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European Commission publishes results of its evaluation of EU merger control rules

On 26 March 2021 the European Commission published the findings of its evaluation of procedural and jurisdictional aspects of EU merger control. The Staff Working Document (SWD) which sets out the Commission's findings spans some 115 pages and has resulted in two significant further outputs by the Commission: (i) the publication of guidance on the application of the referral mechanism set out in Article 22 of the EU Merger Regulation[1] (EUMR) to certain categories of cases, and (ii) the launch of an impact assessment concerned with potential further simplification of EU merger procedures, including the commencement of a public consultation on the subject.

BACKGROUND

The evaluation launched in August 2016 and sought to review the functioning of the EU merger control regime within the context of evolving market realities. Two topics in particular were focussed on within this broader remit: first, the "*effectiveness of turnover-based jurisdictional thresholds in capturing concentrations which may have a significant impact on competition in the internal market*"[2] (including the functioning of the case referral mechanisms), and second, the effectiveness of the simplification measures introduced into the EU merger control procedure in 2013. Following public consultation, the Commission published its findings in the SWD which subsequently resulted in the Commission publishing two further publications tied to the focus areas above: (i) a Communication containing guidance on the application of the referral mechanism set out in Article 22 of the EUMR to certain categories of cases (Guidance), and (ii) a four-page impact assessment setting out a roadmap to further simplification of EU merger control procedures (Impact Assessment).

"JURISDICTIONAL ASPECTS": GUIDANCE ON ARTICLE 22 OF THE EUMR

Article 22 allows Member States to request the Commission examine a concentration notwithstanding the fact that the concentration does not have an EU dimension (and so does not satisfy the turnover thresholds under the EUMR) if that concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request (irrespective of whether the transaction is notifiable in the referring Member State). Historically the Commission has discouraged Member States from referring requests under Article 22 where that Member State does not itself have jurisdiction over the transaction at stake. However, the SWD found that while the Commission's turnover-based jurisdictional thresholds combined with this approach to the Article 22 referral mechanism has generally been effective in capturing significant transactions within the EU internal market, increasingly transactions involve "*firms that play or may develop into playing a significant competitive role in the*

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[1] Council Regulation (EC) No 139/2004 (OJ 2004 L24/1, 29.1.2004).

[2] Commission Press Release IP/21/1384, 26 March 2021.

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markets despite generating little or no turnover at the moment of the concentration", creating a risk that potentially competitively significant mergers may not be reviewed by either the Commission or the relevant Member State(s).

The Guidance, therefore, states that the Commission henceforth intends to both encourage and accept referrals in certain circumstances even in cases where the transaction is not notifiable under the laws of the referring Member State; this, it suggests, will "*permit Member States and the Commission to ensure that additional transactions that merit review under the Merger Regulation are examined without imposing a notification obligation on transactions that would not warrant such review*". The Guidance envisages that the kind of sectors where such referrals are likely to arise include (but are not limited to) the digital economy, pharmaceuticals and biotechnology, in instances where (little or no) turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. It then goes on to suggest that appropriate cases for such referrals would include those where an undertaking:

- is a start-up or recent market entrant with significant competitive potential but yet to develop a business model generating significant revenues;
- is an important innovator or researcher within the sector;
- is an important (actual or potential) competitive force;
- has access to competitively significant assets (such as raw materials, infrastructure, data or IP rights); and/or
- provides products or services that are key inputs for other industries.

The Guidance, which also provides details on certain procedural aspects, makes clear that this is only a change in practice and requires no amendment to the EUMR itself, and the decision to refer any merger under Article 22 remains in the hands of the relevant Member State (though the Commission may in certain circumstances invite a Member State to make a referral). The Guidance also emphasises that it complements the 2005 Commission Notice on Case Referral.[3]

"PROCEDURAL ASPECTS": IMPACT ASSESSMENT AND PUBLIC CONSULTATION ON FURTHER SIMPLIFYING MERGER PROCEDURES

The SWD contains a detailed review of the effectiveness of the simplification process which the EU merger control regime has undergone in recent times, with particular focus on what is referred to as the "2013 Simplification Package": a series of measures which sought to further streamline the simplified procedure for merger notification and review introduced by the Commission in the year 2000, including by the publication of the Commission Notice on a simplified procedure for treatment of certain concentrations[4] (2013 Notice on Simplified Procedure). While the Commission found in its SWD that the 2013 Simplification Package had broadly succeeded in focussing the Commission's resources on the most relevant cases and yielding cost savings for all parties without negatively impacting on the efficacy of EU merger control, it ultimately determined that "*there may be additional cases that are typically unproblematic which are currently not captured by the simplified procedure*" and that "*information requirements may be too extensive in certain circumstances*".

The Impact Assessment is a response to this determination. It states that the Commission plans to assess policy options for potential revisions of both the Merger Implementing Regulation[5] and the 2013 Notice on Simplified Procedure, seeking to achieve further simplification and targeting of the EU merger control rules via four potential avenues:

- <u>Expanding and clarifying the categories of simplified cases</u>: the Commission has identified two possible policy options: either introducing a flexibility clause into the 2013 Notice on Simplified Procedure affording the Commission discretion to treat cases under the simplified procedure in certain circumstances, or adding new

[3] OJ 2005 C 56/2, 5.3.2005.

[4] OJ 2013 C 366/5, 14.12.2013.

[5] Commission Regulation (EC) No 802/2004 (OJ L 133, 30.4.2004) (which implements the EUMR).

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categories of simplified cases for certain vertical links (for instance cases with highly asymmetric market positions upstream and downstream, or cases with limited increments to a pre-existing vertical integration).

- Streamlining the review of simplified cases: the Commission has proposed three policy options (potentially to be introduced cumulatively) which seek to either replace the current Short Form CO with a streamlined "tick-the-box" form or otherwise reduce information requirements and pre-notification discussions.
- Streamlining the review of non-simplified cases: the Commission has proposed two policy options (potentially to be introduced cumulatively), the first of which would modify the structure of the current Form CO and the second of which would identify opt-out sections in the Form CO to be waived by the Commission at the request of the parties on a case-by-case basis.
- Introducing electronic notifications permanently: this would place the Covid-19 related permission currently granted by the Commission for electronic notification on a permanent footing, either by allowing electronic notifications to be followed by originals on paper without delay or by allowing fully digital notifications (including digital signatures).

The Impact Assessment has instigated the Commission to launch a public consultation on the policy options set out above, inviting responses by no later than 18 June 2021. The Commission aims to publish draft reforms of the Merger Implementing Regulation and the 2013 Notice on Simplified Procedure for stakeholder comment in the second half of 2021.

OTHER DEVELOPMENTS

MERGER CONTROL

EUROPEAN COMMISSION CONDITIONALLY CLEARS ESSILORLUXOTTICA/GRANDVISION

On 23 March 2021 the European Commission announced that it has conditionally cleared EssilorLuxottica's proposed €7.2 billion acquisition of GrandVision, following a Phase II investigation. The parties notified the transaction to the Commission on 23 December 2019.

EssilorLuxottica is a large wholesale supplier of optical products (i.e. lenses and eyewear) and is also an optical retailer. GrandVision is an optical retailer that operates optical chains such as GrandOptical and Pearle. EssilorLuxottica sells optical products to optical retailers (including GrandVision), which subsequently resells them to end users. The Commission had concerns that the acquisition, as initially notified, could degrade the access of competing opticians to EssilorLuxottica's products in Belgium, Italy and the Netherlands. This would result in reduced choice and higher-priced products for shoppers. The Commission also had concerns that the transaction would weaken competition in the Italian optical retail market by combining the two largest retailers.

In response to the Commission's concerns, EssilorLuxottica agreed to divest around 350 optical retail stores in Belgium, the Netherlands and Italy, including:

- in Belgium, the GrandOptical chain but without the brand name (with a licence for the rebranding period);
- in Italy, EssilorLuxottica's VistaSi chain and the VistaSi brand together with 72 stores from the GrandVision By chain (which would be rebranded); and
- in the Netherlands, 142 stores from the EyeWish chain and the brand name. Some stores from this chain would be retained by the merged entity and rebranded.

The Commission concluded that the remedies limit the merged entity's retail footprint and reduce the merged entity's incentive to restrict rivals' access to optical products in Belgium, Italy and the Netherlands.

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GENERAL COMPETITION

CMA'S ANNUAL PLAN FOR 2021 AND 2022 FOCUSES ON CONSUMER PROTECTION, POST-BREXIT RESPONSIBILITIES, DIGITAL MARKETS, AND CLIMATE CHANGE

On 23 March 2021 the UK's Competition and Markets Authority (CMA) published its annual plan for 2021/22, following engagement with stakeholders and consultation on an earlier draft.

The plan focuses on four themes:

- **Protecting consumers and driving recovery during and after the coronavirus pandemic**. The CMA will focus on protecting the vulnerable and supporting the UK economy by fostering competition.
- **The CMA taking its place as "*a global competition and consumer protection authority*"** following the conclusion of the Brexit transition period and the commencement of the CMA's newfound power to engage in parallel investigations with the European Commission.
- **Fostering effective competition in digital markets.** This comes as the Government launches the new Digital Markets Unit within the CMA (see below). Pending the new powers, the CMA will use existing tools to address issues in digital markets. The CMA's Data, Technology and Analytics Unit is assessing the capabilities required to effectively monitor digital markets and scrutinise the deployment of algorithms by digital businesses to the potential detriment of competition and consumers.
- **Supporting the transition to a low carbon economy**. The CMA is looking at the use of environmentally friendly claims. The CMA will also work on its communications on sustainability initiatives and competition law compliance.

REGULATORY

CMA'S NEW DIGITAL MARKETS UNIT HAS LAUNCHED IN NON-STATUTORY FORM

In November 2020 the UK Government announced its plans to set up a Digital Markets Unit (DMU) within the UK's Competition and Markets Authority (CMA) to introduce and enforce a pro-competition regime for digital platforms with "*strategic market status*". The DMU does not yet have statutory powers but the Government is planning to legislate and give statutory footing to it.

Ahead of this legislation, on 7 April 2021 the Government announced the launch of the DMU in 'shadow' non-statutory form. The non-statutory DMU will prepare to implement the statutory regime, support and advise the Government on establishing the regime, gather evidence on digital markets and engage with stakeholders in the UK and overseas.

The Government has asked the DMU to start assessing how a code of conduct can govern the relationship between digital platforms and content providers (such as news publishers), and between digital platforms and digital advertisers. The DMU will work with the CMA's enforcement teams and other regulators including the Information Commissioner's Office, Ofcom and the Financial Conduct Authority.

The Government will consult on the design of the new pro-competition regime in 2021.

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