BRUSSELS À JOUR

La Rentrée 2023 – Things to Have on Your Radar after the Summer Break

Markus Röhrig, Philipp Neideck, Christian Dankerl, Joachim Burger, Katarina Bauer and Christoph Sielmann report on the latest developments from the European capital of competition law.

Some of our readers might have been lucky enough to escape rainy Brussels in August and early September, but unfortunately reality slaps hard and most of us are now faced with the inevitable return to the desk. So, besides the usual day-to-day, the question is: What to expect in EU competition law until year's end and will the newly appointed – interim – Competition Commissioner Didier Reynders change the course? To smoothen your Rentrée a little, we have summarized some of the key developments in terms of antitrust, merger control, and the highly anticipated Foreign Subsidies Regulation of importance in 2023:

Antitrust I: It's getting serious for Gatekeepers

Following the entry into force on 1 November 2022 and application as of 2 May 2023 of the Digital Markets Act ("**DMA**"), the Commission received notifications for the designation of gatekeepers from Alphabet, Amazon, Apple, ByteDance (an internet technology company that operates creative content platforms and the developer of TikTok), Meta, Microsoft, and Samsung by the deadline of 3 July 2023. Not voluntarily, of course – the DMA required them to! And rather unsurprisingly, the Commission designated almost all of them on 6 September 2023, with only Samsung being able to escape the designation. What all the designated companies apparently have in common is that they meet the quantitative gatekeeper thresholds in terms of turnover, market capitalization, and number of end and business customers. At least in the eyes of the Commission, that is – it remains to be seen whether the Union Courts will have the last word!

For now, the gatekeepers have six months to fully comply with the requirements in the DMA, meaning at the latest by 6 March 2024. The remainder of 2023 will thus be busy for them. The requirements cover a broad array of areas, depending on the business areas of the gatekeeper, including data interoperability, advertising transparency, and self-preference and tying prohibitions.

In order to verify compliance with the DMA, the Commission recently published its Procedural Implementing Regulation (EU) 2023/814. It deals with the procedural aspects of the DMA, including notifications and submissions of information, the protection of confidential information, access to file and time limits. It intends to promote effective proceedings and give the involved companies, including those appointed as gatekeepers, legal certainty regarding procedural rights and obligations.

WHAT TO EXPECT? The remainder of 2023 will not just be busy for the newly designated gatekeepers. Some national regulators are already some steps ahead in their attempts to regulate the digital economy and they will now need to think about how the DMA is fitting into this.

Antitrust II: FIFA and UEFA vs. The European Super League

One football highlight chases the other. Now that the FIFA Women's World Cup is over, the UEFA Champions League is just around the corner. Football fans get their money's worth. Apropos Champions League – wasn't there also the European Super League? The prospects for a revival of the Super League were knocked back after Advocate General Rantos' legal opinion has been published by the European Court of Justice ("**ECJ**") in December 2022.

In 2021, twelve top clubs caused a stir with the publication of their Super League plans. The project would have been in direct competition with UEFA's Champions League. However, after strong protests from leagues, associations and fans, the plan was rejected within 48 hours. But not from all: Three of the clubs filed a lawsuit against FIFA and UEFA in a court in Madrid, asserting that FIFA's and UEFA's actions opposing the establishment of the European Super League constitute anticompetitive behavior that runs contrary to EU competition law.

In context of a preliminary ruling procedure the ECJ was asked whether UEFA and FIFA are allowed to prohibit the creation of the Super League and impose penalties on participants. The main findings in Rantos' opinion were succinct: The FIFA and UEFA rules under which any new competition is subject to prior approval are compatible with EU competition law. He also argued that EU competition rules do not prohibit FIFA, UEFA, their member federations, or their national leagues from imposing sanctions on clubs who join any breakaway.

Now, the Super League makers must put their trust in the ECJ – but will they score?

WHEN? The decision of the ECJ was expected in March 2023. As there has been no decision so far, one can eagerly await whether the ECJ will seize the opportunity to revolutionize European football.

A blast from the past: Update of the Market Definition Notice

The current market definition notice dates back to 1997. It is now being revised for the first time. While fundamental principles of demand- and supply substitution are still crucial concepts, there have been many significant economic developments over the last 26 years, especially due to digitalization. For context: When the current market notice was drafted, neither Google nor Facebook were born yet – and Amazon was only three years old!

In April 2020, the Commission launched an evaluation of its current notice, with the results set out in a staff working document in July 2021. Following a call for evidence in January 2022, it published its draft revised market definition notice on 22 November 2022. It also launched a public consultation on this draft that ran until 13 January 2023.

The draft notice incorporates 25 years of the Commission's decisional practice and the case law of the EU courts. The proposed changes provide new or additional guidance in several key areas, such as explanations on the general principles of market definition, greater emphasis on non-price elements for determining the need for a service or product, the application to the digital world, and innovation-intensive markets. It also elaborates on possible sources of evidence, meaning that the Commission may use any "reliable" source without applying a rigid hierarchy of different sources of information or types of evidence.

Irrespective of what one thinks about the individual suggestions: It is desirable if in the future the notice would be regularly (not just every 26 years) revised and adjusted, taking into account the developments of the real world. 1997 sure was a different time than 2023!

WHEN? The Commission's draft notice is expected to be finalized in the third quarter of 2023.

Merger control I: Article 22, second act

The fall may bring new developments – and hopefully more clarity – in the Article 22 journey: The Illumina/GRAIL battle is expected to go into the next round. As you will remember, in the summer of 2022, the General Court upheld the Commission's decision to review the merger based on its new Article 22 approach. In the meantime, the Commission prohibited the merger. Illumina has appealed the first instance decision, bringing the case to the ECJ. Will the court confirm the Commission's controversial approach?

WHEN? While no date has been set yet for the oral hearing before the ECJ, it is likely to take place in the second half of 2023 or in early 2024.

Over the summer, two new Article 22 cases have appeared on the horizon: On 18 August, the Commission made public its decision to accept the requests of 15 Member States to review the proposed acquisition of Autotalks by Qualcomm, semiconductor companies based in Israel and the US, respectively. Three days later, the Commission announced that it would assess yet another case under an Article 22 referral (this time submitted by three Member States as well as Norway), namely the proposed acquisition of Nasdaq's European power trading and clearing business by European Energy Exchange (EEX), a subsidiary of Deutsche Börse AG and a major European energy exchange. As in the Illumina/GRAIL case (and unlike in other Article 22 cases such as Meta/Kustomer, Viasat/Immarsat, and Cochlear/Oticon Medical), neither transaction was notifiable under the EUMR or any Member State's notification thresholds. The new cases suggest that the Commission is keen to further embark on the Article 22 path that it has taken, and that the General Court has greenlighted.

Merger control II: Gun jumping back on the plate

Another important issue to follow when the days get shorter and the leaves turn brown will be gun jumping: First, the ECJ is expected to hand down its judgement on Altice's appeal against the General Court's upholding of the Commission's record-setting fee for Altice's pre-clearance acquisition of PT Portugal (the General Court only slightly reduced the fee). The Commission had qualified certain pre-closing covenants that granted Altice veto rights over the target's ordinary business decisions as well as the exchange of certain competitively sensitive information as gun-jumping. In April, the Advocate General delivered his opinion, confirming the Commission's and the General Court's stance. Will the ECJ follow? In any case, it is to be hoped that the ECJ offers some more guidance for the transaction practice.

WHEN? The ruling is expected in the second half of the year.

Secondly, there is a (potential) new case of gun jumping before the Commission: The acquisition of Lagardère by Vivendi, two large French media companies. The proposed transaction as such was notified to and, in June 2023, subject to certain commitments, approved by the Commission. However, on 25 July 2023, the Commission opened a formal gun-jumping investigation against Vivendi in relation to the deal. On the same day, Commissioner Vestager confirmed to a French media outlet that the Commission began looking into Vivendi's behavior, as it could have culminated in a breach of the standstill obligation.

While the Commission did not disclose the specific allegations and conduct that are now under scrutiny, market observers noted that back in 2021 executives of Vivendi and Lagardère began coordinating staff decisions, resulting in a series of layoffs at Lagardère's media outlets Journal du Dimanche and Paris Match, and their editorial policies, which Vivendi's CEO allegedly influenced. It is now the Commission's task to determine whether Vivendi indeed jumped the gun. If the Commission comes to this conclusion, Vivendi could face a fine of up to 10% of its global turnover.

WHEN? According to Commissioner Vestager, the investigation into the allegations could take months. It remains to be seen whether the Commission will conclude its investigation still in 2023.

Merger Control III: A welcome simplification

When returning to your desk after the summer break, a significant change in the merger control space has already taken effect: on 1 September 2023, the Commission's 2023 Merger Simplification Package, adopted in April 2023, entered into force. It broadens the scope of transactions that could potentially benefit from a simplified review.

The 2023 Merger Simplification Package consists of a revised Implementing Regulation, a Notice on Simplified Procedure and a Communication on the transmission of documents. A Q&A document covers practical questions.

The Notice on Simplified Procedure sets out the categories of cases which may be eligible for a simplified review (and which do not lead to an affected market). In particular, the category of simplified cases is broadened to include, e.g., cases in which the previous

combined market share thresholds are exceeded up to a certain limit, but in which the market concentration index (HHI) delta is below 150. It further introduces a category of "super-simplified" cases, which may be notified without having to undergo pre-notification discussions with the Commission. Joint Ventures that not active in the EEA and transactions where the parties' activities neither overlap horizontally, nor are vertically linked fall within this category. Finally, a "flexibility clause" allows the Commission to treat transactions as simplified cases, even though the thresholds for a simplified treatment are slightly exceeded.

The Commission expects that approx. 10% of the cases previously reviewed under the normal procedure would qualify for a simplified treatment under the discretionary simplified treatment.

The notification forms have been amended, including the introduction of a new "tick-the-box" format Short Form CO for simplified cases. However, it needs to be noted that while the format may be simplified, the level of information required has increased and now requires notifying parties to provide information on non-controlling shareholdings above 10% and cross-directorships.

For non-simplified cases, the Form CO now requires parties to submit all data that is collected and stored in the ordinary course of business and that could be useful for a quantitative economic analysis (Sec. 5.5 of the Form CO). Parties will also need to describe how they use such data in the normal course of business and provide analyses derived from such data (Sec. 5.6 of the Form CO).

On a more practical note, all documents – notifications and annexes – can be submitted electronically. Documents that need to be signed will have to be signed using a Qualified Electronic Signature (QES) recognised by the Commission. Despite this progress, filings still have to be submitted by 5pm (and 4pm on Fridays).

WHEN? Good news – simplification as of now: the 2023 Merger Simplification Package entered into force on 1 September 2023 (and it is mandatory to use the revised notification forms!)

Foreign Subsidies Regulation: It is about to get real

As most of our readers are probably well aware, the hotly anticipated – and one may add: infamous – Regulation (EU) 2022/2560 on Foreign Subsidies (**FSR**) entered into force on 12 July 2023. Many large M&A deals are now subject to a new screening process: any deal that falls under the FSR thresholds and is (i) signed after 12 July 2023 and (ii) due to close after 12 October 2023 must be notified to, and approved by, the Commission prior to closing.

The mandatory notification tool will formally catch a wide array of deals, irrespective of whether the contributions received by a non-EU country have a connection to the transaction or otherwise potential distortive effects. A formal FSR filing is always required

- where at least one of the merging parties, the target company, or the JV has a turnover exceeding EUR 500m in the EU in the last financial year; and

- where the acquirer and/or the target company, including all their group companies, received financial contributions by non-EU countries of more than EUR 50m, on an aggregated basis, in the last three years prior to the signing of an agreement, announcement of a public bid or acquisition of a controlling interest.

While information on such financial contributions needs to be collected to determine a filing requirement, the Commission has – following harsh criticism – significantly alleviated the burden on the reporting obligations within a filing. In the final Implementing Regulation (EU) 2023/1441, certain categories of contributions have been exempted from reporting and only such of "risky" and particularly harmful nature (e.g. unlimited state guarantees) need to be described in detail.

And after long discussions, the Commission also made a concession for PE deals, allowing PE firms to report – under certain conditions – only on contributions granted to companies managed by the specific acquiring fund as opposed to all funds managed. Note however: For determining the filing thresholds, still all contributions to PE funds are relevant (as are turnover figures, mirroring the approach under EU merger control rules)

So now that we have the final documents before us and the FSR becomes a deal reality – what do companies and M&A dealmakers have to bear in mind? Key points to be considered are:

- ***Information collection:*** Companies should – if not done already – systemically collect and track all financial contributions received by non-EU countries (public authorities and undertakings with links to the State alike) over the last three years. That could for instance take the form of subsidy scorecard listing all relevant contracts, tax reliefs, capital injections for subsidiaries etc.
- ***Considering request for information waivers***: The Commission can dispense information requirements in a FSR filing if information is not reasonably available to the parties (e.g., because authorities in third countries refuse to cooperate). In relevant cases, companies should prepare arguments to that end to substantiate a potential waiver request to the EC within pre-notification discussions.
- ***Consider impact on deal timetable***: The FSR not only imposes a standstill obligation similar to the EUMR but also mirrors its timetable. The FSR review process also foresees a Phase 1 review of 25 working days after formal notification, following a potential in-depth Phase 2 investigation of 90 working days in case of substantive concerns (potential extension by 15 working days in case commitments are offered). As in EU merger control, the Commission encourages parties to engage in pre-notification discussions on the basis of a draft notification form. In light of this, dealmakers should consider the impact of a FSR review on the deal timeline (e.g., Long-Stop-Date), having recourse to their EUMR experience.

- Dealmakers should also think about ***how to reflect a potential FSR filing in deal documents***:
  - ***Conditions Precedent*** as known for EU merger control and/or FDI proceedings.
  - ***Cooperation obligations*** to ensure smooth filing preparations and engagement of all parties before the Commission, which might be particularly important given the extensive (and potentially difficult) disclosure on financial contributions by non-EU countries and corresponding information requests to be expected during an FSR review.
  - ***Efforts covenants***, e.g., on negotiating and accepting possible remedies, as the FSR has a different focus and goes beyond the types of divestiture or behavioral commitments typically accepted under the EUMR.
  - ***Risk allocation***: Negotiation of hell-or-high water clauses or "break-up fees" to address uncertainty about deal clearance, in particular in cases of high visibility (e.g., investments from China, transactions in strategic sectors such as semiconductors, healthcare etc.).
  - ***Possible springing conditions***: Under the FSR, the Commission will also have powers to call in below-threshold deals (as under Article 22 EUMR) for review, a risk that can and should be addressed for non-notifiable deals proactively. That is again particularly true for highly visible cases.
- ***Prepare for potential parallel Commission reviews***: A number of M&A transactions may require a filing under both FSR and the EUMR. As things stand, such filings would be dealt with by different case teams and companies have to prepare for potential divergence in terms of timing (different length of pre-notification, remedy discussions), different focus of such reviews and having to consider additional remedies. Companies should seek close contact with the Commission early on to align on such risks.
- ***Consider interplay with national procedures***: A number of cases might however only fall under the FSR and potential national merger control and/or FDI procedures. This poses similar questions as raised above on necessary closing conditions, deal timelines and potentially conflicting remedies.

WHAT'S NEXT? Companies and dealmakers now need to face the new realities – there is yet another layer to consider in M&A transactions. Stay tuned for the 12 October, when the Commission will receive the first notifications and hopefully provides further guidance based on its first experiences soon after.

As you see, no shortage on EU competition law topics – busy times ahead. If you want to stay up to speed: Don't forget to follow us on LinkedIn, for your favorite EU competition law topics!

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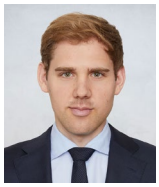

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