FIVE THINGS YOU SHOULD KNOW ABOUT ARTICLE 22

In February, Weil Paris hosted a conference for the French Association for Competition Studies (AFEC – *Association française d'étude de la concurrence*), which featured in-depth discussions on the European Commission's new approach to Article 22 EU Merger Regulation. On the panel were Étienne Chantrel (Deputy General Rapporteur and Head of Mergers at the French Competition Authority) and Romain Ferla (Weil partner), moderated by AFEC Board Member Odile Mathilde Boudou.

BACKGROUND TO ARTICLE 22

In September 2020, EU Competition Commissioner Margrethe Vestager announced that the Commission would now accept referral requests from Member States even when it has no jurisdiction over a particular transaction, provided that it (i) affects trade between Member States and (ii) threatens to significantly affect competition.

Six months later, the Commission published guidance to help companies identify the types of transaction which were more likely to give rise to an Article 22 referral under the Commission's new approach, followed by an FAQ in December 2022.

OUR FIVE KEY TAKEAWAYS FROM THE AFEC CONFERENCE

1. OVER-ENFORCEMENT RISK HAS NOT MATERIALIZED (YET)

Since the Commission's change in approach, it has received only one referral request for a below-the-thresholds transaction (the now well-known *Illumina/Grail* case). The Commission has also reviewed approximately 30 cases which could have given rise to a potential Article 22 referral but ultimately did not. Most of these cases were brought to its attention by merging parties, third parties, or by Member States, with a minority identified by the Commission itself through its monitoring activity.

Mr. Chantrel indicated that the French Competition Authority, for its part, has had to consider very few cases for potential referral since March 2021, and these were often brought to its attention by the merging parties and not by third parties.

So it seems that the risk raised by many of over-enforcement has not materialized. However, given that the *Illumina/Grail* case, along with the Commission's recently published Q&A providing additional guidance, it cannot be excluded that the number of referrals will increase in the coming months.

2. THE DATE WHEN THE TRANSACTION IS "MADE KNOWN" IS NOT WHEN THE PRESS RELEASE IS ISSUED

In *Illumina/Grail*, the General Court provided certain clarifications about the deadline for Member States to refer the case to the Commission. The EUMR indicates that *"if no notification is required, a referral request must be made at most within 15 working days from the date on which the concentration is otherwise made known to the Member State concerned".*

According to the General Court, the concentration is only "made known" when the Member State concerned has in its hands sufficient information to make a preliminary assessment and verify if the substantive conditions contained in that Article 22 are satisfied (or not). Thus, contrary to the parties' arguments, the mere public announcement of the concentration at issue through press releases is insufficient to enable such a preliminary assessment and therefore could not trigger the abovementioned 15 working days period.

Interestingly, the Commission held that the *Illumina/Grail* transaction was only "made known" to Member States

through a letter from the Commission inviting them to send a referral request. This letter was sent 47 days after the Commission received a complaint concerning the transaction. The General Court considered that this 47 day period was unreasonable. However, since the referral request was made less than 15 working days afterwards, it was still made in time. It will be interesting to see how the Court of Justice on appeal rules on this issue.

3. THE COMMISSION'S Q&A PROVIDES MORE HELPFUL EXAMPLES OF TYPICAL REFERRAL CASES

In its 2021 guidance, the Commission provided a set of typical examples that are suitable for a referral. This includes cases where the undertaking is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues, or has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights).

In its recently published Q&A, the Commission provides more specific examples, such as a large social network platform with many active users acquiring a competing platform with a much smaller number of users, but with a higher growth rate than the acquirer. Or where a multi-national company developing and commercializing a best-selling injectable drug for a certain disease intends to acquire a company which does not yet have any revenue but has an advanced pipeline project for a new injectable drug which could also target the same disease.

The panel welcomed this provision of specific examples, since the initial examples were relatively vague and needed more explanation, especially for non-competition lawyers.

4. MERGING PARTIES (OR THIRD PARTIES) MUST DECIDE WHICH AUTHORITY TO CONTACT ABOUT REFERRAL

According to the Commission's Q&A, it is for merging parties or third parties to decide whether to contact the Commission and/or one or more national competition authorities.

The panel agreed that if a deal could potentially affect competition significantly only within one Member State, the Commission would probably not be the most appropriate competition authority to turn to. Conversely, in cases where potential negative effects may be expected in several Member States, it may be more advisable to inform the Commission instead.

Romain Ferla noted that, unlike the FCA, the Commission will issue comfort letters when it considers that a case is not suitable for referral. But this letter does not provide complete "comfort" for the merging parties, since it has no impact on the assessment that can be made by a national authority and so does not affect its right to refer the case to the Commission.

5. THE WINDOW FOR REFERRING COMPLETED DEALS IS GENERALLY SIX MONTHS POST-CLOSING – BUT COULD BE LONGER

Under paragraph 21 of the guidance, the fact that a transaction has already closed does not preclude a Member State from requesting a referral, but the time elapsed since closing is a factor that the Commission may consider when exercising its discretion to accept or reject a request. Although assessments are carried out on a case-by-case basis, generally the Commission would not consider a referral appropriate where more than six months have passed since closing. Further, if the fact of closing was not in the public domain, the six months would run from the moment when material facts about the transaction have been made public in the EU.

A later referral may still be appropriate in exceptional situations, based on, for instance, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers.

Mr. Chantrel's view is that nothing prevents national authorities and the Commission from exceeding this 6 months period, as neither the EUMR nor the Commission's guidance provide for a strict deadline that would be binding on the Commission. He noted also that, outside of the EU, especially in the United States, transactions can be challenged much later than six months following closing.

FOR MORE INFORMATION

Our Antitrust/Competition team is available to discuss any of these issues with you and answer any specific questions you may have. If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below:

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