



ARTICLE

MERGERS BELOW THRESHOLDS CAN NOW BE CONTROLLED



Competition, Retail and Consumer Law Commercial and International Contracts | 27/04/21 |

The European Commission (the "Commission") will, on the basis of Article 22 of Regulation 139/2004, control transactions that do not exceed the national merger control thresholds, upon request of national competition authorities and up to six months after the closing of the transaction.

Until now, the application of merger control mechanisms at EU level and within Member States was simple: only transactions exceeding the notification thresholds were subject to control.

The proliferation of predatory or consolidating acquisitions below these thresholds, particularly in the digital economy, the pharmaceutical sector or biotechnologies, had led the competition authorities to consider dealing with these operations, which may restrict competition.

Germany and Austria have decided to introduce specific thresholds based on the value of the transaction. Other EU Member States, including France, considered that the existing legislative and regulatory frameworks could be sufficient to deal with these transactions, if their application was modified.

Article 22 of the Merger Control Regulation 139/2004 ("**Article 22**") appeared to be the appropriate tool.

This article establishes a referral mechanism which allows a national competition authority to request the Commission to examine a merger which "*affects trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request*".

Until now, the Commission was adding a condition to this text. While Article 22 does not require that the referring States should themselves be competent, the Commission had indicated that it would only accept Article 22 referrals if the transaction exceeded the national notification thresholds in at least one Member State.

On 11 September 2020, Margrethe Vestager announced a doctrinal change. From now on, the Commission would agree, from mid-2021 onwards, to examine Article 22 referral requests from national authorities, even if no control threshold was crossed.

The promise was fulfilled.

On 26 March 2021, the Commission published its Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation[1] which complements the Commission Notice on Case Referral in respect of concentration[2].

The Commission explains that the implementation of the referral mechanism is a response to market developments, which have seen an increase in mergers involving companies that "*play or could play a significant competitive role in the markets, although they generate little or no turnover at the time of the transaction*".

The sectors targeted by the Commission are those where innovation is an "*important parameter of competition*", with companies that have a "*strong competitive potential*". For example, these are the sectors of the digital economy, the pharmaceutical sector, raw materials, intellectual property rights, personal data or infrastructures.

The Commission points out that referral requests shall meet two conditions. The merger shall: (i) *affect trade between Member States* and (ii) *threaten to significantly affect competition within the territory of the Member State or States making the request*. It also states that "*in examining these two criteria, the Commission will take particular account of the prospective nature of the merger control assessment*".

Beyond these legal criteria, the Commission also indicates which factors it takes into account in evaluating whether to allow a referral. It has listed a non-exhaustive, purely illustrative, list of categories of cases that appear appropriate for a referral under Article 22.

The referral is likely to be accepted when the company :

- 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.

The Commission specifies that it may also take into account the value of the transaction: if the price paid by the acquirer is particularly high in relation to the current turnover of the target, the transaction is likely to be admitted. The memory of Facebook's takeovers of Instagram and WhatsApp is still fresh.

The operations concerned may be in progress or already completed. In principle, the Commission will not grant a referral request if the transaction has been closed for more than six months. However, exceptionally, the Commission may grant a referral request more than six months after the closing of the transaction, depending, for example, on "*the magnitude of the potential competition concerns and the potential detrimental effect on consumers*".

In other words, a very large number of transactions are likely to be affected and the completion of the transaction will not provide certainty regarding the risk of a referral under Article 22.

At the procedural level, the Commission states that :

- it will cooperate with national authorities to identify transactions that could be referred;
- parties will be able to submit a pre-notification of their transaction which they consider might be subject to referral under Article 22;
- third parties will be able to inform the Commission of a merger which they believe merits review
- it should inform the parties of the proposed referral as soon as possible.

Finally, the Commission specified the time limits for the examination of the referral request. Once a referral request has been made, the Commission informs the competent national authorities and the parties "*without delay*". Other national authorities may join the referral request within 15 working days of the Commission's notification.

The Commission may decide to examine the transaction at the latest 10 working days after the expiry of the 15 working day period for Member States to submit a referral request. If the Commission does not take a decision within this period, it is deemed to have adopted a decision to examine the concentration.

France did not wait to implement this new doctrine.

On 9 March 2021, the French Competition Authority (the "**Authority**") (which had welcomed the Commission's new doctrine on 15 September 2020[3]) made a referral request to the Commission for the takeover of Grail by Illumina[4]. Several other Member States (Belgium, Greece, Iceland, the Netherlands and Norway) joined this request.

On 20 September 2020, Illumina, a US company specialized in genomic sequencing, announced its intention to acquire the US company Grail, which develops, among other things, blood tests for cancer screening based on genomic sequencing, for a price of 7.1 billion dollars.

The Authority found that Illumina is active in Europe, where it sells next generation genomic sequencers used, *inter alia*, by research laboratories. These products are also used by Grail and its competitors for their development in the field of cancer testing. The Authority considered that, post-transaction, Illumina could "*make access to its sequencers more complex for Grail's competitors, by increasing their price or by degrading their quality*". Given Illumina's weight in the genomic sequencer sector, such a strategy could have significant effects on competition in the cancer screening tests sector. According to the Authority, "*the criteria of affecting trade between Member States and significantly affecting competition on French territory were met*"[5].

The Commission accepted the request for referral on 20 April 2021[6]. On the basis of the information submitted by the Authority and the other Member States, the Commission considered that the criteria of Article 22 were met. The Commission also noted that the referral was justified because Grail's turnover did not really reflect its competitive importance, which is further revealed by the transaction value of USD 7.1 billion.

At the @Echelle conference on 23 March 2021, the Authority stated that the new doctrine "*will fill a gap that existed in European merger control*" and the Commission stressed that "*there will be a number of things to work out with companies*". They both made it clear that Article 22 could now be frequently used.

In other words, in the sectors of the digital economy, pharmaceuticals, raw materials, intellectual property rights, personal data or infrastructure, extra care will be needed for merger operations in order to minimize the risk of legal uncertainty and delay in the implementation of these operations.



In particular, companies will have to assess on their own the extent to which the criteria of the Article 22 referral could be fulfilled by their transaction and decide, if necessary, on the strategy to pursue. In addition, the wording of contracts, in particular the suspensive conditions and completion deadlines, will certainly have to be revised to take into account these elements. Article 22 could also become a weapon for third parties to non-notifiable transactions that wish to challenge these transactions. As the Commission indicated in the above-mentioned conference, this is truly the beginning of a new adventure.

1 https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=uriserv%3AOJ.C_.2021.113.01.0001.01.FRA&toc=OJ%3AC%3A2021%3A113%3ATOC.

2 Commission Notice on Case Referral in respect of concentration.

3 <https://www.autoritedelaconurrence.fr/fr/communiqués-de-presse/lautorite-se-felicite-de-lannonce-de-la-commission-europeenne-qui-acceptera>.

4 To be noted: the Authority's request for referral was the subject of a request for suspension in the context of an urgent procedure submitted to the Conseil d'État, which declared itself incompetent to hear such a request as it could not be detached from the procedure for examining this operation, carried out by the Commission under the supervision of the Court of Justice of the European Union.

5 The Authority also points out in its press release that the U.S. Federal Trade Commission announced on March 31, 2021 its decision to submit to the relevant court an application for a suspension of the transaction on the grounds, inter alia, that, as a result of the transaction, Illumina would be in a position to prevent or delay the development of products competing with Grail's.

6 https://ec.europa.eu/commission/presscorner/detail/en/mex_21_1846.
