BRUSSELS À JOUR

La Rentrée 2022 – Things to Have on Your Radar after the Summer Break (Day 2)

Markus Roehrig, Laura Stoicescu and Joachim Burger report on the latest developments from the European capital of competition law.

Now, that the first post-Covid summer has come and gone, it's time to put up your surf board, pack the kids' lunch boxes and plan for the months ahead. Admittedly, we can't rival with the masters of bento boxes, but we can give you a short overview of "les must" of this fall in terms of antitrust, cartels, merger control, foreign subsidies and State aid. After kicking off our La Rentrée 2022 edition with Antitrust and Cartels yesterday, it's time to turn to Merger Control:

Merger Control: Illumina and the (unholy) GRAIL – the Saga continues

In July 2022, we reported on the General Court's Illumina/GRAIL judgment, backing the Commission's new approach to Art. 22 EUMR referrals and bringing the so-called "killer acquisitions" within the scope of its merger review. But that confirmation (pending ECJ appeal) was only the beginning of more bad news. Quickly after, the Commission served the parties a statement of objections on the grounds that they breached the EUMR by prematurely implementing the acquisition during the ongoing Phase II investigation.

And the Phase II investigation delivered another blow: The acquisition was prohibited, since, according to the Commission, the transaction would stifle innovation and reduce choice in the emerging market for blood-based early cancer detection tests. The Commission found that there is an "innovation race" and that the parties' strong (and expected growing) position would significantly impede effective competition. The decision is somewhat of an outlier: Typically, companies are able to address vertical foreclosure concerns by way of remedies, but the package offered by the parties was found insufficient in that regard.

So what's the next chapter in the saga? An educated guess: More decisions (and appeals) to come. For one, the Commission is determined to sanction the gun-jumping and might impose fines of up to 10% of both companies' annual global turnover. In addition, the Commission already announced to issue a separate decision ordering the transaction

to be unwound, aiming to restore GRAIL's independence for blood-based early cancer detection tests. In the meantime, another decision to order interim measures can be expected, with a first charge sheet aiming to extend the applicable measures for now being sent out on 20 September.

Illumina already announced that it will defend its position vigorously and will, if need be, challenge such decisions before EU courts. So this case might well break the record for cases with most decisions and appeals in history. And procedure-wise, it will be interesting how this cascade of different decisions, starting with the referral requests, would be affected by potential annulment decisions. That might well lead to a domino effect: If one decision up the chain, e.g. the referral upon appeal by the ECJ or the decision to block the vertical merger, were to be declared void, the subsequent decisions should logically be affected too.

WHAT´S NEXT? Some of the Commission's upcoming decisions on gun-jumping, divestiture / unbundling of the deal and potential interim measures might arrive before year's end. And we can expect the appeals to be served up right after. So buckle up for more – legally exciting – episodes of this long-standing saga.

Merger Control: The TowerCast Case – Art. 102 TFEU as yet another Entry Door to review Killer Acquisitions?

While we are – somewhat – on the topic of non-notifiable mergers: The soon to be expected ruling by the ECJ in the case C-449/21 – *TowerCast* might be another addition to the Commission's "killer acquisition" toolbox. The case follows a preliminary ruling request by the Paris Court of Appeal and a dispute around a rejected complaint by TowerCast to the French competition authority Autorité de la Concurrence (AC). In 2017, TowerCast complained that TDF's acquisition of rival Itas constituted an abuse of TDF's dominant position in the upstream and downstream markets for digital terrestrial TV broadcasting.

In its complaint and the following court proceedings, TowerCast relied on the ECJ's 1973 *Continental Can* ruling, in which the ECJ held that that laws prohibiting abuse of dominance could be applied to mergers. Since TDF's acquisition at stake here was non-notifiable, TowerCast asked the AC to review the merger under abuse of dominance rules. But the AC rejected that complaint, arguing that the *Continental Can* case law does not apply any longer, as it was handed down prior to the EU introducing an independent merger control system of its own. Therefore, competition authorities are precluded from applying Article 102 TFEU to a merger, which is governed solely by the EUMR and national merger control regimes, even if it falls below any notification thresholds.

What is maybe most interesting is the Commission's involvement in the case, having intervened in support of TowerCast's position that Article 102 TFEU is applicable to mergers falling below any notification thresholds. The EU watchdog seems intent to use, following a favorable outcome, Article 102 TFEU as another way to review "killer acqui-

sitions". To that end, in the oral hearing, the Commission's representative specifically stated that "*notification thresholds are imperfect*" and that – besides Article 22 EUMR – "*the possibility of 'ex post' application of Article 102 constitutes another safety net*" to catch non-notifiable mergers.

So the ECJ's upcoming judgment could provide competition authorities with an additional tool to tackle "killer acquisitions", particularly when they see the acquisition as part of an overall anticompetitive strategy to extend an undertaking's dominant position. So if TowerCast prevails, dealmakers might have to add another item to its growing check list when seeking EU approval. A first hint which direction this immensely relevant case might take will be given soon, with AG Kokott's opinion just around the corner.

WHEN? AG Kokott's opinion will be delivered on 13 October 2022, with the final judgment expected in early to mid-2023.

Merger Control: Revision of Market Definition Notice

On 12 July 2021, the Commission published a staff working document that sets out the findings of the evaluation of the current Market Definition Notice ("**Notice**"). The evaluation indicated that the Notice adopted in 1997 is still a relevant instrument in antitrust and merger cases, provides comprehensive and clear guidance on key issues of market definition, but may not sufficiently reflect the developments in best practices in market definition, especially in light of digitalization and globalization. The evaluation identified potential areas that may be subject to changes, namely (i) the use and purpose of the SSNIP (small significant non-transitory increase in price) test in defining relevant markets; (ii) digital markets (iii) the assessment of geographic markets in conditions of globalization and import competition; (iv) quantitative techniques; (v) the calculation of market shares; and (vi) non-price competition (including innovation).

The Commission called for evidence for the evaluation of the Notice, a consultation which took place between January and February 2022. While we are waiting for the Commission to decant the result of its consultation, we did get a glimpse of what we might expect. For instance, commissioner Vestager revealed in September this year that the *Wieland*[1] and the *thyssenkrupp*[2] judgments will feed into the review of the Notice. The reason is that both judgments saw debates about the implementation of the Commission's definition of relevant markets, as well as their flexible approach and use of qualitative evidence.

WHEN? Commission adoption planned for first quarter of 2023.

1 Case T-251/19, Wieland-Werke v Commission, 18 May 2022, ECLI:EU:T:2022:296.

2 Case T-584/19, thyssenkrupp AG v Commission, 22 June 2022, ECLI:EU:T:2022:386.

Merger Control: Implementing Regulation and Notice on simplified Procedure

And the Commission seems to work non-stop on overhauling the bigger part of its competition law framework. On 6 May 2022, the Commission published a draft revised Implementing Regulation and a draft Notice on Simplified Procedure for public consultation. The underlying goal is to simplify merger control procedures for straightforward cases: According to the Commission's numbers, approximately 93% of notified transactions receive unconditional clearance and do not give rise to any competitive concerns. Logical conclusion: Easing the administrative burden, both for itself and companies, and focus resources on more complex and relevant cases (go "big on big" as the Commission often calls it), *inter alia* by:

- **Expanding and clarifying cases that qualify for simplified review**, e.g. transactions involving certain vertical relationships (e.g. individual or combined upstream market share below 30%) and to introduce "flexibility clauses" for cases that do not fall under such categories (e.g. combined market share of 20 – 25%; joint ventures with turnover between EUR 100 and 150m in the EEA);
- **Simplifying the Short Form CO and reducing the amount of information to be provided** in simplified cases. To do so, the Commission proposes a revised Short Form CO with "tick-the-box" format, which – rather than the usual open text boxes – includes multiple choice options and tables (e.g. on horizontal overlaps) to be filled;
- **Introducing a so-called "super simplified procedure"**, allowing parties to formally notify a transaction without any pre-notification contacts (i.e. no informal guidance). This would for instance apply to transactions involving joint ventures without turnover/assets in the EEA or without any horizontal overlaps or vertical relationships;
- **Limiting information requirements in non-simplified cases, i.e. under the "usual" Form CO.** This includes the possibility to request waivers for certain (sub-) sections of the Form CO, limiting information requirements for markets falling under the aforementioned "flexibility clause" and new tables to ease collecting information regarding pipeline products. More good news: Some parts are to be eliminated completely, e.g. on cooperative agreements and trade associations;
- **Switching from the old, analog notification system (4 hard copies and 2 CD copies) to a new electronic system.** The pandemic showed that an electronic notification has little to no effect on the merger registry, meaning that going with the time, the Commission aims to implement a digital system for all documents and notifications.

The public consultation closed on 3 June 2022, but the Commission's proposal already provides us with good news, particularly with a view to transactions without any (significant) impact on competition in the EEA. In an environment of increased regulatory approval processes (e.g. with the upcoming Foreign Subsidies Regulation, FDI proceedings), simplified procedures such as the proposed ones will come as a welcome development to dealmakers and can nothing but benefit investments.

WHEN? Commission adoption of the Implementing Regulation and Notice on Simplified Procedure is planned for the end of 2022.

Good news: This was only Day 2 of 3, so we once again invite you to come back tomorrow – same place, same time – for our third and last instalment of *La Rentrée*, this time looking into Foreign Subsidies and State aid. *A demain!*

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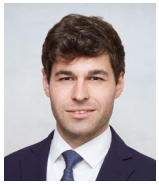

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