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European Commission Publishes Practical Information for Merging Parties on How to Seek Guidance About Article 22 Referral

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The European Commission has published a Frequently Asked Questions and Answers ("Q&A") document which aims to provide practical information with respect to the application of its recently revised Article 22 referral policy. The Q&A in particular addresses how transaction parties can approach the EC for "*early indications*" whether a transaction is a candidate for referral under Article 22.

Background

In March 2021, the European Commission ("EC") published a guidance paper ("Guidance Paper", available here, and our alert here) that, with immediate effect, encouraged national competition authorities to refer certain transactions to the EC for review, even where they do not meet the national merger control thresholds of the referring Member States.

Under Article 22 of the EU Merger Regulation ("EUMR"), a Member State may request the EC to review a transaction (not meeting EU or national merger control thresholds) that:

- affects trade between Member States; and
- threatens to significantly affect competition (established on a *prima facie* basis).

The EC had a longstanding practice of discouraging referral requests under Article 22 EUMR from Member States that did not themselves have the power to review the transaction at stake under their own national rules.

The EC decided to change this practice and adopt a new policy with the Guidance Paper. The driver behind the policy change was to address a perceived enforcement gap regarding the review of so-called "*killer acquisitions*" that fall below the thresholds at the EU or Member State level (acquisitions by incumbents of start-ups or nascent competitors that might otherwise have played a significant competitive role in the market, especially in the pharma and digital industries where such start-ups or nascent companies may not yet generate substantial turnover to trigger any merger filing requirements).

In Illumina/GRAIL, the EC applied its new Article 22 referral policy for the first time by inviting national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (since GRAIL had no sales in the EU at all). The application of the new policy, in this case, was endorsed by the EU General Court in July (see our alert here), although it is now subject to appeal.

Since the Illumina/GRAIL case, the European Commission has already accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these three cases the transaction triggered the national merger control thresholds in at least one EU Member State.

Key points of the Q&A

The Q&A document (available here) sets out 11 pages of brief guidance focused on 10 questions. The EC states that the document may be subject to updates building on experience and future case law and welcomes comments on the document.

Assessment of candidates for Article 22 referral

In the introduction, the EC states that the new policy is a "*targeted tool focusing on specific categories of cases*", but notes that it is "*not limited to any specific economic sector*".

The Q&A recalls the categories of cases that will normally be appropriate for an Article 22 referral that were set out in the Guidance Paper, as well as the specific factors in the Illumina/GRAIL transaction that encouraged the EC to accept the reference.

The EC also recalls paragraph 22 of the Guidance Paper that notes that a circumstance where a transaction has *already* been notified in one or several Member States that did not request a referral or join such a referral request may constitute a factor *against* accepting an Article 22 referral. It states that this "r*eflects the one-stop-shop principle, which is at the core of the EU Merger Regulation*".

The Q&A sets out 5 hypothetical examples of cases (which are, at least partially, based on real-life examples) that the EC may consider as suitable candidates for an Article 22 referral, even where the transactions do not trigger any national merger control thresholds. The hypothetical examples consist of a transaction in the:

- Tech (specifically the social networking) sector [1] where the target has a fast-growing base of monthly active users ("MAU");
- Pharmaceutical sector where the target has an advanced pipeline product for a drug that competes with the acquirer's best-seller;
- Biotech sector where the target has a competing DNA sequencing system that has been significantly improved in the last two years and to whom the acquirer's customers could consider migrating;
- Music distribution sector where the target has important data regarding user preferences; and
- Laboratory equipment sector where the target supplies a key input.

Seeking guidance from the EC

The Q&A aims to provide practical guidance on the mechanics for obtaining an "*early indication*" from the EC that it does not consider that a transaction would constitute a good candidate for an Article 22 referral. The possibility of obtaining an "*early indication*" was offered in paragraph 24 of the Guidance Paper, but there was no detail provided on how the mechanism would work.

The EC states that parties seeking guidance must submit a case team allocation request to the Merger Registry and should follow up with a short briefing paper (there is no prescribed form).

The Q&A provides a list of points that the EC recommends should be included in the briefing paper. While some of the items should not be too onerous for parties to provide (e.g. a description of the transaction, turnover information, transaction documents), some of the information could be challenging to provide in a form that the EC considers to be sufficiently complete. This is especially the case as the Q&A states that the items should be substantiated by "*data and evidence, including on (product and geographic) market definition and the competitive landscape in the relevant markets*". The more challenging information includes:

- Elements that could suggest on a preliminary basis that the transaction would not threaten to significantly affect competition within the territory of one or more Member States;
- Whether the turnover in the relevant markets properly reflects the parties' actual or future competitive potential in these markets; and
- Whether the target (i) is a start-up or recent entrant with significant competitive potential; (ii) is an important innovator or is conducting potentially important research; (iii) is an actual or potential important competitive force; (iv) has access to competitively significant assets (raw materials, infrastructure, data or intellectual property rights) and/or provides products or services that are key inputs/components for other industries.

The EC will not provide guidance on purely hypothetical transactions. Parties must at least demonstrate a good faith intention to conclude an agreement, e.g. after signing a letter of intent or memorandum of understanding, or in the case of a public bid following a public announcement of an intention to make a bid.

The EC states that it will "*normally strive to carry out a first review of the information provided by the transaction parties within 5 working days from receipt*". After this period, the EC will either request follow-up information or confirm that it does not have further questions at this stage and provide an approximate timeframe within which the EC will revert regarding the request for guidance.

The EC notes that there is no legal deadline for the EC to finalise its assessment and states that its assessment timeframe depends on the complexity of the transaction and the completeness of the information provided by the transaction parties.

The EC notes that parties may find it more efficient to contact the EC "*in view of the central coordinating role that it plays under the Article 22 Guidance and its ultimate discretion to accept or reject referral requests*". However, the EC states that merging parties and third parties can choose to contact directly national competition authorities.

Third party interventions

The EC confirms that third parties can contact the EC about transactions that they consider are Article 22 referral candidates. They should contact the Head of Unit of the merger unit in charge of the relevant industry/sector with a copy to the mailbox of the merger policy and case support unit.

Third parties are encouraged to submit a short briefing paper that includes all the information available regarding the factors for referral set out in the Guidance Paper.

The EC states that it is under no obligation to take any specific action following an approach by a third party, although the EC will acknowledge receipt and, where it obtains sufficient information, adopt a position within a reasonable period of time regarding whether it is an appropriate Article 22 referral case and whether it is appropriate to inform one or more Member States accordingly.

Timelines for referral request

The Q&A recalls that if no notification is required, a referral request by a Member State must be made at most within 15 working days of the date on which the transaction is otherwise "*made known*" to the Member State concerned. The Q&A refers to the General Court's judgment in Illumina/GRAIL, which considered that "*making known*" should be understood as the active transmission of relevant information to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral (in particular whether the concentration affects trade between the Member States and threatens to significantly affect competition) have been satisfied.

In Illumina/GRAIL, the EC sent a letter to the Member States ("invitation letter") inviting them to send a referral request 47 days after the EC received a complaint concerning the transaction. The General Court considered that the invitation letter constituted "*making known*" and that the referral request was therefore in due time. However, the General Court did describe the delay between the complaint and the invitation letter as unreasonable, and it will be interesting to see how the Court of Justice on appeal rules on this issue. We can expect the EC in future cases to try to move more quickly to issue invitation letters to Member States. Illumina/GRAIL also raises the issue as to whether it is more efficient for transaction parties to contact Member States for Article 22 guidance in addition to or as an alternative to the EC to ensure that the transaction is "*made known*" as quickly as possible and that the 15 working day clock starts (see further on this point in the outlook section below).

Outlook

The EC's latest guidance is short and untested. It remains to be seen how demanding in practice the EC will be about the extent of the information that transaction parties need to supply before it will be willing to provide referral guidance and how quick the EC will be in providing this guidance in view of the absence of legal deadlines.

While the Q&A hints that approaching the EC may be the most efficient mechanism in view of its central coordinating role and ultimate discretion, transaction parties can also consider sending "*mini-notifications*" to all 27 EU Member States to make the transaction known and manage the risk of a referral. If each of the NCAs has been informed of the transaction and has not made a referral request within 15 working days, the EC will not be able to assert jurisdiction over the transaction.

In the current landscape [2], merging parties are advised to factor in carefully and at the outset, the possibility of an Article 22 referral in transaction timetables, closing conditions and risk allocation provisions in the deal documents.

Where there are indications of a referral request, an appropriate closing strategy should be devised. The Q&A and Guidance Paper note that transaction parties are not obliged to take or refrain from any action regarding the implementation of the transaction when they are made aware that a referral request is considered, but they may decide to delay the transaction's implementation until it has been decided whether a referral request will be made. Unlike the UK Competition and Markets Authority, the EC has limited [3] experience in intervening in completed mergers. However, the Guidance Paper notes that referrals may be appropriate after closing, and even more than six months have passed after closing in exceptional circumstances (e.g. because of the magnitude of the potential competition concerns and of the potential detrimental effect on consumers).

Until the Article 22 guidance procedure has evolved with experience, proactive engagement with the EC and/or the national competition authorities may not be the best route for transaction parties. It may be more appropriate to avoid informing the EC and national authorities of the details of a transaction that might otherwise not receive scrutiny, especially where speed is of the essence, for example in a competing bid situation, and where there are unlikely to be complaints. Risks of a referral need to be put in context. Speaking at the European Commission's digital mergers workshop on 13 December 2022, Julia Brockhoff (Head of Unit A2 at DG Competition) said that since the new Article 22 policy has been adopted, the EC has looked closely at 30 cases where none of the Member States had jurisdiction to review, but that there has been an actual referral in only one case so far (Illumina/GRAIL).

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[1] The European Commission has recently published a policy brief on its developing decisional practice in digital and technology-focused sectors. See Competition policy brief, Issue 02/2022 – December 2022, *Merger Enforcement in Digital and Tech Markets: An Overview of the European Commission's Practice*.

[2] In November 2022, the hotly debated DMA finally entered into force. The DMA requires "*gatekeepers*" to inform the EC of all intended acquisitions of tech companies or any transactions that enable the collection of data. The information provided will be relayed to national competition authorities. The DMA explicitly states that the national regulators may use the information to request the EC to examine a transaction under the Article 22 referral mechanism. This may trigger several additional referrals in the digital sector.

[3] The European Commission (EC) announced on 5 December 2022 that it had issued a statement

of objections setting out its proposed restorative measures (divestment and transitional measures) to unwind Illumina's blocked acquisition of GRAIL.

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