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Brief remarks on new interpretation of Article 22 of the European Merger Regulation

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Resume

Ms. Vestager announces a new interpretation of Article 22 of Regulation (EC) 139/2004 which allows a national competition authority to refer a case with a non-European dimension to the Commission. As of next year, the Commission will accept the referral even if the transaction did not fall within the competence of the national authority because it did not trigger the thresholds of controllability of the latter. This new interpretation is clearly intended to allow the Commission to refer to it acquisitions of small innovative companies with no or limited turnover.

Art. 22 of the Merger Regulation was not designed for this purpose by the drafters of the Regulation, but for an entirely different reason. There may be good reasons for wanting to reform the Regulation. But please, not in this manner!

M. Vestager, The future of EU merger control, *International Bar Association,* 24th Annual Competition Conference, 11 sept. 2020, site de la Commission européenne
https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en

In September 2020, Ms. Vestager was invited to an IBA conference. That's what she said:

"Thresholds
One of the main issues that we looked at was whether our thresholds for filing a merger, which are based on the companies' turnover, are still the right way to spot mergers that matter for competition. Because these days, a company's turnover doesn't always reflect its importance in the market. In some industries, like the digital and pharmaceutical industries, competition in the future can strongly depend on new products or services that don't yet have much in the way of sales.
We've discovered that, on the whole, the existing thresholds work well. But there are a handful of mergers each year that could seriously affect competition, but which we don't get to see because the companies' turnover doesn't meet our thresholds.
One solution could be a new threshold that's based on the value of the merger, not the sales of the companies. But it's not easy to set a threshold like that at the right level. If it's too high, it doesn't really help – you still end up missing a lot of the cases that matter. On the other hand, if you set it low enough to make sure that you see all those mergers, you risk making companies file a lot of cases that simply aren't relevant. So right now, changing the merger regulation, to add a new threshold like this, doesn't seem like the most proportionate solution.
In fact, the answer is hiding in plain sight. On a few occasions, we did get to see the mergers that we wanted to see anyway – because Europe's national competition authorities referred them to us. And those referrals could be an excellent way to see the mergers that matter at a European scale, but without bringing a lot of irrelevant cases into the net.
There's just one small issue. Like the Commission, most of Europe's national competition authorities can only review cases where the companies' turnover meets a certain threshold. And in recent years, the Commission has had a practice of discouraging national authorities from referring cases to us which they didn't have the power to review themselves.
That practice was never intended to stop us from dealing with cases that could seriously affect competition in the single market. And yet today, when a company's importance for competition isn't always reflected in its turnover, it could have exactly that effect – meaning that some important mergers can't be reviewed by the Commission, or by national authorities.
So the time has come to change our approach. We plan to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves.
This won't happen overnight – we need time for everyone to adjust to the change, and time to put guidance in place about how and when we'll accept these referrals. But if all goes well, I hope we'll be able to put this new policy into effect around the middle of next year".

A strong support in France. Mrs. Vestager's announcement is important for the future of merger control in Europe. In this speech, the Commissioner warns of an important change in the doctrine of the European Commission in the application of Article 22 of Regulation (EC) No 139/2004 on the control of concentrations. In France, the French Competition Authority quickly communicated this new interpretation to express its approval. In fact, the French *Autorité de la concurrence* has been calling for this interpretation for several years. So the *Autorité* has stated, only a couple of days after the announcement: "*This evolution of the European Commission's doctrine on Article 22 of the European Merger Regulation is an excellent solution, which helps to address concerns that have arisen about the risk that certain transactions with a negative impact on competition may escape the control of the competition authorities. It has the advantage that it can be implemented at short notice. It will thus provide an initial response to the problem of predatory and consolidating acquisitions, particularly in the digital economy*".

It is obvious that Article 22 has been somewhat asleep lately, but for an obvious reason: its raison d'être in the regulation was somewhat obsolete. To understand it, one has to go back on its origin.

Article 22, drafting, origins and raison d'être. The Merger Regulation states that "*One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 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 well known that this provision had been introduced at the request of the Dutch delegation at the time of the drafting of the 1989 Regulation. At the time, only three Member States had merger control, so it was welcome to allow them to ask the European Commission to hear a case which, however, did not have a Community dimension. And since, the State requesting the upward referral did not have domestic control, it was understandable that nothing was said about its own competence to deal with the operation. Moreover, the Commission intervened on behalf of the referring authority, and the effects of its decision were limited to the territory of the State concerned.

Since all Member States have national control, this type of referral has become rare. Upward referrals are sometimes implemented when it appears that the Commission is better placed than a national authority to deal with a case that does not have a European dimension. For example, in an *Iconex / Hansol Denmark / R+S Group* case, in 2019, the German authority, whose expertise could not be questioned, had sent a referral request to the European Commission because the transaction, which did not have a European dimension, would have cross-border effects and that the Commission could possibly implement structural remedies for activities that were not located in Germany (Case M.9293).

Gradually, however, another fate for Article 22 began to be imagined. Since the text is very vague, we might as well use it! For digital concentrations that escape the European thresholds, Article 22 appeared to be the convenient way to refer the matter to the Commission. This was seen in the case of the acquisition of Shazam by Apple, in which Austria took the initiative of a referral under Article 22 (Case M.8788).

However, the question of the competence of the national authority remained. The Commission had always been hostile to a referral of a case for which national jurisdiction was not triggered, in order to preserve the legal security of companies. Carles Esteva Mosso said it very clearly at a conference in France in 2017. He had been asked about the possibility of a referral under Article 22 in a situation where the national threshold was not reached and had recalled that Article 22 was adopted to make up for the total absence of merger control in a

Member State, and that it no longer makes much sense today where almost all Member States have merger control based on the triggering of thresholds. In his view, allowing an Article 22 referral of operations below national thresholds would jeopardize the legal security of companies. If they are not required to notify their operation in any Member State of the Union, they are entitled to consider that they can directly implement it without prior authorization (reported by A. Ronzano, Actu-concurrence n° 102/2020).

Article 22 tomorrow, a brutal reform. "*We plan to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves*". The intentions of the European Commission are very clear. We know the reason for this change in doctrine: the Commission considers that some transactions involving the acquisition of innovative companies (with no or very low turnover, either because they have not yet sufficiently developed their concept or because their business model does not generate turnover) by large companies may raise competition problems, without however triggering the thresholds for review by a competition authority. In this case, it is not possible to review supposedly predatory acquisitions. This is why the Commission now intends to free itself from this methodological constraint of European merger control law.

This means that, from now on, the European Commission will accept a referral as soon as the conditions of Article 22 are met, i.e. conditions that are, after all, fairly simple to meet when taken out of the context for which they were initially laid down: 1) that the case is a "concentration" within the meaning of the Regulation, 2) that there is an effect on trade between Member States, and 3) that there is a risk that the case may significantly impede competition.

The Commission's new interpretation is a brutal reform of the regulation. From a legal point of view, and this point of view should not be so easily ignored by the European Commission, this new reading is not in line with the raison d'être of Article 22. Of course, the interpretation is in line with the letter of the text: one could even say that the previous Commission's interpretation, according to which the Commission should accept the referral only under the condition that national jurisdiction was triggered by the dimension of the transaction, added a condition that is not in the regulation. So why did the Commission refuse the referral? Because the rationale of the text was very precise, and clearly limited, in the Commission's view, the possible scope of the regulation. The new interpretation is therefore questionable from a legal point of view because it does not comply with the spirit of article 22. It may be added that this new interpretation is also contrary to the spirit of the regulation as a whole. Europe has decided to implement an ex ante control of mergers. The Merger Regulation does not allow for ex post merger control, although this model was already on the table when this legislation was adopted. Allowing an Article 22 referral under the new conditions introduces such control, contrary to the general framework set out in the Regulation.

This is another problem of a democratic nature. This reform is decided, on its own initiative, by the European Commission. It is being done without the judges, and without the legislator, even though the time for reforming the Merger Regulation is approaching and it would have been appropriate for the legislator to decide on such a radical change. It is therefore highly questionable that the Commission decided on such a reform unilaterally, without regard for the democratic balance of the Union's institutions. Perhaps European democracy will deliver a different result than that expected by the European Commission. This may be a problem. But such a reform should not only be decided in Brussels. Introducing ex post control in Europe is a radical change for undertakings and for European law itself. It takes time. Mrs Vestager herself says: "We

need time". It is therefore surprising to read, a few words later, that the new approach will be implemented "by the middle of next year"!

Beyond these considerations regarding the method used, there is reason to be concerned about the consequences of this reform on the legal certainty of undertakings; the objections that inspired the Commission's reticence up to now still exist today. If one understands correctly, from now on, the Commission will accept the referral by one (or more) competition authority(ies) of a concentration, the dimension of which did not trigger any national threshold. It is therefore reasonable to believe that the companies concerned will not have notified it and that it is therefore ex post that the European Commission will carry out its assessment. How can the transaction be secured upstream of this control? How long after it has been completed will the transaction be threatened by intervention by the competition authority?

Again, the Commission may have good reason to believe that predatory acquisitions should be quickly controlled. But this deserves real democratic debate, patient and intelligent reform. It is therefore not with one sentence in a conference that this type of reform should be introduced, and it is not in six months that the details are settled; European merger law deserves better than that.

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