
**ICLA**

# Position paper on the European Commission's new approach to the Article 22 EUMR referral mechanism

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## 1. Introduction[1]

1.1 In March 2021, the European Commission (***Commission***) adopted guidance on the application of the referral mechanism in Article 22 of the EUMR (***Guidance***). The Guidance sets out that the Commission intends to accept referrals of concentrations under Article 22 in situations in which the concentration does not meet either the EU or any national merger control thresholds (subject to the criteria within Article 22 being met).

1.2 The Guidance has sparked a debate regarding the scope of Article 22. The primary question is whether concentrations are eligible for referral by a Member State under Article 22 in situations in which (i) the Member State has a national merger control regime; and (ii) the Member State does not have original jurisdiction to review the concentration under its national rules. A secondary question is whether Article 22 foresees a distinction between the referral by the initial Member State and referral by subsequent Member States.

1.3 Prior to the adoption of the Guidance, the Commission's policy and practice under the current EUMR (adopted in 2004) reflected that an initial request under Article 22 could/should be made only by a Member State with original jurisdiction (or, if applicable, no merger control regime). However, additional Member States could then join the initial request even if they did not have original jurisdiction.

1.4 In this paper ICLA sets out some considerations on the scope of Article 22 and the practical implications of the new policy in the Guidance. In summary, ICLA considers:

a. The better view is that the EUMR is to be understood as meaning that concentrations are eligible for referral under Article 22 only if *either* (i) a Member State does not have a national merger control regime; *or* (ii) a Member State does have a national merger control regime and has original jurisdiction.

[1] In this paper, "EUMR" is used to refer to each of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings; and its predecessor Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings as the context requires. For simplicity, this paper refers to Articles 101 and 102 TFEU without reference to their legacy enumeration under previous versions of the TFEU.

In addition, the view put forward in the Guidance is illogical in light of, and inconsistent with, the fundamental principles underlying the EUMR (see 2 below).

b. Should the Commission not be prepared to amend its position, it should at least take account of the practical issues that its new approach creates for companies and review its Guidance and practice with a view to increase legal certainty and make it practicable for companies (see 3 below).

## 2. Considerations on the scope of Article 22

### *The historical evolution of Article 22*

2.1 The original Article 22 (adopted in 1989) expressly reflected the intention of the EU legislature that concentrations would be examined exclusively under the EUMR (and not under (what are now) Articles 101 and 102 TFEU).[2] This also meant that presumably concentrations falling below the EUMR thresholds would not be investigated under Articles 101 or 102 by the Commission[3] - however they would be subject to potential review under the merger control regimes of the Member States. This can be seen as having created a potential enforcement gap insofar as the Commission would not, following the adoption of the 1989 EUMR, investigate concentrations under Articles 101 or 102 whereas a number of Member States did not have national merger control regimes and could not enforce Articles 101 and 102 prior to 2004 (and the adoption of Reg. 1/2003). It was therefore logical to enable those Member States without merger control regimes to ask the Commission to "step-in" and investigate concentrations impacting their Member States and having a cross-border effect (in accordance with the criteria of Article 22 EUMR).

2.2 It is recalled that Article 22 is knowned as the "Dutch clause" - crafted so as to enable Member States like the Netherlands (which had no merger control regime in 1989) to ask the Commission to step-in to review concentrations having an impact on their market, absent a national merger control regime.

2.3 Nothing suggests that Article 22 was intended to enable Member States to refer concentrations to the Commission in circumstances in which the relevant national legislatures have adopted merger control regimes and, through the operation of those regimes, determined that certain concentrations do not merit review (e.g. because of the size of the merging parties). It is a leap of logic to read such a power into Article 22 given that Article 22 was arguably designed only to close an enforcement gap with respect to non-existence of merger control regimes in certain Member States.

2.4 With the adoption of national merger control regimes in all Member States (except Luxembourg) in the intervening years, the original purpose behind Article 22 has become largely redundant. In 1997, Article 22 was amended to enable joint referrals by

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[2] This can be clearly seen from the wording of Articles 22(1) and (2) which provided: "1. This Regulation alone shall apply to concentrations as defined in Article 3." "2. Regulations No 17 (6), (EEC) No 1017/68 (7), (EEC) No 4056/86 (8) and (EEC) No 3975/87 (9) shall not apply to concentrations as defined in Article 3." In accordance with the case law of the Court of Justice, Articles 101 and 102 remain potentially applicable to concentrations.

[3] This is supported by the Notes published by the Commission in 1997 (notes_reg4064_89_en.pdf (europa.eu)). These Notes place Article 22 squarely in the context of the intended non-application of Articles 101 and 102 to concentrations.

Member States. At the time of the adoption of the current EUMR in 2004, Article 22 was debated alongside Article 9 in the context of case referrals under the EUMR.

2.5 It is instructive to recall that referrals under Article 9 always assumed that the EU Commission had original jurisdiction. With the adoption of new referral mechanisms under Article 4 in 2004, it was equally foreseen that either the EU Commission or Member States would have original jurisdiction. For example, recital 15 EUMR states that "*Other Member States which are **also** competent to review the concentration should be able to join the request* [emphasis added]". This requirement makes sense: if there is no original jurisdiction, there is no competence to refer between national and EU level.[4] This also supports the argument that the referral system inherent in the EUMR assumes original jurisdiction.

2.6 By contrast, the concept of 'original jurisdiction' was arguably irrelevant to the original purpose of Article 22 - i.e. as it envisaged 'requests' (and not « referrals ») by Member States for the Commission to review concentrations that would otherwise escape scrutiny under Articles 101 and 102 and merger control (due to not only the absence of a national merger control regime but also the fact that Member States had no jurisdiction to apply Article 101 and 102 prior to 2004). The 1989 version of Article 22 envisaged that a *"...request must be made within one month at most of the date on which the concentration was made known to the Member State or effected*." This language has largely survived and remains in the current version of Article 22 which provides that *"...a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.*" Arguably, this supports the view that, in respect of concentrations for which no notification is required, a request for the Commission to review that concentration can be made only by a Member State that does not have a national system of merger control. This is because the clause 'otherwise made known' has its roots in the original version of Article 22.

2.7 The 1989 version of Article 22 does not make express reference to referrals of concentrations from Member States with merger control regimes where the Member State has original jurisdiction to review the concentration. It has been the practice of the Commission to accept such referrals. The primary rationale cited by the Commission in reforming the EUMR in 2004 (in respect of Article 22) was the need to adjust Article 22 to enable pre-notification referrals.[5] The Notice on case referral includes a flow chart on Article 22 referrals which reflects that if there is no referral of a case, then "*national proceedings continue.*" This legacy and practice presuppose that proceedings had started at national level in the first place (i.e. that a transaction was notifiable), and are consistent with the view that Article 22 does not extend to concentrations that fall below national thresholds (of Member States which have national merger control regimes).

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[4] By analogy, the Notice on case referral makes clear that a 'competent authority' under Article 4(5) means an authority with original jurisdiction.

[5] The Commission explained that adjustments to the referral mechanism "*In the light of the above and taking into account the results of the public consultation the Commission has concluded that the most effective way of meeting the two main objectives outlined above, that is optimal allocation of cases and reduction in the incidence of multiple filings, could be achieved through a more streamlined system of referrals. Such a system would be based on an enhanced recourse to the Merger Regulation's referral mechanisms under Articles 9 and 22 ECMR, including their improvement and use at a pre-notification stage, so as to provide for an effective means of fine-tuning the allocation of cases brought about by the turnover thresholds of Articles 1(2) and 1(3) ECMR.*"

2.8 Similarly, following the adoption of Reg. 1/2003, Member States have become able to enforce Article 101 and 102. Provided a merger below (EU and national) thresholds would threaten competition, there is arguably no enforcement gap as both the Commission or a Member State authority could use Article 101 and 102 (potentially combined with interim measures) to review cases below mergers thresholds.[6]

2.9 The historical context does not support the Commission position. To the contrary, the more consistent view is that where merger control exists, transactions that are below thresholds are not subject to review. These considerations point overall to the better interpretation of Article 22 being that it does not enable a 'referral' of a merger where there is no original jurisdiction. Absent the exceptional situation where a Member State has no merger control regime, the referral mechanism under Article 22 is about identifying the authority amongst those who have original jurisdiction which is best placed to carry out the review.

***The inherent logic of the EUMR***

2.10 The Guidance purports that *any* concentration can be referred to the Commission even when it falls under all EU and national thresholds - subject only to the criteria of Article 22 which relate to the expected impact on competition of the concentration and certain timing requirements. Arguably, if the legislature had really intended that the EUMR would operate in such a manner it would have made more direct and express provision for such a mechanism (e.g. by conferring on the Commission the direct ability to call in such concentrations below the thresholds).[7] The absence of such clear provisions supports the view that Article 22 was not intended to have such a broad application and that its terms must be understood more narrowly as proposed above.

***The EUMR foresees that the jurisdiction of the Commission to review concentrations is defined in accordance with objective criteria***

2.11 The Guidance does not foresee *referral* (as such) of jurisdiction in order for the Commission to assert jurisdiction over a concentration under Article 22 - i.e. because there is no original jurisdiction in the first place which could be « referred ». The Guidance arguably acts only to expand the jurisdiction of the Commission without having any impact on the jurisdiction of the Member States. However, the jurisdiction of the Commission under the EUMR has been set by legislature and is defined in accordance with the turnover thresholds in Article 1. Moreover, this expansion of jurisdiction is at odds with the fundamental principles upon which the EUMR is based - including the need for clear and predictable criteria to enable companies to identify notifiable transactions. As the Commission has acknowledged "*The thresholds are purely quantitative, since they are only based on turnover calculation instead of market share or other criteria.* ***They pursue the objective to provide a simple and objective mechanism that can be easily handled by the companies involved in a merger*** *in order to determine if their transaction has a [Union] dimension and is therefore notifiable.*"[8]

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6 See EUMR Preamble at Para. 7, as well as, for example, Case Philipp Morris, where the ECJ considered that Art. 101 could also be used for the control of concentrations (See joined cases 142 and 156/84 British Tobacco Co. Lts and R.J. Reynolds Industries Inc. Vs. European Commission [1986] ECR 1099).

7 Such powers exist under some national merger control systems - i.e. where the legislature makes express provision for the regulator to call-in and review concentrations that are not subject to mandatory notification.

8 Para 127 of the Consolidated Jurisdictional Notice. See also Recital 9 EUMR, which states that "*The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension*."

***The Guidance is at odds with the objectives underlying the referral system in the EUMR***

2.12 The EUMR foresees the referral of concentrations between the Commission and the Member States. Recital 11 of the EUMR provides "*The rules governing the referral of concentrations from the Commission to Member States and from Member States to the Commission should operate as an effective corrective mechanism in light of the principle of subsidiarity; these rules protect the competition interests of the Member States in an adequate manner and take due account of legal certainty and the 'one stop shop' principle."* The Guidance purports that referrals under Article 22 can be understood as extending to concentrations that fall below all EU and national thresholds and this is fundamentally at odds with the objectives underlying the referral mechanisms in the EUMR.

2.13 The principle of subsidiarity requires that the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national level. Where merger control systems are in place in Member States, it follows that Member States have taken action and determined which types of concentrations are subject to their national merger control regime. Should Member States consider that below their own existing national thresholds, there is a risk that some transactions may affect competition on their territories, they are free to amend their own merger control laws in order to capture such cases. This is what Austria and Germany have done, with the introduction of an additional value-based threshold, and this is also what Spain and Portugal have anticipated with an alternate market share threshold, that allows them to capture transactions that would fall below their turnover thresholds but may create or reinforce a dominant position on their territory. In fact, the German Bundeskartellamt so far refused to make use of Article 22 in case that it has no original jurisdiction.[9] For the Commission to unilaterally interpret Article 22 as a tool to gain jurisdiction over cases that clearly fall within the competence of Member States clearly undermines the principle of subsidiarity set out in the TFEU. It is inherent in the logic of the referral system that there is a split of competence and that the Member States are responsible for determining which concentrations (below the EUMR thresholds) are subject to merger control review.

***The Guidance increases legal uncertainty***

2.14 The Guidance unquestionably increases legal uncertainty. As is further explained in more detail on practical considerations in Section 3 below, the Guidance is inadequate to enable companies to safely identify which deals are at risk of review by the Commission (and therefore to assess, inter alia, deal timing and how to deal with this in terms of contractual documentation). In addition, all deals now have to be assessed under the usual jurisdictional rules as well as the (subjective/qualitative) criteria in Article 22. This means that even deals (including potentially those involving non-EU targets with no activities in the EU) which parties consider ought not to qualify for referral are at risk. For deals likely to be at risk, some form of consultation with all impacted authorities is likely the only route to obtain certainty – albeit there is limited clarity on the form or timing of comfort. Also, such consultations, which take time and can require a lot of resources and money, may simply not be feasible for all transactions.

[9] See the Bundeskartellamt's press release of 23 July 2021 re. Facebook/Kustomer, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2021/23_07_2021_Facebook_Kustomer.html, also referred to below.

2.15 Arguably, concentrations that are subject to notification at EU or Member State level have enhanced legal certainty and predictability of process compared to "below thresholds" transactions. This clearly goes against the EUMR's objectives of having a « ***simple and objective mechanism*** *that can be easily handled by the companies involved in a merger in order to determine if their transaction has a [Union] dimension and is therefore notifiable »*.[10]

2.16 The existence of increased legal uncertainty as a result of the Guidance supports the view that the scope of Article 22 does not extend to concentrations falling under all EU and national thresholds. This uncertainty notably concerns the ability of merging parties to identify in a timely way whether their deals are subject to review by the Commission under the EUMR. The case law of the Court of Justice supports the view that the EUMR is to be understood as enabling parties to identify in a foreseeable way whether the Commission has competence to review their deals. For example, in the *Cementbouw* judgment:

> "*The competence of the Commission to make findings in relation to a concentration in the context of Regulation No 4064/89 on the control of concentrations between undertakings must be established, as regards the whole of the proceedings, at a fixed time. Having regard to the importance of the obligation of notification in the system of control put in place by the Community legislature, that time must necessarily be closely related to the notification of the concentration.* ***Both the concern for legal certainty, which implies that the authority having competence to examine a concentration must be able to be identified in a way which is foreseeable, and the need for speed, which characterises the general scheme of Regulation No 4064/89*** *and which requires the Commission to comply with strict time-limits for the adoption of the final decision, failing which the operation is deemed compatible with the common market, require that, where the Commission has established, in relation to a particular concentration, its competence in the light of the criteria laid down under Articles 1(2) and (3) and 5 of Regulation No 4064/89, that competence cannot be challenged at any time or be in a state of constant flux.*"[11]

2.17 The practical difficulties for merging parties identifying whether their mergers are subject to review by the Commission are explained further below. These practical difficulties are at odds with the core principles of the EUMR (based on thresholds which are objectively quantifiable) and the referral system which assumes an efficient *transfer* of jurisdiction - rather than the creation of new jurisdiction.

***The Guidance undermines legitimate expectations***

2.18 In light of the above considerations, the Guidance can equally be seen as undermining the legitimate expectations of parties that deals which fall below all EU and national thresholds cannot be reviewed and potentially prohibited or made subject to remedies by the Commission under the EUMR.

2.19 It is arguably insufficient that the Guidance has the stated objective that the expanded use of Article 22 will be exceptional. It is the EUMR (not the Commission) that creates a clear and predictable system for the notification and referral of cases. For the same

[10] Para 127 of the Consolidated Jurisdictional Notice.
[11] Case C-202/06 P Cementbouw Handel & Industrie BV v Commission of the European Communities.

reasons the legal uncertainty noted above cannot be seen as inherent in the system of referrals under the EUMR.[12]

## 3. Practical considerations in relation to the Article 22 Guidance

3.1 Notwithstanding the legal arguments stated above, ICLA is of the view that, should the new approach to Article 22 EUMR remain in force, it will raise a significant number of important practical issues for businesses. In the section below, ICLA therefore would like to raise the Commission's attention to these practical issues, which have a considerable impact on the way companies will operate, innovate, transact, and take long-term decisions - far beyond the limited number of cases the Commission intends to capture through its new approach.

### A. Substantive issues

***Introduction of a substantive criterion to assess jurisdiction***

3.2 Through its new approach, the Commission is requiring companies to evaluate the potential competitive impact of their transaction as a substantive criterion to assess jurisdiction: this qualitative approach goes against the spirit of EUMR (legal certainty and clear and predictable criteria – see section above), and creates a significant burden on companies for the mere purpose of assessing jurisdiction – as opposed to a regime of clear, pre-defined quantitative criteria, that are easy to apply without an extensive, and potentially lengthy and costly, substantive analysis.

3.3 This new approach de facto introduces a substantive criterion to merger control – at least for transactions below EU and Member State thresholds – contrary to most merger control standards around the world, and contrary to the ICN Recommended Practices for Merger Notification and Review Procedure (the ***ICN Recommendations***), which specify that "*Clarity and simplicity are essential features of well-functioning notification thresholds*" and that thresholds should be based on "*clear, understandable, and easily administrable "bright-line" tests*".[13]

3.4 The ICN Recommendations even go as far as advising against qualitative criteria, by stating "*Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria. (…) Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification*".[14]

3.5 This additional burden on companies should be considered in particular in view of the fact that this new requirement (to assess a risk of referral according to substantive criteria) will henceforth apply to virtually all transactions below EU and Member State thresholds, and which, traditionally the Commission considered too small or too remote in terms of local nexus to create a risk under EU competition rules. Going forward, any such transaction below thresholds, even those that are indeed very small and

[12] Subject to a potential request by Luxembourg under Article 22 if the deal would have relevant effects in Luxembourg.

[13] See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf, p.5.

[14] See the ICN Recommendations, p.6, emphasise added.

unproblematic will nonetheless require a review by companies and their advisors, to update contractual terms and make a risk assessment both from a timing and deal-certainty perspective. This goes against the principle of predictable and easily applicable criteria for companies to assess jurisdiction, only for the policy objective of addressing concerns in relation to a few, limited potentially problematic transactions.

3.6 This exceeds what is proportionate and necessary in view of the Commission's perceived "killer acquisition" gap, practically resulting in "using a hammer to kill a fly". Contrary to the Commission position that the new approach will not create a significant number of additional notifications, as it is intended to capture only a "*handful of mergers each year*",[15] this approach obviously fails to take account of the companies' perspective, whereby almost all transactions below the thresholds will now require a self-assessment, and in some cases, the need for external European counsel's support, and corresponding burden, delays and costs associated with this.

3.7 The burden resulting from this *de facto* new self-assessment requirement for transactions below EU and Member State thresholds is not mitigated by the Guidance, which not only describes very broadly the type of transactions that may be caught but also uses a vague language, thereby covering *any* potential transaction, provided it may raise potential competition concerns. This provides no guidance to companies that will need to assess risk of referral in virtually all cases, including those that are potentially most benign, in terms of size, impact or local nexus.[16]

3.8 An additional consideration in this respect is that even in the most straight-forward cases, the parties will not want to take any contractual risk and will in all likelihood have to address the possibility of a referral in their transaction documentation. This will create further uncertainty for companies, and will make transactions below (national and EU) thresholds less predictable than those clearly notifiable because they are above them. This uncertainty is further reinforced considering that:

- should a Member State decide to refer a case – and the Commission to accept the referral – potentially all other Member States can join the referral (with the exception of those whose national rules preclude them from doing so, e.g. Spain), creating a significant additional burden on the companies to prepare a filing that assesses the merger in all the referring Member States' jurisdictions. Such a situation puts these companies at a clear disadvantage compared to transactions above EU or national thresholds, that so far would be notifiable in only one or a few jurisdictions (provided they are not subject to an Article 22 referral "above thresholds").[17]
- This new position will significantly increase uncertainty also for the parties to notifiable transactions at national level, as even above national thresholds in one or several Member States, the new approach means that all other Member States (with no jurisdiction) will also be able to refer these transactions to the Commission. This will significantly further increase uncertainty about which

[15] See Vice President Margrethe Vestager speech of 11 September 2020, https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

[16] Paragraph 19 of the Guidance does not provide much insight in terms of the cases that the Commission seeks to target. In fact, the criteria listed could apply in certain industries to *any* transaction, and relate to the status of the target rather than to the level of competitive concerns that the proposed transaction may raise.

[17] See for example the Facebook/Kustomer case which was referred to the European Commission by Austria on 2 April 2021, and where no less than 9 Member States joined the referral.

non-competent jurisdictions may or may not decide to make a referral, and thereby increase the burden on companies and may lead to parallel reviews in many more cases than before.

3.9 Again, ICLA is of the view that the new approach goes well beyond what is necessary to address the perceived gap of the EC.

***Uncertainty of triggering event for a referral***

3.10 Another important consideration, which has already been discussed in many fora since the adoption of the Guidance, is the lack of a clear triggering factor for the timing of a referral, based on the vague notion of the transaction being "made known" to the relevant Member State (absent national notification). Despite some indication in the Guidance, it is unclear to companies what are the facts or elements that would be necessary – beyond the existence and publication of the fact of the envisaged merger – for a transaction to be "known" to National Competition Authorities (***NCAs***) to an extent that would allow it to be able to take a position as to whether the transaction may "threaten to affect competition" in its territory.

3.11 Absent such clear criteria, companies not only remain exposed to arbitrary decisions by NCAs, but may also face very different positions from one NCA to the other. Such uncertainty and discrepancy risks will persist even if parties voluntarily approach NCAs to present their transaction, with a view to try and (re)gain legal certainty by making their transaction "known" and thereby triggering the 15 working days that NCAs have to decide to refer a case to the Commission. It is quite likely that NCAs will – as it is already the case in pre-notification discussions on transactions above thresholds – require more information, thereby significantly delaying the starting point of the 15 working day deadline for NCAs to take their position.

3.12 The same timing considerations apply to referrals that are triggered by the Commission (under Article 22(5) EUMR): should the parties decide to approach the Commission to obtain an (albeit informal and non-binding) opinion as to whether their transaction is a candidate for a referral, the Commission is not bound by any deadline to take a position and can – as in more formal pre-notification discussions – take as much time as it wants to assess its position and decide whether to trigger an Article 22(5) request to Member States. This leaves parties to transactions below thresholds subject to an even more uncertain timeframe, without the possibility – as in other voluntary merger filing jurisdictions, such as the UK or Australia – to trigger themselves the starting date for the authorities' assessment (be it preliminary or formal review) by voluntarily filing their transaction.[18]

3.13 Apart from the timing uncertainty, the risk of inconsistency between NCAs' requirement in relation to the elements necessary for them to be sufficiently informed of the transaction further increase uncertainty for the parties. In practice, NCAs can take very different positions as to whether a case should be referred or not also in relation to their respective assessment of whether the transaction threatens to "significantly affect competition". Whereas a transaction can obviously affect competition differently on the territories of different Member States, there can be many

[18] See for example the ICN Recommendations that specify that "*When a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority*" (emphasize added), p.3.

scenarios where a transaction can be assessed differently by different NCAs depending on their sensitivity to certain issues, or their level of sophistication when it comes to merger control. As an example, a transaction that would preliminary be considered to potentially affect innovation in view of potential overlaps of pipeline products, i.e. products that do not yet exist and for which it is unclear on which territory – if any – they will eventually be marketed if successful may be the subject of very different assessment from one NCA to the next.

***Evidence***

3.14 In the same vein, the vagueness - and hence uncertainty - in relation to the standard that needs to apply to "*prima facie*" evidence of a possible significant adverse impact on competition adds to the overall uncertainty and lack of predictability for companies: in practice, a third-party complaint would probably be sufficient for a NCA to consider as *prima facie* evidence of an adverse effect in most cases - even if such complaint is motivated by the sole objective to delay or derail a competitor's transaction. And even if NCAs ultimately ignore unmotivated third-party complaints, they may still request information from the parties to verify the credibility of such complaint, and thereby create additional burden – and delay - on companies. In any event, absent any precise and binding guidance as to what kind of evidence a NCA can rely on to assess the potential threat to competition, the parties are left in a limbo situation, practically unable to challenge a NCA's decision to refer.

***Nexus***

3.15 The arbitrary nature of the referrals below thresholds is also illustrated by the lack of any significant requirement for a geographic nexus to the EU in relation to products or services that do not yet exist. As the Commission has stated, part of the reasons for its new approach is to be able to capture transactions that would reduce innovation, including cases where the acquisition would allegedly lead to the discontinuation of a pipeline or a start-up project, with products or services not yet on the market in any jurisdiction. In practice, this means that a referral could be triggered in relation to acquisitions of pipelines or other projects, including those being pursued solely outside the EU, for which there is neither evidence nor certainty that they would ever reach the market in general, let alone the EU market in particular (as parties may decide, for many different reasons, whether to commercialise their products in the EU or not). This may lead to scenarios where the Commission would gain jurisdiction over transactions that are not only below EU and national thresholds, but also in relation to prospective products that may never see the light of day nor reach European customers.

3.16 This seems, once again, disproportionate to the objective pursued by the new approach, and will make it extremely difficult for companies outside the EU to anticipate and cater for a potential risk of referral. This, too, will create uncertainty for deals which would otherwise be seen as pro-competitive – as they would in most cases allow small projects to be developed or start-ups to be acquired by larger, better equipped players which would be able to bring them to life.

3.17 This contradicts the ICN Recommendations which state that "*jurisdiction should be asserted only with respect to those transactions that have a material nexus to the reviewing jurisdiction*".[19]

[19] See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf, p.3.

3.18 This begs the question as to whether the Commission – through a new or renewed interpretation of existing texts – has the actual power to extend its jurisdiction so far beyond its current one, as further developed in the first part of this paper.

3.19 The new approach is also at odds with the traditional approach of the Commission in terms of evaluating the impact of a transaction in the future. Based on its decisional practice, the Commission is normally looking at impact of a merger with a 2 to 3-years horizon. When it comes to pipelines or start-ups, the effect of an acquisition may be very uncertain within this timeframe, and the longer it takes to bring a pipeline to market, the more uncertain it is that it would succeed. Expecting NCAs, let alone the parties, to be able to assess this risk at the outset, to decide on a referral and thereby on jurisdiction, is obviously quite a challenge absent the relevant jurisdictional framework for such a prospective analysis of long-term projects. This will require NCAs – and the Commission ultimately in its decision to accept a referral – to look for jurisdictional purposes at potential issues such as (i) products that do not yet exist, (ii) access to the market of which is (sometimes) highly uncertain (see in particular early-stage pharma pipelines) and (iii) products that may not even reach the EU market (e.g. because of the costs or for other commercial/strategic considerations, or differing regulatory requirements). This is particularly relevant to very early R&D products/pipelines, which the Commission indicated are part of the primary reasons for its new approach.

3.20 Overall, this new approach risks having the opposite effect of the stated objective to preserve innovation: by making transactions uncertain and lengthy, deals in relation to innovative products or services will be more difficult. In turn, this may disrupt the ecosystem of start-ups by making their exit strategy much more uncertain (especially at a time when innovation is crucial for the EU economy, in particular for the Green and Digital twin transitions).

## B. Timing considerations

### *Excessive timeframe of the referral*

3.21 In addition to the considerations above, once a NCA becomes aware of a transaction, this starts a period of more than 40 working days (i.e. more than 2 months) before the parties can be certain whether their deal requires to be filed to the Commission, and in relation to which a potentially otherwise unanticipated suspension requirement will apply (from the point at which the Commission informs the parties of the referral request). This includes

- the 15 working days for the NCAs to decide whether to make a referral;
- the time that the Commission takes to inform other NCAs (which it must do "without delay", and which normally takes one to two working days);
- the 15 working days for other NCAs to decide whether to join the referral; and
- the 10 working days for the Commission to decide whether to accept the referral.

3.22 To this set timing, which already leads to approximately 2 months, must be added potentially the following additional time:

- the time necessary for the potential engagement between the parties and NCAs during which NCAs will gather all necessary information to ensure they have sufficient elements to take their position and trigger the 15 working day deadline to decide on a referral. As mentioned above, the NCAs can take as

much time as they want to assess the transaction, as they face no deadline to obtain "sufficient information to make a preliminary assessment".[20] This can even be preceded by engagement between third-party complainants and NCAs about the transaction, for which there is no deadline either;

- the time that it can take for the potential engagement between the parties and the Commission, should the parties decide to reach out to the Commission as a "one-stop-shop" to either gain certainty that their case is not a candidate for a referral, or to actually trigger such a referral (and hence the deadline) through an Article 22(5) request to Member States. Again, as mentioned above, there is no set timeframe for such engagement with the Commission which can take as much time as it wants before sending an Article 22(5) request to Member States;
- the additional time that is required to prepare a Form CO and engage in pre-notification discussions, which is usually otherwise anticipated and takes place prior or simultaneously to the announcement of a transaction.

3.23 These timing considerations are even more detrimental for small deals, that normally can be closed shortly after signing due to the absence of any waiting period or very short merger control reviews (as per a number of national merger control regimes with rather low thresholds in the EU). The procedural and timing aspects of an Article 22 referral will create significant pressure on companies – in addition to the fact that such referrals cannot be anticipated with any degree of certainty, as stated above.

3.24 These complications are further compounded by the fact that companies cannot voluntarily notify a transaction to get the clock ticking and achieve legal certainty for their transaction, as it is the case in the UK for example. Should they nevertheless decide to come forward to voluntarily start the Article 22 referral process, they will still be subject to a minimum of at least two full months, and potentially much more in case of extensive preliminary exchanges with the authorities.

3.25 Given that transactions below thresholds -so far- could be closed speedily after signing (following for example 4-6 weeks of integration planning, or sometimes even shorter based on ICLA members' experience), the new constraints will significantly delay especially those smaller transactions.

3.26 If the Commission eventually decides to accept the referral, it is only at that moment that the pre-notification period starts. Given that such a case will necessarily be considered *prima facie* problematic (this being the pre-condition for an Article 22 referral) that period is likely to take several months before the parties are eventually able to file and have the clock started.

3.27 As explained above, and considering that most parties will want to seek to deal with the risk of a referral below threshold in their negotiations and contractual documents, this leads to the paradoxical – and surely undesirable – situation whereby presumably smaller transactions (below EU and Member State thresholds) will require a much longer closing time than transactions that notifiable ones. This comes on top of an undefined period during which NCAs or the Commission can preliminarily review the transaction and ask questions, without being bound by any time limits.

[20] See para.25 of the Guidance.

3.28 Considering that the new approach seeks to capture primarily tech and pharma deals, adding six months to one year to deal implementation may constitute a significant deterrent to acquisitions in those sectors as it may lead to uncertainty and delay in the development of innovative products (for example as one of the reasons a start-up or small biotech company in pursuing a sale is that it does not have the resources or expertise to take the product or project further and bring it to the market), pending the outcome of the preliminary assessment and of the likelihood of a referral.

3.29 Such procedural and timing considerations may lead to potential acquirers being at a competitive disadvantage in scenarios where the target is subject to a tendering process, and certain bidders are subject to clear filing obligations, whereas others – despite being below thresholds – may end up in a more uncertain situation due to a risk of referral. The timing that parties would have to foresee for closing in a bidding offer will then need to take account of the risk of a referral – including a delay of more than 40 working days at a minimum – compared to other bids "above thresholds". The timing for closing and the certainty about the process and jurisdictions where a filing is required are critical elements in bidding contexts and may put some of the parties at a significant competitive disadvantage, whether the transaction is problematic or not.

3.30 This is particularly true as it is highly unlikely that companies – and their legal advisors – would take the chance to risk a referral (and thereby a significant delay to closing) without having anticipated it in the conditions of the transaction documents and in the timing for closing (also called the "long stop date").

***Post-closing referrals***

3.31 All those complications become even more problematic when looking at the possibility for NCAs (and indirectly the Commission) to "call in" a transaction post-closing, i.e. the possibility to refer the transaction for review by the Commission even though it has already closed (see para. 21 of the Guidance). This new approach contradicts the principle of a "pre-implementation" merger control. It creates further uncertainty for companies as it also foresees the possibility that some transactions may be called in even after the six months' post-closing period set out in the Guidance:

- This is clear from the use of term "generally", which means that in certain (undefined) circumstances that period can be longer: "*the Commission would generally*[21] *not consider a referral appropriate where more than six months has passed after the implementation of the concentration*". It is unclear in which cases the Commission would consider otherwise;
- Moreover, this would also be the case if Member States or the Commission were to consider that they have become "sufficiently aware" of the details of a transaction more than six months following the closing. It is clear from the Guidance that any of the deadlines, including the six-months post-closing one, will only start running as of when "sufficient" elements are available to Member State to make their assessment under the conditions of Article 22 and trigger a referral. What each of the 27 NCAs will consider as "sufficient" is unclear (as discussed above). This wording allows the Commission and Member State to trigger, for reasons that are entirely unpredictable, referrals of cases even long after closing. The Commission will be able to review a transaction under the merger control rules, including with significantly more

[21] See para.21 of the Guidance, emphasise added.

leeway to require drastic and quick remedies than it would otherwise have been able to, were it to pursue the transaction post-closing under Article 101 or 102 TFEU. This further reduces predictability and legal certainty for the merging parties, especially in view of the kind of remedies the Commission could impose (e.g. undoing of a transaction or divestment of an already integrated business).

3.32 Again, the possibility to call in transaction post-closing, and potentially with no time limit, appears to largely exceed what is necessary to achieve the goal pursued by the Commission under its new approach. By comparison, the UK, which also foresees a possibility to "call in" transactions post-closing, has a stricter (and also shorter) time limit to do so,[22] which guarantees the parties some degree of legal certainty after this stricter deadline.

3.33 This is also contrary to the ICN Recommendations that foresee a strict limit for jurisdictions that foresee a review of transactions post-closing: *"When a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty. Such steps may include restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction and authorizing the parties to submit voluntary notifications to the competition authority."*[23]

3.34 All those uncertainties and complications may occur at any time during the process of a transaction, including in situations where the parties are quite far into integration planning, and where a referral request can bring an unexpected suspension obligation at any time. The consequences of such a disruption for businesses, including employees, suppliers and customers can be highly detrimental, and are likely to have a negative impact on deal making generally, way beyond what the Commission may perhaps have anticipated when deciding this policy change.

## C. Other procedural considerations

### *Increased risk of parallel reviews*

3.35 The new approach of the Commission raises a number of additional procedural issues for businesses, including the increased risk of parallel review processes. The risk already exists under Article 22 referral cases from Member States with original jurisdiction, but have so far been exceptional, and will increase significantly with the possibility of referrals below thresholds. Typically, a transaction may be notifiable in a number of Member States that would decide to keep jurisdiction, while other Member States (potentially with or without jurisdiction to review the transaction in the first place) decide to refer (or join a referral) to the Commission. Whereas this possibility already existed before the new approach, the chances that additional Member States (i.e. without having jurisdiction in the first place) join in increases significantly the likelihood of such a scenario. This contradicts the one-stop-shop principle and the underlying EU principle of subsidiarity, as further developed above.

[22] The UK Competition and Markets Authority has four months from the merger being made public or it being completed (whichever is the later) to decide whether or not to refer a transaction to Phase 2.

[23] ICN Recommendations, p.3.

3.36 Only a few months after the adoption of the Guidance, that situation has already occurred with a parallel review of the Facebook/Kustomer case,[24] where Germany has decided to keep jurisdiction while the transaction has been referred by Austria to the Commission. Although the risk of parallel review also existed prior to the adoption of the new approach, this risk clearly increases now and put merging parties in very challenging and burdensome situations, with a risk of diverging outcomes or potentially inconsistent remedies.

3.37 The legal uncertainty that arises from the new approach will impact on how companies make transactions. It increases complexity and reduces legal certainty. Even if the parties do come forward in an attempt to re-gain such legal certainty – by reaching out to Member States or directly to the Commission – they will never succeed to obtain the necessary certainty:

- Member States are under no obligation to formally take a position, and will in most likelihood let the 15 working day period to seek a referral lapse without taking any action;
- To achieve the highest level of certainty against a risk of referral, parties should seek to trigger the 15 working day deadline (for Member States to decide on a referral) from each and every Member State in the EU;
- The Guidance does not preclude a Member State to request a referral even long after the expiry of the 15 working day deadline, should it become "aware" of (allegedly) new elements;
- Similarly, should the parties seek comfort from the Commission, the Guidance specifies that it will only provide for an "opinion" which will, by definition, be non-binding, and can always be revised in view of (allegedly) new facts, even post-closing.

3.38 All these considerations will obviously add further complexity to transaction negotiations, that will need to try to cater for such uncertainty. The fact that a transaction is at risk of being referred will in some cases require additional conditions precedent, management clauses as well as complex allocation of risks between the parties in case of a referral request. Depending on when this referral occurs (in relation to the implementation and closing calendar of the transaction), parties may face very different scenarios, and may decide to review the conditions of a deal, or even to abandon it, thus opening the door to potential litigation. Such additional complexity will discourage companies from engaging in transactions that risk a referral – assuming that such a risk assessment can be made in the first place. Companies will instead divert their attention to more predictable transactions, potentially involving less innovation – making it more difficult to do acquisitions, in particular in the EU (but not only, as the new approach does not require a local/EU nexus) and leading to the opposite outcome from the one intended by the new approach.

3.39 These difficulties will affect all parties to a transaction and may even have a more significant impact on the seller's side, because sellers may lack visibility (i) over the buyer's intention with regard to the assets/business and (ii) in relation to potential overlaps (esp. in case of non-public R&D projects on the buyer's side). In addition,

[24] This transaction was referred by Austria which considered it had jurisdiction under its own, revised merger rules (based on the value of the transaction) but clearly illustrates the risk of parallel reviews under Article 22, which will be increased provided Member States can now refer cases below thresholds.

sellers may suffer reputational and employment instability during the process (the longer, the worse), with key employees deciding to leave in view of the uncertainty of the transaction going through. This could significantly affect the value of the transaction and assets and, again, may jeopardise the willingness of companies to even engage in those deals in the first place.

3.40 Finally, by extending the potential risk of referral to transactions that would, in the past, not be subject to merger review, the new approach creates an opportunity for third parties trying to derail or delay a transaction (or make it more burdensome and costly), for reasons entirely unrelated to any risk to competition. Although the Commission (and presumably NCAs) are used to dealing with such unsubstantiated nuisance complaints, a complaint may still need to be assessed and may lead to a number of unjustified RFIs that may unduly disrupt the businesses of merging parties and delay significantly a transaction. This is particularly true in view of the significant discretion that the Commission and NCAs enjoy in assessing whether a transaction may threaten to affect competition (based on "*prima facie* evidence", as explained above), which will no doubt encourage lobbying initiatives by unsuccessful bidders in auction scenarios or simply by belligerent competitors. This risk, combined with potential claims and litigations, may unnecessarily use time and resources of both businesses and authorities.

## D. Other policy considerations

3.41 Finally, as many have already raised in other fora, the new approach raises a number of issues also from a policy perspective:

- The new approach, by introducing vague criteria for Member States to decide whether a transaction below national thresholds can be referred, introduces arbitrariness in merger regimes in the EU, opening the door to politically motivated referrals.
- As further explained above, the new approach goes against a significant number of the ICN Recommendations, which the Commission was a key contributor to, and which should be the essence of merger control around the world.
- The new approach will also create a precedent for other jurisdictions around the world, and thereby encourage more countries to introduce less predictable, qualitative thresholds and/or post-closing reviews. This will increase further uncertainty of merger control regimes and complexity for companies around the globe.
- The time it took the Commission to "rediscover" the enlarged scope of Article 22 (more than six years after the 2014 Facebook/WhatsApp decision that triggered the discussion around this perceived "gap", despite being referred to and reviewed (and cleared) by the Commission under the prior approach to Article 22) clearly shows that the revised interpretation of Article 22 was not the most obvious tool. Rather, it was probably the easiest way to address the identified gap, without the need to amend the EUMR and go through a potentially lengthy and uncertain legislative process.
- Finally, the fact that the Commission adopted a new position - and published guidance - without any public consultation (not only of companies but also, apparently, of Member States themselves, some of which clearly do not

consider that they are permitted to make referrals under Article 22 where they do not have national jurisdiction over a transaction, e.g. Spain and Germany), on a topic that so fundamentally changes the way the EUMR applies to transaction below EU and national thresholds, clearly goes against any principle of due process. Considering the long reflection time that the Commission took to decide on the best approach to deal with this perceived gap, it is particularly surprising that companies or Member States were not consulted, in particular given the very significant impact of the new approach.

## 4. Conclusion

4.1 In view of the above arguments, ICLA reiterates its view that the new interpretation of Article 22 referrals below national thresholds is incompatible with the spirit of the EUMR and goes against a number of EU legal principles, such as in particular legal certainty, legitimate expectation and the subsidiarity principle.

4.2 Provided the new approach remains in force, ICLA is of the view that the Commission needs to revise its practice and issue further guidance in view of the significant number of practical issues arising from the new interpretation. ICLA sets out below a number of considerations that the Commission may want to take into account in a revised version of its Guidance, as well as in the way it applies its new approach going forward. We encourage the Commission to consult with public stakeholders on the draft of such revised Guidance. In the meantime, ICLA remains available to discuss any of these with the Commission at its earlier convenience.

1) Clarify the criteria for when a transaction is "known" and the type of information that are required for NCAs to be "sufficiently aware" of a transaction.

2) Consider including that the opening of an in-depth review of the deal by another jurisdiction is sufficient for the Commission and Member States to be sufficiently aware of the transaction and trigger the 15 working day deadline to request a referral. The 15 working day deadline could be suspended by the issuance of RFIs by NCAs.

3) Introduce a clear geographic nexus to the EU in relation to products/services that do not yet exist; introduce a time-limit to assess future potential impact for products that will not be available on the EU market before a significant amount of time (pipelines, R&D projects).

4) Set clear deadline for the Commission to adopt its opinion when consulted by the parties about its likely willingness to accept a referral made by Member States based on Article 22 EUMR requirements. Provide increased guarantee that the Commission's opinion not to accept a referral will bind the Commission, provided no significant new elements come to light at a later stage.

5) Clarify the type of information required to seek comfort from the Commission and Member States that a transaction will not be subject to a referral (see for example the UK briefing paper).

6) Consider a mechanism to limit the risk of parallel reviews between the EU and Member States / ensure that Member States that have jurisdiction (because a transaction is above their thresholds) are incentivised to refer the case if an Article

22 referral "below threshold" is made in parallel (through recommendations or publication of good practices), to optimise the "one-stop-shop" principle.

7) Make the six-month post-closing deadline a hard stop for calling in transactions (or at the very least specify the exceptional circumstances – which should be interpreted strictly – under which a transaction could be called in after six-months post-closing); consider reducing this six-months deadline.

8) Ensure systematic coordination between Member States and the Commission before a referral is made, so that the parties do not have to unnecessarily suspend a transaction if the Commission is not going to accept a referral.

9) Shorten the referral timeframe to a more acceptable duration (a maximum of 20 working days instead of 40 for example), so that parties can integrate the timing in their contractual closing timeline without incurring significant delay compared to a scenario where no filing is triggered.