



European Commission to review more transactions under new merger control referral guidance

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The European Commission (the **EC**) has adopted new **Guidance** to encourage more referrals to it from EU Member States (under Article 22 of the EU Merger Regulation) of transactions that do not meet national merger control thresholds (the **Guidance**). This is a significant evolution of the referral mechanism, which companies will need to factor into deal strategies, timetables and documentation.

The Guidance was adopted in light of the results of the EC's seven-year evaluation of a number of procedural and jurisdictional aspects of the EU merger control regime, as summarised in a **Staff Working Document** (the **Evaluation**). In parallel, the EC has also launched an **Impact Assessment** on the revision of certain procedural rules, with the aim of making the merger review process more efficient.

An additional layer of uncertainty for companies

The possible existence of an enforcement gap concerning transactions that involve targets with no or limited turnover, but potentially have a significant impact on competition, has been on the radar screen of competition authorities for a number of years. Some countries – notably, Austria and Germany – have introduced a deal value threshold in an attempt to plug the gap. Similar solutions are being considered in other jurisdictions (Brazil, India,

South Korea), while countries such as the UK are envisaging the introduction of specific merger control rules in certain sectors. The Evaluation notes that recent years have seen an increase in the number of transactions falling into this enforcement gap. And it has confirmed limitations in the turnover-based thresholds for deals involving nascent competitors and innovative companies, including in (but not limited to) the digital, pharmaceutical, biotechnology and certain industrial sectors.

The EC has been keeping a careful eye on what other jurisdictions are doing or preparing, but ultimately has decided to take a different route to addressing the issue – using its existing referrals system.

The Article 22 referral mechanism – whereby, broadly, any EU Member State can ask the EC to examine a merger that is not caught by the EU thresholds and threatens competition within its territory – has enabled the EC to review a number of transactions in the digital and pharmaceutical sectors (notably, the acquisition of Shazam by Apple and the abandoned acquisition of the Tachosil business by Johnson & Johnson). However, the Evaluation found that the effectiveness of this mechanism has been reduced by the EC's practice of discouraging referrals where a Member State did not have jurisdiction to review a merger under its own national rules.

The stated aim of the Guidance is to address this concern by actively encouraging national competition authorities to refer certain transactions that are not notifiable under their domestic rules.

Wide discretion to accept referrals

For a referral to be made, the merger must (i) affect trade between EU Member States; and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request. These two criteria – that already exist under the current referral regime – ensure that the transaction has a sufficient nexus with the EU and the referring Member State(s). These are the only substantive requirements that must be met for a referral to take place. They are sufficiently broad to capture a large number of transactions and the EC will in practice

continue to enjoy considerable discretion to pick up mergers that it wishes to review.

Focus on "killer" acquisitions

The EC will focus on transactions where one of the parties'/target's turnover does not reflect its actual or future competitive potential. This includes scenarios where the party/the target (i) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues; (ii) is an important innovator or is conducting potentially important research; (iii) is an actual or potential important competitive force; (iv) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (v) provides products or services that are key inputs/components for other industries. This list is purely illustrative and is not limited to any specific economic sector, although the EC does particularly call out digital, pharmaceuticals and biotechnologies. Significantly, deal value will play a role - the EC may take into account whether the value of the consideration is particularly high compared to the current turnover of the target.

No time limit

Closing the deal does not preclude a Member State from requesting a referral. However, the EC will generally not consider a referral appropriate where more than six months have passed after the implementation of the merger. If closing was not in the public domain, this six-month period would run from the moment when material facts about the concentration have been made public in the EU. Importantly, the Guidance underlines that there may be exceptional situations where a later referral may be appropriate in light of the magnitude of the potential competition concerns and the potential detrimental effect on consumers. Notification of the transaction in one or several Member States that did not request a referral or join a referral request may constitute a factor against accepting the referral, but will not preclude a referral.

The EC's new approach towards referrals from Member States creates an additional layer of uncertainty for companies. Merging parties will have

the possibility to voluntarily come forward with information about their intended transactions in order to get an early indication of the EC's likely position. However, there is an increased risk that mergers falling below EU thresholds and national thresholds in EU Member States nonetheless end up being reviewed by the EC.

In the UK, the Competition and Markets Authority (the **CMA**) can also decide to call in completed transactions that were not voluntarily notified by the merging parties. This power is limited in time and the CMA has a maximum of four months post-closing to call in a merger that is in the public domain. In contrast, the Guidance's referral regime is potentially open-ended and the recent reported suggestion by the Director-General of the EC's competition department, Olivier Guersent, that "*It's not about the power to revisit mergers ex post indefinitely*" may provide only limited comfort to merging parties.

The EC has not consulted on the Guidance and a number of questions are left unanswered. For example, there is little guidance on the nature of the "exceptional situations" that may be taken into account by the EC to open an investigation more than six months after closing. There is also little guidance on the form and scope of publication that would be required for the deal to be in the "public domain".

More importantly, integration steps that have been implemented before the referral are likely to raise practical and legal issues. The suspension obligation will only apply to the extent that the transaction has not closed on the date on which the EC informs the parties that a referral request has been made. The EC will inform the parties as soon as possible that a referral is being considered, but this will not oblige the parties to refrain from integrating their businesses. At the same time, the Guidance suggests that the parties may decide to take appropriate measures, such as delaying the transaction's implementation, until it has been decided whether a referral request will be made. The parties will therefore need to consider carefully whether to proceed with integration when their transaction is a potential candidate for referral. If the EC ultimately decides to prohibit the deal, there may

be no choice but to untangle the businesses. It also remains to be seen how the EC would react if parties to a potentially problematic deal that has already closed continued to integrate their businesses while the EC review is ongoing. It is to be hoped that, as suggested by Guersent, the EC proactively monitors how the new policy is working and makes changes where necessary.

Simplifying the EU merger control procedure

In parallel, the EC has launched an Impact Assessment on the revision of certain procedural aspects of EU merger control. Generally, the EC is looking to target and simplify procedures to reduce the burden on merging parties and ensure a more efficient use of EC resources, without undermining effective merger control.

Expanding and clarifying the categories of simplified cases

This may take the form of a flexibility clause giving the EC discretion to treat cases under the simplified procedure in certain circumstances (eg joint ventures that raise no competition concerns), as well as the adoption of new categories of simplified cases for certain vertical links.

Streamlining the review of simplified cases

The current notification form could be replaced, at least in part, with a tick-the-box list of statements on the basic facts relevant for the assessment, without the need to provide underlying evidence. This may potentially remove the need for pre-notification contacts in a number of simplified cases.

Streamlining the review of non-simplified cases

The EC will assess whether the structure of the current notification form could be amended (eg by separating sections for factual information and for advocacy). Opt-out sections to be waived by the EC at the request of the parties may also be identified. The EC will also explore whether certain additions should be made to the notification form for questions that the EC asks regularly through requests for information.

Introducing electronic notifications

The EC is currently allowing businesses to notify their merger cases electronically due to the Covid-19 restrictions. The EC will assess whether fully digital notifications could be introduced.

These proposals are positive news for merging parties, although it remains to be seen how the relevant regulatory texts will be amended at the end of the assessment process. The EC intends to publish a draft of the revised regulatory texts in the second half of 2021 for stakeholders' comments. The **consultation form** is open until 18 June 2021.

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