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How Illumina-ting: the EU Merger Regulation and the brutal operation of power under Article 22 EUMR

Gavin Bushell (Baker McKenzie, Belgium) · Tuesday, April 20th, 2021

In Joseph Heller's seminal World War II novel, the protagonist Captain Yossarian finds himself in an inescapable situation.

To continue flying into war is insane, but claiming insanity to avoid going to war immediately demonstrates your sanity. There is no way out. This is Catch-22.

But the book also has other fascinating passages, touching on the nature of logic, and the operation of rules.

In one, Yossarian meets an elderly woman. She tells him "*Catch-22 says they have a right to do anything we can't stop them from doing*".

"*What the hell are you talking about?*" Yossarian shouted at her in bewildered, furious protest…

"*The soldiers with the hard white hats and clubs. The girls were crying. 'Did we do anything wrong?' they said. The men said no and pushed them away out the door with the ends of their clubs. 'Then why are you chasing us out?' the girls said. 'Catch-22,' the men said. All they kept saying was 'Catch-22, Catch-22.' What does it mean, Catch-22? What is Catch-22?*"

"*Didn't they show it to you?*" Yossarian demanded, stamping about in anger and distress. "*Didn't you even make them read it?*"

"*They don't have to show us Catch-22,*" the old woman answered. "*The law says they don't have to*".

"*What law says they don't have to?*"

"*Catch-22*".

Some critics have explained how Heller's work draws out neatly the brutal operation of power.

Re-reading that passage, I could not help thinking that the fate of the girls must feel sadly familiar to Illumina and Grail, two companies now subject to an unexpected Article 22 EUMR referral, in a case that triggered no merger control filings in Europe. Today (20 April 2021), the European Commission accepted the referral request.

This development comes hot on the heels of the European Commission's new policy on Article 22 EUMR, with the adoption of new guidance on 26 March 2021 (the ***Guidance***).[1]

The policy marks an important extension of the EUMR's jurisdiction and the European Commission's power. The debate on European transaction value thresholds is now a moot point.

It is now very clear that the European Commission will now accept (and actively encourage) referral requests from Member States even if a transaction falls below the national merger thresholds – even if the deal has closed. So, the European Commission can pull in for merger review a transaction that has no merger filing requirements in Europe.

The Guidance took immediate effect – and today the European Commission saw the fruit of its new weapon in the case against Illumina's USD 7 billion bid for Grail in the cancer testing space.

In fact, MLex[2] reported that the European Commission wrote to the national competition authorities on 19 February 2021 to request they trigger the Article 22 EUMR procedure. On 9 March 2021, the French Competition Authority did so (and the Norwegians have subsequently agreed under the EEA Agreement).

This suggests the Guidance was not public at the point the policy change was implemented.

Attempts by Illumina before the French and Dutch courts failed to stop the referral, cementing the awesome power of the European Commission to pull in deals.

It is a significant development. And it came without any form of public consultation. And it is one that has caused some concern to the M&A community, raising real questions on the legality of the policy, on legal certainty, on timing and due process aspects.

What is Article 22 EUMR all about?

Article 22 of the "old" EU Merger Regulation (Reg. 4064/89)[3] was called originally the "*Dutch clause*".

The provision was inserted into the old EU Merger Regulation to allow Member States to refer cases to the European Commission in the event that they did not have national merger controls (like the Netherlands at that time). With the mass adoption of merger control laws in all Members States today (with the exception of Luxemburg),[4] the clause is arguably redundant for its original purpose.

During the early days of the EU Merger Regulation, Article 22 EUMR was seldom used.

In fact, it took three years for the Article to be first used – and it was not the Dutch but the Belgian competition authority that first used it in January 1993 (so should it actually be called the "*Belgian clause*"?).[5]

That case was M.278 – *British Airways/Danair*, and the European Commission quickly decided that competition would not be significantly impeded on the Brussels-London Gatwick route because air services offered by Sabena and British Midland on Brussels-London Heathrow also constrained the parties.[6]

Only eight other cases arose in the first 14 years of the life of the EU Merger Regulation.

However, the recast EU Merger Regulation adopted in 2004 greatly elaborated on the Article 22 EUMR process.[7] This arguably increased the incentive to invoke the article, and to date, there have been 42 Article 22 EUMR requests (a tiny fraction of the 10,000 plus transactions that have received case numbers from the European Commission). Surely, with the incentive to use the new weapon, the numbers will increase further going forward.

The text of Article 22 EUMR is contained in the footnote below and not repeated here. But two important aspects are worth elaboration: the legal test, and the timing implications.

What is the Article 22 EUMR legal test?

In order for a Member State's request for referral to be admissible, two legal pre-conditions must be fulfilled. The concentration must: (i) affect trade between Member States; and (ii) it must threaten to significantly affect competition within the territory of the Member State(s) making the request.

In reality, it is a low threshold for any Member State to meet. This appears to be borne out by the statistics. In the 28 years of Article 22 EUMR operation, there have only been four refusals (i.e. less than 10%).[8]

The first of these pre-conditions should not come as a surprise. It is an essential component of European antitrust law demarking the general boundary between Community interest and national interest.

The second pre-condition requires a Member State to demonstrate (according to the Guidance) that "*based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus it deserves close scrutiny. Such preliminary analysis may be based on prima facie evidence of a possible significant adverse impact on competition, but would be without prejudice to the outcome of a full investigation*".[9]

Yet, query if the word "*threaten*" is liberal enough perhaps to arguably invite mere speculation of a risk to competition without potentially any market data or analysis? I am not certain that a press release is enough. As a matter of principle, should not the legal test require something more than speculation (see more on this below)?

Nonetheless, the Guidance is welcome (when is guidance from the European Commission not?). It goes on to elaborate that Member States may draw inspiration from the European Commission's Horizontal and Non-Horizontal Merger Guidelines.[10] The Guidance also lists as relevant considerations:

- the creation or strengthening of a dominant position of one of the undertakings concerned;
- the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators;
- the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; and
- the ability and incentive to leverage a strong market position from one market to another by

means of tying or bundling or other exclusionary practices.

The Guidance further states that referrals may also be appropriate in cases where the turnover of the target does not reflect its actual or future competitive potential. This would include, for example, transactions where the target:

- 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 is conducting potentially important research;
- is an actual or potential important competitive force;
- has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or
- provides products or services that are key inputs/components for other industries.

In its assessment, the European Commission (and arguably the Member States) may also take into account whether the value of the transaction is particularly high (i.e. significant multiples of enterprise value).

Of course, the Guidance is welcome. Yet it is notably light compared to the more elaborated joint guidance from the Austrian and German competition authorities on the application of their respective value based thresholds (which runs to 30 pages rather than the Guidance's sparse 6.5 pages).[11]

It is tempting to think that the European Commission has done the minimum required to roll out the policy (i.e. no consultation, no elaborated guidance) – and that it could have done much more.

What are the timing aspects of Article 22 EUMR?

One alarming aspect (in an electronic and instant world), is that Article 22 EUMR can inject a considerable delay and uncertainty into any M&A process.

A deadline of 15 working days applies to a Member State to make a request, from the point in time that either a transaction is notified to it, or from the date on which the transaction is "*made known*" to the Member State. Whilst the date of notification is clear cut, the notion of "*made known*" is not.

The Guidance itself attempts to address this point. But with insufficient clarity. It states: "*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*" (which in turn is drawn from the Notice on Case Referrals). This will be very relevant to cases (like *Illumnia/Grail*) that will be encouraged for referral when the national merger laws are not met.

Once notified of the request by the European Commission, other Member States have 15 working days to join the referral request. Another 10 working days delay is thereafter injected into the process to allow the European Commission to decide on whether it will accept the referral. So Article 22 EUMR can inject an eight week procedural delay into any unfortunate deal.

All of this raises some important questions

The Guidance raises some potentially profound questions on (and risks to) the new Article 22 EUMR policy, particularly for cases where national merger control laws are not triggered.

Firstly, it is untested whether decisions based on Article 22(3) EUMR are judicially reviewable. Some may say not, as it does not produce legal effects against third parties. Illumina may disagree. And it certainly is individually and directly concerned by the decision taken today.

So, whilst Illumina may have lost its appeals in front of the French and Dutch national courts, will we now see an expedited appeal to the General Court of the European Court of Luxembourg on the application of the Article 22 EUMR test? Let's see.

If Article 22 EUMR is justiciable, does this open an avenue for appellants to claim that mere speculation on the outcome of a transaction (i.e. the "*it's an acquisition by a GAFAM/big pharma company, and we don't like it*" approach), is insufficient to discharge the true and proper test of a preliminary assessment based on prima facie evidence imposed by Article 22 EUMR?

Are we really saying that this is enough for the test to be discharged? Would the General Court upheld a referral request based on a press release and the mere speculation that a transaction merits further scrutiny simply because a GAFAM or big pharma company is involved? Does "*threaten*" simply allow an interpretation that the "…*we don't like it*" approach wins the day and Heller's white helmets can prevail?

Surely, we need more clarity on the scope and the nature of the legal test – and what is required to discharge it.

Further, if the test does engender that something "*more*" is required, does this admit an eventual risk that certain Article 6 or Article 8 EUMR decisions taken following an Article 22 EUMR referral, may be appealed on the grounds that the European Commission's referral procedure was flawed by an unlawful request by a Member State or an irregular procedure? Imagine the consequence in timing – an Article 10(5) EUMR process.

Does this policy now introduce an open-ended referral period for Member States when national merger laws are not triggered? A national competition authority may simply take the view that its 15 working day period for referral has not started because it cannot make a preliminary assessment in the absence of a notification. Press releases and public information may not yield sufficient critical data (e.g. on pipeline products, on R&D innovation spaces or lines of research, etc) to allow a prima facie assessment. Does this risk putting merger parties at further delay risk?

Query also if this opens the door to an *ex officio* or informal national investigation (in the absence of national merger control law being triggered), involving rounds of questions and communications with the parties before the referral request is made?

Other questions abound.

Query how a national competition authority can act if merger parties ignore its informal requests for information and documents for the purposes of a preliminary assessment?

Query whether it would be lawful for a national competition authority to use its national merger law investigative tools to collate information and documents in the absence of national jurisdiction?

Query at what point in that process will the national competition authority be able to conclude an appropriate preliminary assessment?

Query whether different national competition authorities will take different approaches to making such preliminary assessments?

Some practical suggestions for dealing with the Article 22 EUMR new policy

With some of my Baker McKenzie colleagues, we have been thinking through some of the practical suggestions for clients in the light of the Guidance (see here).[12] With my own gloss, here are some tips for companies contemplating a transaction that may be an Article 22 EUMR candidate case:

An EUMR review is always a possibility now, particularly in big tech and big pharma sectors, giving rise to considerable deal uncertainty: All transactions in certain critical sectors such as big tech and big pharma[13] (and possibly others) falling below the relevant EUMR or national Member State filing thresholds may still be reviewed under the EUMR. A careful pre-signing antitrust analysis of the risk of, and a strategy for dealing with, an Article 22 EUMR referral is now warranted in all such candidate cases. This would also arguably apply to certain types of asset-deals, such as exclusive licensing or exclusive tech transfer deals in the pharma and life sciences spaces that previously escaped merger scrutiny on the grounds that the acquired undertaking was not turnover-generating.

Beware that closed transactions with no notification requirement in Europe can still be pulled in for review: Significantly, the Guidance notes that if a transaction has closed, that does not preclude a Member State from requesting a referral (or the European Commission from seeking its referral).[14] Query whether, in practice, the 15 working day deadline from the transaction being made known to the Member State to make the referral to the European Commission may limit the number of closed transactions in the public domain being referred (though note my comments above).

Consider whether six months is enough?: In so-called unpublicized transactions, the time elapsed since closing will be a factor that the European Commission may consider when exercising its discretion to accept or reject a referral request. The Guidance indicates that a referral may not be appropriate where closing was more than six months before more material facts about the transaction were made public. But this should be treated with some caution. There is no hard rule here. What if a complaint arises post-merger at around six or nine months, once the perceived effects of a transaction's implementation can be seen on the market? The European Commission may depart from its own guidance so long as it gives reasons. Ultimately, it has the discretion to decide that a longer period is appropriate, based on the magnitude of potential competition concerns and the detrimental effect on consumers.

Consider informal pre-closing approaches to the relevant competition authorities? Those of you familiar with the UK merger control regime will know the briefing paper route (something that

appears to be more well-trodden since Brexit). It may be prudent to ask yourselves (and your clients) whether this approach needs to adopted more broadly in Europe. The Guidance invites merger parties to come forward on a voluntary basis with information about their intended transaction (the "*please review us*" approach). The European Commission will then indicate whether a proposed transaction is a candidate for a referral under Article 22 EUMR.[15] Interestingly, the Guidance states that such a view will be provided "*if sufficient information to make such a preliminary assessment has been submitted*". Does this statement itself highlight the difficulty of undertaking a *prima facie* assessment as flagged above (it suggests mere speculation may not be enough to discharge the test)? An alternative approach for merger parties may be to contact a national competition authority with a view to triggering the 15 working day deadline.

Beware of third-party complaints (or if you are a third party think of this as a new avenue to challenge rivals' deals)*:* The Guidance notes that third parties may contact the European Commission or the Member States and inform them about a merger that, in their opinion, could be a candidate for a referral under Article 22 EUMR. Again, the Guidance refers to the need to have "*sufficient information for the Commission to undertake a preliminary assessment*" but arguably the threshold for lodging such a complaint is arguably lower (as there is no legal test for such a complaint). Ostensibly, critics of GAFAM or big pharma companies now have an open invitation to write to the European Commission any time a deal is announced. I would expect this approach to be used routinely.

If your deal has not closed, be aware that you may be subject to a legal obligation to suspend closing if an Article 22 EUMR referral is made: Article 7 EUMR applies a suspension obligation to the extent that the deal has not closed on the date on which the European Commission informs the merging parties that a referral request has been made.[16] So be aware that there could be an impediment to closing that would otherwise not naturally arise on your initial antitrust analysis.

Consider how to anticipate the Article 22 EUMR risk in your transaction documents: Parties to transactions falling below the EUMR and national merger control filing thresholds now need to manage the risk of an Article 22 EUMR risk. The good news is that a large number of sectors and transactions not presenting any of the "*candidate features*" as outlined in the Guidance can proceed directly without further thought. However, any transactions in the big tech/big pharma and other sectors presenting any of those candidate features will need a strategy for dealing with the risk. And this may have to be reflected in transaction documents (or side letters). Consider whether a condition precedent can be invoked by the buyer? Consider whether cooperation clauses on engaging with the European Commission (and other authorities) are required? Consider whether the long-stop date needs adjustment (particularly in otherwise unconditional deals) to take into account the considerable delay caused by the Article 22 EUMR mechanism itself (i.e. potentially eight weeks and possibly longer)?

Concluding remarks

The Guidance is an economic reality today – it has effect, as we have seen in *Illumina/Grail*.

It will not be the only case.

All in-house counsel at big tech and big pharma (and all other critical sectors presenting potential candidate elements) should be aware of this potential risk in all transaction types capable of being

caught by Article 22 EUMR.

Article 22 EUMR is now some kind of "*tractor beam*", like that used by the Borg (another brutal organization) to pull spaceships into their haunting and terrible domain for assimilation. As in Star Trek: Resistance is Futile.

Now (unlike with the Borg), we can only hope that there will be some serious moderation and self-restraint by the European Commission and the national competition authorities in using Article 22 EUMR.

Otherwise, we risk having witnessed one of the most significant backdoor extensions of jurisdiction in European merger control history, without consultation at any level.

And that's not to consider how many other competition authorities around the world may now seek to reshape their own jurisdiction laws in a similar fashion, particularly those who hold the European Commission up as a beacon of light in the world of merger enforcement.

In the meantime, live long and prosper.

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[1] See, https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

[2] See, https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1277831&siteid=190&rdir=1.

[3] See, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31989R4064.

[4] Our proprietary Baker McKenzie Global Merger Assessment Platform (GMAP) tells me that Luxembourg is the only EU Member State with no merger control regime. However, a concentration that is likely to strengthen a dominant position in the Luxembourg markets may be caught by the regulatory jurisdiction of the Conseil de la Concurrence or the Luxembourg Competition Authority (LCA). In a recent case, the LCA exerted its jurisdiction to retrospectively review and assess whether an acquisition infringed Article 102 TFEU and the equivalent Article 5 of the Luxembourg Competition Law of 23 October 2011 in the movie theatre sector (Utopia). As the target was in financial difficulties and was expected to exit the market, the LCA concluded that the transaction did not constitute an infringement of the law nor abusive conduct, taking the failing firm doctrine into consideration.

[5] We had to wait five years until 1995 for the Dutch to invoke a request in Holland Media Group, see https://ec.europa.eu/commission/presscorner/detail/en/IP_96_653.

[6] See, https://ec.europa.eu/commission/presscorner/detail/en/IP_93_106.

[7] See, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0139&qid=1618051851

609. 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. 2. The Commission shall inform the competent authorities of the Member States and the undertakings concerned of any request received pursuant to paragraph 1 without delay. Any other Member State shall have the right to join the initial request within a period of 15 working days of being informed by the Commission of the initial request. All national time limits relating to the concentration shall be suspended until, in accordance with the procedure set out in this Article, it has been decided where the concentration shall be examined. As soon as a Member State has informed the Commission and the undertakings concerned that it does not wish to join the request, the suspension of its national time limits shall end. 3. The Commission may, at the latest 10 working days after the expiry of the period set in paragraph 2, decide to examine, the concentration where it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it shall be deemed to have adopted a decision to examine the concentration in accordance with the request. The Commission shall inform all Member States and the undertakings concerned of its decision. It may request the submission of a notification pursuant to Article 4. The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

Article 2, Article 4(2) to (3), Articles 5, 6, and 8 to 21 shall apply where the Commission examines a concentration pursuant to paragraph 3. Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made. Where a notification pursuant to Article 4 is not required, the period set in Article 10(1) within which proceedings may be initiated shall begin on the working day following that on which the Commission informs the undertakings concerned that it has decided to examine the concentration pursuant to paragraph 3. 5. The Commission may inform one or several Member States that it considers a concentration fulfils the criteria in paragraph 1. In such cases, the Commission may invite that Member State or those Member States to make a request pursuant to paragraph 1.

[8] These are M.3986 – *GAS NATURAL/ENDESA*, see https://ec.europa.eu/commission/presscorner/detail/en/IP_05_1356; M.4124 – *COCA COLA HELLENIC BOTTLING COMPANY/LANITIS BROS*, see https://ec.europa.eu/competition/mergers/cases/decisions/m4124_20060224_201314_1693335_EN.pdf; M.5828 – *PROCTER & GAMBLE / SARA LEE HAIR CARE* (partial refusal), see https://ec.europa.eu/commission/presscorner/detail/en/IP_10_395; and M.6502 – *LONDON STOCK EXCHANGE GROUP PLC/LCH CLEARNET GROUP LIMITED*, see https://ec.europa.eu/competition/mergers/cases/decisions/m6502_20120704_201314_2890657_FR.pdf.

[9] See, paragraph 15 of the Guidance.

[10] See, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52004XC0205%2802%29 and https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1018(03)&from=DA,

respectively.

[11] See, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

[12] See, https://insightplus.bakermckenzie.com/bm/antitrust-competition_1/european-union-merger-control-a-new-policy-enables-post-closing-reviews-of-deals-even-where-no-national-filing-thresholds-are-met.

[13] The Guidance highlights transactions in both the pharmaceutical and biotech sectors. A greater risk now exists that transactions in the healthcare industry will be referred to the Commission. Intense scrutiny by the Commission can be expected given that the European Commission, the UK Competition and Markets Authority, the Canadian Competition Bureau, the Federal Trade Commission, Department of Justice and three US offices of attorneys general have recently created a working group with a view to harmonizing their approach to analyzing pharmaceutical deals.

[14] See paragraph 21 of the Article 22 Guidance and Article 22(4) of the EUMR.

[15] See paragraph 24 of the Article 22 Guidance.

[16] See paragraph 31 of the Article 22 Guidance.

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