Article 22 is applicable to all mergers, not only those that meet the jurisdictional criteria of the referring Member State. Once a referral has been initiated by a Member State having jurisdiction under its national law, other Member States can join that referral request. The Commission will then undertake an assessment in order to determine if the legal test is met.[3] If the Commission accepts the Article 22 referral request, it will then review the effects of the transaction in all Member States that submitted such a request. Member States that do not join the request may continue to review the transaction under national rules, assuming their relevant merger control thresholds are met. Therefore, we may see an increase in the number of transactions that are subject to parallel Commission and Member State merger control review.

New approach

To date, the Commission has discouraged Member States from making referrals for mergers that national competition authorities do not have jurisdiction to review because their merger filing thresholds have not been met. In an evaluation of procedural and jurisdictional aspects of EU merger control (see here), it was found that this approach to Article 22 referrals meant a "number of relevant transactions have escaped the Commission's direct merger control jurisdictions," showing, in particular, a limitation to turnover-based thresholds. As outlined by Commissioner Vestager, the Commission now feels that "a company's turnover doesn't always reflect its importance in the market" or its "actual or future competitive potential."[4]

According to the Commission, the change in policy has come about as a result of market developments. In particular, the Article 22 Guidance highlights that:

> These developments appear particularly significant in the digital economy, where services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories, before seeking to monetize the business. Similarly, in sectors such as pharmaceuticals and others where innovation is an important parameter of competition, there have been transactions involving innovative companies conducting research & development projects and with strong competitive potential, even if these companies have not yet finalized, let alone exploited commercially, the results of their innovation activities. Similar considerations apply to companies with access to or impact on competitively valuable assets, such as raw materials, intellectual property rights, data or infrastructure.[5]

Significant impact on competition — guiding principles

- A referring Member State must demonstrate that the transaction:

1. affects trade between Member States
2. threatens to significantly affect competition within the territory of the Member State(s) making the request

The Commission's Horizontal and Non-Horizontal Mergers Guidelines provide guidance on this. For the purposes of assessing cases covered by the Article 22 Guidance, relevant considerations for deciding whether the transaction threatens to significantly affect competition may include:

1. the creation or strengthening of a dominant position of one of the undertakings concerned
2. the elimination of an important competitive force, including the elimination of a recent/future entrant or the merger between two important innovators
3. the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets
4. the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices[6]

The Article 22 Guidance states that the categories of transactions that will normally be appropriate for an Article 22 referral, where the merger is not notifiable in the referring Member State(s), are transactions where the turnover of the target does not reflect its actual or future competitive potential. This would include, for example, transactions where the target:

1. is a startup or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model)
2. is an important innovator or is conducting potentially important research
3. is an actual or potential important competitive force
4. has access to competitively significant assets (such as, for instance, raw materials, infrastructure, data or intellectual property rights)
5. provides products or services that are key inputs/components for other industries[7]

In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.[8]

Procedural implications

Timing: Article 22 referrals are subject to deadlines that can complicate deal timetables: (i) a deadline of 15 working days from the transaction being made known to the Member State for it to refer the transaction to the Commission; (ii) once notified of the request by the Commission, other Member States have 15 working days to join the referral request; (iii) up to another 10 working days for the Commission to decide whether it will accept the referral. The Commission is of the view that "made known" requires the Member State to have sufficient information to undertake a preliminary assessment on whether to refer the transaction but this is a subjective test and no further guidance on this test is given.

Closed transactions: Significantly, the Article 22 Guidance notes that if a transaction has already been closed, that does not preclude a Member State from requesting a referral.[9] However, in practice, the 15-working-day deadline from the transaction being made known to the Member State to make the referral to the Commission will limit the number of closed transactions in the public domain being referred. In unpublicized transactions, the time elapsed since closing will be a factor that the Commission may consider when exercising its discretion to accept or reject a referral request. The Commission would generally not consider a referral appropriate where closing was more than six months before material facts about the transaction were made public so that the transaction was made known to the Member State. The Article 22 Guidance does not provide further details on what material facts need to be disclosed for the 15-working-day deadline period for referral to commence. In addition, the six-month period is just guidance and the Commission ultimately has the discretion to decide that a longer period is

appropriate, based on the magnitude of potential competition concerns and the detrimental effect on consumers. As such, in theory, transactions could be referred to the Commission at any time after a transaction has closed.

Potential uncertainty: Depending on the facts of the case (particularly those in the digital and pharma sectors, as these are singled out in the Article 22 Guidance), falling below the relevant EU or national Member State merger filing thresholds may not preclude a transaction from being reviewed by the Commission. A careful analysis of the risk of an Article 22 referral is now warranted.

Voluntary submission to the Commission or contact NCAs: The Article 22 Guidance invites merging parties to come forward voluntarily to the Commission with information about their intended transaction. Where appropriate, the Commission will provide guidance as to whether the proposed transaction is a candidate for a referral under Article 22 of the EUMR, provided sufficient information to make such a preliminary assessment has been submitted.[10] It remains to be seen if this option will be readily used by merging parties, which may prefer to undertake their own risk assessment. An alternative approach may be to contact relevant NCAs with a view to triggering the 15-working-day deadline.

Third-party complaints: The Article 22 Guidance also notes that third parties may contact the Commission or the competent authorities of Member States and inform them about a merger that, in their opinion, could be a candidate for a referral under Article 22 of the EUMR. While any complaint will need to contain sufficient information for the Commission to undertake a preliminary assessment as to whether the criteria for referral are met and the Commission and Member States are under no obligation to take action following contact by a third party, we anticipate that this option will be used.[11]

Suspension obligation: The Article 7 of the EUMR suspension obligation applies to the extent that the deal has not closed on the date on which the Commission informs the merging parties that a referral request has been made.[12] The parties cannot complete prior to obtaining EU clearance.

Transaction documents: Parties to transactions falling below the European and national merger control filing thresholds that are economically significant (e.g., based on deal value), should now manage the risk of such referrals in their transaction documentation.

Industry implications

Implications for technology firms and the interaction with the Digital Markets Act (DMA): As drafted, the DMA is currently largely silent on changes with respect to merger control rules, apart from the introduction of an "obligation to inform the Commission about concentrations." This is partly because the Commission did not want to use the legal basis of Article 352 of the TFEU, which it is required to do if it is amending the EUMR, given the length of time this process would have taken. However, the Article 22 Guidance states that it will affect "in particular, transactions in the digital and pharma sectors."[13] The DMA and the Article 22 Guidance together demonstrate a clear direction of travel for mergers between technology firms, which will continue to face significant scrutiny by the Commission.

Implications for firms in the pharmaceutical and biotech sectors: The Article 22 Guidance highlights transactions in both the pharmaceutical and biotech sectors. A greater risk now exists that transactions in the healthcare industry will be referred to the Commission. Intense scrutiny by the Commission can be expected given that the Commission, the UK Competition and Markets Authority, the Canadian Competition Bureau, the Federal Trade Commission, Department of Justice and three US offices of attorneys general have recently created a working group with a view to harmonizing their approach to analyzing pharmaceutical deals.[14]

New impact assessment

The Commission has also announced a new impact assessment to assess policy options to further simplify the Merger Implementing Regulation and the Notice on Simplified Procedure. The aim of this consultation is to:

1. identify additional cases that are highly unlikely to raise competition concerns and, therefore, could be assessed under the simplified procedure

2. ensure sufficient safeguards so that the simplified procedure does not apply to cases that merit a more detailed review
3. ensure effective, efficient and proportionate information gathering
4. explore possibilities to reduce the average time needed to obtain a clearance decision for nonproblematic cases
5. simplify the notification of concentrations, including via electronic notifications

As a first step of that process, the Commission has launched a public consultation to gather further information and seek views from stakeholders. The deadline for submitting a response is 18 June 2021.

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[1] See https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf

[2] Article 22 of the Merger Regulation states that, in order for a referral to be made by one or more member state to the Commission, two legal requirements must be fulfilled. The concentration 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.

[3] *Ibid*.

[4] See paragraph 19 of the Article 22 Guidance.

[5] See paragraph 9 of the Article 22 Guidance.

[6] See paragraph 15 of the Article 22 Guidance.

[7] See paragraph 19 of the Article 22 Guidance.

[8] See paragraph 19 of the Article 22 Guidance.

[9] See paragraph 21 of the Article 22 Guidance and Article 22(4) of the EUMR.

[10] See paragraph 24 of the Article 22 Guidance.

[11] See paragraph 25 of the Article 22 Guidance.

[12] See paragraph 31 of the Article 22 Guidance.

[13] See paragraph 10 of the Article 22 Guidance.

[14] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1203 We understand that the working group will be considering issues such as: how can current theories of harm be expanded and refreshed; what is the full range of a pharmaceutical merger's effects on innovation; in merger reviews, how should pharmaceutical conduct such as price fixing, reverse payments and other regulatory abuses be considered; what evidence would be needed to challenge a transaction based on any new or expanded theories of harm; what types of remedies would work in the cases to which those theories are applied; and what have we learned about the scope of assets and characteristics of firms that make successful divestiture buyers.