After decades of discouraging European National Competition Authorities (NCAs) to refer cases to the European Commission (EC) on the basis of article 22 of the European merger regulation, Executive Vice President in charge of competition, Margrethe Vestager, announced on 11 September 2020 (IBA 24th annual conference), that the EC will soon review mergers referred by NCAs on that basis. This is a turning point for merger control in Europe.

**Background:** article 22 of the EUMR, is known as the "Dutch clause". It was included in the old EU merger control regulation to give EU Member States that did not have national merger control rules (as was the case of the Netherlands at the time) a legal basis to refer concentrations that could harm the single market to the EC.

**What this change of approach means:** a concentration that would neither meet EU nor—any—national thresholds can be referred by NCAs to the EC. The EC can decide whether or not to review it.

**What are the conditions for referral:** the concentration must (i) affect trade between EU Member States (MS) and (ii) threaten to significantly affect competition within the territory of the requesting EU MS(s). The first condition will be met by companies that have cross-border activities within the EU. To demonstrate the second condition, NCA(s) only have to provide *prima facie* evidence of a risk of distortion.

**Who can make the referral to the EC:** EU NCAs

**Why this change now:** for the last five years, some have advocated that merger control in Europe needs rethinking, as a number of M&A transaction (including "killers acquisitions"), are not caught due to targets low turnover, which do not meet the relevant thresholds triggering merger review.

**When will this change take place:** likely by mid-2021. Further guidance is expected from the EC by then.

**Are certain sectors specifically targeted:** the referral system applies indistinctively to all sectors; however, the pharma and tech sectors are under the spotlight.

**Practical impact for companies:** referral requests add significant delays to M&A deals. Companies will therefore have to factor this in when drafting conditions precedents. This change occurs in the context of an overall trend towards greater legal uncertainty as a consequence of *inter alia* Brexit, new and unclear "value of transaction" tests (Germany and Austria), and possible future *post-closing* system, which France is advocating for.

**What’s next:** other important developments are to be expected soon, including a revised approach to market definition.
If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Paris lawyers:

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