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Kirkland Alert

2022 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 direct investment control ("FDI") and gives an outlook on what can be expected in 2022.

I. Overarching Themes

The European Commission ("EC") is currently pursuing a review of its competition policy tools with "unprecedented scope and ambition" in light of increased digitalisation, the green transition and the COVID-19 pandemic. With its review the EC intends to ensure that its existing tools remain fit for purpose and are complemented by new instruments.

Digital

The EC's proposal for a Digital Markets Act ("DMA") is currently in the legislative process and expected to be adopted in 2022.[1] The DMA is designed to regulate the behaviour of large digital platforms acting as gatekeepers between business users and their customers in the EU. While certain details of the gatekeeper definition are still being "fine-tuned", it seems clear that the DMA will largely apply to major US tech companies. Those companies identified as gatekeepers will have to adhere to "do's and don'ts" rules, which include interoperability requirements, data access/portability and a ban on self-preferencing. Once adopted, the EC will have far-reaching investigative powers and the ability to impose behavioural or structural remedies (which includes break-ups as a last resort) as well as significant fines for non-compliance with the DMA. The intention is that the DMA will work in tandem with existing competition rules by setting *ex ante* rules that ensure contestable and fair digital markets. The EC's DMA proposal also obliges gatekeepers to inform the EC of acquisitions of companies

providing digital services. This will allow the EC to detect potential killer acquisitions (i.e., the acquisition of a nascent or future competitor by an established player) and to encourage Member States to refer cases to the EU under its new referral guidance which effectively expands the EC's jurisdictional reach.

The EC is also conducting a review of rules and guidance that govern agreements between competitors (so-called "Horizontal Block Exemptions") and supplier/distributor relationships (so-called "Vertical Block Exemptions") as well as guidance on market definition (the current guidance dates back to 1997). During the public consultations stakeholders emphasised the need for a "digital facelift" of these documents.

Sustainability

The EC is considering how EU competition rules can complement environmental and climate policies more effectively in order to achieve the European Green Deal objectives. A competition policy brief published by senior DG COMP officials in September 2021 highlights that more antitrust guidance will be given in the updated guidelines on horizontal cooperation and vertical agreements. The brief also indicates that the EC may be willing to issue individual guidance in relation to sustainability initiatives that raise novel issues and to adopt decisions finding that competition rules are not applicable in certain instances. Moreover, according to the brief, sustainability benefits (e.g., reduced air pollution) could be taken into account in the antitrust assessment as long as these are valued by users of the product (while at the same time the consumer welfare standard should be maintained as a key policy principle).

COVID-19

In response to the COVID-19 pandemic, the EC adopted a State aid Temporary Framework enabling Member States to provide support to businesses in need. Since the beginning of the pandemic the EC has adopted around 700 decisions approving aid of more than €3 trillion covering a variety of sectors, often in record time. The Temporary Framework was recently prolonged until June 2022.

The EC also adopted an Antitrust Temporary Framework aimed at providing guidance for cooperating on shortages of critical hospital medicines, medical equipment or bottlenecks in vaccine production. In March 2021, the EC issued a comfort letter relating to a matchmaking event allowing companies to cooperate with the aim of addressing bottlenecks in the production of coronavirus vaccines. It is only in 2020

that the EC returned to issuing comfort letters after nearly 20 years in light of the pandemic.

II. EU Merger Control Developments

Merger Statistics

Despite the ongoing COVID-19 pandemic, the EC received the second-highest number of merger notifications in the history of EU merger control in 2021: 405 (which is 44 more than in 2020 and 23 more than in 2019). This is despite the UK's departure from the bloc, which has led to many mid-size transactions falling under the EU review thresholds.

Merger Remedies

The EC approved seven cases in Phase 1 subject to commitments and four cases in Phase 2 subject to commitments. Although there were no outright prohibitions, two cases (both in the air transport sector — Air Canada/Transat and IAG/Air Europa) were abandoned in Phase 2 since, according to the EC, the proposed remedy packages did not adequately address competition concerns. The Aon/Willis Towers Watson case was cleared by the EC with remedies but later also abandoned as the US Department of Justice filed a lawsuit to block the transaction.

In the Novelis/Aleris case, the EC adopted final binding measures relating to the divestment of a former Aleris plant in Belgium in 2021. Novelis had offered to divest the plant in order to obtain clearance in 2019 following a Phase 2 investigation but was not able to close the sale within the required divestiture period (despite being granted extensions by the EC). As a result the EC's clearance decision became inapplicable and the EC adopted provisional interim measures. Later Novelis sold the Belgian plant in compliance with these interim measures and subsequently the EC adopted final measures that were similar to the original commitments of 2019 (and included, as is common, a non-reacquisition clause preventing Novelis from re-acquiring the Belgian plant).

New Referral Policy

The EC's new referral policy encourages Member States to refer transactions to the EU if they involve start-ups or recent entrants, especially in the digital and pharma sectors. Member States can now refer a case up to the EC even if they do not have jurisdiction under national rules. Importantly, transactions may trigger a referral even if the target is not active in the EU as long as an impact on competition in the EU can be expected. The EC will consider referrals up to ~6 months post-closing which is a deviation from the general EU pre-closing notification system. Guidance on the new policy has been issued by the EC but is broad and vague, so it will take time for the practice to become clear.[2]

The Illumina/Grail transaction has been the first case under the EC's new referral policy. Illumina announced the proposed acquisition of Grail, a healthcare company developing blood-based cancer tests, in September 2020. In April 2021, the EC accepted a referral request by France (which was joined by other Member States) even though Grail has no revenues or business presence in the EU. As a result, Illumina notified the transaction to the EC in June 2021. The case is currently in Phase 2 after the EC had identified potential vertical foreclosure concerns according to which Grail's future competitors in the EU may be excluded due to Illumina's leading upstream market position in gene sequencing systems. In August 2021, Illumina closed the transaction despite the EC's pending probe as the deal would have expired before the EC would have concluded its merger review. Only two days following the closing, the EC initiated a gun-jumping investigation and has in the meantime — for the first time in EU merger control history — imposed interim measures on the parties which include that Illumina and Grail need to be held separate and run by a hold separate manager in the interim period.

Illumina has sued the EC before the EU General Court, arguing that the EC does not have jurisdiction to review the deal. A decision of the court can be expected before the end of the EC's merger investigation (which is currently end of February 2022) as the EU judges are reviewing the case under the expedited procedure.

In the second case under the new referral policy — Facebook/Kustomer — the EC accepted a referral from Austria (who was competent to review the case under Austrian rules). The case is currently in Phase 2 before the EC. Germany has now taken concurrent jurisdiction to review the transaction, thereby risking to undermine the EU's "one stop shop" principle.

Gun-Jumping

Aside from the ongoing Illumina/Grail gun-jumping investigation, the EU General Court largely confirmed the EC's gun-jumping fine against Altice relating to the Altice/PT Portugal case,[3] but reduced the fine by 10% as Altice initiated the merger review process before the EC promptly.

The EC rejected a gun-jumping complaint brought by Suez in the Veolia/Suez case. In a first step, Veolia had purchased 29.9% of Suez's shares from a single seller, which did not give Veolia control. In a second step, it launched a public bid for the remaining shares of Suez. Under EU merger rules there is an exemption from the stand-still obligation for acquiring shares from multiple sellers in a public bid context. The EC found that this exemption applied in this case and therefore there was no gun-jumping. Suez has appealed the EC's decision to reject Suez's complaint before the EU General Court.

III. EU Cartel Developments

Cartel enforcement remains a top priority for the EC. In 2021, 11 cartel decisions were adopted by the EC and total fines of ~€1.75 billion were imposed. The most significant fine was imposed in the car emissions cartel (~€875 million), followed by fines of ~EUR 743 million imposed on global banks in three separate trading cartels. In the car emissions cartel, the EC found that a group of German carmakers violated EU antitrust rules by deciding not to compete on emission cleaning technology for diesel cars. More specifically, the car makers reached an agreement on tank sizes and ranges for an additive called AdBlue as well as a common understanding on the average estimated AdBlue consumption, and they also exchanged competitively sensitive information on these elements. It is the first time that the EC found that cooperation on technical elements and innovation, as opposed to price fixing or market sharing, amounts to cartel behaviour. The car manufacturer cartel decision was published together with a comfort letter in which the EC outlined why it considered that some cooperation was in line with competition rules.

The EC has also resumed inspecting companies for suspected cartel activity after no dawn raids had been carried out for a period of two years due to the COVID-19 pandemic.[4] In autumn 2021, the EC raided companies active in the wood pulp and defence sectors in different Member States and EC Executive Vice-President Margrethe Vestager has announced that a "series of raids" will follow in the coming months.[5]

Also in 2021, the European Court of Justice upheld a finding that Goldman Sachs ("GS") was jointly and severally liable for a fine of €37 million that the EC imposed on GS's erstwhile portfolio company, Prysmian, for its participation in the power cables cartel. The judgment provides final confirmation that the conduct of a portfolio company may be imputed to the parent (including a financial sponsor) where the parent exercises "decisive influence" over the company's commercial conduct. The case also confirms that (i) decisive influence is presumed (i.e., no supporting evidence is required) for parents of wholly owned subsidiaries and parents in a similar situation to that of a sole owner (e.g., exercise of all the voting rights); and (ii) even where a presumption does not arise, decisive influence may arise at lower shareholding levels — even at less than 50% — depending on the legal, factual and economic links between the parent and its subsidiary.

In another important judgment, Sumal, the Court of Justice found that subsidiaries can be subject to antitrust damages claims relating to cartels in which their parent companies were involved if the claimants can show that (i) the subsidiary and the parent company are part of a single economic unit (meaning that there are sufficient legal, economic and organizational links between them) and (ii) there is a specific link between the activity of the subsidiary and the infringement for which the parent is liable (i.e., it must market products that were the subject of the cartel). In the case at hand, Sumal, a Spanish company, had sought compensation from Mercedes Benz Trucks España, a subsidiary of Daimler AG, in relation to the purchase of trucks against the background of the EC's trucks cartel decision. The EC's decision in this case was addressed to Daimler and not its Spanish subsidiary.

IV. Abuse of Dominance

The EC continues to investigate large US tech companies for abuse of dominance violations. Importantly, in November 2021, the EU General Court upheld a 2017 fine of €2.42 billion against Google for favoring its own price comparison service (Google Shopping) on its general results pages while demoting the results from competing comparison shopping services. The judgment confirms that these so-called "self-preferencing" practices can constitute an abuse of dominance and that such practices do not necessarily have to be assessed in light of the traditional test relating to essential facilities. Instead, self-preferencing can be an abuse on its own terms, thereby arguably broadening the scope of Article 102 TFEU. In its judgment, the court emphasized Google's "superdominant" and "ultra-dominant" position as well as the importance of Google's general search engine for third parties to effectively compete

in the market (while also making it clear that self-preferencing practices can only be prohibited when they have, or are likely to have, anti-competitive effects).

In the pharmaceutical space, the EC recently accepted commitments offered by Aspen Pharmacare to end its investigation into excessive pricing of six cancer medicines. The EC's investigation found that Aspen had been achieving very high profits from its sales of these medicines, both in absolute terms and when compared to the profit levels of similar companies in the industry. The EC also found that Aspen did not have any legitimate reasons for such high profit margins, in particular as the medicines in question had been off-patent for many years and Aspen had not significantly invested in their development. Under the commitments, Aspen agreed to reduce its prices for these medicines significantly (on average by ~73%) and to continue to supply them in the EEA for a guaranteed period of up to 10 years. Excessive pricing cases are rare, and the EC's decision is the first of this type by the EC in the pharma sector.

V. Foreign Investment Control

After the EU FDI Screening Regulation ("FDI Regulation") took effect in October 2020, Member States now have to cooperate closely with the EC and other Member States in their foreign direct investment reviews. However, the FDI Regulation does not give the EC the final say in foreign investment control matters (this power remains with the individual Member States). The new cooperation mechanism significantly increases the likelihood that Member States are made aware of transactions that have not been notified and that they may call-in cases for FDI review at a late stage or even after the closing of the transaction has occurred.

The FDI Regulation has also incentivized Member States to introduce or expand their FDI regimes: 24 out of 27 Member States now have regimes in place or are in the process of introducing a mechanism (compared to 11 in 2017). Post-Brexit, the UK is no longer part of the EU FDI framework, but the UK government has introduced a far-reaching national security regime that requires mandatory notifications as of 4 January 2022 while applying retroactively to all transactions completed since 12 November 2020.[6]

According to the first FDI report published by the EC in November 2021, ~1,800 transactions were reviewed under national FDI rules in the EU in 2020. Austria, France, Germany, Italy and Spain have been the most active FDI regimes so far. 80% of these transactions were approved without formal screening and assessed within 15 days. Of

the remaining 20%, 79% were approved without conditions, 12% were approved with conditions and 9% were either prohibited or abandoned.

Separately, in May 2021, the EC proposed a regulation for an EU foreign subsidies regime. The rationale behind the proposal is to create a level playing field between companies that receive support from EU governments, which is subject to EU State aid rules, and those that obtain foreign subsidies from non-EU governments, which are currently not subject to State aid control. The new foreign subsidies regime includes a transactional element: proposed acquisitions of EU targets by investors who have received financial support from non-EU governments in the context of the transaction will likely have to notify the EC. The EC will likely also have far-reaching powers including the ability to block transactions and to ask for divestments. The EU foreign subsidies regulation is expected to be adopted in 2022.[7]

VI. Outlook — What to Expect in 2022

We expect regulatory scrutiny of mergers to increase going forward. Transactions will potentially be subject to three separate regimes in the EU: merger control, foreign investment control and the EU foreign subsidies regime. Post-Brexit, the UK CMA is conducting parallel reviews to the EC's investigations in high-profile cases, which has already led to diverging outcomes in some instances (even though there continues to be close cooperation between the authorities). The EC and the US agencies may cooperate even more closely in transatlantic cases given their broad alignment on competition policy and enforcement practices, thereby increasing scrutiny and prohibition risks. Finally, a recent competition policy brief of November 2021 calls for strong enforcement of EU competition rules, especially in the post-COVID recovery phase, in light of increased industry concentration and profitability in the last two decades. In order to mitigate these risks, antitrust advisors should be involved at an early stage of the transaction to identify merger control and FDI filing requirements and to advise companies accordingly on strategy and timeline implications.

The EC will increasingly investigate non-traditional cartels. This started several years ago with the investigations of several buyer cartels that have led to significant fines (e.g., ~€260 million in the ethylene purchaser cartel). Also, Executive Vice-President Vestager recently announced that the EC will be investigating agreements in labour markets, e.g., wage-fixing and no-poach agreements. In light of the German car manufacturer cartel, it is possible that the EC will investigate other companies for preventing innovation competition. The EC is also expected to increasingly look into

suspected cartel activities *ex officio* in light of a general decline in leniency applications caused by a rise of private damages claims.

Sustainability will remain high on the EC's agenda and will start playing a more prominent role in the EC's assessment of individual cases. In the area of sustainability cooperation, the EC can be expected to issue individual guidance in the form of comfort letters. This could mean that the EC will start issuing individual guidance more frequently when approached (even outside of sustainability matters), albeit likely only in areas where novel issues arise.

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1. For further details, please see our *Alert*: https://www.kirkland.com/publications/kirkland-alert/2020/12/eu-proposes-rules-for-big-tech-gatekeepers.↩

2. For more details, please see our *Alert*: https://www.kirkland.com/publications/kirkland-alert/2021/04/small-shift-in-eu-merger-policy.↩

3. For more details, please see our *Alert*: https://www.kirkland.com/-/media/publications/alert/2018/08/the-european-commissions-125m-gun-jumping-decision/theeuropeancommsions125m-gunjumpingdecisionagainst.pdf.↩

4. With one exception: In June 2021, the EC raided a company in Germany that is active in the garment sector.↩

5. The EC also raided a Belgian company active in the animal pharmaceutical sector for suspected abuse of dominance in October 2021.↩

6. For more details, see our *Alert*: https://www.kirkland.com/publications/kirkland-alert/2021/11/uk-foreign-investment-screening-regime.↩

7. For further details, please see our *Alert*: https://www.kirkland.com/publications/kirkland-alert/2021/05/the-eus-proposal-for-a-foreign-subsidies-regime.↩

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Suggested Reading

- 10 January 2022 Press Release Kirkland Counsels Navitas on $3.25 Billion Sale to Enterprise Products Partners
- 10 January 2022 Press Release Kirkland Represents Owens & Minor, Inc. on Acquisition of Apria, Inc. for $1.6 Billion
- 05 January 2022 Press Release Kirkland Advises MD Now Urgent Care on Sale to HCA Healthcare