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EU merger control regardless of thresholds

The new European Commission policy regarding Article 22 of the EU Merger Regulation paves the way for review of mergers that neither meets the EU thresholds nor the thresholds applicable in the member state that refers the merger. The application of this new policy will now be tested in court

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In March 2021 the European Commission introduced a new policy regarding Article 22 of the EU Merger Regulation (EUMR), which allows EU member states to refer mergers to the EU for review. Under the new policy, the Commission has begun accepting referrals of mergers with relevance for the internal market from national competition authorities even if the referring authorities have no power to review the cases under their national merger control rules. In principle, this new policy allows the Commission – subject to a referral request by at least one member state – to review any merger, regardless of the value of the transaction and the turnover and market share of the parties.

Article 22 EUMR allows member states to refer mergers to Brussels for review under certain circumstances. Known as the "Dutch Clause", Article 22 was already part of the first EUMR adopted in 1989 at a time when some member states – notably the Netherlands – did not yet have merger control rules in place. In this situation, Article 22 EUMR allows these member states to request the Commission to examine mergers "for them" that do not meet the relatively high thresholds of the EUMR, but affect intra-EU trade and threatens competition within the referring member state. However, almost all member states subsequently introduced their own national merger control rules (today only Luxembourg has no merger control regime) and the Commission adopted a practice of "discouraging" referral requests under Article 22 EUMR from member states that did not have original jurisdiction over the transaction at stake. While the Commission never rejected a referral from a member state, it was clear that it would in principle not accept such requests. This policy followed the simple rationale that mergers, which are not considered relevant for merger control review by national law, are generally not likely to have a significant impact on the internal market and thus do not justify a review at the EU level. Consequently, the only function of Article 22 EUMR in recent years was to allow two or more member states, which were competent for the review of a merger under their own merger control rules, to make a joint request for referral to the Commission in cases where the EU was better placed to review a merger because the merger impacted more than a national market or markets.

Recently, however, the Commission policy regarding Article 22 referrals took a 180-degree turn. On 26 March 2021 the Commission published the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases", which under certain circumstances now "encourages and accepts" referrals in situations where the referring member state does not have initial jurisdiction over a merger. The aim is to allow the Commission to examine mergers, which in its view merit EU merger review, but do not meet the thresholds of the EUMR or national merger control rules.

This drastic policy change comes as part of the conclusion the Commission drew from its evaluation of the

EUMR, which started in 2016. One of the issues the Commission looked at during this evaluation was how to review mergers involving companies that play a significant competitive role despite generating little or no turnover and are not caught by traditional turnover-based thresholds. In particular, this concerns "killer acquisitions" – dominant players that acquire nascent, innovative companies with the intention of eliminating future competition. Studies estimate that a significant share of acquisitions in the pharmaceutical industry is carried out with the sole purpose of discontinuing the target companies' drug projects. Alarms have also been raised in the digital sector about the high number of start-ups that large companies are acquiring.

To address the problem that such transactions may escape merger control scrutiny because of the target's low turnover, Germany and Austria introduced transaction value-based thresholds. However, based on the mixed experiences these countries achieved with transaction thresholds, the Commission determined that additional thresholds would not be an effective and proportionate solution: a transaction value threshold at the EU level would either be too low and create significant additional notification requirements for largely unproblematic transactions or too high to catch the “interesting” mergers. Instead of introducing a transaction value threshold, the Commission decided to adjust the Article 22 EUMR referral policy to pick-up “certain cases” in collaboration with member states.

However, by encouraging member states to refer cases to Brussels – irrespective of their own competence – under this new policy the Commission can in principle ascertain jurisdiction for any transaction it finds worthy of review. The important questions are: which cases would be concerned and in what situations would parties need to prepare for merger control even if they do not meet EU and member state turnover thresholds. In its Guidance paper of 26 March 2021, the Commission defines the categories of cases generally considered appropriate for referral under Article 22 EUMR. Firstly, the transaction needs to meet the criteria of Article 22 EUMR, which means it must not be a purely national case and there must be the risk of a serious competition problem. If these criteria are met, the Commission has the discretion to encourage and accept a referral. The overarching principle guiding this discretion is whether the turnover of at least one party in the merger (normally the target) does not reflect its actual or future competitive potential. According to the Commission’s guidance paper, good candidates for such “underestimated competitive potential” include:

- **A start-up or recent entrant** with significant undeveloped competitive potential or a start-up with a business model that is generating significant revenue (or is still in the initial phase of implementation and forecasts significant revenue);
- A company qualifying as an **important innovator** or is conducting potentially important research;
- A market player deemed to be an actual or potential **important competitive force**;
- A company with **access to competitively significant assets** (e.g. raw materials, infrastructure, data or intellectual property rights);
- A supplier with products or services that are **key inputs or components** for other industries.

Furthermore, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the target's current turnover. Overall, this framework gives the Commission great discretion to select cases. This means that companies involved in transactions and particularly transactions in the pharma and digital markets must live with considerable legal uncertainty

The new Article 22 EUMR referral policy also raises tricky procedural questions, such as when and for how long member states are able to make referral requests.

According to Article 22 EUMR, requests must be made at most within 15 working days of the date when the

concentration was “made known” to the member state. The Commission takes the view that this policy implies that there should be sufficient information to make a preliminary assessment as to whether the criteria for a request are fulfilled, which is a vague specification since this includes the need for sufficient information to assess whether the merger could create a competition problem.

Another practical problem: as soon as the Commission accepts the referral, the standstill obligation kicks in “to the extent the merger has not been implemented”, potentially leaving parties with a partly implemented merger and unable to move back or forward. The Commission has stated that parties can gain legal certainty by discussing potentially problematic mergers, which could be subject to an Article 22 EUMR referral, with the Commission. The details of such discussions, however, are not clear yet.

Lastly, the Commission points out that a transaction, which has already been closed does not preclude a member state from requesting a referral, even though the Commission indicated that it will take into account the time elapsed after the closing as a relevant factor for its assessment for accepting a referral. In general, the Commission explained that it will not accept a referral if more than six months have passed since the implementation of the transaction (the six month time period starts the moment material facts about the concentration have been made public in the EU).

Less than a month after the adoption of the new policy, the Commission first applied the new principles and accepted a request from France to review the acquisition of Grail by Illumina. The deal did not reach the turnover thresholds under French merger control law, but France asked the Commission to review the deal following a referral based on its new Article 22 EUMR policy. Belgium, Greece and the Netherlands and the EFTA states Norway and Iceland, which all lacked the national competence to review the case, joined France’s request, which the Commission accepted on 19 April 2021, quoting concerns of market foreclosure and price increases.

On 29 April 2021, Illumina announced that it had filed an action in the General Court of the EU asking for annulment of this decision. The Commission's controversial new policy will now be put to a legal test.