

On 26 March 2021, the European Commission (EC) published a communication on Article 22 of the EU Merger Regulation (EUMR), setting out new [guidance](#) (Guidance) and a [Staff Working Document](#) on how it will accept referrals by Member States of transactions that fall below the EUMR or Member States' turnover-based jurisdictional thresholds.

Background

When Article 22 was introduced in 1989, it was initially called the "Dutch clause", intended to allow those Member States without a merger control regime an avenue to ensure potentially anticompetitive mergers that did not have a "community dimension" could be reviewed (at the time, the Netherlands was such a Member State). With the adoption of national merger control regimes over time, the European Commission developed a policy of discouraging referral requests from Member States that did not have original jurisdiction to review the transaction.

In stark contrast, the Guidance now aims at encouraging EU Member States to refer more transactions to the EC even where the transactions do not meet the national merger control thresholds. This is a remarkable change in the EC's policy expected to have far-reaching implications for deals affected.

Member States have already acted on the EC's Guidance. Less than a month after publication, the EC has already accepted a request by France to assess the proposed acquisition of GRAIL by Illumina, a cancer screening tech case triggering no European or national merger control law reviews. Belgium, Greece, Iceland, the Netherlands and Norway have joined the request.

Sectors Under Scrutiny

The EC explains its rationale behind such change is to catch "killer acquisitions", i.e. mergers concerning dominant players acquiring targets that, despite generating little or no turnover in the EU or any Member State, are of high value and have the propensity to become far more competitive in the future.

The EC notes that this trend is particularly pronounced 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 monetise the business. In addition, this trend can be seen in sectors such as pharmaceuticals and those where innovation is an important parameter of competition. For example, companies conducting research and development projects and with strong competitive potential, even if these companies have not yet finalised, let alone exploited commercially, the results of their innovation activities. Article 22, thus, provides a way of preventing them from slipping under the EC and Member States' radars.

Despite these objectives, the Guidance does not set the perimeter for the referral system to any particular sector or type of transaction, leaving Article 22 open to limitless referrals across industries and transaction type.

Primary Candidates for Referral

The EC suggests certain cases where such a referral may be appropriate. These are where an undertaking:

- Is a start-up 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).
- Is an important innovator or conducting potentially important research.
- Is an actual or potential important competitive force.
- Has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights).
- Provides products or services that are key inputs/components for other industries. In its assessment, the EC 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.

However, the EC emphasises in the Guidance that this list is provided for purely illustrative purposes as the only two legal requirements of Article 22 of the EUMR that must be fulfilled are that the concentration must:

- i. Affect trade between Member States; and
- ii. Threaten to significantly affect competition within the territory of the Member State or States making the request.

Procedure

A referral may be made voluntarily by the parties to a transaction; by a third party contacting the EC or the Member State authorities; or where the EC is aware of a concentration, it may inform the Member State and invite that Member State to make a referral request.

A referral request must be made within 15 working days of the date on which the concentration is “made known” to the Member State concerned. While parties are not obliged to take or refrain from taking any action in relation to the implementation of the transaction, they may decide to take measures they consider appropriate, such as delaying the transaction’s implementation until it has been decided whether a referral request will be made.

If a request has been made, the Commission will inform the Member States and undertakings involved and other Member States may join the request within a further period of 15 working days of being informed. The EC will then have 10 further working days from that point to decide whether to examine the transaction. If it does not decide in this period, it will be deemed to have adopted a decision to examine the concentration in accordance with the request.

The EC may also accept referrals from Member States even once the transaction has closed. The EC notes that it would “generally” not consider a referral appropriate where more than six months have passed after closing; however, this six-month period would run not necessarily on the completion of a deal, but from the moment material facts on the transaction had been “made public in the EU”. The Guidance notes that for “exceptional situations,” a later referral beyond this time is left open.

Wide-ranging Implications for Businesses

The Guidance raises critical concerns for dealmakers:

- **Legal uncertainty** – Without the structure of excluding an EC filing purely on the basis of turnover thresholds at EU or national level, it will be more difficult to predict whether the EC will review certain deals especially as the parameters of the Guidance are unclear; uncertainty is exacerbated by the possibility of post-closing review, which is worded in a way that allows the EC complete discretion to decide if a transaction is “exceptional”
- **Third-party complaints** – By allowing third parties to alert the EC of transactions (that the third parties are not involved in), the Guidance raises opportunities for corporate rivals to transactions to cause mayhem
- **Timetable delays** – The lengthy wait of 40 working days (eight weeks) for parties to a transaction to hear about whether it would be referred for review by the EC is burdensome for time-critical transactions
- **Transaction documents** – Conditions precedent in transactional documents (e.g. share purchase agreements) will require attention as parties need to consider whether their deal could be referred to the EC

With the questions this Guidance raises and the far-reaching implications of Article 22, it is clear that this new approach will face battle during consultation. The EC has opened its public consultation until 18 June 2021 to gather further information and seek views from stakeholders. It remains to be seen how the EC will shape the Article 22 referral system and whether it will resolve uncertainty with pragmatic solutions.

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