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ANTITRUST AND COMPETITION

The Commission's New Guidance Creates Legal Uncertainty for Merger Control in the EU

On 26 March 2021, the Commission published a new Guidance on the application of the EU upward case referral system set out in Article 22 of the EUMR. Under the Guidance, EU Member States can now ask the Commission to review certain transactions that do not meet the national or EU merger filing thresholds. This major policy shift will put significant additional burden on dealmakers and increase legal uncertainty for businesses.

The Guidance seeks to address a perceived enforcement gap regarding whether the Commission may be missing the review of certain acquisitions of nascent and/or innovative companies, which do not generate significant turnover but with strong competitive potential (so-called killer acquisitions). Such transactions are unlikely to meet the EU merger filing thresholds and may also escape merger control review at EU Member State level, as national thresholds generally require at least a minimum level of local target revenues, a market share increment, or an acquisition of a pre-existing market share. This major policy shift will lead to significant uncertainties for businesses. Indeed, merging parties will now need to assess whether the conditions for Article 22 EUMR referral could be met.

Although the Guidance does not single out any specific sector in which potentially anticompetitive mergers have escaped scrutiny, both statements made by the Commission's top officials and the Guidance refer to the digital, pharmaceutical, and biotechnology sectors. It is also worth noting that already a number of national competition authorities in Europe (NCAs) have indicated that they intend to refer to the Commission certain transactions. This is the case of the French competition authority's decision (joined by the Belgian, Greek, Icelandic, Norwegian, and Dutch authorities and accepted by the Commission on 20 April 2021) to refer to the Commission the proposed acquisition of a developer of blood tests to identify early-stage cancer by the leader in gene sequencer and input supplier of that target. The U.S. Federal Trade Commission is also currently challenging the transaction. In addition, the Commission may also investigate the US$1 billion acquisition of a famous customer service platform by one of the most important social media providers. Indeed, a spokesperson for the Commission confirmed that the Commission received a request from Austria to refer the proposed acquisition under Article 22 EUMR.

Article 22 EUMR allows EU Member States to request the Commission to review transactions that do not meet the EU merger filing thresholds, but may: (i) affect trade between EU Member States; and (ii) threaten to significantly affect competition within the territory of the EU Member State(s) making the request. Although it was in theory already possible for an NCA to make an Article 22 referral even when the applicable merger control

thresholds were not met at a national level, the Commission's practice was to reject such a referral request when the national thresholds were not met. This will now change, as NCAs that do not have jurisdiction can also refer transactions upwards to the Commission.

The Guidance provides broad criteria to determine which transactions are eligible for an Article 22 referral request: (i) “the elimination of a recent or future entrant”; (ii) the merger between “two important innovators”; “the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets”; or (iii) the “ability and incentive to leverage a strong market position from one market to another by means of tying or bundling.” With respect to key procedural aspects, an NCA has 15 working days from the date on which the transaction is “made known” (i.e., has sufficient information to make a preliminary assessment of the criteria relevant for evaluating the referral) to refer the transaction to the Commission. The Commission generally will not consider a referral appropriate if a transaction has closed more than six months beforehand. The Guidance suggests that once the parties have been informed of a referral request, they may take measures they consider appropriate (e.g., delaying the closing) until they know whether a referral request will actually be made.

The Guidance represents a significant development for dealmakers as it effectively opens the door for the Commission to review transactions that do not meet the EU merger filing thresholds. Merging parties may decide to approach the Commission or an NCA voluntarily with information on the transaction and its impact in certain EU Member States to obtain further clarity as to whether their transaction would be eligible for an Article 22 referral. However, the risk is that such approaches may be interpreted as admissions that the transaction does raise antitrust concerns, hence inviting regulatory review. Whilst the full ramifications of the Guidance remain unclear, companies and dealmakers will need to carefully assess the risk of an Article 22 referral and its impact on the transaction timeline.

ENVIRONMENTAL AFFAIRS

Sustainability Criteria for Green Hydrogen

On 31 March, 23 renewable energy producers signed a letter requesting the Commission to promote the highest sustainability standards in the EU Taxonomy for the production of clean hydrogen. The letter was sent to Commissioner Kadri Simson (Executive Vice-President for the European Green Deal), and other European Commissioners.

According to the Commission, the EU taxonomy is a classification system, establishing a list of environmentally sustainable economic activities. The EU taxonomy is an important enabler to scale up sustainable investment and to implement the European Green Deal. The Taxonomy Regulation was published in the Official Journal of the European Union on 22 June 2020 and entered into force on 12 July 2020. It tasks the Commission with establishing the actual list of environmentally sustainable commercial activities by defining technical screening criteria for each environmental objective through delegated acts.

Under the Taxonomy Regulation, technologies that meet the criteria will qualify for a green investment label. According to the signatories, only renewable hydrogen should be awarded the prized green label and not hydrogen produced from nuclear or fossil energy sources.

The letter argues that Europe should support high sustainability standards for clean hydrogen in its green finance rules. The group is concerned about certain proposals that could weaken emission thresholds in the EU taxonomy

and reiterated its support for the Commission's initial, strict proposal for a greenhouse gas (GHG) emissions threshold for hydrogen (H2) production at 2.256tons CO2e per ton of H2, and GHG emissions threshold for electricity production of 100g CO2e per kilowatt hour from gaseous and liquid fuels.

According to the letter's signatories, the Commission should ensure that the future EU hydrogen economy "will achieve the highest sustainability standards" to make the bloc "a true industrial leader" in clean energy technologies. The Commission must uphold its initial proposals on the emission thresholds when setting the final rules.

Studies and papers indicate that renewable hydrogen produced from 100 percent renewable electricity sources can play a strategic role in decarbonizing sectors of the economy that are challenging to electrify and can foster Europe's industrial leadership in future technologies. According to Solar Power Europe, a non-profit composed of 40 national solar power associations and one of the signatories, the EU taxonomy is a decisive step to streamline future public and private investments towards clean hydrogen production projects while making renewable hydrogen competitive against alternatives, helping deliver the European Green Deal goals and making Europe a global leader in renewable hydrogen solutions.

Signatories also highlighted the need to show leadership and ambition on this important topic, which will shape the future of the European Hydrogen Economy.

Apart from Solar Power Europe, the signatories of the letter also include, for example, Acciona, S.A., Akuo Energy, Enel Green Power S.p.A., European Energy, BayWa r.e, and others.

For additional information on the EU and member states' hydrogen strategies, please The H_2 Handbook produced by K&L Gates global hydrogen team.

European Commission Adopts Guidelines to Clarify the Term 'Environmental Damage' as Defined in the Environmental Liability Directive

On 25 March 2021, the Commission adopted Guidelines to clarify and provide a common understanding of the scope of the term "environmental damage" as defined in Article 2 of the2004/35/EC Environmental Liability Directive. The Environmental Liability Directive establishes a framework for environmental liability based on the "polluter pays" principle to prevent and remedy environmental damage, making operators liable to prevent and restore any environmental damage caused by their activities. Article 2 defines "environmental damage" as damage to protected species and natural habitats, damage to water, and damage to soil.

The Commission noted in its 2016 evaluation of the Environmental Liability Directive that its ability in achieving a high level of environmental protection and in preventing and remedying environmental damage was hampered by a significant lack of clarity and uniform application of key concepts amongst Member States and stakeholders. Such lack of common understanding of how the term "environmental damage" should have been applied has weakened the Environmental Liability Directive's implementation.

The Guidelines' objective is therefore to provide a common understanding of the definition of "environmental damage," with respect to the legal and regulatory context as well as to the case-law of the Court of Justice of the European Union. The Guidelines are envisaged as being of use in particular to Member States, competent authorities, operators, natural and legal persons, and providers of financial security.

In terms of structure, the Guidelines analyze the legal and wider regulatory context, consider the definition of "damage" and of "environmental damage," and examine in detail the three separate categories of environmental damage, including (i) "damage to protected species and natural habitats," (ii) "water damage," and (iii) "land damage."

As the Environmental Liability Directive is a general instrument that applies to several environmental subject areas, the definition of "environmental damage" also apply to the Birds Directive, the Habitats Directive, theWater Framework Directive, and the Marine Strategy Framework Directive.

These Guidelines are part of a wider effort by the Commission to strengthen the implementation of the Environmental Liability Directive and to strengthen Member States' actions related to environmental harm and non-compliance with EU environmental legislation. The Commission will now work with Member States and stakeholders to ensure the harmonized implementation of the Environmental Liability Directive.

DIGITAL ECONOMY

The State of the Digital Transatlantic Economy

On 26 March 2021, European Commissioner for Justice Didier Reynders gave a speech at the 2021 Transatlantic Conference, which reflected on common objectives between the European Union and the United States. While there are several topics under discussion at the conference, including taxes, antitrust laws, efforts to address disinformation, 5G security, and artificial intelligence, Commissioner Reynders focused on privacy and illegal content.

With respect to privacy, Commissioner Reynders noted that a key priority for the Commission is to find a solution to last year's Schrems II ruling by the European Court of Justice, which raised questions on the protection of privacy when data are shared between the EU and the and the United States. Commissioner Reynders and US Secretary of Commerce Gina Raimondo issued a common statement reiterating their commitment to intensify negotiations to find a solution to ensure safe data flows. Both the European Union and the United States agreed on the key importance of developing a successor arrangement to the EU-U.S. Privacy Shield, which was invalidated by the Schrems II ruling. Commissioner Reynders mentioned that the appropriate solution should be based on access to court, enforceable individual rights, and limitations against excessive interferences with privacy.

On illegal content, Commissioner Reynders mentioned a need for the EU and the United States to agree that strong and effective laws that prohibit the spread of hate speech online do not endanger free speech. He also noted that the new 'know your business customer' and 'compliance by design' principles in the upcoming Digital Services Act should considerably reduce the risk of online scams and greatly contribute to better compliance and safe products online.

Finally, Commissioner Reynders expressed his wish that by working together, the European Union and the United States can cooperate with other like-minded partners to create common global standards.

ECONOMIC AND FINANCIAL AFFAIRS

ESMA Consults on Changes to the EU Money Market Funds Regulation

ESMA launched a consultation on potential amendments to the EU Money Market Funds Regulation (MMFR).

ESMA aims to review the stress experienced by MMFs during the March 2020 crisis and assess the roles played by markets, investors and regulation, and proposes potential reforms.

ESMA provided a detailed analysis of the impact of the March 2020 turmoil on some segments of the U.S. and EU MMF industry, which experienced a very high level of stress. MMFs exposed to private markets recorded very high outflows, while facing challenges to dispose of their assets due to the lack of liquidity in Commercial Paper and Certificate of Deposit markets. The March 2020 episode illustrated that MMFs and more broadly money markets remain subject to a range of vulnerabilities, which can be split across a few dimensions: (i) liquidity of underlying markets; (ii) regulatory requirements; and (iii) role of credit rating agencies.

In this context, ESMA is currently contemplating:

- Reforms targeting the liability side of MMFs. These include decoupling regulatory thresholds from suspensions/gates to limit liquidity stress and requiring MMF managers to use liquidity management tools such as swing pricing.
- Reforms targeting the asset side of MMFs. These include the review of the requirements around liquidity buffers and their use.
- Reforms targeting both the liability and asset side of MMFs. These include reviewing the status of certain types of MMFs such as stable Net Asset Value MMFs and Low Volatility Net Asset Value.
- Reforms that are external to MMFs themselves. These include assessing whether the role of sponsor support should be modified. In addition, ESMA is also gathering feedback from stakeholders on other potential changes, particularly linked to ratings, disclosure, and stress testing.

As for next steps, interested parties can provide comments until 30 June 2021, while ESMA will deliver its opinion on the review of the MMFR in the second half of 2021.

European Commission Consults on Measures to Promote Instant Payments

The Commission launched a public consultation to feed into the reflection on obstacles and possible enabling measures to ensure wide availability and use of instant payments in the European Union.

The public consultation is also accompanied by a more technical consultation targeted to payment service providers (PSPs) and providers of technical services supporting the provision of instant payments including. The technical consultation addresses PSPs incentives to adhere to an instant credit transfer scheme, PSPs liquidity management, and compliance with the sanctions screening obligations with respect to instant credit transfers.

Notwithstanding, the public consultation aims at identifying the concerns that would need to be addressed to incentivize EU payments market players to offer innovative, convenient, safe, and cost-efficient pan-European payment solutions based on instant credit transfers.

In this context, the consultation asks questions such as: (i) how to tackle fraud; (ii) whether easy withdrawals could lead to bank runs; (iii) whether a single European QR code standard for instant credit transfers should be available; and (iv) whether consumers are willing to pay a premium fee for instant credit transfers compared to regular credit transfers.

Interested parties can provide input until 23 June 2021.

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