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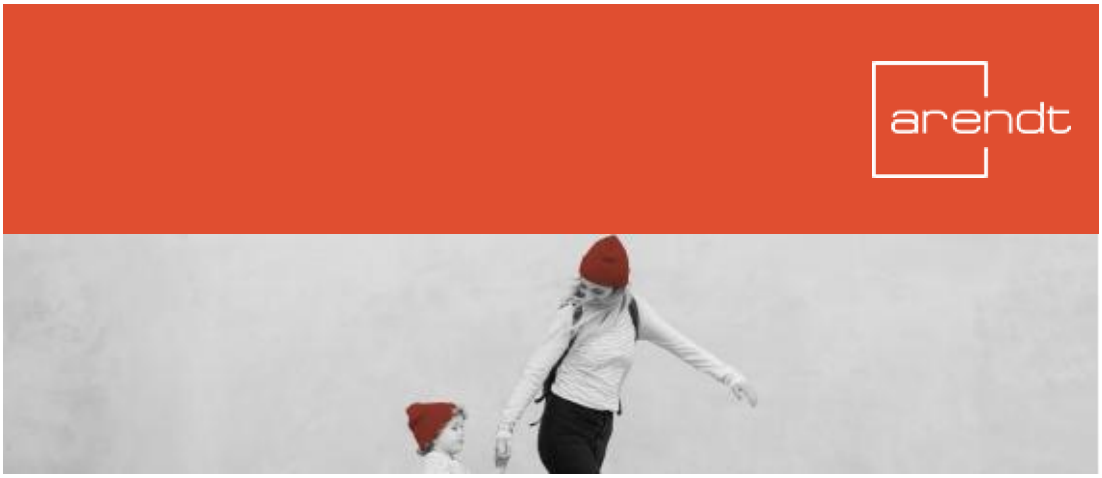

Luxembourg Newsflash - 3 May 2021

Luxembourg Competition Council willing to review and refer M&A transactions to the European Commission

On 29 April 2021, following the release of the widely commented European Commission guidance on Art. 22 of the EU Merger Regulation (EUMR), the Luxembourg Competition Council published a statement on the recent policy change.

In addition to explaining the key characteristics of the European Commission referral notice, the Competition Council made the following noteworthy comment:

"*Crucially, the Commission also confirms in its Notice that a referral remains possible where the requesting Member State has not put in place a specific national merger control regime, which is the case for the Grand Duchy of Luxembourg. Following the Notice, the* [Luxembourg] *Competition Council is now more encouraged to use Article 22 to refer a merger to the European Commission when there is an effect on trade between Member States and a threat of a significant effect on competition in the country.*"

A link to the full comment (in French) can be found here_

Implications

The statement of the Competition Council shows strong support for the EU Commission policy change, and signals a willingness to initiate the review and preliminary assessment of potentially problematic transactions. Where a transaction referred to the EU Commission is ultimately found to be incompatible with EU competition laws, EU authorities may decide to unwind the transaction or impose other remedies that sufficiently address the competition concerns. This (new) transaction risk has significant repercussions for M&A activity across the European Union, including in Luxembourg.
As discussed in more detail in the earlier newsletter linked above, three immediate consequences for M&A transaction planning arise:

1. **M&A documentation**. Conditions precedent should note the possibility and potential consequences of a referral request under Art. 22 EUMR. Where competition law questions arise, it should also be agreed which party is obliged and bears responsibility for merger control clearance (by means of "best effort" or even "hell or high water" clauses).
2. **Substantive competition law assessments**. Transactions should be analysed as to their potential local impact in EU Member States – regardless of (i) their size and (ii) whether they meet notification thresholds. In addition to multi-jurisdictional filing assessments, substantive analyses may need to be made.
3. **Proactive engagement with authorities**. Where questions arise as to the impact of a transaction on competition in an EU Member State, it may be necessary to proactively inform the competent authorities in order to exclude, or at least minimise, the risk of a referral. This is especially advisable where there is potential for a "tip-off" or complaint by a third party.

Expertise of Arendt & Medernach

The EU & Competition Law practice of Arendt & Medernach has extensive experience in advising on merger control matters, and has represented clients in numerous investigations by the European Commission and the Luxembourg Competition Council. We are at our clients' disposal to provide advice on the new challenges posed by this EU Commission guidance, including all necessary M&A strategy concerns, substantive competition law assessments, proactive submissions and other contact with the authorities, and any other questions that may arise in this context.

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