December 2022

EU Competition Law Newsletter

Highlights

— Commission Publishes Q&A On The Implementation Of Its Guidance For The Application Of Article 22 EUMR Referral

— Advocate General Rantos Gives Red Cards To The Super League And The General Court in *European Super League* and *International Skating Union*

Commission Publishes Q&A On The Implementation Of Its Guidance For The Application Of Article 22 EUMR Referral

On December 12, 2022, the Commission published Frequently Asked Questions and Answers ("Q&A")[1] on the application of Article 22 of the EU Merger Regulation ("EUMR"). While this represents a step in the right direction, the Q&A fails to provide enough clarity given the ample discretion Article 22 EUMR affords the Commission in reviewing mergers that do not meet EU-level notification thresholds.

Background

On March 26, 2021, the Commission adopted a Communication on the application of the referral mechanism pursuant to Article 22 EUMR.[2] Departing from its long-standing approach, the Commission encouraged national competition authorities ("NCAs") to refer transactions that do not meet EU or national-level notification thresholds to the Commission under certain circumstances, even where they have already been implemented. The goal of this significant policy shift was to fill a perceived enforcement gap in respect of so-called "killer acquisitions."

The Commission applied its new Article 22 EUMR referral policy for the first time in the *Illumina/GRAIL* case, inviting NCAs to refer the transaction to the Commission in February 2021. In September 2022, the Commission blocked the transaction after it had already been implemented. This was the first time the Commission reviewed – and blocked – a transaction falling below the EUMR and referring Member State notification thresholds.[3]

[1] European Commission, Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases," Frequently Asked Questions and Answers ("Q&A"), available here.

[2] Communication Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final of March 26, 2021. *See* our March 2021 EU Competition Law Newsletter.

[3] *See* our Alert Memo, "*Illumina/GRAIL: EC Blocks Transaction Below EU and Referring Member State Merger Control Thresholds for the First Time*," September 15, 2022, available here.

Since then, Article 22 EUMR referral requests have also been accepted in three other cases, namely *Meta/Kustomer*,[4] *Viasat/Inmarsat*,[5] *Cochlear/Oticon Medical*,[6] and most recently *Adobe/Figma*.[7] However, unlike in *Illumina/GRAIL*, which did not trigger merger control thresholds in any Member State (let alone at EU-level), in these cases the transactions did trigger national merger control thresholds in at least one Member State.

The Commission's long awaited practical guidance

The Q&A answers 10 questions, split into different sections covering, among others, the assessment of candidate cases for Article 22 EUMR referral as well as practical guidance on: (i) interactions between merging parties and the Commission; (ii) interactions between third parties and the Commission; and (iii) the cooperation between NCAs and the Commission. In particular:

— **Seeking Commission Guidance.** The Q&A clarifies that the merging parties may voluntarily interact with the Commission to receive an "early indication" of whether their proposed transaction is a good candidate for an Article 22 EUMR referral. To facilitate the communication, the merging parties may submit a short briefing paper, that includes information on whether: (i) the transaction affects trade between or in Member States; (ii) the parties' turnover properly reflects their actual or future competitive potential; and (iii) the transaction is notifiable in other jurisdictions. The Q&A confirms that the Commission will only provide guidance after the conclusion of the agreement, announcement of the public bid, or the acquisition of a controlling interest and not for purely hypothetical transactions.

— **Third party complaints.** The Q&A specifies that third parties may also contact the Commission or NCAs to inform them of concentrations they consider suitable for referral. Similarly to the merging parties, third parties are advised to submit a short briefing paper to enable the Commission and the NCAs to examine whether or not the transaction is a suitable candidate for referral.

— **Examples of candidates for referral.** The Q&A provides five possible examples of cases that may be suitable candidates for an Article 22 EUMR referral, where turnover thresholds of the EUMR are not met and these transactions do not require notification under national merger control rules of the Member States. The examples are in the tech (*i.e.*, social networking), pharmaceutical, biotech, and music distribution sectors where the targets have important data regarding user preferences.

— **Timeline for referral and implementation of the transaction.** The Q&A clarifies that an EU-wide standstill obligation only applies for undertakings that have not implemented the transaction by the time they are informed by the Commission that a Member State has made an Article 22 EUMR request (although the Commission still has the power to review implemented transactions if they are subsequently referred). In turn, the Member States have 15 working days to refer a transaction of which they become aware.

— **Commission's response to a referral request.** There is no legal deadline for the Commission to finalize its assessment, but it would normally strive to carry out a first review of the information provided by the merging parties within five working days from receipt.

[4] Commission Press Release MEX/21/2464, "Mergers: Commission to assess proposed acquisition of Kustomer by Facebook," May 12, 2021. Austrian merger notification thresholds were met in this case.

[5] Commission Press Release MEX/22/4743, "Mergers: Commission to assess proposed acquisition of Inmarsat by Viasat," July 27, 2022. Spanish merger notification thresholds were met in this case.

[6] Commission Press Release MEX/22/7554, "Mergers: Commission to assess the proposed acquisition of Oticon Medical by Cochlear," December 12, 2022. Spanish merger notification thresholds were met in this case.

[7] Commission Press Release MEX/23/904, "Mergers: Commission to assess proposed acquisition of Figma by Adobe," February 15, 2023. Austrian and German merger notification thresholds were met in this case.

The future of Article 22 EUMR

The Commission's Q&A is very succinct and fails to provide the much sought after legal certainty for pending and future transactions. The Commission remains able to examine transactions that do not meet EU or national notification thresholds, even if they have already been implemented, and will enjoy ample discretion when deciding whether to accept a referral, due to the Guidelines and Q&A's open-ended and non-binding nature.

Until the *Illumina/GRAIL* saga comes to an end, and before the Court of Justice establishes bright line rules on the application of Article 22,[8] it is advisable for companies to factor in a possible Article 22 EUMR referral in their condition precedents, closing timelines, and antitrust risk allocation provisions.

Advocate General Rantos Gives Red Cards To The Super League And The General Court in *European Super League* and *International Skating Union*

On December 15, 2022, Advocate General Rantos delivered his opinions in the *European Super League* ("ESL") and *International Skating Union* ("ISU") cases. Both cases concern the application of EU competition rules to sport governing bodies. Advocate General Rantos' opinions suggest that sport governing bodies may prohibit third-party events and impose sanctions on the relevant participants as long as the governing bodies' decisions are inherent and proportionate to achieving a legitimate objective relating to the "specific nature of sport" and the "European Sports Model."[9]

Background

ESL. In April 2021, 12 top European football clubs announced a new semi-open competition, the European Super League, as an alternative to UEFA's Champions League. Under the proposed model, participating football clubs would play at the ESL (as opposed to the UEFA's Champions League) while continuing to participate in national championships organized under UEFA rules.[10] UEFA and three national federations issued a joint press release threatening sanctions against participating clubs and players on the same day.[11] In addition, the vehicle incorporated to implement the ESL and participated by said football clubs brought an action against UEFA before a Spanish court, arguing that UEFA's sanctions and its failure to authorize the ESL breached Articles 101 and 102 TFEU. In May 2021, the Spanish court referred the case to the Court of Justice, asking whether UEFA and FIFA rules requiring prior authorization of third-party events and imposing sanctions on participating clubs breached EU competition rules.

ISU. This case concerns an appeal by the ISU, an international body governing ice skating events, of the General Court judgment of 2020 that upheld the Commission's infringement decision against the ISU.[12] In the contested decision, the Commission had found that the ISU rules on prior-authorization of alternative ice skating

[8] For recent coverage of the *Illumina/GRAIL* case and Article 22 EUMR, *see* our August/September 2022, July 2022, October 2021, August/September 2021, April 2021, March 2021, and September 2020 EU Competition Law Newsletters.

[9] *European Superleague Company SL v. UEFA and FIFA* ("ESL Opinion") (Case C-333/21), opinion of Advocate General Rantos, EU:C:2022:993 and *International Skating Union v. Commission* ("ISU Opinion") (Case C-124/21 P), opinion of Advocate General Rantos, EU:C:2022:988.

[10] The Super League Press Release, "Leading European Football Clubs Announce New Super League Competition," April 18, 2021.

[11] UEFA Press Release, "Statement by UEFA, the English Football Association, the Premier League, the Royal Spanish Football Federation (RFEF), LaLiga, the Italian Football Federation (FIGC) and Lega Serie A," April 18, 2021.

[12] *International Skating Union v. Commission* (Case T-93/18) EU:T:2020:610; see our December 2020 EU Competition Newsletter.

events and sanctions on participating athletes (including lifelong bans) breached Article 101 TFEU.

The constitutional significance of the European Sports Model

Advocate General Rantos' opinions in *ESL* and *ISU* are premised on the constitutional recognition of the European Sports Model, which is characterized by: (i) a pyramid structure ranging from amateur sport to elite professional sport; (ii) open competitions across teams, including promotions and relegations; and (iii) a financial solidarity regime. Advocate General Rantos suggests that sport governing bodies, like UEFA and ISU, play a significant role in the European Sports Model, by guaranteeing the uniform application of rules. Most notably, Advocate General Rantos notes that sport governing bodies' dual role as both the regulator and a commercial actor organizing international competitions does not violate competition law in and of itself. Against this background, Advocate General Rantos opines that Article 165 TFEU's references to the "specific nature" and "social and education function" of sport could provide objective justification for sport governing bodies' actions.

ESL: clubs can break-away but cannot have their cake and eat it too

Applying this framework to the case at hand, in *ESL*, Advocate General Rantos finds that UEFA rules requiring prior approval for third-party events and imposing sanctions on participating clubs do not restrict competition *by object* as long as they are proportionate and inherent to the functioning of the European Sports Model. In applying the ancillary restraints doctrine to the UEFA rules, Advocate General Rantos opines that:

— the prior approval scheme inherently pursues the legitimate sporting objectives of openness of competitions and equal opportunity (as it would otherwise be impossible to establish common footballing rules, competitions, and a match calendar);

— UEFA's decision not to authorize the ESL is proportionate, as ESL's semi-closed system (which guaranteed the participation of the 12 founding clubs) threatened the openness and equal opportunity guaranteed by the European Sports Model;

— UEFA's sanctions against participating ESL clubs pursued similar objectives and were proportionate given the clubs' active role in organizing the ESL. However, sanctions against players who were in no way responsible were disproportionate.

Overall, Advocate General Rantos suggests that participating ESL clubs cannot have their cake and eat it too, by simultaneously continuing to participate in certain parts of the UEFA ecosystem (*i.e.*, the national leagues) without any regard for UEFA's rules when it comes to directly competing against UEFA in the most lucrative segment of the football industry.

ISU: the General Court and the Commission sent to the bench

On the application of the ancillary restraints to the *ISU* case, Advocate General Rantos finds that the General Court erred in its finding that the ISU's rules were restrictive of competition *by object* because they did not fulfill the ancillary restraints doctrine. The *ISU* opinion clarifies that a failure to meet the conditions of ancillary restraints does not automatically lead to a by object classification, but rather warrants an in-depth examination of the effects of the agreement.[13] Advocate General Rantos therefore requests the case to be referred back to the General Court for an assessment of the anticompetitive effects of ISU's rules.

[13] *ISU Opinion*, paras. 96-97, citing *Meca-Medina v. Commission* (Case C-519/04 P) EU:C:2006:492.

Practical implications: has the final whistle been blown?

The opinions are not binding, though the Court of Justice follows the Advocate General's lead in about 80% of cases.[14] If followed, Advocate General Rantos' endorsement of Article 165 TFEU would crystallize a lenient but pragmatic approach towards scrutiny of sports governance and a high burden for proving that sport federation bodies' decisions violate competition law rules.

News

Commission Updates

Public Consultation Into The Digital Markets Act Draft Implementing Regulation

On December 9, 2022, the Commission launched a public consultation on its draft Implementing Regulation for the Digital Markets Act ("DMA").[15] The draft DMA Implementing Regulation, with its two annexes, governs the notification process for gatekeepers, the submission to and assessment of information by the Commission, and access to file. The consultation ran until January 9, 2023 and 27 stakeholders submitted their observations. The Commission will now review the feedback it received and plans on adopting the DMA Implementing Regulation in the first quarter of 2023.

Background

The DMA entered into force on November 1, 2022 and will be applicable as of May 2, 2023. Article 3 of the DMA requires potential gatekeepers[16] to notify the Commission and provide the necessary information that will facilitate the Commission's assessment of a formal "gatekeeper" designation. Article 46 of the DMA empowers the Commission to adopt implementing acts setting out the application of the specific provisions of the DMA, in particular in terms of content, and methodology. The DMA Implementing Regulation sets out the form, content, length, timing, and other specific aspects of the notification that potential gatekeepers must submit to the Commission under Article 3 of the DMA.

Notifications and submission of information to the Commission

The DMA Implementing Regulation lays out detailed arrangements for the notification and submission of information to the Commission for gatekeeper designation. Specifically:

— Annex I sets out the information that each notification under Article 3 of the DMA must contain (the "Form Gatekeeper Designation" or "Form GD"). Notably, potential gatekeepers must provide an exhaustive list of their Core Platform Services ("CPS")[17] as they define them, but also any "plausible alternative delineation" of each of these CPS.[18] Annex I also states that all information provided under Article 3 must be "correct, complete and not misleading." Failing that, the Commission could open proceedings against the undertaking and impose a fine of up to one percent of its total worldwide turnover in the preceding financial year.

— Taking inspiration from the rules before the Court of Justice, Annex II sets out page limits applicable to submissions. Notifications for each CPS and replies to the Commission's preliminary findings must not exceed 50

[14] Hunton Andrews Kurth, "Advocate General Upholds Validity of Standard Contractual Clauses in Schrems II Case," December 20, 2019, available here.

[15] Commission Implementing Regulation on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council (the "DMA Implementing Regulation").

[16] The DMA only applies to so-called gatekeepers, which are companies with a significant impact and an entrenched and durable position in the internal market, that provide core platform services as defined in the DMA, and that have been designated as such by the Commission.

[17] CPS are services that: (i) fit into one of the categories of services defined as constituting CPS by the DMA (*e.g.*, search engines, online intermediation services, social network services, web browsers, virtual assistants, online advertising services); and (ii) have 45 million monthly active end users and 10,000 annual business users in the EU.

[18] This could be compared to the requirement to assess all possible market definitions in the Form CO submitted to notify mergers to the Commission.

pages, rebuttals can be up to 25 pages long, and reasoned requests for suspensions and exemptions are limited at 30 pages. These limits only apply to potential gatekeepers and not to Commission decisions.

While the pre-notification period started in January 2023, gatekeepers have until early July to formally notify their services to the Commission.

A fine line between procedural efficiency and rights of defense

The draft DMA Implementing Regulation seeks to balance rapid and efficient enforcement and potential gatekeepers' rights of defense, but often falls short of its ambitions. For instance, gatekeepers can make observations to the Commission on its preliminary findings and potential gatekeepers have a right of access to file after notification of such preliminary findings. Observations on the Commission's preliminary findings must however be "succinct", and access to file is only guaranteed for documents expressly mentioned in these preliminary findings. For other documents in the Commission's file, the list of which will be provided to gatekeepers, the Commission will have the possibility to refuse the companies' request for access. In addition, and more importantly, there is no role for the Hearing Officer under the DMA, and no right to be heard in relation to the Commission's decision to designate a company as gatekeeper.

These shortcomings in the protection of (potential) gatekeepers' rights of defense and the administrative discretion left to the Commission may have severe adverse consequences in practice, in light of the severe penalties that can be imposed under the DMA.

The Commission Continues to Narrow In On Digital Platforms

December saw the Commission nearing the end of its investigations against Meta's and Amazon's alleged self-preferencing practices.

Statement of Objections sent to Meta over alleged abusive practices benefiting Facebook Marketplace

On December 19, 2022, the Commission sent a Statement of Objections ("SO") to Meta (previously Facebook) regarding the company's alleged abusive practices benefiting Facebook Marketplace, its online classified ads service, under Article 102 TFEU.[19]

The SO was issued a year and a half after the Commission's June 4, 2021 decision to open a formal investigation into Meta's data-related practices concerning Facebook Marketplace and pursues two main theories of harm.[20]

First, the Commission preliminarily found that Meta's decision to give Facebook users automatic access to Facebook Marketplace constituted anticompetitive tying. Second, the Commission preliminarily found that Meta's terms and conditions, which allowed Meta to use ads-related data from competing online classified ads services that advertise on Meta for the benefit of Facebook Marketplace, constituted unfair trading conditions.

Meta will now have the opportunity to contest these preliminary findings. The Commission will then determine whether to adopt an infringement decision against the company.

[19] Commission Press Release IP/22/7728, "Antitrust: Commission sends Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace," December 19, 2022.

[20] Commission Press Release IP/21/2848, "Antitrust: Commission opens investigation into possible anticompetitive conduct of Facebook," June 4, 2021. As reported in our June 2021 EU Competition Law Newsletter. While the Commission's initial investigation focused on alleged breaches of both Articles 101 and 102 TFEU, the SO solely focuses on the Article 102 TFEU aspects.

Commission accepts Amazon commitments: DMA enforcement foreshadowed?

On December 20, 2022, the Commission accepted the commitments offered by Amazon on two different investigations concerning: (i) Amazon's alleged use of non-public marketplace seller data; and (ii) Amazon's alleged discriminatory conduct concerning its Buy Box and Prime programs.[21] [22]

To resolve the investigation into marketplace seller data, Amazon committed to refrain from using non-public seller data to the benefit of its retail operations.

To resolve the Buy Box and Prime investigation, Amazon committed to: (i) apply non-discriminatory conditions and criteria for the selection and ranking of sellers' offers to appear in the Buy Box; (ii) display a second Buy Box for products with differentiated prices and/or delivery; (iii) allow Prime sellers to choose any carrier for their logistics and delivery services and to negotiate terms directly with said carriers; and (iv) avoid using any information obtained through Prime about the terms and performance of third-party carriers for its own logistics services.

Executive Vice-President and EU Commissioner for Competition Margrethe Vestager noted that "the data commitments definitely seem to match what would be asked within the Digital Markets Act."[23] Thus, the commitments offered by Amazon could provide a template for other gatekeepers to consider once the Digital Markets Act becomes applicable on May 2, 2023.

Court Updates

Court of Justice Judgment on Belgian Tax Decree Clarifies Privilege Rules For Competition Cases

On December 8, 2022, the Court of Justice delivered its judgment in the *Orde van Vlaamse Balies and Others v. Vlaamse Regering* case[24] following a request for a preliminary ruling from the Belgian Constitutional Court on the validity of a Flemish decree designed to implement an EU directive discouraging aggressive tax planning arrangements. The judgment is noteworthy for broadening the scope of the legal professional privilege applicable in competition law cases.

Background

At the core of the dispute was an EU directive, which provided that all intermediaries involved in aggressive cross-border tax-planning arrangements (*i.e.*, arrangements that could result in tax avoidance and evasion) were bound to report such practices to the competent tax authorities. The Flemish decree transposing the directive into national law required lawyers involved to disclose the fact that they are advising on cross-border tax arrangements. The Order of the Dutch-language legal professional association challenged the law before the Belgian Constitutional Court, which referred the matter to the Court of Justice to understand whether the disclosure obligations imposed on lawyers breached the Charter of Fundamentals Rights of the EU, which affords confidentiality to communications between legal counsel and clients.

[21] Case AT.40462 – Amazon Marketplace and Case AT.40703 – Amazon Buy Box. See our November 2020 EU Competition Law Newsletter on the investigations, and our July 2022 EU Competition Law Newsletter on the Commission's invitation to third parties for reviews on Amazon's commitments.

[22] Commission Press Release IP/22/7777, "Antitrust: Commission accepts commitments by Amazon barring it from using marketplace seller data, and ensuring equal access to Buy Box and Prime," December 20, 2022.

[23] MLex, "Amazon data commitments match DMA obligation, EU's Vestager says," December 20, 2022.

[24] *Orde van Vlaamse Balies and Others v. Vlaamse Regering* (Case C-694/20) EU:C:2022:963.

The judgment

Relying on Article 7 of the Charter of Fundamental Rights of the EU, the Court of Justice recalled the importance of a lawyer's role and of the confidentiality of its correspondence with its clients. In particular, it upheld that Article 7 of the Charter covered "not only the activity of legal defence but also legal advice."

Assessing the Flemish decree against this background, the Court of Justice stressed that the disclosure requirement would constitute a direct interference with the special protection afforded by Article 7 of the Charter of Fundamental Rights that was not justified or proportionate.

Significance for EU competition law

Despite the tax-related nature of the referral, the Court of Justice's findings on privilege, and in particular, its interpretation of Article 7 of the Charter, are equally applicable to competition law proceedings. To date, the Commission has followed a strict approach to the legal professional privilege designation in competition proceedings by only accepting privilege for communications that related to the parties' rights of defense in *competition proceedings*.

In practice, this left communications between external counsel and undertakings on other legal aspects (including among others, advice from deal teams on corporate law, patent lawyers on IP law, and labor lawyers on employee disputes) defenseless against the Commission's increasing requests for information in behavioral investigations and for internal documents in merger proceedings.

Against this background, the Court of Justice's interpretation of legal professional privilege as expanding beyond legal defense and covering all legal advice provides ground for undertakings to claim privilege over communications that confer legal advice on the often forgotten non-competition law related aspects of a business decision. While the Court of Justice also upheld that Article 7 of the Charter precludes disclosure of privileged communications "both with regard to its content and to its existence," it remains unlikely that the Commission would stop requesting privilege logs that disclose the existence of privileged communications (together with high-level information on its authors/senders, addressees, and date, among others).

AUTHORS

Basak Arslan
T: +32 2 287 2178
barslan@cgsh.com

Ségolène Allègre
T: +32 2 287 2171
sallegre@cgsh.com

Jon Polanec
T: +32 2 287 2165
jpolanec@cgsh.com

Ambroise Simon
T: +32 2 287 2042
amsimon@cgsh.com

Deniz Sezis
T: +32 2 287 2038
dsezis@cgsh.com

Rita Pimentel Torres
T: +32 2 287 2272
rpimenteltorres@cgsh.com

Myrane Malanda
T: +32 2 287 2115
mmalanda@cgsh.com

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Thomas Graf
tgraf@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Patrick Bock
pbock@cgsh.com

Romano Subiotto QC
rsubiotto@cgsh.com

Christopher Cook
ccook@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Nicholas Levy
nlevy@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

F. Enrique González-Díaz
fgonzalez-diaz@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Isabel Rooms
irooms@cgsh.com

23.0227.02_022823