

Acquisitions Under the Spotlight: Analyzing the Expanded EU Merger Control Regime

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Ingrid Vandenborre: Good morning. Good afternoon, everyone, and welcome to our program of today. We are going to be discussing the Commission's new Article 22 guidance that will expand European Commission's jurisdiction to review transactions below the notification thresholds in EU member states. I'll give a bit of an introduction for those of you who are not familiar with the topic of discussion; and, then, I'll introduce our very eloquent panel too that will be highlighting what the focus should be as we consider the potential for transactions to be reviewed under the new guidance.

Just so by way of introduction for those of you who haven't been following that development, under the March 26 guidance that was issued by European Commission, the Commission will monitor potentially problematic acquisitions and will invite member states to refer deals for EC review that is followed and in context of the Commission's review of pharmaceutical and technology sector deals that may be involved with companies with no or low revenues but with allegedly very important competitive consequences. But all acquisitions under thresholds are potentially affected. Once notified by the EU, companies would be prevented from implementing their acquisition until completion of the Commission's investigation so that would add potential timetable to the review. Even completed transactions can be subject to review post-closing. The guidance suggests a six-month cutoff period for review that would run from a point in time when the guidance indicates the material facts of the case are "made known to the applicable officials." So, at some point, merging parties may obtain comfort through informal engagement agency once those facts are "made known" but there is no legal bar to major reviews. The legal approach is applicable to any deals that could potentially affect the EU regardless of the nexus.

And, so, we've seen that in a couple of examples. There are two deals that have been under review to date. There is Illumina Grail that's been under review and now Facebook customers also have been referred. In each of those cases, the European Commission has asked member states to refer transactions for review. And then finally, just a note, that that guidance should also be considered in the context with the European Digital Markets Act, which is currently undergoing parliamentary review and, which will, once enacted, allegedly will require gatekeeper companies to inform the Commission of their transactions. So, together with this Article 22 reform, that would increase the span of review, particularly for those sector deals. So, with that, you have a bit of an introduction as what we're dealing with. Clearly, it is a very relevant and very potentially significant expansion of jurisdiction that raises a lot of questions in terms of what its scope will be and how it will be used.

Let me introduce to you our panel. My name is Ingrid Vandenborre. I'm the Managing Partner at Skadden Brussel's office that centralizes its non-U.S. Antitrust team. With me today, I'm very happy and very fond to introduce to you Paul Csiszár who is the Director of Basic Industries Manufacturing and Agriculture at the Directorate Générale for Competition at the European Commission. His directorate is overseeing Illumina Grail, for example, so hopefully he will be able to share with us some of his thoughts on how the guidance will be applied.

Also with us today, is Jacques Crémer who is Senior Researcher at the Toulouse School of Economics and he is a co-author of the *Competition Policy for the Digital Era Report*. Those issued and very renowned and very important to the Commission of Digital Market Strategy. And then, we have Dr. Jorge Padilla with us as well. He is a Senior Managing Director and Head of Compass Lexecon EMEA. And joining us, as well, is my partner, Giorgio Motta, from our Brussels Antitrust group.

With this very distinguished panel, I'll note and then I'll also say it. We'll apply a bit of Chatham House for what that means. But, I think, in essence, it means each of us is speaking in their capacity. This is a brainstorming session of something what the guidance could mean, recommendations it could mean for companies for those of you listening, advising your teams and your clients internally. What does the guidance mean? What should it mean? What do we need to prepare for? Just to collect our best thoughts and see if we can get to where what's good modus operandi or best practice to apply.

The first question. We'll go through a couple of points. We'll talk a little about the canon cases. We'll talk about process as well. But maybe the first question upfront is the new guidance useful? Is it necessary and is it useful? Is it trying to get at something that is important or is it essentially overkill and are we just needlessly expanding and rendering review unpredictable? Paul, perhaps with a bit of that controversial question landed in your lap, do you want to give us your thought a bit about the background and need the Commission, as seen in your view, to introduce the guidance?

Paul Csiszár: Right, yes. Thank you, Ingrid. Hello, everybody. Happy to be here. Ingrid, you followed the basic rule that a good lawyer never ask a question where he or she doesn't know the answer. Is this useful? I think you've all guessed my answer, yes. It is very, very useful. Before I go into that, I would just repeat that I speak in my personal capacity today. Indeed, this is a little bit brainstorming. I'm going to take as much notes as you and probably the audience, because I want to hear your views. Convey to my colleagues, discussing it. The guidance are very new. The new application of Article 22, which has been in our merger regulation for a long time, is a new chapter and, therefore, we have to learn a little bit as we go along.

I think the guidance is a little bit more serious. The guidance is very useful for two reasons. One, it supports a much needed new approach to Article 22, as announced by our Executive Vice President, last September. And it provides the guidance provides very useful elements how to apply this in practice. So, just a little bit, two or three sentences to explore that. I think we all agree that in the past decade, we saw market developments that resulted in a gradual increase of mergers involving firms that play or may develop into playing a significant competitive role in the markets, despite the fact that they generate little or no turnovers. We

know those cases. We read about them and so forth. So clearly there is an issue which the DG COMP has been looking at over the years considering whether what external base threshold is the right approach or whether there is an enforcement gap. What should we do about it? Again, these market developments are there. They exist. Other jurisdictions do address them various ways. Probably there is no one super silver bullet to deal with these issues. I mean, obviously, one approach could have been just to set a threshold based on the value of the merger. The problem with that, if you set it too high, you don't get certain transactions. If you set it too low, you have unnecessarily many, many more notifications which you don't have the resources and companies don't want to deal with. So, we think that the Commission's new approach into Article 22 provides flexibility to target concentrations that do merit review at EU level, notwithstanding the fact that their own turnover is very low or even nonexistent. So, I would stop there. I could go on and on.

Again, the second part of the question, why the guidance is useful? The guidance contains a lot of elements which are not new. I think, later in our conversations and interactions, these elements will come up, at least, or I will be able to remind everybody. But it also contains some factors and elements which, I think, can form the basis of an intelligent approach to this question. What I can tell you in my very personal capacity, as somewhat a member of senior management in DG COMP, we are dealing with the incoming cases as all comes in under our jurisdiction, is that we have plenty of cases. We are not looking for increasing our dockets, the number cases in our dockets substantially. We are not looking for excuses there. And if you examine the public discourse over the years, if you examine again my commissioners and my director general of speeches, I think you'll get together with what is in the guidance. You will get a good feel what we are interested in to capture, to have a balanced enforcement. So, I'll stop there and happy to listen to others.

Ingrid Vandenborre: Thank you. Maybe I'll let Jacques and then Jorge to comment kind of their perspective whether the guidance gives us something that was needed for.

Jacques Crémer: Should I go ahead?

Ingrid Vandenborre: Yes.

Jacques Crémer: First thing is the Commission was under lots of pressure to change the law. So, I think it would have been very difficult not to do something about mergers. Lots of people have been very worried about the fact of small mergers becoming exploding timebombs in them, so I think something had to be done. My reading of the guidance is actually – I find it relatively pleasant to read, which is rare for a document of this type and relatively clear. When you read about the economics, which are included, I think we'll discuss them in more detail later – what are they looking for? What are the cases and so on? They look relatively reasonable. The truth of the truth – I'm not sure that in tech the issue of mergers was, mergers which have gone under the radar, was that important. As important as the IP, the public discourse. In case things do come up, I think it's fine to do it this way.

One thing which I have been very surprised when I've been trying to do my preliminary research for this meeting, is how many law firms were putting out statements explaining the new regulation and saying, "but this is catastrophic because it induces lots of uncertainty. We don't

know and firms are not going to know,” and so on and so on. But, it seems to me it’s a full case of competition law. If I gave you Article 101 and 102 and you looked at them, you would say “Oh, what uncertainty. Nobody can understand what this means.” And the way those things are figured out is by case law; and, I assume that the uncertainty will last two, three years and then the uncertainty will disappear. I’m not that worried about the uncertainty. And then we learn by saying that the Illumina Grail merger, which was the first one that was referred to the Commission, has also been challenged by the FTC. It seems that, at least with the first case, which is coming up, there was some reason for opposing it, and it looks like a very taxing case, but we’ll see how it goes.

Ingrid Vandenborre: Thank you very much, Jacques. I think – I know Giorgio, at least from our perspective, we have discussed we have some other views on the unpredictability. But Jorge, I’m asking you first what are your thoughts? Not a lot of unpredictable consequences? Is it necessary to have the guidance? What’s your view?

Jorge Padilla: Well, I think that the guidance is useful, but what I want to talk about is the approach, whether there is a change in the position of the Commission in respect to Article 22 is useful or is reasonable. And I think that the answer is yes, but I want to caveat that with two comments. I mean, first, I think that the Commission is telling us in the guidance that what motivates the change in its reappraisal, I think that is the terminology that they use. The reappraisal of the application of Article 22 is motivated by concerns about Type 2 errors that these insufficient interventions in connection with mergers involving companies that are below the turnover thresholds, and in situations in which there are stock-opts or potential entrance or there is an important innovator or firms are representing an important competitive force or they have access to key assets or they provide products or services that of are great importance. And it seems to me that, especially with respect to the last three categories, you know, the fact that these companies don’t have large turnovers doesn’t mean that their acquisitions cannot have anti-competitive effects. And I think that, therefore, it makes sense. Now, I’m not aware of any study that quantifies in a systematic way the likelihood of these Type 2 errors in connection with these firms. I think there a few post mortems out there, but they are somewhat insufficient. But I think there is growing consensus that those types of mergers may be problematic.

In fact, I would add one category of mergers that would be a matter of concern to me and these I have direct experience because I’ve seen these happening in which a company starts buying slowly distribution assets, distribution companies, slowly and slowly, all of them below thresholds, and by the time that the competition authorities realize actually, distribution in the market is foreclosed. You know, all those sequential acquisitions of distribution companies have actually foreclosed the market.

Now, I’m an economist, so I think that I’m advocating always for cost-benefit analysis. The benefits are that we will control or minimize some Type 2 errors. What are the costs? I think that there are some costs that are there but maybe they are not that problematic, that are implementation costs, the commission must have internalized those costs when making the decision. And then there is always the possibility of Type 1 errors. Whenever you take measures that minimize Type 2 errors, you increase the likelihood of Type 1 errors, and vice versa, by the way, so it’s impossible to solve both of them at the same time. What are the ones that may be a matter of concern? Well, you could say that exposed to maybe too many

interventions. I'm not so sure that I worry about those. I may have a little more concerns about some effects. So mergers that may not happen that should happen because actually they are efficient. Now, in particular, my concerns would be limited to the first two categories identified in the guidance. First, in the case of the startups and recent entrants in the case of innovators. And that's because entry and innovation are highly uncertain propositions. Very risky, and whoever is going to invest wants to have exit routes. And mergers is a form of exit which, I think, and many people think, is quite efficient. So, I'm a little bit worried about those Type 1 errors in connection with those type of mergers, and much less worried about Type 1 errors involved when the mergers involve companies below thresholds but that impose an actual or important significant constraint or that have access to key assets or that provide key services. There, I am much less concerned. And look, I mean, as to legal certainty, I am not the right person to ask. I'm an economist. In fact, I typically propose policy reforms that maximize legal uncertainty even if they, in my opinion, promote economic efficiency.

Ingrid Vandenborre: Okay. With that maybe, I think, Giorgio, we're left with you to help us on legal certainty. Paul, what are your thoughts?

Paul Csiszár: Thank you, Ingrid. Obviously, I think the specific concern that, or the questions that this guidance has raised to businesses are one of predictability of the merger process. We do know that the EU merger control process is, the beauty of the process is, has always been predictability. Companies know if and when their deal is subject to a merger control approval. Obviously, with this guidance, companies have to do a bit more efforts now. And what I think in practice this means, is that there will be a need for companies to do a bit of a self-assessment, if you will, of the potential antitrust risks or the antitrust merits assessment in the EU at the outset of the deal, right? So at a much earlier stage and, basically, I think, the companies will need to expand somehow the type of assessment that they already do today in the context of other jurisdictions like the voluntary jurisdictions that we typically look at like the UK. But, I think, it's important and I just want to lead to what Jorge just said. This kind of self-assessment, it's not necessarily easy because the conditions of the Article 22 guidance, as Jorge just mentioned, are really based on a prospective type of assessment, right? I mean, the type of interesting case is a relevant case. Cases where the target will be an innovator, a potential and important competitive force, so there will always be somehow a need to look into the future and what the target's going to look like in one or two years down the road. And this is going to be something, a type of assessment that will need to be somehow frontloaded in the process. There have been questions about process – and I know we will get there—so let me pause there, because I think the guidance does provide some helpful elements on the process. But I do have some suggestions there.

Ingrid Vandenborre: Thank you. I think it's the predictability is, of course, key and it's also there are other jurisdictions that similarly rely on more on the substance of assessment for jurisdiction. One element of those is that they don't typically have a bar on closing right. They don't typically. It allows for kind of a more systemic review but you don't have an automatic bar on closing in the same way as you have under the EC rules. The things that have been said lead us, I think, very nicely into the next set of the discussion which is, What are the right criteria for assessment? We know there's are a couple of criteria. Jorge started to identify a few where he saw more of a basis for the guidance to be effective or useful. Others may be less so. We know that there are other regimes that apply, for example, valuation thresholds that, along with

some kind of local nexus, is evaluation threshold a good threshold? Will this de facto apply a bit as evaluation threshold? That maybe de facto the Commission would look at those deals that are particularly high value. Is another criteria whether there are reviews pending in other jurisdictions? And are there any elements that may suggest are safe harbors that companies can look to and say, well, in these circumstances, we know the Commission would typically not be interested?

And, maybe, before I'll go back to Paul for input on that, I just wanted to flag something that, I think, Pierre Regibeau mentioned this on a panel yesterday when he said that – because we know that the guidance is meant to target “killer acquisition” type of deals and he mentioned that the concept of killer acquisitions doesn't really apply in the same way to digital, he said, as the pharma, I'm just reading from his notes, he says, in digital there is no long and visible innovation process in the same way as in pharma where there are pipelines and precise obligatory steps. So it's difficult in the digital sphere, according to Pierre, to tell in advance, whether an acquisition will give off innovation. This goes to the forward-looking concept here, and that difficulty in making that self-assessment that Giorgio mentioned. And, so, the EC would ask whether companies have an overlap or whether it impacts competition between ecosystems, potentially. But, he's cautioning against exaggerated interpretations of this concept and, particularly, in the context of Article 22.

So, that brings us to maybe a good startup position to asking what are the right criteria to fall under the Article 22 review or potential review? What are the key candidates' cases, if we look at the different potential criteria? Paul, I'll start back with you to set us right there.

Paul Csiszár: Thank you, Ingrid. A lot of issues are on the table. Just a little footnote, I don't like the expression of “killer acquisitions.” Actually, I do like it because people tend to focus on future competition and innovation competition concept and it's a catchy phrase. But, on the other hand, not all problematic acquisitions with no turnovers are killers. Many of them maybe delay or cause other harms and not killing, actually, the target or the target's business or the target's innovation. That's a footnote. So, I think you said, or it's being said, that the Article 22 guidance defines the effect on trade and a significant effect of competition within the territory of a member state in broad terms, right? I mean, this is, indeed, the legal criteria, which has existed for 20-30 years for Article 22 in the merger regulation. So, nothing new is there. These terms—you used the frame “broad terms,” yes, could be viewed. Nevertheless, they are not new. We are all familiar with these phrases—these two legal criteria. You are familiar, we are familiar with well-established case practice, as well as the related jurisprudence on that. Sorry, for playing a little bit too much lawyering here. So, I would say that in that sense, the new guidance doesn't bring anything new. It refers back to other notices and other guidances of the Commission's established practice and so forth, of how to meet the legal criteria of Article 22 under the new concept. Again, the difference is that the target may not have or does not meet the threshold, the turnover threshold.

So, that's on elements which are not new. What's new, of course, is the additional criteria, which the guidance lists where the focus should be. I think Jorge focused on it a little bit as well as Jacques. Those are the—by the way—one more thing, I made a note that in your introduction, Ingrid, you said that the Article 22 provides possible jurisdiction for the Commission regardless of nexus. I would like to take an issue with that, very politely, but very

firmly. The guidance paper – the new Article 22 – expressly provides that meeting the two legal criteria of Article 22 could ensure that the transaction has a sufficient nexus. And this has been in the books for quite a long time. Again, there is jurisprudence on that, there is case practice. If those legal criteria are not met, irrespective of whether a member state wants to refer, irrespective of whether the Commission would like that jurisdiction, the jurisdiction cannot have jurisdiction on a case. So, the nexus will always have to be there because it's one of the basic legal criteria.

Now, what is new in the guidance – I don't want to read the whole Article 19 – you are familiar with and your audience can look at it, I mean, indeed, the focus – the new elements is where the turnover or at least one of the undertakings concerned does not reflect its actual or future competitive potential. And that's a criteria of which is not black and white. It's not a per se criteria as an economist would say, fortunately, I would say. And then, the guidance provides a couple of examples – non-exhaustive examples – such as the target being an important innovator, actual or potential important competitive force. Again, interpretation of what constitutes “actual” or “potential” important competitive force, we have the EC horizontal merger guidelines, it's been in the books for a long time. That horizontal merger guidelines talks about pipeline products and their importance in innovation. All these things have been “in the books” for a long time (quote unquote) in our practice and our jurisprudence for a long, long, time. Other factors, as I think it was mentioned earlier, access to competitively significant assets, key inputs, components. Again, all of this put in the context of very of the consideration received by the seller is particularly high compared to the current turnover. So, again, here is what Jorge called Type 1 error in a jurisdictional sense, at least to examine. And that's another footnote, a little reply, that we always strive not to have Type 1 and Type 2 errors, obviously. The bar concerns Type 1 errors. Here it is a little bit more nuanced because we like to make sure that we have the possibility to look at that transaction – not with a view – of course, once you look at a transaction, there's a possibility as you said, Type 1 and Type 2 errors – but I think that the analogy would be that just because the highway patrol installs more cameras on the road, it doesn't mean that it is determined to issue more speeding tickets. Right? So, it's a little bit more nuanced substantive Type 1, Type 2 errors versus a jurisdictional issue here. So, I will probably stop here. These factors are very important, which I just mentioned, Article 19 of the guidance, because those are the new elements and basically those are the factors, which counsels in-house, outside counsel, us, we have to examine and meaningfully look at – does it warrant a proposition from the Commission for a member state to refer that case? I'll stop there.

Ingrid Vandendorre: Okay, thanks very much, Paul. Jacques, I know you wanted to comment a bit more, and I don't know if we'll get an answer in this session whether should valuation be a right cutoff or a safe harbor, or are there any safe harbors? What should be the right criteria? I think you were starting to mention that earlier a bit as well.

Jacques Crémer: Yes, what I would like to comment, Jorge and Paul discussed Article 19. I found Article 9 also very useful. So, I know in some sense it's less regulatory but it's more economics and it explains the type of phenomena which the Commission is worried about. And, so, I don't know what is the legal status of it, but it seems to me, they will provide some more guidance for what are the economic forces you should look at. There are basically a few of them. There are network externalities. The fact that you are trained to acquire a user base and then save a user base. There is a data, so both of them are ready for digital and I guess your

Facebook thing is about data. And when there's innovative products not yet marketed, which is basically focused with pharmaceuticals. I guess that this could also happen in digital. You could have developed a new computer chip and you haven't yet marketed it. And I think that the problem as Paul was saying and as Jorge was saying, there's a problem of looking ahead.

It's very, very difficult for us to figure out ahead and, I think, it can be different for different categories. So, take network externalities. I guess, the case what everybody thinks about when they think about network externalities and mergers which were not caught is the WhatsApp/Facebook case. It's very, very difficult to know what would have happened – so everybody now says, it's a bad idea. Look, WhatsApp is very important and would have been a strong competitor to Facebook. But if Facebook had not bought WhatsApp – and remember, WhatsApp had begun charging for its services and we know that it's very hard to convince people to pay regularly – Facebook might have pushed Messenger much harder. So it's not entirely clear how do you go and make a prospective analysis? I think in the case of network externalities, it's really very, very difficult. And it's going to be...I think it's the kind of thing where... there's really lots of uncertainty now...it's going to be very interesting to see whether after the referrals that the Commission refuses to take on and so on are going to provide more certainty over time.

Let me skip over data, take innovative products, I think, is also very interesting. I think Pierre was mentioning the horizontal guideline mergers. But this is not a new example of horizontal merger, it's a vertical merger because it's a company buying one of its clients and we have to discuss innovation in vertical mergers. I mean, this is wonderful for economists because we know nothing about it. There is already a huge amount of debate on horizontal mergers and innovation but economists are willing to take knives to hit each other on this. Horizontal mergers and innovation is something which is very ready to explode and it's going to be very, very interesting to see what our standard of proofs that the Commission in using in order to decide (a) whether to take the cases and (b) for cases which are that perspective to decide whether or not you should stop the merger. So, I'm not sure if I answered your question but those are my thoughts which came to my mind as I was reading on this.

Ingrid Vandenborre: Yes, I think it's very helpful because it shows that maybe the practice will develop as the cases will develop, right? We know from some of the recent statements from officials that there will be more focus on vertical mergers and that there hasn't been, to date, very much on vertical mergers and innovation and that will be more the focus going forward and that may sharpen practice also for implication of the guidance.

Maybe during the Jorge, you mentioned you saw intervention in less in those two areas of start-ups and import innovation maybe more when we are talking about key inputs. Does that sort of rhyme with what Jacques was mentioning that it's more uncertain there what the impact is if we look forward?

Jorge Padilla: Yes, I think so. I think that that's the reason why I'm a little bit more concerned about the potential for Type 1 errors in connection with mergers in which the acquiror where the target is a start-up or an important innovator. I'm much less concerned about the other examples that are provided in Article 19. But, more generally, Ingrid, if I may, I think that I agree with Paul that the criteria—the two criteria—while very general, have been around for a

long period of time; and, I must say, that I take comfort reading the *Rafael* decision in the Illumina Grail that the Commission is doing a serious assessment before deciding to take on-board one of these or to look for in reviewing these mergers.

Now, I think, do we need additional safe harbors? I'm not sure, to tell you the truth. I think, actually, it would defeat the purpose of the whole exercise because I think that the exercise is based on the idea that the safe harbors that we had in place do not correlate very well with the importance or economic significance of certain transactions. I think that that's why we are abandoning the two-number thresholds to some extent. The value of the transaction threshold—I think the value of the transaction provides information about what the parties think what would be the future cashflows of the acquiror business and that's relevant. But, again, I'm not sure that it correlates one-to-one with potential anti-competitive risk; and, so, I think, it's not that helpful. I think that the key issue here is that the Commission implements usually and vigorously the two tests—the effect of trade between member states and the test of whether the transaction threatens to significantly affect competition.

The previous one, I think, to me, is very clear; the second one we have a couple of questions that, perhaps, Paul wants to look at. With respect to the effects on trade, I think that there's a lot of jurisprudence. I think that the companies that will need to do self-assessment need to understand that if they operate in EA-wide markets or even wider markets then they're going to be in and, if they operate in national markets but there are lots of imports they are likely going to be in, then it seems to me that this condition is going to be automatically satisfied for pharma and digital companies.

And with respect to the second test, the threat to significantly affect competition, I mean, I wonder why they are using “significantly affect competition” rather than SIEC because I think that this SAC must be SIEC. You know, the significantly impede effective competition, I think that it should be the same and, I think, is the same. And, to me, the key issue there—which could serve as a factor—is what is the standard of proof? Now, I understand from Article 15 that it is prima facie evidence. Frankly, having read the Illumina Grail, I think that the Commission went beyond prima facie evidence, in that they looked a lot and argued a lot about the need for review; but, you could consider introducing some more tighter criteria—reasons for concern, like in the 6(1)(c) or a balance of probabilities or a strong evidence and that could be a factor. And that is the dimension in which I could see things being developed but, I guess, I'm not sure that that needs to be decided now. I think that what, in practice, is finally adopted, I think it is something that we can see as time goes by.

Based on what I have seen thus far with Illumina Grail, and I'm not involved in the case one way or the other, but I have been able to read, it seems to me that where there is guidance that mentions prima facie evidence, there has been more allowances before concluding that the review was necessary; and, to me, one must look like a close to a 6(1)(c) almost but maybe I am wrong.

Ingrid Vandenborre: I will ask Paul to comment, maybe collect his thoughts while Giorgio gives his reaction on the criteria for assessment? I'll spare you a few minutes, Paul, to reflect and see if you want to respond before we go on.

Paul Csiszár: I'm sorry, I just jumped in because I should have said earlier that, since the Illumina Grail case is pending before the European courts, I don't feel comfortable to comment one way or another. What I would say that Jorge is definitely on the right path in a sense that alternative ways to looking at this issue—what do we call it—enforcement gap or potential underenforcement type, to not having jurisdiction in some of these cases? As I mentioned earlier, they are not perfect. I think Jacques emphasized a paragraph or Article 9 of the guidance, those are the essence where the Commission wants to enquire, we will never take it easy, we want to get in to those cases which potentially, genuinely create problems. Now, whether it will, in practice, get to a mini 6(1)(c) or whatever, I genuinely cannot comment on that not because I don't want to, we have to develop a practice. We will talk about other procedural aspects—I don't want to run ahead—that maybe companies should come forward—because, let's think practically—and I stop there. These cases will not come out of the blue. Law firms and companies already are reviewing that transaction from many, many months with respect to filings elsewhere—we in the EU possibly and, more importantly, other major jurisdictions around the world. So, this is not going to be a last minute, “Oh my God, we missed the entire boat, now we're going to have a year delay because, now, we just have to go to the EC.” It's not going to be like that, right? But that's a procedural aspect and for smart lawyers to figure out how not to cause an extra delay in the process.

I think Jorge wanted to comment.

Jorge Padilla: No, no, I was waving my hands in order to adopt the camera, so forget about that.

Ingrid Vandendorre: Okay, so we'll go to maybe Giorgio for any corrections before we go to process because I am just looking at the time so that will leave us time for questions.

Giorgio Motta: Yes, I do have a couple of comments on what Paul said but it does fit with the process questions, Ingrid, so I'd be happy for us to jump into that if you want.

Ingrid Vandendorre: Just to say to everyone here, if there's questions, please raise them into the chat and we will try and put them forward to the panel for comments, as well. But now, let's go to the process implications and see what it means for companies de facto on deals getting done, right?

So, according to the guidance, I'm just noting, referral requests must be made 15 days following the date that the transaction is “known to the member states concerned indicating that the information provided should be sufficient to allow a preliminary assessment.” So, a bit of the first question there is, what scope of information should be sufficient? We know from some of the public statements the Commission has given, that a press release on a deal is not considered sufficient information to allow an assessment of a referral and the guidance indicates that parties can voluntarily reach out to the Commission for an indication of what is sufficient information and what guidance would be available then. So, in terms of process, “what is the scope of information?” is the first question and “is there a format that parties should think about when they are thinking of consulting with the Commission?” So, maybe, I'll raise that with Paul for first thoughts on what we should be thinking of there.

Paul Csiszár: Yes, thank you, Ingrid. First of all, the format—there is no formal, formal format—call it a briefing paper, another paper. I mean, we have practices with the Bar on informal consultations, be it on joint control, joint ventures, jurisdictional issues. We have a well-established practice that we try to, in these pre-notification periods or issues, we try to respond within five working days—go back and forth. Obviously, a press release which is addressed to stock markets and others, don't touch upon the issues which we have been discussing for the last half an hour; and, here, I would make a connection that process cannot be totally decoupled from substantive requirements because what we will be looking for (not length or form), we will be looking for whether those criteria (which is Article 9 or Article 19), the additional factors are there, and to what extent are there, and what are the company's arguments that they are not there? So, we should not look at that case, I presume, and this is the litmus test for the purposes of this jurisdictional question. Whether to ask for a referral? We'll have to look at it. So, if you can put all of these factors on five pages, better, probably it has to be 10, 15 or more, I don't know. But, again, we have a well-established informal practice. Sometimes, we go back and forth on more complex control issues, jurisdictional issues—you are familiar with that. We want to get moving on this. That's why the notice says we encourage parties to reach out to us early. Again, you can plan that timing when you plan other filings in other jurisdictions so you don't have a major mismatch should the Commission and member states proceed with an Article 22 referral. I mean, these are common sense practical considerations, and I think the practice will determine—I mean, cases will come to our way, even if I wanted to say a page number or a format, it's impossible at this early stage of this process. I don't think we will always want to go to the depth of a 6(1)(c) or a Phase 1 clearance type of analysis. We also said in the guidance that we will get back to you when we can, when we indicate that we will not be seeking referral from member states. Ultimately it's always up to the member states to refer, right? So, we would like to do it as efficiently, as expeditiously as possible, you know, we have plenty of work, resources are not abundant. So, I think grownups can get on with this process in a reasonably intelligent way.

Ingrid Vandenborre: Yes, we have a little bit of experience, and now of course with the U.K. briefing paper process, which provides for a set practice whereby parties present information as part of a briefing paper which is typically around five pages. It sounds like the easy practice would be a bit different from that and you may need a bit more to determine whether you would seek jurisdiction in that way—so not quite similar to the U.K., it sounds like we would need a bit more.

Paul Csiszár: Maybe it's a reasonable conclusion. I would not like to comment on that. The CME has the biggest staff focusing on these issues. Maybe that helps them to dive in earlier and more in depth. Again, I don't want to use the "in depth" because that means something else in our practice, so maybe that would lend itself to a reasonably different initial briefing paper—just call it briefing paper. Again, I mean, if there is a will, there is a way. It's like in all prenotifications. In some cases companies and counsels cooperate well, you know, and sometimes the cooperation doesn't work out that well for whatever reason. It doesn't really matter. I think in more cases it will work out well.

Ingrid Vandenborre: Okay, and what should parties think of in terms of a time frame. Sorry, Giorgio is going to ask for timing and then maybe you want to jump in there what it means in practice. But just to think of the time frame, is it a matter of two weeks, a month, two

months? Is there a time frame that the Commission would expect to or that you think the Commission will likely be using this time frame to give feedback to the parties? Is there a sense that what companies should expect when they come to get informal feedback?

Paul Csiszár: Well, I cannot and I don't want to commit to anything specific. I made a general reference to our "other consultations" which you're familiar with, not as high profile "sexy" consultations you know on control, joint control, change of control or some other jurisdictional issues. I mean, like in other prenotifications, we try to react within five business days, not for a final position because, again, the criteria which is in the guidelines, as well as the two legal criteria of Article 22, sometimes not that easy, particularly if you were to take the position of the companies that they don't see that the legal criteria are met. You know, we have to seriously look at that and even if the legal criteria are met, we can have a reasonable discussion whether the additional factors which are listed in Article 19 in the guidance whether they are met, to what extent they are met, whether it's warranted. Again, Jacques very rightly focused also on the concepts set out in Article 9 as well, indeed. So, we have to have intelligent discussion with that, and it's a two-way street. The more information we have, in some cases, that's difficult to get. You know, if we get waivers because you are with other jurisdictions, for the purposes of these early discussions, if we have waivers, obviously then we can benefit on a lot of things which jurisdictions are doing. If we don't have that, that slows things down. Again, I genuinely think how we've been working over the years, and we touch upon on the substantive issues that it's an ex-ante assessment, and when we leave the traditional horizontal price increase potential issues, right, in the near future, we're going to innovation future competition these issues are getting complex, very complex when you do a case, the real case, you know, or vertical cases, or conglomerate issues, right?

Now, we have to a little bit look at them for the purposes of the jurisdictional issue. I think we all agree because that's in the spirit of this selective way of perhaps asserting jurisdiction on a few cases. So, we inadvertently have to have some intelligent substantive exchanges which will have to be on a case-by-case basis. Again, I would say the earlier you come to us to engage, the less painful it will be for everybody, and, I don't know, but maybe that's just what the regulator says, "Come and show all of your cards early on and then we take it from there." So, I'll stop there.

Ingrid Vandendorre: Yes, okay, well it's helpful. I mean, it gives, it's true, there's a certain rhythm in prenotification processes that we know of applies, right? You give information, and there's a certain back and forth that applies. If everyone is kind of in good faith cooperating, the process advances. That's a very fair point I want to apply here as well.

Giorgio, so I used something earlier because, of course, the practical implementation is very important here. What are your thoughts?

Giorgio Motta: I think I agree with most of the suggestions by Paul. Paul, I think you're exactly right, and I want to focus on two points. And I think you can also gather that some of the concerns or questions that you're getting just derive from the fact that we have a new system, right? So, we don't really have much precedence, and that's why businesses get sometimes a bit nervous because they don't know what to expect. That's just part of the process. As you say, it's a learning process that we have to go through collectively let's say. But I think the two

points that I think it's important for businesses, for companies and for the Commission to focus on as we kind of build this precedence are one—the point that you mentioned, Ingrid. Try to get as much clarity as possible about the timing, just the timing of the overall process because obviously that can have a large impact on the deal negotiations but then on the deal implementation. So, it's something that, these are questions that will be asked and that come early in the process. How long is this sort of consultation going to take? So, thanks for the feedback that you can give already now, but I think this will be something that companies will look as much guidance as possible in the next few months. And on that point, Paul, you are exactly right. We'll be looking at all of these points, right? It's part of the normal merits assessment, right, looking at the horizontal and the non-horizontal merger guidelines. It is also true that when we discuss this issue about innovation, the loss of an important company force—these are discussions that can take block in the context of a merger process. So as you say, I think we need to find a balance for you to have the necessary information to make the assessment early on but without having a process that drags out into months because otherwise I think that would defeat the whole purpose. Please, Paul.

Paul Csiszár: Thank you. One comment which came to my mind earlier, and you raised a very good point. This is not just a bilateral exchange because many of these deals are openly publicly debated, not just from a competition point of view, but almost they're broader, general, economic or stock market considerations will be all over the place. And remember Article 22 originally (and still very much so), is something where the driver seat is by the member state; so member states can approach us. So, even if we were to fall asleep, even if you were not to come forward to us, and we are too busy, and we have plenty of new Article 22 cases, right? It can happen that some member states say "Hey, for my citizens, my politicians, this is an important case. I just read about it, my congressman, my local parliament says what are we doing about it, and I have to say I don't have jurisdiction." "Oh, you don't have jurisdiction, my neighboring member state doesn't have a... why don't we give a call to the Commission and ask an Article 22 referral?" I think we can write a very good briefing paper why the Commission should take this case. Then you find yourself that in other jurisdictions they are in second request six months down the line, and somehow in our bilateral exchanges somehow we didn't get on at the beginning. That could be a possibility. The guidance also refers to third parties' submissions. I mean some of these cases third parties will chip in, maybe in favor of the parties, maybe in favor of the jurisdiction. So, all these things will have to be considered on your end when you do the timing. We will try to do with our limited resources, you know, monitoring markets and deals that's coming up because, again, we don't have any incentive to be at the end of the queue among reviewing agencies coming in at the very end and hold up transactions. We fully sympathize with that concern. Somehow, I think, the mutual interest of the Brussels Bar and DG COMP is to fit this process into the overall review process which you guys run in a large multi-national cross-border merger.

Giorgio Motta: Right, right, which takes me I think to the second point that I think you have mentioned already, Paul, and that is that the corporation, right, and I think we welcome very much the open and the transparent approach that DG COMP has in the prenotification process of a merger. I think that to have the same level of open and transparent discussions when companies come in, as you say, they come in and talk about it on this early consultation about these deals, that would be extremely I think valuable for a company, especially this initial stage, right, where there are so many uncertainties because, let's be honest, when a company

comes in, one of the criteria, as we said before, is the deal may raise some competition concerns, right? That's kind of, there may be some risk. So, I think, companies may be at least in this initial stage be kind of, they may have some questions, they may be reluctant of saying, you know why should my deal be kind of the first test case, or one of the first test cases. But I think if we can, as we already do, if we can show there is this open and transparent discussion from the outset, I think that would be helpful. That's my only suggestion.

Ingrid Vandendorre: Thanks very much. I think that's a very good sort of forward-looking practice approach to end on. I think we had one or two questions in the chat commenting as to the innovation points that Jorge raised already. I think the one element that I think Paul commented on as well is the interrelation with member states who may have jurisdiction and to what extent any Commission assessment would be precedential or have value for future referral requests of member states after the Commission's been consulted. I think those things may have to work themselves out in practice.

I'm noting that we're a bit over time, so with that I think we should probably end this session here today. I'd like to thank all of the participants. I'd like to Thank Paul for his candor and the practical approach and the willingness to share with us his thoughts, even though we all understand it's a very new instrument, and there are cases pending that makes it very complicated to have these kinds of discussions so we appreciate it very much. Thank you to Jacques and Jorge for adding your thoughts, and I think a lot of us were taking notes carefully as to the key criteria to look out for as we assess the deals. Thanks Giorgio for the comments on the practical implementation as well.

And with that, I thank everyone, and wish everyone a good rest of your day. Good afternoon. Good evening. Bye everyone.