Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control

Brussels, 26 March 2021

The European Commission has published today a Staff Working Document that summarises the findings of the evaluation of procedural and jurisdictional aspects of EU merger control. Following the results of the evaluation, the Commission decided to adopt a communication providing guidance on the application of the referral mechanism between Member States and the Commission set out in Article 22 of the Merger Regulation, and launch an impact assessment on exploring policy options for further targeting and simplification of merger procedures.

Executive Vice-President Margrethe Vestager, in charge of competition policy, said: “The EU merger procedures have served us well so far. Our evaluation however has identified some areas for improvement. A number of transactions involving companies with low turnover, but high competitive potential in the internal market are not reviewed by either the Commission or the Member States. A more frequent use of the existing tool of referrals under Article 22 of the Merger Regulation can help us capture concentrations which may have a significant impact on competition in the internal market. In parallel, we are also looking at the possible revision of certain procedural aspects of EU merger control. To this end, we invite input from stakeholders on different policy options to achieve further targeting and simplification of the EU merger control procedures.”

Findings of the evaluation of procedural and jurisdictional aspects of EU merger control

The objective of the evaluation was to assess the functioning of selected aspects of EU merger control to understand how the rules have worked in changing market realities. The evaluation focused on two topics in particular:

- the effectiveness of the turnover-based jurisdictional thresholds in capturing concentrations which may have a significant impact on competition in the internal market, and
- the effectiveness of simplification measures introduced in 2013.

To inform the evaluation process, the Commission carried out a public consultation, held numerous meetings with stakeholders, carried out extensive research into deal activity and analysed its own enforcement practice. The Commission also relied on evidence from a separate work stream on the effects of digitisation on competition policy, and closely monitored the introduction and application of additional jurisdictional thresholds based on transaction value in some of the Member States.

As regards the jurisdictional thresholds, the evaluation results showed that at this stage, the turnover-based jurisdictional thresholds, complemented with the referral mechanisms, have generally proved effective in capturing significant transactions in the EU internal market. Recent market developments, however, have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role in the markets despite generating little or no turnover at the moment of the concentration. Accordingly, a number of transactions which could potentially have an impact on competition in the internal market have not been reviewed by the Commission or, in some cases, by any Member State. This includes in particular concentrations involving nascent competitors and innovative companies, including in (but not limited to) the digital, pharmaceutical, biotechnology and certain industrial sectors. While informative, the value of the transaction may not always be sufficiently correlated with the transaction’s potential competitive significance. Therefore, encouraging and accepting more referrals under Article 22 of the Merger Regulation – notably where the transaction does not meet the national merger control thresholds – could give Member States and the Commission the flexibility to target concentrations which merit review at EU level, without imposing notification obligations on transactions that do not.

As regards the simplification measures, the evaluation has shown that the 2013 simplification package has been effective in increasing the application of simplified procedures to unproblematic mergers and in reducing administrative burden both for businesses and the Commission in terms of resources and time spent on the merger review, while ensuring effective enforcement of the merger rules. However, there is still room for further simplification and targeting of the rules.
The findings of the evaluation of procedural and jurisdictional aspects of EU merger control are summarised in a Staff Working Document.

**Article 22 Guidance**

In view of the findings of the evaluation, the Commission intends, in certain circumstances, to encourage and accept referrals in cases where the referring Member State does not have initial jurisdiction over the case, where the criteria of Article 22 are met.

The objective of the Article 22 Guidance adopted today is to facilitate and clarify the Commission’s approach in this respect and to complement the guidance provided in the Commission Notice on Case Referral.

In particular, the Article 22 Guidance describes the categories of cases which may constitute suitable candidates for a referral in situations where the transaction is not notifiable under the laws of the referring Member State(s). It also sets out the criteria that the Commission may take into account in exercising its discretion to accept such referrals.

More specifically, cases that will normally be appropriate for such a referral consist of transactions where the turnover of at least one of the companies concerned does not reflect its actual or future competitive potential. This could be the case of a start-up or recent entrant with significant competitive potential or an important innovator. It can be also the case of an actual or potential important competitive force, or of a company with access to competitively significant assets or with products or services that are key inputs or components for other industries.

**Impact assessment on revision of procedural rules**

The Commission has committed to focus its resources on relevant cases and reduce administrative burden where possible without compromising effective enforcement. In view of this and the results of the evaluation, the Commission has also launched today an impact assessment on the revision of certain procedural aspects of EU merger control.

The initiative will assess policy options to achieve further targeting and simplification of the procedures through a revision of the Merger Implementing Regulation and the Notice on Simplified Procedure. The objective is to:

- identify additional cases that are highly unlikely to raise competition concerns and could therefore be assessed under the simplified procedure (as the obligation to notify the concentration applies irrespective of the likelihood of competitive effects);
- ensure sufficient safeguards so that the simplified procedure does not apply to cases that merit a more detailed review;
- ensure effective, efficient and proportionate information gathering;
- explore possibilities to reduce the average time needed to obtain a clearance decision for non-problematic cases; and
- simplify the notification of concentrations, including via electronic notifications.

The purpose of impact assessments is to analyse the extent to which there is an existing gap which should be addressed by an action at EU level and to analyse the possible options and tools through which any such gap could be addressed. As a first step of that process, the Commission has launched today a public consultation, with a view to gather further information and seek views from stakeholders. Stakeholders are invited to submit their views on the Commission’s consultation website until 18 June 2021.

**Background**

EU merger control aims to ensure that major corporate reorganisations do not result in lasting damage to competition in the internal market. To achieve this aim, the EU Merger Regulation grants the Commission exclusive jurisdiction to review whether such concentrations may significantly impede effective competition in the internal market or a substantial part of it.

The scope of application of EU merger control is determined using turnover thresholds. If the merging companies’ turnover at worldwide, EU and Member State level exceeds certain thresholds, they have to notify their concentrations to the Commission and must not implement them before receiving approval. Concentrations not captured by EU merger control may still come within the jurisdiction of one or several EU Member States. To ensure that the most appropriate authority carries out the assessment, and as long as certain conditions are met, the review can be referred from the Commission to the Member States or vice versa under the Merger Regulation’s referral system.
Article 22 of the Merger Regulation allows Member States to ask the Commission to examine any concentration that does not have an EU dimension but which affects cross-border trade and threatens to significantly affect competition within the territory of the Member State(s) making the request irrespective of whether such transaction is notifiable under the national merger control rules of the referring Member State. The Commission has in the past used its discretion under Article 22 to discourage referrals where the concentration fell outside the referring Member State's national merger control thresholds. This practice was based on the experience that such transactions were not generally likely to have a significant impact on the internal market. In recent years, however, market developments have resulted in a gradual increase of concentrations involving companies with low turnover, but high competitive potential in the internal market.

For More Information

See the dedicated webpage of DG Competition, which contains all stakeholder contributions submitted in the context of the evaluation, summaries of the different consultation activities, the Staff Working Document and the Guidance on Article 22 referrals. See also the Have your say webpage on the impact assessment which contains the inception impact assessment and the link to the public consultation questionnaire.

IP/21/1384

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