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# The Commission's New Guidance on Referrals under Article 22 of the EU Merger Regulation

## Catching Killer Acquisitions or Pulling the Rabbit out of the Hat

Markus Röhrig and Philipp Otto Neideck report on the latest developments from the European capital of competition law.

**26 March 2021 was a busy day for the Commission. Not only did the Commission publish the results of its recent evaluation of the EU's merger control regime[1] and launched the impact assessment stage regarding the simplification of the merger review process.[2] It also released the long-awaited guidance on the proposed policy change around the referral mechanism laid down in Article 22 of the EU Merger Regulation (the "Article 22 Guidance").[3] Article 22 allows Members States to refer certain deals to Brussels, a provision that the Commission is hoping to use as a new tool to catch "killer acquisitions" which might otherwise evade merger control review in the EU. While the proposed policy change raises many questions for deal makers and antitrust counsels advising them, the Article 22 Guidance offers somewhat limited answers. At the same time, the Commission already found its first test case for the new policy: According to reports in the press, the Commission invited the Members States to refer the acquisition of Grail by Illumina Inc., a transaction in the healthcare industry, to Brussels, although no Member State had jurisdiction to review the case. The French Autorité de la concurrence has apparently taken up the invitation and it now remains to be seen if and how the case will progress on European level.**

### A new policy to catch "killer acquisitions"

At least since the 2014 *Facebook/WhatsApp*[4] case, which only ended up in Brussels because the parties had requested a referral pursuant to Article 4(5) of the EU Merger Regulation, the Commission has been concerned that "killer acquisitions", in particular

1 Commission Staff Working Document Evaluation of procedural and jurisdictional aspects of EU merger law, SWD(2021) 66 final.

2 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12957-Revision-of-certain-procedural-aspects-of-EU-merger-control.

3 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final.

4 Commission, decision dated 3 October 2014, Comp/M.7217.

in the digital economy or the pharmaceutical sector, may escape regulatory scrutiny. However, introducing a new jurisdictional threshold into the EU Merger Regulation, for example based on the value of a transaction, is complex and politically controversial. In order to nonetheless close the perceived enforcement gap, Vice President *Margrethe Vestager* announced last September that, in the future, the Commission would consider encouraging Member States to refer cases to Brussels.[5] No provision was explicitly mentioned. However, between the lines, it became apparent that Article 22 of the EU Merger Regulation was supposed to be the means of choice. The provision allows Member States to request the Commission to examine a concentration that does not meet the EU Merger Regulation's turnover thresholds, but may affect trade between Member States and threaten to significantly affect competition within the territory of the Member States making the request. The curious thing about Article 22 is that the provision (at least in the view of the Commission) does not require the Member States making the request to have jurisdiction over the deal under their own national merger control rules. In the past, the Member States nonetheless mainly used the provision for referring cases over which they did have jurisdiction, but felt that the Commission was better placed to handle them. In fact, the Commission even discouraged Member States from referring cases that would not also fall under their own merger control regimes. Now, this long-standing policy is about to change. When announced last year, the upcoming policy change raised several legitimate questions around legal uncertainty and what it meant for companies planning their deal timelines, questions to which the Article 22 Guidance fails to offer a comprehensive response.

## Moving towards a more subjective jurisdictional threshold

Under the current regime, the Commission's jurisdiction is established based on the parties' turnover, an objective and predictable threshold. While turnover calculation can at times be tricky, in most cases companies can establish with a high degree of certainty whether a notification in Brussels is required or not. This is different where the Commission assumes jurisdiction under Article 22. There, the threshold for making a referral request is linked to the substantive assessment of the deal's impact on competition. The Member States, and ultimately also the Commission, need to argue only that the transaction may affect trade between Member States and that it threatens to significantly affect competition within the territory of the Member States making the request. This is a much more intricate and complex matter to resolve than calculating turnover, and it is much more difficult for companies to predict in advance what position to regulators are likely to take. What is more: It is in the discretion of the Member States to refer the transaction and in the Commission's to accept it. The new policy thus tends to introduce additional uncertainty to establishing which regulator(s) will eventually review a transaction.

## Deal timelines at risk?

The Commission's new policy also creates additional uncertainty around the merging parties' deal timelines. At the outset of their deal, companies run a comprehensive assessment of where merger control filings need to be made and how long the review process

5 https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

is likely going to take. On that basis, they will set a potential closing date, determine when they will be able to achieve which synergies, compile integration plans, and secure transaction financing where required. The Commission's new policy can have significant implications on the deal timeline, particularly if a referral request is made late in the M&A process. A deal might have gone unnoticed by regulators after signing for many months before the Commission might assume jurisdiction under Article 22. If the parties are already about to close their deal, acting in a good faith based on their initial jurisdictional assessment, a referral request may entirely derail the process. This is because, as soon as the Commission has informed the parties that it has received a referral request, the so-called "gun-jumping" prohibition applies, meaning that the parties are no longer allowed to consummate their deal. This might translate into a delay of several months or even more, given that Article 22 applies only where a transaction threatens to significantly affect competition within a Member State's territory. In these circumstances, the Commission's investigation, from pre-notification potentially through phase II proceedings, can take significant time. A referral request can also be submitted after closing. While the "gun-jumping" provision does not apply in that scenario, the parties will face a potentially extended period of uncertainty, not knowing whether the Commission will approve their deal.

The referral mechanism set out in Article 22 of the EU Merger Regulation offers little help to minimize the risk of referral requests late in the M&A process. Article 22 requires the referral to be made within 15 working days after the transaction has been notified or otherwise made known to the Member State. However, that deadline is not necessarily linked to typical milestones in an M&A process such as signing or announcement. Where neither the Commission nor any Member State has jurisdiction, the parties will not submit a notification. Therefore, the issue will typically be when the deal was "made known" to the Member State. According to the Commission's existing Referral Notice[6], this requires the Member State to have "sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request." In practice, however, the parties rarely know what information a Member State has available, let alone what a Member State or the Commission consider "sufficient".

## Limited guidance accompanying the policy change

It comes as no surprise that the legal community eagerly awaited the Article 22 Guidance. Practitioners had hoped that the Commission would detail what types of transactions and/or industries the new policy was targeting, what would trigger the deadline of 15 working days to submit a referral request and, more generally, how it would safeguard merger companies' legitimate expectations in terms of which regulators get to review their deals. Unfortunately, the Article 22 Guidance provides less insights than practitioners had hoped for. It starts by pointing out that "the Member States and the Commission retain a considerable margin of discretion in deciding whether to refer cases or accept referrals"[7] – and this guiding principle runs through the entire document.

6 Official Journal C 56, 5. March 2005, p. 2 et seqq., para. 50, fn. 43.

7 Article 22 Guidance, para. 3.

*Types of transactions and/or industries* – The Commission states that it is interested in cases "where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential".[8] It may also consider "whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target".[9] While this offers some insights into the rationale, the Article 22 Guidance is otherwise limited to listing examples, such as start-ups and important innovators, adding that these are provided for "purely illustrative purposes".[10] Although the Commission notes, in line with its prior statements, that such cases are particularly conceivable in the digital economy and the pharmaceutical sector,[11] it does not limit its new policy to these industries.[12]

*Substantive requirements for a referral request* – The Commission remains tight-lipped when it comes to what it means for a transaction to affect trade between Member States and to threaten to significantly affect competition within the territory of the referring Member State, as required under Article 22. It primarily refers to the existing Referral Notice, and resorts to general statements such as, e.g., the (unsurprising) conclusion that the creation of a dominant position may suffice to significantly affect competition in a given Member State, thus qualifying a case for referral.[13] If the new policy is targeting primarily "killer acquisitions" (although the term is not used in the Article 22 Guidance) in the digital economy and the pharmaceutical sector, further guidance on potential theories of harm or factors relevant to market power in such industries might have been useful. The Article 22 Guidance provides examples of activities typical for such industries (e.g. the collection of data in several Member States or the development and implementation of R&D projects),[14] but without any guidance how to evaluate them.

*The risk of split reviews* – The referral mechanism in Article 22 comes with an inherent risk of split reviews, which materializes if the Commission accepts a referral from one Member State but other Member States, instead of joining the request, conduct their own reviews in parallel. The Commission rightly seeks to avoid that scenario, however, its guidance remains sparse. If a Member State has jurisdiction to review a transaction, but does not request or join a referral, the Commission may consider this as an argument against the need to bring the case to Brussels.[15] However, this is only one of potentially several factors and far away from a commitment to avoid split reviews.

*(No) fixed deadlines for referral requests* – The Commission "would generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration".[16] This provides at least some indication in terms of how long companies may face the risk of a referral. However, six months is a long time in any transaction schedule and, given that the six months periods runs only from implementation (provided the implementation of the transaction was in the public domain), it does not address the risk of "last minute" referrals before closing. Moreover, the Commission emphasises that it may also accept later referrals in exceptional situations. The Article 22 Guidance offers also very limited insights into how the Commission will apply the 15

8 Article 22 Guidance, para. 19.
9 Article 22 Guidance, para. 19.
10 Article 22 Guidance, para. 20.
11 Article 22 Guidance, para. 20.
12 Article 22 Guidance, para. 9.
13 Article 22 Guidance, para. 15.
14 Article 22 Guidance, para. 14.
15 Article 22 Guidance, para. 22.
16 Article 22 Guidance, para. 21.

working days deadline, particularly in terms of what constitutes "sufficient information" to trigger the deadline. Rather, the Article 22 Guidance invites parties to engage in informal guidance with the Commission (and/or with the Member States) if they believe that their case may potentially be prone for a referral.[17] This is, of course, a small comfort, as such jurisdictional guidance takes time, entails costs and may just awaken the interest of the Commission (or of the Member States) in the case.

## What to expect

There will in all likelihood only be relatively few additional cases that Member States and Commission may seriously consider for a referral under the new policy. Although the Commission quickly implemented the new policy in the Illumina/Grail transaction, it would be premature to label the Article 22 Guidance a paradigm shift for EU merger control law. However, in each individual case, the commercial impact may be significant, particularly if the referral request is made late in the M&A process. Moreover, the lack of clear guidance may have a side-effect even for transactions that *prima facie* do not qualify as "killer acquisitions". The parties must consider whether the transaction documents should, as precautionary measure, explicitly cover unexpected referral requests, for example in respect to the long-stop dates for the transaction financing, the closing, but also for more technical aspects, such as the obligation of buyer and seller to support the drafting of the merger notifications.

In terms of broader policy considerations, even if one shares the view that there might be an enforcement gap in respect to "killer acquisitions", doubts remain whether Article 22 and the Commission's new policy are the right fix. Instead of relying on a change in enforcement policy and a provision that the legislator never intended for the purpose (the envisaged solution of the Commission is a bit like the famous rabbit that a magician pulls out of an empty hat), wouldn't it be more effective for the Commission to formally amend the EU Merger Regulation if it sought to bring additional transactions within its jurisdiction?

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## Contact

**Markus Röhrig**
**Partner**
T +32 2 7885 525
markus.roehrig@hengeler.com

**Philipp Otto Neideck**
**Senior Associate**
T +49 211 8304 719
philipp.neideck@hengeler.com

**www.hengeler.com**

17 Article 22 Guidance, para. 24.