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Newsletter EU Law

A bi-monthly review of EU legal developments affecting business in Europe

Issue September/October 2021

Commission investigates NVIDIA's acquisition of Arm

On 27 October 2021 the Commission opened an in-depth investigation into proposed acquisition of Arm by NVIDIA.

NVIDIA develops and supplies processor products for various applications, including in datacentres, Internet of Things, automotive applications and gaming. Arm designs semiconductor and software solutions and licenses out intellectual property (IP) for processing units. By acquiring Arm, NVIDIA would gain full control over Arm's technology and licensing business.

Following its preliminary investigation, the Commission considers that Arm has significant power in the market for the licensing of Central Processing Unit IP. The merged entity would have the ability to restrict or degrade access to Arm's technology by providers of processor products that NVIDIA may compete with. The merged entity would also have the economic incentive to engage in such foreclosure strategies which could reduce competition in the market for processor products in various applications.

The Commission will further examine whether the transaction might stifle innovation because Arm licensees might be reluctant to continue sharing commercially sensitive information with the merged entity because they are competing with NVIDIA.

Acquisition of IHS Markit by S&P Global cleared subject to conditions

On 22 October 2021 the Commission approved the acquisition of IHS Markit by S&P Global, subject to conditions.

S&P Global and IHS Markit are major global providers of commodity and financial data such as credit ratings and market intelligence products. The Commission was concerned that the acquisition would reduce competition in the markets for price assessments for oil, coal, biofuels and petrochemicals, loan identifiers, and leveraged loan market intelligence where both companies are active and would face limited competition following the merger.

To address the Commission's competition concerns, the companies offered that, in commodity price assessments, S&P will divest of IHS Markit's Oil Price Information Service as well as Coal, Metals and Mining businesses. In financial

data and infrastructure the merged entity will divest of a number of S&P Global businesses and of S&P Global's CUSIP issuance and data licensing business. The entity will divest also of S&P Global's leveraged loan 100 index family as well as its market intelligence product. The Commission cleared the proposed transaction, as modified by the commitments.

Gun-jumping I: Illumina must hold GRAIL separate

On 29 October 2021 the Commission adopted interim measures to restore and maintain the conditions governing effective competition following Illumina's early acquisition of GRAIL, which the Commission decided is in breach of the standstill obligation under the EU Merger Regulation.

It is the first time that the Commission has adopted interim measures following an unprecedented early implementation of a concentration. The measures provide that GRAIL must be kept separate from Illumina and be run by independent Hold Separate Managers. Illumina and GRAIL are prohibited from sharing confidential business information. Illumina has the obligation to finance additional funds necessary for the operation and development of GRAIL. GRAIL will actively work on alternative options to the transaction to prepare for the possible scenario in which the deal would have to be undone.

The Commission will continue to investigate whether the companies' behaviour may trigger the imposition of fines, as well as its in-depth investigation into the transaction itself.

ECJ holds subsidiary responsible for damages caused by parent's antitrust infringement

On 6 October 2021, in the context of the truck cartel, the European Court of Justice (ECJ) delivered a judgment that strengthens private enforcement of cartel damages. The ECJ applied the concept of economic unit establishing the subsidiary's liability for harm caused by infringements of the parent company. The ECJ agreed with the Advocate General's prior opinion.

As a consequence of the judgment, damages caused by the parent company's infringement of European competition law can also be claimed from subsidiaries. For details see Luther's [blogpost](#).

Gun-jumping II: ECJ dismisses appeal by Altice against fines

The General Court dismissed Altice Europe's action against the Commission decision imposing two fines totalling €124.5m in connection with the acquisition of PT Portugal.

Altice Europe (Altice) is a multinational cable and telecommunications company. PT Portugal is a telecommunications and multimedia operator in Portugal. In 2014 Altice concluded a share purchase agreement (SPA) to obtain sole control of PT Portugal. The SPA described how PT Portugal's business was to be managed in the period between the signing of that agreement and the closing of the transaction following authorisation by the Commission (preparatory clauses). In 2015 the Commission agreed to the acquisition, but in 2016 found that some of the preparatory clauses gave Altice a right to veto the appointment of senior management of PT Portugal, its pricing policy, commercial terms and a wide range of contracts. In 2018, it imposed on Altice a fine of €62.25m for having failed to notify the acquisition and €62.25m for failing to comply with the standstill obligations.

Altice brought an action seeking annulment of that decision. The General Court dismissed the plea of illegality raised by Altice and concluded that specific articles of the Merger Regulation are not redundant and do not infringe the principle of proportionality or the prohibition of double punishment. The General Court confirmed that Altice exercised decisive influence over PT Portugal, thereby infringing both the notification and the standstill obligation. However, it reduced the fine for failing to notify the concentration to the Commission by €6.22m.

Binding measure for the Greek power market

On 10 September 2021 the Commission made legally binding measures proposed by Greece to allow the competitors of Public Power Corporation (PPC) to purchase more electricity on a longer-term basis.

PPC is the Greek state-owned electricity provider. In 2008 the Commission found that Greece had infringed competition rules by giving PPC privileged access rights to lignite. Due to appeals at both the General Court and European Court of Justice, and difficulties with the implementation of a previous remedies submission, corrective measures had not been implemented.

As part of the binding measure, PPC will sell quarterly forward electricity products on the European Energy Exchange and/or the Hellenic Energy Exchange. As a result, buyers will obtain electricity at a stable price every day during the quarter in question. This will enhance the ability of PPC's competitors to source wholesale electricity on the forward market and hedge against price volatility. PPC will ensure that sufficient volumes of wholesale electricity are made available to competitors. The proposed remedies will lapse when existing lignite plants stop operating commercially at the latest by 31 December 2024.

ITA not liable to pay back subsidies granted to Alitalia

On 10 September 2021 the Commission decided that new air carrier Italia Trasporto Aereo S.p.A. (ITA) is not Alitalia's economic successor and Italy's capital injections into ITA are market compliant.

EU state aid rules provide that a new company acquiring the assets of another company is not liable for past aid received by the seller, provided that the two companies are sufficiently different from one another.

ITA will have significantly reduced activities and will operate less than half of Alitalia's fleet of aircraft. It will focus on the profitable routes employing fewer aircraft fleet and less staff. ITA will only take over limited parts of Alitalia's handling and maintenance businesses. Italy agreed to refund the prepaid tickets that Alitalia will not have honoured at the time it ceases its operations. The Commission stated that Italy has demonstrated that there is a clear break between Alitalia and the new airline ITA. Italy's capital injections of €1.35bn into ITA is in line with terms that a private investor would have accepted. ITA will also not be liable for the €900m, plus interest, that Alitalia must repay to Italy following a separate Commission decision.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

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