NautaDutilh

Benelux Competition Law in 2024

5 things you need to know

Intro

We believe that 2024 will be a big year for competition policy, with five major developments. Our Competition team explains how these developments may impact your business and the market environment in which you operate.

#1 FDI screening of M&A transactions may initially lead to increased scrutiny before its impact stabilises

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#3 The impact and effectiveness of the DMA will become clearer in 2024, both at EU and national level

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#5 Competition authorities acknowledge the need for cooperation in pursuit of sustainability goals

In 2023, three new types of instruments entered into force: national screening mechanisms for foreign direct investment (FDI) screening in the Benelux, the Foreign Subsidies Regulation (FSR) and the Digital Markets Act (DMA). Potential spill-over effects of these instruments, together with the European Commission's tough(er) stance on substantive assessment, are expected to influence the enforcement under the EU merger control rules. A similar tightening in market regulation is mirrored in the enforcement by the Benelux competition authorities. But it's not all doom and gloom. Both the European Commission and national authorities acknowledge the ever-increasing (social) responsibilities faced by undertakings and show their support for cooperation between companies in favour of sustainability.

#1

FDI screening of M&A transactions may initially lead to increased scrutiny before its impact stabilises

With a national FDI screening mechanism in place in almost all EU Member States, the EU regulatory landscape for FDI screening appears ready for further fine-tuning – and apparently, increased scrutiny.

Last year, national foreign direct investment (FDI) screening mechanisms entered into force in Belgium, the Netherlands and Luxembourg. These regimes have introduced an important additional 'check-box' for M&A transactions. Having filed the first FDI notifications, we have found that the three regimes differ significantly in scope, and that all three authorities handle contacts in different ways.

In the Netherlands, the Vifo Act (*Wet Veiligheidstoets investeringen, fusies en overnames*; read our description here) imposes mandatory screening of transactions seeking to acquire control over providers of vital infrastructure, companies active in sensitive technology and managers of business campuses. The past six months, following its entry into force on 1 June 2023, have shown that this regime does not apply to many transactions but in many cases, the exclusion of the notification obligation requires a careful analysis of the target's activities in the light of the Vifo Act. Given that the national FDI regimes have created quite some uncertainty as to their scope and application, the efforts of the Dutch authority (the BTI) to ensure open communication and to provide informal guidance are commendable. This is in line with its strategy of limiting the number of notifications and interpreting the scope of the Vifo Act rather narrowly.

In Belgium, the first experiences with the Cooperation Agreement, which entered into force on 1 July 2023, illustrate the extent to which the national regimes can differ. Although the administrative body of the Belgian authority (the ISC) is receptive to informal contact, the structure of the authority (consisting of all federated states alongside the federal government) does not allow for informal advice on the notification obligation. Combined with the broad scope of the sectors covered by the FDI regime, this

currently results in many non-critical M&A transactions being notified, as the recommended approach in case of doubt is still to notify on a 'better safe than sorry' basis. The authority is working hard to provide additional guidance, but this is not expected in the near future.

In Luxembourg, the FDI Act came into force on 1 September 2023. It also covers deals signed before that date that will be closed afterwards. Some categories of the activities within scope are not always clearly defined. Moreover, the relevant authority (the Minister of Economy) seems to have an extensive interpretation of the notion of foreign investment and expects that in the case of doubt any investment crossing the 25% threshold, where one of the entities/persons upstream in the chain is non-EU/EEA, should be notified. The authority provides a Q&A which is regularly updated.

With a national FDI screening mechanism in place in almost all EU Member States, the EU regulatory landscape for FDI screening appears ready for further fine-tuning – and apparently, increased scrutiny. Over the past two years, the proportion of formally screened cases has increased significantly (over half of the cases). On 24 January 2024, the European Commission published its proposed revision of the FDI Regulation, which the national FDI regimes are based on. Two notable changes are introduced: (1) the scope of the FDI Regulation is extended to 'investments into the European Union under foreign control' (done through direct and indirect EU-based subsidiaries of non-EU entities); and (2) a clearer framework for cooperation between national screening authorities and the Commission, which is also aimed at streamlining the procedure in case a transaction must be notified in multiple EU Member States.

#2

While the precise focus of the FSR has yet to be defined, the new requirements under this regulation have become a reality

The shift towards a form of 'protectionism' at EU level is also evident at national level. Member states such as the Netherlands are increasingly (considering) investing in their national markets, including in AI and biotechnology, strategic R&D, innovative EU companies and start-ups.

The Foreign Subsidies Regulation (FSR) entered into force on 12 June 2023, introducing a new tool for the Commission to assess potential distortions caused by foreign financial contributions, either on its own initiative or following a mandatory notification by companies for certain large M&A transactions and public tenders (see our description in general or specifically for public tenders).

Determining what information should be included in a notification can be quite a difficult task and, as a result, the notification process can be lengthy. To make the process as efficient as possible, the Commission encourages pre-notification discussions. The Commission has indicated that it has entered

into pre-notification discussions in 38 cases as of early December 2023. Eight of these cases are under formal review. An unexpectedly high number, as the Commission had estimated that it would deal with around 30 cases per year.

The shift towards a form of 'protectionism' at EU level is also evident at national level. Member states such as the Netherlands are increasingly (considering) investing in their national markets, including in AI and biotechnology, strategic R&D, innovative EU companies and start-ups. Interestingly however, there seems to be a gap in the scope of the FSR as certain large tenders are not captured. In the Netherlands, for example, the procedure for granting permits to build wind farms does not qualify as a public procurement procedure under the FSR. Large projects with a direct impact on Europe's (renewable) energy supply therefore seem to escape the Commission's scrutiny. This is remarkable, given the underlaying aim of the FSR (which was at least partly a response to the Inflation Reduction Act in the US). We would expect the Commission to be very keen to investigate the bids submitted in these procedures to ensure that they are not won by foreign actors relying on foreign state aid.

As most of these tender bids are greenfield investments, they would also fall outside the scope of (most) FDI regimes. Consequently, there is a risk that these tenders will slip through the cracks without any means for review. The response of the Commission will be a 'must watch'. Will they use their ex oficio tool to investigate these tenders? Do they have the capacity to do so, given the heavy caseload under the merger tool? 2024 will hopefully bring some clarity.

#3

The impact and effectiveness of the DMA will become clearer in 2024, both at EU and national level

Third parties and national authorities have been given an important role in the enforcement of the DMA. In case of non-compliance by the gatekeepers affected parties will be able to call on national competition authorities; and will most likely be able to claim damages before the civil courts.

2024 will see significant enforcement developments in the digital services and online platforms market. Six major technology companies are currently amending several of their platform services to comply with the Digital Markets Act (DMA) before the deadline of 7 March 2024. In addition, the Commission is conducting five market investigations on other platform services to assess whether they fall within the scope of the DMA, which are also expected to be completed in 2024. Notably, the Dutch digital travel company Booking.com has entered into discussions with the Commission as it expects to meet the quantitative thresholds of the DMA (which it currently does not meet due to a decline in its user base following the Covid-19 pandemic).

The DMA introduced a complementary tool to the EU competition rules to regulate the market behaviour of the largest technology companies. It includes a set of (i) objective criteria to identify so-called 'gatekeepers' (i.e. large digital platforms that provide

‘core platform services’ or CPS), such as online search engines, app stores and messenger services); and (ii) obligations and prohibitions for these gatekeepers. A CPS provider will be designated as a gatekeeper if it meets three qualitative criteria (the undertaking has a significant impact on the internal market, provides an important gateway for business users to reach end users and enjoys an established and durable position), which will be presumed to be satisfied if three quantitative thresholds are met.

Third parties and national authorities have been given an important role in the enforcement of the DMA. The Commission has made it clear that it will rely on various stakeholders to market test the amendments proposed by the designated gatekeepers to ensure DMA compliance. In case of non-compliance by the gatekeepers - a scenario that is not unrealistic based on experience under the competition rules - affected parties will be able to call on national competition authorities; and will most likely be able to claim damages before the civil courts.

The Dutch Authority for Consumers and Markets (ACM) is at the forefront of supporting regulation of large technology companies. It has sent two employees to Brussels to join the Commission’s enforcement teams for the DMA. While the programme gives the Commission more enforcement power, it also enables the ACM employees to gain relevant experience. In this way, the ACM is also preparing to strengthen its own position as a national enforcement body. The aim is to lower the threshold for those who want to complain about gatekeepers. The ACM is much more accessible than the Commission.

The Belgian Competition Authority (BMA/ABC) has also acknowledged its role and stated that it will focus on developing an enforcement policy that takes into account the specific challenges of a medium-sized economy, with a particular emphasis on a healthy competitive environment for the development and further growth of ‘small tech’ companies in the services sector. Competition infringements in the digital economy will also be considered a priority and the BMA/ABC will be particularly alert to possible abuse of dominance and abuse of economic dependence.

#4 The increased scrutiny under merger control rules will continue in 2024

The three regulatory tools will certainly have spill-over effects on the ‘traditional’ enforcement of the merger control rules. Besides having an extra ‘check-box’ for FDI and FSR, which may have an impact on the transaction procedure itself, gatekeepers under the DMA are required to notify the Commission of any intended concentration where the merging entities or the target provide (core platform) services in the digital sector or enable data collection pursuant to Article 14 of the DMA.

The increased scrutiny of acquisitions of smaller companies with significant market and competition potential (also referred to as 'killer acquisitions'), is expected to continue.

The exact impact on the Commission's assessment is not yet known. The Commission's recent statement that it will block Amazon's acquisition of iRobot raises the question whether gatekeepers will face a much tougher stance from the Commission. Will they be able to proceed with acquisitions if they are not willing to propose (extensive) commitments? The Commission appears to confirm the apparent shift in merger control enforcement, most notably illustrated by its block of Booking.com's acquisition of eTraveli. Here, it relied heavily on an 'ecosystem' theory of harm: a theory that allows authorities to challenge acquisitions by conglomerates (such as large companies in digital markets) in neighbouring markets, even where they have a limited presence.

The increased scrutiny of acquisitions of smaller companies with significant market and competition potential (also referred to as 'killer acquisitions'), which we flagged last year, is expected to continue. A recent blog by its president indicates that the ACM will not cease its call for additional merger control competencies for acquisitions of smaller undertakings that potentially raise significant competition concerns, and do not exceed the notification thresholds.

In Belgium, the BMA is expected to continue its new image as a decisive authority, as demonstrated last year when it applied the Towercast judgment of the EU Court of Justice and imposed the divestiture of an acquired undertaking by applying the prohibition of abuse of dominance arising solely from the transaction itself (a non-notifiable merger).

Finally, the Luxembourg government has submitted a draft law to the parliament to introduce a mandatory merger notification regime. This regime is largely based on the EU, Belgian and French regimes, with the turnover thresholds for mandatory notification being EUR 60 million in Luxembourg for all undertakings concerned and EUR 15 million in Luxembourg for at least two undertakings concerned individually.

#5

Competition authorities acknowledge the need for cooperation in pursuit of sustainability goals

There is increasing pressure on undertakings to improve their sustainability performance - either through regulation, such as the EU Corporate Sustainability Reporting Directive (CSRD) or through private enforcement, such as the recent ESG litigation in the Netherlands (*Milieudefensie*) and Belgium (*Klimaatzaak*). At the same time, undertakings may rely on the support of competition authorities for cooperation with other companies to promote sustainability.

Both the Commission and the national authorities acknowledge the ever-increasing (social) responsibilities of companies and support cooperation between companies in favour of sustainability.

In the Netherlands, the ACM has long been at the forefront of this development, advocating and implementing a lenient approach to cooperation on sustainability initiatives. The ACM has been willing to exempt restrictive agreements from the cartel prohibition where significant environmental gains benefited society as a whole (without necessarily being passed on to the consumers of the products covered by the agreement). However, this somewhat more 'liberal' approach has been 'overruled' by the Commission in the revised EU Guidelines on horizontal cooperation agreements, which state that "sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement."

Nevertheless, we expect the ACM to maintain its lenient approach. This is reflected in the final guidelines it published in October 2023, according to which the ACM "does not consider it appropriate to further investigate an agreement aiming to reduce environmental damage if preliminary investigation shows that it is plausible that the agreement is necessary to achieve environmental benefits and such benefits sufficiently outweigh the potential disadvantages to competition." This seemingly more lenient approach presents interesting opportunities for companies to join forces in moving towards a more sustainable business. In our experience, the ACM is usually very open to engage in informal discussions on this issue. Such informal discussions provide valuable insight in their position and can provide companies with more legal certainty regarding their joint sustainability initiatives.

In Belgium, the BMA has indicated that one of its priorities is the interplay between sustainability and competition law, but it has yet to develop its position on sustainability agreements under competition law. So far, the BMA has only cleared an initiative aiming to provide 'sustainable wages' to banana farmers. It will be interesting to see if more of these sustainability initiatives will be submitted to the BMA and what the BMA's approach will be in these cases. Given the success of the *Klimaatzaak*, we expect to see more climate litigation in Belgium, as the Belgian courts - similar to the Dutch courts - have accepted the legal responsibility to accelerate climate action. We expect that companies will want to cooperate and start sector-wide initiatives.

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