

European Commission Amends Referral Policy to Allow Review of Previously Non-Reportable ‘Killer Acquisitions’

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On 26 March 2021, the European Commission (**EC**) published new guidance on when it will accept referrals from EU National Competition Authorities (**NCA**s) to review deals involving potential “killer acquisitions” that would previously have avoided merger review.¹ The new Article 22 EU Merger Regulation guidance follows on from a Vestager speech in September 2020 that noted the EC’s intention of “accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves”.²

The Article 22 referral mechanism dates from a period when a number of EU Member States did not have their own merger control regimes but wanted the ability to refer deals to the EC for examination. Referrals have been rare in recent years. The EC has tended to discourage use of Article 22, not least because of the uncertainties it creates for transacting parties.

The EC’s new willingness to accept referrals therefore represents a significant policy shift that will complicate future merger filing risk assessments and forms part of a broader re-evaluation of procedural and jurisdictional aspects of EU merger control.³ Companies, particularly those involved in fast-moving, digital markets, should be wary of the wide discretion allowed to NCAs to refer deals to the EC, even where revenue-based jurisdictional thresholds are not satisfied.⁴ The new guidance considers:

- **Deals at risk of referral:** The EC is primarily interested in reviewing deals where: (i) a target’s revenues are not reflective of its actual or future competitive potential, as may be recognized in total deal value; and (ii) the transaction potentially raises substantive issues requiring examination. Deals involving start-ups, recent market entrants, important innovators and/or companies with access to competitively significant assets (e.g., raw materials, infrastructure, data or intellectual property rights) are likely to be candidates for referral, particularly when being acquired by already well-established market players.
- **Time limits on referral:** A referral request must be made within 15 working days of the date on which the deal is “made known” to the Member State concerned.⁵ The EC will generally only accept referrals where the deal has not yet closed or where closing only occurred within the preceding six months.⁶ Deals closed more than six months previously will only be reviewed in

¹ Available at: https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

² Margrethe Vestager, ‘The future of EU Merger Control’, International Bar Association 24th Annual Competition Conference, 11 September 2020.

³ The EC’s Staff Working Document and associated materials are available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384.

⁴ For a deal to be eligible for referral it does not need to satisfy EU-level or national-level jurisdictional thresholds but it must: (i) affect trade between EU Member States; and (ii) threaten to significantly affect competition within the territory of the Member State(s) making the request.

⁵ The EC’s guidance advises that “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”.

⁶ This period of six months will run from the moment when material facts about the concentration have been made public in the EU.

exceptional circumstances, where warranted due to “the magnitude of the potential competition concerns and of the potential detrimental effect on consumers”.

- **Review procedure:** Upon receipt of a referral request, the EC will inform the merging parties and all NCAs immediately. Other NCAs may join the referral request within 15 working days. After the expiry of this period, the EC has a further 10 working days to decide whether to review the deal. If a formal review is initiated the EC’s normal merger review procedure and associated waiting periods will apply.
- **Standstill obligation:** As soon as the EC informs merging parties of a referral request, a standstill obligation arises and the parties are not permitted to take any steps to implement the deal, even partially, pending formal clearance or confirmation that the EC will not initiate a review.
- **Risk of complainant intervention(s):** Third parties are able to engage with the EC and/or NCAs to inform them of deals they view as candidates for referral. The EC is also able to identify deals that satisfy the Article 22 criteria, inform relevant Member States and invite them to submit a referral request.

Identifying risk of an Article 22 referral will be increasingly critical to ensure a smooth pathway to closing and mitigating adverse timing and other execution risks. Dealmakers should consider taking various steps to reduce uncertainty:

- **Account for referral risk in deal documents:** Where appropriate, take account of referral risk in deal closing conditions and associated interim covenants, including mechanisms allowing for extensions to long-stop dates. Deal teams may also want to consider including mechanisms that allow for variations to pricing structure.
- **Assess risk of post-closing review:** Where parties plan to sign and close simultaneously, buyers will need to assess whether they are comfortable with the risk of a post-closing EC merger review, which could result in the deal needing to be unwound at the buyer’s cost.
- **Consider voluntary engagement:** In order to manage risk of a late stage intervention, merging parties may wish to engage pro-actively with the EC shortly after signing to confirm there will not be an Article 22 referral. The EC is willing to provide an early view, where furnished with “*sufficient information to make such a preliminary assessment*”. A similar approach to the briefing paper strategy commonly adopted when engaging with the UK Competition and Markets Authority may be appropriate.
- **Deal publicity:** Merging parties may want to consider how to publicize a transaction and what information to make available to start the clock on the 15 working days allowed to NCAs to refer a deal to the EC, counted from when the transaction is “made known”. Strategies will vary by transaction, taking account of which NCAs may be considering a referral and whether there is prospect of third party complainants bringing the deal to the attention of the EC or NCAs.

Although risk of referral will remain low for a large number of transactions, deal teams are encouraged to conduct risk assessments and, where needed, develop regulatory engagement strategies at an early stage in deal planning.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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