

Insights

EU/UK MERGER CONTROL – FIVE TRENDS TO WATCH IN 2022

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2022 is shaping up to be another year of significant merger control and foreign direct investment (“FDI”) developments. The use of Article 22 of the EU Merger Regulation (“EUMR”) might jeopardise the European Commission’s one-stop shop status. The emergence of the UK’s National Security and Investment Act (“NSI”) regime adds an extra layer of complexity for certain deals with a UK-nexus. And, after a year of full separation for the EU and UK, we could be seeing the start of a divergence of approaches to merger control between the CMA and the European Commission.

In addition, emerging digital regimes and the developing sustainability debate may result in further shifts in the regulatory landscape.

ARTICLE 22 VS THE ONE-STOP SHOP

Article 22 EUMR allows Member States to refer deals to the Commission that do not meet the EU’s review thresholds but which could have an impact on competition within Europe. The Commission announced in 2020 that it would accept referrals under Article 22 even where neither national nor EU notification thresholds had been met. See [here](#) for our earlier blog on this development which notes the new policy’s expansive but targeted reach.

2021 saw the first referrals under this new policy. In March 2021, a number of competition authorities, including France’s Autorité de la Concurrence, referred the Illumina/GRAIL deal to the Commission. Illumina promptly appealed the Commission’s acceptance of the referral, and completed the acquisition. We are watching closely for the outcome of Illumina’s appeal, which could have significant implications for deals with an EU-nexus which don’t meet either national or EU thresholds.

There was a further - and potentially significant - development in 2021, as Germany’s Bundeskartellamt announced that a prospective acquisition required notification in Germany despite the Commission having already accepted a referral under Article 22. A review of the same acquisition by both the Commission and a Member State would compromise the efficient working of the EUMR’s one-stop shop principle - by which filings in Member States’ are not required where

the Commission has jurisdiction. Until there is further clarity, dealmakers will face uncertainty as to which EU agencies have jurisdiction when Article 22 is in play.

INWARD INVESTMENT UNDER THE MICROSCOPE

The UK's new NSI regime, which came into full force on 4 January 2022, introduces mandatory prior approval requirements for transactions across a range of key sectors where a target has activities in the UK. The target does not need to be UK-incorporated, or have a permanent presence in the UK, to be caught by the regime. Deals that do not fall within the mandatory regime are still at risk of being called-in for review by the Secretary of State where they may pose a potential risk to national security.

The NSI regime has the potential to catch a significant number of deals with a UK nexus, although the UK Government has suggested that only a small proportion of deals will actually be affected.

BCLP has written extensively on the NSI regime, most recently in [this insight](#).

In Europe, too, there is a new subsidies screening regulation in development. Proposals for an EU foreign subsidies regime - which would introduce mandatory notifications for non-EU investments above certain thresholds - could come for a vote in the European Parliament towards the middle of this year. MEPs have been focussing on lowering the thresholds proposed by the Commission which, if agreed, would bring more transactions within the regulation's reach. BCLP's previous blog on these subsidies proposals can be found [here](#).

ARE THE COMMISSION AND THE CMA GOING THEIR SEPARATE WAYS?

Brexit no longer dominates headlines as once it did, but its impact is being felt in many parts of the economy. It is still early days, but this impact might extend to a divergence in the Commission's and CMA's approaches to merger control.

There have already been signs from a handful of mergers that the two regulators might be adopting differing substantive approaches. Looking ahead, over the next few months many observers will be paying close attention to how the CMA approaches the Microsoft/Nuance deal following unconditional approval in Brussels at the end of 2021.

Conversely, it looks as though 2022 could see more scope than ever for convergence between the Commission and the US antitrust agencies. In 2021, President Biden appointed heads of the US Federal Trade Commission and the Antitrust Division of the Department of Justice who share similar views to EU antitrust chief Commissioner Vestager on many substantive subjects including concerns about "killer" acquisitions.

GREATER DIGITAL REGULATION ON THE HORIZON

The Digital Markets Act (“DMA”) is motoring through the EU’s legislative procedure, and could even come into force before the end of the year as the French Presidency of the EU has prioritised its passage.

If the DMA is adopted, certain major digital firms could be assigned “gatekeeper” status and have obligations and restrictions imposed upon them. It is likely that these gatekeepers would be obliged to inform the Commission of any intended acquisitions - allowing the Commission to review what it considers to be potentially damaging “killer acquisitions” or otherwise avoid perceived harm to the internal market.

Digital regulatory developments are also forthcoming in the UK. In 2021, the Digital Markets Unit was set up within the CMA. The Government subsequently published a consultation on the new competition regime for digital markets, which it hopes will include designating certain tech firms as having “Strategic Market Status” and imposing on these firms both a code of conduct and a mandatory filing regime.

We can expect further progress on the proposed European and UK digital regimes in 2022.

A GREENER COMPETITION LAW?

The debate over the role that competition law should play in the transition to a more sustainable society has become one of the biggest talking points amongst antitrust aficionados. BCLP has written on this subject previously (see [here](#)) and co-hosted a series of webinars featuring prominent regulators, business leaders and economists (see [here](#)).

2022 is shaping up to be another significant year for the debate. The Commission’s new Horizontal Block Exemption Regulations are expected to include the pursuit of sustainability goals. In the UK, the CMA is working on its advice for the Government on how competition law can support its green targets. As regards merger control, the Commission has flagged that it may seek to incorporate sustainability concepts within “innovation” theories of harm. These developments could have implications for companies in all sectors of the economy - potentially impacting not only collaborative activities but also merger control and other competition law issues.

Nobody yet knows how “green” competition law will become, but we expect continued movement on this hot topic during 2022.

BCLP’s Antitrust and Competition group advises on merger control and FDI in the EU, UK and globally. If you have any questions about this blog - or on merger control or FDI more generally - please contact any of the lawyers listed.

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