2023 EU Merger Control Highlights and Looking to 2024

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2023 saw some very significant decisions, investigations, court judgments and legislative developments in European Union merger control. Notably:

- For the first time ever, in *Illumina/GRAIL*, the European Commission (EC) ordered the unwinding of an already completed acquisition.
- The EC prohibited the *Booking/eTraveli* transaction solely because of what seems to be a novel theory of harm based on "ecosystem concerns."
- The EC concluded seven other Phase II investigations with five clearances subject to remedies (three of which were behavioral remedies).
- The European Court of Justice (ECJ) delivered three important judgments:
  - *CK Telecoms*, which addressed standard of proof and concepts such as closeness of competition and significant competitive force;
  - *Towercast*, a preliminary ruling confirming that the abuse of dominance prohibition under Article 102 TFEU applies to concentrations that are not subject to either EU or national merger control; and
  - *Altice*, where the ECJ endorsed the EC's right to impose separate fines for breaches of each of the notification and standstill obligations under the EU Merger Regulation (EUMR).
- The EC adopted legislative measures to simplify its merger review procedures.

Fewer deals (355 compared with 371 in 2022 and 405 in 2021) were notified to the EC in 2023 than in any year since 2015 (see EC statistics here). Additionally, and perhaps reflecting an increasingly tough enforcement climate, the EC cleared only four mergers with remedies at the end of its Phase I review, the lowest number since 1997 (when only 168 deals were notified); three of these four transactions (*Sika/MBCC Group*, *Hitachi Rail/Ground Transportation Systems Business of Thales*

and *Advent/GFK*) had been withdrawn and renotified, presumably to allow the parties to address concerns raised during Phase I and avoid lengthy Phase II investigations.

EC's Unprecedented Order to Unwind Illumina/GRAIL

In October, the EC ordered the reversal of Illumina's completed acquisition of GRAIL. This decision was a new chapter in the *Illumina/GRAIL* saga, which has now been ongoing for almost three years.

The EC's unwinding order followed its imposition of interim measures and gun-jumping fines on Illumina and its prohibition of the acquisition based on vertical competition concerns. The EC's divestiture order aims at recreating the pre-transaction status quo. Illumina must restore GRAIL's independence, stand-alone viability and competitiveness to its pre-transaction levels. Illumina has 12 months, with a possible three-month extension, to divest GRAIL. In the meantime, the EC has imposed transitional obligations to ensure that Illumina and GRAIL remain separate and that nothing occurs to prejudice full restoration of competition after the divestiture. Illumina must provide GRAIL with the necessary financial support to ensure GRAIL's viability and contribute to the ongoing development and launch of GRAIL's early cancer detection. The press has reported that Illumina has challenged certain aspects of the EC's divestiture order. For further information on this unprecedented order, see our client alert.

Separately, and despite their recent decision to abandon the deal, Illumina and GRAIL have continued to challenge the EC's jurisdiction to review their proposed transaction under the Member State referral procedure of Article 22 EUMR (see our client alert for a detailed overview of Article 22). The outcome of this challenge will be critical given that the EC has continued to apply its amended Article 22 EUMR Guidance. For example, during 2023, the EC decided, following referrals, to review two transactions, *Qualcomm/Autotalks* and *EEX/Nasdaq Power*, that were not notifiable to the EC or to any EU Member State.

Booking/eTraveli: Novel EC Prohibition

In September, the EC blocked Booking's proposed acquisition of eTraveli. It appears from the EC's press release and other public statements that the EC based its decision solely on what the EC has termed "ecosystem concerns."

The EC concluded that the transaction would have strengthened Booking's already dominant position in the market for online travel agency for hotels (hotel OTA) in the European Economic Area (EEA), which would reduce competition and increase prices for hotels and possibly consumers.

Booking offered behavioral remedies, including giving customers an option to book hotels through competing hotel OTAs on the eTraveli flight offerings screen. The EC decided, however, that the

proposals did not sufficiently address its concerns mainly because they were too difficult to implement and monitor in practice. For further information on this unprecedented prohibition, see our client alert.

While this was the EC's only prohibition decision in 2023, another transaction was abandoned in December after both the EC and the UK Competition and Markets Authority (CMA) raised concerns.

Phase II Clearance Decisions

The EC approved seven deals in 2023 after in-depth Phase II merger investigations. Two of these were approved without conditions (Hydro's acquisition of Alumetal and Viasat's acquisition of Inmarsat), while three were subject to behavioral remedies.

3 deals cleared subject to behavioral commitments

The EC conditionally approved Broadcom's acquisition of VMware subject to remedies providing for third-party access to interfaces required for interoperability and source code and Broadcom agreeing to implement a firewall between the team developing its hardware and the team in charge of third-party certification and support. The EC had found that, absent the remedies, the transaction would harm competition in the worldwide market for fiber channel host-bus adapters because Broadcom would have had the ability and incentive to foreclose Marvell, its only rival in that market.

The EC approved Orange's acquisition of VOO and Brutélé – two leading Belgian cable operators – subject to 10-year access commitments, including Orange giving Telenet, a competitor, access to parts of VOO's and Brutélé's existing fixed network infrastructure and to Orange's future fiber-to-premises network. Following its Phase II investigation, the EC concluded that, without the remedy, the three-to-two transaction would substantially restrict competition and increase the likelihood of coordination in retail markets for (i) fixed internet access, (ii) audio-visual services and (iii) multiple-play bundles (including fixed-mobile convergent services) in the parts of Belgium covered by VOO and Brutélé's fixed networks. The remedy should allow Telenet to enter the market in the south of Belgium and parts of Brussels and effectively replace Orange in these regions.

The EC approved Microsoft's acquisition of Activision Blizzard subject to licensing commitments. The EC concluded that Microsoft would have the ability and incentive to make Activision's games exclusive to Microsoft's cloud game streaming service and withhold them from rival streaming services, which would significantly reduce competition in the distribution of games through cloud streaming services in the EEA. The EC also concluded that the transaction would enable Microsoft to strengthen the position of Windows in the market for PC operating systems. To address these concerns, Microsoft offered 10-year licensing commitments comprising:

- Free licenses to consumers in the EEA allowing them to stream all current and future Activision Blizzard games through any cloud game streaming service for which they are licensed, and

- Corresponding free licenses to cloud game streaming service providers.

The EC decided that these commitments fully addressed its concerns and cleared the transaction. The UK CMA had identified similar concerns regarding the cloud streaming market in the UK and initially rejected Microsoft's proposed licensing commitments and instead insisted on a divestiture that would include at least the popular Call of Duty game. The parties did not agree to that remedy, so the CMA prohibited the transaction. Microsoft then renotified a modified deal under which it proposed to sell the rights to stream Activision Blizzard games to Ubisoft via its cloud service Ubisoft+ for 15 years, and the CMA approved the modified transaction.

2 transactions cleared subject to divestment commitments

In *MOL/OMV Slovenija*, the EC had concerns that the transaction would reduce competition in the retail supply of motor fuels in Slovenia. The EC approved the transaction subject to MOL's divestiture of 39 fuel stations.

In *Vivendi/Lagardère*, the EC identified concerns regarding markets for publication of books and press magazines in French-speaking EU countries. The EC concluded that Vivendi's commitment to divest its publishing business, Editis, and the celebrity press magazine Gala resolved its concerns.

3 Significant European Court Judgments

In *CK Telecoms*, the ECJ upheld the EC's appeal regarding the assessment of transactions in oligopolistic markets (here, UK telecom markets) when the transaction does not create or strengthen a dominant position. The ECJ set aside the General Court's (GC) 2020 judgment that had annulled the EC's 2016 decision prohibiting Hutchison's acquisition of Telefónica UK's O2 and referred the case back to the GC for reexamination of certain factual and legal issues. This is the first judgment to address several issues regarding the concept of a "significant impediment to effective competition" (SIEC).

Notably, the ECJ held that, for all types of transactions, the standard of proof for the EC to show a SIEC is the "balance of probabilities" – not the higher standard of a strong probability – and that the EC therefore need only show that it is more likely than not that a transaction would significantly impede effective competition. The ECJ observed that there is no general presumption under the EUMR that a concentration is either compatible or incompatible with the internal market. Accordingly, the ECJ concluded that the EC cannot be required to meet a higher standard of proof when prohibiting transactions than when approving them.

The ECJ also ruled that the GC's interpretation of the SIEC test was overly restrictive. The GC had held that unilateral effects from a concentration may result in a SIEC only when a transaction would both eliminate important competitive constraints that the merging parties had exerted on each other and reduce competitive pressure on the remaining competitors. The ECJ, however, concluded that

this interpretation would undermine the EUMR's objective of effectively controlling all transactions that could give rise to a SIEC.

In addition, the ECJ clarified the concept of an "important competitive force" (i.e., some companies may have a bigger influence on the competitive process than their market shares or similar indicia might suggest). For example, the ECJ noted that even if a merging party in an oligopolistic market does not stand out from its competitors as being "particularly aggressive" in terms of price, the merger itself could still alter the competitive dynamic to a significant and detrimental extent. In this case, the ECJ held that the GC had wrongly focused on whether the target company had been "particularly aggressive" in terms of pricing. The ECJ instead observed that pricing is not the only important parameter for assessing competitive dynamics in differentiated product markets and ruled that for an entity to be an "important competitive force," it need only be shown that it has more of an influence on the competitive process than its market share, or similar measures, would suggest.

The ECJ also clarified the degree of closeness of competition that the EC must demonstrate to prohibit a transaction. The ECJ noted that the concept of "particularly close" competitors implies that there is a very high level of substitutability between the parties' products on differentiated product markets, but that such a level of substitutability is not necessarily required. Indeed, merging parties could be incentivized to increase their prices even in cases where the substitutability between their products is not particularly high, but where there is a low level of substitutability between their products and competitors' products. Consequently, the ECJ ruled that the GC was wrong to have required the EC to show that the parties were "particularly close" competitors; rather, transactions involving close competitors, even if not particularly close ones, could lead to a SIEC.

Furthermore, the ECJ upheld the EC's appeal insofar as the GC had held that the EC's quantitative analysis wrongly failed to account for "standard" efficiencies common to all merger transactions. The ECJ observed that there is no reference to standard efficiencies in the EUMR or any presumption that mergers lead to efficiencies.

In *Towercast*, the ECJ revived its 1973 judgment in *Continental Can*, which allowed authorities to assess whether acquisitions constitute an abuse of dominance. The ECJ clarified that while transactions that are notifiable under the EUMR are not also subject to abuse of dominance investigations, national competition authorities and courts are not precluded from reviewing whether transactions constitute an abuse of dominance if a transaction is not notifiable under the EUMR or national merger rules (provided that the transaction has not been referred to the EC under Article 22 EUMR (see above)). The ECJ ruled, however, that just because an acquisition strengthens the position of a dominant company does not mean there is an abuse of dominance. Rather, to be abusive, the degree of (strengthened) dominance resulting from the transaction should "*substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market.*" The key is that the acquisition not only strengthens the dominant company's market position (which is not illegal in itself) but also eliminates competition from all market players except those who are dependent on the dominant company.

The ruling diminishes legal certainty and increases the possibility of antitrust intervention when an acquisition does not require any notifications. Following the judgment, the Belgian Competition Authority opened an investigation into the takeover of edpnet by the Belgian telecom company Proximus. During the investigation, Proximus decided to divest edpnet.

In *Altice Group*, the ECJ confirmed that, when imposing fines for gun-jumping, the EC may impose two separate fines for breach of the EUMR's notification and standstill obligations. In 2018, the EC had fined Altice, the French telecommunications company, €62.25 million for implementing its acquisition of PT Portugal before notifying the transaction to the EC and another €62.25 million for implementing the transaction before obtaining the EC's clearance. The GC rejected Altice's appeal in 2021.

The ECJ rejected Altice's argument on appeal that the EC lacked authority to impose two separate fines. In this regard, the ECJ clarified that despite a certain degree of overlap, the notification obligation and the standstill obligation are distinct obligations with separate aims. However, the ECJ concluded that the EC did not fulfill its obligation to state reasons for part of its decision as it had failed to explain clearly and unequivocally why it imposed two identical fines for the infringements of the standstill and notification obligations. While the EC had found that these infringements were identical in nature and gravity, the ECJ noted that they differed in their duration. Accordingly, the ECJ reduced the fine imposed for infringing the notification obligation from €62.25 million to €52.91 million to reflect, in particular, the instantaneous nature of the infringement.

Legislative Developments

In April 2023, the EC adopted a package of measures that aim to simplify its merger control rules. Among the most significant changes, there will now be a "super-simplified" merger procedure for (i) transactions with no horizontal overlaps or vertical relationships between the parties and (ii) the creation of joint ventures with no current or expected turnover or assets in the EEA. The EC has stated that for these kinds of transactions, the parties may directly submit a notification without engaging in the customary pre-notification discussions with the EC.

The reforms, effective as of September 1, 2023, also introduce (i) a wider category of transactions that are assumed to qualify for the simplified procedure and flexibility for the EC to treat others under the same category, (ii) a "tick-the-box" notification form for transactions notified under the simplified procedure, and (iii) changes to Form CO, the notification form for ordinary cases. See our client alert for a more detailed overview.

What to Watch for in 2024

Looking ahead to 2024, we await the outcome of three ongoing Phase II investigations in *Korean Air Lines/Asiana Airlines*, *Orange/MasMovil/JV* and *Amazon/iRobot*. The investigation of IAG's second attempt to acquire sole control of Air Europa Holding, which was announced in December 2023, will

also be of interest; when IAG previously attempted to acquire Air Europa, the EC raised concerns that the deal would reduce competition in the markets for passenger air transport services on Spanish domestic routes and on international routes to and from Spain.

We expect the EC to publish its revised Market Definition Notice during 2024 (this had been expected in the third quarter of 2023). The revised Notice is expected to reflect evolutions in EU case law but not introduce dramatic changes. It will also provide additional guidance on when the EC may find global markets. In addition, the revised Notice will likely provide guidance on how the EC will define markets involving multisided platforms and digital ecosystems.

In planning for and executing transactions, businesses will need to assess the extent to which the EC and the CMA diverge in their assessments. While the two agencies adopt similar positions on most deals, the CMA was much more reluctant than the EC to accept behavioral remedies in *Microsoft/Activision*.

Both the CMA and the EC are currently assessing whether Microsoft's investment in OpenAI has resulted in a reviewable transaction under their respective merger-control laws.

Finally, as mentioned above, despite the deal being abandoned, there will undoubtedly be more legal developments in *Illumina/GRAIL*.

These and many other EU merger developments will be discussed in more detail in the forthcoming update to Sweet & Maxwell's Rowley & Baker: International Mergers - The Antitrust Process *(General Editor: Mark Opashinov), to which this firm is contributing a revised and updated chapter on EU merger law.*

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