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Insights

THE YEAR AHEAD FOR M&A REGULATION IN BRUSSELS

BCLP'S TOP 5 THINGS TO WATCH IN 2024

Jan 29, 2024

SUMMARY

2024 is shaping up to be a year of significant change in Brussels. European Parliamentary elections in June will be followed by the appointment of a new Commission in the autumn. After two terms and 10 years at the helm of EU competition policy (which is unprecedented in recent times), Margrethe Vestager is likely to move on from her post as the bloc's top antitrust enforcer – and her replacement will likely bring a new enforcement agenda.

This article explores the top current trends and developments affecting M&A regulation in Europe, focusing on the continued targeting of "below threshold" deals via Article 22 of the EU Merger Regulation ("EUMR"), the rise of the new ecosystems theory of harm, the role of the Foreign Direct Investment ("FDI") and Foreign Subsidies Regulation ("FSR") screening regimes and sustainability as a factor in the substantive assessment of mergers – all set against the backdrop of the incoming new Commission that will drive EU competition policy until 2029.

ARTICLE 22 – MORE "BELOW THRESHOLD" TRANSACTIONS REFERRED

The Commission's investigation – and prohibition – of the Illumina/GRAIL deal has drawn significant attention to its amended approach of accepting referrals from Member States under Article 22 EUMR where the Member States themselves lack jurisdiction to review the transaction.

Read our previous articles on this topic:

- *Safety net or overreach? The European Commission's new policy on member state merger referrals*
- *Illumina v European Commission: the General Court's judgment marks the end of the principle of legal certainty in merger control*

The Commission flexed its enforcement muscles in Illumina/GRAIL, fining both parties for "gun-jumping" by closing the deal before receiving merger control clearance. Dealmakers will have noticed the size of Illumina's record-breaking fine for a merger infringement – €432 million – which represents 10% of its annual turnover, the maximum fine that the Commission may impose. In addition, the Commission took the unusual step of also fining GRAIL, the target, albeit with a symbolic €1,000 fine. The vast majority of deals will not proceed through merger control reviews in the same manner as Illumina/GRAIL, but the Commission's determination to seriously enforce against cases it sees as infringing competition law is a warning to all of the need to consider the merger control implications of a deal even where jurisdictional thresholds might not be met.

In addition, in 2023 the Commission accepted two further referral requests from Member States in relation to non-notifiable transactions. Qualcomm's acquisition of auto-chip startup Autotalks was not notifiable in any Member State, but seven states made a referral request to the EU due to fears that this amounted to a killer acquisition. Similarly, EEX's acquisition of Nasdaq's European power trading and clearing business was referred by four Nordic countries on the grounds that it would be a combination of the only two providers of services for on-exchange trading and clearing of Nordic power contracts. As both reviews were on-going at the start of 2024, these cases will be ones to watch going forward - in addition to any further Article 22 "below threshold" referrals the Commission may accept or request.

While the Commission has said that Article 22 EUMR "below threshold" referrals would likely be used infrequently, in cases that could create substantive issues dealmakers will need to carefully consider the real possibility that deals could be subject to review even when they may not trigger jurisdictional thresholds.

ECOSYSTEMS AS A THEORY OF HARM

In blocking the Booking/eTraveli transaction, the Commission found that there would be anticompetitive effects as a result of the relatively novel "ecosystems" theory of harm.

The Commission held that Booking would have been able to strengthen its position in the supply of hotel online travel agency ("OTA") services by acquiring eTraveli, which supplies flight OTA services. It concluded that flight OTA services are the closest complement to Booking's hotel OTA business and that, by acquiring eTraveli, Booking would expand its travel services ecosystem and thus make it more difficult for competitors to compete for the provision of hotel OTA services.

Although Booking is appealing the Commission's block, the outcome of this investigation perhaps increases the chances that we will see competition authorities using this theory of harm more frequently in merger investigations – in particular in digital markets.

Currently, the ecosystem theory is not part of the Commission's merger guidelines, nor has it been tested in the courts. However, the Merger Working Group of the International Competition Network

("ICN"), whose members include nearly all competition agencies worldwide, has included ecosystem issues in its upcoming update to its recommended practices chapter on non-horizontal mergers to be published later this year. This indicates that there is broad agency support for assessing mergers on this basis, and might pave the way for agencies worldwide to adopt similar theories of harm.

SUSTAINABILITY IN MERGER CONTROL REVIEWS

Sustainability has been a hot topic in competition law for a few years, and we have written about this previously (see our global review of sustainability/antitrust initiatives). In a Policy Brief issued in September 2023, shortly after the EU's new Horizontal Guidelines were published (which include a new chapter on sustainability agreements), the Commission outlined its approach to sustainability in merger control and how existing EU law can be used to support the bloc's green agenda.

The Policy Brief, while not a binding statement of Commission policy, suggests that the Commission might not block an otherwise anticompetitive merger if the sustainable efficiencies generated by the merger outweigh the anticompetitive harm. Therefore, businesses looking to do deals should keep in mind the various efficiencies – including in terms of sustainability – that would arise from their transactions, as such factors could be crucial in securing merger control clearances. Similarly, the Commission has indicated in the Policy Brief that it could look negatively upon mergers that could impede green innovation – indicating that dealmakers will need to take into account any harm to the environment caused by a loss of competition as a possible adverse factor in a substantive merger assessment.

FDI AND FSR – THE OTHER PILLARS OF THE EU'S M&A SCREENING FRAMEWORK

Merger control is just one of three regimes that businesses must now keep in mind when doing deals in the EU. EU national FDI regimes (coordinated by the EU's foreign investment screening regulation) and the EU's new FSR regime add further M&A regulatory steps that need to be considered at an early stage in deal planning.

FDI

The EU's foreign direct investment screening mechanism is set to be updated in 2024. The most eye-catching of the Commission's proposed developments is that Member States will be required, rather than just encouraged, to set up national screening regimes (albeit the vast majority of Member States have already done so).

The proposed revision to the EU framework would require Member States, as a minimum, to screen investments in EU businesses that participate in programmes or projects of Union interest (for instance critical infrastructure and critical technologies) or that have key roles for security and public order. In the meantime, dealmakers continue to face the challenge of assessing whether FDI

approval requirements are triggered (and, if so, obtaining such approvals) based on differing – and often changing – rules across Member States.

FSR

In October 2023, all aspects of the FSR regime came into force. This includes a mandatory notification obligation for deals where the target (in an acquisition) or one of the merging parties (in a merger) generates EU turnover of at least €500 million and the parties in total received financial contributions from non-EU governments of more than €50 million.

The Commission initially anticipated receiving only a few FSR M&A notifications – perhaps only approximately 30 each year – although we understand that it may have already reviewed more notifications than this, so it appears that a greater number of deals might fall within the thresholds than the Commission had expected. In order to assist businesses, the Commission will soon begin work on guidance for the M&A notification regime, although it may be some time before any such guidance is adopted.

Read more about our assessment of the EU's FSR regime >

THE NEW COMMISSION – AND PROBABLY A NEW COMMISSIONER – FOR 2024

In June 2024, Europeans will head to the polls to elect a new European Parliament. We can expect serious negotiations over the top Commission roles to commence shortly afterwards. Margrethe Vestager has been Competition Commissioner since 2014, and has indicated that she would be open to a third five-year term. However, with no guarantee that Denmark will nominate her as a Commissioner again as her political party is not in power in Denmark, and with other larger Member States eyeing up the prestigious Competition Commissioner post, the odds appear well against her extending her brief to 2029. But in EU politics, one should never say "never"…

If you would like further information on how EU merger control, FDI and FSR might affect your business – or if you have any questions more generally about competition law compliance – please contact Dave Anderson, Paul Culliford or Tom Wright.

The authors would like to thank Calum Paton for his assistance with this article.

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