The Dutch clause revisited: new Commission guidelines on case referrals based on Article 22 of the EU merger control regulation

Merger Control - Dutch Clause - Guidelines - Non-Notifiable Concentrations

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Introduction

In a White Paper adopted in 2014,[1] the Commission evaluated certain substantive and procedural aspects relating to the EU merger control system. It concluded that the system did not require a significant overhaul, but acknowledged that some fine-tuning could be performed, especially as far as jurisdictional aspects are concerned, and with a view to simplifying merger control procedures. Such matters remained in the spotlight as the years passed by and in 2016-2017 an evaluation process of procedural and jurisdictional aspects of EU merger control commenced.[2] In late March 2021, the Commission published a Staff Working Document taking stock of this evaluation process.[3] This process also triggers two developments:[4] first, launching an impact assessment and a public consultation on exploring further simplification of merger control procedures; second, adopting a set of guidelines dealing with particular jurisdictional aspects of the case referral system. Neither of these developments is foreign to EU merger control. Regarding the former process (i.e. simplification of procedures), one may recall the so-called 'Simplification Package' of 2013,[5] through which the Commission, *inter alia*, widened the scope of its simplified procedure and reduced the amount of information required for notifying concentration transactions. The latter process (i.e. the new guidelines on jurisdictional matters) was triggered by the growing concerns surrounding the effectiveness of the EU merger control system's jurisdictional thresholds, specifically its ability to capture concentrations without an EU dimension, which could nevertheless restrict competition in the Internal Market. Reviewing the jurisdictional boundaries is again a process familiar to EU merger control: for example, Regulation 1310/97 amended the first Merger Control Regulation 4064/89, by adding lower criteria that may trigger the Commission's jurisdiction. The current jurisdictional debates surround the Commission's (in)ability to establish jurisdiction over certain transactions (with potential competition significance), specifically in the digital and

pharmaceutical sectors, where the consideration for certain deals may run in the billions, although the turnover of the target firms is limited. The Commission's response to these debates and to the challenges related to transactions in such economic sectors consists of adopting a set of (non-binding) guidelines on the application of the referral mechanism set out in Article 22 of the Merger Control Regulation.[6] In this blog post I discuss some of the intended and unintended consequences of the Commission's new approach to handling such concentrations, as embedded in these Guidelines, issued on 26 March 2021.

Status quo

For more than three decades, the EU merger control system, based on Regulation 4064/89 and since 2004 on Regulation 139/2004, has been a solid pillar of EU competition law, alongside the antitrust prohibitions embedded in Articles 101 and 102 TFEU. The Merger Control Regulation(s) have allowed the Commission to review over 8000 concentration transactions to date,[7] prior to their implementation (or in other words, in an *ex-ante* manner). While the overwhelming majority of such transactions were deemed not to be problematic as far as their compatibility with the Internal Market is concerned, some concentrations were found to present (serious) risks regarding the structural changes they may create in the market. The EU merger control system is geared to prevent, or as the case may be, alleviate the effects of such transactions, which would otherwise result in distortions of competition and consumer welfare detriments.

The EU merger control system is designed to catch those significant structural changes, the impact of which could be felt beyond the national borders of any one Member State.[8] To this end, the Merger Control Regulation puts forward bright-line quantitative tests in Article 1(2) and (3), which are meant to establish the Commission's exclusive jurisdiction to apply the EU merger control rules to those transactions that can be qualified as concentrations according to the qualitative criteria of Article 3: legal mergers, acquisitions of shares or assets and full-function joint ventures. This system has allowed the Commission to review transactions between large market players in essentially almost all sectors of the economy. Yet, like any system based on bright-line jurisdictional tests, the turnover threshold system which Regulation 139/2004 uses in order to identify those concentrations that have an EU dimension (and consequently merit review by the Commission) is not bullet-proof. Specifically, practical scenarios may occur, in which concentrations between parties whose turnover does not qualify their transaction for EU review,

although such transaction may result in significant competition impact in the Internal Market. Vice versa, there are transactions that although 'on paper' they have an EU dimension, impact distinct markets of national dimension only. To remedy such anomalies, the EU Merger Control Regulation contains a corrective mechanism embedded in the so-called case referral system: essentially, Articles 4(4) and (5), 9 and 22 allow, at the request of the merging parties or of the Member States, before or after the notification of the concentration, the reallocation of the review process to the authority best placed to evaluate the transaction, be it the Commission or a National Competition Authority (NCA).

In the recent past, certain sectors of the economy, such as the digital and pharmaceutical sectors, show 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. The significance of the competition impact is primarily triggered by these firms' data- or innovation-related activities, which although extremely valuable, are not yet monetised.[9] Since deals involving such players do not normally have an EU dimension, reliance on the case referral mechanisms to bring those concentrations under the Commission's review is key. For example, transactions such as *Apple/Shazam*[10] and *Facebook/WhatsApp,*[11] were cleared by the Commission thanks only to the referral requests submitted based on Articles 22 and 4(5) of Regulation 139/2004, respectively.

The referral system has generally worked well so far. The statistics[12] show that Member States and merging parties alike have made use of the possibilities available under the Merger Control Regulation. The Commission also adopted guidelines detailing its approach to case referrals.[13] Recently however, especially in light of the upsurge of concentration activity in the digital sector (but not only), questions have been raised as to whether reliance on turnover only paints a sufficiently accurate picture of the potential impact that a concentration may have on the market. In some Member States, such as Germany and Austria,[14] the decision was taken to insert provisions related to the value of the transaction in their domestic merger control systems, specifically to prevent important concentrations from falling even under the domestic turnover thresholds, thus escaping not only EU, but also domestic scrutiny. Similar avenues were discussed (more or less vividly) at EU level, in relation to reframing the turnover thresholds criteria of the EU Merger Control Regulation.[15] Yet, the Commission did not choose the route of inserting transaction value criteria in the turnover threshold formula. Instead, the Commission chose to

direct the focus on the functioning of the so-called 'Dutch clause' embedded in Article 22 of Regulation 139/2004, which allows Member States to refer concentrations without an EU dimension for review by the Commission under the EU rules. Specifically, the Commission issued Guidelines[16] on the functioning of the Dutch clause, complementing the 2005 Notice on Case Referrals.

Discussion

The first question that may be asked is why the Commission chose the route of making use of the case referral system to address concentrations of the sort mentioned above,[17] instead of approaching the problem as the German and Austrian authorities did, by inserting value-based criteria in the jurisdictional test? Going beyond the obvious practical drawbacks which the latter choice would entail, namely performing an amendment to the actual Merger Control Regulation's text (which would require unanimity in the Council), the Commission motivates its choice in the 2021 Staff Working Document,[18] as follows: after thoroughly investigating a number of sources (including Bloomberg's 'deal list' financial database and the Commission's own qualitative examination of a sample of concentrations), it became apparent that a good part of high-value concentrations did not have a local nexus in the EU. Other such high-value deals were reviewed by a number of NCAs in the EU, including the German and Austrian authorities, based on the newly adapted domestic jurisdictional thresholds. Based on the recent enforcement experience in these two Member States, it seems that the new thresholds have not resulted as yet in capturing additional anti-competitive transactions, as all transactions notified on the basis of the new thresholds have been cleared unconditionally.[19] Finally, the Commission's research revealed that a number of competitively relevant cases seem to have escaped its *direct* jurisdiction based on the current turnover thresholds. Still, the absence of complementary value-based or value-to-turnover ratio criteria has not in itself significantly contributed to impairing the effectiveness of the EU Merger Control Regulation's jurisdictional thresholds. This is because the referral mechanisms of Article 4(5) and 22 of Regulation 139/2004 have mitigated the shortcomings of the EU dimension (rigid) criteria.[20] However, these referral mechanisms have their limits. Addressing these limits via guidelines (rather than amending the Merger Control Regulation) and further expanding the avenues available under Article 22 seems to be a less cumbersome solution.

One of these limits concerns established practice relating to Article 22 referrals. The starting point is that the competition authorities (NCAs and Commission) retain a

considerable margin of discretion: the NCAs have discretion whether to refer the case and the Commission has discretion regarding acceptance of the case. With the proliferation of domestic merger control regimes (all EU Member States currently have merger control rules in their domestic laws, except Luxembourg), the Commission started to use its discretion not to accept certain referrals under Article 22. Specifically, the Commission actively discouraged referrals of cases that did not originally fall under the domestic jurisdiction of the referring Member State, since experience showed that such deals were generally unlikely to have a significant impact on the Internal Market. The Commission's approach is so despite the fact that the text of Article 22 of Regulation contains no provision pointing in this direction. Actually, Article 22 applies to all concentrations (as defined in Article 3 of the Merger Control Regulation), not only to those that meet the domestic jurisdictional thresholds. Furthermore, Article 22 was applicable even if the referring Member State had no merger control regime in place.[21] The only criteria required for the application of the Dutch clause relate to the concentration affecting the trade between the Member States and threatening to significantly affect competition within the territory of the referring Member State(s), thus ensuring a sufficient nexus with the EU and the referring Member State(s).[22] In par. 11 of the Guidelines, the Commission signals a '180 degrees' shift in its approach: the referral of non-notifiable concentrations under domestic law is now encouraged. The Commission also pledges to accept such referrals, of course where the criteria of Article 22 are met. In this vein, the problematic (high-value) transactions without an EU dimension will not 'slip through the cracks', while also keeping the regulatory burden (i.e. notification requirements) low for those deals that do not warrant a Commission review. This new approach indeed says plenty about the Commission's willingness to exercise its discretion. Still, it says nothing about the Member States' willingness to refer. Closing the enforcement gap left open by Regulation 139/2004 turnover thresholds requires however that the Member States are willing and able to cooperate on this front. The domestic authorities have to have the means to uncover such problematic transactions, some of which may not be in the public domain, due to the lack of obligation to notify the transaction domestically. Also, to my mind, the communication channels between the Commission and the NCAs will have to be used to the fullest: particularly, I expect that the mechanisms of Article 22(5), according to which the Commission may invite the NCAs concerned by a case to make a referral, and of Article 19(2) on close and constant liaison between the Commission and the Member States in merger control procedures, will catch some traction.[23]

It has to be also kept in mind that when the Commission accepts an Article 22 request, it only obtains jurisdiction for the territory of the Member State(s) that have requested the referral or joined another Member State's request. This means that non-requesting States can continue to apply national law (in parallel to the Commission's appraisal of the concentration). The Commission may only take into account in its analysis competition effects outside the jurisdiction of the requesting Member State(s) in limited circumstances, for example when the geographic market extends beyond the borders of the these Member States(s).[24] While the scenario of parallel appraisals by the Commission and the non-referring NCAs is not necessarily problematic, since almost all Member States use similar substantive criteria to appraise the (anti-)competitiveness of a concentration, the outcome is far from ideal from a procedural point of view. This is so especially in a dynamic sector such as the digital economy: such concentrations would require multiple filings, the appraisal would run through different timelines of investigation, there would be different procedural requirements and safeguards that would apply, etc. Admittedly, par. 22 of the Guidelines points to the fact that 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. If this is the case, the Member State having its referral request rejected will be left with 'no help', going against the original rationale of the Dutch clause provision. A different solution would be for the parties to make use of a pre-notification referral of Article 4(5) of the Merger Control Regulation. This solution comes however with (at least) two drawbacks: first, the transaction must be *capable* of being reviewed under the national competition laws of *at least three* Member States (despite it not requiring a notification in some of the national jurisdictions?), and second, the timing of the process – once the transaction is notified in one Member State, it may be a bit too late to trigger the Article 4(5) *pre-notification* mechanism. So, good planning is key when the given transaction matches such scenarios. Par. 24 of the Guidelines points in this direction too, by encouraging the parties to voluntarily come forward with information about their transactions and obtain (I imagine, during the pre-notification talks with the Commission) an early indication as to whether the concentration would or would not constitute a good candidate for an Article 22 referral.

Speaking of timing and good planning, the third section of the Guidelines dealing with procedural aspects brings some interesting scenarios to light. Par. 27 speaks of a situation where the parties are about to implement their transaction, while the Commission is considering whether to accept a referral request. While the Commission may not impose on the parties an obligation to stop the implementation

of the deal at this stage of the process, it still expresses the hope that the parties may consider delaying the deal's implementation. The Commission seems not only to count on the parties' good faith, but also on their interest not to over-complicate the matter, and have the concentration implemented and running as smoothly as possible. This would mean that the parties, even when not having to notify a transaction, would have to exercise caution and to foresee that the case may not be closed even once the implementation is performed. Not to mention that such delays as suggested by the Commission come with costs attached. Who is expected to bear those costs? The parties themselves? And speaking of closing the deal, par. 21 of the Guidelines contains a rather odd statement, to my mind: the fact that a transaction has already been closed does not preclude a Member State from requesting a referral. Indeed, Article 22(4) of Regulation 139/2004 signals that the prohibition of 'gun-jumping' in Article 7 of the Merger Control Regulation applies to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a referral request has been made. Once again, timing is important, as the Commission signals that the referring Member States should not wait longer than six months (from the moment of the deal's implementation, or from the moment the deal 'appears' in the public domain) before making the Article 22 referral request. Several questions flow from the provisions of par. 21: what happens if the transaction is fully implemented without it being required to be notified to any authority? What is the Commission expected to do when asked to appraise such an implemented deal? Does this amount to a move towards *ex-post* merger control? I recall that the Commission toyed with the idea of *ex-post* control in the context of the 2014 White Paper, when designing a targeted transparency system of intervention on competitively significant links (i.e. minority shareholdings).[25] This mechanism is however no longer of actuality. Getting back to the already implemented non-notified concentrations referred to the Commission, I can imagine that although such scenarios may seldom occur, the Commission could make use of already established mechanisms to handle the effects of such deals: for example, Article 8(4) of the Merger Control Regulation could be used to dissolve the concentration. This is generally quite a cumbersome process. Also, dissolving a concentration raises legal certainty issues for the parties involved in the (non-notifiable) deal, who have not infringed any legal obligations they may have had, and who simply want to carry on with their business ventures. Furthermore, where does the provision of par. 21 of the Guidelines leave the domestic authorities? It seems that even when transactions have been performed and legally implemented in domestic jurisdictions, the Member States have to act as 'watchdogs', monitoring markets for such transactions. A legitimate question would be where do the

resources for such 'surveillance' activities come from? Also, does the Commission have any means to 'encourage' the domestic authorities to do so, or is it simply relying on the good-will and the cooperative spirit of the NCAs?

Lastly for now, speaking of 'watchdogs', par. 25 of the Guidelines may provide a partial answer to some of the questions listed just above: third parties may be enrolled in this market monitoring exercise. Essentially, competitors, customers or consumers unhappy with a given merger, or simply concerned citizens, could inform the Commission or the NCAs that a concentration could be a good candidate for an Article 22 referral. However, the threshold for convincing the authorities that such a route should be approached is not low: sufficient information to make a preliminary assessment as to whether the criteria for referral are met must be provided. Furthermore, the Guidelines do not seem to incentivise to a great extent third parties to come forward with information, since even if third parties would hope for some sort of relief by seeking to have the case referred to the Commission for appraisal, they may not draw any rights or expectations from their contact with the authorities. This is because Article 22 does not impose any obligation on the competent authorities of the Member States or on the Commission to take any action following contact by a third party.

Conclusion

The Guidelines on Article 22 case referrals embody the Commission's response to a global trend in the digital and pharmaceuticals sectors: acquisitions of small, innovative players, with huge market and competition potential. The Commission's approach is innovative, in the sense that it deviates from the path chosen by authorities in some national jurisdictions, namely amending the jurisdictional thresholds, by adding transaction value criteria. The Commission chose instead to rely, once again, on the work of the NCAs in the EU Member States. I have to admit, this approach made me think of a 'decentralisation' process, similar to that of the enforcement of Articles 101 and 102 TFEU, without necessarily naming it by name as such. To a certain extent actually, for certain types of transactions (i.e. deals not having an EU dimension, not needing to be domestically notified, but nevertheless having potential to impact the EU Internal Market), the Guidelines seem to go in the direction of 'decentralising' some of the enforcement activities: the NCAs are expected to contemplate referral of such cases, which otherwise they themselves would have not caught in their jurisdictional nets. In the name of fostering healthy competition in the EU Internal Market, I can see why it is important to have such

transactions properly scrutinised. At the same time, I can see how legal certainty is extremely important to those parties engaged in concentration transactions: a transaction falling below (national) jurisdictional thresholds should be able to be closed and implemented smoothly and swiftly, without much regulatory intervention. It is therefore reasonable to think that the approach embedded in the Commission's Guidelines should not be sheltered from questions. This is probably why this blog post leaves the reader with more questions than concrete answers. Nevertheless, hopefully the discussion above provides some food for thought.

[1] Commission White Paper: Towards More Effective EU Merger Control, (2014) COM/2014/0449 final.

[2] See 2016/2017 Commission public consultation on procedural and jurisdictional aspects of EU merger control, https://ec.europa.eu/competition/consultations/2016_merger_ control/index_ en.html.

[3] See Commission Staff Working Document, Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control, SWD(2021) 66 final.

[4] See https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384; https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12957-Revision-of-certain-procedural-aspects-of-EU-merger-control.

[5] See https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1214.

[6] Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases, C(2021) 1959 final.

[7] See https://ec.europa.eu/competition/mergers/statistics.pdf.

[8] Regulation 139/2004, Recitals 8, 9.

[9] Note 6.

[10] Case M.8788 *Apple/Shazam*, (2018) OJ C 106/16.

[11] Case COMP/M.7217 *Facebook/WhatsApp*, (2014) C/2014/7239 final.

[12] See note 7.

[13] Commission Notice on Case Referrals in Respect of Concentrations, OJ C 56/2005.

[14] See Sections 35(1a) of the German Act against Restraints of Competition and Section 9(4) of the Austrian Cartel Act, respectively.

[15] See e.g. the Commission White Paper, note 1; the 2016/2017 Commission public consultation, note 2; J. Crémer, Y.-A. de Montjoye and H. Schweitzer 2019, 'Competition Policy for the Digital Era', 2019, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[16] See note 6.

[17] For an exemplificative list of the types of cases the Article 22 Guidelines has in mind, see par. 19 of the Guidelines, where reference is made to cases involving start-ups, important innovators, players with important intellectual property rights or access to raw materials, infrastructure or data, etc.

[18] Staff Working Document 2021, note 3, par. 77 *et seq.*

[19] Ibid, par. 125.

[20] Ibid, par. 132-134.

[21] Notice on Case Referrals, note 13, par. 50; Article 22 Guidelines, note 6, par. 3, 6, 8.

[22] Article 22 Guidelines, note 6, par. 17.

[23] Ibid, par. 23, 26.

[24] Staff Working Document 2021, note 3, par. 57.

[25] For more on this matter see C.S. Rusu, Targeted Transparency Control of Competitively Significant Links: Heading Towards Regulatory Overkill?, Romanian Competition Journal 1-2, 2015.