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European Commission's Position on Merger Control Referrals: A Small Revolution for M&A Deals

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In September last year, after Executive Vice President Margrethe Vestager announced the European Commission (the "EC") new approach to merger control, we expressed the view that merger control in the European Union was at a turning point. This was probably an understatement -- talking about "revolution" would have been more accurate.

Without any consultation of legal practitioners and business actors (which is customary in these situations), on March 26, 2021 the EC published its new Guidance on the application of the referral mechanism set out in art. 22 of the European Union Merger Regulation (the "EUMR") (the "Guidance").

This revolution has made one victim: legal certainty.

What this change of approach means: A concentration that would neither meet European nor any EU Member States ("EU MSs") national thresholds can be referred to the EC.

Considering that an art. 22 referral can be combined with national reviews by EU MSs, this also marks the end of the "one-stop-shop" principle.

What are the conditions for referral? The concentration must (i) affect trade between EU MSs and (ii) threaten to significantly affect competition within the territory of the requesting EU MS(s).

The first condition will not only be met by companies that have cross-border activities within the EU, but also those whose "*R&D projects*" and "*property rights*" "*may be commercialized in more than on EU MSs*" (Guidance, §14). These criteria could not be wider.

To demonstrate the second condition, National Competition Authorities only have to provide *prima facie* evidence of a risk of distortion. Relevant (but, of course, "*not exhaustive*") considerations include "*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; or 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.*" (Guidance, §15)

The EC will also consider other factors, including, "*where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This would include,*

for example, cases where the undertaking: (1) 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); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries. In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target." (Guidance, §19).

This "*purely illustrative list*", as the EC puts it, is an interesting mix of a market shares test (dominance criteria), a value of transaction test (value of consideration), and more broadly seems to be adding conditions that do not exist in the EUMR, which may possibly be challenged.

Who can make the referral to the EC? EU and EEA National Competition Authorities. The EC can also invite a National Competition Authority to make the referral (Guidance, §26).

National Competition Authorities and the EC "*retain a considerable margin of discretion in deciding whether to refer cases or accept referrals, respectively*" (Guidance, §14). This says it all.

And it also—paradoxically, now that the U.K. has Brexited—mimics the voluntary U.K. system: merging parties are encouraged to "*voluntarily come forward*" (Guidance, §24).

Practical impact for companies: Referral requests will add significant delays to M&A deals. In total, the referral process can last up to 40 working days. Companies will have to factor this in when drafting and negotiating transaction documents (conditions precedent) and during the planning process. If at the end of 40 working days, the EC does not take a decision, it "*shall be deemed to have adopted a decision to examine the concentration*" (EUMR art. 22 and Guidance, §§26-30).

The EC has also made clear that the tool can be used by third parties to identify M&A transactions that would merit a referral (Guidance, §25). Surely, complaints will be on the rise.

Timeframe for intervention: Rather than providing a clear timeframe for intervention, the EC will "*generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration*" assuming it is in the public domain (Guidance, §21). However, in "*exceptional situations*" (Guidance, §21) a later referral may also be made.

If before closing, the EC informs the merging parties that a referral request has been made, the suspension obligation applies and will only cease if the EC subsequently decides not to examine the concentration (Guidance, §31).

Are certain sectors specifically targeted? It applies indistinctively to all sectors (Guidance §20); however, the pharmaceutical and tech sectors are clearly under the spotlight.

What's next? Some say that the new approach will bring the EU system closer to the U.S. one. There, antitrust enforcers retain jurisdiction to review deals that have been reviewed under the HSR Act and those that fall below reporting thresholds if there is reason to believe that the deals resulted in loss of competition. However, there is a major difference: these "post consummation" challenges need to be litigated before U.S. federal courts, providing important procedural safeguards for the parties.

Conclusion: From an effective and straight-forward (and praised) system, the EC has created uncertainty by taking the worst of each world: the Spanish and Portuguese market tests, the German

and Austrian value of consideration tests, and the British voluntary system. Clearly legal challenges will be on the rise as well.

Our team is here to help you navigate these chaotic processes.

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