THE EUROPEAN COMMISSION REINFORCES ITS POWERS IN MERGER CONTROL

MERGERS BELOW EU AND NATIONAL NOTIFICATION THRESHOLDS MAY BE SUBJECT TO MANDATORY FILING

Introduction

The European Commission has recently published new guidelines on the application of the re-allocation mechanisms of the EU Merger Regulation,[1] which encourage national competition authorities (such as the Portuguese Competition Authority) to refer to the Commission certain mergers which may significantly affect competition, even when such transactions are not subject to notification under the applicable national merger control rules.[2]

This guidance, which follows a Commission review of the application of the Merger Regulation,[3] aims to fill a gap in the application of EU merger control rules to transactions involving emerging and innovative companies, notably in the digital, pharmaceutical and biotech sectors, with significant competitive potential, despite generating little or no turnover at the time of the merger - the paradigmatic example was the case of the acquisition of Whatsapp by Facebook in 2014, which did not meet the notification thresholds of the Merger Regulation, despite the size of the transaction (USD 16 billion) and the great importance of Whatsapp.[4]

---

[1] Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, of 29.01.2004, pp. 1–22 ("**Merger Regulation**").
[2] Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, of 26 March 2021, C(2021) 1959 final.
[3] See press release of the Commission IP/21/1384, of 26 March 2021.
[4] The concentration was eventually notified to the Commission on Facebook's own initiative under the referral mechanism of Article 4 of the Merger Regulation as it was subject to notification in at least three Member States and it was cleared (Decision of 3.10.2014, M.7217, Facebook/Whatsapp).

The Commission wasted no time in applying the new guidance, announcing a few days ago that it decided to examine the Illumina/Grail merger, following requests from six national competition authorities, even though the transaction did not meet the notification criteria in any of the Member States concerned.[5]

The existing system: "one-stop shop" merger control

One of the main benefits of the Merger Regulation is that it ensures that concentrations which have a European dimension (because they meet the notification thresholds set out in its Article 1) are notified and assessed solely by the European Commission.

Under the "one-stop shop" principle, if a merger has an EU dimension the Member States' competition laws do not apply. In contrast, if it falls below the EU thresholds, the merger may have to be filed to one or more national authorities to the extent that it meets the respective national notification thresholds. There is broad consensus that the EU one-stop shop system is more efficient and provides more legal certainty for companies than if a merger had to be notified simultaneously to several different national authorities.

Nevertheless, in order to ensure that the assessment is carried out by the authority best placed to do so, the Merger Regulation provides procedural mechanisms for the re-allocation of jurisdiction (or "referral") of cases. One of these is the so-called "Article 22 referral" mechanism, which allows one or more national competition authorities to request the Commission to agree to examine a concentration without EU dimension which nevertheless affects intra-European trade and threatens to significantly affect competition within the territory of the State or States making the request. If it considers that these criteria are met, the Commission may examine the concentration.

While the Article 22 mechanism was initially conceived also because not all EU Member States had national merger control regimes, over the years (and the progressive establishment of such regimes in almost all Member States) the Commission developed the policy of not accepting Article 22 requests from authorities which were not originally competent to review the concentration under

[5] See *Mergers: Commission to assess proposed acquisition of GRAIL by Illumina*, Daily News 20.04.2021.

national rules, not least because it was considered that such cases would in principle have no impact on the internal market. It is this policy that the Commission now decided to change.

The new guidance on Article 22 referrals

After noticing that certain mergers with significant competitive impact (despite generating little or no turnover at the time of the transaction) were not examined by the Commission or, in some cases, by any Member State, the new guidance announces that the Commission will encourage and accept more referrals under Article 22, in particular when the transaction does not meet the national merger control thresholds.

To assess whether a concentration may have an **influence on trade between Member States**, the Commission will take into account specific factors such as the location of (potential) customers, the availability and supply of the products or services concerned, the collection of data in several Member States, or the development and implementation of R&D projects, the results of which, including IP rights, could be marketed in more than one Member State.

In turn, mergers are deemed to **threaten to significantly affect competition** (in the territory of the Member State(s) making the request) if they raise competition concerns under the existing substantive rules, in particular those that create or strengthen a dominant position; that eliminate an important competitive force (such as a new entrant, a potential competitor or a particularly innovative company); or that make it more difficult for competitors to enter and stay in the market, in particular to gain access to important inputs or customers.

Additional factors will also be considered in the assessing whether the merger should be referred under the Article 22 mechanism despite not being notifiable in the Member States concerned. These are cases where the turnover of at least one of the undertakings concerned does not reflect its (current or future) competitive potential, and in particular if such undertaking:

(i) is a start-up or a new entrant in the market with significant competitive potential, although it has not yet implemented a business model generating significant revenues;
(ii) is an important innovator or innovator or develops potentially significant R&D efforts;
(iii) represents a current or potential competitive force;

(iv) has access to competitively important resources (such as raw materials, infrastructure, data, intellectual property rights); and/or
(v) provides products or services that are essential to other industries.

While fully implemented concentrations may be subject to referral under Article 22, the Commission will, in principle, not accept requests from national authorities which are made more than 6 months after the closing of the concentration or the date on which it became public knowledge.

The Commission announces that it will cooperate actively with national competition authorities, and when relevant will proactively invite such authorities to submit referral requests. Parties to a concentration may also voluntarily contact the Commission for an indication as to whether the Commission is likely to accept or encourage referral requests.

In cases where a concentration is not notifiable under applicable national laws, Member States should send the referral request within 15 working days of becoming aware of its existence (*i.e.* when they have sufficient information to make a preliminary assessment as to whether it meets the criteria of Article 22 of the Merger Regulation). The other Member States will have 15 working days to comment, following which the Commission will make a decision on the request within 10 working days.

Lastly, if the Commission agrees to examine the case, it may require the parties to submit a full notification, in particular if the concentration has not yet been notified to the national authorities concerned. If the concentration has not yet been implemented, the parties will be prevented from closing it until the adoption of an express or tacit clearance decision within the time limits set by the Merger Regulation.

Practical implications: less legal certainty and increased importance of self-assessment by the parties

The Commission's recent decision to examine the Illumina/Grail transaction, mentioned above, is a good example of the application of the new guidance on the Article 22 mechanism. Grail, the acquired company, develops innovative cancer detection tests based on genome sequences.

Although the transaction has a value of USD 7.1 billion, it did not meet the notification criteria in any Member State, which led the French competition authority to submit a referral request to the Commission. After five other authorities joined the request, the Commission decided on 20 April 2021 to examine the case, after finding that in a preliminary analysis the merged company would have the ability to restrict access to (or increase prices of) next-generation cancer detection tests, considered to be "game changers" in the fight against cancer.

Illumina has subsequently announced that it considers the Commission's decision to accept the referral request in this case to be illegal, and that it will appeal to the EU General Court, meaning that the new guidance will be subject to judicial scrutiny in the near future.[6]

While the new policy announced by the Commission increases legal uncertainty for companies participating in mergers that do not meet the European and national notification thresholds, the guidance provides useful indications as to where the risk of an Article 22 referral is most significant.

It is therefore advisable that the parties in M&A transactions, especially in the digital, biotech and pharmaceutical sectors:

1. Carry out, as part of the preparation of the transaction, a preliminary competition analysis, in addition to the current turnover-based jurisdictional analysis, in order to assess the likelihood of any of the companies involved meeting the criteria referred to in the guidance;
2. Take into account the impact of a possible Article 22 referral request on the timing and even on the viability and structure of the transaction;
3. Address the risk of referral to the Commission in the drafting of the transaction documents; and
4. Consider proactively approaching the national competition authorities and/or the Commission itself in order to mitigate the risk that the transaction is subject to an Article 22 referral.

[6] Cf. Global Competition Review, "Illumina urges General Court to annul Article 22 referral", 29 April 2021.

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS

Pedro de Gouveia e Melo [+ info]
Beatriz Lopes da Silva [+ info]