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Kirkland Alert

EU Antitrust Update

26 February 2019

This update summarizes recent developments and trends in the different areas of EU competition law and gives an outlook on what can be expected in 2019.

EU Merger Control

Record number of EU filings. In 2018, the European Commission (EC) received more than 400 merger notifications, its largest ever number of merger filings (including five mergers that were “pulled and re-filed”). This continues an upward trend in which the number of merger filings have increased each year since 2014. More than three-quarters of the deals were cleared under simplified review, while several large deals were approved after extensive Phase II investigations and far-reaching remedies (e.g., Linde/Praxair and Bayer/Monsanto). In early 2019, on the same day, the EC blocked two transactions because the remedies offered by the parties did not adequately address its competition concerns (Siemens/Alstom and Wieland/Aurubis).

EU merger thresholds may change. Following a public consultation in 2017, the EC is considering the introduction of transaction value-based thresholds for deals in which the target company does not yet generate sufficient revenues to meet EU turnover thresholds. Such thresholds would allow the EC to assess deals where a large player acquires a smaller innovative target in order to prevent its rise as a competitor in the future, e.g., a start-up in the digital or pharma sector (sometimes referred to as “killer acquisitions”). Similar thresholds have been introduced in Germany and Austria, but rejected in France. Those in favour of changing the EU Merger Regulation (EUMR) often refer to the Facebook/WhatsApp case, which the EC was only able to review following a referral request by Facebook to the EC, despite a purchase price of \$19 billion. However, we understand that DG COMP’s plans to propose a change of the merger thresholds may be on hold for now and, in any event, it has historically been difficult for the EC to broaden the jurisdictional criteria under the EUMR.

“European champions” debate. There is significant debate in Europe about the need for “European champions,” and that debate could have implications for EU competition policy or lead to EUMR changes. This has been triggered by the EC’s recent veto of the proposed rail merger by Siemens/Alstom. The French and German governments have strongly been in favor of the merger as the combined entity could have countered state-backed Chinese rivals. Competition Commissioner Margrethe Vestager has acknowledged the need for “*true European champions*,” but said that the response to global competition not taking place on a level playing field cannot be to undermine competition in Europe. Following the EC’s veto in Siemens/Alstom, the French and German governments have presented initial ideas for changing EU merger rules in a joint manifesto. These include a right of appeal to the EU Council that could override EC decisions in political cases and amendments to the EUMR and the merger guidelines to take greater account of both competition at a global level as well as potential future competition. Any changes to the EUMR would however require unanimous approval by EU Member States after an extensive legislative process. This development demonstrates a potential shift toward more politically motivated considerations as a factor in substantive mergers review.

Common ownership. The EC has taken an interest in common ownership and its potential anticompetitive effects, which is a topic that originated in the U.S. Common ownership relates to simultaneous ownership of stock in competing companies held by a single investor, where none of the holdings are large enough to give the owner control over of those companies, but potentially allow for some degree of influence. Commissioner Vestager has publicly mentioned that the EC needs to better understand to what extent common ownership exists in Europe and what its effects are. Notably, the EC already takes common ownership into account in its competitive assessment. Prominent examples concern agrochemical cases (most recently in Bayer/Monsanto), in which the EC found that certain equity holders collectively held significant positions in each of the main competitors. The EC concluded that such common shareholdings may have an effect on their rivals’ incentives to compete, which needed to be factored into the analysis.

Breaches of procedural merger rules. The EC has been enforcing procedural merger-related violations more strictly, particularly with regard to steps taken towards integration prior to merger clearance (so-called “gun jumping”). In April 2018, the EC imposed a record fine of €124.5 million on Altice for gun-jumping violations in the context of its acquisition of PT Portugal. Specifically, the EC found that Altice’s pre-closing rights under the SPA to veto and intervene in the target’s business with regard to senior management, pricing strategies and certain commercial contracts, as well as its actual exercise of such rights, were too far-reaching. According to the EC, the

companies also extensively exchanged competitively sensitive information without the appropriate safeguards being in place (clean teams, etc.). This is an important decision which provides practical guidance for parties on the boundaries of gun-jumping for pre-closing covenants in SPAs. The EC's Altice decision was followed by the EY/KPMG judgment of the European Court of Justice (ECJ) in May 2018, which clarified that the EU stand-still obligation only captures "*a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*". The ECJ's judgment provides welcome guidance as the court's formula ties gun-jumping back to the EUMR concept of concentration, but there remains uncertainty as to the extent to which the judgment will in practice allow farther reaching pre-closing interactions than in the past. Outside of gun-jumping, the EC has fined and is investigating companies for providing incorrect and misleading information during its review in breach of merger control rules. In addition, Telefónica Deutschland is being investigated by the EC for a possible violation of the merger commitments given in the context of its merger with E-Plus in 2014.

EU Cartel and Antitrust Developments

Cartels. In 2018 the EC handed down four cartel decisions, with fines totalling ~€800 million, and opened four new investigations. The EC is increasingly pursuing cases that, rather than involving traditional price fixing cartels, concern other non-traditional forms of collusion. In September 2018, the EC opened a formal investigation into whether several German car manufacturers colluded to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars. According to the EC, consumers may have been denied the opportunity to purchase less polluting cars, despite the technology being available. Commissioner Vestager has said that "*[t]his is a new thing, because this is not a suspicion of collusion of setting prices, or disabling choice as such... a cartel is much more than just agreeing on prices*". Other non-traditional cases that are being investigated by the EC include suspected cartels for fixing purchase prices in the styrene monomer and ethylene markets (which follow a €68 million fine against a purchasing cartel in the car battery recycling market in 2017), as well as an information exchange case against aviation and aerospace insurance brokers.

Antitrust. Following its e-commerce sector enquiry, the EC has renewed its focus on resale price maintenance (RPM). In July 2018, the EC imposed total fines of ~€111 million against four consumer electronics companies for engaging in RPM by restricting the ability of their online retailers to set their own retail prices for their products. The EC found that the pricing restrictions typically had a broader impact on

overall online prices for the relevant consumer electronics products, as many online retailers use pricing algorithms that automatically adapt prices to those of competitors. The EC reduced the companies' fines by 40-50 percent for cooperation under an uncodified mechanism that has so far only been used in a few non-cartel cases. Other notable EU antitrust enforcement actions include a ~€40 million fine against Guess for restricting retailers from online advertising and selling cross-border to consumers in other Member States (so-called "geo-blocking"), and the opening of a formal investigation into whether agreements of the IT travel software suppliers Amadeus and Sabre with airlines and travel agents restrict the latter's ability to use alternative suppliers of ticket distribution services.

Abuse of Dominance

Dominance in the technology sector. A focus of the EC has been to investigate dominant firms for abuse of market power in the technology sector. In 2018, it fined Google €4.3 billion for imposing restrictions on Android device manufacturers and mobile network operators, after having fined the company €2.42 billion in 2017 for using its search engine to prioritise its own shopping comparison service over those of others (with investigations ongoing regarding complaints against Google's implementation of the remedies imposed by the EC). There is also an ongoing investigation against Google for, amongst other things, allegedly requiring third parties to use its "AdSense" platform, which displays online search advertisements on third-party websites. The EC also fined Qualcomm €997 million in 2018 for making significant payments to a major customer on condition that this customer would not purchase microchips from competing chipmakers. The EC separately has an ongoing predatory pricing case against Qualcomm, alleging the company sold certain baseband chipsets at prices below cost, intending to hinder competition in the market. Amazon is being investigated by the EC for its dual role as a competitor, but also host, to third-party merchants, which sell goods on Amazon's websites. Finally, Broadcom is under EU investigation for possibly illegally pressuring customers to buy its semiconductors.

Looking Ahead: What to expect in 2019?

- Digitisation and "Big Data" will continue to be an area of priority, with the EC considering whether competition rules need to be re-interpreted or changed in response to digital challenges. By late March 2019, a panel of special advisers will report to the EC on the future challenges of digitisation for competition policy. The

EC's competition directorate is also seeking €140 million in a new budget line dedicated to tools to combat digital sector cases.

- Companies should expect continued strict EU antitrust enforcement, including in non-traditional areas, and lengthy reviews of complex transactions by the EC, with a focus on pipeline product overlaps and innovation, extensive internal document requests and economic analysis. It is not yet clear whether the debate on "European champions" and Member States' initiatives will have an impact on merger control enforcement and rules.
- 2019 will likely see a new Competition Commissioner replacing Commissioner Vestager, whose leadership focused on "fairness and competition" and actions against some of the world's most well-known companies on both sides of the Atlantic.
- Brexit is likely to have a significant impact, certainly in case of a "hard Brexit". Once the UK leaves the EU, the UK Competition and Market Authority (CMA) will have jurisdiction to review complex cases that may have previously been within the sole remit of the EC, leading to parallel investigations in the UK and Brussels. Alongside an increase in cartel probes and other investigations, the CMA is expecting to review 30-50 more merger cases each year.

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