

## II

(Information)

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COMMUNICATION FROM THE COMMISSION

**Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation  
to certain categories of cases**

(2021/C 113/01)

1. The purpose of this document is to provide practical guidance regarding the Commission's approach to the use of the referral mechanism set out in Article 22 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Merger Regulation')<sup>(1)</sup>. The aim is to facilitate and clarify its application in certain categories of appropriate cases.
2. This document complements, for such cases, the guidance provided in the Commission Notice on Case Referral<sup>(2)</sup>, which provides general guidance on the overall case referral system established in Article 4(4) and (5), Article 9 and Article 22 of the Merger Regulation.
3. The document aims to provide only general guidance on the appropriateness of particular categories of cases for referral under Article 22 of the Merger Regulation: the Member States and the Commission retain a considerable margin of discretion in deciding whether to refer cases or accept referrals, respectively<sup>(3)</sup>. The Commission may revise this Guidance at any time in light of future developments. It may also decide to consolidate the content of this Guidance in the Notice on Case Referral, in the light of experience gathered in applying the revised approach to referrals under Article 22.
4. This Guidance applies, *mutatis mutandis*, to the referral rules contained in the EEA Agreement<sup>(4)</sup>.

1. **Introduction**

5. The Merger Regulation grants the Commission exclusive jurisdiction to review concentrations with an EU dimension, defined by the application of combined turnover-based thresholds. Such thresholds delineate the transactions whose impact on the market is deemed to go beyond the national borders of any one Member State and which, as such, are

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

<sup>(2)</sup> Commission Notice on Case Referral in respect of concentrations. OJ C 56, 5.3.2005, p. 2. This Guidance should thus be read in conjunction with the Notice on Case Referral. Additional guidance can be found in the European Competition Authorities (ECA) *Principles on the application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of the EC Merger Regulation* (2005).

<sup>(3)</sup> Cf. point 7 of the Notice on Case Referral.

<sup>(4)</sup> According to Article 6(3) of Protocol 24 of the EEA Agreement, one or more EFTA countries may join a request for referral made by a Member State under Article 22 of the Merger Regulation if the concentration affects trade between one or more Member countries and one or more EFTA countries and threatens to significantly affect competition within the territory of the EFTA country or countries joining the request.

in principle best dealt with at the EU level <sup>(5)</sup>. The Merger Regulation contains a corrective mechanism to the application of these quantitative jurisdictional thresholds, allowing, under specific circumstances, a referral of individual cases between the Commission and one or several Member States <sup>(6)</sup>. This system of referrals aims to ensure that the more appropriate authority or authorities for carrying out a particular merger investigation review(s) the case despite not being initially competent.

6. Article 22 of the Merger Regulation allows for one or more Member States to request the Commission to examine, for those Member States, any concentration that does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. It is clear from the wording, the legislative history and the purpose of Article 22 of the Merger Regulation, as well as from the Commission's enforcement practice, that Article 22 is applicable to all concentrations <sup>(7)</sup>, not only those that meet the respective jurisdictional criteria of the referring Member States <sup>(8)</sup>.
7. The mechanism set out in Article 22 of the Merger Regulation has allowed the Commission to review a significant number of transactions in a wide array of economic sectors, such as industrial, manufacturing, pharmaceutical and digital. These have included cases eventually subject to an in-depth investigation and/or authorised only following modification by the remedies offered by the parties <sup>(9)</sup>.
8. With the progressive implementation of national regimes for merger control in almost all Member States, the Commission, in exercising the discretion granted to it by the Merger Regulation <sup>(10)</sup>, developed a practice of discouraging referral requests under Article 22 from Member States that did not have original jurisdiction over the transaction at stake. This practice was notably based on the experience that such transactions were not generally likely to have a significant impact on the internal market.
9. In recent years, however, market developments have resulted in a gradual increase of concentrations involving firms that play or may develop into playing a significant competitive role on the market(s) at stake despite generating little or no turnover at the moment of the concentration. These developments appear particularly significant in the digital economy, where services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories, before seeking to monetise the business. Similarly, in sectors such as pharmaceuticals and others where innovation is an important parameter of competition, there have been transactions involving innovative companies conducting research & development projects and with strong competitive potential, even if these companies have not yet finalised, let alone exploited commercially, the results of their innovation activities. Similar considerations apply to companies with access to or impact on competitively valuable assets, such as raw materials, intellectual property rights, data or infrastructure.
10. Against this background, the Commission has examined the effectiveness of the turnover-based jurisdictional thresholds of the EU Merger Regulation in its Evaluation of procedural and jurisdictional aspects of the EU Merger control <sup>(11)</sup>. It has concluded that, while these thresholds, complemented by the referral mechanisms set out in the Merger Regulation, have generally been effective in capturing transactions with a significant impact on competition in the EU internal market, a number of cross-border transactions which could potentially also have such an impact have escaped review by both the Commission and the Member States. This includes in particular transactions in the digital and pharma sectors.

<sup>(5)</sup> Cf. Article 1 of the Merger Regulation. Concentrations with an EU dimension, i.e. those above these turnover thresholds, fall within the exclusive jurisdiction of the Commission. Concentrations falling below these thresholds may fall within the competence of the Member States, according to the jurisdictional rules of their respective national regimes.

<sup>(6)</sup> Cf. Article 4(4) and (5), Article 9 and Article 22 of the Merger Regulation.

<sup>(7)</sup> As defined in Article 3 of the Merger Regulation.

<sup>(8)</sup> Article 22 of the Merger Regulation is also applicable when the referring Member State has not established a dedicated national merger control regime.

<sup>(9)</sup> Under, respectively, Article 6(1)(c) and Articles 6(1)(b) with 6(2) and Article 8(2) of the Merger Regulation.

<sup>(10)</sup> Cf. Article 22(3) of the Merger Regulation. See also point 7 of the Notice on Case Referral.

<sup>(11)</sup> See Commission Staff Working Document of 26 March 2021.

11. The Commission considers that a reappraisal of the application of Article 22 of the Merger Regulation can contribute to addressing this issue. In the light of the above considerations, 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 (but where the criteria of Article 22 are met). This change in approach will permit Member States and the Commission to ensure that additional transactions that merit review under the Merger Regulation are examined by the Commission <sup>(12)</sup>, without imposing a notification obligation on transactions that would not warrant such review. This change in the current practice does not require a modification of the relevant provisions of the Merger Regulation.
12. This Guidance provides indications about the categories of cases that may constitute suitable candidates for a referral in situations where the transaction is not notifiable under the laws of the referring Member State(s), and thus on the criteria that the Commission may take into account in such situations when encouraging or accepting such a referral. It also provides guidance on certain procedural aspects. Therefore, the Guidance aims to increase transparency, predictability and legal certainty as regards a wider application of Article 22 of the Merger Regulation.

## 2. **Guiding principles for the referral of cases which are not notifiable under the laws of the referring Member State(s)**

### 2.1. *Legal requirements*

13. Article 22 of the Merger Regulation states that, in order for a referral to be made by one or more Member States to the Commission, two legal requirements must be fulfilled. The concentration must:
  - (i) affect trade between Member States; and
  - (ii) threaten to significantly affect competition within the territory of the Member State or States making the request.
14. For the first criterion, the Notice on Case Referral explains that a concentration fulfils the requirement if it is liable to have some discernible influence on the pattern of trade between Member States <sup>(13)</sup>. The concept of 'trade' covers all cross-border economic activity and encompasses cases where the transaction affects the competitive structure of the market. The Commission will in particular assess whether the transaction may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Specific factors which could be relevant may include the location of (potential) customers, the availability and offering of the products or services at stake, the collection of data in several Member States, or the development and implementation of R&D projects whose results, including intellectual property rights, if successful, may be commercialised in more than one Member State.
15. For the second criterion, the Notice on Case Referral states that a referring Member State is required, in essence, to demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus it deserves close scrutiny. Such preliminary analysis may be based on *prima facie* evidence of a possible significant adverse impact on competition, but would be without prejudice to the outcome of a full investigation <sup>(14)</sup>. The Commission Horizontal <sup>(15)</sup> and Non-Horizontal Merger Guidelines <sup>(16)</sup> contain guidance as to how the Commission assesses concentrations when the undertakings concerned are actual or potential competitors on the same relevant market and when the undertakings concerned are active on different relevant markets, respectively. For the purposes of assessing cases covered by this Guidance, relevant considerations for deciding whether the transaction threatens to significantly affect competition may include the creation or

<sup>(12)</sup> As explained in the Notice on Case Referral (cf. footnote 45), the Commission examines the concentration upon the request of and on behalf of the requesting Member States. Article 22 of the Merger Regulation should therefore be interpreted as requiring the Commission to examine the impact of the concentration within the territory of those Member States. The Commission will not examine the effects of the concentration in the territory of Member States which have not joined the request unless this examination is necessary for the assessment of the effects of the concentration within the territory of the requesting Member States (for example, where the geographic market extends beyond the territory/or territories of the requesting Member State(s)).

<sup>(13)</sup> Notice on Case Referral, point 43.

<sup>(14)</sup> Cf. point 44.

<sup>(15)</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 31, 5.2.2004, p. 5) ('Horizontal Merger Guidelines').

<sup>(16)</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C 265, 18.10.2008, p. 6).

strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.

16. When examining both criteria, the Commission will particularly take into account the prospective nature of the merger control assessment.
17. The application of these two criteria ensures that the transaction has a sufficient nexus with the EU and the referring Member State(s).

## 2.2. *Other factors which may be considered*

18. As indicated in the Notice on Case Referral, when considering whether or not to exercise their discretion to make or accede to a referral request, the Member States and the Commission should above all bear in mind the need to ensure effective protection of competition in all markets affected by the transaction <sup>(17)</sup>.
19. Besides the principles set out in the Notice on Case Referral <sup>(18)</sup>, the categories of cases that will normally be appropriate for a referral under Article 22 of the Merger Regulation where the merger is not notifiable in the referring Member State(s) consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This would include, for example, cases where the undertaking: (1) 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 is still in the initial phase of implementing such business model); (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force <sup>(19)</sup>; (4) has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries. In its assessment, the Commission may also take into account whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.
20. The list above is provided for purely illustrative purposes. It is not limited to any specific economic sector or sectors and cannot be deemed in any way comprehensive.
21. While the referral is subject to the deadlines set out in Article 22, the fact that a transaction has already been closed does not preclude a Member State from requesting a referral <sup>(20)</sup>. However, the time elapsed since the closing is a factor that the Commission may consider when exercising its discretion to accept or reject a referral request. Although assessments are carried out on a case-by-case basis, the Commission would generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration. If the implementation of the concentration was not in the public domain, this period of six months would run from the moment when material facts about the concentration have been made public in the EU. In exceptional situations, however, a later referral may also be appropriate, based on, for example, the magnitude of the potential competition concerns and of the potential detrimental effect on consumers.
22. Finally, a circumstance where the transaction has already been notified in one or several Member States that did not request a referral or join such a referral request may constitute a factor against accepting the referral. However, the Commission will make its decision based on all relevant circumstances, including, as mentioned in the paragraph above, the extent of the potential harm, and also the geographic scope of the relevant markets.

<sup>(17)</sup> Notice on Case Referral, point 8.

<sup>(18)</sup> Cf. point 45.

<sup>(19)</sup> In the sense of paragraphs 37 and 38 of the Horizontal Merger Guidelines.

<sup>(20)</sup> The Merger Regulation acknowledges this possibility in Article 22(4).

### 3. Procedural aspects

23. The Commission will cooperate closely with the competent authorities of the Member States to identify concentrations that may constitute potential candidates for a referral under Article 22 of the Merger Regulation but do not meet the jurisdictional criteria relevant under the respective national laws. It may exchange information to that effect with national competition authorities <sup>(21)</sup>. In such exchanges, confidential information will be protected in accordance with the applicable laws <sup>(22)</sup>.
24. Merging parties may voluntarily come forward with information about their intended transactions. Where appropriate, the Commission may in such cases give them an early indication that it does not consider that their concentration would constitute a good candidate for a referral under Article 22 of the Merger Regulation, if sufficient information to make such a preliminary assessment has been submitted.
25. Third parties may contact the Commission or the competent authorities of the Member States and inform them of a concentration that, in their opinion, could be a candidate for a referral under Article 22 of the Merger Regulation. To enable the Commission and the competent authorities of the Member States to assess whether or not the transaction may be a candidate for referral, such contact should include sufficient information to make a preliminary assessment as to whether the criteria for referral are met, to the extent such information is available to the third party. Article 22 of the Merger Regulation does not impose any obligation on the competent authorities of the Member States or on the Commission to take any action following a contact by a third party.
26. Where the Commission becomes aware of a concentration that it considers as meeting the relevant criteria for a referral, it may inform the Member State(s) potentially concerned and invite that Member State or those Member States to make a referral request <sup>(23)</sup>. It is up to the competent authorities of a Member State to decide whether they wish to make the request.
27. If a referral request is being considered, the Commission will inform the parties to the transaction as soon as possible <sup>(24)</sup>. While being made aware of such consideration does not oblige the undertakings concerned to take or refrain from taking any action in relation to the implementation of the transaction <sup>(25)</sup>, they may decide to take measures they consider appropriate, such as delaying the transaction's implementation until it has been decided whether a referral request will be made.
28. If no notification is required, a referral request must be made at most within 15 working days of the date on which the concentration is otherwise made known to the Member State concerned <sup>(26)</sup>. The notion of 'made known' should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral <sup>(27)</sup>.
29. Once a referral request has been made, the Commission will inform the competent authorities of the Member States and the undertakings concerned without delay. Other Member States may join the initial request within a period of 15 working days of being informed by the Commission of the initial request <sup>(28)</sup>. The Commission encourages the Member States to inform each other and the Commission as soon as possible whether or not they intend to join the referral request <sup>(29)</sup>.

<sup>(21)</sup> Notice on Case Referral, points 53 et seq. See also ECA Principles, paragraphs 3, 20 and 23 and 26–9.

<sup>(22)</sup> Notice on Case Referral, points 57 and 58. See also ECA Principles, paragraph 34.

<sup>(23)</sup> Article 22(5) of the Merger Regulation. See also ECA Principles, paragraph 22.

<sup>(24)</sup> According to the ECA Principles, if a joint referral request is being considered, the national competition authorities should inform the parties to the transaction as soon as possible (cf. paragraph 25).

<sup>(25)</sup> The suspension obligation set out in Article 7 of the Merger Regulation only applies as of the date on which the Commission informs the undertakings concerned that a request has been made, to the extent that the concentration has not been implemented on that date. See Article 22(4) of the Merger Regulation, first sub-paragraph.

<sup>(26)</sup> Article 22(1) of the Merger Regulation, second sub-paragraph. See also Notice on Case Referral, point 50.

<sup>(27)</sup> Cf. Notice on Case Referral, footnote 43. See also ECA Principles, paragraph 31.

<sup>(28)</sup> Article 22(2) of the Merger Regulation. See also Notice on Case Referral, point 50 and ECA Principles, paragraph 24.

<sup>(29)</sup> ECA Principles, paragraph 24.

30. At the latest 10 working days after the expiry of the 15-working-day period for Member States to join the referral request, the Commission may decide to examine the concentration if it considers that it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. If the Commission does not take a decision within this period, it will be deemed to have adopted a decision to examine the concentration in accordance with the request <sup>(30)</sup>.
  31. The suspension obligation set out in Article 7 of the Merger Regulation applies to the extent the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a referral request has been made <sup>(31)</sup>. The suspension obligation ceases if the Commission subsequently decides not to examine the concentration.
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<sup>(30)</sup> Article 22(3) of the Merger Regulation, first sub-paragraph.

<sup>(31)</sup> Article 22(4) of the Merger Regulation, first sub-paragraph.