

# KIRKLAND & ELLIS

Kirkland Alert

## 2023 EU Antitrust & FDI Update

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This update summarizes recent developments and trends in the different areas of EU competition law and foreign investment control (“FDI”) and gives an outlook on what can be expected in 2023.

### I. New Regulation

There were several notable regulatory developments in 2022, in particular the EU Foreign Subsidies Regulation (“FSR”) and the Digital Markets Act (“DMA”).

#### FSR

The FSR gives the European Commission (“EC”) notification-based tools to investigate transactions and public procurement procedures involving financial contributions by a non-EU government that meet certain revenue thresholds. In addition, it gives the EC the power to investigate a wide range of market situations that cover lower value transactions as well as situations in which the EC suspects that a financial contribution may affect the operation of companies active in the EU. The FSR allows the EC to impose far-reaching conditions (e.g., divestments, dissolution of the transaction, access remedies) where it finds that a foreign subsidy was given that actually or potentially affects competition in the EU. According to the EC, the FSR closes a regulatory gap. Previously the EC was only able to scrutinize subsidies obtained from EU Member States under EU State aid rules, now its powers of review and intervention extend to subsidies provided by non-EU governments.

The FSR will apply as of 12 October 2023 for transactions that have signed on or after 12 July 2023. Transactions will have to be notified to the EC for an acquisition of a target company generating revenues of at least EUR 500 million in the EU, if the acquirer and / or the target have received financial contributions of at least EUR 50 million from non-EU governments in the prior three calendar years. The notion of

financial contribution is extremely broad under the FSR. The Implementing Regulation for the FSR is due to be published shortly and should provide some additional guidance.

## DMA

The DMA aims to regulate the conduct of large digital companies providing core platform services (e.g., online search engines, app stores, messenger services) – so-called gatekeepers. It will become applicable as of 2 May 2023. Gatekeepers will have to adhere to “do’s and don’ts” relating to interoperability and data access / portability requirements, self-preferencing and data collection. The DMA allows the EC to impose hefty fines (up to 10% of global revenue) for non-compliance as well as behavioral and structural remedies (incl. break-ups) for “systematic” non-compliance. In addition, gatekeepers will have to inform the EC of any intended acquisitions of targets providing digital services. The EC will undoubtedly use the information it receives about these transactions in assessing whether to invite Member States to refer cases to the EU under its new referral policy (further details below).

## II. EU Merger Control Developments

### Merger Statistics

The number of merger notifications in 2022 dropped to 371 (from 405 in 2021) but remained historically high. Close to 80% of the cases were cleared unconditionally under the EC’s simplified procedure.

### Merger Remedies and Prohibitions

The EC approved ten cases in Phase 1 subject to commitments and two cases in Phase 2 subject to commitments. The EC prohibited two cases – *Illumina/Grail* (healthcare) and *Hyundai/Daewoo* (shipbuilding). 12 cases were withdrawn by the merging parties (eight in Phase 1 and four in Phase 2).

The *Illumina/Grail* case is significant in various respects. The transaction is the first case that was reviewed by the EC following a change to its referral policy in 2021. Under this policy the EC encourages Member States to refer up cases involving start-ups and recent entrants with significant competitive potential (in particular in the pharma and digital sectors). The intention is to capture so-called “killer acquisitions”

where a target is acquired to prevent competition by a future / nascent competitor who does not generate significant revenues today. Following a lengthy review, in September 2022, the EC prohibited *Illumina/Grail* due to vertical foreclosure concerns even though Grail does not have any operations, revenues or employees in the EU. A further highly unusual feature of the case is that during the EC's investigation Illumina closed the transaction in breach of the standstill obligation which prohibits merging parties from implementing a transaction before approval has been obtained. The EC adopted, for the first time in EU merger control history, interim measures ordering the parties to keep Grail separate from Illumina. It also initiated a gun-jumping investigation and a very significant fine of up to 10% of Illumina's global turnover can be expected in 2023. Illumina filed appeals against the EC's prohibition decision as well as the the EC's decision to accept the referral request from Member States. In the latter case the GC has sided with the EC, finding that the EC was competent to decide that it would examine the transaction under EU merger rules (this judgment is currently under appeal before the ECJ).

The *Cargotec/Konecranes* merger also made headlines in 2022. The EC cleared the transaction subject to remedies following a Phase 2 review. However, one month later, the UK Competition & Markets Authority ("CMA") rejected those remedies and prohibited the transaction. The parties had proposed a remedy package involving assets from each party (a "mix and match" remedy) and this was unacceptable to the CMA, even though the EC had ultimately been willing to clear on that basis. The case underscores the divergence that can arise between different competition authorities and, in particular, between the EC and UK in a post-Brexit world.

Finally, there have been two notable Advocate General ("AG") opinions. Even though these are non-binding, the Court of Justice of the European Union ("ECJ") often follows them. In October 2022, AG Kokott issued an opinion that the ECJ should set aside the GC's judgment which had overturned the EC's 2016 prohibition of *Hutchison/O2*. If the ECJ follows AG Kokott, this will represent a major win for the EC, whose ability to intervene in so-called "4 to 3" mergers had been placed in some doubt by the GC. In a second major opinion relating to a different merger case (*Towercast*), AG Kokott took the view that the EU abuse of dominance rules can apply to transactions which do not meet the thresholds under European merger control rules. This raises the possibility of competition authorities in the EU intervening in acquisitions after the event and potentially fining companies for abuse of dominance as a result of acquisition. In particular this could feasibly arise in relation to killer acquisitions, as an alternative to the EC referral route outlined above.

### III. EU Cartel Developments

## Cartels

Cartel enforcement remains one of the EC's top priorities. In 2022, the partial revival of dawn raids continued (which had effectively come to a halt during the pandemic): the EC carried out five dawn raids with respect to suspected cartel violations (in online food delivery, water infrastructure, fashion, natural gas, and automotive).

The EC issued two cartel decisions in 2022 (compared to ten in 2021). The most significant fine was imposed in the styrene monomer purchasing case (~EUR 157 million), which was a buyer cartel. In this case, the EC found that a group of styrene monomer purchasers had coordinated their negotiation strategies and exchanged competitively sensitive information in relation to an industry reference price. To date, there are only a handful of EU buyer cartel decisions.

## IV. Abuse of Dominance

2022 saw major developments on the abuse of dominance front, as the EC issued four infringement decisions and the European Courts handed down five judgments (four by the GC, and one by the ECJ). The EC also opened new investigations against Google (relating to online display advertising) and is investigating two pharmaceutical companies in relation to the alleged systematic spreading of misleading information about a competing product (competitive disparagement).

In *Amazon Marketplace*, the EC accepted commitments from Amazon addressing concerns over Amazon's use of non-public data of marketplace sellers and Amazon's rules and criteria for the Buy Box and Prime which, according to the EC, favored its own retail business. The conduct that was under investigation in this case has been made the subject of a gatekeeper obligation in the DMA.

A number of judgments of the European Courts are of interest:

In September 2022, the GC issued its long-awaited judgment in *Google Android*. The GC largely upheld the EC's decision that Google abused its dominant position relating to tying arrangements for certain apps it offers for its Android mobile operating system, but slightly reduced the fine of EUR 4.3 billion to EUR 4.1 billion.

Early in 2022, the GC annulled the EC's EUR 1.06 billion fine on a U.S. company, ruling that the EC's analysis of the company's loyalty rebates was incomplete and insufficient to establish that the rebates were capable of causing anticompetitive effects. In June 2022, the GC also annulled the EC's decision in *Qualcomm*. The EC had fined Qualcomm EUR 998 million in respect of large discounts granted to a U.S. company in return for exclusivity. The GC highlighted "a number of procedural irregularities" that had affected Qualcomm's right of defense and also found that the EC had not taken into account all of the relevant factual circumstances in its substantive assessment.

## V. FDI

All but two EU Member States now have FDI screening mechanisms in place or are in the process of establishing them. Austria, France, Germany, Italy and Spain remain the most active FDI regimes, with some of the Scandinavian authorities starting to become more active as well. In 2022, Germany and Italy blocked several deals. Two transactions were ordered to be unwound following FDI screening (*Heyer/Aeonmed* in Germany and *Apli Aviation/Mars Information Technology* in Italy). *Siltronic/GlobalWafers* could not be completed as the parties were not able to obtain clearance in Germany in time. Cosco's investment in the port of Hamburg was partially approved by the German government but limited to a 25% stake (instead of 35%).

## VI. Outlook – What to Expect in 2023

We can expect even closer scrutiny of mergers going forward. Investors will have to prepare for the FSR which will become relevant for transactions as of the autumn of 2023. The EC may start "calling in" additional transactions under its changed referral policy following the adoption of the DMA. In addition, several new FDI regimes are expected to enter into force, including in Belgium, Denmark, Luxembourg, the Netherlands, and Slovakia.

The outcome of the *Hutchison* case before the ECJ will be paramount as the case is about the precise legal standard that should be applied by the EC when assessing mergers, as well as key concepts such as when companies can be considered to be close competitors.

Whilst no sector falls outside the purview of European regulators, we can expect that the key sector in focus will continue to be the digital sector, with ongoing antitrust investigations, regulators on the look-out for killer acquisitions, and the roll-out of the

DMA.

Finally, with pressure increasing to allow companies to engage in “green” initiatives, following adoption of new guidance, the EC may start now to issue comfort letters on sustainability cooperation. Whilst the EC has indicated its willingness to provide more guidance on such initiatives, it can at the same time be expected that the EC will vigorously investigate cases of green washing or cartels that are formed under the pretense of sustainability efforts.

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- Antitrust & Competition

## Suggested Reading

- 27 January 2023 Kirkland Alert Revised Hart-Scott-Rodino Act Thresholds, Filing Fees and Civil Penalty Amounts Announced
- 23 January 2023 Press Release Kirkland Advises Thoma Bravo on Acquisition of Magnet Forensics Inc.
- 13 January 2023 Press Release Kirkland Represents Bain Capital Private Equity in Significant Equity Investment in EcoCeres

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