Article 22 EUMR: 10 Things to know

April 2021

What does the Commission's change of policy mean in practice for companies around the world and their M&A practice?

On 26 March 2021, the EU Commission ("EC") has announced a change of policy with regards to the application of Article 22 of the EU Merger Regulation ("EUMR") (see here).

Why is the EC's change of policy of interest for M&A transactions in the pharmaceutical sector?

- Acquisitions in the pharma sector that don't meet the EU nor national thresholds for notification can now be reviewed by the EC following referral requests by Member states.
- Acquisitions in the pharmaceutical sector will be on the radar of the EC since competition concerns have been identified in this sector in the past years.
- New caution is needed for transactions involving companies, licensing agreements or other assets which turnover does not reflect their actual or future competitive potential (for instance acquisition of start-ups).
- A referral request can lead to significant delays in the M&A process (procedure of up to 40 working days) and the EC could now review transactions even after closing.
- The upcoming months represent a "testing period" for the EC's change of policy but immediate steps could be taken by pharma companies to mitigate and/or address the risk of referrals.

What are the 10 key things for companies around the world to know when running M&A transactions?

1. What is the rationale for this change of policy?

There was a perceived "enforcement gap" primarily focused on "killer" acquisitions but also on other competitively sensitive transactions which did not meet the EUMR turnover-based thresholds. Instead of reforming the existing thresholds (or adding transaction-based thresholds like in Germany and Austria), the choice has been made to use an existing legal provision: Article 22 of the EUMR in a novel way.

2. What is an Article 22 referral?

If a transaction does not meet the EUMR thresholds, a referral request can be made by one or several Member States to the EC requesting the EC reviews the transaction. This is the case even if the transaction does not meet any of the relevant national thresholds for notification. In practice, prior to the EC's change of policy, Article 22 referrals to the EC have been effectively made (31 times, e.g. Apple/Shazam) but only in cases where at least one Member State had jurisdiction over the transaction.

3. What are the conditions for an Article 22 EUMR referral?

Two cumulative conditions have to be met : the transaction has to (i) potentially affect cross-border trade and (ii) raise "prima facie" competition concerns. Both criteria can be interpreted broadly. They may even cover transactions where the target is not present in the EU (i.e. no sale, no asset, no employee, etc.) on the mere possibility that competition in the EU might be affected in the future. This may catch small and apparently remote transactions, such as the acquisition of a small non-EU biotech at an early stage of clinical trials, but there would be no intent from the EC to use Article 22 as a "catch-all" tool, given that the EC already has a mandatory filing regime for transactions meeting the thresholds. The EC intends to focus on high impact transactions (high transaction value, low value but big acquirer, important media coverage, etc.).

4. Is Article 22 EUMR limited to certain sectors?

No. Article 22 applies to all sectors of the economy. In practice, it is expected that the pharmaceutical and the digital sectors will be the main areas of focus at the early stage of this change of policy, since innovation is key in these sectors and competition concerns have repeatedly been identified by competition authorities in the past years.

5. Is Article 22 EUMR limited to specific types of transactions?

No. Article 22 applies to all transactions that qualify as "*concentrations*" within the meaning of the EUMR, i.e. any transaction that leads to a change of control of an undertaking (acquisition of a legal entity, acquisition of assets, creation of a full-function joint-venture, etc.). Acquisitions of start-ups are likely to be of primary concern.

6. Does the procedure for a referral request open the door to an ex-post merger control?

Upon its own initiative, requests from the parties to the transaction, requests from third parties and/or a request from the EC itself, a Member State can initiate a referral request within 15 working days ("WD") from the moment a transaction is "made known" to this Member state. Other Member States can join the request within 15 WD and the EC then has 10 WD to decide to accept or reject the referral (procedure of up to 40 WD in total). The "made known'" criteria is a moving one, and a referral can be made even after the transaction has been closed in the EU or elsewhere. Although the EC's change of policy was not intended as such to create an EU ex-post-merger review regime, it may be the case that, for the first time, the EC will review transactions after lawful closing which leads to significant legal uncertainty for parties to a transaction. The EC's stated policy is that it will generally not review transactions more than six months after closing.

7. What is the impact of a referral request on the timing of a transaction?

For ongoing transactions that have not been closed yet, the parties are subject to a stand-still obligation (i.e. they cannot close their deal) from the moment the EC informs them of a Member State's referral request. Parties must take this into account in the timeline of their transaction and must consider whether to provide for the possibility of a referral in the transaction documentation. For transactions that have already been closed, the referral request has no impact on itself, but if and when the EC accepts the referral and reviews the transaction, the EC could theoretically prohibit the transaction or issue a conditional clearance (i.e. impose remedies such as divestments)

8. Can companies mitigate the risk of referrals after closing?

One way to mitigate the risk of referrals would be to ensure that the transaction is widely made known, including to the EC and the 27 EU competition authorities, but practice will need to develop on what "made known" actually means. The clearest solution will be to contact each authority in countries that may be affected but this is something that companies may not be willing to do. Mere press releases might not be considered as sufficient for the transaction to be effectively "made known" (see the Illumina-Grail case (*ongoing*)). The information that needs to be "made known" is also questionable. Waiting for practice to develop, an immediate practical tip for companies would be to document all relevant public communications on their transactions. Another option is to seek early indication from the EC on whether it would be keen to accept any referral request. But the EC does not have yet any template for a briefing paper that could be usefully used to approach the EC for an early indication or to make the transaction sufficiently known from the relevant competition authorities.

9. How to mitigate the risk of Article 22 referrals in the transaction documents?

The drafting of transaction documents should now account for the Article 22 risk since it might lead to significant delays in the M&A process. Traditional conditions precedent and long-stop dates should likely be reconsidered. Also, buyers will obviously have an interest in ensuring that the seller's cooperation at least up to six months after closing in the transaction documents.

10. How to navigate M&A transactions as a result of this policy change?

Although the EC said that the upcoming months represent a testing period, immediate steps can nonetheless be taken by companies to anticipate the risk of referrals in their M&A deals. New procedures could be implemented to anticipate whether a transaction might likely be subject to a referral request by relying on a wide range of factors (impact of the transaction in several Member States, sectors involved, filings in one or more Member State or non-EU countries, amount of the transaction, market power or turnover/profile of the acquirer, media coverage, etc.). Then, following a thorough assessment, a well informed decision could be made regarding the possibility to request early indications from the EC and/or Member States on their appetite to review the deal.

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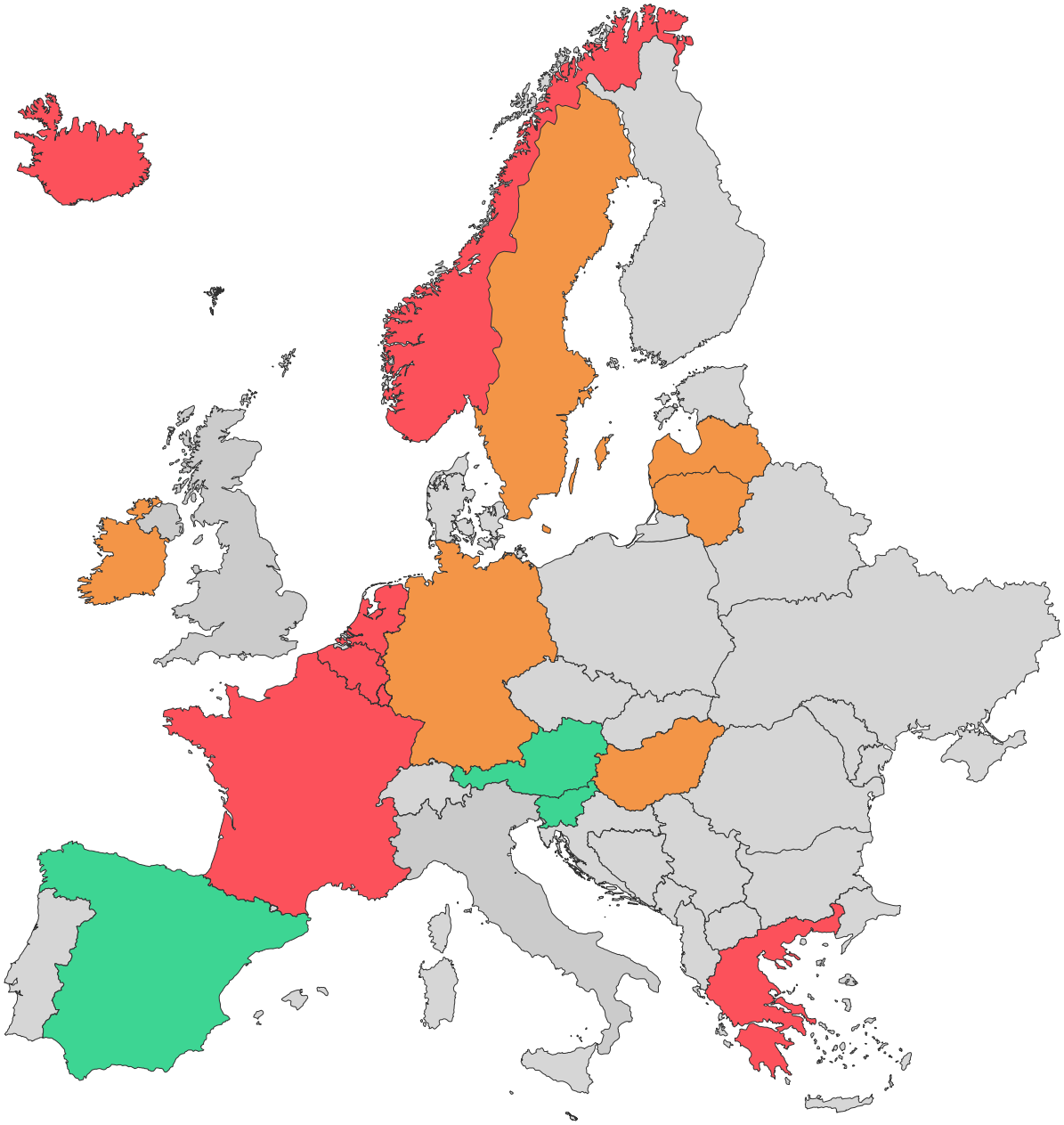
Response by country

National competition authorities have expressed diverging opinions on whether they are likely to make referral requests to the EC. Please find below an indicative map of the response by country to date, keeping in mind that this information is likely to evolve in the upcoming months. *[in red: likely to make referral requests, in orange: less likely to make referral requests, in green: not likely to make referral requests, in grey: unknown]*



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