

# Kluwer Competition Law Blog

## EU Commission Launches Major Merger Control Reform

Jay Modrall (Norton Rose Fulbright, Belgium) · Thursday, April 1st, 2021

On March 26, the EU Commission [announced](#) a major reform of EU Merger Regulation (EUMR) procedures, arguably the most significant since the 2004 adoption of the current EUMR. The current EUMR expanded EU jurisdiction by broadening the EUMR standard of review and allowing parties to request that transactions notifiable in three or more Member States be referred to the Commission instead. The new reforms arguably expand the Commission's jurisdiction much more dramatically.

Under the most significant change – which is already in effect — Member States will be encouraged to refer transactions not meeting the EUMR thresholds to the Commission with or without the parties' consent, even if the referring Member States themselves have no jurisdiction. Such a referral by one or more Member State will not deprive others of jurisdiction, potentially leading to the same transaction being reviewed in parallel by the Commission and Member State authorities. The Commission is also consulting on modest changes to make the EUMR process less burdensome, especially in non-problematic cases, but any such changes will likely not take effect until 2022.

The Commission published three major documents: a [communication](#) on the application of the referral mechanism set out in Article 22 (the Article 22 Guidance); a [roadmap](#) on procedural aspects of EU merger control, with an inception impact assessment and [consultation](#) open for comments until June 18, 2021 (the Procedural Consultation); and an [evaluation](#) of the results of the review of EU merger control processes that the Commission has conducted since a 2014 white paper and 2016 consultation (the Staff Working Paper).

### **Background**

In 2020, the Commission engaged in an ambitious antitrust reform program, proposing a new competition tool, a new hybrid antitrust/trade law regime to address distortive effects of subsidies granted outside the EU (including in M&A transactions) and a new antitrust-inspired regulatory framework for so-called “gatekeeper” platforms, as well as consulting on the contribution of competition law to sustainability objectives and the Commission's block exemptions and guidance on cooperative agreements. Notably missing from this list was merger control (except as part of the sustainability consultation).

In September 2020, however, Executive Vice-President Margrethe Vestager gave a [speech](#)

outlining the Commission's plan to publish a "full report" in early 2021 on the results of the Commission's 2016 [consultation](#) on procedural and jurisdictional aspects of EU merger control, as well as subsequent reviews. In the 2016 consultation, the Commission proposed revising the EUMR by adding a transaction value-based threshold to capture high-value acquisitions of start-ups and small targets below the EUMR's turnover thresholds. This proposal followed another, informal consultation on the possible extension of the EUMR to capture non-controlling investments. Both proposals were widely criticized.

The 2016 consultation also proposed various reforms to increase the efficiency, and reduce the burden, of EUMR review and to streamline the process of referring transactions between the Commission and Member State authorities. These proposals received generally positive feedback.

Faced with this inconsistent reaction, the Commission chose to make no changes. Until now. In her September 2020 speech, Vestager outlined three main areas for reform: encouraging Member State authorities to refer transactions below the EUMR thresholds for Commission review; making EUMR procedures simpler and easier; and updating the Commission's approach to merger assessment, particularly in light of trends towards greater digitization and concentration in many markets. The March 26 documents largely deliver on this promise.

### **The Article 22 Guidance**

Article 22 EUMR allows Member States to request the Commission to examine mergers that do not meet the EUMR's turnover-based thresholds but affect trade between the Member States and threaten significantly to affect competition within the territory of the Member State or States making the request. Article 22 EUMR was drafted at a time when a number of Member States lacked their own merger review regimes and wanted to be able to call on the Commission for assistance.

With the implementation of merger control regimes in almost all Member States, the Commission developed a practice of discouraging referral requests from Member States that did not have jurisdiction over the transaction in question, on the basis that such transactions were unlikely to have a significant impact on the EU internal market. According to the Commission, however, market developments have resulted in more transactions involving companies with a significant actual or potential competitive role even though they generate little or no turnover. The Commission notes particularly transactions in the digital economy; transactions in sectors, such as pharmaceuticals, where innovation is an important parameter of competition; and transactions involving companies with access to or impact on competitively valuable assets, such as raw materials, intellectual property rights, data or infrastructure.

Accordingly, under the Article 22 Guidance, the Commission now intends to encourage and accept referrals even in cases where the referring Member State does not have initial jurisdiction over the case, where the Commission considers that the parties' turnover doesn't reflect their actual or future competitive potential. Examples include start-ups or recent entrants with significant competitive potential; important innovators; and companies with access to competitively significant assets or products or services that are key inputs or components for other industries. Notably, the Commission's examples go well beyond the digital and pharma sector cases typically cited as raising "killer acquisition" type concerns and cover many transactions that may trigger

foreign direct investment (FDI) screening under the new EU framework regulation.

The Article 22 Guidance notes that the Commission can examine a transaction under Article 22 EUMR even if it has already been closed, although the Commission will generally not do so more than six months after closing (or when “material facts” about the concentration have been made public in the EU, if later). Similarly, the fact that a transaction has already been notified in one or several Member States may constitute a factor against accepting a referral request but will not preclude the Commission from doing so. As mentioned, if Member States reviewing a transaction do not join the referral request, the same transaction could be reviewed at both the EU and Member State levels.

The Commission plans to cooperate closely with Member State authorities to identify concentrations that may constitute potential candidates for referral, including by exchanging information with national competition authorities. The Commission and Member State authorities may also consider complaints from third parties who provide sufficient information.

The Commission’s great flexibility under the Article 22 Guidance implies a significant level of legal uncertainty for transaction parties. To mitigate such concerns, the Commission may give an early indication that it does not consider a transaction a suitable candidate for referral to merging parties who voluntarily submit sufficient information about intended transactions. The Article 22 Guidance does not explain what information will be sufficient for this purpose. When the Commission is considering a referral request, it will inform the parties as soon as possible, so they can take appropriate measures, such as delaying the transaction’s implementation until it has been decided whether a referral request will be made.

Article 22 EUMR, as supplemented by the Article 22 Guidance, also provide some comfort around timing. Member States making a referral request must do so within 15 working days of the date on which the transaction is notified or otherwise “made known” to the Member State concerned. The Article 22 Guidance says that the “notion of ‘made known’ should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral.” Again, what information will be sufficient for these purposes is unclear, but arguably a standard corporate press release announcing a transaction would not be enough. As a result, the triggering event for the Article 22 EUMR referral timeline will often be unclear.

Once a referral request has been made, the Commission will inform Member State authorities and the parties without delay. Other Member States may join the initial request within 15 working days. The Commission will have an additional 10 working days to decide whether to accept the referral, for a total of 40 working days (plus potentially several more days between the date the Commission receives the first referral request and the date on which it notifies other Member States). If the Commission does not take a decision within this period, it is deemed to have accepted the referral request.

Once the Commission informs the parties that a referral request has been made, the EUMR obligation to suspend implementation will apply to the extent the transaction has not been implemented (unless and until the Commission decides not to accept the request). As a result, under Article 22 EUMR, the EUMR’s suspensory obligation can arise long after the parties have determined where filings will be required, and there is no way for them to know in advance whether or when the EUMR suspension requirement will arise. The practical effect of suspension

on buyers and targets where a transaction is already closed is unclear; title to shares or assets will have already transferred, and board and management members may already have been replaced.

The new board and management must continue to operate the target business, which may involve cooperating with other group members, but presumably, the target management would no longer be able to seek instruction from the buyer.

### **The Procedural Consultation**

The Procedural Consultation seeks comment on a variety of proposals to reduce administrative burdens, leading to potential revisions of the Commission’s [Merger Implementing Regulation](#) and [Notice on Simplified Procedure](#).

With respect to the EUMR’s simplified procedure for non-problematic cases (the Simplified Procedure), the objective is to identify additional cases that could benefit from the Simplified Procedure, while also adding safeguards to identify otherwise qualifying cases meriting more detailed review.

One option to expand the simplified procedure is to introduce a “flexibility clause” that would give the Commission discretion to treat cases as “simplified” when current market share thresholds are only slightly exceeded or in cases of joint ventures with turnover or assets value slightly exceeding EUR 100 million (e.g., up to a turnover of EUR 150 million). A second option is to add new categories of simplified cases for certain vertical links:

- Where market shares upstream and downstream are very “asymmetric” — very low in one of the markets and high in another with an increased maximum market share in one market (e.g., <40%) but low market shares in the other market (e.g., <5%).
- Cases with high downstream sales shares (e.g., <50%) but relatively low purchasing share by downstream entity as customer on the upstream market (i.e., the percentage that the purchases of a specific input by the downstream entity represent of the overall demand of such input, e.g., <5% or <10%) while the upstream sales share remains beneath the current threshold (<30%).
- Cases with relatively high combined market shares but limited increments to a pre-existing vertical integration.

The Commission’s Notice on Simplified Procedure includes safeguards and exclusions to identify transactions that *a priori* qualify for the Simplified Procedure but, in fact, require closer examination under the normal procedure. The Commission is considering expanding the grounds for excluding transactions to include the number of competitors remaining post-transaction; their strength, including their market shares compared to the merged entity’s; whether share thresholds are exceeded in terms of capacity or production; whether one of the parties entered the market in the past three years or is an important innovator; whether the transaction gives rise to pipeline-to-pipeline or –marketed product overlaps; and whether the parties’ activities overlap in highly differentiated products. Some of these criteria overlap with the Article 22 Guidance criteria for below-threshold transactions the Commission may review based on a Member State referral.

The Commission further suggests reducing the amount of information required in simplified cases and changing the notification form, for instance by introducing tick-the-box questions in the Short Form CO that require fewer descriptions and allow for faster processing. The Commission also suggests not requiring further explanations or underlying evidence with respect to jurisdictional

questions in simplified cases and the competitive assessment in cases without overlaps, relying on statements of fact by the merging parties. These changes could reduce or remove the need for pre-notification contacts in some Simplified Procedure cases.

The Procedural Consultation also proposes ways to make its information-gathering procedures more effective, efficient and proportionate in non-simplified cases. The two options under consideration involve separating sections for factual information and for advocacy (where the parties could summarize their main arguments, on a voluntary basis) and by introducing a table with an overview of all affected markets, on the one hand, and identifying “opt-out” sections of the Form CO that the Commission could waive on a case-by-case basis, on the other. The Commission also asks whether the form used in voluntary referral cases, the Form RS, could be streamlined.

Finally, the Procedural Consultation proposes allowing electronic notifications, introduced in response to the Covid-19 outbreak, on a permanent basis.

### **The Staff Working Paper**

The Staff Working Paper sets out the results of the Commission’s evaluation of procedural and jurisdictional aspects, beginning with a 2014 white paper that preceded its 2016 consultation. The Staff Working Paper provides the analytical support for the Article 22 Guidance and the proposals in the Procedural Consultation.

The Staff Working Paper examines two general themes: First, whether the current framework of purely turnover-based jurisdictional thresholds for EU merger control excludes potentially problematic mergers, in particular, high-price transactions for targets having low turnover in digital, pharma and other sectors; and second, whether there is potential to further simplify EU merger control and reduce the accompanying burden – including with regard to the system of referral of cases.

With regard to the first topic, the Commission concluded that the EUMR thresholds, complemented with the EUMR’s referral mechanisms, have generally proved effective in capturing significant transactions. The lack of a transaction-value-based threshold was not problematic, as transaction value may not correlate with potential competitive significance. A value-based threshold would also likely increase costs for the Commission and parties.

On the other hand, the Commission considered that some transactions that could impact competition are not caught by the EUMR. The Commission concluded that its previous approach of discouraging referrals under Article 22 EUMR where the concentration falls outside the national merger control thresholds limited the effectiveness of referrals as a corrective mechanism.

With regard to simplification, the Commission argues that the 2013 simplification package was effective, but there remains “some, possibly limited, room to further simplify procedure and cut red tape.”

Thus, the Staff Working Paper provides background and analysis that explains the changes and proposals set out in the Article 22 Guidance and Procedural Consultation. The Staff Working Paper does not deliver on Vestager’s promise to review and update the Commission’s substantive

assessment of mergers under the EUMR in view of digitization and increased concentration in various markets. The Staff Working Paper also does not incorporate the results of the Commission's consultation on sustainability and competition policy in relation to merger review. Further EUMR-related initiatives can thus be expected in the coming months.

## **Conclusion**

The Commission's 2021 EUMR reform package is, at the same time, arguably the most ambitious since the 2004 adoption of the EUMR, and very cautious. The EUMR reform package is cautious in that none of the changes require an amendment to the EUMR itself; the Commission can implement them all unilaterally. As a result, the Commission has abandoned some well-received proposals from the 2016 consultation, such as eliminating the two-step process for voluntary referrals.

The Procedural Consultation proposals are likely to be well received and to lead to modest improvements for notifying parties by 2022. However, the impact of the Article 22 Guidance is immediate, and negative for transaction parties. Even if the Commission reviews only a few transactions per year under the new approach – and only time will tell – the Article 22 Guidance creates legal uncertainty for parties to transactions falling below the EUMR's thresholds.

The Commission argues that it is not changing Article 22 EUMR, and thus not expanding its jurisdiction. In practice, however, the Article 22 Guidance signals a major change in Commission policy that will require parties planning transactions below the EUMR thresholds to make significant changes to their transaction planning and documentation. Transaction parties can no longer limit their assessment of antitrust risks to European jurisdictions where notifications are required. They must also assess the risk, based on the imperfect information in the Article 22 Guidance, that the transaction will be referred to the Commission. They will need to build that risk into their transaction timetable and seek ways to mitigate it, in particular by proactively contacting the Commission.

Transaction parties will also need to review and revise their standard transaction documentation, which may not take account of the risk of an Article 22 EUMR referral. More specifically, closing conditions will need to take account of the fact that an EUMR approval requirement may arise after signing. Contractual obligations to seek and obtain merger approvals will also need to be amended accordingly.

Although relatively few mergers may be referred under the new policy, these will likely be significant, global transactions, not local transactions whose effects are limited to one or a few Member States. The Commission likely hopes that all Member States will join in the new Article 22 EUMR referral requests, creating a *de facto* one-stop-shop. But there will no doubt be cases in which one or more Member States retains jurisdiction, creating complex case management and jurisdictional issues, especially where the relevant markets are EEA-wide. These cases may also trigger FDI review, another process now requiring EU-level coordination. Especially complex issues will arise where a referral request is made after a transaction has already closed.

Unfortunately, although the Article 22 Guidance was introduced with immediate effect, it raises as many questions as it answers. After years of reflection, the Commission has now acted boldly to address the perceived problem of competitively significant transactions falling below EU and

Member State merger filing thresholds. Transaction parties and counsel will wish, however, that the Commission had taken the time and to consult on more complete guidance.

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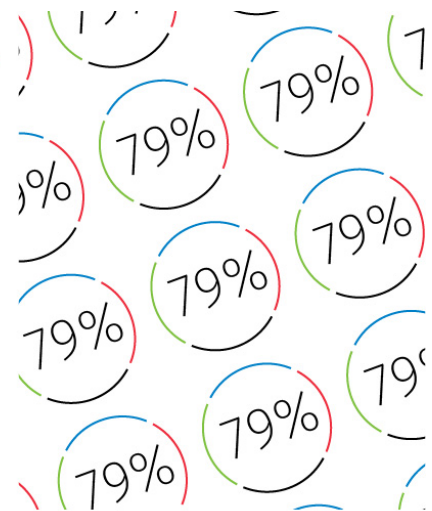
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