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things you need to know about competition law

Intro

In 2021, 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 greater possibilities for cooperation in the area of sustainability

#2 a new merger filing obligation for certain transactions related to national security

#3 new platform regulations

#4 new vertical agreement guidelines

#5 state aid during the COVID-19 crisis

#1



This new legislation would allow companies to submit a sustainability initiative to the government

Greater possibilities for cooperation in the area of sustainability

In 2020, the Dutch Authority for Consumers and Markets (“ACM”) published draft guidelines on sustainability. The new guidelines aim to provide much-welcomed clarity on the applicability of competition law to cooperation between companies with sustainability goals and to encourage companies to cooperate in the area of sustainability. Many interested parties provided feedback on the draft guidelines during the consultation round last summer. The final guidelines were published in January 2021 and the ACM will now use these guidelines to discuss these issues with the European Commission. In the meantime, undertakings may use the guidelines to self assess their cooperation in the area of sustainability and to discuss this with the ACM.

Moreover, proposed legislation on sustainability initiatives (*Ruimte voor duurzaamheidsinitiatieven*) will be discussed in the Lower House this year. This new legislation would allow companies to submit a sustainability initiative to the government and ask the government to waive the application of competition law in relation thereto. The proposal has given rise to substantial debate, on both the legal and practical aspects, so it will be interesting to see the final version of the bill.

#2



In 2021, new Dutch legislation on the assessment of the economy and national security (*Wet toetsing economie en nationale veiligheid*) is expected to enter into force.

New merger filing obligation for certain transactions related to national security

In 2021, new Dutch legislation on the assessment of the economy and national security (*Wet toetsing economie en nationale veiligheid*) is expected to enter into force. The new law is based on the Foreign Direct Investment (“FDI”) Screening Regulation and introduces a merger filing obligation for certain transactions. When a target company is active in the provision of (i) vital processes or infrastructure or (ii) sensitive technology, the transaction will need to be notified to the Ministry for Economic Affairs and Climate Policy. An exemption applies when a sector-specific test is provided for by Dutch law.

This new legislation will most likely be discussed in the Lower House in the first quarter of this year. When it enters into force, the law will apply with retroactive effect as from 2 June 2020 to all transactions falling within its scope that give rise to a reason for investigation from a national security perspective. Therefore, we recommend already taking this new legislation into account in the context of merger filing assessments.

The new law on the economy and national security was preceded by a recent amendment to the Dutch Telecommunications Act. The amendment introduced a merger filing obligation for the telecommunications sector, including data centres and internet exchange points. The first merger filings under the

Telecommunications Act are expected to be made this year. As indicated above, transactions that fall under the Telecommunications Act will not need to be reported under the new legislation.

#3



The entry into force of the Digital Markets Act would represent a fundamental change to competition supervision in the EU

New platform regulations

Late last year, the European Commission published two long-awaited and much-discussed draft regulations on digital services: the Digital Markets Act and the Digital Services Act. These two regulations could have far-reaching consequences, especially for large tech platforms. The proposed Digital Services Act contains rules on subjects such as transparency and combating disinformation with the aim of protecting users of digital platforms. The proposed Digital Markets Act contains additional rules for and imposes obligations (do's and don'ts) on so-called digital gatekeepers. As well as increasing the European Commission's power to exercise *ex ante* supervision of compliance with these do's & don'ts, the Digital Markets Act extends merger control. When it enters into force, digital gatekeepers will be required to report all acquisitions in the digital sector, even if they fall below the current turnover thresholds. Violations of the Digital Markets Acts may be fined by the European Commission. As is customary for competition law violations, the fines can reach up to 10% of the group's worldwide turnover.

The entry into force of the Digital Markets Act would represent a fundamental change to competition supervision in the EU, not least because it gives the Commission far-reaching *ex ante* powers.

#4



It is clear that the (competition) rulebook on vertical agreements is in need of an update to provide clarity in the modern landscape

The new vertical agreement guidelines

Many everyday vertical agreements are covered by the Vertical Block Exemption Regulation (“**VBER**”) issued by the European Commission. Certain common clauses in business dealings – such as exclusivity and non-compete clauses – are in fact counter-competitive and would be considered violations of competition law were it not for the VBER. If your business is part of a distribution network, chances are that certain clauses in your vertical agreements are rendered possible by the VBER.

The VBER will expire on 31 May 2022. The European Commission has reviewed the functioning of the VBER in order to determine whether it should be amended, repealed or continued. Its review showed that growth in online sales has had an impact on exclusive distribution models. Indeed, the online model has made it easier for both buyers and sellers to trade outside a given territory. Given the growth in Internet sales – which the COVID-19 pandemic has only accelerated – it is clear that the (competition) rulebook on vertical agreements is in need of an update to provide clarity in the modern landscape. The European Commission is preparing such a revision, which is expected to be published in the course of this year.

#5



On our website, you can find an updated tracker of state aid measures available in the Netherlands, Belgium and Luxembourg

State aid during the COVID-19 crisis

COVID-19 had a severe impact on companies and their business in 2020, the ripple effects of which will continue to be felt well into 2021 as the pandemic is still disrupting economies worldwide. Thanks to the lessons learned during the first wave of COVID-19 in the Netherlands, the Dutch government has put in place several measures to support and aid companies experiencing a significant decrease in business due to the measures taken to curb the spread of the virus. The European Commission has also launched several initiatives to help those most affected and created a Temporary Framework to assess state aid measures necessary to keep European economies afloat. On our website, you can find an updated tracker of state aid measures available in the Netherlands, Belgium and Luxembourg including support for SMEs, wage reimbursement by the social security authorities, and coronavirus-related financing support. We will continue to keep you informed of these and other relevant state aid measures in 2021.

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