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Kirkland Alert

2024 EU Antitrust and FDI Update

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This update summarizes recent developments and trends in 2023 in the different areas of EU competition law and foreign investment control (“FDI”) and gives an outlook on what can be expected in 2024.

I. Regulatory Developments

Foreign Subsidies Regulation (“FSR”)

The FSR started to apply in July 2023. The new regime is aimed at closing a regulatory gap identified by the EU Commission (“EC”) given that financial support from EU governments is subject to EU State aid control, whereas support by non-EU governments was not systematically scrutinized before the adoption of the FSR. Under the FSR, the EC assesses whether financial contributions by non-EU countries are foreign subsidies that distort competition in the EU. The new regime includes a mandatory notification obligation for M&A transactions where (1) a target company generates revenues of at least €500 million in the EU and (2) the parties have received aggregate financial contributions of at least €50 million from non-EU governments in the prior three calendar years. Approximately 50 M&A-related FSR notifications were filed in 2023. The FSR also includes a notification obligation for public procurement procedures and allows the EC to investigate any type of economic activities and market situations (e.g., greenfield investments) when it suspects that a foreign subsidy may be involved.

Digital Markets Act (“DMA”)

The DMA started to apply in May 2023. It regulates the conduct of large digital companies providing core platform services (e.g., online search engines, app stores, social networking services) – so-called ‘gatekeepers’. The DMA defines specific do’s and don’ts that gatekeepers have to adhere to relating to self-preferencing, portability requirements, data collection and other conduct. In addition, gatekeepers must inform the EC of any intended acquisitions of targets providing digital services.

Consequences of noncompliance are fines of up to 10% of the company’s global turnover and, in cases of systematic infringements, additional remedies (including break-ups).

In September 2023, the EC designated six companies as gatekeepers, with 22 of the services provided by these companies identified as core platform services under the DMA. Several companies have challenged their gatekeeper designation before the General Court, the EU’s second highest court. Meanwhile, the EC has signaled that it is leaving the door open for potential additional designations, with further announcements expected in February 2024.

II. EU Merger Control Developments

Merger Statistics

The number of merger notifications in 2023 dropped slightly to 356 (from 371 in 2022), but remained at a high level. The vast majority of the cases (about 75%) were filed under the EC’s simplified procedure.

Under its updated referral policy under Article 22 of the EU Merger Regulation, the EC accepted two additional referral cases that were not notifiable at EU Member State level (*Qualcomm/Autotalks* and *EEX/Nasdaq Power*), the first one being *Illumina/Grail*, which led to a prohibition and the largest EU fine for gun jumping to date (as noted below).

The EC approved four cases in Phase 1 subject to commitments and five cases in Phase 2 subject to commitments. The EC prohibited one case in 2023 – *Booking/eTraveli* (see details below). Four cases were withdrawn in Phase 1 and one case in Phase 2.

Mergers Resulting in Remedies and Prohibitions

In *Booking/eTraveli*, the EC found that the transaction would have strengthened Booking's dominant position in the hotel online travel agencies ("OTA") market. The case is noteworthy as the EC's prohibition is based on a nontraditional "ecosystem" theory of harm.

According to the EC, Booking's market share is above 60% in the EEA, and it benefits from network effects due to a significant scale in its hotel offering. eTraveli provides flight OTA services, which are often the first step in the planning of a trip and therefore an important customer acquisition channel. The EC found that the transaction would have allowed Booking to expand its travel services "ecosystem" as the addition of eTraveli's flight OTA product would have generated significant additional traffic to Booking's platform, raising barriers to entry for competing OTAs. The EC rejected the remedies offered by Booking. Booking had proposed to display multiple hotel offers from competing hotel OTAs on the flight checkout page, but the EC found that the selection and ranking of offers by competing hotel OTAs was not sufficiently transparent and nondiscriminatory, the offers would not have been shown on other important cross-selling channels and the remedies would have been difficult to monitor. Booking has challenged the EC's decision before the EU General Court.

The EC approved the proposed acquisition of Activision by Microsoft after conducting an in-depth investigation. The EC found that the transaction would have harmed competition in the distribution of PC and console games via cloud game streaming services, a nascent market segment. The EC found this would have been the case if Microsoft had made Activision's games exclusive to its own cloud game streaming service, thereby withholding them from rival cloud game streaming providers. Microsoft addressed the EC's concerns by offering – for ten years – free licensing to customers in the EEA allowing them to stream via any cloud game streaming services all current and future Activision Blizzard PC and console games and a corresponding license to cloud game streaming services. Diverging from the EC's decision, the UK Competition and Markets Authority ("CMA") had initially blocked the transaction over innovation and reduction of choice concerns relating to the cloud gaming market. Later the CMA cleared the transaction as Microsoft decided not to acquire Activision's cloud streaming rights outside of the EEA.

Judicial Review

In July 2023, the highest EU court, the EU Court of Justice ("ECJ") overturned the General Court's judgment in the *Hutchison/O2* telecoms case. Four years earlier, the

General Court had annulled the EC's decision to block Hutchison's \$14.5 billion bid for O2. The General Court's judgment had placed some doubt in the EC's ability to block "4 to 3" mergers. In its judgment, the ECJ agreed with the EC and confirmed the legality of a number of important substantive concepts, in particular that it is sufficient for the EC to demonstrate that the transaction will "more likely than not" raise competition concerns and that the burden of establishing efficiencies firmly lies with the merging parties.

Gun Jumping

The ECJ confirmed in the *Altice* case that the EC was right to impose two separate fines on Altice for failing to notify its acquisition of PT Portugal and for implementing the transaction in violation of the stand-still rules. The EC had imposed a fine of €62.25 million for each of these infringements, amounting to a total fine of €124.5 million. The ECJ, however, lowered Altice's fine relating to the failure to notify violation to €52.9 million given that it is an instantaneous infringement, whereas the violation of the stand-still rules is a continuous infringement, and the EC had not explained why the fines were the same despite this difference. The ECJ also confirmed the EC's broad interpretation of what constitutes gun jumping, including premature influence acquired through pre-closing covenants in the SPA as well as exchanges of competitively sensitive information.

In *Illumina/Grail*, the EC imposed a fine of €432 million on Illumina for closing the transaction during the EC's ongoing merger review. In setting the fine, the EC took into account that Illumina had acted intentionally by pursuing a strategy of weighing up the risk of a gun jumping fine against the risk of having to pay a high break-up fee if it had failed to take over Grail (a U.S.-based producer of cancer detection tests). For the first time, the EC also fined the target, Grail, a symbolic amount of €1,000. Illumina has challenged the EC's gun jumping decision before the General Court. Illumina's appeal that the EC did not have jurisdiction to review and prohibit the Grail transaction (in which case there would be no gun jumping violation) is pending before the ECJ.

III. EU Cartel Developments

Cartel enforcement remains one of the EC's stated top priorities, and there are signs that cartel enforcement is on the rise again. Four cartel infringement decisions were adopted in 2023 relating to banking, defense, chemicals and pharmaceuticals, amounting to total fines of €89 million. The EC carried out unannounced inspections

(“dawn raids”) in the following sectors: fragrances, fashion, artificial grass, construction chemicals and food delivery services. Several cartel investigations were formally closed without a substantive decision (wood pulp, water infrastructure). According to a senior official, the EC received a larger number of leniency applications than in previous years.

For the first time, cartel fines were imposed in the pharma sector: the EC fined several companies a total of €13.4 million for participating in a cartel concerning a pharmaceutical ingredient used to produce Buscopan (an abdominal antispasmodic drug). The EC’s investigation into a defense sector cartel (which led to a fine of €1.2 million) was concluded in less than two years (the average duration of EC investigations following dawn raids is more than five years).

The EC is also for the first time investigating so-called ‘no poach’ agreements, which are agreements between companies not to hire each other’s employees – something that has been on the radar of the U.S. enforcers for a longer time. Delivery Hero and Glovo were raided by the EC in November 2023 for having allegedly agreed not to “poach” employees. Executive Vice President Vestager had announced in 2021 that the EC would start looking into wage-fixing and no-poach agreements.

IV. Abuse of Dominance

The EC’s focus continues to be on “Big Tech”. Mostly traditional concerns are being scrutinized (e.g., discrimination, self-preferencing, tying and bundling). For those companies designated as “gatekeepers”, some conduct will be covered by the DMA, but outside of the scope of the DMA, the EU abuse of dominance rules will continue to be fully relevant.

In May, the ECJ confirmed the German Federal Cartel Office’s position that a competition authority can assess a breach of the General Data Protection Regulation (“GDPR”) rules as part of its abuse of dominance assessment. The German authority had found that a cross-service use of personal data contrary to data protection rules amounted to abusive conduct by Meta (Facebook at the time). According to the German authority, Meta’s general terms had made the use of its social network subject to the processing of the user’s “off-FB” data, namely data relating to the user’s visits to other websites, without their consent. However, the ECJ also held that the competition authority must cooperate with the relevant GDPR authority, to ensure consistency and avoid departure from previous decisions of the GDPR authority.

In September, the EC re-adopted parts of its 2009 decision against a U.S. company and imposed a fine of approximately €376 million on the U.S. company for abusing its dominance in microprocessors through offering certain types of anticompetitive rebates (in 2009, the EC had fined the U.S. company €1.06 billion). The lower fine follows a judgment by the General Court in 2022 which annulled the EC's 2009 decision, in particular the EC's finding related to the U.S. company's conditional rebates practice (which the EC is now challenging before the ECJ).

V. FDI

The number of EU Member States with an active screening mechanism has continued to grow, with only a handful of Member States still developing their FDI regime. 2023 saw the entry into force of new regimes in Belgium, Estonia, the Netherlands, Luxembourg and Sweden. Ireland and Greece are expected to follow in 2024. Austria, France, Germany, Italy and Spain remain the most active FDI regimes. While several EU Member State regimes are still being expanded in scope, the UK has announced that it intends to narrow somewhat and to refine the scope of its two-year-old NSIA regime in 2024. In addition, the EC has been consulting on a number of possible changes to the EU FDI Screening Regulation.

Several deals were blocked in 2023, two of which signaled tightened enforcement in view of the geopolitical situation. In November, the Italian government blocked French-based Safran's planned \$1.8 billion acquisition of Collins Aerospace's flight controls business on account of concerns that the foreign ownership could affect supply contracts for the Eurofighter program. This is a first-ever block on FDI grounds of an intended intra-EU investment. In October, the French government blocked the proposed \$245 million acquisition of the Canadian manufacturer Velan by U.S.-based bidder Flowserve. Velan's French units make valves that are used in nuclear power plants and submarines. The concern, although not public, is understood to be that the French companies would have been subject to U.S. export controls which could have affected the supply of nuclear submarine components to France's Ministry of Armed Forces, should the U.S. government decide to limit exports of the relevant products.

VI. Outlook – What to Expect in 2024

We expect heightened regulatory scrutiny, in particular of M&A transactions, given that deals may be subject to merger control, FDI and FSR in Europe.

In merger control, the EC will likely continue to develop and apply nontraditional theories of harm, especially in the tech sector, and will potentially factor in “green” aspects more prominently in its substantive analysis. The EC can also be expected to continue to apply its jurisdictional powers expansively and “call-in” cases that may raise competition concerns, even if they are not notifiable at national level.

Additional FDI regimes will come on-stream in 2024. Many of the existing regimes are still too untargeted in scope, leading to a large number of “fail safe” notifications. Proposals to revise the EU’s FDI Screening Regulation may help to filter out cases not meeting certain criteria and address divergences between national screening mechanisms. Several jurisdictions may additionally be considering outbound investment screening regimes to stem the outflow of know-how and investment into critical technologies abroad.

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Suggested Reading

- 16 January 2024 Press Release Kirkland Advises Actis on Sale to General Atlantic
- 12 January 2024 Press Release Kirkland Advises Strategic Value Partners and Pfeiderer Group on Sale to The Kaczmarek Family together with Innova Capital

- 11 January 2024 Press Release Kirkland Advises Monomoy on \$315 Million Sale of Sportech to Patrick Industries

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