NautaDutilh

Benelux Competition Law

5 things you need to know in 2023

Intro

In 2023, we believe that you, as in-house counsel, will have to deal with five main developments in the area of competition law. By anticipating these changes, you can use them to your advantage and prepare for their impact. The five main developments we have identified are:

#1 New notification obligations for transactions involving foreign investments and subsidies from non-EU governments

#2 Entry into force of the Digital Markets Act

#3 Developments in merger control

#4 New horizontal and vertical block exemption regulations and guidelines

#5 Increased scrutiny of non-solicitation clauses

The first three developments are also relevant from a transactional perspective. The last two developments illustrate the ongoing need for companies to remain alert of the competition law implications when drafting (and reviewing) contractual arrangements. At the same time, the new (draft) guidelines offer increasing opportunities for agreements with sustainability goals.

#1

New notification obligations for transactions involving foreign investments and subsidies from non-EU governments

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Next to merger control, deal makers should also consider the implications of FDI and FSR on their transactions in terms of deal timing and certainty.

Both at EU and national level, new regulations regarding national security and foreign investments/subsidies have already made their appearance. On 12 January 2023, the Foreign Subsidies Regulation (FSR) entered into force. The FSR grants the European Commission the power to investigate and assess subsidies granted by non-EU governments to companies active within the EU. The new rules introduce a new filing and standstill obligation for companies engaging in M&A deals and public tenders that involve a certain foreign financial contribution. Under the FSR, the European Commission also has the possibility to start investigations on its own initiative and request adhoc notifications. The notification obligation for companies will be effective as of 12 October 2023 and applies to transactions concluded and public tenders initiated after 12 July 2023. Companies should consider the implications of the FSR on their respective business within the EU.

In the Netherlands, a new notification and standstill obligation will be introduced through the Screening of Investments, Mergers and Acquisitions Act (Wet veiligheidstoets investeringen, fusies en overnames, Vifo Act). The Vifo Act is expected to come into force in the course of 2023 and aims to establish a security test for changes of control or influence over specific Dutch companies in the interest of national security. The notification obligation will apply to transactions with regard to acquisitions of control over (a) vital providers, (b) companies active in sensitive technology and (c) managers of a corporate campus. What qualifies as a company active in sensitive or highly sensitive technology is and can further be specified in a separate decree. For companies active in highly sensitive technology, there will already be a notification obligation in the event the acquiring party obtains (or increases its) significant influence over the company. Significant influence exists when the acquiring party has the right to appoint and dismiss directors or when the acquiring party is able to cast a minimum of 10% of the votes at the general meeting. Compared to other EU countries that have adopted similar FDI screening mechanisms, the 10% threshold can be considered quite low.

In Belgium, the draft legislation on FDI Screening mechanism is expected to enter into force on 1 July 2023. The Belgian regime will only screen direct or indirect acquisitions by non-EU investors of a company incorporated in Belgium. In principle it applies to two categories. The first category involves a 25% acquisition (direct or indirect) of voting rights in a company whose activities involve (i) critical infrastructure for i.a. energy, transport, health and media, (ii) technology and raw materials essential for i.a. public (health) safety, defense, and strategic interests such as AI, (iii) supply of critical inputs including energy, (iv) access to sensitive information, (v) private security and (vi) freedom of media. Where the target company is active in the biotech sector and has a turnover of EUR 25 million or more, the Belgian regime will apply as well. The second category concerns a 10% acquisition (direct or indirect) of voting rights of a company carrying out activities in defense, energy, cybersecurity, electronic communications or digital infrastructure, and where the target company has an annual turnover exceeding EUR 100 million.

In Luxembourg, bill n°7885 will introduce a FDI screening mechanism and will apply to investments made by foreign investors that control a Luxembourg based company that carries out critical activities within its territory. Control can be established by either (i) owning directly or indirectly 25% or more of the capital of the Luxembourg company, (ii) having a majority of the voting rights of the shareholders of the Luxembourg company, (iii) having the right to appoint or remove the majority of the members of the administrative, management or supervisory body of the Luxembourg company, while at the same time being a shareholder, or (iv) being a shareholder of the Luxembourg company and pursuant to an agreement with other shareholders, controlling a majority of the voting rights.

We will continue to keep you informed of the developments with regard to FDI screening within the European Union.

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For non-gatekeepers, it may be advisable to analyse the DMA in more detail to see if it provides a legal basis for a broader offering of services as expected by the European Commission.

Entry into force of the Digital Markets Act

The Digital Markets Act (DMA) entered into force in late 2022 and next to that, the European Commission also published DMA's Draft Implementing Regulation along with "Form Gatekeeper Designation" and other documents. Largely, the Draft Implementing Regulation deals with practical aspects of the DMA. As of May 2023, the DMA will become applicable. As mentioned in our earlier blog, the DMA represents a fundamental change to competition supervision within the EU. The aim of the DMA is to put an end to unfair behavior by companies that act as so-called "gatekeepers" on digital platforms. Potential gatekeepers must notify their core platform services to the European Commission by 3 July 2023. The European Commission is expected to make a decision on businesses designated as "gatekeepers" in September 2023, after which a gatekeeper will have six months to comply with a clear list of do's and don'ts. These include, among others, allowing business users to promote their offers on other platforms, not cross-using personal data without end-user consent and avoid self-preferencing. Large companies active in the provision of core platform services will likely be already aware that they are acting as a "gatekeeper". Companies like Amazon offered commitments that were also accepted by the European Commission. Recently, Amazon has committed to altering the way data is collected on its online marketplace and part of these changes relate to business practices that are covered by the DMA. Even Google announced that it would let nongaming app developers use rival payment systems on its Android operating system.

Apart from this ex ante supervision, the DMA extends to merger control. The DMA establishes the obligation on gatekeepers to notify transactions "where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data". For businesses other than gatekeepers, it may be advisable to analyse the DMA in more detail to see if the new regulatory framework provides a legal basis for a broader offering of services, as expected by the European Commission.

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Developments in merger control

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It is advisable to consider potential repercussions of Article 22 for future transactions to avoid delays or taking a more proactive approach.

Lately, there has been a heightened level of scrutiny regarding the acquisition of smaller companies with a significant market and competition potential (sometimes referred to as killer acquisitions). This trend was further reinforced by the ruling of the General Court of the EU in the Illumina/GRAIL case, which confirms the implementation of the new policy of the European Commission. Formerly known as the Dutch clause, Article 22 of the EU Merger Regulation allows a Member State to request the European Commission to examine a transaction that does not meet EU merger control thresholds but would affect intra-EU trade. In the Illumina/GRAIL case, the General Court confirmed that the European Commission may examine such transaction, even if a transaction would not meet any national merger control threshold. In December 2022, the European Commission published an FAQ further laying out practical information on the application of its Article 22 referral policy.

Recently, the European Commission has accepted to assess the acquisition of Oticon Medical by Cochlear under this provision. Several EU countries, including the Netherlands, had requested the European Commission to assess this acquisition in the medical-devices market. It is thus advisable to consider potential repercussions of Article 22 for future transactions, due to the possibility of significant delays. One potential solution is to take a proactive approach by notifying national authorities or requesting an early indication from the European Commission.

Luxembourg being the only country in the EU without a national merger control regime, the Luxembourg competition authority has indicated several times that it would have recourse to an Article 22 referral in case of a transaction with incidence on the intra-EU trade and leading to significant distortion of competition on Luxembourg territory. Please note that there is a fair chance that in spring 2023 a bill will be presented in order to introduce a merger control regime in Luxembourg.

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New horizontal and vertical block exemption regulations and guidelines

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We recommend adapting distribution agreements to the revised VBER and to already prepare for new rules on horizontals including greater possibility for cooperation pursuing sustainability objectives.

For companies active in online sales, an important focus point for 2023 should be the new Vertical Block Exemption Regulation (VBER) and its accompanying guidelines. The VBER and guidelines have been revised to adapt to the modern digital landscape. For the “offline” market, the VBER largely remains unchanged, but the revised VBER introduces new rules for the online market. The new VBER places stricter rules on dual distribution and maintaining across-platform retail parity obligations, but is more relaxed on limitations on active and online sales. Additionally, it offers more clarification for exclusive and selective distribution systems. Companies have until 31 May 2023 to adapt their existing distribution agreements.

Within the context of vertical relations, it is useful to remind companies that on a Belgian level, the legislation sanctioning B2B market abuse has been in force for over two years now, and has led to a rather fragmented collection of judgments by the Belgian civil and commercial courts. When reviewing existing business relations this should be a further factor to take into account.

At the same time, this year may also see greater possibilities for cooperation in the area of sustainability. It is expected that in the first half of 2023, two revised Horizontal Block Exemption Regulations (HBER) as well as horizontal cooperation guidelines are likely to be finalised by the European Commission. An important aspect of the new guidelines is the guidance on sustainability agreements. Amongst others, the guidelines introduce a wider definition of “sustainability” and a broader safe harbour for sustainability standardisation agreements. In the Netherlands, the ACM has been at the forefront to address the interplay between competition law and sustainability. ACM’s draft guidelines on sustainability agreements highlight opportunities and sets boundaries within which green collaboration maybe achieved between competitors. In practice, the ACM is actively supporting collaborations between businesses that are aimed at promoting sustainability within the framework of its guidelines. For example, energy users have been allowed to purchase wind energy jointly and fix the electricity rate for green energy for several years. More details about such developments are discussed in our previous blog.

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Increased scrutiny of non-solicitation clauses

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Given the announced increased enforcement by the competition authorities, we advise to put non-solicitation agreements on the agenda for 2023.

In the US, non-solicitation agreements ("no poach" and "no hire") have long been subject to supervision by the authorities. Last month, the Federal Trade Commission (FTC) proposed to broadly ban non-solicitation clauses with workers. Following the US competition authority, both the European Commission, the ACM (and other national competition authorities), have announced that non-solicitation clauses and other agreements that prevent employees from transferring to another company, will be subject to more supervision by the authorities. In February 2023, the ACM also published guidelines for self-employed persons to make collective agreements about rates and other (employment) conditions without violating the cartel prohibition. Non-solicitation agreements can be regarded as a violation of the cartel prohibition, as they reduce competition on the labour market. This, in turn, limits innovation, reduces the incentive for efficiency and leads to lower wages.

Although there are situations where non-solicitation clauses in contracts are justified, a non-solicitation agreement should be drafted in such a way that competition is minimally restricted. For instance, it should be limited in duration (e.g. during the cooperation but not subsequently) and personnel dimension (only for employees with specific technological knowledge and skills). Attention should also be given to what alternatives exist that are less restrictive of competition, such as agreeing on reasonable financial compensation.

Non-solicitation agreements in violation of the cartel prohibition risk high fines and nullity of the clause in question, making the non-solicitation agreement effectively worthless. A fine can be imposed on both companies to the agreement. Please see further details in our recent blog on non-solicitation clauses (here) Given the announced increased enforcement by the competition authorities, we advise to put non-solicitation agreements on the agenda for 2023.

About the team

At NautaDutilh, we understand the importance of navigating the complex landscape of competition law when it comes to joint ventures, mergers, acquisitions and other cooperations. Our team is well-versed in both EU and national competition law across a wide range of market sectors, allowing us to provide comprehensive and practical advice to our clients.

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