



GCR INSIGHT



**EUROPE,
MIDDLE EAST
AND AFRICA**

ANTITRUST REVIEW 2021

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

Reproduced with permission from Law Business Research Ltd

This article was first published in July 2020

For further information please contact Natalie.Clarke@lbresearch.com

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL
© 2020 Law Business Research Ltd
www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of June 2020, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

© 2020 Law Business Research Limited

ISBN: 978-1-83862-260-2

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Contents

Europe

Economics: Overview	1
Mark Lewis and Rebecca Scott	
Analysis Group	

European Union

Abuse of Dominance	17
Bill Batchelor and Caroline Janssens	
Skadden, Arps, Slate, Meagher & Flom LLP	

Cartels and Leniency	31
Elvira Aliende Rodriguez, Caroline Pr�el, Sujin Chan-Allen and Ruba Noorali	
Shearman & Sterling LLP	

Joint Ventures	44
Catriona Hatton and David Cardwell	
Baker Botts LLP	

Merger Control	58
Kyriakos Fountoukakos, Dafni Katrana and Agathe C�elari�	
Herbert Smith Freehills LLP	

Pharmaceuticals	83
J�r�mie Jourdan, James Killick, Assimakis Komninou, Strati Sakellariou-Witt and Axel Schulz	
White & Case	

Cyprus

Commission for the Protection of Competition	100
Loukia Christodoulou	
Chairperson	

Contents

Denmark

Overview 108

Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle

Merger Control..... 123

Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle

France

Overview 136

Jérôme Philippe and Aude-Charlotte Guyon
Freshfields Bruckhaus Deringer LLP

Competition Authority..... 150

Isabelle de Silva
President

Merger Control..... 156

Mélanie Thill-Tayara and Laurence Bary
Dechert LLP

Germany

Cartels 167

Anne Caroline Wegner, Helmut Janssen and Sebastian Janka
Luther Rechtsanwaltsgesellschaft mbH

Federal Cartel Office 179

Andreas Mundt
President

Merger Control..... 189

Silvio Cappellari and Stephanie Birmanns
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH

Private Antitrust Litigation 202

Albrecht Bach and Christoph Wolf
Oppenländer Rechtsanwälte

Greece

Overview	216
Cleomenis Yannikas	
Dryllerakis & Associates	

Norway

Competition Authority	228
Lars Sjørgard	
Director General	

Portugal

Overview	237
Ricardo Bordalo Junqueiro and João Francisco Barreiros	
VdA	
Competition Authority	249
Margarida Matos Rosa	
President	

Russia

Competition Authority	254
Igor Artemiev	
Head of the Federal Antimonopoly Service of Russia	

Spain

Competition Authority	263
José María Marín-Quemada	
Chairman of the National Commission for Markets and Competition	

Sweden

Overview	271
Elsa Arbrandt, Fredrik Lindblom and Sanna Widén	
Advokatfirman Cederquist KB	

Contents

Competition Authority..... 281

Rikard Jermsten
Director General

Switzerland

Overview 289

Daniel Emch, Anna-Antonina Gottret and Stefanie Schuler
Kellerhals Carrard

Turkey

Cartels 299

Gönenç Gürkaynak and Öznur İnanılır
ELIG Gürkaynak Attorneys-at-Law

Dominance..... 311

Gönenç Gürkaynak and Burcu Can
ELIG Gürkaynak Attorneys-at-Law

Merger Control..... 324

Gönenç Gürkaynak and K Korhan Yıldırım
ELIG Gürkaynak Attorneys-at-Law

Ukraine

Merger Control..... 336

Denis Lysenko, Sergey Denisenko and Yevgen Blok
Aequo Law Firm

United Kingdom

Cartel Enforcement..... 344

Frances Murphy, Joanna Christoforou and Michael Zymler
Morgan Lewis & Bockius UK LLP

Merger Control..... 363

Peter Harper, Kate Newman, Claire Morgan, Annabel Borg and Laura Wright
Eversheds Sutherland

Middle East and Africa

Angola

Overview	378
-----------------------	------------

Ricardo Bordalo Junqueiro and João Francisco Barreiro

VdA

COMESA

Competition Commission.....	389
------------------------------------	------------

Willard Mwemba

Director of the Mergers and Monopolies Division

Israel

Overview	400
-----------------------	------------

Tal Eyal-Boger, Ziv Schwartz and Shani Brown

FBC – Fischer Behar Chen Well Orion & Co

Mauritius

Competition Commission.....	417
------------------------------------	------------

Deshmuk Kowlessur

Executive Director

Mozambique

Overview	428
-----------------------	------------

Ricardo Bordalo Junqueiro and Marta Flores da Silva

VdA

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 2021 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, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

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.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review

London

June 2020

European Union: Merger Control

Kyriakos Fountoukakos, Dafni Katrana and Agathe Célarié

Herbert Smith Freehills LLP

In summary

This article discusses key jurisdictional, procedural and substantive developments in EU merger control from June 2019 to April 2020, in particular (1) jurisdictional issues relating to Brexit and the operation of the EU and UK merger control regimes during and after the transition period, (2) the European Commission's tough stance against procedural infringements of the EU Merger Regulation, (3) the ongoing debate on 'European Champions' and the Commission's response to the presence of third country state-owned companies in the EU, (4) the updated foreign direct investment regime, (5) the Commission's evaluation of the Market Definition Notice, and (6) key themes regarding digital mergers. Also, it discusses the implications of covid-19 on EU merger regulation.

Referenced in this article

- Case COMP/M.8179 *Canon/Toshiba Medical Systems Corporation* (art.14.2 proc.) and Case T-609/19 *Canon v. Commission*
- Case COMP/M.8181 *Merck/Sigma-Aldrich* (article 14.1)
- Case C-10/18 P *Mowi ASA v. Commission*
- *Google/Fitbit*
- Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings; Guidelines on the assessment of horizontal mergers under the Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings; and Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings
- Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union
- Commission Notice on the definition of relevant market for the purposes of Community competition law

Introduction¹

EU merger control statistics and the new Commission

The number of cross-border deals in the European Union remained high in 2019, albeit with an 8 per cent fall in the number of notifications to the European Commission (the Commission) as compared to 2018.² Deal value in European mergers and acquisitions (M&A) decreased in comparison to the levels seen in 2018 (€889 billion in 2019 compared to €1,079 billion in 2018), and in fact reached its lowest level since 2013 (when it was €520 billion).³ Correspondingly, the number of mergers notified to the Commission in 2019 fell slightly compared to the 2018 total (382 in 2019; 414 in 2018). However, it still represents the second highest number of notifications in the past 12 years and the third highest number of notifications since the implementation of the EU Merger Regulation⁴ (EUMR).⁵ It remains to be seen whether the number of notifications will remain high in 2020, in particular in light of the anticipated impact of covid-19 on the economy. At the time of writing, 73 transactions had been notified to the Commission, and the number of notifications during the period from 16 March 2020 to 3 April 2020 (ie, the first three weeks after Commission officials started teleworking because of the pandemic) was 20 (which is almost identical to the number of notifications during the same period in 2019).⁶

Although the number of cases reviewed by the Commission under the simplified procedure has slightly decreased when compared with 2018 (283 in 2019; 302 in 2018), the proportion of such cases compared to the overall number of notifications has continued to increase, from 73 per cent in 2018 to 74 per cent in 2019. The eight Phase II investigations opened by the Commission in 2019 represent a decrease from the 12 opened in 2018 but this is in line with the levels seen in 2016 and 2017 (eight and seven, respectively). Nonetheless, although there were no prohibition decisions in

-
- 1 This article aims to provide an overview of the main EU merger control developments in 2019–2020 (and in particular in the period from June 2019 to mid April 2020). The contents of this article are for reference purposes only: they do not constitute legal advice and should not be relied upon as such. The authors would like to thank Evi Gkaidatzi (stagiaire, Herbert Smith Freehills LLP, Brussels) and Verity Musselwhite Steel (trainee solicitor, Herbert Smith Freehills LLP, Brussels) for their helpful research and input.
 - 2 See DG Competition, Merger statistics (up to 29 February 2020), at <http://ec.europa.eu/competition/mergers/statistics.pdf>.
 - 3 See IMAA, Number & Value of M&A Worldwide, at <https://imaa-institute.org/mergers-and-acquisitions-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 to 22, at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en>.
 - 5 See speech by Cecilio Madero Villarejo, Deputy Director General Mergers, 'Recent Developments in Merger Control', European Law Workshop, Brussels, 14 January 2020, at https://ec.europa.eu/competition/speeches/text/sp2020_01_en.pdf.
 - 6 These figures were provided by Jose-Maria Carpi Badia, Head of Unit, Mergers Case Support and Policy at DG Competition, during his presentation in the webinar 'DG COMP and Coronavirus Crisis' hosted by Concurrences on 7 April 2020.

2018, there were three in 2019 (the highest level since 2001, when there were five prohibition decisions). In addition, in 2019, the Commission cleared 16 deals subject to remedies (10 at Phase I and six at Phase II), while 12 deals were withdrawn prior to a decision (all at Phase I).

In December 2019, the new Commission President Ursula von der Leyen and her College of Commissioners took office, succeeding the Juncker Commission, with Margrethe Vestager continuing in her previous role as Commissioner for Competition and also taking up a new role as Executive Vice President in charge of co-ordinating the Commission's agenda on creating 'a Europe fit for the Digital Age'. In her mission letter, von der Leyen tasked Vestager with 'strengthening competition enforcement in all sectors', focusing on 'improving case detection, speeding up investigations and facilitating cooperation with and between national competition authorities'.⁷ One area of focus will be the evaluation and review of European competition rules, including the 'ongoing evaluation of merger control'. This seems to implicitly allude to calls for changes to EU merger control rules to facilitate the creation of 'European champions'. Vestager signalled her unwillingness to accede to political demands to countenance mergers that, though ostensibly establishing 'European champions', would result in anticompetitive effects, when she blocked the *Siemens/Alstom* deal in February 2019. Her stance on this issue is unlikely to change – even though there is increased willingness to take into account the overall geopolitical circumstances and protect vulnerable EU companies in the wake of the covid-19 pandemic. Vestager is likely to focus on the reform of competition rules that apply to digital markets and Big Tech companies, where she has a particularly strong track record of enforcement (in relation to mergers and otherwise).

It remains to be seen how exactly Vestager's new dual role will play out in relation to merger control. However, her interventionist track record, presiding over six prohibitions during her previous five-year term (the most in a single term since Mario Monti was Commissioner for Competition from 1999 to 2004), indicates that intense scrutiny of mergers is likely to continue in her new mandate.

Although the Commissioner remains the same, there has been a change at the top of DG Competition (the Commission Directorate General responsible for the enforcement of the competition rules). In December 2019, Olivier Guersent was appointed as the new Director General of DG Competition. Guersent has previously held senior positions in DG Competition, including in its mergers department, and thus has a long experience in all areas, including merger control. He has hit the ground running with active advocacy in various forums in Brussels and beyond.

Impact of covid-19 on EU merger control

At the time of writing, the extensive fallout from the rapid spread of the covid-19 pandemic in early 2020 is placing increasing strain on economies and has already affected competition law enforcement, including merger control.

7 See President-elect von der Leyen's Mission Letter to Margrethe Vestager, 10 September 2019, at https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margrethe-vestager_2019_en.pdf.

In terms of practical implications, most Commission officials are currently teleworking. In this regard, on 13 March, DG Competition issued a short notice encouraging companies to delay the filing of merger notifications in view of the limitations that staff are likely to face because of teleworking and the anticipated difficulties in collecting information from third parties during the coming weeks.⁸ A senior DG Competition official also encouraged parties to discuss the timing of their filings with case teams, especially when a 'comprehensive' market investigation is anticipated, noting that the officials will be ready to deal with cases when companies can show 'very compelling' reasons to proceed with notification without delay.⁹ Also, any in-person meetings, including state-of-play meetings, are currently held via phone calls or videoconferences.

Based on the Commission's merger statistics available at the time of writing, there was no decrease in the number of notified cases in the first few weeks of the crisis¹⁰ and the Commission remained quite active during this period.¹¹ However, the full effect on notification levels and merger investigations remains to be seen.

In terms of the impact on the substantive review of transactions, DG Competition is determined to ensure that merger control remains operative and effective. Owing to the crisis, it is possible that in the coming weeks or months there will be a number of transactions involving targets in financial difficulties in relation to which the merging parties might attempt to rely on the 'failing firm' defence¹² to obtain clearance. Traditionally, the 'failing firm' defence is rarely accepted by the Commission¹³ in view of the high evidentiary burden imposed on the parties. As the Commission is unlikely to deviate from the existing legal framework and its decisional practice, it remains to be seen whether in light of the evolving economic situation, there might be more cases in the future in which the parties would be successful in their 'failing firm' arguments.

8 DG Competition's urging of companies to hold off notifying mergers was reiterated by some national competition authorities (NCAs), while other NCAs took even stronger measures, including the suspension of their statutory deadlines (see Lexis PSL, 'MJ merger control—competition authorities and coronavirus (COVID-19) status', at <https://www.lexisnexis.com/uk/lexispsl/competition/document/391332/5YFR-0153-GXFD-83HP-00000-00/>).

9 As stated by Jose-Maria Carpi Badia, Head of Unit, Mergers Case Support and Policy at DG Competition, during his presentation in the webinar 'DG COMP and Coronavirus Crisis' hosted by Concurrences on 7 April 2020.

10 See section 'EU merger control statistics and the new Commission', above.

11 Among others, the Commission approved the *PKN Orlen/Energa* deal (Case COMP/M.9626 PKN Orlen/Energa) and opened a Phase II investigation into Johnson&Johnson/TachoSil (Case COMP/M.9547 *Johnson&Johnson/TachoSil*; the notification was ultimately withdrawn on 8 April 2020 and the deal was abandoned).

12 See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, 5.2.2004, paragraphs 89 to 91, at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN). Based on paragraph 89, '[t]he Commission may decide that an otherwise problematic merger 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.'

13 This defence was accepted, eg, in Case COMP/M.6796 *Aegean/Olympic II* in October 2013.

Moreover, as discussed below, in mid March 2020, the Commission adopted new guidelines on foreign direct investment (FDI) urging member states to appropriately and rigorously screen third-country FDI into strategic industries in the European Union that are key for battling the covid-19 crisis (primarily healthcare) to ensure that any such FDI 'does not have a harmful impact on the EU's capacity to cover the health needs of its citizens'.

Key highlights

In summary, the key developments in EU merger control during the period between June 2019 and mid April 2020 are as follows.

- On 31 January 2020 (11pm GMT), the United Kingdom left the European Union and the transition period provided for in the Withdrawal Agreement started to run. During the transition period (ie, until 31 December 2020), the EUMR and UK merger control regimes will operate as if the UK were still an EU member state. The Competition and Markets Authority (CMA) has published its guidance on how Brexit will affect its powers and processes – including in relation to merger control – during the transition period, towards the end of it, and after the transition period ends.
- The Commission continued to adopt a tough approach to procedural infringements in merger cases. In June 2019, it imposed a fine of €28 million on Canon for gun-jumping (decision now pending on appeal). Its investigation into Merck KGaA and Sigma-Aldrich for providing incorrect information during a merger review is ongoing. Also, the judgment by the Court of Justice of the European Union (CJEU) in *Marine Harvest* issued in March 2020 sends a clear warning that the Commission may impose two separate fines for gun-jumping: one for breach of the notification requirement and another for breach of the standstill obligation.
- The debate on the need to revamp the EUMR to facilitate the creation of 'European champions' that will be able to compete globally (which started following the prohibition of the *Siemens/Alstom* deal in early 2019) has continued throughout 2019 and is likely to intensify during 2020. In view of Commissioner Vestager's firm stance on this issue, we are unlikely to witness wholesale changes to the EU merger control rules. However, in response to concerns regarding the increasing presence of Chinese (and other third-country) state-owned companies in the EU, the Commission will publish a White Paper in June 2020, setting out its proposals on how to prevent harm to competition arising from foreign subsidies and state ownership.
- The new FDI Regulation, which constitutes a response to increased foreign direct investment in European strategic assets, will become fully applicable as of 11 October 2020. Moreover, in March 2020, the Commission adopted new guidelines – ahead of the application of the FDI Regulation – to ensure a strong EU-wide approach to foreign investment screening in response to the covid-19 crisis.
- In April 2020, the Commission launched an evaluation of its Notice on Market Definition to determine whether it is still 'fit for purpose' in light of the numerous economic and market developments in the past 23 years (mainly globalisation and digitalisation). The deadline for comments on this evaluation was 15 May 2020 and a public consultation will be launched in Q2 2020.
- A number of key topics have emerged (or continued to be debated) in relation to digital mergers, including: (1) whether the existing merger control rules need to be updated to capture acquisitions of low-turnover but high-value targets (on which the Commission is currently

reflecting); (2) whether the existing theories of harm should be revisited or the burden of proof should be shifted in certain circumstances (as proposed in the Special Advisers' Report published in April 2019); and (3) the importance of data and the interplay between competition and privacy laws (which is expected to become topical in the context of the proposed *Google/Fitbit* deal).

We consider in more detail a number of jurisdictional, procedural and substantive developments.

Jurisdictional developments

Brexit

In December 2019, the UK Parliament approved the Brexit Withdrawal Agreement, which was also ratified by the European Parliament in late January 2020. The transition period that started on 31 January 2020 (11pm GMT) is set to expire at the end of December 2020.

Transition period

During the transition period, the EUMR and UK merger control regimes will operate in substantially the same way as prior to 31 January 2020. In this respect, mergers within EUMR jurisdiction will be dealt with by the Commission, including with respect to effects on any UK market, while UK turnover will be included in the normal way for EUMR purposes as if the UK were still an EU member state. The CMA will not open an investigation into the same transaction (ie, the 'one-stop-shop' regime of the EUMR will continue to apply), unless jurisdiction is transferred to it under articles 4(4) or 9 of the EUMR. One important change is that the CMA no longer has the right to participate in meetings of the Advisory Committee.¹⁴

Live cases during the transition period

The Withdrawal Agreement provides that, after the transition period, the Commission remains competent for administrative procedures initiated before the end of the transition period.¹⁵ On 16 March 2020, the CMA referred to the Commission the proposed acquisition of Corporate Services

14 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 UK.

15 Article 92(3)(c) specifies that, for the purpose of the EUMR, proceedings shall be considered as having been initiated (1) at the moment the transaction has been notified to the Commission (in accordance with articles 1,3 and 4 EUMR), (2) the time limit of 15 working days referred to in article 4(5) EUMR (request by the merging parties for a merger to be reviewed by the Commission) has expired, without any member state with national jurisdiction (including the United Kingdom) having expressed disagreement with the request to refer the case to the Commission, or (3) the Commission has accepted (or is deemed to have accepted) a referral request under article 22 EUMR in which the CMA participated.

Business of Nets A/S by Mastercard Incorporated of Parts, based on article 22 of the EUMR.¹⁶ Without the referral, the Commission would not be able to review the merger as it did not meet the EUMR thresholds. However, the deal met the national merger thresholds in certain member states. Denmark initiated a referral request, and was joined by the United Kingdom, Norway, Sweden, Austria and Finland to refer the case to the Commission. The Commission considered that the transaction may have significant anticompetitive effects in the 'broader plausible Nordic or EEA/UK-wide market' for the provision of certain infrastructure services and accepted the referral on the basis that it is best placed to assess the cross-border effects of the transaction.¹⁷

Pre-notification discussions with the CMA

The CMA will have jurisdiction over transactions that have not been formally notified to the Commission before the end of the transition period. The CMA encourages merging parties to engage with it if it is possible that a transaction will not have been formally notified or referred to the Commission before the end of the transition period and the transaction is likely to meet the UK thresholds and may raise competition concerns. The CMA itself will also monitor such cases and may approach the merging parties, as well as third parties, to request information.¹⁸

After the transition period

Once the transition period ends, the EUMR and its 'one-stop-shop' regime will no longer apply in the United Kingdom. Turnover of the parties in the United Kingdom will no longer be relevant in assessing whether the EUMR thresholds are met, and the Commission will have no jurisdiction to take into account the effects of a transaction it reviews on any UK market.

The EUMR and the UK merger regime will instead run in parallel and a transaction that qualifies under the EUMR may also be subject to UK merger control (if the UK thresholds are met).¹⁹

The extent to which the Commission and the CMA will cooperate with each other in the event of parallel investigations after the transition period remains to be seen (for example, cooperation in relation to confidentiality waivers is expected to continue).

16 See CMA, 'Anticipated acquisition by Mastercard Incorporated of Parts of the Corporate Services Business of Nets A/S: Request pursuant to article 22 of Council Regulation (EC) 139/2004', ME/50824-19, at https://assets.publishing.service.gov.uk/media/5e86fe8be90e0706f24fe002/Mastercard._Nets_Article_22_Request_-_for_publication_-_03042020_v2.pdf.

17 Commission Daily News, 6 April 2020, at https://ec.europa.eu/commission/presscorner/detail/en/mex_20_608.

18 See CMA, 'UK Exit from the EU, Guidance on the functions of the CMA under the Withdrawal Agreement', CMA113, 28 January 2020, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864371/EU_Exit_guidance_CMA_web_version_final_---2.pdf.

19 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.

Parties to M&A transactions taking place during the course of 2020 will need to be alert to the relevant transitional provisions under the Withdrawal Agreement, which may affect the regulatory outcome for their transaction.²⁰

Procedural developments

Procedural infringements

Gun-jumping

As discussed in previous editions,²¹ procedural fairness has been one of the key themes in EU merger control during the past few years, with the Commission (and national competition authorities (NCAs)) imposing fines or opening investigations for procedural infringements of the EUMR, in particular for gun-jumping and the provision of incorrect or misleading information during the Commission's review.

Commission fines Canon for gun-jumping

On 27 June 2019, Canon received a €28 million fine for implementing its acquisition of Toshiba Medical Systems Corporation (TMSC) prior to notification to, and clearance by, the Commission.²²

On 12 August 2016, Canon notified its proposed acquisition of TMSC from Toshiba, for which Canon used a so-called warehousing two-step transaction structure involving an interim buyer.²³ As a first step, the interim buyer acquired 95 per cent in the share capital of TMSC for €800, whereas Canon paid €5.28 billion for the remaining 5 per cent of the shares and share options over the interim buyer's stake. This first step was carried out prior to notification to or approval by the Commission. As a second step, following approval of the merger by the Commission, Canon exercised its share options, acquiring 100 per cent of TMSC shares. The Commission cleared that transaction unconditionally on 19 September 2016. However, in July 2017, Canon received a statement of objections (SO) for implementing the acquisition before notification and approval under the EUMR.²⁴

20 For further information, see HSF e-bulletin, 'Impact of the Withdrawal Agreement for merger control', 5 February 2020, at <https://www.herbertsmithfreehills.com/latest-thinking/brexit-impact-of-the-withdrawal-agreement-for-merger-control>.

21 See GCR, *The European, Middle Eastern and African Antitrust Review 2019*: 'European Union: Merger Control – Annual update 2017–2018', 12 July 2019, at <https://globalcompetitionreview.com/insight/europe-middle-east-and-africa-antitrust-review-2020/1195105/european-union-merger-control>; and 'European Union: Merger Control – Annual update 2017–2018', 11 July 2018, at <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2019/1171817/european-union-merger-control>.

22 Case COMP/M.8179 *Canon/Toshiba Medical Systems Corporation* (art.14.2 proc.).

23 See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2008/C 95/01, 16 April 2008, at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>, paragraph 35.

24 A supplementary statement of objections was issued in November 2018.

The Commission adopted its decision in June 2019, finding that:

- the first and second steps in the transaction structure together formed a single notifiable merger, and the first step contributed to the acquisition of final control over TMSC, which occurred with the second step. In fact, within the structure chosen by the companies, the first step was necessary for Canon to gain control over TMSC; and
- by carrying out the first step, Canon partially implemented its acquisition of TMSC before both the notification and the Commission's approval in breach of articles 4(1) and 7(1) of the EUMR, respectively.²⁵

However, the Commission's finding of a procedural infringement did not affect the approval of the transaction.²⁶

Canon stated in a press release²⁷ that the Commission relied on a 'novel concept of "preparatory acts" or "partial implementation"', which is inconsistent with the EU courts' jurisprudence, and has appealed the decision before the General Court (GC).²⁸ It remains to be seen how the GC will assess Canon's appeal in particular in light of the Court of Justice of the European Union (CJEU) judgment in *Ernst & Young*²⁹ that was issued in May 2018, some months after the Commission's initial SO to Canon. As discussed in previous editions, in that case, the CJEU clarified that the EUMR standstill obligation only captures 'a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking' and provided some guidance regarding the permissible steps parties can take prior to merger approval.

Pending the GC judgment and the lack of clarity regarding the legality of warehousing structures (which are not used frequently), merging parties are advised to be particularly cautious when considering transactions that involve interim buyers, including with regard to the interdependency of the relevant transactions (which could be viewed as forming parts of a single concentration), as well as any option rights that will be exercised to acquire control at some point in time.

CJEU judgment in *Marine Harvest v. Commission*

On 4 March 2020, the CJEU upheld³⁰ the Commission's decision imposing a €20 million fine on *Marine Harvest* (now known as *Mowi*) for gun-jumping.

25 Pursuant to article 4(1) EUMR, concentrations with an EU dimension must be notified to the Commission prior to their implementation; and pursuant to article 7(1) EUMR, those concentrations must not be implemented until they have been approved by the Commission.

26 It is noted that the Ministry of Commerce in China has fined Canon approximately US\$44,000 for completing the same deal before seeking competition clearance in the country. Also, the Fair Trade Commission in Japan approved the transaction but sent Canon a warning that a merger filing is required before any part of the deal is implemented (see MLex Comment, 'Canon, Toshiba novel deal structure merits EU attention', 6 March 2017, at www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=871072&siteid=190&rdir=1).

27 See Canon press release, 27 June 2019, at <https://global.canon/en/news/2019/20190627.html>.

28 Case T-609/19 *Canon v. Commission*.

29 Case C-633/16 *Ernst & Young*, CJEU Judgment of 31 May 2018; for further discussion of this case, see our previous editions (footnote 21, above).

30 Case C-10/18 *P Mowi ASA v. Commission*, CJEU Judgment of 4 March 2020.

In December 2012, Marine Harvest acquired 48.5 per cent of Morpol's shares via a private transaction, which was not notified to the Commission (the December 2012 Acquisition). Marine Harvest subsequently acquired the remaining 51.5 per cent of Morpol's shares in the context of a public bid and then formally notified the Commission of its plans in August 2013. As part of this process, Marine Harvest informed the Commission that, in accordance with article 7(2) of the EUMR,³¹ it would not exercise any voting rights over Morpol. In September 2013, the Commission conditionally approved the transaction,³² but in July 2014, it fined Marine Harvest €20 million for breach of the notification obligation (article 4(1) EUMR) and the standstill obligation (article 7(1) EUMR).³³ In particular, the Commission found that the acquisition of the 48.5 per cent stake conferred on Marine Harvest *de facto* sole control over Morpol, as in practice Marine Harvest enjoyed a stable majority at Morpol shareholders' meetings.

The Commission's decision was upheld on appeal by the GC.³⁴ In its appeal before the CJEU, Marine Harvest argued, *inter alia*, that the GC failed to apply article 7(2) of the EUMR and that it infringed the principle of *ne bis in idem*³⁵ by ruling that the Commission was entitled to impose separate fines for breach of article 4(1) and of article 7(1) of the EUMR.

The CJEU dismissed the appeal. It held that the exemption in article 7(2) only applies to transactions in which control is acquired through a public bid, whereas Marine Harvest had already obtained control based on a private transaction (the December 2012 Acquisition). Moreover, the CJEU held that the principle of *ne bis in idem* did not apply in this case as the obligations under articles 4(1) and 7(1) of the EUMR were different in nature, with different limitation periods and autonomous objectives and, further, the penalties for breach of article 4(1) and article 7(1) were imposed by the same authority in a single decision.

Gun-jumping infringements have been a top priority for the Commission in the past few years and the CJEU judgment sends a clear message that companies should make sure they observe their merger filing obligations or they are likely to face two separate, potentially heavy, fines. The Commission imposed two separate fines for breach of the notification and standstill obligations also on Canon (see above) and on Altice (on which we have previously reported)³⁶ – in both cases, the appeals against the Commission's respective decisions are pending before the GC.

31 Pursuant to article 7(2) EUMR, the acquisition of control from various sellers through a public bid, or a series of transactions in securities, can be implemented prior to clearance. However, this applies only if the transaction is notified to the Commission without delay, and if the acquirer does not exercise the respective voting rights.

32 Case COMP/M.6850 *Marine Harvest/Morpol*.

33 Case COMP/M.7184 *Marine Harvest/Morpol* (Art. 14.2 proc.).

34 Case T-704/14 *Marine Harvest ASA v. Commission*, GC Judgment of 26 October 2017.

35 This principle precludes an undertaking from being found liable or proceedings being brought against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged.

36 Case COMP/M.7993 *Altice/PT Portugal* (Art. 14.2 proc.) and Case T-425/18 *Altice Europe v. Commission*.

Provision of incorrect or misleading information

Commission publishes decision in General Electric/LM Wind

In last year's edition, we reported on the Commission's fine of €52 million imposed on General Electric (GE) in April 2019³⁷ for the provision of incorrect information during the Commission's review of its acquisition of LM Wind.

GE had stated in its notification to the Commission that it did not have any higher-power output wind turbine for offshore applications in development, beyond its existing 6MW turbine. However, through information collected from a third party, the Commission found that GE was simultaneously offering a 12MW offshore wind turbine to potential customers. When confronted with this information, GE withdrew its notification and re-notified the transaction, this time including complete information on its future project. The transaction received an unconditional Phase I clearance but the Commission subsequently fined GE for providing incorrect information.

The decision fining GE was published in January 2020 and it appears that the Commission had discussed with GE the 'possibility of a cooperation procedure' in return for a reduction of the fine on a number of occasions during the investigation. However, GE declined to cooperate and, as a result, the case reverted 'to the standard procedure'.³⁸ During the Commission's 2017 investigation into Facebook for the provision of incorrect or misleading information when the company was seeking approval for its acquisition of WhatsApp,³⁹ Facebook was involved in a cooperation process and acknowledged that it had infringed the rules, which resulted in the imposition of a lower fine. The Commission's approach in both cases clearly indicates that it might be keen to apply the cooperation procedure – which so far has been mainly used in antitrust investigations – in cases of procedural breaches of the merger control rules.

Ongoing investigation into Merck and Sigma-Aldrich

As noted in last year's edition, in July 2017 the Commission sent an SO to Merck KGaA and Sigma-Aldrich alleging that the parties failed to provide important information about an innovation project 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.⁴⁰ At the time of writing, this investigation is continuing and it is unclear whether the Commission has offered the parties the possibility of a cooperation procedure in return for a reduction in fines.

Conclusion

The developments above serve as a reminder that procedural infringements of the EUMR rules remain in the spotlight and can lead to the imposition of significant fines. To minimise risks, merging parties are advised to exercise particular caution when considering the notifiability of their transaction (even if this only involves a minority stake acquisition as the latter might also

37 Case COMP/M.8436 *General Electric Company/LM Wind Power Holding* (Art. 14.1 proc.).

38 *ibid.*, paragraphs 56 and 57.

39 Case COMP/M.8228 *Facebook/WhatsApp* (art. 14.1 proc.).

40 Case COMP/M.8181 *Merck/Sigma-Aldrich* (art. 14.1 proc.).

confer control, depending on the circumstances), make sure appropriate safeguards are in place to prevent early implementation of their transactions, and be diligent with regard to their submissions to the Commission during the review process.

Withdrawal and refiling of notifications

Parties sometimes undertake a strategy of withdrawing and refiling their notifications to avoid the merger process moving into a more burdensome and time-intensive Phase II review (ie, 'pull and refile' practice). This is used, *inter alia*, when an issue that was not apparent during the pre-notification phase emerges during Phase I⁴¹ and the parties consider that it would require considerable time to address it, or the Commission considers the notification incomplete.

As discussed in last year's edition, there has been an increasing trend of 'pull and refile' cases in the European Union – during the period under review, this happened in at least three instances, ie, *Lactalis/Nuova Castelli*,⁴² *Telefonica/Prosegur/Prosegur Alarmas España*⁴³ and *Aurubis/Metallo Group Holding*.⁴⁴

'Pulling and refiling' can provide the parties with the time they need to discuss further with the Commission and iron out its concerns, thereby avoiding the need for remedies or a Phase II investigation. However, the 'pull and refile' tactic in *Aurubis/Metallo Group Holding* did not prevent the transaction from undergoing an in-depth investigation. The deal was originally notified to the Commission in August 2019, but predictions that the Commission's concerns could not be resolved by the Phase I deadline led the parties to withdraw the filing a few weeks later. The deal was subsequently refiled in mid October but, in November, the Commission opened a Phase II investigation, most likely because additional issues emerged from the market investigation that required more time to be resolved.

Withdrawing and refiling remains comparatively rare in the European Union as the lengthy pre-notification period generally enables the parties to understand potential issues at an early stage and ensure these are addressed prior to formal notification.

It remains to be seen whether the difficulties the Commission is likely to face in conducting its market investigation during the covid-19 crisis, combined with the tight deadlines under the EUMR, might lead to an increased use of the 'pull and refile' practice in the coming weeks or months.

41 In Phase II, parties are permitted to withdraw their notification only if they can demonstrate that they have abandoned the deal in its entirety; therefore, withdrawing and refiling is not possible in Phase II investigations.

42 Case COMP/M.9413 *Lactalis/Nuova Castelli*. The case was originally notified to the Commission on 9 September 2019 and withdrawn on 3 October. The parties subsequently refiled on 4 November and received unconditional Phase I clearance on 9 December.

43 Case COMP/M.9559 *Telefonica/Prosegur/Prosegur Alarmas España*. The case was originally notified to the Commission on 27 November 2019 but was withdrawn less than a month later (on 20 December 2019) after the Spanish competition authority requested to review the transaction under article 9 EUMR. The parties refiled the transaction to the Commission on 15 January 2020 and the transaction received unconditional clearance on 19 February 2020.

44 Case COMP/M.9409 *Aurubis/Metallo Group Holding*.

Substantive developments

European champions

Calls for changes to EU merger control rules and the Commission's reaction

As discussed in last year's edition, the Commission's prohibition of the *Siemens/Alstom*⁴⁵ deal in 2019 received significant political criticism (in particular from France and Germany) and sparked debate on whether the EUMR rules should be amended to foster the emergence of 'European champions' and promote the interests of European companies abroad.⁴⁶

A joint manifesto issued by the French and German governments called for a revision of the current merger control rules to 'take greater account of competition at the global level' with a view to enabling European companies to 'successfully compete on the world stage'.⁴⁷ Also, in February 2020, France, Germany, Poland and Italy sent a letter to Vestager noting that European companies have to compete with foreign companies, which sometimes benefit from substantial state support, and hence the situation calls for 'an evaluation and modernisation' of the current guidelines on horizontal mergers and the Commission's Notice on Market Definition, to take better account of third countries' state intervention as well as potential competition.⁴⁸

Vestager has so far adopted a firm stance against proposed changes to the EUMR to facilitate the formation of 'European champions', emphasising that alleged global competitiveness cannot come at the expense of a healthy competitive environment in the European Union.⁴⁹ Smaller member states (including Denmark, Portugal and the Netherlands)⁵⁰ and other stakeholders have also expressed similar views. For instance, the Austrian competition authority stated recently

45 Case COMP/M.8677 *Siemens/Alstom*.

46 The *Siemens/Alstom* case is the standout deal in a trend that has also seen the Commission's prohibition of Wieland's acquisition of Aurubis Rolled Products (adopted on the same day as the *Siemens/Alstom* prohibition) – a deal that would have created a 'European champion' in the production of rolled copper products; and the decision of *Aperam* in December 2018 to abandon, during a Phase II review, its proposed acquisition of VDM Metals (which according to *Aperam* would have created a 'European alloys champion') (Case COMP/M.8907 *Aperam/VDM*).

47 See 'A Franco-German Manifesto for a European industrial policy fit for the 21st century', 19 February 2019, at <https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century>.

48 See Joint paper by Germany, France and Poland, 'Modernising EU Competition Policy', 4 July 2019, at https://www.bmw.de/Redaktion/DE/Downloads/M-0/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4; and Letter by Germany, Italy, France and Poland to Margrethe Vestager, 4 February 2020, at https://www.mlex.com/Attachments/2020-02-06_B37TXD0P8G60XSIM/Letter-to-Vestager.pdf. Similar views have also been expressed by several members of the European Parliament.

49 See Vestager's speech, 'The champions Europe needs', Berlin, 9 January 2019, at [https://uk.practicallaw.thomsonreuters.com/w-018-4396?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-018-4396?transitionType=Default&contextData=(sc.Default)&firstPage=true).

50 See MLex Insight, 'European champions reform opposed by Portugal's prime minister', 11 March 2019, R <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1072499&siteid=190&rdir=1>; MLex Insight, 'Denmark 'skeptical' of Franco-German overhaul of competition rules', 11 March 2019, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1072313&siteid=190&rdir=1>; and MLex Comment, 'Franco-German quest to rewrite competition rules gets Dutch pushback', 15 May 2019, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1091978&siteid=190&rdir=1>.

in a position paper that changing the EUMR to allow deals similar to *Siemens/Alstom* would benefit only a few large companies from larger member states, while companies from smaller member states would be harmed as they would have to compete against 'European champions with market power'.⁵¹

In view of the lack of consensus on this issue, and the fact that any changes to the EUMR would require the unanimous vote of member states, it appears unlikely at the time of writing that there will be any wholesale or substantive amendments to the EU rules to favour the emergence of 'European champions'.

However, in view of the significant concerns⁵² arising from the increasing presence of foreign (in particular Chinese) companies in the European Union and the need to ensure a level playing field between European and Chinese competitors, Vestager announced in March 2020 that the Commission was working 'on new powers... that would allow us to deal... with harm that foreign subsidies and state ownership can do to competition in Europe' and would publish a White Paper with its proposals in June 2020.⁵³

In this vein, the new EU Regulation establishing a framework for the screening of foreign direct investments into the Union (the FDI Regulation,⁵⁴ discussed below) is also a response to increased foreign direct investments (FDI) in European strategic assets. The Commission has also announced that it will review its Notice on Market Definition (see below) – this will also cover issues relating to the geographical extent of competition, which is a key element of the 'European champions' debate.⁵⁵

51 See Austrian Competition Authority (Bundeszweitsbewebsbehörde), 'Position Paper on National and European Champions in Merger Control', November 2019, at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Positionspapier_European_Champions_EN.pdf.

52 In her mission letter, President von der Leyen asked Vestager to 'develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market' (see footnote 7, above).

53 See Vestager's speech, 'Keeping the EU competitive in a green and digital world', Bruges, 2 March 2020, at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/keeping-eu-competitive-green-and-digital-world_en. See also *Financial Times*, 'Vestager urges stakebuilding to block Chinese takeovers', 12 April 2020, at <https://www.ft.com/content/e14f24c7-e47a-4c22-8cf3-f629da62b0a7>, where it is reported that Vestager stated that 'European countries should buy stakes in companies to stave off the threat of Chinese takeovers' amid the covid-19 pandemic. This initiative appears to reflect the Dutch government's proposals to allow closer vetting of state-subsidised foreign companies operating in EU markets (see *Financial Times*, 'Brussels urged to rein in state-backed foreign rivals', 4 December 2019, at <https://www.ft.com/content/f1ef1896-15fa-11ea-9ee4-11f260415385>).

54 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 L 79I, 21 March 2019, pp. 1 to 14, at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN>.

55 France has considered this development as a big win in the 'European champions' debate (see *Politico*, 'France claims big win against Vestager in battle for champions', 12 December 2019, at <https://www.politico.eu/article/europe-competition-france-claims-big-win-against-margrethe-vestager-in-battle-for-champions-alstom-siemens/>).

Fincantieri/Chantiers de l'Atlantique

The discussion around 'European champions' is likely to further intensify in the context of the proposed merger between the Italian shipbuilder Fincantieri and the French shipyard Chantiers de L'Atlantique.⁵⁶ The Commission opened a Phase II investigation as it had concerns that the transaction, which would combine the two biggest players in the market for building cruise ships, may remove an important competitive force and reduce competition in an already concentrated market with high barriers to entry.

The French Minister of Economy, Bruno Le Maire, has stated that the merger would create a company of 'the necessary critical size to face global competition, especially from China' and called for changes to the merger rules to better respond to Chinese competition in sectors including rail, aviation and shipbuilding.⁵⁷

Owing to the covid-19 crisis, the Commission 'stopped the clock' in this case on 13 March 2020, just a few weeks before the decision deadline. Fincantieri's senior managers have stated that the market for building cruise ships 'will be transformed by this pandemic', which will make the Commission rethink its previous assumptions and realise that 'a very strong European industry is the only way for a real recovery' from the crisis.⁵⁸

The 'European champions' debate is expected to continue throughout 2020 and is likely to become even more complex in view of the increasing need to preserve vulnerable EU businesses and assets in the context of the covid-19 crisis.

Foreign direct investment

FDI Regulation

The FDI Regulation was adopted on 19 March 2019, entered into force on 10 April 2019 and will become fully applicable as of 11 October 2020 (by which point member states should make any necessary amendments to their domestic regimes to ensure compliance with the Regulation).

While 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 national level pursuant to article 21(4) of the EUMR. In addition, the FDI Regulation creates the framework for an additional, independent form of review that focuses on safeguarding Europe's security, public order and strategic interests. The FDI Regulation does not require member states to adopt or maintain a screening mechanism,⁵⁹ but provides a framework for those that do to ensure that the foreign

56 Case COMP/M.9162 *Fincantieri/Chantiers de l'Atlantique*, at https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6205.

57 See MLex Insight, 'Chantiers will survive if Fincantieri deal is blocked, Le Maire says', 5 March 2020, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1168432&siteid=190&rdir=1>.

58 See MLex Insight, 'Fincantieri-Chantiers merger review must be "re-thought" after Covid-19 crisis, says Maestrini', 2 April 2020, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1176098&siteid=190&rdir=1>.

59 As of 3 April 2020, national screening mechanisms were in force in 14 member states (see https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf, which is regularly updated).

direct investment meets a number of basic requirements. Cooperation, collaboration and information sharing between member states, and between member states and the Commission, are central themes of the FDI Regulation. Member states will 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.

While the member state receiving FDI will be required to give 'due consideration' to other member states' comments and the Commission's opinion, the member state receiving the FDI will retain the authority as final decision maker. However, this obligation is heightened for projects or programmes of interest to the European Union as a whole, where the recipient member state must take 'utmost account' of the Commission's opinion and provide an explanation in the event that this is not followed.

The FDI Regulation is without prejudice to the application of the EUMR; the two regimes remain fully independent.⁶⁰ This presents the Commission with an opportunity to exert dual influence: in addition to being the substantive decision maker for competition issues, it is also able to provide a non-binding advisory opinion when countries seek to review a transaction domestically.

Following the entry into force of the FDI Regulation, several member states are adopting (or considering) new FDI regimes or they are more strongly enforcing their existing ones (eg, in December 2019, France adopted new rules clarifying and expanding its existing FDI control regime).⁶¹

New FDI Guidelines in response to covid-19

On 25 March 2020, the Commission adopted new guidelines⁶² (ahead of the application of the FDI Regulation) to ensure a strong EU-wide approach to foreign investment screening in response to the covid-19 crisis. The Commission's aim is to preserve EU companies and critical assets, notably in areas such as health, medical research, biotechnology and infrastructures that are essential for

60 Member states should nevertheless endeavour to indicate whether proposed foreign direct investment [FDI] is likely to require notification under the EUMR, when notifying the other member states of FDI undergoing screening in their territories.

61 Decree No. 2019-1590 of 31 December 2019, at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039727443&categorieLien=id>. The Decree comes into force on 1 July 2020 and the changes will apply to requests for prior authorisations filed as of 1 April 2020.

62 See Communication from the Commission, 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)', 25 March 2020, C(2020) 1981 final, at https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf. See also HSF, Competition Notes, 'Commission urges Member States to screen foreign direct investment into strategic industries under strain from covid-19', 27 March 2020, at <https://hsfnotes.com/crt/2020/03/27/commission-urges-member-states-to-screen-foreign-direct-investment-into-strategic-industries-under-strain-from-covid-19/>.

security and public order in the European Union. In the words of President von der Leyen, the EU ‘will remain open to foreign direct investment but we need to balance this openness with the need to preserve our economic sovereignty’.⁶³

According to the Commission, in the context of the current crisis, there could be an increased risk of attempts to acquire healthcare capacities (eg, production of medical or protective equipment) or related industries, such as research establishments (eg, developing vaccines) via FDI. Thus, vigilance is required to ensure that any such FDI ‘does not have a harmful impact on the EU’s capacity to cover the health needs of its citizens’ and the Commission calls on member states to make full use already of its FDI screening mechanisms to take fully into account the risks to critical health infrastructures and the supply of critical inputs and other critical sectors. Further, the Commission calls on member states that currently do not have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to set up a fully fledged screening mechanism and, in the meantime, use all other available options to address cases in which the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the European Union, including a risk to critical health infrastructures and supply of critical inputs.

New market definition notice

In December 2019, Vestager announced the Commission’s plan to review the Notice on Market Definition (the Notice),⁶⁴ which dates back to 1997 and provides guidance as to how the Commission defines the relevant product and geographical markets in both merger and antitrust cases. Vestager acknowledged that ‘changes like globalisation and digitalisation mean that many markets work rather differently from the way they did, 22 years ago’,⁶⁵ pointing to some of the pressures on the Notice. These include the changing scope of geographical markets resulting from globalisation of trade (as discussed above, following the prohibition of the *Siemens/Alstom* transaction, there has been political pressure on the Commission to take greater account of competition at global level),⁶⁶ and also the fact that market definition should better reflect the new world of digital markets.

63 See Ursula von der Leyen’s Twitter address, 25 March 2020, at <https://twitter.com/vonderleyen/status/1242859707099942914>.

64 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, pp. 5 to 13, at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN).

65 See Vestager’s speech, ‘Defining markets in a new age’, Chillin’ Competition Conference, Brussels, 9 December 2019, at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en.

66 The joint paper by the French, German and Polish governments released on 4 July 2019 had inter alia underlined the need for the review of the market definition notice as part of the modernisation of the EU merger control.

Indeed, on 3 April 2020, the Commission launched an ‘evaluation and fitness check road map’,⁶⁷ the aim of which is to determine whether the Notice remains fit for purpose in light of the many economic and market changes that have occurred in the past 23 years. The Commission requests wide and general feedback, aiming to assess:

- the effectiveness of the Notice, especially given market developments since 1997;
- the efficiency of the Notice in providing clear, transparent guidance on market definition and whether this analysis is cost-efficient;
- whether the Notice has retained relevance and pertinence in light of market developments since 1997 and the progression of market definition techniques;
- whether the Notice remains in line with the EU courts’ judgments, changes in the legal competition framework and EU competition policy and practice since 1997; and
- the extent to which the Notice has led to a consistent approach to market definition by the Commission and NCAs.

The deadline for comments on this evaluation was 15 May 2020 and, according to the road map, a public consultation of at least 12 weeks will be launched in Q2 2020. A conference or workshop with technical experts and representatives from all main stakeholders may also be held in Q4 2020.

Participation early in the review process (ie, at the present evaluation stage) puts stakeholders in a good position to influence the direction of the changes and to be invited to engage in discussions the Commission may have as it shapes its proposals.

Digital mergers

Background

In recent years, there has been a wave of consolidation in the digital sector,⁶⁸ including transactions whereby Big Tech companies acquired low-turnover but high-value young targets.⁶⁹ 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.

67 See ‘EU competition law – market definition notice (evaluation)’, at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law>. Road maps 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.

68 See, eg, Case COMP/M.8788 *Apple/Shazam*, Case COMP/M.8228 *Facebook/WhatsApp*, Case COMP/M.8124 *Microsoft/LinkedIn*.

69 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 (see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf), 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.

Digital mergers present specific features, including the fact that they occur on 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 (or continue to be debated) in relation to digital mergers, including: (1) whether the existing jurisdictional thresholds need to be updated to capture more acquisitions by Big Tech companies of young targets with competitive significance; (2) whether the existing theories of harm should be revisited or the burden of proof should be shifted in certain circumstances (or both); and (3) the importance of data and the interplay between competition and privacy laws.

Killer acquisitions and value-based thresholds

As discussed in previous editions, the contemplated introduction of new transaction value-based thresholds under the EUMR to close a perceived gap in enforcement, which enables the acquisition of high-value but low-turnover targets to escape the Commission's review, has been on the Commission's radar in recent years.⁷⁰ These value-based thresholds would be primarily intended to capture acquisitions of digital companies in their early stages of development, or companies in other industries that are intensive in terms of research and development (eg, pharmaceuticals), which might be used as a strategy to ensure the early elimination of a potential rival (so-called killer acquisitions) and might not be caught by the EUMR.

The Special Advisers' Report on competition policy in the digital era (the Special Advisers' Report),⁷¹ issued in April 2019, suggested closely monitoring the performance of the value-based thresholds recently introduced in Austria and Germany and waiting to see whether the referral system⁷² does enough to ensure that, where appropriate, these types of transactions are reviewed by the Commission. The relevant practice in Austria and Germany, which have had value-based thresholds for two years now, indicates that such thresholds have had a limited impact in capturing killer acquisitions so far and thus the perceived gap might not exist in practice, although officials

70 A public consultation on this topic was launched in 2016 and a summary of its results was published in July 2017. For further information regarding the proposed changes, see our previous editions in footnote 21, above.

71 See 'Competition policy for digital era: A report by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer', April 2019, at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

72 For instance, the Commission reviewed Facebook's purchase of WhatsApp and Apple's acquisition of Shazam based on referrals from EU member states (see Case COMP/M.8788 *Apple/Shazam* and Case COMP/M.7217 *Facebook/WhatsApp*).

of both NCAs consider that it is ‘too early’ to say whether the new thresholds capture the right cases.⁷³ In *Microsoft/Github*,⁷⁴ however, the new value-based thresholds in Germany were used as a basis for the referral of the transaction to the Commission under article 4(5) of the EUMR.

Commissioner Vestager has not ruled out the introduction of new EUMR thresholds. In a recent speech,⁷⁵ she stated that ‘in the digital world, turnover isn’t always a reliable guide to a company’s importance’ and noted that the Commission will publish in the second half of 2020 the results of its work on the jurisdictional thresholds, including some considerations on whether the referral system is sufficient to ensure that ‘important mergers don’t escape’ the Commission’s notice.⁷⁶

Revisit theories of harm and/or shift the burden of proof?

To date, the Commission has adopted a case-by-case approach in its assessment of digital mergers taking into account the fast-moving nature of digital markets and focusing on non-price effects (eg, innovation, quality and choice).

The Special Advisers’ Report, which – albeit not binding on the Commission – is part of the continuing reflection on the role of competition policy in the digital era, notes that the Commission’s current ‘significant impediment of effective competition’ test generally remains a ‘sound basis’ for the assessment of digital mergers. However, the Report proposes to refine certain theories of harm to address acquisitions by dominant platforms or ecosystems of potential competitors, including smaller companies in adjacent markets, through looking at the technological space or user space rather than the dominant company’s core market. In particular, it suggests that the Commission’s assessment should follow the logic of the analysis of a horizontal (rather than a conglomerate) merger and examine whether the target is a competitive constraint within the technological space and whether its elimination would increase market power within this space. Also, more controversially, the Special Advisers’ Report suggests that in these types of cases, the merging parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies.

It appears that the Commission is currently reflecting on these proposals and might test some of them in future digital mergers before it decides whether any major changes to the current framework are required.

73 See MLex Insight: ‘Merger-value thresholds catch few deals and no unicorns in Austria, official says’, 23 May 2019, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1094979&siteid=190&rdir=1>; and MLex Insight, ‘Germany’s new merger thresholds play limited role so far, Mundt says’, 16 May 2019, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1092344&siteid=190&rdir=1>.

74 Case COMP/M.8994 *Microsoft/Github*.

75 See Vestager’s speech cited in footnote 53, above.

76 In this vein, it is noted that in France the Senate has unanimously approved legislation that establishes new obligations for major digital companies operating in France, including the requirement to notify each acquisition to the competition authority, regardless of its size – the new law has to be approved by the National Assembly. However, the French government has opposed this idea, noting that it would be better to push for legislation at EU level. The discussion of the proposal in parliament has been delayed because of the covid-19 crisis (see MLex Insight, ‘France to put legislative agenda on hold to focus on Covid-19 crisis’, 19 March 2020, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1172102&siteid=190&rdir=1>).

Importance of data and interplay between competition and privacy laws

In recent years, the Commission has considered data issues in a number of digital mergers.⁷⁷ Its analysis appears to focus on whether the aggregation of data sets may strengthen the combined entity's market power and raise barriers to entry or whether the merged entity could foreclose competitors' access to data (or both).

An example of the Commission's increasing scrutiny of data issues in digital mergers is *Apple/Shazam* (discussed in the previous edition), in which the Commission paid close attention to the role of data in the music industry and its replicability by the merged entity's competitors. The transaction was cleared unconditionally but illustrates the extensive scope of data-related concerns the Commission might consider. In this regard, in its recent Communication titled 'A European Strategy for data', the Commission noted that in the exercise of its merger control powers, it will 'look closely at the possible effects on competition of large-scale data accumulation through acquisitions and at the utility of data-access or data-sharing remedies to resolve any concerns'.⁷⁸

The interplay between competition and data privacy laws is expected to come under the spotlight in the context of Google's proposed US\$2.1 billion acquisition of Fitbit (a company that captures health data of customers wearing its activity-tracking devices).⁷⁹ The European Data Protection Board stated in relation to the proposed transaction that further concentration of sensitive personal data 'could entail a high level of risk to privacy and data protection'⁸⁰ and that it would advise on the transaction's implications for data protection 'if so requested' by the Commission. 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'.⁸¹

This approach appears to be in line with previous data-related mergers in which the Commission held that privacy can be taken into account but only to the extent it is relevant to competition. Indeed, in its *Facebook/WhatsApp* decision, the Commission stated that it had analysed potential data concentration 'only to the extent that it is likely to strengthen Facebook's position' and also that any 'privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.⁸²

77 See, eg, Case COMP/M.7217 *Facebook/WhatsApp* and Case COMP/M.8124 *Microsoft/LinkedIn*.

78 See Commission Communication 'A European strategy For data', COM(2020) 66 final, 19 February 2020, at https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf.

79 See Google company announcement, 'Helping more people with wearables: Google to acquire Fitbit', 1 November 2019, at <https://www.blog.google/products/hardware/agreement-with-fitbit/>.

80 See MLex Official Statement, 'It's too early to revise GDPR, EDPB says, weighing in on Google-Fitbit deal', 1 November 2019, at <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?ppo=23&cid=1165301&siteid=190&rdir=1>.

81 See Bloomberg, 'Google-Fitbit Probe Isn't for Data Watchdogs, Vestager Says', 25 February 2020, at <https://www.bloomberqqint.com/business/google-fitbit-probe-is-for-me-not-data-watchdogs-vestager-says>.

82 Case COMP/M.7217 *Facebook/WhatsApp*, paragraph 164.

At the time of writing, Google is in pre-notification talks with the Commission and it remains to be seen whether privacy will ultimately be considered as a ‘parameter of competition’⁸³ in this case.

Member states’ increasing focus on digital mergers

Digital mergers have also attracted increasing interest at a national level, as illustrated by the number of reports issued recently on this topic in several member states.⁸⁴ Among other things, these reports identify the specific challenges posed by digital mergers and set out proposals as to how to address these at a national or EU level (or both). For instance, the NCA in France is considering in its report the introduction of a mandatory reporting requirement for every transaction carried out by structurally important digital platforms to make sure important transactions do not evade review.

83 Case COMP/M.8124 *Microsoft/LinkedIn*, footnote 330.

84 For instance, see Germany Federal Ministry for Economic Affairs and Energy, ‘A new competition framework for the digital economy, Report by the Commission “Competition Law 4.0”’, September 2019, at <https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.html>; French Competition Authority, ‘The *Autorité de la concurrence*’s contribution to the debate on competition policy and digital challenges’, 19 February 2020, at https://www.autoritedelaconurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf; and ‘Unlocking Digital Competition, Report of the Digital Competition Expert Panel’, March 2019 (report commissioned by the UK Treasury and led by the US economist Jason Furman), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.



Kyriakos Fountoukakos
Herbert Smith Freehills LLP

Kyriakos Fountoukakos is the managing partner of the Herbert Smith Freehills office in Brussels, specialising in all aspects of EU and UK competition law, including merger control, cartels, antitrust investigations and advice, distribution agreements, dominance, and competition litigation before the EU courts. He has advised clients across a broad range of industries, including TMT, energy and mining, financial services, pharmaceuticals, transport and consumer goods. Kyriakos works closely with the Herbert Smith Freehills network to provide advice on multi-jurisdictional transactions and investigations.

Kyriakos has particular expertise through his background as an EU official, having held positions as a European Commission official at DG Competition's merger task force and then as a legal assistant in the cabinet of the President of the General Court of the European Union. While at the Commission, he dealt with merger transactions and was part of the team that drafted the current EU Merger Regulation and accompanying notices.

Kyriakos is acknowledged as a leading competition law expert in major legal directories, and was selected as one of the top 40 competition lawyers under the age of 40 in a survey by Global Competition Review.

Kyriakos is an officer of the IBA's antitrust committee. He actively speaks and writes about competition law, is co-editor of the mergers chapter of Jones and Van der Woude's EU Competition Law Handbook, and has given a number of seminars on merger control at UCL, including as part of the LLM course.

Kyriakos has studied at the University of Athens (LLB), King's College London (LLM), the University of Cambridge (MPhil in European studies) and Columbia Law School, New York (LLM). He is qualified as a Greek lawyer, as a solicitor in England and Wales and as an Advocaat in Belgium. Kyriakos is fluent in English, Greek and French.



Dafni Katrana
Herbert Smith Freehills LLP

Dafni Katrana is a senior associate in the Brussels office of Herbert Smith Freehills, dealing with various areas of EU competition law, including merger control (M&A and joint ventures), cartels, antitrust investigations, distribution agreements, dominance, compliance programmes and competition litigation before the EU courts.

Dafni has advised clients active in a broad range of industries, including pharmaceuticals, consumer goods, energy and financial services.

Dafni holds a master of laws degree from the University of Cambridge. Prior to joining Herbert Smith Freehills, she worked as a trainee in another international law firm in Brussels and completed a traineeship at DG Competition of the European Commission. Dafni is qualified as a Greek lawyer and as an *advocaat* in Belgium.



Agathe Célerié
Herbert Smith Freehills

Agathe Célerié is an associate in the Brussels office of Herbert Smith Freehills, dealing with various areas of EU competition law and EU law, including regulatory issues, merger control, antitrust investigations, distribution agreements and compliance programmes.

Agathe has advised clients active in various sectors, including pharmaceuticals, energy, luxury/consumer goods and banking.

Agathe holds an LLM from King's College London and a master of laws from the University of Paris X. Prior to joining Herbert Smith Freehills, she worked as a trainee in different global law firms in Paris and Brussels and completed a traineeship at the European Commission. Agathe is qualified as a French lawyer with the Paris Bar and is also registered with the EU list of the Brussels Bar in Belgium.



HERBERT
SMITH
FREEHILLS

Herbert Smith Freehills is one of the world's leading professional services businesses, bringing together the best people across our 27 offices, to meet all your legal services needs globally. Our clients trust us with their most important transactions, disputes and projects because of our ability to cut through complexity and mitigate risk. Because technical ability alone is not enough, we seek to build exceptional working relationships with our clients, which enables us to develop a deeper understanding of their businesses, provide commercially astute, innovative advice and create better business outcomes for each client.

Ranked among the Global Elite by Global Competition Review, our competition, regulation and trade practice is widely recognised by peers and legal directories as one of the leading teams in the field. We advise many of the world's blue chip organisations in a wide range of industries across the full spectrum of competition work, including merger control, investigations, litigation and state aid, and provide advice on regulated sectors. Many of our lawyers have spent time working for regulatory authorities and for clients, enabling us to provide a unique insight. Our global network of offices allows us to provide a comprehensive and integrated cross-border service to our clients.

Central Plaza
Rue de Loosum 25
1000 Brussels
Belgium
Tel: +32 2 511 7450
Fax: +32 2 511 7772

www.herbertsmithfreehills.com

Kyriakos Fountoukakos
kyriakos.fountoukakos@hsf.com

Dafni Katrana
dafni.katrana@hsf.com

Agathe Célarie
agathe.celarie@hsf.com



The 2021 edition of the *Europe, Middle East and Africa Antitrust Review* is part of the Global Competition Review Insight series of books that also covers the Americas and Asia-Pacific. Each book delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world’s increasingly complex competition regimes.

Global Competition Review works exclusively with leading competition practitioners in each region, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put it into context – that makes this report particularly valuable to anyone doing business in Europe, Africa and the Middle East today.

Visit globalcompetitionreview.com
Follow @GCR_alerts on Twitter
Find us on LinkedIn

an LBR business

ISBN: 978-1-83862-260-2