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Article 22 EU Merger Referrals

Analysis of Commissioner Vestager's announcement to accept referrals from NCAs for non-reportable concentrations

18 September 2020

At a Glance

Executive summary

- The European Commission (EC) has announced that — from mid-2021 — it will start accepting referrals of transactions from EU national competition authorities (NCAs) that fall below the national merger control thresholds. To be referred to the EC, transactions must threaten to significantly affect competition within the territory of the Member State or States making the request.

- Transactions falling below both EU and national thresholds could nevertheless be reviewed — and challenged — by the EC, provided that the EC demonstrates that the deal significantly impedes effective competition in the internal market, or in a substantial part of it.

- As these referrals may impact timing, and even feasibility, of deals, parties to a concentration falling below national thresholds will now systematically need to assess whether their deal can significantly affect competition in any EU Member State — an often complex and time-consuming exercise.

The Development

- On 11 September 2020 during the 24th meeting of the International Bar Association, Commissioner Vestager, in charge of the competition portfolio and vice president in charge of the EU's digital policy, announced that the EC plans "to 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."

- This change would be a very significant development for dealmakers. Through a mere change in enforcement practice (as opposed to legislative change), any transaction that may be seen as raising competition issues could end up being reviewed by the EC — no matter how small the target, and even after the deal has closed.

Background: Unlimited Upward Article 22 EUMR Referrals As a "Solution" to the Killer Acquisition Conundrum

- The assessment of acquisitions of nascent, innovative companies by assumed dominant players, sometimes called "killer acquisitions", is one of the most topical issues raised in recent years in the merger control field. Because such companies often have no or very limited revenues, they typically fall below EU and national merger thresholds and are not subject to a mandatory merger review.

- Germany and Austria have recently supplemented their revenue-based thresholds with "transaction value" thresholds. However, as a practical matter, these supplemented thresholds have not yielded a significant number of additional notifications.

- To capture potentially problematic transactions on a Europe-wide basis (not only "killer acquisitions" by large dominant companies), the EC will — following Commissioner Vestager's announcement — amend its current policy regarding Article 22 of the EU Merger Regulation (EUMR) and start accepting referrals from NCAs, whether or not those authorities had the power to review those cases themselves in the first instance.

- Under Article 22 EUMR, a Member State may request that the EC examine a concentration that has no EU dimension, but that affects trade between Member States and threatens to significantly affect competition within its territory. This Article was introduced in 1989 as the so-called Dutch clause. It was intended mainly to give Member States that, at the time, did not have national merger control laws (such as the Netherlands) a legal basis to ensure that potentially anticompetitive mergers could be reviewed at all. The recent announcement expands the Dutch clause well beyond its original purpose. It is also a significant reversal of the EC's position. In 2014, the EC proposed to amend Article 22 EUMR so that only NCAs competent to review a transaction under their national rules can request a referral to the EC.

- The wording of Article 22 EUMR arguably already allows for such referrals from Member States to the EC. However, the EC has had a long-standing position of discouraging referrals from Member States that have no jurisdiction to review a deal under their national merger control rules. Hence, Commissioner Vestager confirmed the EC will not implement this new policy "overnight", and will need to issue implementation guidance. The revamped guidance and referral mechanism should be up and running by mid-2021.

Practical Implications and Challenges for Businesses

- The future guidance on referrals will need to clarify some of the following points — and the Member States as well as companies will need to be consulted:

    - **Legal uncertainty**. Companies could, until now, rely on the lack of jurisdiction by a particular NCA to exclude that jurisdiction from their merger analysis. Following the envisaged reform, companies will instead need to verify whether the substantive conditions of Article 22 EUMR (particularly whether the transaction threatens to significantly affect competition) are met in one or more Member States even when the transaction falls below the national merger control thresholds. This uncertainty is all the greater given that other Member States can join an initial referral request — thus extending the scope of the EC's investigation into the transaction — if they can demonstrate that the deal also threatens to significantly affect competition within their territory. Given the complexities inherent to such a substantial analysis, considerable legal uncertainty is bound to arise as to whether a referral to the EC is possible or likely.

    - **Timing and disclosure of the deal**. Under the current rules, a referral from an NCA to the EC that falls below the national jurisdictional thresholds must be made within 15 working days from the moment the transaction "is made known" to the Member State concerned.

        - According to the EC notice on referrals, *made known* means that the Member State must have obtained sufficient information to make a preliminary assessment as to the criteria for a referral request pursuant to Article 22 EUMR. The vagueness of the wording will create significant legal uncertainty as to the starting point of the referral timeline, and raises the risk of NCAs referring to the EC transactions that have long-since closed. For parties wanting to complete a deal, this is a moving target.

        - This change of policy also raises the question of how NCAs — with no jurisdiction to review a deal to begin with — will gather sufficient information about a deal. This will likely be addressed by the forthcoming EC guidance. However, businesses will face the following dilemma: either voluntarily provide such information to NCAs and risk NCAs interpreting the information as an admission of the problematic nature of the deal, or refrain from providing any information and remain — perhaps permanently — in a state of uncertainty as to the possibility of a referral to the EC.

    - **Suspension and gun-jumping**. All EU Member States — apart from Luxembourg — have national merger control laws. All require mandatory notification when the thresholds are met, and most require suspension of completion pending a clearance decision, with harsh sanctions (including significant fines) in case of gun-jumping.

        - Parties to a transaction falling below both EU and EU Member States merger thresholds can close their deals without having to wait for approval.

        - Pursuant to the planned reform, however, parties may hesitate to close a transaction if they believe there is a chance that their deal may be challenged by the EC following a later referral.

        - Parties will nevertheless remain able to close their deals up until the EC accepts the referral. At that point, the EUMR applies and the parties can no longer close their deal. Parties will need clarity regarding when they can close their deals. If they have not closed their deal before the EC starts reviewing the deal, parties will need to

continue acting as separate entities and refrain from any integration if they want to avoid fines of up to a maximum of 10% of their worldwide turnover.

- **Deal documentation considerations**. A referral to the EC lengthens the review process significantly. Therefore, companies need to carefully assess the timeline of the referral mechanisms at an early stage, which will be no easy task given the aforementioned uncertainties. Conditions precedent in share purchase agreements (or other deal documents) will need to consider that a deal could be referred to the EC. Similarly, efforts clauses may be needed to anticipate intervention outcomes by all potential regulators and ensure timely cooperation of both parties throughout the merger process. Finally, long-stop dates will need to accommodate a possible referral process.