ECLF

European Competition Lawyers Forum

EUROPEAN COMPETITION LAWYERS FORUM

EUMR: Article 22 Position Paper

15 October 2021

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1 ECLF recommendations

1.1 The European Competition Law Forum ("ECLF")[1] considers that the approach taken in the Guidance of permitting "referral" to the Commission by Member States without original jurisdiction is of questionable legality (as outlined in section 2).

1.2 However, in the interest of constructive engagement, the ECLF makes the following suggestions in the hope that the Guidance can be made workable and the application of the guidance more predictable:

1.2.1 There is a need for clear-cut and practical guidance from the EC, in particular for borderline cases given the vagueness / openness of the referral guidance.

1.2.2 The Guidance should be updated with a list of likely / unlikely referral candidates and sectors.

1.2.3 The *Illumina/Grail* case cannot be the norm. Cases without any nexus to Europe triggering no Member State filings should ordinarily not be suitable for referral up. No other established regime goes as far as not requiring <u>any</u> local nexus / <u>any</u> form of domestic presence at all.

1.2.4 It should be possible for the parties / advisors to get an initial steer from the EC on a "no names" basis as clarity will likely be needed at early stages prior to the signing of the SPA.

1.2.5 The ECLF believes that the briefing paper route (which, for example applies in the UK) should not be replicated. It provides the parties only with limited legal certainty as the UK Competition and Markets Authority (CMA) reserves the right to investigate at a later stage if circumstances change. The CMA's expansive approach to jurisdiction has led parties to submit briefing papers in many instances where such a submission was in fact not warranted (given limited UK nexus and the absence of competition concerns). It would be helpful to get feedback from the EC in writing and in a binding manner.

1.2.6 Specific guidance and practical examples on what would is sufficient for the concentration to be '*made known*' and what constitutes '*sufficient information'* under the new Guidance is needed. In *Illumina/Grail* the EC only sent an invitation letter at the beginning of March 2021, even though the transaction was publicly announced in September 2020. This seems an expansive interpretation of the transaction not being "made known" in September. Clarity on this point would enable the merger parties to have legal certainty on whether the clock has run down within 15 working days of informing NCAs of their transaction.

1.2.7 A clear cut-off point as to when transactions can no longer be referred would be welcome. Similar "limitation periods" apply in other jurisdictions which operate a call in power[2].

[1] The European Competition Law Forum ('ECLF'), founded in 1994, is a group of leading practitioners in EU competition law which is drawn from law firms across the EU. Its aim is to engage in an open dialogue on topical competition law issues and to consider proposals for reform. This response has been compiled by a working group of ECLF members. A list of working group members is set out at Annex 1. While the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.

1.2.8	The guidance should include comfort that a referral is unlikely if the transaction has already been cleared by one or more Member States.
1.2.9	We propose a "one stop shop" centralised clearing system to provide legal certainty to parties at section 5 below.

2 The jurisdictional architecture of the EUMR

2.1 A fundamental principle of the European Union merger control scheme, laid down in the EUMR is the "regulatory settlement" agreed with the Member States in relation to jurisdiction under the EUMR. Article 22 is one of the mechanisms permitting "original" jurisdiction to be re-allocated (in the case of Article 22, from the Member State/s to the EC; in the case of Article 9, to the Member State/s making the request)[3].

2.2 The genesis of Article 22 is well known: the so-called "Dutch clause" as it was introduced at the initiative of the Netherlands which did not, at that time, have a merger control scheme to permit it (and other Member States who did not have merger control laws) to request the Commission to examine a merger, even though, such a merger fell outside the Commission's jurisdiction.

2.3 Article 22 was not, however, intended to function as more than a limited and circumscribed exception to the principles of legal certainty and division of jurisdiction agreed with the Member States and reflected in the EUMR. For this reason, the Council Minutes reflecting the adoption of the EUMR in 1989 record the intent to observe the fundamental principle of subsidiarity, in the following terms:

"In any event [the Commission] does not intend to take action in respect of concentrations [without the minimum global or community turnover dimension] on the grounds that below such levels a concentration would not normally significantly affect trade between Member States". "The Council and the Commission state that the provisions of Article 22(3) to (5) in no way prejudice the power of Member States other than that at whose request the Commission intervenes to apply their national laws within their respective territories".[4]

2.4 When the EUMR was reformed in 2003[5], this principle was taken for granted: the focus then in the referral context was on the best placed authority/ies to review a transaction. Recital 15 of Regulation 139/2004 assumes that the referring Member States would have jurisdiction to review a transaction:

2 See Annex 2 which describes the call in position in Sweden, Norway and the US.
3 Articles 4(4) and (5) also provides for voluntary party led, pre-notification mechanisms.
4 Notes on Council Regulation (EEC) 4064/89.
5 See also OJ C 20, 28.1.2003, paragraph 21: "Article 22 would be applied mainly in those cases which have a significant impact on competition beyond a single Member State. One of the initial purposes of Article 22 was to provide a possibility for Member States which do not have merger control legislation to refer cases with an impact on trade between Member States to the Commission; today only Luxembourg falls into this category. Nevertheless, the possibility for a single member state to refer cases to the Commission should not be completely excluded. This in combination with recital 15 of the EUMR shows that mergers below Member State thresholds were not intended to be covered at the time of the adoption of the current form of the EUMR.

"A Member State should be able to refer to the Commission a concentration which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition within its territory. Other Member States ***which are also competent*** *to review the concentration should be able to join the request".* (emphasis added).

2.5 This was also reflected in practice: the EC had indicated in the past that it would be unwilling to accept Article 22 referrals initiated by a Member State having national merger control (unlike the original Dutch case) but where the national threshold was not met.

2.6 The first case in which the EC accepted an Article 22 referral where a Member State that had jurisdiction over a transaction under its domestic laws (Finland) was joined by Member States that did not was *Omya/J.M. Huber*[6] in 2005. That referral scenario has occurred also in other cases (such as *Energizer / Spectrum Brands*[7] in 2019), which gave rise to uncertainty about the relevance of Member State jurisdiction, since even absent jurisdiction, transactions could end up being reviewed by the EC. However, in that referral scenario, the original request was made by an authority that actually had jurisdiction under its domestic laws. A referral initiated by a Member State that did not have jurisdiction on that basis was not accepted by the EC.

2.7 The Guidance represents a radical shift in Commission policy in that a Member State with national rules on merger control but does not have jurisdiction under those rules would be able to initiate (not only join) a referral request, and the EC has stated that it will accept (and even incentivise) such referral requests.

2.8 This approach deviates from the jurisdictional division between the Union's and the Member States' competences in the field of merger control, as established at the outset of the EUMR. As has become evident recently, some Member States have also explained publicly that the new system set out in the Guidance does not function within that jurisdictional framework.

3 Practical Concerns with the Guidance

Predictability and legal certainty.

3.1 The guidance raises significant issues of predictability and legal certainty. As a result of the Guidance, the EUMR can no longer be said to have "***a simple and objective mechanism that can easily be handled by the companies involved in a merger in order to determine if their transaction has a [Union] dimension and is therefore notifiable***"[8]. In essence, the Guidance breaks with longstanding international practice that jurisdiction should only be asserted based on "*clear, understandable, an easily administrable 'bright-line' tests*"[9] in respect of transactions "*that have a material nexus to the reviewing jurisdiction*".[10]

3.2 These issues include difficulties in:

6 M.3796.
7 M.8988.
8 Paragraph 127, Consolidated Jurisdictional Notice.
9 ICN, Recommended Practices for Merger Notification and Review, RP. II.D.
10 ICN, Recommended Practices for Merger Notification and Review, RP. II.A.

3.2.1 **identifying which deals are likely to be referred to the Commission**. Particular issues arise in life sciences and tech transactions involving companies with little to no turnover as they involve products which have not yet been monetised.

3.2.2 **the degree of nexus to the EU**. If original jurisdiction is not required by an EU Member State there is no underpinning principle which enables parties to determine when their deal is liable to Article 22 referral. As a result, even deals involving non-EU targets with no activities in the EU are at risk of referral.

3.2.3 **timing issues**. In, for example, public deals, without any identified EU or Member State notification requirement, the Guidance would require parties to include an Article 22 condition and to approach agencies (potentially up to 27) for comfort in order to close deals with certainty against the challenging time limits applicable to public takeovers.

3.2.4 **bigger impact on smaller deals**. Given the apparent focus on targets lacking turnover i.e., pre-monetisation, the Guidance has a bigger impact on small deals: i.e those which could enable start-ups to be acquired by larger, better equipped players which can properly capitalise them and enable the development of products with customer benefits. This approach has the scope to hamper a conducive environment for tech and R&D in Europe.

3.3 In the past few months after the Guidance was communicated, members of the ECLF working party are aware of numerous actual and potential transactions in which the potential for referral under the guidance was considered. Some of those transactions did not proceed, though the extent to which uncertainty derived from the Guidance was dispositive is not certain. However, the fact that self-assessment by both sellers and potential buyers is now necessary in respect of numerous potential transaction combinations in itself increases uncertainty and associated costs. In our recent experience, this is not confined to certain industries (such as life-sciences or tech) but authorities as well as potential transaction parties have identified issues in relation to a range of industries and transaction certainty (and transaction costs) have been negatively impacted as a result.

Limitations in coverage of the "new" policy.

3.4 A number of Member States have changed their thresholds to capture cases they considered could raise competition concerns: namely Austria and Germany by introducing transaction value thresholds; and Spain and Portugal via an alternate market share threshold.

3.5 Even if the Commission applies the Guidance, it is unclear that Member States will approach questions of referral in line with that Guidance[11], compounding concerns of lack of legal certainty and predictability identified above. It has for instance been suggested that France may adopt its own guidelines on when it might refer a transaction that does not meet the French domestic jurisdictional rules.

[11] For example, the Bundeskartellamt issued a press release on 23 July 2021 in relation to the Facebook/Kustomer transaction which indicated that it would not make use of Article 22 in cases in which it lacked original jurisdiction.

4 Need for additional guidance/consultation procedure

4.1 The Guidance is lacking in clarity regarding its intended procedure and applicable timelines as well as on likely candidate cases for Article 22 referrals. The EC's vague approach jeopardises legal certainty for merging parties within the EU and beyond (e.g. *Illumina/Grail*). The points below illustrate these concerns with reference to some relevant passages of the Guidance and offer ECLF recommendations to improve the status quo.

Clarity on the likely referral candidate cases.

4.2 The new Guidance is very broad, vague and, as noted in the document, "purely illustrative" (para 20). By way of example, it captures targets who are start-ups or recent entrants with competitive potential, "important innovators", important competitive forces ("ICF"s) and those companies with "access to competitively significant assets" or "key inputs". It is also sufficient that the target has the *potential* to be an important innovator or an ICF. Given the vagueness of the Guidance, the EC is essentially able to review any case that could possibly raise horizontal or vertical competition concerns regardless of other criteria and without any nexus to Europe.

"*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 <u>important innovator</u> or is conducting <u>potentially important research</u>; (3) is an <u>actual or potential important competitive force</u>; (4) has access to <u>competitively significant assets</u> (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are <u>key inputs</u>/components for other industries.*" (emphases add), para 19 of the Guidance.

4.3 Clarity on suitable candidate cases is all the more important since the Guidance may be applied across a broad range of industries, as Executive Vice-President Vestager explained recently:

"*Of course, in a system like the one we have in Europe, where we only review mergers that are notified to us, we first have to get to see the mergers that matter. And <u>I sympathise with the worry that big businesses could buy up green innovators, and kill their new ideas, while those companies are still too small for the mergers to have to be notified. In March this year, we published guidance to encourage Europe's national competition authorities to refer mergers that they think we should review</u> – even if they don't have the power to review those mergers themselves.*" (emphases added), Executive Vice-President Vestager's keynote speech at the 25th IBA Competition Conference.

4.4 The ambition to "*review a significant number of transactions in a wide array of economic sectors*" (para 7 of the Guidance) must not scupper fundamental EU law principles such as legal certainty, legitimate expectations, or subsidiarity. More work is needed to meet the Guidance's stated objective "*to increase transparency, predictability and legal certainty as regards a wider application of Article 22*" (para 12 of the Guidance).

ECLF Recommendation:

4.5 The Guidance should be updated with a more concise and detailed list of likely / unlikely referral candidate cases and sectors.

4.6 Fundamentally, it is critical to determine clear and administrable criteria of nexus to the EU. Cases without the requisite nexus under the EUMR or Member State law should ordinarily not be suitable for review or, indeed, referral. No other established regime that does not rely on turnover for determining jurisdiction (UK, Germany, Austria) goes as far as not requiring any local nexus / some form of domestic presence at all. The review of concentrations without an EU dimension also seems contrary to the spirit of the EUMR as exemplified by its Recital 23:

"*It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market*." (emphases added).

Reaching out to the EC for an 'early indication'.

4.7 While the merging parties may voluntarily come forward with information about their intended transactions, the Guidance does not specify when and how the EC would respond or what information the parties must provide to obtain a clear and meaningful response:

"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." (emphases added), para 24 of the Guidance.

ECLF Recommendation:

4.8 The Guidance should be updated with clear-cut and practical guidance, in particular for borderline cases[12].

4.9 It should be possible for potential or actual transaction parties / advisors to obtain an initial steer from the EC on a "no names" basis as clarity will likely be needed at early stages of negotiating a transaction. It would also be helpful for feedback to be binding and in writing.

[12] In our view, there are lessons to be learned for the Commission from the experience in Sweden, where there is residual jurisdiction for the SCA to order the parties to notify a transaction even if the individual thresholds are not met, if the SCA considers that there are "particular grounds" (see case study on call in: Sweden, in Annex 1). As a result, self-assessment has become essential in Swedish merger control. In most cases, the lack of a horizontal overlap and relevant vertical links make the self-assessment straightforward. Nevertheless, the wide discretion enjoyed by the SCA in the interpretation of "particular grounds" results in a significant number of cases where legal analysis is needed, and where the possibility of reliable consultation with the SCA becomes crucial. To date, experience from consultation with the SCA is largely positive. Whilst never unconditionally giving comfort that it will not use its jurisdiction to review a concentration, the SCA typically provides a sufficiently clear indication for the parties to feel sufficient comfort to close the transaction. Nevertheless, share purchase agreements often need to contain provisions for the possibility of post-closing SCA intervention, and given the serious consequences of this scenario, such negotiations can be complex and time-consuming.

4.10 ECLF believes that the UK briefing paper route should not necessarily be replicated. It provides the parties only with limited legal certainty as the CMA reserves the right to pick up the investigation at a later stage if circumstances change. The CMA's expansive approach to jurisdiction has led parties to submit briefing papers in many instances where such a submission was in fact not warranted (given a weak UK nexus and the absence of any competition concerns).

Time period for making referral requests remains unclear.

4.11 When does the clock start running, e.g. does the clock start running pre- or post RFIs/ can it be stopped?

"*a referral request must be made <u>at most within 15 working days of the date</u> on which the concentration is otherwise <u>made known to the Member State</u> concerned. The notion of 'made known' should be interpreted as implying <u>sufficient information</u> to make <u>preliminary assessment as to the existence of the criteria relevant for the assessment of the referral</u>"* (emphases added), para 28 of the Guidance.

ECLF Recommendation:

4.12 Guidance and practical examples on what would qualify as the concentration being '*made known*' and what constitutes '*sufficient information'* under the new Guidance would be helpful.

4.13 At the minimum, parties should be allowed to start the clock prior to signing the transaction, as soon as they can demonstrate a "good faith intention" within the meaning of Article 4 EUMR, to ensure some predictability and legal certainty in transaction documents by predicting long-stop dates more accurately.

4.14 Clarity would allow parties to have legal certainty as to whether they have successfully run-out-the-clock within 15 working days of informing NCAs of their transaction.

Transactions that have closed.

4.15 The Guidance refers to the time elapsed since closing as *'a factor'* that the EC *'may'* consider and that it would *'generally'* not consider a referral appropriate if more than six months have passed 'after the implementation of the concentration'. It is not entirely clear when this time would start running ('material facts'), nor is the EC's discretion (*a factor; may*; etc) clearly defined – creating significant uncertainty as to the potential time frame for review.

4.16 This uncertainty is further exacerbated by the option of 'later referral' raised in the latter half of para 21 which is based on 'the magnitude of the potential competition concerns and of the potential detrimental effect on consumers'.

"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. However, <u>the time elapsed since the closing is a factor</u> that the Commission <u>may</u> 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 <u>generally not</u> consider a referral appropriate <u>where more than six months has passed after the</u>

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." (emphases added), para 21 of the Guidance.

ECLF Recommendation:

4.17 The Guidance should define a definitive cut-off point as to when transactions can no longer be referred similar to call-in power limitations in other countries. For instance, in Canada, the Competition Bureau can only investigate transactions that do not meet the thresholds for one year after closing and importantly the Bureau does not have all the statutory rights it would have in a "normal" review (e.g. it cannot issue a "Supplementary Information Request" asking for large volumes of internal documents). In Norway, for example, the Authority has 3 months to call in a transaction.

4.18 The Guidance should also clarify that a referral is unlikely if the transaction has been already cleared by one or several Member State NCAs.

EC informing and inviting Member States.

4.19 It is unclear when and how the EC intends to inform and invite Member States to participate in a referral request under the new referral policy. In practical terms, what does '*becoming aware of a concentration'* mean in practice?

"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. It is up to the competent authorities of a Member State to decide whether they wish to make the request." (emphases added), para 26 of the Guidance.

ECLF Recommendation:

4.20 As above, more detail and clarity is needed.

4.21 For instance, in *Illumina/Grail* the EC only sent an invitation letter at the beginning of March 2021, even though the transaction was announced in September 2020. This seems an expansive interpretation of "becoming aware" of a transaction.

Suspension obligation (Article 7 EUMR).

4.22 While the Guidance suggests that undertakings are not obliged to refrain from any action regarding implementation, the suspension obligation under Article 7 applies to the extent that the transaction has not been implemented on the date the EC informs the parties of the referral request – and ceases to apply if the EC decides against examining the concentration.

4.23 The EC has stated that it aims '*as soon as possible'* to inform parties to the transaction that a referral request is being considered. Taking into account the potentially detrimental effect on parties forced to suspend implementation, how long does the EC intend to give itself in the "as soon as possible" window – what factors are at play here e.g. simply weekends and bank holidays or also other factors?

"If a referral request is being considered, the Commission will inform the parties to the transaction as soon as possible." (emphases added), para 27 of the Guidance.

ECLF Recommendation:

4.24 As above, more detail and clarity needed in order to allow the parties to plan for closing accordingly.

4.25 The EC and multiple NCAs have been issuing hefty fines in recent years for actions qualified as 'gun-jumping'. The compliance exercise, i.e., ensuring that a transaction initially not triggering a filing obligation is not implemented, is highly time-consuming and resource intensive. To avoid injecting additional uncertainty and margin of interpretation into EU merger control, it is necessary to define temporal (and substantial) limits in the EC's discretion to consider the request of referral of a candidate case.

5 One-stop jurisdictional assessment

5.1 The recommendations set out in the previous section address points on which the existing Guidance can be improved. In addition, the Guidance would be improved by a mechanism that crystallises the question whether a referral will be made in respect of a transaction.

5.2 A Member State can initiate a referral within 15 days after a transaction was made known or notified to that Member State. The parties to a transaction may trigger that period by initiating contact with NCAs, or the Commission may do so under Article 22(5), but even in such circumstances, the question as to who (if anyone) will exercise jurisdiction may remain open for c. two months (the formal timeline set out in Article 22). It is important to note that this period precedes any meaningful pre-notification consultations and, indeed, formal review whether at EC or Member State level; this protracts the suspension of the transaction merely due to a jurisdictional question (which ought to be resolved expeditiously with reference to a bright-line rule). It is also important to note that, in reality, the potential for a referral under the new Guidance means that jurisdictional uncertainty persists for a longer period of time, also during negotiation of the transaction and even after closing.

5.3 The Guidance would benefit from a revision that provides for an accelerated mechanism that allows parties to remove this uncertainty. The EC could consider the following building blocks, which could be employed without the need to change the wording of the EUMR:

- Parties submit an explanatory submission to the EC (for instance, by way of eTrustEx), which automatically and simultaneously is "made available" to all NCAs. The revised Guidance would explain that such a submission triggers, simultaneously, the two 15-working day periods referenced at Articles 22(1) and (2) (thereby shortening the overall referral process by 15 working days).
- To enable resolution of the jurisdictional question before conclusion of a binding agreement or the launch of a public bid, the revised Guidance would clarify that the submission can be submitted as soon as the undertakings concerned can demonstrate a "good faith intention", within the meaning of Article 4 EUMR, to put in place a concentration.

- The revised Guidance would identify the information to be included in the submission by which the transaction is made known to the EC and the Member States (see above at paragraph 5.2).
- The EC and the NCAs would review the reasoned submission in parallel in the15 working day period. The revised Guidance would explain that, if one or more Member States makes a request for the EC to assume jurisdiction over the transaction, the EC would make a decision on that request without delay (for instance, three working days following the expiry of the 15 working day period).
- Such a decision would be compatible with Article 22(3), which prescribes that the EC may make a decision "at the latest" 10 working days after a request for referral. The practice of adopting a decision "without delay" would limit the EC's use of tacitly accepting jurisdiction as per the last sentence of Article 22(3), first paragraph. The decision would be communicated to the Member States and the parties the same day.

5.4 The process outlined above would not require a change to the EUMR, would establish one consistent (rather than one for each competent authority) method to make known a candidate referral transaction, as well as establish a one-stop-shop process for that jurisdictional decision.

Annex 1: List of Working Group Members

Chair: Nicole Kar of **Linklaters**

- **AMC Law:** Anastasios Antoniou
- **British Institute of International and Comparative Law:** Dr Liza Lovdahl Gormsen
- **Cooley LLP:** Georgina Dietrich / Stella Sarma
- **Herbert Smith Freehills:** Daniel Vowden
- **Kirkland & Ellis LLP:** Thomas S Wilson
- **Linklaters LLP:** Nicole Kar and Jonas Koponen
- **Roschier:** Kristian Hugmark
- **Uría Menéndez:** Edurne Navarro
- **Vinge:** Emma Johansson on behalf of Johan Karlsson

Annex 2

Case study on call in Sweden

The Swedish Competition Act provides for mandatory notification of transactions to the Swedish Competition Authority (the "SCA") where, during the latest financial year, (i) the combined turnover in Sweden of the undertakings concerned exceeded SEK 1 billion (approx. EUR 95 million), and (ii) the turnover in Sweden of each of at least two of the undertakings concerned exceeded SEK 200 million (approx. EUR 19 million).

In addition, in cases where the first threshold is met but not the second, the SCA may order the parties to notify a transaction if the SCA considers that there are "particular grounds" for such an order. The parties can also opt to notify a transaction on a voluntary basis where only the first threshold is met.

Scope and applicability of the particular grounds rule

The SCA's right to call a transaction on the basis of particular grounds was introduced in 1997, following an increase of the thresholds to enable the SCA to exceptionally review transactions falling below the threshold.

The term "particular grounds" is not defined in the Swedish Competition Act. However, the preparatory works clarify that there must be "indications of some strength" of harm to competition for an order to be made and that a particular ground is rarely at hand if the target's turnover is below SEK 25–30 million. The preparatory works explain that particular grounds may be at hand when a strong company in a concentrated market acquires smaller competitors through successive acquisitions or a newly established company that could possibly challenge the position of the acquirer. Further, the SCA's guidelines mention that well-founded complaints from customers or competitors may also constitute particular grounds.

When particular grounds have been identified, the SCA may ex officio order the parties to notify the transaction subject to a penalty payment. Such an order may be issued within two years after the completion of the transaction. However, as the SCA is precluded from prohibiting or condition a transaction after the expiry of the two-year period, the time limit for ordering parties to notify is in practice shorter (approx. one and half years).

Prior to issuing an order, the SCA will reach out to the parties and inform them of its intention to issue an order. In cases where the SEK 1 billion threshold is met, the parties may also voluntarily notify the transaction to the SCA. This alternative enables the parties to start the clock and obtain certainty in cases where an order can otherwise be expected. For the purposes of assessing the risk of receiving an order, there is also a possibility to consult with the SCA on an informal basis. In our experience, such a consultation generally provides helpful guidance even though it is not binding upon the SCA.

The SCA's application in practice

To date, the SCA has ordered the parties to file a transaction in six cases. In addition, the SCA has reviewed more than 20 voluntary notifications on the basis of particular grounds.

One of these cases resulted in a prohibition and four cases resulted in the parties withdrawing their application and abandoning the transaction after having received the SCA's statement of objections.

The one matter which best illustrates the risk of the Swedish system is Swedbank/Svensk Fastighetsförmedling, where despite prior consultation with the SCA, the purchaser felt comfortable not to voluntary file the transaction before closing. Following an order to file (and various hold separate actions), the SCA eventually successfully sued to block the transaction, meaning that the target company was returned to its previous owner long after closing.

Difficulties encountered in the Swedish system / takeaways

Whilst voluntary filings are obviously an option, for judicial efficiency reasons they are not and should not be the preferred option for all concentrations that potentially fall within the jurisdiction of the SCA. Consequently, a large number of transactions involving a party with significant Swedish turnover for a long period of time at least theoretically run the risk of being declared null and void. Nullity as the legal consequence of a prohibition decision means that the risk is not only incumbent on the purchaser. Without due protection in the transaction agreements, the seller also runs the risk of having to return the entire purchase price, in exchange for what could be a damaged part of an unscrambled egg.

Self-assessment has thus become essential in Swedish merger control. In most cases, the lack of horizontal overlap and relevant vertical links make the self-assessment straightforward. Nevertheless, the wide discretion enjoyed by the SCA in the interpretation of "particular grounds" results in a significant number of cases where proper legal analysis is needed and the possibility of reliable consultation with the SCA becomes crucial. To date, experience from consultation with the SCA is largely positive. Whilst never unconditionally giving comfort that it will not use its jurisdiction to review a concentration, the SCA typically provides a sufficiently clear indication for the parties to feel sufficient comfort to close the transaction. Nevertheless, share purchase agreements often need to contain provisions for the unlikely event of post-closing SCA intervention, and given the severe consequences of a worst-case scenario, such negotiations could become complex and time-consuming.

All in all, whilst understanding the upsides from an enforcer's perspective of enjoying discretion in the matters it can pursue, the duration of the period of discretion in the Swedish system appears excessive. Moreover, the workability of the system relies upon efficient and clear dialogue with the SCA, something which works well today but is not guaranteed to merging parties by law.

There are lessons to be learned by the Commission from the experiences in Sweden. These relate primarily to speed, efficiency and legal certainty. The indication from the Commission to open up for consultation as to whether it is likely to accept an Article 22 referral is welcome, but this commitment needs to be clear and possibly stipulated in soft law, with firm criteria as to information to be provided (which must be limited so as not to become akin to a notification), review periods, and reliability of outcome.

Case study on call in Norway

A concentration must be notified in Norway if, in the most recent financial year, (i) the undertakings concerned generated a combined turnover in Norway exceeding NOK 1,000 million, and (ii) at least two of the undertakings concerned generated a turnover in Norway exceeding NOK 100 million.

In addition, the Norwegian Competition Authority ("NCA") may intervene and order a notification of any concentration – including acquisitions of minority shareholdings – falling below the turnover thresholds in certain circumstances.

Scope and applicability of the call-in power

The NCA's powers are widely drawn and the Agency may order a notification in two scenarios: (i) provided there is "reasonable cause" to assume that competition can be affected by the transaction; or (ii) if special circumstances indicate that the NCA should examine the transaction further. As noted above, the power also covers minority acquisitions.

The NCA has stated that it will monitor markets closely, and also encourages market participants to bring forward "complaints" against transactions, e.g. by allowing information to be submitted anonymously. Furthermore, it is not possible for parties to get informal comfort by approaching the Agency. Instead, the NCA's position has been – if in doubt, notify the transaction. Given the NCA's position, it is not customary to reach out in advance and notifying voluntarily is only done in exceptional cases/circumstances.

In terms of timing, the NCA's power applies for three months after the final agreement has been entered into or control has been acquired (which ever occurs first).

The wide scope of the NCA's call in power has been confirmed by the Competition Appeals Tribunal, see decision 2018/363 from 21 December 2018. The Tribunal made two key points. First, it stressed that the NCA has a certain margin of discretion when deciding whether to call in a transaction. Second, the Tribunal lay emphasis on the low threshold for the NCA's right, but also noted that this right is not without limitations. Indeed, the NCA must, as a minimum, be able to point to a risk of an effect on competition. The Competition Appeals Tribunal considered that the requirements of proportionality are met given the legal safeguards and, in particular, the three month deadline for call in.

The NCA's application in practice

The NCA has used this power at least eight times since January 2014, with *Bonnier Books Holding AS-Strawberry Publishing AS* (2021) being the most recent. Please see below two illustrative examples:

- In *Bonnier Books Holding AS – Strawberry Publishing AS*, Bonnier Books initially aimed to acquire a majority shareholding in Strawberry Publishing. The parties decided however to withdraw the notification following the NCA's statement of objections, from which it followed that the NCA was considering intervening against the transaction. The parties thereafter signed the acquisition of 45% of the shares in Strawberry Publishing. This transaction did not confer control and was therefore not notifiable, but was called in by the NCA.

- In *Sector Alarm*, Sector Alarm was to acquire (i) Nokas Small Systems, a subsidiary of Nokas AS, and (ii) 49.99% of the shares in Nokas AS. Neither of the transactions were notifiable (the former did not meet the turnover thresholds and the latter constituted of an acquisition of a minority shareholding not conferring control). The NCA nonetheless ordered a filing in both transactions. The NCA ultimately approved the acquisition of shares in Nokas AS subject to multiple remedies, including that the ownership was limited to 25% and that Sector Alarm was not to carry out the acquisition of Nokas Small Systems. The case illustrates that the NCA prioritises also non-notifiable transactions should they raise any competition concerns.

Case study on call in US

Statutory framework

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") requires that certain transactions – generally, those that exceed the minimum size of transaction threshold (currently $92 million) – be notified to the US Federal Trade Commission ("FTC") and the US Department of Justice ("DOJ") (collectively, "the Agencies") prior to consummation.

The HSR Act amends the Clayton Act, which broadly prohibits acquisitions that may "substantially lessen competition, or tend to create a monopoly." The FTC also has authority under the FTC Act, which prohibits "unfair methods of competition," while the DOJ also has authority under the Sherman Antitrust Act.

Scope and applicability

The Agencies have broad jurisdiction under federal antitrust laws to investigate and challenge transactions. This jurisdiction includes transactions reportable and non-reportable under the HSR Act, as well as consummated transactions previously reported and cleared under the HSR Act. To block transactions pre-consummation, the Agencies must obtain a preliminary injunction in federal court. To unwind consummated transactions, the DOJ must obtain a judgment in federal court; the FTC can obtain a judgment in an administrative proceeding before an administrative law judge.

Given this latitude, the Agencies' actions are determined in part by leadership discretion. Notwithstanding the Agencies' residual jurisdiction after reviewing a transaction under the HSR Act, parties in the past were typically comfortable that clearing the waiting period under the HSR Act – barring unforeseen circumstances – resulted in a *de facto*, if not *de jure*, safe harbor for the transaction. This sentiment has arguably shifted in the current antitrust climate, leading commentators (including the Republican FTC commissioners) to express concerns that the uncertainty arising from the lack of finality is chilling competitively-neutral or even pro-competitive merger activity. Indeed, the FTC announced in August 2021 that it has started sending "standard form letters alerting companies [with transactions under review] that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful." These letters state, in short, that parties consummating transactions before the FTC has finished its investigation "do so at their own risk" and that the FTC "may challenge transactions – before or after their consummation."

Cases/Actions

The Agencies have a track record of challenging unreported consummated transactions, including:

- In *United States v. Bazaarvoice* (January 2013), the DOJ challenged Bazaarvoice's consummated non-reportable acquisition of PowerReviews. The parties competed in the market for online product rating and review platforms. After the court ruled that Bazaarvoice violated the Clayton Act when it acquired PowerReviews, BazaarVoice agreed with the DOJ to divest PowerReviews and take other measures compensating for deterioration of PowerReviews' competition position resulting from the transaction.
- In *In the Matter of Otto Bock HealthCare North America, Inc.* (December 2017), the FTC challenged Otto Bock's consummated non-reportable acquisition of Freedom Innovations (through the acquisition of its owner, FIH Group Holdings). On appeal, the FTC upheld the administrative law judge's decision that the consummated acquisition resulted in anticompetitive harm in the microprocessor prosthetic knee market and required Otto Bock to divest the Freedom Innovations assets, with limited exceptions.
- In *Federal Trade Commission v. Facebook, Inc.* (December 2020), the FTC sued to unwind Facebook's acquisitions of Instagram and WhatsApp, despite clearing both deals after review years earlier. The FTC alleged in its complaint and amended complaint that these acquisitions were part of a pattern of anticompetitive acquisitions of nascent competitors. In dismissing the FTC's initial complaint for inadequately pleading Facebook's market power in a putative market for Personal Social Networking Services, the court nevertheless held that an acquirer could be found to violate the Clayton Act and the Sherman Act as long as it continues to hold the acquired assets, irrespective of when it consummated the transaction. The court declined at the time to address applicable remedies in challenges to such "long-ago mergers."

More broadly, in September 2021, the FTC released a report summarizing the findings of an inquiry it began in February 2020. The inquiry examined non-reportable transactions by Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft Corp. between Jan. 1, 2010 and Dec. 31, 2019. Signaling a potential uptick in the review of non-reportable transactions, FTC Chair Lina Khan said the study "captures the extent to which these firms have devoted tremendous resources to acquiring start-ups, patent portfolios, and entire teams of technologists – and how they were able to do so largely outside of our purview."