ALERT MEMORANDUM

European Commission Announces New Policy To Accept Member State Referrals For Merger Review Even If EC And National Thresholds Are Not Met

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In September 2020, Competition Commissioner Margrethe Vestager announced that from mid-2021 the European Commission ("**EC**") would "*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.*"[1]

Such referrals could in principle occur post-closing in respect of transactions that were not reportable at the national level because they did not meet the applicable thresholds for national merger review. This possibility may introduce a degree of uncertainty for such transactions that merging parties may want to take account of in their transactional documents.

The EC's power to review transactions in such circumstances has existed since the EU Merger Regulation ("**EUMR**") entered into force in 1990. In recent years, however, according to Commissioner Vestager, the EC "*has had a practice of discouraging*" Member States' national competition authorities ("**NCAs**") from referring transactions to the EC where the NCAs themselves lacked the power to review such transactions under their respective national merger control rules.[2] The EC has, though, never automatically excluded such referrals,[3] and there would be no basis in the EUMR for doing so.

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[1] Commissioner Vestager, "The future of EU Merger Control," International Bar Association 24th Annual Competition Conference, September 11, 2020.

[2] Ibid.

[3] See, e.g., 2009 Staff Working Paper accompanying the Report on the Functioning of [the EUMR], COM(2009) 281 final, para. 144 ("it is possible that a Member State may still have cause to refer a case which has a significant effect within its borders but which was not caught by its own jurisdictional thresholds. Under such circumstances, a request for referral would not be automatically excluded by the EC Merger Regulation").

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For many transactions that do not meet EU and Member State thresholds, the risk of referral will remain low, including because the EC can accept a referral only if a transaction "*affects trade between Member States*" and "*threatens to significantly affect competition*" in the referring Member State.[4] In some cases, however, the EC's new policy may have significant implications for merging parties that will now face uncertainty as to whether a given transaction will face an EC review even if jurisdictional thresholds are not met at EU level or in any Member State. Companies in such situations will therefore need to assess the risk of referral, consider how that risk can be mitigated, and decide whether to sign and close the deal in circumstances where referral cannot be excluded.

Commissioner Vestager has indicated that the EC will publish guidance in mid-2021 explaining the circumstances in which the EC would accept such referrals. Such guidance is unlikely, however, to clarify fully the circumstances in which a transaction will or will not be referred under Article 22, particularly since the rationale for the EC's change in policy is to allow additional flexibility to review transactions that could harm competition but do not meet EU or Member State thresholds.

The "*Dutch Clause*"

Under Article 22 EUMR, a Member State may ask the EC to examine a concentration that does not meet EU thresholds but "*affects trade between Member States*" and "*threatens to significantly affect competition*" within that Member State's territory. A Member State requesting referral must show that the transaction "*is liable to have some discernible influence on the pattern of trade between Member States*," and that "*based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus that it deserves close scrutiny*."[5]

The procedure for an Article 22 request is as follows:

— The request must be made within 15 working days from the date of national notification or, where no notification is required, the date when the concentration was "*made known*" to the Member State concerned.[6] In the latter case, the clock starts when a Member State has "*sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request*,"[7] a question of fact that is not always straightforward to determine.

— The EC must then inform other Member States and the merging parties of the referral request "*without delay*," from which time other Member States have 15 working days to decide whether to join the referral request.[8]

— The obligation under Article 7 EUMR not to implement the transaction pending EC approval applies from the date on which parties are informed by the EC that a referral request has been made, except to the extent that the transaction has been implemented by that date.[9]

— The EC then has 10 working days to decide whether to accept the request.[10] If the request is

[4] EUMR, Article 22(1): "One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned."

[5] Commission Notice on Case Referral (2005/C 56/02), paragraphs 43-44.

[6] Article 22(1) EUMR.

[7] Commission Notice on Case Referral, footnote 43.

[8] Article 22(2) EUMR.

[9] Article 22(4) EUMR.

[10] The EC considers two categories of cases most appropriate for referral under Article 22 EUMR: cases which give rise to "serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets" and cases that give rise to "serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected

accepted, the EC will review the transaction in respect of any Member States that made the request.[11] Member States that do not join the request may continue to review the transaction under national rules.

This provision was originally designed to address the situation that certain Member States had no merger rules when the EUMR was adopted in 1989 (including the Netherlands, which led to the provision being known as the "*Dutch clause*"). In *Blokker/Toys "R" Us (II)*, for example, the Dutch government asked the EC in 1997 to review the acquisition of Dutch Toys "R" Us stores by Blokker, a leading Dutch retailer.[12] The EC accepted the referral, identified competition concerns, and ordered Blokker to divest the Toys "R" Us stores.

Article 22 was amended in 1998 to allow two or more Member States to make a joint request for referral to the EC in circumstances where the EC would be better placed to review a transaction (*e.g.*, because the markets in question were wider than national). As virtually all Member States have adopted merger control rules, this became the primary purpose of Article 22. As of September 30, 2020, requests for Article 22 referral have been made in 41 cases, four of which were made prior to 1998 by Member States that lacked national merger control rules at the time of the referral.[13]

The EC has also accepted referral requests from Member States that lacked jurisdiction under national law where the request was made to join a pre-existing referral request by a Member State that had jurisdiction under national law. In *SC Johnson/Sara Lee*,[14] for example, the transaction was initially notified in Spain and Portugal. Spain subsequently requested a referral under Article 22, and five additional Member States that lacked jurisdiction under their respective national merger control rules joined the referral request (Belgium, Greece, France, Czech Republic, and Italy). The notification was subsequently withdrawn.[15]

Reassessing Jurisdictional Thresholds

In recent years there has been extensive debate as to whether the EUMR's jurisdictional thresholds should be revised.

In 2014, the EC consulted on the possibility of extending the scope of the EUMR to apply to the acquisition of non-controlling minority shareholdings.[16] In 2016, following a lively debate on the merits and costs of such a change,[17] Commissioner Vestager decided not to proceed with such a reform, as "*the amount of red tape and the administrative burden it would put on businesses would not give you the benefit of a more competitive market*."[18]

More recently, the EC's focus has been on "*killer acquisitions*" (*i.e.*, acquisitions by strong incumbents of innovative nascent businesses that might otherwise have exercised strong competition with a view to terminating the target's innovations and

to such markets" (Commission Notice on Case Referral (2005/C 56/02), paragraph 45).

[11] Article 22(3) EUMR.

[12] Case M.890, Commission decision of June 26, 1997.

[13] *British Airways/Dan Air* (Case M.278, referred by Belgium in 1992), *RTL/Veronica/Endemol* (Case M.553, referred by the Netherlands in 1995), *Kesko/Tuko* (Case M.784, referred by Finland in 1996), and *Blokker/Toys "R" Us (II)* (Case M.890, referred by the Netherlands in 1997).

[14] Case M.5969, Commission decision of September 7, 2010.

[15] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:C:2011:168:TOC.

[16] https://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.

[17] See, e.g., N. Levy, "EU merger control and non-controlling minority shareholdings: the case against change," 2013 European Competition Journal Volume 9 Issue 3; C.S. Rusu, "EU Merger control and acquisitions of (non-controlling) minority shareholdings – the state of play", CLaSF Working Paper No. 10, February 2014 available at: https://clasf.org/download/working-paper-series/CLaSFWorkingPaper10.pdf; and the Commission's Summary of Replies to the White, March 2015, at: https://ec.europa.eu/competition/consultations/2014_merger_control/summary_of_replies.pdf (summarising 92 submissions in response to the 2014 White Paper).

[18] See https://globalcompetitionreview.com/vestager-minority-shareholder-reform-may-be-unjustifiable.

thereby avoiding competition).[19] Various commentators have proposed that the scope of EU merger control should be expanded to capture acquisitions of this type, in particular those affecting the digital and pharmaceutical sectors, which may not meet revenue-based notification thresholds due to the target's low revenues.[20] Others have argued that there is no persuasive evidence that a material number of anti-competitive acquisitions of emerging firms are escaping antitrust scrutiny.[21]

In an effort to bring such transactions within the scope of their respective merger control rules, certain Member States have amended their jurisdictional thresholds. Germany and Austria, for example, introduced thresholds based on transaction value in 2017, referring to Facebook's acquisition of WhatsApp in 2014 in justifying the change.[22] That particular transaction did not, though, escape merger control. It was reviewed by the EC after Facebook petitioned the EC to take jurisdiction.[23]

The EC has been more cautious. Following the most recent consultation on changes to EUMR thresholds in October 2016,[24] the EC noted that "*there is a risk of catching large amounts of false positive cases and/or spending time on consultations to clarify jurisdictional questions. This would negatively impact the Commission's resources, potentially taking away manpower from competitively significant cases*."[25] In Commissioner Vestager's view, value-based thresholds risk being ineffective (where the threshold is too high) or disproportionate (where the threshold is too low).[26] In 2019, the EC's expert report on Competition Policy for the Digital Era proposed learning from experience with existing and newly introduced national thresholds before deciding whether reforms of the EUMR were necessary.[27]

[19] C. Cunningham, F. Ederer, S. Ma, Killer Acquisitions, April 19, 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

[20] See, e.g., T. Valletti and H. Zenger, "Increasing Market Power and Merger Control," (2019) 5(1) Competition Law & Policy Debate 26–35, page 6 ("A practical complication in the endeavour to scrutinize potential competition cases is that merger thresholds are typically revenue-based rather than value-based. Since potential competition cases revolve around future commercial activities, however, using past revenues as the sole benchmark implies that many important cases will fly under the radar").

[21] See, e.g., N. Levy, H. Mostyn, B. Buzatu, "Reforming EU merger control to capture 'killer acquisitions' – the case for caution," 2020 Competition Law Journal Volume 19 Issue 2.

[22] https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/joint-guidance-new-transaction-value-threshold-german-and-austrian-merger-control-submitted.

[23] Facebook/Whatsapp, Case M.7127, was reviewable under the national merger control regime of three Member States, and was referred to the EC at the parties' request.

[24] https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html ("A debate has recently emerged on the effectiveness of these purely turnover-based jurisdictional thresholds, specifically on whether they allow to capture all transactions which can potentially have an impact in the internal market. This may be particularly significant in certain sectors, such as the digital and pharmaceutical industries, where the acquired company, while having generated little turnover as yet, may play a competitive role, hold commercially valuable data, or have a considerable market potential for other reasons").

[25] Commission, Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, July 2017, available at: https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf.

[26] https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en ("One solution could be a new threshold that's based on the value of the merger, not the sales of the companies. But it's not easy to set a threshold like that at the right level. If it's too high, it doesn't really help – you still end up missing a lot of the cases that matter. On the other hand, if you set it low enough to make sure that you see all those mergers, you risk making companies file a lot of cases that simply aren't relevant. So right now, changing the merger regulation, to add a new threshold like this, doesn't seem like the most proportionate solution").

[27] J. Crémer, Y-A de Montjoye and H. Schweitzer, Competition Policy for the digital era, March 29, 2019, page 115, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf ("In light of the difficulties that the introduction of a non-turnover-based threshold into the EUMR would raise, the EU should wait and assess a) how

Path Of Least Resistance

As foreshadowed in the 2019 expert report, Commissioner Vestager does not appear to anticipate proposing that the EUMR's jurisdictional thresholds should be lowered. Instead, she has outlined a change in policy that, unlike amendments to the EUMR's jurisdictional thresholds, requires no legislative implementation and would provide flexibility for the EC to "*start accepting referrals* [under Article 22 EUMR] *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*."[28] According to Commissioner Vestager, this "*could be an excellent way to see the mergers that matter at a European scale, but without bringing a lot of irrelevant cases into the net*."[29]

As explained above, this is not a revolution. Even if such referrals had been "*discouraged*," they were not excluded and the EC has accepted referral requests from Member States that lacked jurisdiction under their respective national laws where the request was made to join a pre-existing referral request by a Member State that did have jurisdiction under its national law. This change in policy does, however, increase the risk of such referrals and may in turn have implications for the way in which merging parties assess and respond to that risk.

Implications

Most jurisdictions have clear tests determining whether merger control filings are required. If no filings are required, there is no reason to delay closing. Under Article 22, however, a transaction may be subject to merger control review by the EC, before or after closing, even where a transaction does not meet the filing thresholds at EU level or in any EU Member State. To a certain extent, that risk exists today. Because, however, of the EC's policy of discouraging referrals in respect of transactions that were not reportable at the national level, merging parties could relatively easily address the implications of such referrals in their transactional documents, since the risk of a referral would in practice only arise where one or more national notifications were anticipated.

For many transactions that do not meet EU and Member State thresholds the risk of referral will remain low, since the EC can accept a referral only if the transaction "*affects trade between Member States*" and "*threatens to significantly affect competition*" in the referring Member State. In some cases, however, merging parties may be confronted with the possibility that they may be able to close a transaction that is subsequently referred to the EC. Companies in such situations will therefore want to assess the risk of referral, consider how that risk can be mitigated, and decide whether to sign and close the deal in circumstances where referral cannot be excluded. The following considerations are relevant in this connection:

— Many of the transactions that may be impacted by the proposed change in policy may not require any antitrust or regulatory approvals. In these circumstances, merging parties may elect to sign and close simultaneously, or to have only a short delay between signing and closing.

— In such circumstances, buyers will need to assess whether they are comfortable closing in the knowledge that there could be a subsequent review by the EC. Delaying closing until the possibility of a referral has gone away could address that risk, although it might also have implications for various aspects of the transactional agreements, including interim covenants, variations to the pricing structure, and/or buyer protection conditions that may not be required where signing and closing occur simultaneously.

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the new transaction value-based thresholds in Austria and Germany play out in practice, and b) whether the referral system would ensure that transactions of EU-wide relevance are ultimately analysed at EU level. Only if major gaps arise should the EUMR be amended. Even then, there will remain a choice between strengthening and improving the referral regime or amending the EUMR's jurisdictional thresholds").

[28] Commissioner Vestager, "The future of EU Merger Control," International Bar Association 24th Annual Competition Conference, September 11, 2020.

[29] Ibid.

— Obtaining certainty that a referral will not be made may not be straightforward in practice. As noted, NCAs are subject to a 15-working-day deadline for making a referral from the date on which the deal is "*made known*" to the NCA in question. Where there is a material risk of a referral, a buyer could therefore consider informing each NCA of the deal and allowing the 15-working-day deadline to expire. There are, though, various reasons why a buyer might be reluctant to pursue this course, including a reluctance to alert NCAs to a transaction that might otherwise not receive scrutiny and the practical challenges associated with approaching 27 NCAs.

— These issues are similar to those that have arisen in recent years in the UK, where the expansive view taken by the Competition and Markets Authority ("**CMA**") of the UK's "share of supply" test has made it difficult in some cases to determine with certainty whether a given transaction may be subject to review in the UK. To address that risk, companies may approach the CMA prior to signing to secure comfort that a given transaction does not meet the UK thresholds. For the reasons identified above, however, there may be circumstances where companies are reluctant to go through this process and therefore accept some degree of uncertainty.

Conclusion

Having wrestled for several years with the question of whether to expand the EUMR's jurisdictional thresholds, the EC has landed on a simple assertion of policy to capture transactions that might otherwise have escaped review, provided of course that NCAs identify and refer such transactions to the EC. Commissioner Vestager has indicated that the EC will publish guidance in mid-2021 explaining the circumstances in which the EC will accept such referrals. This guidance may assist companies in addressing the uncertainty associated with the EC's new policy in their transactional agreements.

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