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EU Merger Control—Recent Developments and Ongoing Trends

Advisory

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2021 has been a record-setting year in global M&A activity. Total transaction volume topped $5.5 trillion, exceeding prior peaks in 2007 and 2015 that remained below $5 billion.[1] In parallel, the number of global merger control filings increased. The European Commission (EC) alone received 403 merger filings in 2021, which is 44 more than in 2020 and the second highest figure in the history of European Union (EU) merger control.

This Advisory first reviews key developments in EU merger control in 2021 and highlights developing trends.[2] The second part analyzes key themes of important EC merger decisions adopted in 2021.

Key themes in EC merger decisions

New Article 22 EUMR referral policy seeks to create EC review power for transactions not requiring any merger filings within the EU

In March 2021, the EC published a new Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation (EUMR) to certain categories of cases (Guidance).[3] Article 22 EUMR concerns concentrations that do not require an EC filing because the merging parties' revenues fall below the EUMR's notification thresholds. To enable the EC to nevertheless review such transactions, Article 22 EUMR foresees the possibility for Member States to refer such transactions to the EC. Under recent practice, Member States only referred transactions that were notified to them under their national merger control rules. The Guidance brings an important change: it encourages Member States to refer certain transactions that do not trigger national filings. Thus, transactions that do not require merger filings anywhere in the EU can now be reviewed by the EC following an Article 22 EUMR referral. A referral launched prior to closing obliges the merging parties to suspend closing until EC clearance has been obtained. A referral is also possible after the deal has closed, although the EC will generally not consider a referral appropriate when more than six months have passed since closing.[4]

The Guidance marks the end-point of the EC's review of the appropriateness of the EUMR's revenue-based notification thresholds. These thresholds had been criticized for failing to capture acquisitions by powerful incumbents of nascent competitors with low revenues, so-called 'killer acquisitions', even if the target had significant competitive potential and the deal value was high. Unlike the Department of Justice (DOJ) and the Federal Trade Commission (FTC) in the United States and the Competition and Markets Authority (CMA) in the UK, the EC (and most Member State competition authorities) lack the power to review transactions that do not meet the notification thresholds. This led to a perceived gap in the European merger control system with regard to killer acquisitions that did not trigger filing requirements within the EU. The EC initially considered introducing an alternative notification threshold based on transaction value, similar to thresholds that were introduced at

[1] New York Times, "Deal Book Newsletter: The Deals of the Year", 18 December 2021.

[2] Developments until April 2022 have also been taken into account if they related to events in 2021.

[3] EC, Guidance on the application of the referral mechanism set out in Article 22 of the EUMR to certain categories of cases, 26 March 2021.

[4] Guidance, paragraph 21.

national level in Germany and Austria in 2017.[5] The EC has now dropped these plans and instead decided to activate the existing Article 22 EUMR referral mechanism to capture such transactions.

A Member State can launch a referral request under Article 22 EUMR if the transaction '*affects trade between Member States*' and *'threatens to significantly affect competition within the territory of the Member State or States making the request*'. These pre-conditions for referral are met relatively easily.[6]

The Guidance encourages Member States to refer transactions if the target has an actual or future competitive potential that is greater than its current revenues indicate. By way of example, paragraph 19 of the Guidance suggests that this would be the case if the target:[7]

- is a start-up or recent entrant with significant competitive potential;
- is an important innovator or is conducting potentially important research;
- is an actual or potential important competitive force;
- has access to competitively significant assets (raw materials, infrastructure, data or intellectual property rights); and/or provides products or services that are key inputs/components for other industries.

These features can arise in all industry sectors, but the Guidance targets the pharma and digital sectors in particular.[8]

The EC has announced it will monitor transaction activity in publicly available sources and cooperate closely with Member States to identify suitable referral candidate transactions. Moreover, the Guidance invites third parties, such as competitors and customers of merging parties, to bring referral candidate cases to the EC's attention.[9]

Most Member States are cooperating with the EC under the new referral policy. However, some of them, notably Austria and Germany, have declared they will adhere to the old policy and only consider referring cases that meet national filing thresholds.

Illumina's acquisition of Grail is the first transaction captured by the new policy. Announced in September 2020, the acquisition was not filed to the EC or in any Member State. However, actively encouraged by the EC, France made a referral request in March 2021 and was subsequently joined by Belgium, Greece, Iceland, the Netherlands, and Norway. The EC's April 2021 decision accepting the referral is currently under appeal at the EU's General Court (GC),[10] whose judgment is expected in mid-July. As the parties proceeded to closing in August 2021 while the EC's review was pending, the EC started an investigation against Illumina[11] for violating

[5] At the end of 2021, the German and Austrian competition authorities updated their joint guidance on the application of their respective transaction value thresholds. Austria and Germany also increased their traditional revenue thresholds in 2021 in order to reduce the number of national filings.

[6] Guidance on the interpretation of these referral conditions can be found in the Guidance, in the EC's Notice on Case Referral in respect of concentrations ("***Notice on Case Referral***"), 5 March 2005, and in the European Competition Authorities ("***ECA***") Principles on the application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of the EC Merger Regulation, January 2005.

[7] In addition, paragraph 19 explains that the EC will also take into account if the value of the consideration received by the seller is particularly high compared to the current revenues of the target.

[8] Guidance, paragraph 10.

[9] Guidance, paragraphs 23 and 25.

[10] Case T-227/21, *Illumina v Commission*. Illumina's separate challenges of the French and Dutch decisions to request a referral were dismissed by French and Dutch courts.

[11] EC press release, "Mergers: Commission starts investigation for possible breach of the standstill obligation in Illumina / GRAIL transaction", 20 August 2021.

the EUMR's standstill obligation. The EC also imposed interim measures[12] that notably require Grail to be kept separate from Illumina and be run by an independent hold separate manager.[13]

The new referral policy can have a major impact on deal timing and deal certainty. If triggered pre-closing, an Article 22 EUMR referral delays closing significantly[14] and merging parties may have to agree to remedies to address substantive concerns or, in an extreme case, face a prohibition decision. A post-closing review entails the risk of post-closing remedies or dissolution of the transaction. To handle this uncertainty, the parties can ask the EC for early guidance as to whether a contemplated transaction makes a strong referral candidate.[15] But this may lead to delay and attract the EC's attention to transactions that would otherwise have passed unnoticed. Moreover, merging parties can inform Member State authorities about the transaction in an attempt to trigger a 15-working days period during which Member States must decide whether or not to launch a referral request. However, this too will take time and requires significant resources.[16]

The new referral policy requires companies to factor in these increased uncertainties when negotiating deal timetables, closing conditions, risk allocation provisions, and other parts of transaction agreements. Practical options to reduce uncertainty have to be considered carefully and early in deal planning. That said, the number of Article 22 EUMR referral requests launched after the policy shift does not suggest that the procedure will be used in as many cases as commentators initially feared. In 2021 and through spring 2022, Article 22 EUMR referrals were only made in the *Illumina/Grail* and *Meta/Kustomer* transactions. *Illumina/Grail* involved a transaction of the type directly targeted by the Article 22 Guidance, i.e., those that do not require a filing in any Member State. By contrast, *Meta/Kustomer* was initially filed in Austria and then referred to the EC by Austria and nine other Member States that did not have national jurisdiction.[17] However, the low number of referrals may be misleading, as the EC is understood to be waiting for the judgment in the pending appeal against its decision to accept the referral in *Illumina/Grail*.[18] If the EU courts endorse the new approach, the Article 22 EUMR referral mechanism may be used more frequently going forward.

Fines for providing the EC with incorrect or misleading information

In May 2021, Sigma-Aldrich was fined €7.5 million under Article 14(1) EUMR for providing incorrect or misleading information during the EC's investigation of the *Merck/Sigma-Aldrich* transaction, which the EC cleared in June

[12] EC press release "Mergers: Commission adopts interim measures to prevent harm to competition following Illumina's early acquisition of Grail", 29 October 2021. The interim measures were appealed by the parties before the GC, see Case T-755/21 - *Illumina v Commission* and Case T-23/22 - *Grail v Commission*.

[13] The EC's substantive review of the transaction is still ongoing at the time of publication of this Advisory.

[14] Following a Member State request for referral, the EC will inform all other Member States who then have 15 working days to join the request. After this period has passed, the EC will take up to 10 working days to decide whether or not to accept a referral. If accepted, the merging parties will typically have to go through the normal EC filing process.

[15] Guidance, paragraph 24.

[16] Under Article 22(1) sub-paragraph 2 EUMR, the 15-working days period starts with a national notification or at the time the transaction is '*made known to the Member State*'. According to paragraph 28 of the Guidance, which repeats almost identical language already used in paragraph 31 of the ECA Principles and footnote 43 of the Notice on Case Referral, a transaction is 'made known' once the NCA obtains "*sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral*". To meet this standard, the merging parties will typically have to submit to the national authority a meaningful level of detail.

[17] In *Meta/Kustomer*, Germany did not join the referral request. After asserting national jurisdiction under the national transaction-value threshold test, Germany required Meta to submit a national filing. As a result, the EC and the German Federal Cartel Office both reviewed the case. Their final decisions did not conflict on substance because Germany decided to clear the transaction unconditionally following the EC's prior conditional approval.

[18] The GC is expected to render its judgment in mid-July 2022.

2015 subject to a divestiture commitment. In its press release,[19] the EC explained that when discussing the divestment with the EC, Sigma-Aldrich had failed to make the EC aware of a pipeline project called iCap, which was specifically being developed for other products included in the parties' divestiture package. The EC held that information about the iCap project should have been mentioned in the parties' remedies submissions and in their responses to two EC requests for information. The EC found indications that the parties withheld this information to avoid having to sell the iCap pipeline project as part of the divestment business. The EC's press release highlighted that the merging parties' obligation to provide correct and non-misleading information is particularly important with regard to pipeline projects that by their nature are only known to the parties and that the EC can therefore not learn about from third parties.

Sigma-Aldrich is already the third case since 2017 in which the EC has fined merging parties for providing incorrect or misleading information, demonstrating that the EC takes these types of procedural infringements seriously. Importantly, as the EC re-confirmed in *Sigma-Aldrich*, the EC can impose fines even if the provision of incorrect or misleading information had no effect on the substantive outcome of the merger review.

Clarification of gun-jumping rules

2021 saw several developments related to scenarios of early implementation of transactions, or gun-jumping, for which the EC can impose fines of up to 10% of a company's group-wide global revenues under Article 14(2) EUMR.

Of major importance is the GC's September 2021 judgment rejecting the appeal[20] Altice Europe NV (Altice) filed against two fines totalling €124.5 million. The EC imposed these fines on Altice in 2018 for implementing its acquisition of PT Portugal before submitting the required filing to the EC and prior to obtaining EC clearance.[21] The GC notably confirmed the EC's position that 'partial implementation' of a transaction constitutes an infringement of the standstill obligation. Partial implementation could take the form of participating in decision-making in relation to the structure and appointment of senior management, the right to have a say in the determination of pricing policies of the target and the obligation for the target to get approval by the acquirer on all major contracts. The GC also clarified that the exchange of sensitive information can amount to gun-jumping. The details of this judgment suggest that gun-jumping can arise fairly easily. Merging parties need to be particularly careful when drafting and implementing interim covenants in their transaction agreements. Altice's appeal against the GC's judgment is currently pending before the Court of Justice.[22]

A different gun-jumping scenario was pending before the GC in 2021.[23] It concerns Canon's appeal of the EC's decision to impose a fine of €28 million[24] on Canon for using a so-called 'warehousing' two-step transaction structure for its acquisition of Toshiba Medical Systems Corporation (TMSC). Initially, a third-party interim buyer acquired 95% of TMSC's shares while Canon acquired the remaining five percent together with an option to buy the interim buyer's 95%. This first step was implemented prior to notifying the deal to the EC. As a second step following notification and EC approval, Canon exercised its option and acquired the remaining 95%. The EC found that the first and second step formed a single notifiable transaction and that Canon violated the EUMR's gun-jumping rules by completing the first step before notifying or receiving approval from the EC.[25]

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[19] EC Press Release, "Mergers: Commission fines Sigma-Aldrich €7.5 million for providing misleading information during Merck takeover investigation", 3 May 2021. At the time of writing this Advisory, the decision was not yet published.

[20] Judgment of the General Court in case T-425/18 - *Altice Europe v Commission*, 22 September 2021.

[21] EC decision of 24 April 2018 in case M.7993 - *Altice/PT Portugal*.

[22] Case C-746/21 P - *Altice Group Lux v Commission*.

[23] Case T-609/19, *Canon v Commission*.

[24] EC decision of 27 June 2019 in case M.8179 - *Canon/Toshiba Medical Systems Corporation*.

[25] On 18 May 2022, the GC issued its judgment rejecting Canon's appeal and upholding the EC's fining decision.

Another 'single transaction' gun-jumping aspect became relevant in Veolia's takeover of Suez, a publicly listed company. Veolia planned to acquire Suez in two separate steps: (i) a bilateral agreement with Engie to acquire Engie's 29.9% stake in Suez, and (ii) a public bid for the remaining Suez shares. At the time not supporting Veolia's offer, Suez claimed Veolia infringed the standstill obligation by acquiring the 29.9% stake and launching the public takeover offer prior to submitting the EC filing and obtaining clearance. The EC dismissed Suez's claim,[26] considering that the two steps formed a single concentration that in its entirety benefited from the exemption from the standstill obligation provided for in Article 7(2) EUMR. In May 2021, Suez withdrew its appeal[27] against the EC's decision so that the EC's decision is now final.

Finally, as mentioned above, in August 2021, the EC initiated a gun-jumping investigation[28] against Illumina for closing its acquisition of Grail before the EC's review had concluded. The investigation is a logical consequence of the EC's position that the case was validly referred to it under Article 22 EUMR so that a standstill obligation arose under Articles 7 and 22(4) EUMR.

Increased Member State Foreign Direct Investment scrutiny

The trend towards more intensive Foreign Direct Investment (FDI) review continued in the EU and globally in 2021. Several Member State FDI regimes were expanded while new regimes were introduced in Czech Republic, Denmark and Slovakia. This trend continues: in 2022, new regimes have entered or are expected to enter into force in other Member States, e.g., in the Netherlands, Belgium and Ireland.[29] Geopolitical developments and the COVID-19 pandemic contributed to this trend in 2021, which affects acquisitions notably by non-EEA investors in an increasingly long list of industry sectors that are considered sensitive and strategic, including cutting edge technology and healthcare. FDI review now has to be given significantly more detailed attention in deal planning than what used to be the case in the past, both in terms of timing and risk allocation.

In the EU, FDI review remains a prerogative of Member States, although the EU's FDI Regulation[30] introduced some information sharing and cooperation obligations between the EC and Member States and imposes certain minimum substantive and procedural standards that national FDI regimes must follow. Moreover, the FDI Regulation provides a reference point for Member State legislation that they may choose to follow, for example as regards the list of industry sectors that are subject to FDI review.

The triggering criteria for FDI filings differ significantly among Member States but typically relate to: (i) whether and to what extent the target has a local presence (e.g., via local assets or subsidiaries); and (ii) whether the economic sector that the national target is engaged in is considered strategic or sensitive. In several Member States, the acquisition of a fairly small interest in a target company (e.g., 10%) can trigger an FDI filing.

FDI notifications typically are less data intensive when compared to merger control filings, although that may be different in individual cases depending on the complexity of the case. Some Member States, such as Austria, Germany and Italy require FDI filings to be made quickly after signing of the transaction agreement, which can lead to timing pressure. A failure to make a required filing can trigger significant fines or even criminal sanctions including imprisonment of companies' decision makers.

Member State FDI authorities typically assess whether deals have a negative impact on public security and public order. These terms are not clearly defined and leave Member States significant discretion to take into

[26] EC decision of 17 December 2020 in case M.9969 - *Veolia/Suez*.

[27] Case T-121/21, *Suez v European Commission*, order of the president of the third Chamber of 27 May 2021.

[28] EC press release, "Mergers: Commission opens in-depth investigation into proposed acquisition of Grail by Illumina", 22 July 2021.

[29] Only 11 Member States had functioning FDI review regimes in place in 2017, compared to 18 in 2021. Moreover, in 2021, six other Member States had pending legislative initiatives to introduce FDI review mechanisms.

[30] 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.

account a broad range of political and industrial considerations. Most Member States do not publish FDI decisions, which reduces decision-making transparency and hinders the emergence of a body of precedent that merging parties can use as a reference point for future transactions.

Experience shows that the review of non-problematic transactions by Member State authorities often takes one to three months following notification. The review of complex transactions can take significantly longer.

In November 2021, the EC published its first annual Report on FDI review in the EU.[31] The report mentions that in 2020, seven Member States reviewed 1,793 transactions with the following outcomes:

- In approximately 80% of cases, no formal review was conducted because the transaction evidently had no impact on security or public order, or was not subject to the FDI rules.
- In approximately 20% of cases (thus, in approximately 362 cases), formal FDI reviews took place with the following results:
  - Cleared without conditions: ~ 286 transactions
  - Cleared with conditions: ~ 44 transactions
  - Abandoned: ~ 25 transactions
  - Prohibited: ~7 transactions

Examples of prohibited transactions in late 2020 and 2021 include the attempted (indirect) acquisitions by Chinese state-owned funds of a microchip company in Italy,[32] and of a satellite and radio technologies company in Germany.[33] Moreover, in 2021/early 2022, Germany used procedural means to delay its FDI review of Taiwanese company GlobalWafers' attempted acquisition of Germany-based chip supplier Siltronic until the contractual end date of the transaction was reached and the deal lapsed without Germany having taken a substantive FDI decision. These examples show that Member State FDI reviews can derail transactions, even transactions of globally active companies and even if the transaction has been cleared by merger control authorities, as was the case in *GlobalWafers/Siltronic*.[34]

Merger control and FDI review are separate regimes that in principle apply in parallel, but there are important interdependencies. 2021 brought to the forefront the complexities that can arise in this context. In the attempted acquisition by Austrian company Vienna Insurance Group (VIG) of the Eastern European insurance business of AEGON N.V, Hungary blocked the acquisition of AEGON's Hungarian subsidiaries in April 2021 under its newly introduced FDI rules citing a threat to 'Hungary's legitimate interests'. However, the EC granted unconditional merger control approval under the EUMR in August 2021.[35] In February 2022, the EC issued a decision finding Hungary's FDI veto to be in breach of Article 21 EUMR. That provision allows Member States to block a transaction that the EC reviews under the EUMR only for reasons of legitimate interest and generally only subject to prior consultation with the EC.[36] The EC held that these conditions were not present in this case and ordered Hungary to withdraw its veto. Cases in which Member States infringed Article 21 EUMR have been rare

[31] Report from the Commission to the European Parliament and the Council, "First Annual Report on the screening of foreign direct investments into the Union", 23 November 2021.

[32] Reuters, "Italy vetoes takeover of semiconductor firm by Chinese company Shenzhen", April 9, 2021.

[33] Reuters, "Germany blocks Chinese takeover of satellite firm on security concerns", December 8, 2020.

[34] The transaction had obtained merger control approvals in Austria, China, Germany, Japan, Singapore, South Korea, Taiwan, and the United States.

[35] EC decision of 12 August 2021 in case M.10102 - *VIG/AEGON CEE*.

[36] EC press release, "Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation", 21 February 2022.

so far but it is possible that they will arise more often in the future given the proliferation of FDI review in Member States.

Additional planned transaction reporting obligations at EU level

In 2021, two EU legislative proposals were pending that aim to create new reporting obligations for transactions, separately from reporting obligations under merger control and FDI review regimes.

> *Fully-fledged notification and review system for concentrations under the draft Foreign Subsidies Regulation*

In May 2021, the EC proposed a Regulation on foreign subsidies distorting the internal market (Foreign Subsidies Regulation).[37] The draft Foreign Subsidies Regulation aims at ensuring a level playing field in the internal market and at addressing an enforcement gap caused by the lack of scrutiny over foreign (non-EU) public support to companies active in the EU (while EU-originating public funding is reviewed under the existing EU State aid rules).

Relevant here are the new proposed notification obligation and EC review powers regarding concentrations that involve companies that benefited from subsidies.[38]

Articles 18 and 19 of the draft Foreign Subsidies Regulation introduce a mandatory, suspensory, *ex-ante* review mechanism for transactions, requiring companies to notify to the EC concentrations that meet the following thresholds:

a) the acquired undertaking or at least one of the merging undertakings (or, in the case of a joint venture, the joint venture or one of its parents) is established in the EU and generates a turnover of at least €500 million in the EU; and

b) the undertakings concerned received from third countries an aggregate financial contribution in the three calendar years prior to notification of more than €50 million.

The range of financial contributions that count towards the €50 million threshold is very wide and includes, for example, direct grants and the provision of fiscal incentives. Importantly, the financial contribution does not have to be linked to the concentration at issue to count towards the threshold. All contributions to the merging parties have to be aggregated, even if they were made by different countries.

The draft Foreign Subsidies Regulation also enables the EC to call in for review concentrations that do not meet these threshold values if the EC suspects the undertakings concerned may have benefitted from foreign subsidies in the last three years. The EC can carry out these *ex officio* reviews even after the transaction has closed. However, if the merging companies received total contributions of less than €5 million, the EC is unlikely to exercise its review powers.

The key question in the substantive assessment is whether there is a distortion on the internal market. Under Article 3 of the draft Foreign Subsidies Regulation a distortion exists where a foreign subsidy is liable to improve the competitive position of the undertaking concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition in the internal market. This will be determined on the basis of indicators such as the amount and nature of the subsidy and the situation and activity of undertaking in question on the markets concerned. While this substantive standard relates to the review of foreign subsidies generally, Article 17 of the draft Foreign Subsidies Regulation states that "[i]n a concentration, the assessment whether there is a distortion on the internal market shall be limited to the concentration at stake." It remains to be seen what exactly

[37] EC, Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, Brussels, 5 May 2021, COM(2021) 223 final.

[38] The draft Foreign Subsidies Regulation also introduces an *ex-ante* notification-based tool to review public tender/procurement bids.

this means for the review of concentrations under the new regime. Article 4 of the draft Foreign Subsidies Regulation makes clear that foreign subsidies that directly facilitate a concentration are most likely to distort the internal market, but other types of foreign subsidies too can distort the internal market.

Even if the EC considers that a foreign subsidy distorts the internal market, it can still clear the concentration on the basis of a balancing test in Article 5 of the draft Foreign Subsidies Regulation. This provision enables the EC to weigh the negative effects of the subsidy against the subsidy's positive effects on the development of the relevant economic activity. This balancing test opens the door for a wide range of industrial policy and other considerations. The EC can approve or prohibit concentrations, or approve them subject to conditions such as asset divestitures.

Many procedural aspects of the draft Foreign Subsidies Regulation's review regime for concentrations have been modelled after the EUMR. Notably, (i) the EC's review entails a first review phase of 25 working days and potentially a second, in-depth review phase of 90 working days; (ii) the parties are not allowed to close before the EC has issued a decision, (iii) the EC will have wide-ranging investigative powers, and (iv) the EC can impose fines on companies for procedural breaches, up to 10% of their aggregated turnover for a failure to notify, or up to one percent of the aggregated turnover for providing incorrect information.

Following the publication of the EC's proposal, the draft Foreign Subsidies Regulation has been reviewed by the Council of the European Union (Council) and the European Parliament (EP), each suggesting numerous amendments to the EC's proposal.[39][40] These amendments are now being discussed between the Council, the EP and the EC. The goal is for the Foreign Subsidies Regulation to become applicable in the second half of 2023. Clearly, if enacted, the new review regime will have very significant effects on global M&A. This additional layer of scrutiny may lead to further uncertainty in the regulatory review of transactions involving companies that receive non-EU subsidies. The importance of strategic planning will be even greater and may require building more flexibility into timetables.

Information requirement for concentrations of gatekeepers under the draft Digital Markets Act

The notification regime for transactions that will be introduced by the Digital Markets Act (DMA)[41] is much less far-reaching. The EC proposed the draft DMA in December 2020 to ensure a fair and contestable digital environment for businesses and consumers by imposing certain obligations on large online platforms, so-called 'gatekeepers' that have been designated by the EC by means of a decision. Relevant for present purposes is the obligation of designated gatekeepers to inform the EC of almost all of their planned concentrations irrespective of any threshold values.[42] Companies not designated as gatekeepers under the DMA are not subject to this information obligation. Moreover, different from the regime suggested under the draft Foreign Subsidies Regulation, the draft DMA does not create any review or decision-making powers for the EC or Member States with regard to transactions that are subject to the information obligation. That said, the EC and Member States can use the information provided to them under the draft DMA to assess whether Member State merger control filing thresholds are met, for example the transaction value thresholds in Austria and Germany, or to initiate a referral under Article 22 EUMR. The draft DMA is expected to be formally adopted over the summer 2022 and

[39] Council of the European Union, Proposal for a Regulation of the European Parliament and the Council on foreign subsidies distorting the internal market - mandate for negotiation with the European Parliament, 4 May 2022,2021/0114(COD).

[40] European Parliament, Amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 4 May 2022, P9_TA(2022)0143.

[41] EC, 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.

[42] In the EC's initial draft of the DMA, this obligation was included in Article 12. Following a renumbering of articles, Article 12 has become Article 14.

enter into force in October 2022. However, the information obligation regarding concentrations would not apply before the end of 2023 at the earliest, following the designation of gatekeepers by the EC.

Forthcoming changes to EU merger control

Market Definition Notice

In July 2021, the EC published the results of an evaluation[43] of the 1997 Market Definition Notice (Notice). The evaluation report found the Notice to continue to be relevant and fit-for-purpose but called for an update to reflect current EC best practices and changed realities such as globalisation, import competition and digitalization.

A key aspect under review has been geographic market definition. This topic attracted strong public interest and political pressure from France and Germany after the EC prohibited the *Siemens/Alstom* merger in 2019. In a joint statement, the two governments called for updates to be made to the current merger guidelines '*to take greater account of global competition*' and to allow the EC '*more flexibility when assessing relevant markets*'.[44] However, the evaluation report now concludes that no major changes to the EC's practice are called for because global competition considerations are already present in the EC's assessment of mergers. Nevertheless, the EC determined that the Notice could benefit from defining certain concepts, such as the competitive pressure from imports and from including specific guidance on defining markets as global.

The report recognizes the importance of changing the Notice to better describe product market definition in digital cases. New concepts pertinent to digital markets such as multi-sided platforms, network effect, zero pricing, multi- and single-homing, should be addressed in the updated Notice.

Other focal areas which the EC is expected to review include: (i) the SSNIP (small significant non-transitory increase in price) test used to define relevant markets; (ii) quantitative techniques in determining the relevant product market; (iii) the calculation of market shares; and (iv) the assessment of non-price competition (including innovation).

Overall, the EC's recent comments suggest that the revised Notice will better reflect current EC practice but not introduce major policy changes. According to its call for evidence published in February 2022, the EC expects to start the public consultation on the draft Notice in June 2022 and aims to adopt the updated Notice at the latest by Q1 2023.

Merger Implementing Regulation and Notice on simplified procedure

The reviews of the Merger Implementing Regulation[45] and of the related Notice on Simplified Procedure[46] are the only other pending EU merger control reform initiatives. The main goal is to reduce administrative burden. The EC is looking for ways to identify more cases that could benefit from the simplified procedure without letting problematic deals slip its scrutiny. The EC is contemplating two alternative options to achieve this: (i) introducing a '*flexibility clause*' to allow the EC a level of discretion in treating cases as '*simplified*' when the established market share or turnover thresholds are only slightly exceeded, and (ii) formally identifying additional categories of cases qualifying for simplified review.

Moreover, the EC is considering reducing the amount of information that parties must provide in simplified cases. There is a proposal to introduce tick-the-box type of questions in the existing notification form which would not

[43] Commission Staff Working Document Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, 12 July 2021.

[44] Joint statement of the German Ministry of the Economy and Energy and the French Ministry of the Economy and Finance, "A Franco-German Manifesto for a European industrial policy fit for the 21st Century", 19 February 2019.

[45] Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

[46] Commission Notice on a simplified procedure for treatment of certain concentrations under council regulation (EC) No 139/2004, 14 December 2013.

require the provision of further evidence. The EC is also considering permanently allowing electronic notifications, which were introduced on an *ad-hoc* basis during the COVID-19 pandemic.

The EC published an evaluation report regarding these potential measures in March 2021.[47] A public consultation was launched in early May 2022.[48] The EC plans to adopt an updated Notice on Simplified Procedure and a revised Implementing Regulation by Q4 2022. These efforts are welcomed as they will reduce unnecessary burden on merging companies.

International cooperation between merger control authorities

2021 saw efforts of increased merger control cooperation between competition authorities. However, these initiatives have involved only a limited number of authorities rather than a large number, let alone the International Competition Network (ICN).

In April 2021 the competition authorities of the UK, Australia and Germany issued a Joint Statement on Merger Control Enforcement[49] (Joint Statement) calling for *'more rigorous and effective merger enforcement*'. The message to businesses is that the COVID-19 pandemic will not lead to a relaxation of merger assessments; players should expect regulators to be extra careful in disallowing further concentration in digital, high-tech and data intensive markets; efficiency claims made by merging companies will not be taken at face value but will be tested against actual evidence, while more weight will be given to information provided by third parties (competitors, customers and suppliers). The Joint Statement also expresses a preference for structural remedies.

In May 2021, the US FTC, the EC, the Canadian Competition Bureau, and the UK's CMA started a working group on pharmaceutical mergers (Working Group). The background of the initiative is the perceived increase in consolidation, price raises and ongoing concerns about anticompetitive behaviour in the industry. The goal is '*to update their approach to analysing the effects of pharmaceuticals mergers*', and in particular, to adjust the assessment of: (i) market definition, (ii) theories of harm, (iii) effects on innovation, (iv) the design of appropriate remedies, and (v) the characteristics that a successful divestment buyer should possess. The Working Group launched a joint public consultation[50] to gather ideas and views from all stakeholders in the field. The deadline to contribute was 25 June 2021 and the FTC will oversee the collection and publication of the feedback received.

The impact of Brexit on merger control

2021 marked the first year in which the UK no longer participated in the EU merger control system. Observers had speculated that the UK's exit from the EU would lower the number of EU notifications given that merging parties' UK revenues no longer count towards the EUMR's revenue thresholds. However, there is no evidence of such an effect. As mentioned above, in 2021 the EC received the second highest number of merger notifications in its history.

Initial experience suggests that the new situation of the EC and the UK's CMA reviewing transactions in parallel has not posed as much difficulty as some observers had initially feared. At least thirteen transactions were reviewed by both the EC and the CMA in 2021, including *Intel NAND/SK Hynix, Graphic Pack/AR packaging, Air*

[47] EC press release, "Mergers: Commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU merger control", 26 March 2021.

[48] EC press release, "Mergers: Commission seeks feedback on proposed simplification measures regarding merger procedures", 6 May 2022.

[49] CMA, Australian Competition and Consumer Commission and Federal Cartel Office, Joint statement on merger control enforcement, 20 April 2021.

[50] EC press release, "Multilateral Working Group on pharmaceutical mergers launches a joint public consultation", 11 May 2021.

Europa/IAG, Xilinx/AMD, Cargotec/Konecranes, AstraZeneca/Alexion, HIS Markit/CME Global/JV, Meta /Kustomer, S&P/IHS Markit, Nvidia/Arm, Veolia/Suez, Thermo Fisher/PPD, and *Microsoft/Nuance*.

The EC and the CMA were largely aligned in the outcome of their reviews of these transactions. In six of these cases, both the EC and the CMA cleared the transactions without conditions in Phase I (*Intel NAND/SK Hynix, Graphic Pack/AR packaging, Xilinx/AMD, AstraZeneca/Alexion, HIS Markit/CME Global/JV, Thermo Fisher/PPD*)[51] and in one case both authorities cleared with remedies in Phase I (*S&P/IHS Markit*).[52] Two transactions were reviewed in Phase II by both authorities (*Cargotec/Konecranes and Nvidia/Arm*). In February 2022, the parties involved in *Nvidia/Arm* decided to abandon the transaction due to the regulatory scrutiny they were facing globally. Interestingly, the EC decided to clear the *Cargotec/Konecranes* transaction with remedies, while the CMA blocked the deal in late March 2022, forcing the parties to abandon the transaction. Conversely, the EC took a stricter stance than the CMA in the review of *Meta/Kustomer* by opening an in-depth probe and clearing the transaction only subject to remedies, while the CMA cleared the deal in Phase I unconditionally. In *Veolia/Suez*, the EC cleared the transaction with remedies in Phase I while the CMA is yet to adopt a decision after it opened an in-depth investigation.

The EC and the CMA to some extent have appeared to try to align procedures and, at least in some instances, also substantive requests for information if the parties have granted confidentiality waivers. That said, there can be no doubt that both authorities will investigate according to their own rules and time schedules and reach their own conclusions even if that will lead to significant diverging review timelines or decision outcomes. For sure, situations of parallel EC and CMA investigations require additional planning and coordination by the merging parties.

Highlights of EC merger cases

2021 was a busy year for EC merger control:

- 403 transactions were notified (12.1% increase over 2020)
- 393 substantive decisions were adopted (12.2% increase over 2020), of which:
    - Four Phase II clearance decisions, all subject to conditions (compared to four Phase II decisions in 2020, three of which were clearances with conditions and one an unconditional clearance)
    - Seven conditional Phase I clearance decisions (compared to 13 in 2020)
    - 73 regular (non-simplified) unconditional Phase I clearance decisions
    - 309 Phase I unconditional simplified procedure clearance decisions
- While the EC did not prohibit any transaction in 2021, 11 filings were withdrawn by the parties before a decision was taken. At least in some cases, the withdrawals came after it had become clear that the transaction raised competition concerns. Three cases were withdrawn during Phase II (*IAG/AIR Europa*, *Air Canada/Transat* and *Fincatieri/Chantiers de l'Atlantique*) and the remaining eight cases in Phase I (*Egeria/Parcom/Wood Holding Co JV*, *CNP/Aviva life*, *CNP/Unicredit/Aviva SpA*, *Arcelormittal/Liberty Steel France*, *UIR/Hines/Assets*, *DH13/RFR Immo4/Bürogebäude*, *AIP/ Alvance Dunkerque Target Business* and *KHS/Ferrum*).

The following key topics were discussed in some of the high profile cases that were decided by the EC, or that were still pending, in 2021:

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[51] By the time of publication of this Advisory, the CMA also cleared *Microsoft/Nuance* unconditionally in Phase I. The EC had done so already in 2021.

[52] The CMA accepted the commitments offered by the parties in February 2022.

- **Innovation theories of harm.** In two cases (*Nvidia/ARM* and *Illumina/Grail*) the EC assessed innovation theories of harm. In both transactions, the technologies offered by one party was considered an important input for the offerings of the other party's rivals, leading to foreclosure concerns. The EC had doubts about the effects of the transactions on future innovation because they could either prevent rivals' R&D efforts or lead the merged entity to terminate or refocus its innovation activities in the future. The notifying parties in both cases presented a proposal for behavioural remedies in the form of access commitments. The commitment offer in *Nvidia/ARM* was not well received and the parties decided to abandon their transaction in early 2022. The EC's substantive decision in *Illumina/Grail* remains outstanding.
- **Countering competition from China.** In three cases (*Fincantieri/Chantiers De L'atlantique*, *Danfoss/Eaton's Hydraulics Business* and *Cargotec/Konecranes*)[53] the parties argued that their transactions would be beneficial to counter increased competition from Chinese companies. However, the EC has been reluctant to accept this argument as a reason to clear deals.
- **Circular economy/environmental aspects/sustainability.** In 2021, the EC exercised strict scrutiny over mergers in sectors of the circular economy. Three notable transactions were approved with remedies in 2021 (*Schwarz Group / Suez Waste Management Companies*, *Veolia/Suez* and *Derichebourg Environnement / Groupe Ecore Holding*), while one transaction that was pending in Phase II in 2021 (*Kingspan Group/Trimo*) was ultimately abandoned by the parties in April 2022.

Environmental and sustainability aspects increasingly play a role in the EC's merger assessment. Competition policy, including merger control, is seen as an important tool to achieve the goals of the European Green Deal. This is evidenced by the call for contributions on how to take into account sustainability in merger control which the EC launched at the end of 2020. Recent merger precedents demonstrate how sustainability aspects fit into the merger control framework: notably, they may affect market definition and the assessment of closeness of competition if sustainability aspects constitute differentiating factors in the eyes of customers (such as in *Schwarz Group/Suez Waster Management Companies*[54] and *Novelis/Aleris*[55]); or they may be the basis for substantive concerns, as was the case in *Aurubis/Metallo*,[56] where the EC was concerned that the merger between the two major copper scrap purchasers would allow them to pay less for copper scrap thereby disincentivising copper suppliers to collect scrap and thereby leading to increased consumption of primary copper instead of copper scrap.

Sustainability as an efficiency defence is also on the enforcers' radar screen. The EC's chief competition economist, Pierre Régibeau, stated in early 2021 that '*it would make a lot of sense to also consider out-of-market efficiencies*' although he did '*not expect de facto a large number of merger cases to be handled differently even if we take those benefits very seriously*'. At the end of 2020, his team of economists formed a group looking for ways to assess sustainability claims in actual cases.

- **Access remedies.** The EC considered offers of access remedies in several cases in 2021. They were approved in *LSEG/Refinitiv* and *Meta/Kustomer*. An access remedy has also been offered in *Illumina/Grail*. Moreover, Nvidia offered an access remedy in its acquisition of ARM. However, the commitment did not attract positive reaction from regulators and the parties ultimately withdrew the notification and abandoned the deal. In these cases, the duration of the suggested remedy was at least ten years. Increasingly common

[53] The *Fincantieri/Chantiers De L'atlantique* deal was abandoned by the parties (notification withdrawn before final decision of the EC), *Danfoss/Eaton's Hydraulics Business* was cleared with conditions in Phase II and *Cargotec/Konecrane* was cleared by the EC with remedies but blocked by the CMA.

[54] EC decision of 14 April 2021 in case M.10047 - *Schwarz Group/Suez Waster Management Companies*.

[55] EC decision of 10 October 2019 in case M.9706 - *Novelis/Aleris.*

[56] EC decision of 4 May 2020 in case M.9409 - *Aurubis/Metallo*.

features in access remedies are open access to public APIs and access to future improvements or product introductions.

- **Standard of review during COVID-19.** Two cases (*Air Canada/Transat* and *IAG /Air Europa*) in the airline industry were withdrawn in 2021 after the parties could not reach a satisfactory solution with the EC. These two cases illustrate the EC's strict approach to merger assessment also in times of crisis. In the midst of the extraordinary circumstances created by the COVID-19 pandemic which brought the airline sector to a near standstill, the EC made it clear that it will not relax its review threshold to transactions it sees as problematic.

This Advisory reflects the personal views of the authors.

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