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QUICK LINKS

Article 22 in flux? European General Court issues ruling in Brasserie Nationale case

On 2 July 2025, the European General Court (GC) upheld the European Commission's decision to assert jurisdiction over Brasserie Nationale's acquisition of Boissons Heintz, following a referral request from the Luxembourg competition authority (ACL) under Article 22 of the EU Merger Regulation (EUMR). In doing so, the GC endorsed the Commission's broad discretion in accepting referral requests and clarified the time limit for Member States to refer cases to the Commission. The judgment adds to the growing body of case law on the Commission's use of Article 22 to scrutinise below-threshold deals.

Background: Article 22 EUMR and recent developments

Article 22 allows Member States to request that 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.

The original purpose of Article 22 was to allow Member States without their own merger control regimes to request that the Commission review deals that could affect competition in those States. Luxembourg is currently the only EU Member State without its own merger control system. Throughout the years, Article 22 had also been used by EU national competition authorities (NCAs) to delegate their merger review powers to the Commission where the latter was better placed to review a deal - for example, where it raised pan-European issues.

This approach changed in April 2021, when the Commission took the unprecedented step of accepting a referral request in the Illumina/GRAIL case, despite the referring NCA having no jurisdiction over the deal under its own national merger control regime. This led to a legal battle culminating in the European Court of Justice (CJ) clarifying that the Commission had no such powers in September 2024 (see our previous newsletter).

The CJ's ruling in Illumina/GRAIL established an important jurisdictional boundary and was welcomed by dealmakers globally. However, it left certain questions unresolved – particularly in scenarios where the Commission may still lawfully assert jurisdiction under Article 22. This remains a live issue, as several Member States have introduced reforms empowering their NCAs to 'call in' below-threshold transactions. The exercise of these national call-in powers may, in turn, serve as a basis for referral to the Commission under Article 22, further complicating the jurisdictional landscape for cross-border deals.

Where no notification is required, the EUMR requires that an Article 22 referral request be made within 15 working days from the date on which a concentration is "*made known to the Member State concerned*". The meaning of a deal being "*made known*" was not

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addressed by the CJ in Illumina/GRAIL. The GC's judgment in Brasserie Nationale provides fresh guidance on this issue and clarifies the Commission's margin of discretion when accepting referral requests.

The Brasserie Nationale case and appeal

The case concerns the acquisition of Boissons Heintz, a wholesale beverage distributor in Luxembourg, by Brasserie Nationale, a Luxembourg-based producer of beer and mineral water. As above, Luxembourg is currently the only Member State without a national merger control regime, and the transaction did not meet the relevant turnover thresholds for a mandatory merger filing under the EUMR or in any EU or EEA country.

Brasserie Nationale's engagement with the ACL regarding the transaction began with an initial contact on 22 December 2023, followed by a meeting on 10 January 2024. Subsequently, the timeline of events proceeded as follows:

- **17 January 2024**: Third parties submitted information to the ACL about the concentration.
- **25 January 2024**: One of these third parties formally requested that the ACL ask the Commission to examine the transaction using Article 22 of the EUMR.
- **7 February 2024**: The ACL submitted a referral request to the Commission pursuant to Article 22(1) of the EUMR.
- **14 March 2024**: The Commission accepted the referral.

Brasserie Nationale appealed the Commission's decision to accept the referral. In particular, the company argued that the ACL had missed the 15 working day deadline for making an Article 22 referral, contending that the clock should have started when the deal was first "*made known*" to the ACL, as early as 10 January 2024. Brasserie Nationale also argued that the substantive requirements for an Article 22 referral – namely, the effect on trade between Member States and the threat of a significant effect on competition in the territory of Luxembourg – were not met.

The GC's judgment: key points of interest

The meaning of "made known": active transmission of relevant information

The GC affirmed that triggering the 15-working-day deadline requires an "*active transmission of information*". This may be done by the merging parties themselves, third parties or "*any other source*". Crucially, for the transaction to be "*made known*" to an authority, the information transmitted must be sufficient to enable the authority to conduct a "*preliminary assessment*" of whether the deal affects trade between Member States and threatens to significantly affect competition within its territory (the conditions for a referral). The GC also clarified that NCAs are under no obligation to actively seek out the relevant information themselves – effectively allowing NCAs to be passive in their receipt of information.

The GC dismissed Brasserie Nationale's argument that this interpretation of Article 22 is equivalent in effect to a notification obligation. In particular, the GC noted that: (i) there is no penalty for failure to communicate the information, and (ii) the communication may consist in a "*simple note*" containing the information necessary for the NCA's assessment of the conditions for referral, such as "*the relevant transaction, [its] parties, relevant markets, impact on trade between Member States and impact on competition in the relevant Member State*".

Applying these principles, the GC found that Brasserie Nationale's initial communications on 22 December 2023, and 10 January 2024, were insufficient to start the clock on the 15-working day deadline. It concluded that Brasserie Nationale had not demonstrated that the ACL was sufficiently informed about the transaction's effects before third parties submitted information on 17 January 2025.

The Commission's margin of discretion

The GC also confirmed that the Commission possesses a significant margin of discretion when assessing if a concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State making the request. In particular, the GC concluded that the merger did indeed

pose a risk to intra-EU trade by making it harder for beer producers in other Member States to enter the wholesale distribution market in Luxembourg.

In this case, the Commission was entitled to consider a referral appropriate in circumstances where the referring Member State, Luxembourg, does not have its own national merger control regime.

Comment

In cases where an Article 22 referral is a realistic prospect, the GC's judgment appears to place the burden of triggering the review clock largely on the shoulders of the merging parties. To obtain certainty on the commencement of the 15 working day period, parties may need to proactively submit sufficient information to allow the authority to determine if the conditions for referral are met. As illustrated in the Brasserie Nationale case, failure to do so exposes the transaction to third party intervention risk: competitors or other interested parties may submit their own analysis to the NCA, starting the clock and prompting a referral request.

Equally significant is the GC's confirmation that NCAs are under no obligation to proactively seek out the relevant information. It follows that an authority's silence following awareness of a transaction should not necessarily be interpreted as tacit approval or a signal that the referral window has closed.

Following its defeat last year in the Illumina/GRAIL saga, the Commission will see the Brasserie Nationale ruling as a significant victory. However, it is worth recalling that the Commission had also prevailed at the GC in Illumina/GRAIL, only for that decision to be overturned by the CJ on appeal. Whether Brasserie Nationale will pursue an appeal remains to be seen.

Another development to watch is the forthcoming appeal in Nvidia/Run:AI, in which Nvidia is challenging the Commission's acceptance of an Article 22 referral from the Italian competition authority using national call-in powers (see our previous Horizon Scanning piece).

OTHER DEVELOPMENTS

MERGER CONTROL

CMA consults on embedding the 4Ps into its merger jurisdictional and procedural guidance

The UK Competition and Markets Authority (CMA) has released a consultation on proposed updates to its merger guidance on jurisdiction and procedure (CMA2 guidance) and to the merger notice template. These changes aim to integrate the CMA's new '4Ps' framework - pace, predictability, process, and proportionality - into the merger review process. Reflecting the objectives as set out in the government's Strategic Steer to the CMA, the proposals demonstrate the CMA's intention to promote growth by enhancing business and investor confidence.

Key proposals include:

- **Predictability: Clarity on jurisdiction to review mergers**: To improve predictability, the CMA intends to clarify how it interprets and applies the 'material influence' and 'share of supply' jurisdictional tests. In assessing material influence, for example, the CMA confirmed that shareholdings conferring voting rights of less than 25 per cent will be unlikely to confer material influence in the absence of other factors; and that only in limited circumstances can shareholdings of less than 15 per cent confer material influence, when accompanied by other significant factors.
- **Proportionality: Drawing distinctions between national and global markets**: The proposals outline the CMA's prioritisation of transactions involving global firms that have a UK-specific impact, involving local or national markets, over transactions concerning exclusively global (or broader than national) markets. The CMA is also less likely to prioritise deals that exclusively concern global markets where remedies agreed in other jurisdictions would be likely to address any concerns in the UK.
- **Pace and Process: Introduction of KPIs in relation to pre-notification and Phase 1 reviews**: To shorten Phase 1 merger processes, the proposals set out KPIs including a 40 working day timescale for the pre-notification stage (currently 65 working days), and 25 working days for Phase 1 clearance of

'straightforward' mergers (currently 35 working days). In addition, the proposals set out the CMA's intention to maximise early engagement with merging parties during the pre-notification stage, recognising the importance of accurately targeting the investigation and considering constructive remedies. Proposed methods of early engagement include teach-ins and regular update calls. The CMA is also proposing to make the investigation public at the start of pre-notification, rather than at the start of Phase 1. These KPIs will apply to cases where the initial draft notice is submitted after 20 June 2025.

- **Revised Merger Notice**: This proposed template is intended to clearly focus on information that is most relevant to the CMA's investigation, thereby prioritising the most relevant theories of harm. Proposed updates include (i) requests for details on how the merger was agreed, including key individuals involved, (ii) questions on how the merger parties' commercial decisions are made within the relevant markets, (iii) requests for detailed information on bidding processes, and (iv) expanded requests for third-party contacts, including details for the top ten competitors and customers in each relevant market.

The CMA have invited responses to this consultation by 1 August 2025. However, many of the proposed improvements have already been introduced in recent cases.

European Court of Justice confirms General Court ruling in E.ON/RWE asset swaps

On 26 June 2025, the CJ confirmed, following the GC's ruling in May 2023, the European Commission's approval of the acquisition of certain E.ON generation assets by RWE. In doing so, the CJ confirmed the concept of 'single concentration' in the context of asset swaps, as clarified previously by the GC.

In March 2018, RWE and E.ON announced a complex asset swap by means of three concentration operations. The operations were as follows: (1) RWE would acquire control over certain generation assets of E.ON; (2) E.ON would acquire control over the distribution and retail energy business, as well as some production assets of RWE's subsidiary, Innogy SE; and (3) RWE would acquire 16.67 per cent of E.ON's shares. The first and second concentration operations were reviewed and approved by the Commission (Decisions of 26 February 2019 and 17 September 2019 in case M.8871 and case M.8870, respectively), while the third concentration operation was reviewed by the German national competition authority.

Eleven German municipal authorities challenged the Commission's approval of the first two operations before the GC. The GC issued its judgments on 17 May and 20 December 2023 respectively, dismissing these actions.

The GC ruled that the asset swaps did not constitute a 'single concentration' and found no manifest errors in the Commission's assessment of the compatibility of those concentrations with EU competition law. In its May 2023 judgment on the first operation (the acquisition of generation assets of E.ON by RWE), the GC observed that, to regard multiple operations as components of a 'single concentration', two cumulative conditions must be met: (i) the operations must be interdependent in such a way that none could be carried out without the others; and (ii) the operations must result in one or more undertakings acquiring direct or indirect economic control over the activities of one or more other undertakings. The GC found that a 'single concentration' cannot apply where interdependent undertakings gain control of different targets, as is the case in an asset swap. Applying this test to the facts, the GC found that while the interdependence condition was met, the condition regarding the result of the operations was not as there was no functional link between the three concentration operations. In particular, the three components of the parties' proposed asset swap did not constitute several intermediate transactions carried out to confer control over one or several undertakings by the same undertaking.

Subsequently, nine of the municipal authorities appealed these GC judgments to the CJ. In its judgments, the CJ dismissed five of the nine appeals related to the first operation, upholding the Commission's approval and confirming that asset swaps between independent undertakings do not constitute a 'single concentration'. However, due to the GC's failure to fulfil its obligation to state reasons, the CJ set aside four GC rulings that had dismissed certain challenges on inadmissibility grounds, citing that the municipal authorities in question were not individually concerned by the Commission's approval of the first operation. Giving final judgment itself, however, the CJ concluded that these municipal authorities had failed to demonstrate that their market position

was substantially affected by the first operation and thus failed to establish that were individually concerned by the Commission decision. Consequently, as the GC did, the CJ dismissed these four actions as inadmissible.

The appeals against the GC's judgments of 20 December 2023 on the second operation (the acquisition of the distribution and retail energy business) remain pending before the CJ.

China's SAMR consults on draft guidelines for the review of non-horizontal mergers

On 27 June 2025, China's State Administration for Market Regulation (SAMR) launched a consultation on the draft Guidelines on the Review of Non-horizontal Concentrations of Undertakings (the Draft Guidelines).

The Draft Guidelines broadly follow the framework under the existing Guidelines on the Review of Horizontal Mergers (the Horizontal Merger Guidelines), which were released on 20 December 2024 (reported in a previous edition of this newsletter).

The Draft Guidelines focus on two categories of non-horizontal mergers, namely vertical mergers (i.e. mergers involving parties active in different levels of the supply chain) and conglomerate mergers (focusing on mergers involving parties active in neighbouring or complementary markets). Similar to the Horizontal Merger Guidelines, the Draft Guidelines propose market share thresholds for an indicative competition risk analysis, which are summarised in the table below:

Indicative risk level	Market share threshold (in the relevant market(s)) for non-horizontal mergers	Market share threshold (in the relevant market) for horizontal mergers
The merger is presumed to have potential anti-competitive effects	One (or more) of the parties has a market share exceeding 50 per cent	Combined market share exceeds 50 per cent
The merger will need to be closely scrutinised	One (or more) of the parties has a market share exceeding 35 per cent	Combined market share exceeds 25 per cent
The merger has a low likelihood of raising anti-competitive concerns, but is subject to a case-by-case assessment	One (or more) of the parties has a market share of between 25 per cent and 35 per cent	Combined market share is between 15 per cent and 25 per cent
The merger is presumed to have no anti-competitive effects, unless there is evidence to the contrary	Each of the parties has a market share below 25 per cent	Combined market share is below 15 per cent

Specifically, the Draft Guidelines seek to address competition issues that commonly arise in mergers involving digital platforms. For example, they specify that input foreclosure in a vertical merger may take the form of restricting IP licensing, slowing down product upgrades, reducing interoperability, limiting data access, withdrawing application programming interfaces (APIs) and blocking supply channels, etc. The Draft Guidelines also identify other important issues in the context of vertical mergers, such as access to competitively sensitive information of upstream/downstream competitors, and the possibility of self-preferencing in the upstream or downstream market post-merger.

The Draft Guidelines also recognise that transactions involving digital platforms operating in neighbouring markets may give rise to ecosystem-based concerns, which may strengthen network effects and increase user 'stickiness'. The reference to an 'ecosystem-based' theory of harm appears to mirror that of the European Commission in its assessment of the Booking/eTraveli merger (see our newsletter here), which remains under appeal at the time of this newsletter.

The consultation on the Draft Guidelines is open until 16 July. While the Draft Guidelines are subject to revision based on public feedback, the current draft seeks to codify SAMR's current practice in reviewing non-horizontal mergers and sheds light on its intended approach in proactively managing competition law concerns in China's fast-changing digital landscape, in line with international practices.

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