THE YEAR AHEAD IN BRUSSELS

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As we enter 2023, the European Commission is redoubling its efforts to scrutinise transactions on a variety of bases. The focus has been on the digital sector for some time, but the impact of the Commission's expanding toolkit for tackling perceived harms to the internal market can be felt across many parts of the economy.

In this article, we explore the current trends in the Commission's regulatory activities in the M&A space - touching on merger control, foreign direct investment, the Foreign Subsidies Regulation, the Digital Markets Act, market definition and whistleblowing - to highlight the breadth of issues that dealmakers should keep in mind to ensure they don't fall foul of Brussels' ever-expanding rulebook.

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MERGER CONTROL – A REDUCTION IN DEAL CERTAINTY

Illumina/GRAIL and the power of Article 22

- The Commission's now not-so-new approach to Article 22 of the EU Merger Regulation, which we have written about previously (most recently **here**), means that it is accepting referral requests – and actively seeking out referrals – where transactions do not meet either European or national merger control thresholds. The General Court's endorsement of the Commission's approach in Illumina/GRAIL has given the Commission a sure footing for its policy, although Illumina is appealing this ruling to the European Court of Justice (ECJ).
- It is anticipated that the Commission's use of its Article 22 powers will be limited to certain sectors (notably digital and pharma), although the Commission's guidance gives it room to use these powers much more widely. In theory, therefore, any deal which affects trade between Member States and which raises any potential competition concerns could be subject to European-level review.
- In addition, there are reports that the Commission will apply the maximum fine of 10% of annual turnover on Illumina for completing its acquisition of GRAIL without merger control clearance – known as "gun-jumping". Such a fine would send a clear message about the Commission's appetite for aggressively pursuing infringements of competition law.
- The Commission's willingness to review transactions that do not meet any notification thresholds is part of a broader trend globally by competition agencies to find ways to call-in and assert jurisdiction over "below threshold" transactions where there may be competition concerns. Over the last few years the antitrust community has debated how best to respond to "killer acquisitions" – where a larger business acquires a smaller, usually innovative business whose revenue does not trigger merger control thresholds. It appears that these "below threshold" review regimes have become the preferred way forward on this issue (for now at least).

An acquisition as an abuse of dominance?

- Further jurisdictional uncertainty may lie ahead for dominant companies engaging in any acquisition in the EU. Advocate-General Kokott's opinion in Towercast suggests that acquisitions by dominant firms can, in certain circumstances, amount to an illegal abuse of dominance. If the ECJ adopts AG Kokott's opinion, then the Commission and Member State agencies will have yet another tool to prohibit problematic acquisitions that fall below merger thresholds. This risk cannot be mitigated via the submission of a merger control notification for transactions that do not meet notification thresholds (where there is no possibility to voluntarily notify a transaction), and thus exposes dealmakers to yet more regulatory uncertainty in Europe. Private actions may also be used by parties harmed by a transaction that breaches Article 102. The antitrust community is eagerly awaiting the ECJ's judgment in Towercast to understand how the Commission and Member States can apply Article 102 to acquisitions by dominant companies.

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M&A SCRUTINY EXPANDING BEYOND MERGER CONTROL

Foreign direct investment (FDI)

- At the encouragement of the European Commission, now almost all Member States either have an FDI screening mechanism, or are in the process of adopting one. The EU's investment screening framework, which came into full operation in late 2020, serves as a cooperation mechanism for Member States and the Commission, allowing the Commission to issue opinions where an investment might threaten the security or public order of more than one Member State (or a strategic project or programme of EU-interest). Member States are required to notify the Commission of any FDI in their territory that is undergoing screening. The regime has been in operation for two years. In that time, the Commission has examined more than 740 FDI transactions.
- The EU's published statistics for 2021 suggest that its screening activities have not generally been a significant impediment to deal timelines. It reports that 86% of its assessments were completed within 15 calendar days, and that it gave an opinion in less than 3% of transactions. The timeline where there is an in-depth phase two referral, however, is less clear. The Commission puts this down to its need to receive information from the notifying Member State. In 2021, the time taken by Member States to provide the requested information ranged from three to 101 days. Member States have no deadline for responses under the FDI Regulation, and the Regulation's review clock is stopped while information is outstanding. Although only a small number of transactions should be affected by the timeline uncertainty from a phase two review, it is something that dealmakers should bear in mind where there is a risk of the Commission wanting to take a closer look.

Foreign Subsidies Regulation (FSR)

- In November 2022, the EU adopted a new foreign subsidies regime aimed at financial contributions given by non-EU governments to businesses that are active in the EU. For the first time in the EU's history, the FSR regime establishes a mandatory notification process for businesses that have received such subsidies when they are a party to certain mergers or public tenders. Transactions and tenders that exceed specified financial thresholds will require notification and approval by the Commission.
- The FSR will also empower the Commission to investigate potentially distortive non-EU subsidies up to ten years after they are made, provided they were made no more than five years before the regime becomes effective.
- The Commission will be afforded a similar array of enforcement powers to its remedial toolkit for merger control - namely the ability to prohibit transactions and public contract awards, require structural and behavioural remedies from parties and impose fines of up to 10% of global turnover for non-compliance.
- The new regulation will take effect on 12 July 2023, with the M&A and public procurement notification regimes beginning on 12 October 2023. BCLP has prepared a **summary** with the key information on the FSR regime.

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KEEPING PACE WITH THE DIGITAL ECONOMY

- The Digital Markets Act, which takes effect on 2 May 2023, imposes a significant regulatory burden on those digital firms designated as "gatekeepers" due to the size of their operations. BCLP has produced a **summary** outlining the key points of the new DMA regime.
- The DMA includes a provision that requires designated gatekeepers to inform the Commission of all of their acquisitions. Coupled with the Commission's Article 22 policy noted above, this could greatly increase the number of transactions in the digital sector that are reviewed by the Commission. Furthermore, the Commission will have the power to temporarily block any acquisition by a gatekeeper where there is systemic non-compliance with the DMA. As a package, the DMA and the Commission's policy on Article 22 EUMR greatly enhances the range of deals in the digital sector that can be subject to regulatory interference.
- In addition, novel theories of harm - notably concerning digital players' "ecosystems" – are emerging at EU level and are being discussed by antitrust agencies worldwide through the International Competition Network.

> This regulation, together with strong competition law enforcement, will bring fairer conditions to consumers and businesses for many digital services across the EU.
>
> Margrethe Vestager

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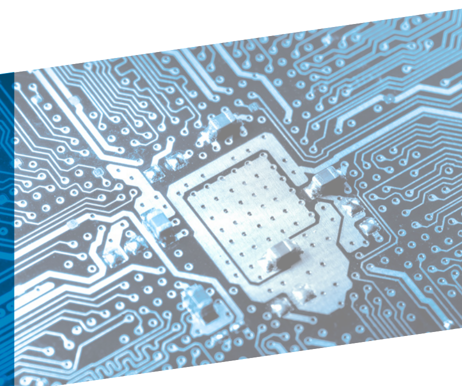
MODERNISING MARKET DEFINITION

- During the final couple of months of 2022 and stretching into January 2023, the Commission consulted on its updated Market Definition Notice. This is the first revision of the Notice since its adoption in 1997.
- The Commission's proposed updates are not "doing away" with the existing Notice, but rather develop the Notice's principles and guidance to meet the needs of today's economy - an economy which is almost unrecognisable from that which existed when the Notice was first published more than 25 years ago.
- As expected, the updates to the Notice include new guidance on digital markets. There is also valuable new information on other key areas of market definition practice, including:
  (i) non-price elements such as innovation and quality.
  (ii) markets that are expected to undergo structural transitions.
  (iii) new principles for innovation-intensive markets.
- The Commission hopes to adopt the updated Notice by the third quarter of 2023.



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PROCEDURAL CHANGES – EASIER FOR SOME, HARDER ON OTHERS

Super-simplified merger control notifications

- Following a consultation in 2022, the Commission is expected replace the existing short form version of its merger control notification form (the Short Form CO) with an even shorter version. The Short Form CO may be used in transactions that fulfil certain criteria that make them less likely to pose competition concerns. The Commission's proposal is for the new Short Form CO to contain multiple choice questions and tables rather than the current open text questions that require subjective narrative answers. In addition, under the Commission's proposals, certain transactions (including joint ventures with no EU-nexus and cases where there are no horizontal overlaps or vertical relationships between the parties) will benefit from a super-simplified Short Form CO, in which they are asked to provide even less information and will not require a pre-notification dialogue with the Commission. The Commission's intent with this reform is to reduce the burden on businesses whose acquisitions trigger the EU's merger control thresholds but pose no competition concerns while freeing up the Commission's resources to focus on more complex and problematic mergers.

Expanding the whistleblowing tool

- The Commission announced in January 2023 that it would bolster its investigative reach by extending the scope of its whistleblowing tool to merger control and state aid infringements.
- It remains to be seen whether the expansion of the whistleblowing tool encourages reporting of merger-related infringements such as gun-jumping. But in an era when the Commission (like many agencies worldwide) has increased its enforcement actions against procedural infringements, this new tool signals to dealmakers the seriousness of the Commission's approach. Dealmakers should therefore continue to ensure competition law vigilance during negotiations.

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