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The European, Middle Eastern and African Antitrust Review 2018

European Union: Merger Control

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EU merger control in 2016-2017: shifting account settings?

The Commission 'pokes' companies with an increasingly tough stance on procedure and substance

In spite of the dual shocks of the outcome of the UK referendum on Brexit and US presidential election, 2016 was once again a busy year for EU M&A activity.

The year indeed continued the previous few years' trend of increasing numbers of notifications to the European Commission (the Commission), with 362 transactions notified in 2016, compared to 337 in 2015.[2] This represented the second-highest number of notifications ever received by the Commission, beaten only by the pre-crisis 2007 peak of 402. With 153 notifications already made as at 31 May 2017, this trend looks well on track to continue in 2017.

The eight Phase II investigations opened by the Commission in 2016, while not as many as the 11 of 2015, still represent a significant number and, notably, only one of these transactions was cleared unconditionally (while six transactions were cleared with remedies and one was prohibited).[3] Indeed, 2016 saw 25 mergers cleared by the Commission with remedies (19 following Phase I, six following Phase II), the highest number in some years. Together with the three mergers prohibited in 2016 and thus far in 2017 (*Hutchison 3G UK/Telefónica UK*,[4] *Deutsche Börse/London Stock Exchange Group*[5] and *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia*),[6] and the 12 transactions abandoned prior to the adoption of a decision (some of which could be viewed as de facto prohibitions), Margrethe Vestager's Commission is demonstrating its willingness to intervene.

The technology, media and telecoms (TMT) sector saw a flurry of interest in 2016 as buyers from many industries looked to strengthen their technological capabilities and retain their competitive edge in an increasingly digital world. Acquisition of TMT targets accounted for over 20% of European deal volume in 2016.[7]

It is unsurprising, therefore, that the Commission has increasingly been turning its attention to the suitability of the existing merger rules to digital markets. In October 2016, the Commission launched a public consultation on possible jurisdictional and procedural changes to the EU Merger Regulation (EUMR),[8] including in particular introducing alternative deal-value-based thresholds (in addition to the purely turnover-based thresholds), in order to capture acquisitions involving certain young and innovative companies whose competitive potential is not adequately reflected in their turnover.

Similar amendments to the German and Austrian merger control regimes were recently introduced. The success or otherwise of the German and Austrian changes in catching relevant transactions (while not over-including) will be informative for the Commission in deciding how, if at all, to implement similar changes at the EU level. We discuss this topic in more depth below, together with other jurisdictional changes considered by the Commission (see 'Commission consultation on potential changes to EUMR thresholds and other jurisdictional issues').

As regards the procedural merger control rules, in a speech in March 2016,[9] Commissioner Vestager stated that the Commission 'keep[s] a very close eye on whether companies are complying with the procedural rules. And I won't hesitate to take action if we suspect that they haven't. Because we cannot allow companies to undermine a successful system by breaking the most basic rules.'

Indeed, the recent imposition of a €110 million fine on Facebook[10] for providing incorrect and misleading information during the *Facebook/WhatsApp* merger investigation and the statement of objections (SO) addressed to Altice for implementing its takeover of PT Portugal prior to the Commission's clearance decision[11] are further evidence that, now well into her third year in the role, Commissioner Vestager is keen to investigate and sanction procedural breaches. This topic is considered further below (see 'Commission gets tough on violations of procedural merger control rules', below).

In the remainder of this article, we also consider in more detail other key developments in EU merger control in 2016/2017, including the following:

From a jurisdictional perspective, the upcoming clarification by the EU Courts of:

- the notion of 'undertakings concerned' in the context of an appeal to the General Court (GC) of the Commission decision opening a Phase II investigation into the *HeidelbergCement/Schwenk/Cemex* transaction (see 'Pending GC judgment on the notion of undertaking concerned', below);[12] and
- the issue of whether the Commission has jurisdiction to review transactions involving a change of control over a non full-function joint venture, in the context of a reference for a preliminary ruling made by the Austrian Supreme Court to the ECJ[13] (see 'Pending ECJ judgment on changes of control over non full-function joint ventures - advocate general opinion' below).
- From a procedural perspective, the GC judgment annulling the Commission decision prohibiting the acquisition of TNT Express by UPS on due process grounds[14] (see 'GC annuls the Commission decision blocking UPS/TNT transaction on due process grounds', below).

From a substantive perspective:

- the continued focus on the role of innovation in merger control assessments, particularly in light of the Commission decisions in *Dow/DuPont*[15] and in *ASL/Arianespace*,[16] and on potential competition from pipeline products in transactions involving pharmaceutical companies, in light of the Commission decisions in cases *Abbott Laboratories/St Jude Medical*[17] and *Boehringer Ingelheim/Sanofi Animal Health Business*[18] (see 'Continued focus on innovation', below); and
- the role of data in merger control assessments, in particular in light of the Commission decision in *Microsoft/LinkedIn*[19] (see 'The role of data - Microsoft/LinkedIn', below).

In the last section of the article, we consider the potential impact of Brexit on EU and UK merger control (see 'Impact of Brexit on EU and UK merger control', below).

Jurisdictional developments

Commission consultation on potential changes to EUMR thresholds and other jurisdictional issues

Introduction

In October 2016, the Commission launched a public consultation seeking feedback from stakeholders on several jurisdictional and procedural aspects of the EUMR (the 2016 consultation). The 2016 consultation was part of the Commission's ongoing review and assessment of the EUMR and followed on from a report on the functioning of the EUMR published in 2009,[20] a public consultation which took place in 2013[21] and the Commission White Paper entitled 'Towards more effective EU Merger Control' published in 2014,[22] which, according to the Commission, confirmed that the EUMR worked well and that no fundamental overhaul of the merger control regime was needed. The Commission found, however, that there was scope for improving the current rules.

The 2016 consultation focused on three main jurisdictional and procedural areas, namely the effectiveness of purely turnover-based jurisdictional thresholds in the EUMR; the treatment of cases that typically do not raise competition concerns (eg, the creation of offshore joint ventures); and the referral mechanisms between EU member states and the Commission.

Jurisdictional thresholds

Of these three areas, the most interesting one is the proposed reform of the EUMR jurisdictional thresholds. The Commission's main concern in this regard is that transactions which involve the acquisition of a target company with insufficient EU-wide turnover at the time of the transaction, but with competitive significance (eg, market players in the digital economy which control large amounts of commercially valuable data), are likely not to be captured under the current notification requirements.[23]

According to the Commission, this enforcement gap may be particularly significant in the digital economy. The Commission refers, by way of example, to the *Facebook/WhatsApp*[24] deal where, despite WhatsApp's US$19 billion valuation and its 600 million customers, the Commission initially did not have jurisdiction to review the transaction because WhatsApp's turnover did not meet the EUMR thresholds.[25] According to the Commission, this gap might also concern other sectors, such as pharmaceuticals, if established players purchase highly valued biotech companies that own products under development that have not yet been marketed and therefore do not generate significant turnover. It has therefore been suggested to complement the existing turnover-based jurisdictional thresholds of the EUMR with additional notification requirements based on alternative criteria, such as the transaction value.

However, it has been questioned whether expanding the scope of the EUMR to include deal-value thresholds is warranted at the moment.[26] Such a change may be disproportionate (as it might catch many transactions without competitive significance) and may give rise to significant legal uncertainty, in particular in light of the complexities linked with establishing suitable alternative thresholds and the associated increased burdens on business at a time when the Commission is seeking to streamline the EUMR to avoid unnecessary ‘red tape'.

In view of the above, it may be preferable for the Commission not to take any action at this stage but keep the issue under review. This approach would also enable the Commission to capitalise on the experiences in Germany and Austria, which recently amended their jurisdictional thresholds to add a threshold based on transaction value (€400 million for Germany and €200 million for Austria), and assess both the extent of any enforcement gap and the application of such a threshold in practice.

Treatment of non-problematic transactions

In the context of the 2016 consultation, the Commission also invited comments on whether there is scope for further simplification of the treatment of certain categories of non-problematic transactions.

The Commission considers, inter alia, a possible exemption from filing for joint venture transactions involving ‘extra-EEA joint ventures' (ie, joint ventures which operate outside the EEA and have no effect on competition within the EEA). Such transactions are currently notifiable on the basis of the turnover of the parent companies, albeit under a ‘super-simplified' regime, but one that still involves material information burdens (eg, on joint control and full functionality issues).

Referral mechanisms between the Commission and the EU member states

In the 2016 consultation, the Commission also sought comments on a number of technical aspects of the EUMR, including pre-notification and post-notification referral procedures.

One of the options considered in case of pre-notification referrals to the Commission is the replacement of the time-consuming two-step procedure (ie, the Form RS requesting a referral followed by the Form CO notification) by the combination of the referral request and the substantive notification of the transaction in a single submission to the Commission. This would save the parties and the Commission significant time and resources.

Acquisitions of non-controlling minority stakes are no longer part of the debate

It should be noted that one of the main proposals in the 2014 White Paper was the potential expansion of the EUMR to cover acquisitions of non-controlling minority shareholdings (which arose in the long-running *Ryanair/Aer Lingus* case) on the grounds that the Commission does not currently have adequate tools for dealing with anticompetitive acquisitions of minority shareholdings. However, stakeholders were critical as regards the necessity and proportionality of the proposed system for the introduction of a review of minority, non-controlling, shareholdings. In addition, in a speech in March 2016, Vestager stated that she was not convinced about the necessity of the proposed change to the current merger control system.[27] That statement, combined with the fact that the relevant proposal was not part of the latest consultation, suggests that such a change is no longer on the Commission's agenda.

Conclusion

The 2016 consultation ended on 13 January 2017. The responses to the consultation have not been published at the time of writing. The responses will be followed by a Commission staff working document which is likely to be published in the second half of 2017. Depending on the results of the 2016 consultation, the Commission will assess whether legislative measures are necessary. Any changes to the EUMR would require unanimity at member state level and agreement with the European Parliament.

Pending GC judgment on the notion of ‘undertaking concerned'

On 5 September 2016, HeidelbergCement and Schwenk, both German construction material producers, notified to the Commission their proposed joint acquisition, via their joint venture Duna Dráva Cement (DDC), of Cemex Croatia, a subsidiary of the Cemex Group and the largest cement producer in Croatia.[28] On 10 October 2016, the Commission opened a Phase II investigation into the proposed transaction, as it had concerns that it may reduce competition for grey cement in Croatia.[29]

HeidelbergCement and Schwenk both appealed the Commission's decision to open a Phase II investigation to the GC[30] arguing that the Commission committed a manifest error of assessment by considering them, rather than DDC (the full-function joint venture in which each of them holds a controlling interest of 50% and which was the direct acquirer in this case), to be the ‘undertakings concerned', and concluding as a result that the transaction had a ‘Union dimension', which granted the Commission jurisdiction to review it. According to the applicants, if DDC had been considered the ‘undertaking concerned', the EU thresholds would not have been met and the Commission would not have had jurisdiction to review the transaction; therefore, HeidelbergCement and Schwenk alleged that the decision to open a Phase II investigation violated article 1 EUMR and the underlying principles of legal certainty and subsidiarity.

In addition, both applicants referred to paragraph 147 of the Consolidated Jurisdictional Notice (the Jurisdictional Notice),[31] which provides that, when a joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, the parent companies can be considered to be the ‘undertakings concerned', rather than the joint venture. The applicants argued in this regard that the Commission erred in applying paragraph 147 in this case and also that it failed to state the reasons why the conditions set out in this paragraph were met.

On 5 April 2017, the Commission prohibited the proposed transaction on the ground that it would have reduced competition in the Croatian market for grey cement and would have led to higher prices for cement customers. As regards the parties' pending appeals before the GC, the Commission noted in its press release[32] that it took into account HeidelbergCement and Schwenk's turnover figures in order to determine whether it had jurisdiction to review the proposed transaction as ‘although the acquisition is implemented through DDC, HeidelbergCement and Schwenk were the drivers of the transaction and were significantly involved in the initiation, organisation and financing of the deal'.

The GC's judgment is expected to provide some more clarity on the notion of ‘undertaking concerned' and more specifically on the interpretation of paragraph 147 of the Jurisdictional Notice.

Pending ECJ judgment on changes of control over non full-function joint ventures - advocate general opinion

On 27 April 2017, the Advocate General Juliane Kokott handed down her opinion on a request for a preliminary ruling from the Austrian Supreme Court regarding the application of the EUMR to transactions involving a change of control over an existing non full-function joint venture.[33]

The Austrian Supreme Court asked the European Court of Justice (ECJ) whether articles 3(1)(b) and 3(4) EUMR must be interpreted to mean that a move from sole to joint control over an existing undertaking, in circumstances where the undertaking previously having sole control becomes one of the undertakings acquiring joint control, constitutes a concentration only where the undertaking over which joint control is acquired is a full-function joint venture, ie, where it exercises, on a lasting basis, all the functions of an autonomous economic entity.

Advocate General Kokott considered the wording, purpose and context of the relevant EUMR provisions and noted that

> the concept of concentration within the meaning of article 3 of the EU merger regulation is to be understood as meaning that the creation of joint ventures - be this by the formation of entirely new undertakings or the

conversion of existing undertakings into joint ventures - is subject to the EU merger control regime only if the undertakings in question are full-function.[34]

According to Advocate General Kokott, the EU merger control regime is aimed at capturing transactions which result in a change in the structure of the market. If an undertaking does not have an autonomous presence on the market (ie, if it is a 'non full-function' joint venture), it follows that any change in its control structure cannot have the effect of changing the structure of that market. Therefore, it would 'run counter to the essence of the EU merger control regime to make the conversion of an existing non-full-function undertaking into a joint venture subject to mandatory ex ante control by the Commission'.[35]

It is noteworthy that, in this case, the Commission's Directorate-General for Competition had informed the parties in a non-binding comfort letter that the proposed transaction did not appear to constitute a concentration under article 3 EUMR while the Commission's legal service took the diametrically opposed view in the procedure before the Court. Advocate General Kokott openly criticised the lack of a uniform approach within the Commission in relation to this case noting that 'it is extremely regrettable that, on such a fundamental and recurrent issue of competence, the Commission did not first commit to a clear and uniform approach and then apply it consistently'.[36]

The judgment in this case, which is due by the end of 2017, will be particularly welcome as it is expected to clarify one of the most obscure points in the EU merger control regime, thus increasing legal certainty and ensuring a uniform application of the rules, for the benefit of companies.

Procedural developments

Commission gets tough on violations of procedural merger control rules

Fine on Facebook for provision of incorrect and misleading information

On 29 August 2014, Facebook notified to the Commission its proposed acquisition of WhatsApp. The Commission reviewed the proposed transaction in relation to the markets for consumer communications services, social networking services and online advertising services and cleared the transaction unconditionally on 3 October 2014.

During the merger review, Facebook had stated - in both its notification and its reply to a Commission request for information - that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

On 18 May 2017, the Commission adopted a decision under article 14(1) EUMR imposing on Facebook a record fine of €110 million for providing incorrect and misleading information during the Commission's 2014 investigation. In particular, the Commission found that, contrary to Facebook's statements during the investigation, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014, and that Facebook staff were aware of such a possibility.

The fine imposed on Facebook is lower than it would otherwise have been as the company cooperated with the Commission and acknowledged that it had infringed the rules. The Commission further considered that the incorrect and misleading information provided by Facebook did not have an impact on the outcome of the 2014 decision approving the transaction.

This case is notable because it is the first time that the Commission has adopted a decision imposing a fine on a company for providing incorrect or misleading information since the entry into force of the EUMR in 2004 (it had previously imposed fines for similar violations under the old EU Merger Regulation[37] in accordance with different fine-setting rules).[38] The Commission previously conducted a similar investigation into Munksjö and Ahlstrom, as it had concerns about disparities between market share estimates provided in the merger notification file and those in the parties' pre-existing internal documents, but it closed its investigation finding that no breach had occurred.[39]

The Commission reportedly has a number of other cases in the pipeline.[40] This underlines the need for merging parties to check carefully the accuracy of the information they submit to the Commission and also to explain any discrepancies between that information and the information contained in pre-existing internal documents, which are also submitted to the Commission as part of the notification requirements.

SO to Altice for 'gun-jumping'

On 18 May 2017, the Commission sent an SO[41] to the multinational telecoms company Altice for implementing its takeover of PT Portugal prior to the notification of the proposed takeover to the Commission on 25 February 2015, and prior to the Commission's clearance decision on 20 April 2015,[42] in breach of the obligation of prior notification of a concentration and the standstill obligation under articles 4(1) and 7(1) EUMR, respectively.[43]

In particular, the Commission alleges that a purchase agreement between the two companies enabled Altice to exercise decisive influence over PT Portugal before the deal was notified to, and approved by, the Commission. In Commissioner Vestager's words, the Commission's preliminary conclusion is that Altice crossed the line in terms of what is allowed prior to a clearance decision as it

> gave instructions [to PT Portugal] on how to handle commercial issues, such as contract negotiations. And it also seems to have been given sensitive information. Information that only PT Portugal's owner should have had - and without any safeguards to stop it misusing that information.[44]

The Commission further notes in its press release that it considers 'gun-jumping' to be a 'very serious infringement' as it undermines the effective functioning of the EU merger control system.

Altice, which faces a fine of up to 10% of its annual global turnover for the alleged infringement, has announced[45] that it does not agree with the Commission's preliminary views and that it will submit a full response contesting all the Commission's objections.

It should be noted that, in November 2016, Altice received a fine of €80 million from the French Competition Authority (FCA) for 'gun-jumping' in the context of its proposed acquisitions of SFR and OTL, which were concluded in 2014. In particular, the FCA found that the parties had started to integrate and share competitively sensitive information before receiving the FCA's approval.[46] The FCA decision has received some criticism for going too far, in that it questions the validity of some SPA clauses and M&A practices which are standard market practice aimed at protecting the interests of the buyer. It remains to be seen whether the Commission will take as strict an approach in the *Altice/PT Portugal* case as that adopted by the FCA.

Procedural breaches in the spotlight of the Commission and national competition authorities

The Commission decisions described above send a clear message to companies that the Commission remains committed to protect the integrity of the EU merger control procedure and is increasing the level of scrutiny of procedural breaches during the review process.

Based on recent statements by Commissioner Vestager,[47] the Commission is currently revisiting a small number of past merger cases (apparently fewer than five) to determine whether the companies involved submitted incorrect or misleading information or infringed other procedural obligations under the EUMR.[48] According to Commissioner Vestager, the Commission needs to adopt a strict approach towards such infringements because 'these obligations are what makes it possible [for the Commission] to do [its] job.'[49]

National competition authorities (NCAs) and national courts also appear to be vigilant in relation to procedural breaches of their own merger control rules. For instance, in addition to the fine imposed on Altice by the FCA for 'gun-jumping' (mentioned above), the Danish Competition Council found that KPMG Denmark's termination of an existing cooperation agreement with KPMG International amounted to early implementation of its merger with Ernst & Young.[50] The case was brought before a Danish national court which made a reference for a preliminary ruling to the ECJ.[51] The Commission's decision in *Altice/PT Portugal* and the ECJ's preliminary ruling on the Danish Court's reference are expected to shed some light on what type of pre-completion conduct amounts to infringing 'gun-jumping' rules and what actions constitute permitted transition planning aimed at preserving the value of the target pre-completion.

In addition, on 2 May 2017 the Hungarian competition authority imposed a fine of approximately €242,000 on Infineon and reversed the clearance decision for its acquisition of Wolfspeed, on the ground that Infineon provided misleading information (which came to light as a result of conflicting information provided to the US Federal Trade Commission (FTC)).[52]

It is therefore clear that procedural rules in the context of merger control do matter for the Commission and NCAs. The recent enforcement actions at EU and national level emphasise the need for companies to be particularly diligent as regards their procedural obligations. If they breach these obligations, they might be faced with significant fines (or even with revocation of the clearance decision), even a long time after their transaction has been approved by the Commission/NCAs.

GC annuls the Commission decision blocking UPS/TNT transaction on due process grounds

On 7 March 2017, the GC annulled[53] the Commission decision prohibiting the acquisition of TNT Express by United Parcel Services (UPS).[54]

In particular, the GC found that the Commission's econometric analysis was based on an econometric model different from that which had been the subject of an exchange of views during the administrative procedure, as the Commission made non-negligible changes to the analyses previously discussed with UPS. In view of those changes, the Commission was required to communicate the final econometric analysis model to UPS before adopting its decision and, by failing to do so, the GC found that it had infringed UPS' rights of defence.[55]

In particular, the GC took the view that during the administrative procedure, UPS might have been better able to defend itself if it had had at its disposal, before the adoption of the relevant decision, the final version of the econometric model chosen by the Commission.[56, 57] According to the GC, this conclusion could not be challenged by the Commission's argument that its findings were also based on qualitative analysis (in addition to the econometric model), as the Commission expressly acknowledged that, in the context of its investigation, econometric-based arguments (inter alia) had already successfully countered qualitative analysis.[58]

It should be noted that the GC acknowledged the necessity for speed in the context of the merger control proceedings.[59] However, on the facts, it found that the econometric analysis was finalised over two months before the Commission adopted its decision and therefore, the Commission should have, at the very least, communicated its essential elements to UPS.[60]

The GC therefore annulled the Commission decision in its entirety without examining the other pleas in law put forward by UPS. The judgment sends a strong signal that the GC requires transparency in the use of economic evidence by the Commission; if the Commission uses econometric evidence against the parties, it should provide them with an opportunity to review and comment on all its essential elements (even at a late stage in the proceedings). More generally, the judgment underlines the importance the GC places on the parties' rights of defence during Commission proceedings, even in merger control cases where the deadlines are very tight.

The Commission is therefore likely to take greater care in the future as regards the disclosure of its econometric modelling to the parties. It is, however, unclear whether it might be deterred from relying on economic models in cases where the need for disclosure conflicts with the necessity for speed under the EUMR.

The Commission has appealed the judgment before the ECJ and the case is pending.[61]

Substantive developments

Continued focus on innovation

Introduction

Following on from previous years,[62] the Commission continued its focus on innovation as a substantive concern in merger control analysis. Of particular interest is the Commission decision in *Dow/DuPont*,[63] in which the Commission applied what is widely viewed as a novel theory of harm: reduction in innovation which is not product-specific.

The *ASL/Arianespace*[64] decision is also noteworthy as the Commission found that, where merging parties operate on neighbouring markets, reduction in innovation can be caused by information flows between the parties post-transaction.

Finally, the Commission decisions in *Abbott Laboratories/St Jude Medical*[65] and *Boehringer Ingelheim/Sanofi Animal Health Business*[66] are in line with the Commission's approach in recent years; namely that where one party is already active on the market and the other is either about to launch a competing product or such product is in the later stages of development, a divestment package remedying the overlap will often be necessary for the parties to secure approval.

Dow/DuPont

One of the Commission's concerns in *Dow/DuPont* was that the merger would significantly reduce innovation competition for pesticides. Unlike in previous cases,[67] the Commission did not stop with the analysis of identifiable overlapping pipeline

products - instead, it went on to investigate more generally the impact of the merger on the parties' incentives for innovation in pesticides. The Commission found that the merged entity would have lower incentives and ability to innovate in this market than Dow and DuPont separately, and that the three other remaining players, in what is an industry with high barriers to entry, would not provide a sufficient competitive constraint. The transaction was eventually approved but only after the parties offered to divest a substantial part of DuPont's existing pesticides business and its entire R&D function.

The Commission's approach in *Dow/DuPon*t has been described as 'crystal ball gazing'[68] and has been criticised on the basis that the assessment as to whether innovation will be reduced in a given market as a whole (rather than in relation to specific pipeline products) inevitably involves uncertainties, and therefore presents significant methodological difficulties. However, it might be the case that the Commission was more willing to assess general harm to innovation in *Dow/DuPont* (than it would have been in other similar cases) because in the course of its investigation it found specific evidence that post-transaction the merged entity would have cut back on the amount Dow and DuPont would otherwise have spent on developing innovative products. It therefore remains to be seen how widely this approach will be applied in future cases.

The decision will be of most interest to companies in R&D intensive sectors, such as pharmaceuticals and agrochemicals, which are likely to see their mergers being scrutinised even more carefully in the future. This will be particularly the case with mergers between two R&D originators, where the new theory of harm is most likely to apply.

ASL/Arianespace

This case concerned the acquisition by ASL, a joint venture between Airbus and Safran, of Arianespace. Of relevance to the decision was that Arianespace, a provider of satellite launch services, and Airbus, a manufacturer of satellites and of components used by launch service providers, operated on neighbouring markets. The Commission was concerned that the transaction could give rise to flows of sensitive information between Arianespace and Airbus concerning their respective competitors, which could, in turn, result not only in less competitive tenders but also in less innovation in the markets for satellites and launch services. The transaction was approved subject to the parties' commitments to put in place procedures preventing any such information exchanges (eg, adequate firewalls and restrictions on the moving of employees between the two companies).

Abbott Laboratories/St Jude Medical

One of the Commission's concerns in *Abbott Laboratories/St Jude Medical* related to horizontal overlaps on the transseptal sheaths market. Prior to the merger, St Jude was the leader on this market, while Abbott had developed a product, Vado, which had the potential to become a strong competitor and challenge St Jude's position. The Commission had concerns that Abbott would abandon the launch of Vado after the transaction and only approved it after Abbott offered to sell the whole of the Vado business to a suitable purchaser.

Boehringer Ingelheim/Sanofi Animal Health Business

In *Boehringer Ingelheim/Sanofi Animal Health Business*, the Commission identified a number of biologicals and pharmaceuticals markets where one of the parties was a strong player, while the other was either a competitor or a potential competitor, as it was developing a product in order to enter the market. Given the limited number of other players in those markets, the Commission concluded that the elimination of one of the merging parties would harm competition. To address the Commission's concerns, the parties agreed to divest the target's overlapping products, including pipeline products.

The role of data - Microsoft/LinkedIn

The treatment of 'big data' within competition law has been a hot topic recently, and the Commission had further opportunity to consider this topic in *Microsoft/LinkedIn*, which it cleared with commitments in December 2016.[69] There were limited horizontal overlaps between Microsoft's wide range of IT products and LinkedIn's products, primarily its social network. The Commission focused principally on conglomerate issues, in particular professional social network services, customer relationship management software solutions, and online advertising services. It ultimately dismissed concerns directly relating to data.

In its assessment of horizontal overlaps in online advertising services, the Commission acknowledged that the relevant national data protection rules constrained the merging parties, and considered two possible data-related theories of harm: that in a hypothetical market for the supply of data, the merger would lead to an increase in market power or barriers to entry/expansion; and that existing competition based on data may be eliminated. The Commission dismissed these theories as:

- the parties did not generally make available their data to third parties in the relevant markets;
- combination of their datasets did not appear to raise barriers as ‘there will continue to be a large amount of internet user data that are valuable for advertising purposes and that are not within Microsoft's exclusive control'; and
- the parties are small players in the relevant market.[70]

The Commission also considered data in the context of conglomerate effects, based on a potential concern that, post-transaction, the merged entity could foreclose competing suppliers of customer relationship management (CRM) software solutions by leveraging its market position in the sales intelligence solutions to the CRM software solutions market. The Commission dismissed this concern in particular as there were numerous alternative providers of comparable databases and so Microsoft would not have sufficient market power; in addition, the pool of customers purchasing both products was not large enough for the risk of foreclosure to arise.

A further big data-related aspect of the case was the Commission's analysis of whether LinkedIn data could be a key input to advanced functionalities in CRM software solutions through machine learning, and whether post-transaction Microsoft could hinder innovation by restricting access to it. The Commission rejected this also, in particular as all major CRM providers offered (or planned to offer) such functionalities without access to LinkedIn's data (other data was available). The Commission also noted that LinkedIn did not have significant market power in the provision of such data; and data protection laws were likely to hinder any attempt to utilise the data.

The Commission also found that Microsoft was particularly strong in the provision of productivity software (with its Office products) and considered whether Microsoft could restrict competing software providers' access to LinkedIn's data for machine leaning, thus hindering innovation. This was also rejected in particular as:

- even if a hypothetical upstream market for the provision of data for the purposes of machine learning in productivity software were established, LinkedIn's market share would be limited given that various types of data may be used for machine learning;
- moreover, LinkedIn did not currently license the data; and
- in addition, data protection laws were a potential source of restraint on Microsoft's use of the data.[71]

Brexit and merger control

Impact of Brexit on EU and UK merger control

The UK's impending exit from the EU is expected to bring about numerous changes to EU and UK merger control.

The main practical implication is likely to be parallel notifications in the EU and the UK, as, once the UK is no longer a member state, the ‘one-stop shop' regime introduced by the EUMR will no longer apply to transactions which are notifiable to the UK. This could further increase burden and costs for companies, in particular in view of the level of UK merger fees and the longer time frames for UK merger control clearance. Moreover, it cannot be excluded that the parallel investigations of the Commission and the UK Competition and Markets Authority (CMA) might lead to divergent decisions in the UK and the EU. In this regard, it remains to be seen whether the Commission and the CMA will enter into any enhanced cooperation arrangements enabling them to take advantage of each other's information gathering or to engage in some form of coordination in relation to information requests or remedies.

Since the CMA has the ability to select non-notified mergers to review, it is likely that, for legal certainty purposes, many companies will choose to notify in the UK. An increase in the number of mergers reviewed by the CMA may possibly be expected (which, based on conservative estimates, is likely to be of over 50%), which could have a significant impact on the CMA's resources. The CMA might therefore look at adjusting the merger control thresholds or the timelines in the long term. Accordingly, it is possible that there might be a decrease in the number of mergers reviewed by the Commission (as regards transactions where the UK turnover of the parties is significant).

As regards the substantive assessment of merger cases, Brexit may well not have a significant impact on the CMA's competition analysis. However, once the UK is no longer bound by the EUMR, there will be greater scope for the UK competition authorities to intervene in mergers on public interest or industrial policy grounds. Currently, once a transaction qualifies under the EUMR, the UK can only intervene in limited circumstances on the grounds set out in article 21(4) EUMR (public security, plurality of the media, prudential rules and any other public interests requiring approval by the Commission on a case by case basis). This provision has been applied successfully in only very few cases to date.[72] The UK government has already announced its intention to adopt legislation in order to increase its powers to review mergers on public interest grounds not related to competition, and to give it greater control over foreign ownership, in particular in respect of critical infrastructure.[73] The CMA has already weighed in on this debate by supporting a focused competition regime.[74, 75]

In the short term, detailed transitional arrangements will be necessary to determine the appropriate cut-off point for disapplication of the EUMR (eg, whether this should be the date of the signing of the deal, the date of the submission of the case allocation request to the Commission or the date of the notification) as well as the treatment of pending merger cases (eg, as regards the companies' appeals before the EU Courts).[76]

At the time of writing this article, the terms of the UK's relationship with the EU post-Brexit remain highly uncertain. It is clear that the implications of Brexit for merger control will depend largely on the model that would form the basis of the UK's relationship with the EU and therefore, the full implications may not emerge for several months or even more than a year. Companies are therefore advised to remain alert and closely monitor developments in this area.

Notes

1. This article aims to provide an overview of the main EU merger control developments in 2016/2017. The contents of this article are for reference purposes only: they do not constitute legal advice and should not be relied upon as such. All views expressed are personal. The authors would like to thank Eleanor Gerrans (trainee solicitor, Herbert Smith Freehills LLP, Brussels) for her helpful research and input.
2. See DG Competition, Merger statistics (up to 31 May 2017), available at: http://ec.europa.eu/competition/mergers/statistics.pdf.
3. As regards the prohibition decision, see Commission decision of 11 May 2016 in Case COMP/M.7612 *Hutchison 3G UK/Telefónica UK*.
4. Commission decision of 11 May 2016 in Case COMP/M.7612 *Hutchison 3G UK/Telefónica UK*.
5. Commission decision of 29 March 2017 in Case COMP/M.7995 *Deutsche Börse/London Stock Exchange Group*.
6. Commission decision of 5 April 2017 in Case COMP/M.7878 *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia*.
7. See Grant Thornton, European M&A activity, 'Deal activity dipped in 2016 amidst political uncertainty and upheaval, but fresh opportunities are emerging', 2 December 2016, available at: www.grantthornton.global/globalassets/1.-member-firms/global/insights/article-pdfs/2016/european-ma-activity.pdf. See also *GCR*, 'EU Merger Control in 2015/6: a year of complex deals', 20 July 2016, available at: http://globalcompetitionreview.com/chapter/1067819/eu-merger-control.
8. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24, 29.01.2004, p.1-22, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en.
9. Speech of Commissioner Vestager at the Studienvereinigung Kartellrecht, Brussels, 10 March 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en.
10. Commission decision of 17 May 2017 in Case COMP/M.8228 *Facebook/WhatsApp* (Art. 14.1 proc.).
11. Case COMP/M.7993 *Altice/PT Portugal* (Art. 14.2 proc.); see Commission press release IP/17/1368 of 18 May 2017, available at: http://europa.eu/rapid/press-release_IP-17-1368_en.htm.
12. Commission decision of 10 October 2016 in Case M.7878 *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia*, OJ C374, 13.10.2016, p.1.
13. Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, ECLI:EU:C:2017:322.
14. Case T-194/13 *United Parcel Service v Commission*, ECLI:EU:T:2017:144.
15. Commission decision of 27 March 2017 in Case COMP/M.7932 *Dow/DuPont*.
16. Case COMP/M.7724 *ASL/Arianespace*; see Commission Press Release IP/16/2591 of 20 July 2016, available at: http://europa.eu/rapid/press-release_IP-16-2591_en.htm.
17. Commission decision of 23 November 2016 in Case COMP/M.8060 *Abbott Laboratories/St Jude Medical*.
18. Commission decision of 9 November 2016 in Case COMP/M.7917 *Boehringer Ingelheim/Sanofi Animal Health Business*.
19. Commission decision of 6 December 2016 in Case COMP/M.8124 *Microsoft/LinkedIn*.
20. Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004 of 18 June 2009, COM(2009) 281 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0281&from=EN.
21. Commission Staff Working Document 'Towards more effective EU merger control' of 25 June 2013, SWD(2013) 239 final, available at: http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf.
22. White Paper 'Towards more effective EU merger control' of 9 July 2014, COM(2014) 449 final, available at: http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf.
23. Evaluation of procedural and jurisdictional aspects of EU merger control, consultation strategy, available at: http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_strategy_en.pdf; see also Evaluation roadmap, Evaluation of procedural and jurisdictional aspects of EU merger control, 3 August 2016, available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_comp_003_evaluation.pdf.

24. Commission decision of 3 October 2014 in Case COMP/M.7217 *Facebook/WhatsApp*.
25. The transaction was notifiable in three member states. However, the parties submitted to the Commission a referral request pursuant to article 4(5) EUMR. Since none of the member states competent to review the transaction expressed its disagreement, the Commission ultimately examined the transaction.
26. See also International Bar Association (IBA) response to the Commission consultation, 'Submission to the Directorate-General for Competition of the Commission of the European Union regarding the consultation on evaluation of procedural and jurisdictional aspects of EU merger control', 13 January 2017, available at: www.ibanet.org/Document/Default.aspx?DocumentUid=6E3C715B-07AD-46B0-8613-F88A8190F476. See also HSF response to the Commission consultation 'Evaluation of procedural and jurisdictional aspects of EU merger control', 13 January 2017, available at: http://sites.herbertsmithfreehills.vuturevx.com/20/13209/landing-pages/e-questionnaire-herbert-smith-freehills-llp-response---commission-consul....pdf; and Annex 1 to the response 'Jurisdictional thresholds (section IV.2)', 13 January 2017, available at: http://sites.herbertsmithfreehills.vuturevx.com/20/13209/landing-pages/annexes-on-jurisdictional-thresholds--referrals-and-technical-aspects---....pdf.
27. Speech of Commissioner Vestager at the Studienvereinigung Kartellrecht, Brussels, 10 March 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en.
28. At the request of the parties, the Commission referred the Hungarian part of the transaction to the Hungarian competition authority and focused its investigation only on the acquisition of Cemex's Croatian assets. The Commission did not receive a request for referral for any other part of the transaction, including Croatia.
29. Commission decision of 10 October 2016 in Case M.7878 *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia*, OJ C374, 13.10.2016, p.1.
30. Case T-902/16 *HeidelbergCement v Commission*, OJ C53, 20.02.2017, p.49 and *Case T-907/16 Schwenk Zement v Commission*, OJ C63, 27.02.2017, p.45.
31. Commission Consolidated Jurisdictional Notice under Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C95, 16.04.2008, p.1-48, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)&from=EN.
32. Commission press release IP/17/883 of 5 April 2017, available at: http://europa.eu/rapid/press-release_IP-17-883_en.htm.
33. Opinion of Advocate General Kokott in Case C-248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, ECLI:EU:C:2017:322.
34. Ibid, point 44.
35. Ibid, point 31.
36. Ibid, point 22.
37. Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1-12, available at: https://publications.europa.eu/en/publication-detail/-/publication/22f2e094-c50c-464f-8032-2335c888db19/language-en.
38. See Commission Decision of 28 July 1999 in Case COMP/M.1543 *Sanofi/Synthélabo* (article 14 proc.); Commission Decision of 14 December 1999 in Case COMP/M.1608 KLM/Martinair (article 14 proc.); Commission Decision of 14 December 1999 in Case COMP/M.1610 *Deutsche Post/Trans-o-Flex* (article 14 proc.); Commission Decision of 14 July 2000 in Case COMP/M.1634 Mitsubishi Heavy Industries (article 11 and article 14 proc.); Commission Decision of 19 June 2002 in Case COMP/M.2624 BP/Erdölchemie (article 14 proc.); and Commission Decision of 7 July 2004 in Case No COMP/M.3255 Tetra Laval/Sidel (article 14 proc.).
39. See Case COMP/M.7191 Munksjö/Ahlstrom (article 14.1 proc.) and Commission Press Release IP/14/1222 of 29 October 2014, available at: http://europa.eu/rapid/press-release_IP-14-1222_en.htm.
40. For instance, it has been reported that General Electric recently confirmed that the Commission has opened an investigation into the possible provision of misleading information by General Electric in relation to its proposed takeover of LM Wind Power, which received unconditional clearance (see Commission decision of 20 March 2017 in Case COMP/M.8283 *General Electric Company/LM Wind Power Holding*); see MLex Insight 'GE could be in EU crosshairs for LM Wind Power Transaction' of 22 May 2017, available at: www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=889412&siteid=190&rdir=1.
41. Case COMP/M.7993 *Altice/PT Portugal* (Article 14.2 proc.); see Commission Press Release IP/17/1368 of 17 May 2017, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/17/1368.
42. Commission decision of 20 April 2015 in Case COMP/M.7499 *Altice/PT Portugal*.
43. In a number of previous cases, the Commission imposed significant fines on merging parties for failure to notify and obtain clearance for a transaction prior to completion; see eg, Commission decision of 23 July 2014 in Case COMP/M.7184 *Marine Harvest/Morpol* (article 14.2 proc.) and HSF e-bulletin 'Risks of non-compliance with EU merger control rules: EU Commission fines Marine Harvest €20 million' of 23 July 2014, available at: http://sites.herbertsmithfreehills.vuturevx.com/46/7830/compose-email/risks-of-non-compliance-with-eu-merger-control-rules--eu-commission-fines-marine-harvest--20m-for--gun-jumping-.asp. See also Commission decision of 10 June 2009 in Case COMP/M.4994 *Electrabel/Compagnie Nationale du Rhone*, upheld by the GC (Case T-332/09 *Electrabel v Commission*, ECLI:EU:T:2012:672) and the ECJ (Case C-84/13P Electrabel v Commission,

ECLI:EU:C:2014:2040) and HSF e-bulletin 'Risks of breach of EU merger control filing requirements: EU Court of Justice upholds €20 million fine imposed on Electrabel' of 3 July 2014, available at: http://sites.herbertsmithfreehills.vuturevx.com/46/7723/compose-email/risks-of-breach-of-eu-merger-control-filing-requirements--eu-court-of-justice-upholds--20-million-fine-imposed-on-electrabel.asp.
The prohibition on 'gun-jumping' also applies to implementation falling short of completion. The Commission has previously taken enforcement action in relation to such early implementation, but has not imposed fines to date (see eg, Commission press release IP/97/1062 of 1 December 1997, available at: http://europa.eu/rapid/press-release_IP-97-1062_en.htm?locale=en).

44. Speech of Commissioner Vestager, Romanian Competition Council Anniversary Event, Bucharest, 18 May 2017, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en.
45. See Altice's press release available at: http://altice.net/sites/default/files/pdf/20170518-alt-pr-european-commision-pt-portugal_0.pdf.
46. See HSF e-bulletin 'The Altice case: a costly warning not to engage in gun-jumping before receiving merger control clearance' of 10 November 2016, available at: http://sites.herbertsmithfreehills.vuturevx.com/46/12874/compose-email/the-altice-case--a-costly-warning-not-to-engage-in-gun-jumping-before-receiving-merger-control-clearance.asp.
47. See MLex Insight 'Vestager says EU is scrutinizing data submissions in 'handful of mergers', 27 March 2017, available at: www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=876735&siteid=190&rdir=1.
48. The authors note that on 6 July 2017 the Commission announced that it had sent three separate SOs to Merck and Sigma-Aldrich; General Electric; and Canon, alleging that they breached the EUMR procedural rules: General Electric, and Merck and Sigma-Aldrich by providing incorrect or misleading information; and Canon by implementing a merger before notification and clearance (see Commission press release IP/17/1924 of 6 July 2017, available at: http://europa.eu/rapid/press-release_IP-17-1924_en.htm). These developments took place between finalising and publication of this article and therefore they are not discussed herein in more detail.
49. Speech of Commissioner Vestager, Romanian Competition Council Anniversary Event, Bucharest, 18 May 2017, available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en.
50. See MLex Insight 'KPMG Denmark, EY 'gun-jumping' case reaches EU court', 14 December 2016, available at: www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=851421&siteid=190&rdir=1.
51. Case C-633/16 Ernst & Young P/S v Konkurrenceråd, OJ C46, 13.02.2017, p.19.
52. See Hungarian Competition Authority press release, available at: http://gvh.hu/data/cms1036207/Vj015_2017_m.pdf (in Hungarian).
53. Case T-194/13 United Parcel Service v Commission, ECLI:EU:T:2017:144.
54. Commission decision of 30 January 2013 in Case COMP/M.6570 UPS/TNT Express.
55. Ibid, paragraphs 205-210.
56. Ibid, paragraph 215.
57. The GC noted in paragraph 210 of its judgment that 'the contested decision should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the contested decision would have been different in content, but that there was even a slight chance that it would have been better able to defend itself'.
58. Ibid, paragraphs 216-217.
59. Ibid, paragraph 219.
60. Ibid, paragraph 220.
61. Case C-265/17P Commission v United Parcel Service.
62. See *GCR*, EU Merger Control in 2015/6: a year of complex deals, 20 July 2016, available at: http://globalcompetitionreview.com/chapter/1067819/eu-merger-control.
63. Case COMP/M.7932 *Dow/DuPont*; see Commission Press Release IP/17/772 of 27 March 2017, available at: http://europa.eu/rapid/press-release_IP-17-772_en.htm.
64. Case COMP/M.7724 ASL/Arianespace; see Commission Press Release IP/16/2591 of 20 July 2016, available at: http://europa.eu/rapid/press-release_IP-16-2591_en.htm.
65. Commission decision of 23 November 2016 in Case COMP/M.8060 in *Abbott Laboratories/St Jude Medical*.
66. Commission decision of 9 November 2016 in Case COMP/M.7917 in *Boehringer Ingelheim/Sanofi Animal Health Business*.
67. See eg, Commission decision of 28 January 2015 in Case COMP/M.7275 *Novartis/GlaxoSmithKline Oncology Business* (discussed in *GCR* 'EU Merger Control in 2015/6: a year of complex deals', 20 July 2016, available at: http://globalcompetitionreview.com/chapter/1067819/eu-merger-control).
68. See also *Financial Times*, 'M&A playbook: how to get the EU to approve a takeover', 17 April 2017, available at: https://www.ft.com/content/64b13eae-1ef0-11e7-a454-ab04428977f9, and in particular Kyriakos Fountoukakos' statement that '[I]nnovation is a hot, and controversial, topic, with some people saying the commission is engaging in 'crystal ball gazing'.
69. Commission decision of 6 December 2016 in Case COMP/M.8124 *Microsoft/LinkedIn*.

70. Ibid, paragraphs 176-181.
71. Ibid, paragraphs 370-381.
72. See eg, Commission decision of 21 December 1995 in Case IV/M.567 *Lyonnaise des Eaux/Northumbrian Water*, where the Commission accepted the UK's legitimate interest in complying with the Water Industry Act 1991.
73. See 'Government confirms Hinkley Point C project following new agreement in principle with EDF', Department for Business, Energy and Industrial Strategy press release of 15 September 2016, available at: https://www.gov.uk/government/news/government-confirms-hinkley-point-c-project-following-new-agreement-in-principle-with-edf. The UK government has been expected to consult on its proposals for the new controls for some time (in view of the uncertainty surrounding the outcome of the general election on 8 June 2017, it is unclear whether and when this consultation will take place). See also 'July 11, 2016 Speech by Theresa May, launching her national campaign to become Leader of the Conservative Party and Prime Minister of the United Kingdom of 11 July 2016', available at: www.wlrk.com/docs/TheresaMayJuly11Speech.pdf, where, as part of her campaign to become Prime Minister, Theresa May stated that '[A] proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain.'
74. See speech by Andrea Coscelli 'The CMA and its place in a changing world', 4 February 2017, available at: https://www.gov.uk/government/speeches/andrea-coscelli-on-the-cmas-role-as-the-uk-exits-the-european-union.
75. Members of the EU Parliament have recently called for the creation of a European Committee on Foreign Investment, which would be entrusted with reviewing acquisitions of EU companies by foreign persons in strategic sectors, including energy, transport, telecommunications, health and water (see MLex Insight 'Foreign mergers, acquisitions, need more EU vetting, politicians say', 21 March 2017, available at: www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=875420&siteid=190&rdir=1). It seems, however, that the Commission is not ready to engage with such initiatives and therefore, control of foreign direct investment at the EU level is not (at least for the time being) on the Commission's agenda (see MLex Insight 'EU notes foreign-takeover concerns, but warns against new vetting powers', 10 May 2017, available at: www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=887030&siteid=190&rdir=1).
76. For further analysis on the impact of Brexit on UK competition law, see Brexit Competition Law Working Group (BCLWG) 'Provisional conclusions and recommendations on the implications of Brexit for UK competition law and policy', April 2017, available at: www.bclwg.org/wp-content/uploads/2017/04/BCLWG-Provisional-Conclusions-and-Recommendations-FINAL.pdf; and City of London Law Society, Competition Law Committee, Brexit Working Party 'The implications of Brexit for UK Competition Law: Practical issues and priorities', 3 March 2017, available at: www.citysolicitors.org.uk/attachments/category/108/Brexit%20implications%20for%20UK%20Competition%20Law.pdf.

Previous Chapter:European Union: Joint Ventures

Next Chapter:European Union: Pharmaceuticals

The European, Middle Eastern and African Antitrust Review 2018

European Union

Austria

1. Austria: Federal Competition Authority
2. Austria: Overview

Belgium

1. Belgium: Competition Authority

Croatia

1. Croatia: Competition Agency

Cyprus

1. Cyprus: Commission for the Protection of Competition

Denmark

1. Denmark: Competition and Consumer Authority
2. Denmark: Overview
3. Denmark: Merger Control

France

1. France: Competition Authority
2. France: Merger Control

Germany

1. Germany: The Federal Cartel Office
2. Germany: Merger Control
3. Germany: Private Antitrust Litigation

Greece

1. Greece: Hellenic Competition Commission
2. Greece: Overview

Hungary

1. Hungary: Competition Authority

Ireland

1. Ireland: Competition and Consumer Protection Commission

Italy

1. Italy: Competition Authority
2. Italy: Cartels

Latvia

1. Latvia: Competition Council

Lithuania

1. Lithuania: Competition Council

2. Lithuania: Overview

Luxembourg

1. Luxembourg: Competition Council

Moldova

1. Moldova: Competition Authority

Netherlands

1. Netherlands: Authority for Consumers and Markets
2. Netherlands: Private Antitrust Litigation

Norway

1. Norway: Competition Authority
2. Norway: Overview

Poland

1. Poland: Office of Competition and Consumer Protection

Portugal

1. Portugal: The Portuguese Competition Authority
2. Portugal: Overview

Romania

1. Romania: Overview

Russia

1. Russia: Federal Antimonopoly Service

Slovenia

1. Slovenia: Overview

Spain

1. Spain: National Authority for Markets and Competition

Sweden

1. Sweden: Competition Authority

Switzerland

1. Switzerland: Overview

Turkey

1. Turkey: Cartels
2. Turkey: Dominance

3. Turkey: Merger Control

Ukraine

1. Ukraine: Merger Control

United Kingdom

1. United Kingdom: Competition and Markets Authority
2. United Kingdom: Cartel Enforcement
3. United Kingdom: Telecoms

COMESA

1. COMESA: Competition Commission

Egypt

1. Egypt: Competition Authority

Israel

1. Israel: Antitrust Authority
2. Israel: Overview

Jordan

1. Jordan: Competition Directorate

Mauritius

1. Mauritius: The Competition Commission of Mauritius.

Mozambique

1. Mozambique: Overview

Zambia

1. Zambia: Competition and Consumer Protection Commission