

The revised Commission merger control referral mechanism – Practical considerations for Luxembourg M&A transactions



On 26 March 2021, the European Commission (the “Commission”) published “Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases”.¹

The impact of the document comes close to a paradigm shift for merger control in the European Union and its Member States, extending significantly the Commission’s discretion to intervene in M&A transactions. This is particularly true for Luxembourg, which remains the only jurisdiction on the European continent to date without a dedicated merger control regime.²

Companies and legal counsels are advised to take this policy change into account and to integrate the risk of EU merger control intervention into their transaction planning.

In truth, the now-formalised policy change of the Commission may lead to a de facto notification obligation across EU Member States, forcing companies to (i) reflect an omnipresent merger control risk in M&A transaction documents, (ii) conduct a preliminary assessment (where required) as to the impact of the transaction on certain markets, and (iii) engage proactively with competition authorities to limit the risk of intervention. These steps should also address the risk of third party “tip-offs” to the Luxembourg Competition Council, and/or directly to the EU Commission.

Background

Article 22 of the EU Merger Control Regulation (“EUMR”) allows Member States to refer a concentration³ for merger control review to the Commission even where national or EU-wide merger control thresholds are not met. Such a referral can be made (regardless of the size of the transaction) where:

- the transaction affects trade between Member States, and
- the transaction threatens to significantly affect competition within the territory of a Member State.

Where a national competition authority carries out a preliminary assessment of these criteria and considers them met, it can decide to refer the case to the Commission. The latter is then in a position to either accept or decline the referral.

A key policy change

The Commission previously discouraged referrals from competition authorities that did not have jurisdiction to review a transaction under their national legislative framework. With the new guidance, the position of the Commission changes – and with it, the discretion of the Luxembourg Competition Council to make use of the referral mechanism. Targeted in particular (but not exclusively) toward so-called “killer acquisitions” in digital, pharmaceutical, and certain industrial sectors, the new guidance actively encourages referrals of transactions that meet the conditions of Article 22 EUMR.

Making a referral request - two substantive criteria

The Commission document provides guidance as to when it considers that the relevant criteria are met and a referral can, or should, be made.

Criterion 1 – the effect on trade between Member States. In line with long-standing Commission practice, the notion of “trade” covers all kinds of cross-border “economic activity”. The Commission notes that relevant factors could include the location of (potential) customers, the availability and offering of the products or services at stake, as well as the collection of data in several Member States. For Luxembourg, a wholly domestic transaction that does not “affect” cross-border trade with Germany, France, and/or Belgium is, at the very least, difficult to imagine under this assessment framework.⁴

Criterion 2 – a significant threat to effective competition within the territory of the Member State making the request. The second criterion also leaves a significant degree of discretion to national competition authorities. It is required that “based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition”. The guidance states that “such preliminary analysis may be based on prima facie evidence, (...) but would be without prejudice to the outcome of a full investigation”. Among other factors, the Commission lists the following as potential “significant adverse impacts”: (i) the creation or strengthening of a dominant position, (ii) the elimination of an important competitive force, or recent and/or future entrants, and (iii) coordinative theories of harm such as the reduction of a competitor’s ability or incentive to compete and innovate.

If the Luxembourg Competition Council concludes that a concentration is likely to affect a market in Luxembourg in terms of these two criteria, a referral to the EU Commission can no longer be ruled out.

Accepting a referral

The Commission emphasises that, in determining the appropriateness of a referral and whether to open an investigation, Article 22 is intended in particular to apply to cases in which the

turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This is notably the case where the transaction target is (i) a promising start-up, (ii) an important innovator or (iii) an actual or potential important competitive force, or where it (iv) has access to competitively significant infrastructure or data or (v) provides products or services that are key inputs/components for other industries.

It is therefore advisable to remain cognisant of the policy change implications, especially in “innovative industries” such as the digital and pharmaceutical sectors, for key infrastructure or technology companies, as well as more generally for start-ups that develop into important competitive forces in a market. In Luxembourg, this also applies to regulated industries (such as the energy, telecommunication or healthcare sectors) and to the omnipresent financial sector, in which an artificially grown competitive edge can now become the subject of an EU merger control proceeding.

Time limits

Any referral under Art. 22 EUMR needs to be made within 15 working days after a transaction is “made known” to an authority. The new guidance interprets this notion as the point in time at which an authority has amassed enough information to carry out a preliminary assessment of the above two substantive criteria. A newspaper article or other generic publication of a transaction is unlikely to be sufficient in this respect.

However, it appears that companies may need to engage proactively with competition authorities of Member States in which the transaction could have a competitive impact. In that case, parties would need to communicate key information on the transaction and the companies concerned, and request formal confirmation that no referral will be made. This would, of course, constitute a de facto notification obligation on the initiative of the parties to the transaction. The guidance explicitly mentions this possibility for concerned companies, but refrains from obliging authorities to respond to such initiatives.

Importantly, closing a transaction does not preclude a competition authority from making a referral request. The Commission states, however, that referrals lodged more than six months after transaction closing will only be accepted in exceptional circumstances.

Where a transaction has not yet closed, acceptance of the referral by the Commission will trigger the merger control standstill provision, after which the transaction will not be able to close without prior Commission approval.

Consequences for M&A strategy

The new Commission guidance on the referral mechanism is nothing short of a merger control paradigm shift. While the policy change and its underlying objective are clear (namely, to review more transactions that could be problematic because they do not meet merger control

thresholds), the guidance raises a series of new – as yet unanswered – questions. This in turn creates a degree of legal uncertainty for M&A transactions across the European Union.

It is clear that any such referral by a competition authority will trigger significant delays in a transaction schedule. Merger control procedures are prone to be time and cost-intensive, in particular in a referral scenario, in which a preliminary analysis will have identified a series of competition law concerns that will need to be addressed and discussed with the competent authorities.

In light of these facts, three immediate consequences for M&A transaction planning arise:

- M&A documentation. Conditions precedent should note the possibility and potential consequences of a referral request under Art. 22 EUMR. Where competition law questions arise, it should also be agreed which party is obliged and bears responsibility for merger control clearance (by means of “best effort” or even “hell or high water” clauses).
- Substantive competition law assessments. Transactions should be analysed as to their potential local impact in EU Member States – regardless of their size and whether they meet notification thresholds. In addition to multi-jurisdictional filing assessments, substantive analyses may need to be made.
- Proactive engagement with authorities. Where questions arise as to the impact of a transaction on competition in an EU Member State, it may be necessary to proactively inform the competent authorities in order to exclude, or at least minimise, the risk of a referral. This is especially advisable where there is potential for a “tip-off” or complaint by a third party.

Conclusion

All of these considerations have applied, in Luxembourg and elsewhere, since 26 March 2021. Like any EU competition authority, the Competition Council has the power to refer cases to the Commission where it identifies concerns ex officio or after having been “tipped off” by a third party. Luxembourg’s lack of a national merger control regime could, in fact, make this more likely to happen; that in turn could create a policy shift towards something approaching a national targeted merger control regime (for problematic transactions).

While only time will tell how the Commission and the Luxembourg Competition Council put this formal guidance into practice, it is clear that some recent controversy – for example, surrounding the acquisition of Paul Wagner & Fils by the (de facto) state-owned energy company Encevo – might have been easily resolved by means of the newly reformed referral mechanism.

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1 The full text is available online [here](#)

2 Under Luxembourg competition law, transactions can only be investigated and prohibited in an ex-post analysis (i.e. after closing), as potential abuses of a dominant position (following ECJ precedent in Continental Cans or Luxembourg precedent in Utopia). The creation of a dominant position is therefore automatically out of scope of such an assessment, limiting the review powers of the Competition Council significantly.

3 Arendt & Medernach has published guidance on the EU merger control framework and the type of transactions that can be subjected to merger please refer to: EU [merger control](#)

4 To the extent that local assets are involved. However, where Luxembourg is the chosen jurisdiction for special purpose vehicles or M&A structuring reasons, the location of the underlying assets should be the determining factor in assessing the criteria under Art. 22 EUMR.