

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN HEATHER
SENIOR VICE PRESIDENT
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July 23, 2021

Mr. Olivier Guersent
Director-General
Directorate-General for
Competition
European Commission
Place Madou, 1
1210 Brussels
Belgium

Re: The European Commission's New Approach to Article 22 of the EU Merger Regulation and Related Guidance

Dear Sir,

The Chamber of Commerce of the United States of America (“**Chamber**”) is the largest business advocacy organization in the world, operating in over 50 countries to promote free enterprise and advance trade and investment, representing companies of every size and from every sector.

Among the Chamber's important roles is representing the interests of its members in matters before enforcement agencies, legislative bodies, courts and other relevant institutions. The Chamber thus takes this opportunity to present its serious concerns in relation to the European Commission Guidance on the application of the referral mechanism set out in Article 22 of the EU Merger Regulation¹ to certain categories of cases (“**Commission Guidance**”).² In particular, the Chamber finds that the Commission Guidance introduces a paradigm shift that (1) creates significant uncertainties for businesses, including those with little or no presence in the EU, (2) adversely and disproportionately impacts industry, (3) rests on a dubious legal basis, and (4) lacks adequate stakeholder consultation, which is especially important considering its dramatic, worldwide impact.

The Chamber respectfully urges the Commission to reconsider its new approach to Article 22, suspend the Commission Guidance, and engage in a full consultation on the impact of the proposed changes.

¹ Council Regulation (EC) N° 139/2004 of January 20, 2004 on the control of concentrations between undertakings, OJ L 24/1, January 29, 2004, p. 1 (“**EU Merger Regulation**”).

² 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, March 26, 2021.

1. SIGNIFICANT UNCERTAINTIES FOR BUSINESSES

- (1) Two major changes to the EU merger control regime arise under the Commission's new approach to applying Article 22 of the EU Merger Regulation. First, transacting parties to numerous operations lose the benefits of objective, largely turnover-based thresholds for reporting concentrations, which are now replaced by subjective criteria. Second, consummated concentrations may now be called in for review at EU level.
- (2) The Chamber is particularly concerned with the great uncertainty resulting from this new policy approach, which raises significant substantive and procedural issues. The Commission Guidance – a mere six and a half page soft law instrument – cannot adequately address the range of concerns this shift in enforcement practice represents. It even appears to run contrary to the declared objective of facilitating and clarifying the application of the new approach to Article 22 by increasing “*transparency, predictability and legal certainty.*”³

1.1 Introducing subjective thresholds

- (3) In the context of a globalized economy and the increasing layers of merger control regimes worldwide, merger notification thresholds serve the primary objective of providing as much transparency and predictability as possible to merging parties on transactions that may trigger antitrust scrutiny.⁴ The International Competition Network (“**ICN**”) therefore considers that thresholds should be “*clear and understandable*” and favors thresholds based exclusively on objectively quantifiable criteria (i.e. turnover, or assets)⁵ that are readily accessible and enable parties to make swift and precise assessments.
- (4) Until now, the EU system earned praise for aligning with these recommendations and even served as a model of predictability and legal certainty. Most jurisdictions today, following in the EU's footsteps, rely on objective notification thresholds.⁶
- (5) However, the Commission Guidance now excludes the benefit of objective thresholds in numerous cases by encouraging National Competition Authorities (“**NCA**s”) to refer certain sub-threshold transactions to the Commission. This rests on the unsubstantiated premise that the reviewability of acquisitions of nascent competitors may not be based on objectively measurable criteria.
- (6) This major departure from established practice is liable to generate significant unpredictability, which the Commission Guidance does not alleviate. While the

³ Commission Guidance, § 12.

⁴ International Competition Network, Recommended Practices for Merger Notification and Review Procedures (2018). See also, OECD, Local Nexus and Jurisdictional Thresholds in Merger Control – Background Paper by the Secretariat (2016).

⁵ International Competition Network, Recommended Practices for Merger Notification and Review Procedures (2018), Section II, D and E.

⁶ OECD, Merger Control in Dynamic Markets – Background Note by the Secretariat (2020), page 15. The note refers to the earlier work of the OECD: Local Nexus and Jurisdictional Thresholds in Merger Control – Background Paper by the Secretariat (2016), § 69. See, also, Anu Bradford, The Brussels Effect: How the European Union Rules the World, Oxford University Press (2020), page 115 *et seq.*, demonstrating that a significant number of third-country agencies have looked to the EU in tailoring their own competition regimes.

Guidance presents substantive criteria that identify likely candidates for referral under the new approach, these fall short of the standard of clarity under the ICN's recommendations – recommendations that the EU played a leadership role in creating.⁷ Moreover, the criteria in the Commission Guidance are at odds with the principle of legal certainty, a general principle of EU law under which transacting parties must be able to identify in a foreseeable manner the authority competent to examine a given transaction.⁸ In particular:

- **The Commission Guidance criteria (paragraph 19) are overly broad, open-ended, and thus provide insufficient guidance.** For instance, how can companies determine what the Commission and NCAs would view as an “important” innovator or research? Also, while open-ended criteria may be justifiable with regard to guidelines on the substantive assessment of mergers, they lack the required predictability when used to ascertain jurisdiction over transactions. Companies are left unable to self-assess whether EU jurisdiction may be excluded. This places an undue burden on the industry and eventually consumers, which contravenes “*the requirements of legal certainty and speed which apply in the context of control of concentrations.*”⁹
- **The Commission Guidance criteria also leave room for disparate interpretations at Member State level.** Certain NCAs recently confirmed such interpretive hurdles when sharing their views on appropriate cases for Article 22 referrals.¹⁰ The disproportionate effect of a Member State’s referral request on transacting parties further compounds the uncertainty faced by companies, since Article 22 provides that an NCA’s referral request carries the quasi-automatic effect of placing a suspensory obligation on parties.¹¹ Any request under the current regulatory landscape will therefore have very tangible and potentially disruptive effects on transaction timelines.
- **The new approach to Article 22 confers EU merger control with sweeping extraterritorial scope.** Turnover thresholds set out in the EU Merger Regulation and national merger regimes provide a solid and predictable proxy to establish sufficient economic links between transactions and the EU, thereby

⁷ The ICN recommendations note that jurisdictions were examining whether to introduce supplementary thresholds to address a perceived gap in enforcement regarding high-value, low-turnover targets. In this regard, it specifically called on those jurisdictions to ensure that “*the new thresholds are clear and understandable and that the transaction has a material nexus to the jurisdiction*”. See, International Competition Network, Recommended Practices for Merger Notification and Review Procedures (2018), Section II, B.

⁸ Judgment of December 18, 2007, *Cementbouw Handel & Industrie BV*, Case C-202/06 P, EU:C:2007:814, § 38.

⁹ Judgment of 14 July 2006, *Endesa SA v. Commission*, Case T-417/05, ECLI:EU:T:2006:219, § 209.

¹⁰ For instance, speaking at a webinar, the Prosecutor General of the Belgian competition authority stated that good candidate cases included transactions involving an undertaking benefitting from state aid. See, PaRR, Belgian official says deals involving state aid recipients could be good Article 22 candidates – Daldewolf, May 3, 2021.

¹¹ Article 22, paragraph 4. The triggering event is the parties’ receipt of a Commission notice that a Member State has made a referral request. However, Article 22, paragraph 2 provides that when the Commission receives such a request, it must inform the parties “*without delay*”, and thereby triggering the suspensory obligation. No safeguards are provided.

justifying the Commission’s jurisdiction under public international law.¹² By contrast, the Commission Guidance’s subjective criteria could result in transactions flagged for EU review, even if concerning businesses with little or no activities in the EU internal market.

Moreover, the Chamber is significantly concerned about the broad language used in the Commission Guidance on the requisite standard of proof Member States must satisfy to refer a transaction under Article 22. Indeed, the Commission Guidance provides that a Member State is only required to demonstrate that, “*based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse impact on competition, and thus it deserves close scrutiny.*”¹³ Such language could very well cover mere speculation as to the risks a proposed transaction could pose to competition in the EU, thereby inviting referrals of transactions concerning businesses with little to no EU activities. The Commission has no recognizable authority to review mergers where the target of an acquisition has no turnover within its jurisdiction. Any concerns with such transactions are of concern to the competition authorities in other jurisdictions. Any effort by the Commission to insert themselves is extraterritorial and violates the principle of international comity enshrined in the U.S.-EU Agreement of 1991.¹⁴

1.2 Opening an *ex post* EU merger review regime

- (7) The Commission’s new approach to Article 22 also opens the possibility for each Member State to refer closed transactions for EU review. Moreover, since Member States generally do not have jurisdiction over transactions below their thresholds in any event, they have no incentive to overlook an invitation from the Commission to refer a deal under Article 22(5). This effectively amounts to creating a power to call-in transactions for EU review.
- (8) Such a new power is hardly constrained by Article 22, which contains no express time-limit for referring consummated mergers. By subjecting transacting parties to the perpetual risk of *ex post* merger review, particularly when based on inherently subjective criteria, this generates significant uncertainty for businesses. The Commission Guidance provides no clear limitations on this new power:
 - **Indicating that a referral is “generally” not deemed as appropriate more than six months after implementing a merger is largely unsatisfactory.** First, the event triggering this six-month period is uncertain. The Commission Guidance does not explain what constitutes “*material facts*” regarding a concentration or how these should be made public in the EU. Second, the six-month period is merely indicative, and the Commission makes clear that it is not bound by it.

¹² For instance, as recognized in *Gencor*, the EU Merger Regulation’s scope is notably rested on “*sales operations within the common market as a factor linking the concentration to the [EU]*”. See, Judgment of March 25, 1999, *Gencor*, T-102/96, EU:T:1999:65, § 85.

¹³ Commission Guidance, § 15.

¹⁴ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws - Exchange of interpretative letters with the Government of the United States of America, No L 95/47, September 23, 1991.

authorities faced with reviewing jurisdictional questions and otherwise unproblematic cases.

- (13) **Second, stifling innovation by curbing incentives to invest in start-ups.** The new policy approach will directly impact SMEs, as transactions to acquire these are most likely to fall below EU and national thresholds. Acquisitions are a strategic driver for start-ups to scale-up and expand in Europe, particularly since venture capital funding in Europe remains significantly lower than in the United States.¹⁸ By placing additional regulatory burdens on SMEs, the new approach will impede their access to capital and growth opportunities. This is contrary to the Commission’s general efforts to reduce the regulatory load for SMEs, and in the longer run, could harm the European economy as a whole.

3. A DUBIOUS LEGAL BASIS TO THE NEW APPROACH TO ARTICLE 22

- (14) The Commission Guidance appears to rely on the premise that the EU Merger Regulation affords the Commission with a general power to review any transaction that may significantly impede competition in the internal market. However, this leaves serious doubts as to whether the new approach rests on a sound identification of the objective of the EU Merger Regulation or a correct interpretation of Article 22.
- (15) The primary role of the EU Merger Regulation is to designate the Commission – under the “*one-stop shop*” principle – as the single venue in the EU to deal with the largest, cross-border mergers. The underlying objective is to relieve transacting parties from scrutiny by multiple Member States, as recognized by the Competition Commissioner upon the enactment of the original EU Merger Regulation.¹⁹
- (16) Member States were also careful to limit the role of the Commission, as reflected by the EU Merger Regulation’s limited scope (Article 1), which focuses on concentrations of EU dimension fulfilling a set of turnover thresholds. The regime thus provides for a scheme of separate competences. While the Commission has exclusive oversight in large cross-border transactions, Member States remain competent to structure their own national merger control regimes.
- (17) Suppose that the EU legislator had intended, to the contrary, to create a system whereby the Commission could have jurisdiction to review both larger transactions of EU dimension (under Article 1) and smaller concentrations that do not meet any of the lower Member State thresholds. In such scenario, the EU legislator would have expressly provided for such additional substantive scrutiny.

¹⁸ Venture capital funding in Europe is reported as reaching USD 24 billion in 2020, compared to USD 73.6 billion in the United States. (see, <https://sifted.eu/articles/europe-us-vc/>).

¹⁹ See, Sir Leon Brittan Q.C., subsequently Lord Brittan, The Law and Policy of Merger Control in the EEC, Address to the Bar European Group of May 3, 1990 (available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_90_36). In particular, the Competition Commissioner explained: “*All mergers with a Community dimension will benefit from the one-stop-shop regime. We have clarified and simplified the law in an area which was full of uncertainties and complications. A large European merger had to be hawked around several European capitals for approval and consideration also had to be given to the precise scope of Articles 85 and 86 in this field, on the basis of two judgements of the Court of Justice. Now we have the policy right and we have clarified the procedures and the substantive rules.*” (emphasis added).

- (18) However, it is clear from the legislative history, language and associated recitals of Article 22 that this provision was always intended as a residual mechanism to address some Member States' lack of a national merger regime and as an efficiency tool to avoid multiple filings. In other words, Article 22 was never foreseen as providing a possibility for Member States with a national regime to refer a case for EU review despite having no original jurisdiction.
- (19) In light of the above, Article 22 does not afford the Commission with a general mandate to review transactions that meet neither EU nor national merger notification thresholds. Such a power could only be accrued through a revision of the EU Merger Regulation. It appears, however, that the Commission's new approach reflects a broader attempt to impose additional scrutiny on certain transactions, while sidestepping the legislative route. This is all the more striking in view of how the new approach to Article 22 meshes with the recent Commission proposal for a Digital Markets Act ("DMA").²⁰ The DMA proposes a targeted duty on identified gatekeepers to inform the Commission of all their transactions. However, it does not provide the Commission with any powers to challenge such transactions as this would have required a different legal basis and more burdensome legislative process. In contrast, the Commission's Guidance over its plans to redirect the use of Article 22 is an expanded version of the authority it is seeking through the legislative process. The envisaged interaction between the DMA and the Commission Guidance is clear. Should the DMA be adopted in its current form, the Commission could effectively leverage the information gathered under the DMA by exercising its power under Article 22(5) to call-in and review gatekeepers' sub-threshold transactions.

4. ABSENCE OF STAKEHOLDER CONSULTATION

- (20) The Chamber's present initiative to communicate its serious concerns is all the more important since the Commission Guidelines were issued without prior consultation of any of the numerous relevant stakeholders, an especially serious concern as they have broad impacts far beyond the EU's borders. This is inconsistent with the principles of openness and transparency of EU action as enshrined and elaborated in the Treaty on the European Union²¹ ("TEU") and the Commission's Better Regulation Guidelines.²² As specified by the TEU, one of the hallmarks of these principles is engagement with stakeholders.²³ Such engagement is not a perfunctory procedural requirement but an essential tool to ensure that all EU action rests on strong evidence and broader validation by those concerned.²⁴
- (21) The Commission's new approach to Article 22, as above-discussed, is tantamount to a complete paradigm shift in EU merger control. The Commission could not have

²⁰ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM (2020) 842 final, December 15, 2020.

²¹ See, Articles 1, 10 and 11 TEU.

²² Commission Staff Working Document on Better Regulation Guidelines, SWD (2017) 350, July 7, 2017 ("**Better Regulation Guidelines**").

²³ In particular, Article 11 TEU provides: "[t]he European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent."

²⁴ Better Regulation Guidelines, Chapter 1, section 2, which describes Better Regulation as "a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders." See, also Chapter 7, section 1.

overlooked that its adoption was “*likely to provoke a degree of public attention (and possibly adverse reactions) in the EU institutions and beyond*”.²⁵ Such new policy approach is necessarily a “*major initiative*” and should have been subject to a prior impact assessment or “roadmap” for public feedback.²⁶ These documents are necessary to explain the contemplated policy option and to enable stakeholders to provide timely and important feedback.²⁷ In this regard, the Chamber recalls that Executive Vice President Vestager recently emphasized the importance of communication, cooperation and openness in developing new EU policies.²⁸

- (22) During the 2016-2017 review process stakeholders were not asked to present their views on a revamp of the Commission’s approach to Article 22. The evaluation was essentially focused on the existence of an “*enforcement gap*” and the sufficient adequacy of current jurisdictional thresholds. The most strategic issue, i.e. the necessary follow-up action to address this perceived gap, was never submitted for public feedback. By omitting to engage with stakeholders, especially on the possible identification of other objective thresholds to capture gap cases, the Commission departed from its own Better Regulation Guidelines and relinquished the necessary dialogue on the wide-reaching impact of a strategic new policy. As a result, the Commission’s new approach to Article 22 rests on the peremptory assertion that problematic acquisitions of nascent competitors cannot be captured by objective criteria.
- (23) The valuable predictability brought by the EU Merger Regulation’s turnover thresholds and the *ex-ante* regime should be preserved and not compromised without good reason. The new approach to Article 22, as set out in the Commission Guidance, rests on the premise that a perceived enforcement gap does in fact exist for acquisitions of certain low-turnover targets. However, public consultation would have shed important light on the lack of overwhelming evidence in this regard. Notably, during the 2016-2017 review, only 3 out of 15 responding NCAs considered that such a gap existed.²⁹ Also, as an overall majority of respondents considered that introducing complementary thresholds was not justified, the Commission dropped its proposition for a new transaction value threshold. Given this, it appears wholly disproportionate that the new Article 22 policy raises legal uncertainty for numerous concentrations in its attempt to identify competition concerns that might arise in only a fraction of these cases.

²⁵ See, Tool #6, Planning and Validation of Initiatives.

²⁶ These are not limited to legislative proposals. For instance, the Better Regulation Guidelines specify: “[i]mpact assessments collect evidence (including results from evaluations) to assess if future legislative or *non-legislative EU action* is justified.” (own emphasis) (Chapter 1, section 3.4).

²⁷ The Better Regulation Guidelines provide that stakeholders must be able to give feedback on each roadmap or inception impact assessment (Chapter 7).

²⁸ Speech delivered on July 5, 2021 at the College of Europe in Bruges (accessible at: https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/global-perspectives-eu-competition-policy-special-address-competition-summer-school-college-europe_en). In particular, the Vice President declared that “[t]his same strong fabric – communication, cooperation, openness – is also the starting point for every new policy project we develop.”

²⁹ Commission Staff Working Document, Evaluation of procedural and jurisdictional aspects of EU Merger Control, SWD (2021) 66 final, March 26, 2021, § 87 and footnote 110.

- (24) In light of the above, the Chamber respectfully urges the Commission to reconsider its new approach to Article 22, suspend the Commission Guidance, and engage in a full-fledged consultation on the impact of the envisaged changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Sean Heather". The signature is written in a cursive, flowing style.

Sean Heather