EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2022

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Contents

EUROPE

EUROPEAN UNION

Dealing with the Broad Impact of Antitrust on JVs 1
Catriona Hatton and David Cardwell
Baker Botts LLP

EC puts the Focus on the Digital Economy 18
Stavroula Vryna, Richard Blewett, Nelson Jung and Thomas Vinje
Clifford Chance

Fines and Cartel Damages 38
Elvira Aliende Rodriguez, Ruba Noorali and Victoria Rivas Santiago
Shearman & Sterling LLP

Merger Control Updates... 52
Kyriakos Fountoukakos, Camille Puech-Baron and Agathe Célarié
Herbert Smith Freehills LLP

Modernising the Law on Vertical Agreements 74
Gian Diego Pini and Antonio Cammalleri
Skadden, Arps, Slate, Meagher & Flom LLP

© Law Business Research 2021

CYPRUS

CPC Still Busy During Covid-19 92
Loukia Christodoulou
Chair of the Cyprus Commission for the Protection of Competition

DENMARK

The Differences in Danish and EU Competition Law 101
Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle

A Primer on Merger Control 119
Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle

FRANCE

Beyond the Punisher 137
Jérôme Philippe and Aude-Charlotte Guyon
Freshfields Bruckhaus Deringer LLP

Changes and Firsts for the FCA 155
Mélanie Thill-Tayara and Laurence Bary
Dechert LLP

FCA’s Strong Activity in Covid Times, including in Digital Markets 172
Isabelle de Silva
President of the French Competition Authority

Private Antitrust Litigation – a Practical Guide 177
Mélanie Thill-Tayara and Marion Provost
Dechert LLP

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GERMANY

A Leader in Private Antitrust Litigation 195
Albrecht Bach and Christoph Wolf
Oppenländer Rechtsanwälte

Addressing the Power Dynamic 214
Anne Caroline Wegner, Helmut Janssen and Sebastian Janka
Luther Rechtsanwaltsgesellschaft mbH

FCO at the Forefront in the Digital Era 232
Andreas Mundt
President of the Federal Cartel Office

Increased Scrutiny on FDI 248
Silvio Cappellari and Stephanie Birmanns
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH

GREECE

Presenting the Greek Antitrust Framework 265
Cleomenis Yannikas
Dryllerakis & Associates

NORWAY

High Activity in Covid Times 281
Lars Sørgard
Director General of the Norwegian Competition Authority

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PORTUGAL

Maintaining Strong Enforcement 293
Margarida Matos Rosa
President of the Portuguese Competition Authority

RUSSIA

Enforcement Practice of FAS Russia 300
Igor Artemiev
Head of the Federal Anti-Monopoly Service of Russia

The Specifics of Economic Concentration in Russia 312
Irina Akimova and Ksenia Simakova
BGP Litigation

SPAIN

Towards Consolidation of Competition Culture.. 332
Cani Fernandez
President of the National Commission for Markets and Competition

SWEDEN

New Decision-Making Powers for thew SCA – the Future is Here?.......... 342
Elsa Arbrandt, Fredrik Lindblom and Sanna Widén
Advokatfirman Cederquist KB

Collaboration and Enhanced Deterrence 354
Rikard Jermsten
Director General of the Swedish Competition Authority

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SWITZERLAND

Fighting Against Being a High-Price Island.. 363
Daniel Emch, Corinne Wüthrich-Harte and Stefanie Karlen
Kellerhals Carrard

TURKEY

Combating Abuse of Dominance... 376
Gönenç Gürkaynak and O Onur Özgümüş
ELIG Gürkaynak Attorneys-at-Law

Merger Control in a Nutshell 394
Gönenç Gürkaynak and K Korhan Yıldırım
ELIG Gürkaynak Attorneys-at-Law

Recent Legislative Changes and Cartel Enforcement.................................. 409
Gönenç Gürkaynak and Öznur İnanılır
ELIG Gürkaynak Attorneys-at-Law

UKRAINE

Casting a Wide Net for Merger Control... 425
Mariya Nizhnik, Sergey Denisenko and Yevgen Blok
Aequo Law Firm

UNITED KINGDOM

Summary of Cartel Enforcement Action... 435
Frances Murphy, Joanna Christoforou, Michael Zymler and Gabrielle Martin
Morgan Lewis & Bockius UK LLP

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Merger Control in the Post-Brexit Landscape 463
Peter Harper, Kate Newman, Nicola Holmes, Annabel Borg, Claire Morgan and Laura Wright
Eversheds Sutherland

Middle East and Africa

ANGOLA

Growing from EU Inspiration 479
Ricardo Bordalo Junqueiro and João Francisco Barreiros
VdA

COMESA

Tug of War on Extraterritoriality and the Saving Grace of Regional Law 494
Willard Mwemba
Chief Executive Officer of the COMESA Competition Commission

ISRAEL

Competition Law Regime 508
Tal Eyal-Boger, Ziv Schwartz and Shani Brown
FISCHER (FBC & Co)

MAURITIUS

Over a Decade of Competition Enforcement 527
Deshmuk Kowlessur
Executive Director of the Competition Commission of Mauritius

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review* 2022 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, we have added a specific focus on the digital economy and vertical agreements in the European Union, as well as private litigation in France and merger control in Russia, alongside updates from the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Sweden, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel and Mauritius.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

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European Union: Merger Control Updates

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IN SUMMARY

This article discusses key jurisdictional, procedural and substantive developments in EU merger control from June 2020 to May 2021.

DISCUSSION POINTS

- Jurisdictional developments: the EU and UK merger control regimes and the Commission's guidance on article 22 of the EU Merger Regulation (EUMR)
- Procedural developments: cracking down on procedural infringements and tightening the standard of proof to prohibit concentrations
- Substantive developments: FDI Regulation, European Green Deal and focus on the digital sector and life sciences industry

REFERENCED IN THIS ARTICLE

- Council Regulation (EC) No. 139/2004 of 20 January 2004
- Guidelines on horizontal mergers, 2004/C 31/03
- Commission Notice to stakeholders, REV 1, 2 December 2020
- Commission Notices, OJ C56, 5.03.2005
- Communication from the Commission, C(2021) 1959 final, 26 March 2021
- Commission Notice, OJ C372, 9.12.199
- The European Green Deal, COM/2019/640 final, 11 December 2019
- Commission Staff Working Document, SWD(2021) 66 final
- Regulation (EU) 2019/452
- Digital Markets Act, COM(2020) 842 final
- CMA Guidance, CMA 125, 1 December 2020
- Case No. M.7612, *Hutchison 3G UK/Telefónica UK*
- Case No. M.9660, *Google/Fitbit*

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Introduction[1]

EU merger statistics

Deal value in European mergers and acquisitions (M&A) decreased in 2020 in comparison to the levels seen in 2019 (€680 billion in 2020 compared to €889 billion in 2019) – reaching its lowest level since 2013 (when it was €520 billion).[2]

The number of cross-border deals in the European Union, nonetheless, remained high in 2020, despite a 5.8 per cent fall in the number of notifications to the European Commission (the Commission) compared with 2019 (361 notifications in 2020; 382 in 2019).[3] The number of notifications to the Commission in 2020 still represents the fifth highest number of notifications in the past 12 years and the sixth highest number of notifications since the implementation of the EU Merger Regulation[4] (the EUMR). It remains to be seen whether the number of notifications will remain high in 2021, in particular in light of the continued impact of the covid-19 pandemic on the economy. At the time of writing, 89 transactions have been notified to the Commission in 2021.

Although the number of cases reviewed by the Commission under the simplified procedure has slightly decreased when compared with 2019 (278 simplified cases in 2020; 283 in 2019), the proportion of those cases compared to the overall number of notifications has continued to increase, from 74 per cent in 2019 to 77 per cent in 2020. The Commission opened eight Phase II investigations in 2020, the same number as in 2019. There was no prohibition decision in 2020 against three in 2019 (the highest level since 2001).

In addition, in 2020, the Commission cleared 16 deals subject to remedies (13 at Phase I and three at Phase II), while nine deals were withdrawn prior to a decision (seven at Phase I and two at Phase II).

Key highlights

The key developments in EU merger control during the period between June 2020 and May 2021 include, among other things, the following.

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1 This article aims to provide an overview of the main EU merger control developments over the period from June 2020 to May 2021. The contents of this article are for reference purposes only: they do not constitute legal advice and should not be relied upon as such.

2 See 'Number & Value of M&A Worldwide' in IMAA, 'M&A Statistics'.

3 Directorate General for Competition, 'Merger statistics'.

4 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24, 29.01.2004, pp. 1–22.

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On 31 December 2020, the transition period, during which the EU and UK merger control regimes operated as if the United Kingdom were still an EU member state, came to an end. Since 1 January 2021, the EU and UK merger control regimes operate in parallel as two separate regimes. Mergers may, therefore, require notification to both the Commission and the UK Competition and Markets Authority (CMA), provided the respective thresholds are met.

In early December 2020, both the Commission and the CMA published final guidance on the impact of Brexit on competition law, including merger control, after the end of the transition period.[5]

On 26 March 2021, the Commission published guidance on referrals pursuant to article 22 of the EUMR of transactions falling below the national thresholds of EU member states.[6] The guidance widens the practical scope of application of article 22 as the Commission, reversing previous policy, will encourage EU member states to refer and will accept referrals of merger cases when they are initiated by an EU member state that lacks jurisdiction over the case. This new approach directly aims at bringing 'killer acquisitions' (ie, acquisitions by established players of start-ups or innovators with strong competitive potential in the early stages of their development) within the scope of the EUMR.

On the same day, the Commission launched a consultation on the revision of certain jurisdictional and procedural aspects of the EUMR, with the aim of widening the scope of cases eligible to benefit from the simplified procedure and making the whole notification and review process simpler.

On 3 May 2021, the Commission imposed a €7.5 million fine on Sigma-Aldrich for providing incorrect or misleading information as part of the review process of its acquisition by Merck.

The EU Regulation on the screening of foreign direct investment (the FDI Regulation)[7] became fully operational on 11 October 2020, thus creating an EU-wide framework for the coordination of the screening of foreign direct investment.

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5 European Commission, 'Commission Notice to stakeholders: Withdrawal of the United Kingdom and EU rules in the field of competition law', REV 1, 2 December 2020; CMA, 'Guidance on the functions of the CMA after the end of the Transition Period', CMA 125, 1 December 2020.

6 European Commission, 'Communication from the Commission: Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases', C(2021) 1959 final, 26 March 2021.

7 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L791, 21.03.2019, pp.1–14.

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The past year was also marked by the growing awareness that EU competition law, including merger control, has a role to play in achieving the objectives of the European Green Deal strategy. Following the launch in autumn 2020 of a consultation on this topic, the Commission held a conference on 4 February 2021 to discuss how EU competition law can facilitate the development of a greener EU economy.

On 28 May 2020, the General Court handed down a landmark judgment in the *CK Telecoms* case[8] in which it annulled the Commission's decision prohibiting the proposed acquisition by Hutchison of O2. This judgment is notable in that the General Court has significantly raised the standard of proof that the Commission must meet before it is able to prohibit a merger.

A number of key topics have continued to be debated in relation to mergers in the digital sector, in particular the importance of data and the interplay between competition and privacy laws in the context of Google's proposed acquisition of Fitbit, which the Commission cleared on 15 December 2020 subject to commitments. The Commission has also taken a renewed interest in life sciences mergers, with many cases cleared with commitments, and the development of international cooperation in relation to mergers in the pharmaceutical sector.

We consider the above in more detail below and discuss additional jurisdictional, procedural and substantive developments.

Jurisdictional developments

Brexit and EU merger control

In December 2019, the UK parliament approved the Brexit Withdrawal Agreement, which was then also ratified by the European Parliament in late January 2020. The transition period started on 31 January 2020 (11pm GMT) and expired on 31 December 2020.

During the transition period, the EUMR and UK merger control regimes operated in substantially the same way as prior to 31 January 2020. In this respect, mergers within EUMR jurisdiction have been dealt with by the Commission, including in relation to effects on any UK market, while UK turnover has been included in the normal way for EUMR purposes as if the United Kingdom were still an EU member state.

8 Case T-399/16, *CK Telecoms UK Investments v Commission*, EU:T:2020:217.

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During the transition period, the CMA was not allowed to open an investigation into the same transaction (ie, the 'one-stop-shop' regime of the EUMR continued to apply), unless jurisdiction was transferred to it under articles 4(4) or 9 of the EUMR. One important change was that during the transition period, the CMA no longer had the right to participate in meetings of the Advisory Committee.[9]

In early December 2020, both the Commission[10] and the CMA[11] published their final guidance on the impact of Brexit on competition law.

Since the end of the transition period, the EUMR is no longer applicable in the United Kingdom. The United Kingdom is, therefore, no longer covered by the EUMR one-stop-shop regime; however, the Commission retains jurisdiction over all the merger cases that were notified to it before the end of the transition period. For merger cases that were not notified to the Commission before the end of the transition period, the Commission has no jurisdiction to assess the effects of a transaction on any UK market.

On turnover calculation, the Commission's guidance refers to articles 1 and 3 of the EUMR, pursuant to which the relevant date for establishing jurisdiction over a concentration is the date of conclusion of the binding legal agreement, the announcement of a public bid or the acquisition of a controlling interest or the date of the first merger notification, whichever date is earlier. The Commission's guidance then provides that:

> *[t]hese rules are not altered by the Withdrawal Agreement or otherwise by the United Kingdom's withdrawal from the EU. If any of the relevant events takes place prior to the end of the transition period, the Commission will assess whether the jurisdictional test of the EUMR is met on the date of that event and will take into account the turnover that the parties to the concentration realise in the United Kingdom to establish the turnover of the undertakings concerned at the EU and individual Member State level. If the relevant date for establishing EU jurisdiction takes place after the end of the transition period, the Commission will no longer take into account the turnover that the parties to the concentration realise in the United Kingdom.*

9 Article 128(5) of the Withdrawal Agreement provides that UK experts may, if invited, exceptionally attend meetings if the discussions concern the United Kingdom, but they will have no right to vote, and their presence will be limited to the specific agenda items relating to the United Kingdom.

10 See footnote 5.

11 ibid.

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The EUMR and the UK merger control regime have consequently started to run in parallel, and a transaction that falls within the scope of the EUMR may also be subject to UK merger control (if the UK thresholds are met).[12]

Commission's guidance on article 22 EUMR: extension of its jurisdiction?

Pursuant to article 22 of the EUMR, an EU member state can request the Commission to examine a concentration that does not have an EU dimension where it affects trade between member states and threatens to significantly affect competition within the member state making the request.

While nothing in the wording of article 22 of the EUMR prevents an EU member state from requesting such a referral for a concentration that does not meet its own national merger control thresholds, over the years, the Commission has been discouraging referral requests from member states that did not have jurisdiction over the transaction at stake under their national regimes.

In September 2020, Commissioner Vestager announced that the Commission would start making use of article 22 of the EUMR to tackle a 'handful of mergers each year that could seriously affect competition, but which [the Commission does not] get to see because the companies' turnover doesn't meet the thresholds'.[13]

This announcement resulted in the publication on 26 March 2021 of guidance on the referral mechanism set out in article 22 of the EUMR,[14] changing the Commission's past practice. Under the new guidance, the Commission will now accept referrals by EU member states of concentrations that fall below their domestic jurisdictional thresholds. The new guidance is immediately applicable and completes the guidance already provided in the Commission's Notice on referrals.[15]

Deals in which the turnover of at least one of the undertakings concerned does not reflect its 'actual or future competitive potential' are considered 'appropriate cases' for a referral where the transaction is not notifiable under the laws of the referring member state. The guidance provides a non-exhaustive list of examples:[16] start-ups or recent

12 This may add a burden and cost for businesses, in particular in view of the level of the UK merger fees and the longer time frames for UK merger control clearance. Also, the CMA has estimated that this will lead to an increase in UK merger investigations of up to 40 per cent.

13 Speech at the IBA 24th Annual Competition Conference: the future of EU merger control, 11 September 2020.

14 See footnote 6.

15 Commission Notice on case referral in respect of concentrations, OJ C56, 05.03.2005, pp. 2–23.

16 Note that this list is not limited to any specific economic sector.

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entrants with significant competitive potential; important innovators or undertakings involved in potentially important research; actual or potential important competitive forces; undertakings with access to competitively significant assets (eg, raw materials, infrastructure, data, intellectual property rights) and undertakings providing products or services that are key inputs or components for other industries.

The guidance also sets out the criteria that the Commission may consider in exercising its discretion to accept such referrals, including whether the value of the consideration received by the seller is particularly high compared to the current turnover of the target.

Member states can request a referral even where transactions have already been implemented. The Commission will, however, typically not consider a referral appropriate where the transaction has been implemented for more than six months, unless the level of the potential competition concerns and the detrimental effect on consumers would justify intervention.

In a recent example, the US Federal Trade Commission flagged to the Commission the acquisition by Illumina of Grail, a company involved in developing a cancer detection test, as 'potentially problematic'. The Commission then asked the national competition authorities of the EU member states whether any was interested in requesting a referral under article 22 of the EUMR. The French Competition Authority initiated a referral request and was joined by several other member states.[17] Illumina unsuccessfully challenged the Commission's attempts to take jurisdiction over a deal below EUMR and national jurisdictional thresholds in the French and Dutch national courts.

In April 2021, the Commission accepted the referral[18] on the basis that Grail's competitive significance was not reflected in its turnover given the US$7.1 billion deal value, and the transaction gave rise to a risk to restrict access to, or increase prices of, next generation sequencers and reagents to the detriment of Grail's rivals active in genomic cancer tests. As a result of the referral, Illumina cannot implement the transaction before notifying and obtaining clearance from the Commission. Appeal of the Commission's referral acceptance decision is pending.

17 France was joined by Belgium, the Netherlands, Greece, Iceland and Norway. See 'Illumina loses French legal challenge to EU referral of Grail deal', *MLex* (1 April 2021).

18 Commission's daily news for 20 April 2021.

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This change of policy increases the likelihood of referrals under article 22 of the EUMR and expands the Commission's jurisdiction for merger control. Mixed opinions have been expressed about the new guidance. While some, such as the French Competition Authority, consider this change of policy welcome to enable the Commission to tackle killer acquisitions,[19] others fear the new guidance will reduce legal certainty for companies, in particular given the possibility for the Commission to review deals that have already been implemented.

Procedural developments

The impact of covid-19 on EU merger control

The outbreak of the covid-19 pandemic since early 2020 has placed increasing strain on economies and has affected competition law enforcement, including merger control.

In terms of practical implications, most Commission officials have been teleworking since March 2020 (with the exception of limited office presence during the months of summer 2020). The Commission has, therefore, encouraged companies to notify concentrations electronically, both through email and its eTrustEX platform. Any in-person meetings, including state-of-play meetings, are currently held through phone calls or videoconferences. It remains to be seen whether the 'new normal' will bring about the end of those measures.

Despite the significant effects of the pandemic on the global economy, this has not been reflected in the Commission's merger control activity; there was only a slight decrease in the number of notified cases in 2020 compared to 2019 (361 notifications in 2020 against 382 in 2019), and the Commission has remained quite active during this period.

In terms of the impact on the substantive review of concentrations, the Directorate General for Competition (DG Comp) is determined to ensure that merger control remains operative and effective. The covid-19 pandemic has increased the risk of concentrations involving targets in financial difficulties in relation to which the merging parties might attempt to rely on the 'failing firm' defence to obtain clearance.[20]

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19 French Competition Authority press release, 'The Autorité welcomes the announcement by the European Commission, which will henceforth allow national competition authorities to refer sensitive merger transactions to it for examination, including when they are not subject to national merger control' (15 September 2020).

20 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, 05.02.2004, paragraphs 89–91. Based on paragraph 89, '[t]he Commission may decide that an otherwise problematic merger

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Traditionally, the failing firm defence has rarely been accepted by the Commission in view of the high evidential burden imposed on the parties.[21] Although we are not aware of specific cases where the defence has been raised since the outbreak of the pandemic, it seems unlikely that the Commission will deviate from the existing legal framework and its decisional practice. However, it remains to be seen whether, in light of the evolving economic situation, there will be more cases in the future in which the parties are successful in their failing firm arguments.

Revision of the Implementing Regulation and the Commission Notice on Simplified Procedure

On 26 March 2021, the Commission published a staff working document that sets out the findings of its evaluation of the procedural and jurisdictional aspects of EU merger control.[22]

The evaluation suggests that the set of simplification rules introduced in 2013 has enhanced the effectiveness and celerity of the EU merger control process and reduced the administrative burden on businesses and on the Commission, while allowing the latter to focus on the most relevant cases. The Commission found, for instance, that decisions adopted under the simplified procedure usually take nine working days less than under the normal procedure.[23]

On the other hand, the Commission identified some room for improvement and has launched a consultation to review the simplification package of 2013. As part of this initiative, the Commission intends to expand and clarify the categories of cases eligible to the simplified procedure; ensure effective, efficient and proportionate information gathering; and promote electronic notifications.

Stakeholders are invited to provide their views by 18 June 2021 as the Commission is planning to adopt a new implementing regulation in the first quarter of 2022.

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is nevertheless compatible with the common market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger.'

21 This defence was accepted, for example, in Case No. COMP/M.6796, *Aegean/Olympic II*, in October 2013.

22 Commission Staff Working Document, 'Evaluation of procedural and jurisdictional aspects of EU merger control', SWD(2021) 66 final.

23 See paragraph 192 of the Commission Staff Working Document: 'the simplified decisions are usually adopted around working day 16, while decisions under the normal procedure usually take 25 working days'.

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International cooperation on pharmaceutical mergers

On 16 March 2021, the Commission announced the launch of a multilateral working group together with the UK CMA and the US competition agencies.[24] The group was created to exchange best practices in relation to pharmaceutical mergers.

This joint project takes place as competition agencies have increased scrutiny over life sciences mergers (see below), given the wave of acquisitions in the sector and their possible effects on the prices of medicines and innovation.[25] Increasing concerns over killer acquisitions in the pharma sector[26] have encouraged competition authorities to review their traditional approach and narrow market definition. For instance, the Commission has widened the scope of 'potential competitor' to encompass pipeline products that are still at Phase I of their clinical trials if the specific circumstances of the case so require.[27]

A large number of outstanding issues remain to be addressed by competition authorities. The working group is expected to refresh and expand the existing theories of harm, a change that would also require them to determine which evidence is needed and which remedies are appropriate. Additionally, the working group intends to identify the characteristics of firms that make successful divestiture buyers and to explore the full range of a pharmaceutical merger's effects on innovation.

Overall, this recent development illustrates the step taken towards a potential more 'aggressive approach to tackle anticompetitive pharmaceutical mergers'.[28] In terms of procedure, the joint project – albeit still at an early stage – should also further enhance transatlantic cooperation and strengthen the relationships between the Commission and the CMA following Brexit.

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24 Commission press release, 'Competition: The European Commission forms a Multilateral Working Group with leading competition authorities to exchange best practices on pharmaceutical mergers', IP/21/1203.

25 Federal Trade Commission (FTC) press release, 'FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers'.

26 Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (19 April 2020), *Journal of Political Economy*, Vol. 129, No. 3, pp. 649–702, March 2021.

27 Commission decision in Case No. COMP/M.7275, *Novartis/GlaxoSmithKline Oncology Business*.

28 In the words of FTC acting chair Rebecca Kelly Slaughter 'Statement by Acting FTC Chairwoman Rebecca Kelly Slaughter on Enactment of the American Rescue Plan Act' (12 March 2021).

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Commission fines Sigma-Aldrich €7.5 million for providing incorrect or misleading information

In previous editions, we reported that, in July 2017, the Commission sent a statement of objections to Merck and Sigma-Aldrich alleging that the parties failed to provide important information about an innovation project (iCap) with relevance for certain laboratory chemicals, which was at the core of the Commission's analysis during its review of the proposed acquisition of Sigma-Aldrich by Merck.

In 2020, the Commission dropped the allegations against Merck and sent a supplementary statement of objections to Sigma-Aldrich only. This supplementary statement of objections contained allegations that Sigma-Aldrich had intentionally or at least negligently provided misleading and incorrect information to the Commission about iCap during the merger review process.[29]

On 3 May 2021, the Commission adopted its long-awaited decision, finding that Sigma-Aldrich committed three different infringements by providing, deliberately or at least negligently, incorrect or misleading information in the remedy submissions and in the replies to two requests for information. The Commission also found indications that Sigma-Aldrich's supply of incorrect or misleading information was intended to avoid the transfer of iCap to the remedy taker Honeywell.

The Commission considers that the infringements are particularly serious because:

- providing correct and non-misleading information in merger investigations is crucial for the functioning of the EU merger control system;
- the information at stake related to an innovation project that was clearly related to and important for the divestment business; and
- considering the confidential and sensitive nature of iCap, the Commission's only way of obtaining the information was from Sigma-Aldrich.

As a result, on 3 May 2021, the Commission imposed a fine of €7.5 million on Sigma-Aldrich.

This decision further testifies to the Commission's hard stance towards procedural infringements.

29 Commission's daily news for 1 July 2020.

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Tightening of the standard of proof in merger cases

On 28 May 2020, the General Court handed down a landmark judgment in *CK Telecoms*,[30] which annulled the Commission's decision to prohibit the acquisition by Three of its rival O2[31] for failing to prove the existence of a significant impediment to effective competition (SIEC) to the requisite legal standard. In particular, it found that the Commission failed to prove to the requisite legal standard the effects of the concentration on prices and on the quality of services for consumers[32] and failed to prove that Three was a maverick[33] and that Three and O2 were close competitors.[34]

This judgment is particularly important because the General Court has clarified and tightened the standard of proof that the Commission must meet to prohibit a concentration. It ruled that the Commission is required to demonstrate with a strong probability the existence of an SIEC following the concentration.[35] Absent the strong probability of an SIEC as a result of the merger, the Commission cannot prohibit it. Importantly, the General Court did not mention the existence of a margin of discretion on the part of the Commission.

The merger at issue in *CK Telecoms* gave rise to horizontal competition concerns falling short of dominance, which may have been the reason for higher scrutiny by the General Court, given the complexities of the economic assessment. The *CK Telecoms* judgment, therefore, testifies to the General Court's will to intensify its judicial review of Commission merger prohibition decisions, at least for 'gap' cases, (ie, concentrations in oligopolistic markets that raise horizontal competition concerns without, however, creating or strengthening a dominant position).

The Commission has appealed the *CK Telecoms* judgment to the Court of Justice, and the appeal is pending.[36]

30 Case No. T-399/16, *CK Telecoms UK Investments v Commission*, EU:T:2020:217 (*CK Telecoms*).

31 Commission decision in Case No. M.7612, *Hutchison 3G UK/Telefónica UK*.

32 *CK Telecoms*, paragraphs 275, 281 and 282.

33 *CK Telecoms*, paragraphs 155 to 226.

34 *CK Telecoms*, paragraphs 249 and 250.

35 *CK Telecoms*, paragraph 118: 'In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration. Thus, the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not', on the basis of a "balance of probabilities", as the Commission maintains. By contrast, it is less strict than a standard of proof based on "being beyond all reasonable doubt"'.

36 Case No. C-376/20 P, *Commission v CK Telecoms UK Investments*.

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Substantive developments

Update on the new Market Definition Notice

In December 2019, Commissioner Vestager announced the Commission's plan to review the Market Definition Notice,[37] which dates back to 1997 and provides guidance on how the Commission defines the relevant product and geographic markets in both merger and antitrust cases.

After publishing an 'evaluation and fitness check road map' on 3 April 2020,[38] the Commission launched a public consultation of the 2020 Evaluation of the Market Definition Notice on 26 June 2020 in light of the initial feedback received, seeking views from a variety of stakeholders from the public and private sectors, including consumer associations, EU national competition authorities and government bodies, academia and legal and economic practitioners. As part of the consultation process, the Commission published an online questionnaire to which it received 86 responses.

The Commission intends to publish the results of the evaluation later in 2021.

The FDI Regulation is now fully operational

The FDI Regulation was adopted on 19 March 2019 and entered into force on 10 April 2019. The FDI Regulation however only became fully operational and applicable to foreign direct investment (FDI) transactions on 11 October 2020. This period was seen as necessary to allow EU member states time to make any amendments to their FDI regimes and for the Commission to set up an information-sharing mechanism to exchange information on FDI.

The EUMR contains a competition-focused test and, in principle, does not allow for political considerations to be taken into account as part of the EU merger review process. Other non-competition legitimate interests can be taken into account at the national level pursuant to article 21(4) of the EUMR. The FDI Regulation is without prejudice to the application of the EUMR; the two regimes remain fully independent.[39] This presents the Commission with an opportunity to exert dual influence: in

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37 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 09.12.1997, pp. 5–13.

38 European Commission, 'EU competition law – market definition notice (evaluation)'. Roadmaps and evaluations such as these are a relatively new tool of the Commission, which it uses to define the scope of a major new law or policy or, as in this instance, the evaluation or fitness check of an existing law or policy.

39 Member states should, nevertheless, endeavour to indicate whether the proposed FDI is likely to require notification under the EUMR, when notifying the other EU member states of FDI undergoing screening in their territories.

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addition to being the substantive decision-maker for competition issues, it is also able to provide a non-binding advisory opinion when EU member states seek to review a transaction domestically under FDI rules.

The FDI Regulation creates a cooperation framework allowing EU member states and the Commission to exchange information and provide comments. It does not establish FDI screening at the EU level itself and does not require EU member states to introduce or maintain FDI screening mechanisms;[40] however, it sets out the common criteria and standards that those mechanisms, if adopted, should take. Member states have the opportunity to comment on FDI taking place elsewhere in the European Union, and the Commission will be able to issue an opinion when an investment poses a threat to the security or public order of more than one member state.

Merger control and the European Green Deal

In December 2019, Commission President Ursula Von der Leyen announced the European Green Deal, a roadmap aiming at making the European Union's economy sustainable and climate neutral by 2050.[41] The European Green Deal covers all sectors of the economy. It sets out a number of actions to boost the efficient use of resources by moving to a clean and circular economy, restore biodiversity loss and cut pollution. Such actions include, for example, investing in environmentally friendly technologies and decarbonising the energy sector.

Following the announcement of the European Green Deal, some national competition authorities within the European Union have started to think about how competition rules could be applied to help the transition to a green economy. In July 2020, the Dutch Authority for Consumers and Markets published draft guidelines (updated in January 2021) setting out criteria for assessing agreements entered into between competitors that aim at achieving a sustainability objective. In September 2020, the Hellenic Competition Commission published a discussion paper on how competition policy could further contribute to the green transition.

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40 As of 30 March 2021, national screening mechanisms were in force in 18 EU member states: Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain (as well as the United Kingdom). Four additional EU member states are taking the necessary legislative steps to implement a screening regime for FDIs (see Commission, 'List of screening mechanisms notified by Member States', which is regularly updated).

41 Communication from the Commission, The European Green Deal, COM/2019/640 final, 11 December 2019.

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The Commission followed this trend: in September 2020, it announced the upcoming publication of a consultation aiming at gathering views of interested stakeholders on how competition rules and sustainability policies can work together. The consultation, which closed in November 2020, covered all the fields of competition law, including merger control. It was followed by a conference on 'Competition Policy Contributing to the European Green Deal' organised by the Commission on 4 February 2021.

Executive Vice President Vestager noted at the conference that, although there are more direct instruments than competition policy to achieve the objectives of the European Green Deal (eg, climate laws), competition policy nonetheless must play its part by ensuring that state aid rules encourage investment in the green economy and that antitrust and merger control rules favour green innovation. She announced that the Commission would publish a report on the lessons from the consultation process and the input to the debate before the summer.[42]

With regard to merger control in particular, the key issue that transpired at the conference was the need to avoid killer acquisitions of green innovation (ie, acquisition of disruptive green start-ups). It was, however, felt that the EUMR remains broadly fit for purpose in this respect.

Work is also under way within the chief economist's team at DG Comp to develop tools to be ready to take into account green efficiencies in the assessment of mergers,[43] even though the chief economist does not expect a radical change in practice in this regard and doubts that the Commission would clear mergers purely on green efficiency grounds.[44] The upcoming review by the Commission of Veolia's hostile bid for Suez (which, at the time of writing, is yet to be notified) will be interesting from that perspective.[45]

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42 A number of other concrete outputs were announced in relation to antitrust and state aid rules, namely: plans to update the rules on state aid for energy and the environment, and regional aid for Europe's less developed regions and, later in 2021, a consultation on the options for an updated framework and guidance on horizontal cooperation between competitors and vertical supply agreements.

43 Hellenic Competition Commission, 'Sustainable Development and Competition Law: Towards a Green Growth Regulatory Osmosis', online conference held on 28 September 2020.

44 'Veolia-Suez deal to test green arguments in EU merger reviews', *MLex* (5 March 2021).

45 ibid.

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Continuing focus on mergers in the digital sector

In recent years, there has been a wave of consolidation in the digital sector,[46] including transactions whereby big tech companies acquired low-turnover but high-value young targets;[47] thus, regulators around the world – including the Commission – have been considering whether their merger control rules should be updated to tackle the specific challenges involved in digital mergers.

Digital mergers present specific features, including the fact that they occur in fast-moving markets, they might involve zero-price markets or platforms that play a dual role (this is the case when a company controls the terms of access to the platform but it may also market services competing with rival services offered on the platform), and relate to companies that generate and rely on data to develop their products or services.

In recent years, a number of key topics have emerged and continue to be debated in relation to mergers in the digital sector, including whether the existing jurisdictional thresholds need to be updated to capture more acquisitions by big tech companies of young targets with competitive significance and the importance of data and the inter-play between competition and privacy laws.

With regard to jurisdiction, the Commission seems to have made the choice to further exploit the potential of the existing tools by changing its policy regarding referrals under article 22 of the EUMR (see above). This – coupled with the Commission's proposal for the Digital Markets Act[48] published on 15 December 2020, which provides that gatekeepers[49] must inform the Commission of all intended concentrations of businesses providing any services in the digital sector, regardless of whether they meet the EUMR thresholds – should provide the necessary toolkit to the Commission to detect and review killer acquisitions.

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46 See, for example, Commission decisions in Cases Nos. M.8788 (*Apple/Shazam*), M.8228 (*Facebook/WhatsApp*) and M.8124 (Microsoft/LinkedIn).

47 For instance, based on the report 'Ex-post Assessment of Merger Control Decisions in Digital Markets' of 9 May 2019, prepared by Lear for the CMA, in the period 2008–2018, Google acquired 168 companies, while Facebook and Amazon acquired 71 and 60 companies, respectively. Most of those deals were not reviewed by the Commission as they did not meet the EUMR thresholds, despite the competitive significance of the target in some cases.

48 Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

49 The Commission will designate a platform as gatekeeper if it has significant impact on the internal market; operates a core platform service that serves as an important gateway for business users to reach end users; and enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

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The interplay between competition and data privacy laws came under the spotlight lately in the context of Google's proposed US$2.1 billion acquisition of Fitbit, a producer of wearable health and fitness devices. By acquiring Fitbit, Google would acquire the database maintained by Fitbit about its users' health and fitness and the associated technology.

In August 2020, the Commission opened an in-depth investigation to assess whether the transaction would further entrench Google's market position and raise barriers to entry in online advertising.[50] It eventually cleared the transaction on 16 December 2020, subject to commitments.[51]

The decision addresses three different types of conglomerate effects:

- The first issue concerned advertising data. The transaction might enable Google to acquire large amounts of data that could be useful to better target its ads and make it more difficult for its competitors to match its services. To obtain clearance, Google committed to maintaining a separate data silo for Fitbit and not to use the health and wellness data collected from Fitbit devices in the European Economic Area (EEA) for its own advertising services.
- The second issue concerned access by third parties to Fitbit's data. The Commission was concerned that Google would foreclose its competitors from accessing Fitbit data that was available in a Web API. Google committed to maintaining access to Fitbit data free of charge, thereby protecting nascent firms and start-ups in the EU digital healthcare space. In February 2021, Commissioner Vestager explained, however, that this protection of nascent firms does not mean that *Google/Fitbit* is a 'poster child of killer acquisitions'.[52]
- The third issue concerned potential loss of interoperability. The Commission raised doubts on whether Google would degrade the interoperability of competing wrist-worn wearable devices with Android smartphones. In this case, Google will be obliged to continue to freely license to Android original equipment manufacturers (OEMs) and to ensure that wearable device OEMs also have access to

50 Commission press release, 'Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google', 4 August 2020, IP/20/1446.

51 Commission decision in Case No. M.9660, *Google/Fitbit*.

52 PaRR report: https://app.parr-global.com/intelligence/view/intelcms-jqjqvr.

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future functionalities. This decision echoes previous merger decisions[53] as well as previous ex post cases,[54] which all concerned loss of interoperability and companies with alleged bottleneck power.

Finally, in the *Google/Fitbit* case, the Commission drew a clear line between pure privacy concerns and competition issues. Some market participants argued that this acquisition would make it difficult for users to track their health data. The Commission did not endorse that argument, considering that the General Data Protection Regulation is a better placed regulation to address privacy-related issues.

The European Data Protection Board stated, in relation to the Google/Fitbit transaction, that further concentration of sensitive personal data 'could entail a high level of risk to privacy and data protection'[55] and that it would advise on the transaction's implications for data protection 'if so requested' by the Commission. Commissioner Vestager rejected that offer, noting '[w]e are just very careful not to see a competition issue where there is a privacy issue because, if that is the case, it's not for us.'[56]

Continuing interest in and scrutiny of life sciences mergers

Over the past year, the Commission has cleared a number of transactions in life sciences subject to commitments.

The Commission's interest and scrutiny of life sciences mergers continued unabated in 2020. A good illustration of the Commission's approach to mergers that it is concerned may reduce innovation competition is Johnson & Johnson's proposed acquisition of Tachosil, which was withdrawn in April 2020 following the Commission's opening of an in-depth investigation at the end of March 2020.[57] The Commission's Phase I investigation indicated that the merger was likely to reduce potential competition and innovation for the supply of dual haemostatic patches.[58]

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53 Commission decisions in Cases Nos. COMP/M.6281, *Microsoft/Skype*, and M.8124, *Microsoft/LinkedIn*.

54 Case No. T-201/04, *Microsoft Corp v Commission*, EU:T:2007:289.

55 'It's too early to revise GDPR, EDPB says, weighing in on Google-Fitbit deal', *MLex* (1 November 2019).

56 'Google-Fitbit Probe Isn't for Data Watchdogs, Vestager Says', *Bloomberg* (25 February 2020).

57 Commission decision in Case No.M.9547, *Johnson & Johnson/Tachosil*.

58 ibid.

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On 8 June 2020, the Commission approved the acquisition of Bayer's animal health division by Elanco,[59] subject to commitments. In this case, which concerned pharmaceutical products for pets and livestock, the Commission found competition concerns in a number of countries in relation to otitis products for pets as well as several types of parasiticides. To address those concerns, the parties offered to divest the target's existing or pipeline products in relation to otitis, anticoccidials and parasiticides for pets in the EEA and the United Kingdom.

On 22 April 2020, the Commission approved the merger between Mylan and Pfizer's Upjohn division, subject to commitments.[60] In particular, the Commission found competition concerns in relation to 36 molecules in several countries owing to the strong market position of the parties. To address those concerns, the parties offered the divestment of Mylan's business for certain generics.

On 18 February 2021, the Commission approved the acquisition of Varian by Siemens Healthineers, subject to commitments.[61] In this case, the Commission found competition concerns in the possibility of limiting the interoperability in the markets for the supply of medical imaging solutions and the supply of radiotherapy solutions. To address those concerns, Siemens Healthineers committed to adhere to the de facto industry-wide interoperability standard (DICOM) and to ensure interoperability in those markets.

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59 Commission decision in Case No. M.9554, *Elanco Animal Health/Bayer Animal Health Division*.

60 Commission decision in Case No. M.9517, *Mylan/Upjohn*.

61 Commission decision in Case No. M.9945, *Siemens Healthineers/Varian Medical Systems*.

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