Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2024 – Ukraine

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2024 marked the third year in which the Antimonopoly Committee of Ukraine (***AMCU***) exercised its statutory powers amid the challenges of the full-scale war. Yet, as of 2025, the regulator has demonstrated remarkable agility, remaining fully operational – reviewing merger control notifications, commencing investigations, issuing decisions, as well as dedicating significant efforts to aligning Ukrainian competition law with that of the European Union (***EU***).

In this blog post, we provide a summary of the year's key developments. We begin with fine statistics and enforcement trends, highlight priority sectors targeted by the regulator, and review merger control activity. We then examine enforcement in areas such as bid rigging, unfair competition, and informational violations; spotlight the first-ever application of the leniency procedure; and summarize the AMCU's efforts in state aid control and competition law reform. Finally, we outline the AMCU's enforcement priorities and provide an outlook for 2025.

Fine Statistics

Throughout 2024, the regulator issued *1,146 decisions* on violations of Ukrainian competition law, imposing fines totaling just over *UAH 1 bln.* (approx. *EUR 23 mln.*). Of the UAH 1 billion in fines imposed by the regulator in 2024, nearly 90% stemmed from two types of violations: anticompetitive concerted practices and gun jumping. Notably, bid rigging accounted for 100% of the total fines imposed for anticompetitive concerted practices. The AMCU also investigated 47 gun-jumping cases, representing 10% of the total fines imposed. Violations related to unfair competition, informational violations, and abuse of dominance accounted for 5.2%, 2.9%, and 2.8% of the total fines, respectively.

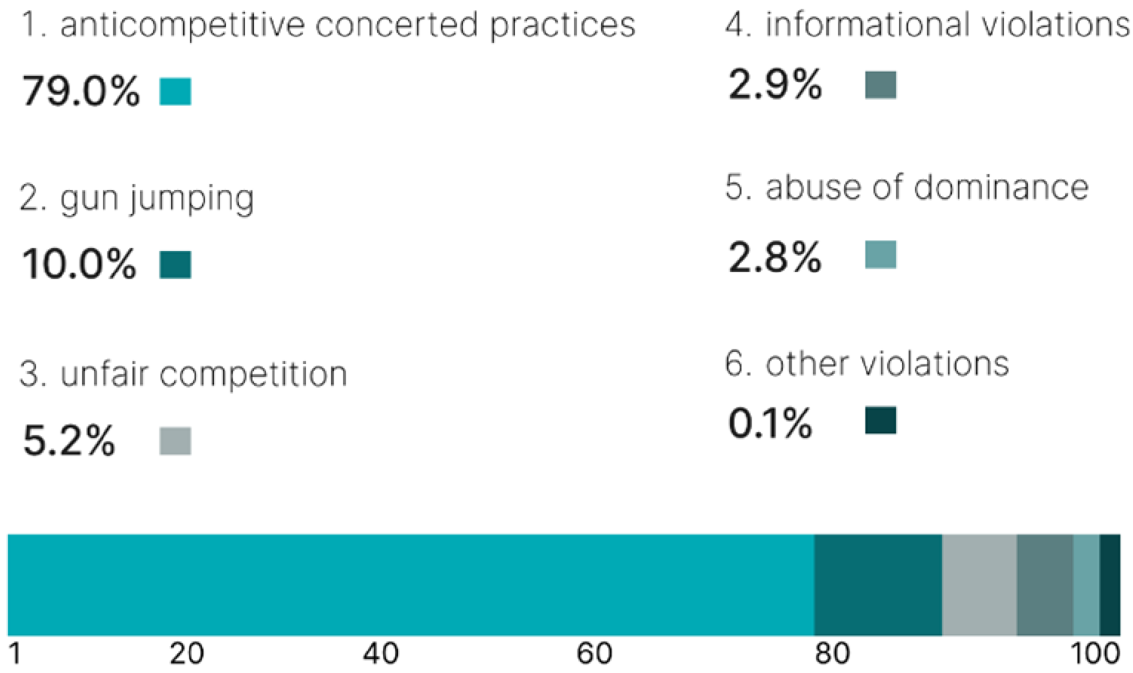

Figure 1. *Breakdown of the AMCU fines by Type of Violation*

Sectors Targeted by the AMCU

Throughout 2024, the regulator enforced Ukrainian competition law across a broad range of industries, namely:

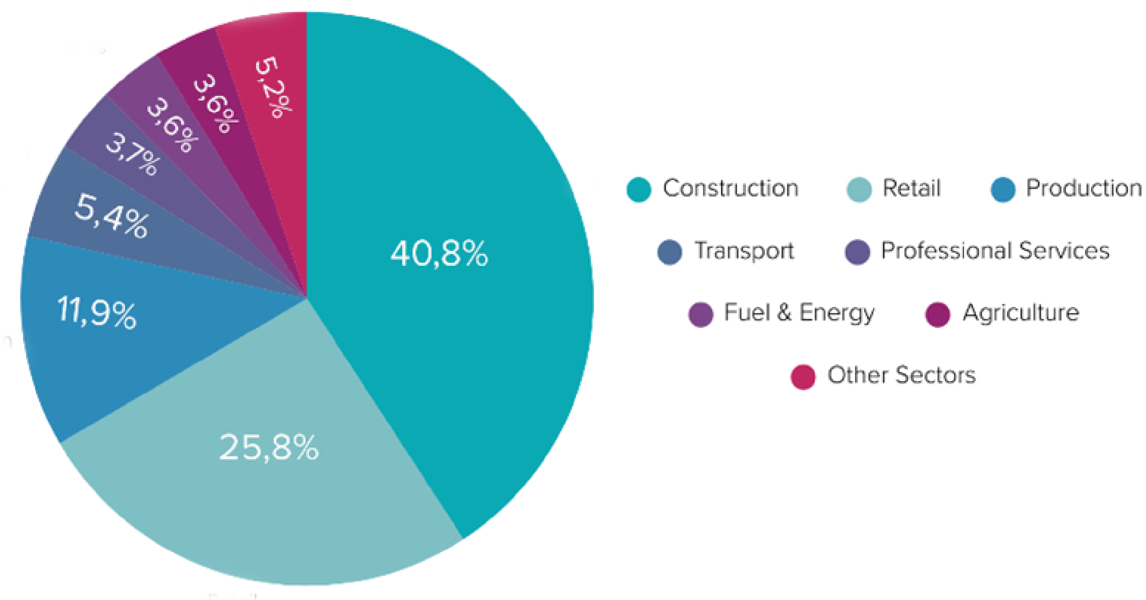

Figure 2. *Sectors at the AMCU's Spotlight in 2024*

Merger Control

The AMCU was busy with merger control reviews in 2024, having reviewed *496 notifications*, of which:

- *364* were processed and resulted in merger clearances;
- *131* were either rejected due to non-compliance with formal requirements or withdrawn by the parties on their own initiative. It is worth noting, however, that most of the rejected notifications were subsequently rectified and resubmitted by the parties, ultimately receiving merger clearance and contributing to the total of *364* approved mergers [1];
- *1* case was closed without a decision on the merits.

The majority of clearances (*306 out of 364*) were granted in *Phase I* as the respective mergers posed no threat to domestic competition. Competition concerns, however, were identified in *11 cases*, which were ultimately cleared in *Phase II* following an in-depth review by the AMCU – *4* of these were subject to remedies. The remaining *47 clearances* were issued in gun-jumping cases, where transactions were completed without prior AMCU's clearance, but the parties voluntarily submitted their filings to the regulator post-closing.

Also, in 2024, the AMCU issued 51 preliminary conclusions on mergers. These are issued in response to specific notifications and reflect the AMCU's initial assessment of whether a transaction requires merger clearance and whether such clearance is likely to be granted.

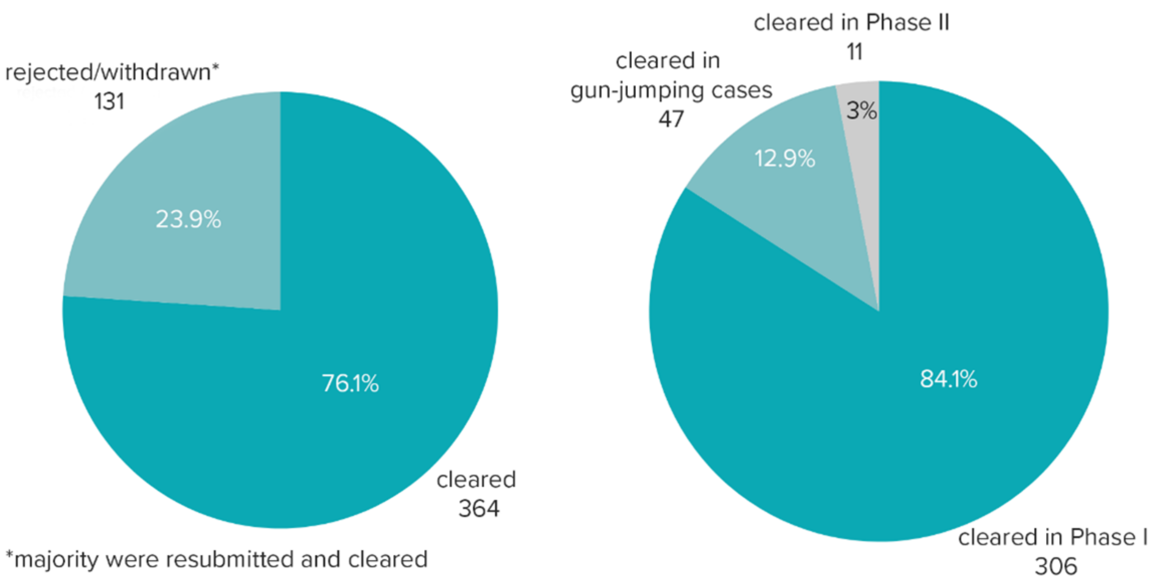

Figure 3. *2024 Merger Control Statistics*

Notable Mergers

The largest transactions by value cleared in *Phase I* by the AMCU in 2024 included:

- *$8.5 billion* merger of Reliance Industries' and Walt Disney's Indian media assets;
- *$4 billion* acquisition of Broadcom's End-User Computing Division by KKR;

- *$3.6 billion* merger of Berry Global's Health, Hygiene and Specialties Global Nonwovens and Films business with Glatfelter.

Out of deals having appreciable nexus in Ukraine, the following are worth mentioning:

- ***Merger of Bunge and Viterra***. The AMCU's assessment focused on two markets: agricultural products and the transshipment of vegetable oil at the Mykolaiv port. Regarding the first market, the AMCU concluded that the parties' combined market shares were moderate and the market itself was highly competitive. As for the second market, the regulator noted that the importance of the Mykolaiv port had declined following the beginning of the full-scale war in Ukraine in February 2022. This led to a shift in demand to other ports, along with a decrease in the volumes of oil production and transshipment. The AMCU concluded that the transaction would not result in monopolization or a restriction of domestic competition and, therefore, granted the clearance.
- ***Acquisition by MSC of Hamburger Hafen und Logistik AG and the Port of Hamburg.***
The AMCU concluded that the transaction could adversely affect competition in the container terminal of the Odesa seaport. To mitigate this risk, the regulator cleared the transaction subject to certain behavioral remedies imposed on the buyer, in particular, an obligation not to unjustifiably restrict third-party access to container terminal services and terminal's infrastructure. Access must be granted on fair market terms and with at least 30% of the terminal's annual available design capacity allocated accordingly.
- ***Acquisition by CRH of Dyckerhoff Cement Ukraine.*** The parties were close competitors with high market shares in the Ukrainian market for gray Portland cement. To prevent the monopolization of the market, the transaction was cleared subject to certain structural remedies, including:
(1) the divestiture of 25-28% of shares in Dyckerhoff Cement Ukraine (*Dyckerhoff*), along with certain veto rights, to an independent third party; (2) the appointment of only independent executives at Dyckerhoff; (3) the prohibition to unjustifiably refuse to supply cement to third parties, as well as the obligation to maintain existing production capacities; (4) the application of market-based pricing and fair contract terms to all cement buyers; (5) the prohibition to unjustifiably restrict third-party access to the cement market; and (6) the prohibition on clinker exports that would prevent fulfillment of third-party cement orders.

Gun Jumping

Local Transactions

In 2024, the AMCU imposed fines totaling *UAH 101.5 mln.* (*approx. EUR 2.3 mln.*) for gun-jumping violations. More than a half of that amount was imposed in the following local transactions:

- *UAH 37.3 mln.* (*approx. EUR 0.84 mln.*) fine for the acquisition of control by PJSC "Kyiv Cardboard and Paper Mill" over LLC "Autospetstrans-Kyiv Cardboard and Paper Mill," which took place back in 2017;
- *UAH 21.3 mln.* (*approx. EUR 0.48 mln.*) fine for the acquisition by LLC "Pulp Mill Print" of certain assets and entity of Blitz-Inform group, which took place back in 2019.

The regulator identified that the buyers in these transactions (PJSC "Kyiv Cardboard and Paper Mill" and LLC "Pulp Mill Print") belong to the same corporate group. Repeated violations by entities within the same group may be considered an aggravating factor by the regulator and could contribute to the imposition of higher fines.

Foreign-To-Foreign Transactions

Additionally, in 2024, the AMCU imposed fines for closing foreign-to-foreign transactions without the regulator's clearance:

- *UAH 4.5 mln.* (*EUR 0.11 mln.*) fine for the creation of a joint venture between Electricite de France, Nebras Power, Sojitz Corporation and Kyuden International Corporation;
- *UAH 2.5 mln.* (*EUR 0.06 mln.*) fine for the acquisition by Sika of control over MBCC;
- *UAH 0.47 mln.* (*EUR 0.01 mln.*) fine for the acquisition by YILFERT Holding of control over Rosier SA; and
- *UAH 0.05 mln.* (*EUR 0.001 mln.*) fine for the acquisition by Cheplapharm of control over certain pharmaceutical assets. [**2**]

Bid Rigging

In 2024, the AMCU continued its traditional focus on identifying bid-rigging violations – i.e., the distortion of results of bids, auctions, tenders, and public procurements – which constitute one of the types of anticompetitive concerted actions under Ukrainian competition law. Last year, the regulator issued *2,012 decisions* related to anticompetitive concerted actions, 100% of which being bid-rigging violations. The highest fine imposed for bid rigging during the year totaled *UAH 106 mln.* (*approx. EUR 2.4 mln.*).

It is worth mentioning that the AMCU has developed strong expertise in tackling this type of violation. In Ukraine, bid rigging is considered a *per se* violation, and thus the regulator is not required to prove a negative effect on domestic competition. Furthermore, fines for bid rigging may reach up to 10% of the annual turnover per violation; however, the most adverse consequence is not the fine, but rather the prohibition from participating in public procurements for the next three years.

Unfair Competition

In 2024, the AMCU identified *58 violations* of the Law of Ukraine "On Protection Against Unfair Competition" (***Unfair Competition Law***), with total fines amounting to *UAH 53.3 mln.* (*approx. EUR 1.2 mln.*). The highest fine imposed by the AMCU for unfair competition last year was *UAH 17.7 mln.* (*approx. EUR 0.4 mln*). Traditionally, the most frequent violation of the Unfair Competition Law in the country has been the dissemination of misleading information.

In 2024, the AMCU focused on identifying the dissemination of misleading information across three markets: mineral waters, dietary supplements, and cosmetic products. It is worth noting that the threshold for proving misleading information in Ukraine is relatively low, as the applicable legal test in Ukraine is based on the perspective of an average, unskilled consumer – someone who is presumed not to verify the accuracy of commercial claims and who relies primarily on their overall first impression.

Informational Violations

In 2024, the AMCU continued its active efforts to combat so-called informational violations – i.e., providing false, inaccurate, or incomplete information to the regulator in response to its request, or failing to submit the requested information altogether. The regulator reviewed *312 cases* of informational violations in 2024, with the most common being the failure to submit the requested information.

Nord Stream 2 Project–Related Case

The case stemmed from the AMCU's investigation into alleged anti-competitive agreements related to the Nord Stream 2 project (***Project***). The AMCU launched an investigation back in 2021, suspecting a gun-jumping violation committed by the Project participants – specifically, the failure to obtain prior concerted practice clearance from the regulator. As part of the investigation, the AMCU sent the requests to the Ukrainian subsidiaries of: (1) Engie Energy Management Holding Switzerland AG (***Engie***), (2) Shell Exploration and Production (LXXI) B.V. (***Shell***), and (3) Wintershall Nederland Transport and Trading B.V. (***Wintershall***) requesting to confirm or deny conclusion of any agreements related to the Project.

According to the AMCU, none of the entities submitted information to the regulator, preventing the latter from exercising its discretionary powers – in case at hand, determining whether the participants in the Project were required to obtain prior clearance. As a result, the AMCU imposed fines on the Ukrainian subsidiaries of Engie, Shell, and Wintershall. Shell's subsidiary received a fine of *UAH 43 mln.* (*approx. EUR 0.9 mln.*) – the largest fine ever imposed by the AMCU for an informational violation. All three entities challenged the AMCU's decision in Ukrainian courts.

In March 2025, Wintershall's Ukrainian subsidiary won the case before the Ukrainian Supreme Court. The central question in this case was whether Ukrainian entities belonging to foreign corporate groups can be held liable for failing to provide the regulator with the requested information that is in the possession of another entity within the same corporate group. The Supreme Court ruled that holding a Ukrainian entity liable for not providing information held by a foreign affiliate would violate the principle of fairness in legal liability. Furthermore, it emphasized that corporate affiliation alone does not justify extending the AMCU's enforcement powers beyond Ukraine's jurisdiction.

AMCU Started Targeting Digital Markets

Jumping ahead, digital markets have been identified as the AMCU's top enforcement priority for 2025. In fact, the regulator began moving in this direction as early as 2024, issuing recommendations to two tech-related companies operating in different areas of the digital economy.

Kyiv Digital

In early 2024, the AMCU issued recommendations to the municipal company behind the Kyiv Digital app – a multifunctional platform offering various services, including payments for transport ticketing and parking fines. The AMCU expressed concerns that users faced commission fees of up to 10%, with no access to alternative payment service providers (PSPs) that could offer more competitive rates. To address these concerns, the regulator issued recommendations to the municipal entity administering the app to promote competition by enabling the integration of additional PSPs on transparent, clear, and non-discriminatory terms.

BlaBlaCar

Later in the year, the AMCU turned its attention to BlaBlaCar, identifying the platform as likely dominant in the narrowly defined market of ”carpooling services via online platforms in Ukraine”, citing its market leadership and lack of substantial competition from rivals. The regulator alleged that BlaBlaCar applied unjustified service fees to passengers and maintained inconsistent refund policies when passengers canceled rides. The AMCU recommended that the company adopt a transparent methodology for fee calculation and implement a fair and non-discriminatory refund policy.

Legislative Developments and EU Integration

Last year, the AMCU remained actively engaged in supporting Ukraine’s EU integration efforts. As part of the second phase of the Ukrainian competition law reform, the regulator developed legislative proposals aimed at strengthening its institutional capacity and providing more effective tools for enforcing competition law. Notably, the proposals introduce administrative liability for companies and government officials who obstruct dawn raids, fail to submit requested information to the regulator, or ignore official summonses to appear and provide explanations.

On the international front, the AMCU took significant steps toward obtaining associate membership in the OECD Competition Committee, further aligning Ukraine’s competition framework with global best practices, including implementation of the OECD Recommendations on Competitive Neutrality. Throughout the year, the regulator also cooperated with the European Commission on competition policy, holding bilateral meetings as part of the official screening process to assess the alignment of Ukrainian legislation with EU law.

First-Ever Leniency Case

2024 marked a milestone for Ukraine’s antitrust enforcement with the first-ever application of the updated leniency procedure by the AMCU. Although leniency provisions had been part of Ukraine’s competition law since 2002, their effectiveness had long been hindered by the lack of clear procedural guidance. A significant shift occurred with the entry into force of competition law amendments on 1 January 2024, accompanied by the adoption of the respective procedure by the AMCU.

Ukraine’s updated leniency procedure brings greater clarity and alignment with EU standards. It offers full immunity from liability to the first applicant, while subsequent applicants may receive fine reductions of up to 50%, 30%, or 20%, respectively. Applications can be submitted even after an investigation has started, as long as they are filed before the AMCU issues its preliminary conclusions.

In December 2024, the AMCU applied the updated leniency procedure in a bid-rigging case involving two public procurements. One company received full immunity after providing information about the violation to the regulator, submitting key evidence and fully cooperating. The second company, which did not cooperate, was fined 2% (the maximum statutory fine of up to 10%) of its annual turnover for each of the two bid-rigging violations committed.

State Aid

To recall, Ukraine introduced a state aid regime in alignment with EU *acquis* under the EU-Ukraine Association Agreement in 2014. The regulatory framework, effective from 2 August 2017, is based on the law of Ukraine "On State Aid to Undertakings" (***State Aid Law***) and secondary legislation.

Following the full-scale invasion by Russia, Ukraine introduced martial law, leading to a temporary suspension of state aid control, effective from March 2022. Since then, state aid grantors have been exempted from the obligation to notify the AMCU of new or amended aid measures – these measures are automatically deemed compatible with domestic competition rules.

In 2024, the AMCU prepared a draft law aimed at introducing liability and penalties for state aid grantors, particularly those who grant unlawful or incompatible state aid. In line with its obligations under the EU-Ukraine Association Agreement, the AMCU conducted a partial inventory of existing schemes and compiled a list of potential state aid measures requiring compliance with the State Aid Law. Grantors must align these schemes with the law and its compatibility criteria. Non-compliant schemes will be terminated.

AMCU's Top Priorities for 2025

In its 2024 report, the AMCU highlighted the following markets and industries its top enforcement priorities for 2025:

Figure 4. *AMCU's Top Priorities for 2025*

The AMCU also highlighted in its report that identifying bid-rigging violations in the following sectors will remain a top priority in the upcoming year: defense, healthcare, and construction. Another key priority for the AMCU in 2025 will be enhancing its institutional capacity, including harmonizing Ukrainian competition law with EU standards, continuing cooperation with the OECD, and further strengthening the AMCU's powers in bid-rigging investigations.

Outlook for 2025

Despite the ongoing challenges of wartime, we expect the AMCU to remain fully operational and increasingly active in 2025. The regulator is likely to issue a greater number of decisions, impose higher fines, and commence new investigations and sector inquiries.

We do not anticipate a decline in the average number of merger control notifications reviewed by the AMCU. Over the past five years, this number has consistently ranged between 450 and 550. Given the AMCU's growing focus on identifying gun-jumping violations, we strongly recommend that foreign counsel assess carefully whether a transaction is notifiable and ensure timely notification when required.

Finally, we expect the AMCU's increasing interest in digital markets to translate into more assertive enforcement. The regulator has clearly identified digital platforms as its top enforcement priority for 2025. Accordingly, we anticipate a rise in investigations involving tech companies operating in a digital economy.

[**1**] This means that if a transaction involves the acquisition of multiple direct targets – rather than a single holding company consolidating them – there may be multiple separate filings for the same overall deal. As a result, the statistics may be distorted, and the actual number of distinct deals could be lower than the number of filings suggests.

[**2**] The exceptionally low fine was because the transaction qualified for a special procedure available during the initial months of the war (February–June 2022), under which only nominal fines were imposed in cases where the parties filed and closed the transaction before obtaining the clearance.

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EVP Ribera's Merger Review Policy Takes Shape

Jay Modrall (Norton Rose Fulbright, Belgium) · Thursday, May 15th, 2025

Executive Vice President (EVP) Ribera is on a "mission impossible" to develop a "new approach to competition policy" "support[ing] European companies to innovate, compete and lead world-wide and contribut[ing] to our wider objectives on competitiveness and sustainability, social fairness and security." EVP Ribera was particularly tasked with revising the European Commission's (Commission's) decades-old guidelines on the assessment of horizontal mergers (the HMG). On May 8, the Commission launched a wide-ranging Consultation not only on the

HMG, but also on the Commission's guidelines on the assessment of non-horizontal mergers (the NHMG and, together with the HMG, the Merger Guidelines). Although the Consultation is a wide-ranging call for input that will guide the Commission's future work, the Consultation also provides extensive background shedding light on what the antitrust community can expect during EVP Ribera's tenure.

EVP Ribera's Mission Letter raised questions about how broader European Union (EU) policy objectives could or should be integrated into the Commission's assessment of transactions under the EU Merger Regulation (EUMR). In comments to the European Parliament, EVP Ribera said that "EU merger control must continue to evolve to capture contemporary needs and dynamics like globalization, digitalization, sustainability, innovation and resilience." Launching the Consultation, EVP Ribera described it as a "comprehensive and ambitious review . . . to account for disruptive changes in our societies and our economies over the past 20 years, such as digitalisation, and enable us to ensure that innovation, resilience, and the investment intensity of competition are given adequate weight in light of the European economy's acute needs." She argued that "only by evolving . . . can [we] ensure that our merger control policy continues to serve people, drive innovation, and strengthen Europe's resilience and leadership."

EVP Ribera's Mission Letter and comments on the Consultation, as well as the text of the Consultation itself, suggest that the future Merger Guidelines will reflect a thorough-going review of the basic principles of EU merger control, not merely a technical update to reflect EU Court judgments and the Commission's decisional practice in the years since the Merger Guidelines' adoption.

The Consultation. The Consultation is divided into two parts, a General Questionnaire and a targeted consultation with an In-depth Questionnaire covering "topics that are key for the EU economy, namely competitiveness and resilience, market power, innovation, decarbonisation, digitalisation, efficiencies, defence and labour considerations." Alongside the targeted consultation, the Commission published seven papers that will be the basis for broader engagement with stakeholders, including through dedicated events and workshops. The Commission will also commission an economic study on the dynamic effects of mergers.

The Consultation refers to the Commission's July 2024 Political Guidelines and EVP Ribera's mission letter, as well as the January 2025 Competitiveness Compass. The Consultation also draws inspiration from the September 2024 Draghi Report on European competitiveness, which among other things called for a new approach to EU merger policy allowing European companies to achieve greater scale and the introduction of a new "innovation defence".

The Consultation is open until September 3, 2025. The Commission will then publish the feedback it receives and its own evaluation, followed by a consultation on draft revised Merger Guidelines. The Commission will also conduct and publish an impact assessment. The Commission aims to adopt the final revised Merger Guidelines in late 2027 but can be expected to begin implementing any policy changes stemming from the Consultation well in advance.

The General Questionnaire. The General Questionnaire observes that, "in the respectively twenty-one and sixteen years since the adoption of the [Merger] Guidelines there have been significant market trends and developments that have changed the dynamics of competition. . . .In light of these factors, which apply equally to both the [HMG and NHMG], the Commission is proposing to revise both sets of guidelines in a holistic exercise. The goal is to ensure the Guidelines are up-to-date in order to allow the Commission to continue to protect competition under the [EUMR] in evolving market realities, while not intervening in transactions that do not harm competition. In addition, the revised merger guidelines should provide increased transparency and predictability to the business community as to how the Commission assesses mergers today."

The General Questionnaire accordingly asks broad questions, including whether the Merger Guidelines have "allowed the Commission to identify correctly the transactions that significantly impede effective competition in the internal market;" "contributed to promoting competition;" and provided "correct, clear and comprehensive guidance on merger assessment" and "legal certainty and transparency". The General Questionnaire also asks about the costs and benefits of having Merger Guidelines; the objectives the Merger Guidelines do or should pursue; possible inconsistencies or contradictions; and whether the Merger Guidelines contribute to more consistent enforcement, as well as soliciting suggestions for simplification and cost-reduction.

Although the Commission commonly asks such threshold questions about whether antitrust policy documents should be renewed, in practice there is little or no doubt that the Commission plans to issue revised Merger Guidelines. On the other hand, the General Questionnaire asks several questions that may point to changes in the structure and content of the future guidelines. For example, the General Questionnaire asks whether "the distinction between effects of horizontal and non-horizontal mergers [is] still relevant" and whether it would be preferable to have separate guidelines on horizontal and nonhorizontal mergers or a single document. The General Questionnaire also asks whether and if so how future guidelines should take account of sectoral regulations (e.g. telecommunications, energy) and particular features of certain sectors (e.g., longer investment cycles, innovation intensity).

The General Questionnaire also seeks input on the Merger Guidelines' treatment of factors used to assess market power, such as market shares, concentration level, barriers to entry or expansion, and diversion ratios, whether certain aspects are unclear or outdated and whether other metrics should be included. The Commission further seeks input on the assessment of coordination and foreclosure risks and anti-competitive effects that may stem from transactions that do not create or strengthen a dominant position.

The General Questionnaire touches on themes addressed more fully in the In-depth Questionnaire. These include "competitiveness" (including the benefits of increased scale, security of supply, resilience of the EU economy and increased innovation and investment). More specifically, the General Questionnaire seeks input on potential harms and benefits of consolidation in global strategic sectors, digital and deep technology innovation, and clean and resource efficient technologies and biotechnologies (e.g., IoT, cloud, quantum, telecom, data, advanced connectivity, cybersecurity, and/or AI). Similarly, the General Questionnaire calls for input on the treatment of innovation and other dynamic elements; sustainability and clean and resource-efficient technologies; digitalization; efficiencies; public policy, defense and security; and labor market considerations.

The In-depth Questionnaire. The In-depth Questionnaire "focusses on in depth and technical parameters related to EU merger control" on the following seven topics: competitiveness and resilience; assessing market power using structural features and other market indicators; innovation and other dynamic elements in merger control; sustainability and clean technologies; digitalization; efficiencies; and public policy, security and labor market considerations. These questions apparently represent the Commission's efforts to collect evidence that can be used to implement the Mission Letter's broader mandate to modernize EU competition law.

For each topic, the In-depth Questionnaire provides a brief introduction and technical background, followed by specific questions. .In relation to competitiveness and resilience (Topic A), the In-depth Questionnaire calls for reflection on whether EU merger control must be adapted to support start-ups, scale-ups, and medium-sized companies to scale up in global markets, while safeguarding a level playing field. The In-depth Questionnaire identifies four specific topics for further investigation: scaling up; resilience and value chains; enhancing investment and innovation; and globalization.

The In-depth Questionnaire notes that productivity tends to increase scale, and increasing scale through mergers and acquisitions may help firms become more productive. The acquisition of existing businesses may also be a means for a company to expand into other Member States or increase its global outreach to compete with large global rivals. On the other hand, market power resulting from mergers can lead to price increases, diminished quality or innovation, and a reduced number of suitable suppliers, all of which can negatively impact the competitiveness of other businesses.

Mergers may also have a negative or positive impact on the EU's resilience in the face of global shocks and the need for a diverse, competitive supply base (e.g. for critical raw materials and other inputs required for the green and digital transitions). On the one hand, mergers can secure companies' access to inputs they need to compete, including through the integration of activities at different levels of the value chain, and integration of competitive EU suppliers may reduce dependencies on external sources. On the other hand, mergers may result in less competitively priced inputs, less innovative or lower quality products or a reduced number of suitable suppliers, with negative effects on companies' competitiveness and resilience not only in Europe but also in global markets. Having a variety of businesses active in the EU Single Market can support firms' ability to multi-source and to be dynamic and resilient to shocks. By contrast, less competition risks making an economy "brittle" and thus less resilient.

Scale resulting from M&A transactions can also impact incentives for investment and innovation. Scale might provide companies with benefits such as lower costs, better access to capital markets or R&D&I capabilities that increase their ability to invest and innovate. At the same time, company size does not typically reflect the ability to invest and innovate, as many of the most innovative firms in sectors such as pharma, biotechnology, digital or high-tech are small and medium-sized enterprises. While scaling up companies with disruptive technologies can help disseminate important innovations across the economy, the acquisition of nascent competitors by large established players to protect their market power (so-called "killer acquisitions") might harm innovation.

The In-depth Questionnaire observes that the degree of globalization affects the geographic scope of competition in relevant antitrust markets. Competition in the EU may be affected by imports into Europe from other parts of the world, but also by subsidies or other competitive advantages received by market participants outside the EU.

In relation to the assessment of market power using structural features and other market indicators (Topic B), the HMG and NHMG both contain structural indicators relating to market shares and concentration levels that mostly provide guidance on where competition concerns are unlikely to arise (so-called "safe harbors"). With the exception of market shares above 50% in a horizontal merger, they do not offer rules of thumb for when a merger can be presumed to be harmful, since there can be situations where a merger will not harm competition, for instance because the parties are not close competitors, competition in the market is intense, or large market shares may turn out to be only temporary.

In the Commission's view, the revision of the Merger Guidelines offers a chance to adequately reflect the risks resulting from mergers in a situation of rising levels of concentration and profit margins in EU markets. One means to achieve this would be the adoption of stricter indicators (or rebuttable presumptions) to identify more easily mergers that are likely to result in a significant impediment to effective competition. In addition, the Commission may set out a more comprehensive framework relying on alternative approaches to assessing market power, and particularly those that emerged in its case practice. For example, capacity shares are already frequently used structural indicators. Further market features of relevance may include diversion ratios, profit margins, the distribution of spare capacities or a firm's pivotality. Some of these market features may be especially relevant in cases that do not result in the creation or strengthening of a dominant position, or in cases involving highly differentiated markets.

The revised Merger Guidelines may also reflect criteria for the assessment of cases that do not result in the creation or strengthening of a dominant position. For instance, the revised Merger Guidelines may provide further guidance on when merging firms can be considered close competitors or how to identify mergers that would result in the elimination of an important competitive force. In some cases, even if the combined market shares or concentration levels are not particularly high, a merger may still lead to anticompetitive effects by increasing the risk of coordination. Given developments such as algorithmic pricing, the In-depth Questionnaire calls for reflection on whether the framework for the assessment of coordinated effects is still fit for purpose. Similarly, the In-depth Questionnaire calls for reflection on whether the Merger Guidelines' "ability-incentive-effects" framework for assessing foreclosure risks in non-horizontal mergers should be amended.

In relation to innovation and other dynamic elements in merger control (Topic C), the In-depth Questionnaire notes that mergers can impact innovation competition in both directions – they may increase the ability of the merged firm to innovate but also harm innovation competition and thus incentives to invest in R&D. The effects of mergers on innovation are often more difficult to predict than price effects, so the challenge is to further develop a sufficiently accurate yet administrable framework for assessing dynamic merger effects on innovation.

Similarly, the acquisition of a potential competitor with a promising product in development or notable R&D capabilities can accelerate commercialization of improved products or prevent future competition (e.g. if a merger leads to the discontinuation of a promising product or line of research or increases barriers to entry or expansion). The challenge is to identify circumstances in which the acquisition of a potential competitor may increase or stifle competition, not only in horizontal but also in non-horizontal mergers.

Topic D addresses the role of sustainability and clean technologies. The In-depth Questionnaire notes that merger control has a role to play in allowing procompetitive mergers to support the transition to a clean and sustainable economy, while preventing mergers with negative effects on clean innovation and sustainability goals, for example, where an incumbent acquires a disrupting innovator offering a green product to delay or cannibalize it ("green killer acquisitions") or a merger reduces incentives to invest and innovate in green products or technologies. Non-horizontal mergers may also have a negative impact, for instance by removing or reducing access to less carbon- or energy-intensive products or services (including key green technologies and materials, such as batteries, renewable components, and recycling infrastructure) that generate less waste or require less raw materials.

On the other hand, mergers may support climate and sustainability objectives and the clean transition and have a positive impact on clean innovation, for example on the deployment of cleaner/greener technologies or manufacturing processes. Mergers can provide the leverage needed to invest in decarbonization, cleaner products and technologies and more energy-efficient solutions and infrastructure. Vertical integration may also enhance the circular use of raw or recycled materials and allow companies to adopt more innovative, efficient and clean resource management across larger segments of the supply chain.

Some mergers may also generate sustainability benefits that could offset negative effects on competition ("green efficiencies"). At the same time, careful assessment is required to avoid greenwashing attempts and ensure that claimed benefits materialize post-merger. Mergers should not make clean products or services, for example, related to renewable energy, sustainable waste management and recycling, resource-efficient (digital) solutions, electric vehicles etc., less affordable or inaccessible to businesses and citizens.

The In-depth Questionnaire notes that the growing interplay between competition, innovation and sustainability considerations across industries and related benefits calls for reflection on merger control's contribution to European sustainability objectives. Key questions in this regard include the methodology and parameters to be included in the competitive assessment to take due account of sustainability considerations, as well as the quantification and verification of green incentives and efficiencies.

Digitalization (Topic E) has of course been a key feature of markets addressed in EUMR reviews for decades. The In-depth Questionnaire notes that an extended forward-looking assessment may be required to properly capture the effects of a transaction in such markets, particularly when the merger involves the acquisition of a nascent player or a nascent market. In fast-moving markets, killer acquisitions of complements require careful assessment, because in such markets a complementary product or player of today may very quickly become a substitute.

According to the In-depth Questionnaire, leading companies in the digital and tech sectors commonly seek to acquire complementary businesses or key inputs (e.g., data, technology, user traffic, but also talent, compute capacity and others) with the aim of strengthening their position in core markets. Such a strategy may contribute to increases in innovation. On the other hand, developing or expanding an ecosystem of related products and services may entrench an incumbent's position, thus making it harder for rivals to enter, expand, or innovate.

This type of business strategy does not easily fit into the traditional distinction between horizontal and non-horizontal mergers, because fewer transactions are purely horizontal**,** vertical or conglomerate in nature, and the lines between horizontally or non-horizontally linked product markets become increasingly blurred. For instance, in mergers involving companies with activities across several product markets, products often need to interoperate with each other or are offered as part of an ecosystem of related services.

Digital markets also raise questions about how forward-looking merger assessments should be, what kind of future changes should be taken into account, and what facts and evidence should be considered. This is particularly challenging in nascent and fast-moving markets, where historical market shares may say little about future effects on competition.

Finally, certain digital mergers raise privacy and data protection concerns, for instance when a merger leads to the acquisition of data or the combination of datasets. For example, competition to gain customers based on companies' privacy settings can be considered a non-price parameter of competition, and the acquisition of a target marketing itself as prioritizing customer data protection could reduce consumer choice for privacy-focused services. Privacy concerns can also be relevant to the credibility of (alternative) suppliers, e.g., if customers don't find it feasible to work with suppliers processing data in non-EU servers. The question is whether and if so how privacy and data protection objectives enshrined in EU law should be taken into account as parameters of competition.

In relation to efficiencies (Topic F), the In-depth Questionnaire notes that otherwise harmful mergers may result in "efficiencies" that may counteract potential harms to consumers. Mergers can generate cost savings that are passed-on to consumers in the form of lower prices or lead to improved products or services, for example from increased investment and innovation (as opposed to synergies that only result in higher profits). Compared to horizontal mergers, vertical and conglomerate mergers may provide more scope for efficiencies, e.g. in the form of an elimination of double margins or better coordination of marketing efforts.

Efficiencies should be assessed against the EUMR's legal mandate to protect effective competition and the clarification that any efficiencies should be to the advantage of intermediate and ultimate consumers. The Merger Guidelines specify that cognizable efficiencies must benefit consumers, be merger-specific and be verifiable. The balancing exercise between harm and efficiencies becomes increasingly complex when there is asymmetry between the alleged anticompetitive effects and benefits. Another challenge arises from timing differences, as investments usually materialize over a long period of time, whereas anticompetitive effects may materialize immediately.

The question arises which type of evidence or metrics are appropriate for the assessment of efficiency claims and the required likelihood of materialization to accept efficiencies. For example, the assessment of efficiencies concerning improved quality of products or services is typically linked to consumers' willingness to pay for higher quality, and merging companies may find it difficult to submit reliable and robust evidence in support of the increase in quality.

Finally, efficiencies have to be merger-specific. The Commission must consider whether the same benefits could be achieved in a less harmful way, for example through a cooperation agreement. However, determining the existence and viability of an alternative may not be straightforward. For instance, an alternative option should be realistic, but this may be put into question if an acquirer has already made an unsuccessful attempt at it in the past.

Topic G groups together public policy, security and labor market considerations. Although these topics are very different, each raises a question about how EU policy objectives beyond competition policy can be integrated into EU merger review. Although merger control focuses primarily on ensuring that mergers do not harm consumers, vibrant competition also contributes indirectly to other policy objectives. Where companies become too powerful, they may become too-powerful-to-care. Where companies become so large as to be essential, they can become too-big-to-fail, and therefore increasingly difficult to regulate.

The Political Guidelines call for a new era for European Defence and Security, and there have been calls for further consolidation in the EU defense sector. Neither the HMG nor the NHMG include guidance specific to mergers relating to security or defense. Member States may consider legitimate national security interests to be impacted by a merger – and consequently seek to intervene on public security grounds. However, merger rules may prevent harmful market power in non-European inputs relevant for EU defense. Thus, the In-depth Questionnaire seeks feedback on whether the revised Merger Guidelines should deal with the interaction between Member States' security and defense interests and the Commission's competition assessment. Similarly, the In-depth Questionnaire seeks feedback on how to undertake a potential balancing of interests between defense and competition objectives in cases involving dual-use goods.

Mergers can also impact media plurality. Article 21(4) EUMR allows Member States to "take appropriate measures to protect legitimate interests," such as "plurality of the media". On the other hand, the Commission may consider the impact of a loss of competition on media plurality in its assessment of mergers. Mergers and acquisitions in the media industry could reduce consumer choice, resulting in a landscape where a few dominant companies could wield considerable power over democratic processes by influencing public opinion. The Commission will consider this dynamic, alongside traditional factors like price and quality, when evaluating the implications of mergers and acquisitions in the media sector, as well as related sectors such as artificial intelligence.

Mergers can also significantly impede competition in labor markets by shifting the balance of power between employers and workers. Monopsonies in labor markets can lead to lower wages, higher unemployment, and worse working conditions, as well as lowering downstream output and higher prices. While the existing HMG consider the potential effects of mergers on buyer power more generally, EU merger control assessments have not so far considered the effects of mergers specifically on labor markets. The question therefore arises whether the revised Merger Guidelines should provide guidance on when an expected significant loss of competition through the exercise of buyer power in labor markets leads to a significant impediment to competition.

Mergers may also raise concerns about job losses due to restructuring and offshoring. These effects are not the result of a change in market power. Thus, they are not covered by the EUMR and will not be addressed in the revised Merger Guidelines. The In-depth Questionnaire also notes that cost savings resulting from restructuring or offshoring are unlikely to be passed on to consumers and thus should not be accepted as efficiencies.

Conclusion. The Consultation calls for evidence on a wide range of topics. The review process will last over two years before revised Merger Guidelines are finally adopted. However, the Consultation provides useful background on issues the Commission considers important and some strong hints on its direction. Changes emerging from the review process may be seen in practice well before new Merger Guidelines are finalized.

From a structural perspective, it seems likely that the current HMG and NHMG will be replaced by a single set of Merger Guidelines addressing horizontal, vertical and conglomerate mergers. A holistic approach should lead to a more nuanced analysis of transactions that do not fit neatly into a horizontal or non-horizontal box. The revised Merger Guidelines will also likely include more detailed treatment of competitive metrics beyond sales shares and market concentration. The revised Merger Guidelines may also address market features such as investment cycles and innovation intensity, as well as applicable regulatory frameworks, to the assessment of notified transactions.

The Commission also apparently aims to provide more guidance on parameters raising red or yellow flags. Such guidance would help antitrust advisors identify transactions likely to be challenged. On the other hand, efforts to develop presumptions of anti-competitive effects based on market shares or other individual parameters will no doubt be controversial.

The revised Merger Guidelines can also be expected to provide more detailed guidance on hot-button issues such as so-called killer acquisitions, the role of ecosystems in digital and tech transactions, plurality and artificial intelligence in the media sector, privacy as a parameter of competition, the assessment of mergers in the defense sector and buyer power in labor markets.

Perhaps most importantly, the Consultation reflects the Commission's efforts to integrate broader policy considerations set out in EVP Ribera's Mission Letter, the Political Guidelines and the Competitiveness Compass, as well as the Draghi Report, into EU merger policy. The Consultation notes the link between criteria such as innovation, resilience, sustainability, security and other policy goals and the EU competitive landscape. Although many of these issues are addressed in other EU regulatory frameworks, the Commission is considering how EUMR review can be harnessed to promote EU objectives.

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Federal Supreme Court judgment Vifor/HCI Solutions: Art. 7 para. 2 CartA is not an endangerment offense

Marcel Meinhardt, Jannick Koller, Lorenz von Arx (Lenz & Staehelin) · Thursday, May 8th, 2025

The proceedings against Vifor Pharma/HCI Solutions

In December 2016, the Swiss Competition Commission (ComCo) fined HCl Solutions AG (HCI) around CHF 4.5 million for abuse of a dominant market position. HCI, a subsidiary of Vifor Pharma Participations AG (Vifor), operates, among other things, the "Compendium" of electronic drug information and user-specific INDEX databases (e.g. "medINDEX" for doctors), which are used via corresponding software solutions from third-party providers. In this context, ComCo accused HCI of having systematically used contractual clauses with software companies for several years that were aimed at hindering competing database providers. In addition, the inclusion of drug information in the INDEX products was only offered to pharmaceutical companies in a package ("bundled") with additional services. In January 2022, the Federal Administrative Court confirmed the abuse of a dominant market position in principle, but reduced the sanction.

In its ruling of 23 January 2025 (2C_244/2022), the Federal Supreme Court partially upheld the appeal filed by Vifor and HCI and referred the case back to the Federal Administrative Court for a new assessment and determination of the sanction. The Federal Supreme Court's comments on Art. 7 para. 2 CartA[1] and the sanction are particularly interesting. Here are the most important points:

No abuse of a dominant market position under Art. 7 CartA in the case of a purely hypothetical threat to competition

Although the Federal Supreme Court confirmed that HCI held a **dominant** position on the relevant markets, it clarified **that Art. 7 para. 2 CartA is not an endangerment offense:** It specified that, in accordance with the "*effects-based approach*", a particular conduct must **actually** be **potentially capable** of causing harm to competition. The **risk of adverse competitive effects must actually exist based on all the specific circumstances**; a merely hypothetical risk of harm to competition is not sufficient. Similarly, the mere fact that a contractual clause corresponds to an element of Art. 7 para. 2 CartA is not sufficient. The Federal Supreme Court thus follows the more recent case law of the ECJ, which also follows an "*effects-based approach*" (see judgment of the ECJ of 19 January 2023, C-680/20, Unilever Italia).

Against this background, the Federal Supreme Court ruled as follows on the four types of conduct by HCI in question:

- Exclusive purchasing clause in a single contract (clause A): The Federal Supreme Court denied an effective capability of this clause to exclude competitors, as it only occurred in one of 176 contracts with software houses and, according to the statement of the (one) software house concerned, was of little practical significance. Moreover, it did not completely exclude third-party providers. In the opinion of the Federal Supreme Court, the clause is therefore not abusive.
- Prohibition on feeding third-party data with the same or essentially the same structure as HCI's XML structure into software (clause B): Insofar as this clause B, which was contained in 83 of around 176 contracts, went beyond the protection permitted under copyright law and also prohibited permissible imitation, the Federal Supreme Court qualified it as abusive within the meaning of Art. 7 para. 2 lit. e CartA.
- Bundling the publication of drug information with editorial and technical quality control: In the opinion of the Federal Supreme Court, this clause is not abusive, as these are not separate goods. The quality control is part of the publication service in the "Compendium" or in the INDEX databases and is typically requested jointly by pharmaceutical companies.
- Tying the publication of drug information with (optional) free upload to AIPS: The Federal Supreme Court also ruled that this clause was not abusive, as the upload was an incidental additional service with no independent economic significance. There was neither a separate market nor an independent demand for it.

Reduction of the sanction and no consideration of intra-group sales

The Federal Supreme Court confirmed the sanction only with regard to the partially abusive clause B. However, the remaining findings of the lower court were to be set aside and the sanction reduced accordingly.

Furthermore, according to the Federal Supreme Court**, the intra-group sales should not have been taken into account when determining the sanction**. **In contrast to a margin squeeze** (BGE 146 II 217), the pharmacies and wholesalers of the Galenica Group were not involved in the abusive behavior. There was therefore no abuse of the vertical group structure.

[1] Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA) of 6 October 1995, SR 251.

Posted in Source: OECD“>Abuse of dominance, Judicial review, Switzerland | No Comments »

Presume at Your Peril: Do New Antitrust Proposals Introduce New Risks?

John M. Taladay, Christine Ryu-Naya (Baker Botts LLP) · Wednesday, May 7th, 2025

Legal presumptions play an important role in competition enforcement. They can translate decades of judicial experience and economic learning into workable, practical tools for efficient enforcement of the competition laws and provide predictability and clarity to companies seeking to comply with those laws. In the past few years, presumptions have been increasingly introduced to streamline enforcement efforts. But we are now seeing new presumptions, particularly with respect to the digital economy or to platform companies, that are not based on well-established legal and economic precedent but are designed as an enforcement expediency. As we explore, these can easily become an enemy to both competition on the merits and competition law enforcement.

The introduction of legal presumptions in competition law has been justified in two main ways. The main justification is the “*experience rationale*,” which uses a presumption as a type of shorthand for significant past experience. In this manner, the presumption is shaped by past legal precedent or past economic and empirical evidence focused on the known effects of certain well-defined conduct. The simplest example is the irrebuttable presumption that price fixing equates to competitive harm. A second, lesser justification relies on the principle of judicial economy, which offers presumptions as necessary to conserve and spread sparse enforcement resources. This justification rarely applies to irrebuttable presumptions, as those exist due to the legal logic that the mere existence of the act is proscribed. For this reason, the judicial economy justification is more often related to rebuttable presumptions. These justifications are not mutually exclusive; a presumption may rely on more than one justification.

Some recent proposals, however, discard these established justifications in favor of creating legal presumptions from whole cloth. Supporters of these proposals argue that these “*new*” presumptions are necessary to contend with rapidly changing digital markets (the “*fast-moving market*” justification) or to properly combat the potential influence of large, dominant companies (the “*platform*” or “*ecosystem*” justification).

While these at best could be seen as offshoots of the judicial economy rationale, they lack the critical foundation of factual and economic experience upon which well-functioning presumptions are built. As a result, they often expose enforcers and companies to significant risks. These risks include unpredictable and arbitrary enforcement, chilling investment and risk-taking in new innovation and extrajudicial interpretation of the law. As examples, we review certain recent proposals in Europe, the United States, Canada, and India.

In **Italy**, the Annual Law for the Market and Competition (Law No. 118/2022) introduces a significant new presumption related to economic dependence for companies that rely on digital platforms to reach their customers. The law presumes economic dependence exists when a company uses, shifting the burden of proof to the platform to disprove the company's dependence. Notably, the application of the presumption of economic dependence under the Annual Law was recently challenged in court, with the result that an interim measure order imposed by the Italian competition authority was overruled. The court's decision emphasized that the presumption is "expressly rebuttable."

By reversing the burden of proof, the Italian law introduces a significant, likely overwhelming, evidentiary hurdle. Platforms must now prove a negative – a lack of dependence – by identifying and suggesting alternative options for companies deemed dependent. This creates a "*proof proximity*" issue, as platforms are required to blindly evaluate alternatives available to the customer and explain why they are sufficient, even though they are not the entities that would actually use or rely upon them. Critically, this law may also discourage platforms from innovating to attract new users. Since unique features might make it more difficult for a platform to show that a customer is not "*reliant*" on the platform, companies may be reluctant to invest in innovation for fear of increasing the risk of findings of economic dependence.

Issues of evidentiary burden are also present in the 2023 U.S. *Merger Guidelines* and the United Kingdom's Digital Markets, Competition, and Consumers Bill (DMCC), which both utilize presumptions as relate to mergers. In the **U.S.**, the revised *Merger Guidelines* state that a merger that creates a firm with a share over 30% and an HHI increase of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly. While the *Guidelines* lack the binding authority of a judicially created presumption, they carry significant influence over judicial decision-making.

While the initial public draft of the *Guidelines* was ambiguous about rebuttal evidence, the final version—perhaps in response to hundreds of public comments on the topic—explicitly states that presumptions of illegality can be rebutted or disproved. However, those seeking specifics are in for a lengthy search: the *Guidelines* state that "[the] *higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it*." But it provides no detail about what types of evidence may suffice (U.S. Merger Guidelines, at 6).

Public statements by one U.S. agency suggest any rebuttal evidence is likely to be met with skepticism in some corners. For example, former Federal Trade Commission Chair Lina Khan has noted that efficiency "*doesn't appear anywhere in the antitrust statutes,*" downplaying the potential persuasiveness of efficiency evidence despite its judicial recognition and history of relevance in U.S. antitrust enforcement (*see, e.g.*, Federal Trade Comm'n v. University Health, 938 F.2d 1206 (11th Cir. 1991)). This raises serious questions about whether companies seeking to rebut a merger presumption will find a receptive and objective decisionmaker, which in turn suggests that this "*rebuttable*" presumption may be anything but. Similar skepticism can be found in the 2021 joint statement from the UK Competition & Markets Authority, Australian Competition & Consumer Commission, and the *Bundeskartellamt*. This is particularly hazardous in administrative jurisdictions, *i.e.*, where the competition authority itself takes the initial decision. It also suggests that even a merger with minimal prospects of competitive harm, but overwhelming demonstrable efficiencies might be shot down.

The Canadian Competition Act similarly introduced a structural presumption for mergers. The presumption, which took effect in 2024, establishes a combined market share threshold of 30%, above which a merger is presumed to substantially lessen competition. The new presumption marked a significant reversal: the original Act, passed in 1986, provided that a merger could not be found to substantially lessen competition solely on the basis of market share. As evidenced by its (unsurprising) similarity to the U.S. *Merger Guidelines* and the UK's DMCC, discussed immediately below, this shift towards a more structural approach to merger analysis as adopted by a few other jurisdictions. Unlike the U.S. *Guidelines*, the amended Canadian Competition Act identifies bases for rebuttal, such as the presence of acceptable substitutes, low barriers to entry, and the level of remaining competition (*see* § 93). But this law, unlike the U.S. *Guidelines*, does not just reflect agency enforcement intention, it has immediate force of law.

The **UK**'s DMCC combines elements from both the Italian law and the U.S. *Merger Guidelines*, introducing a presumption of market power for firms with a 30% share while imposing a reverse burden of proof on companies designated as having "*strategic market status*" (SMS). Under the law, SMS firms are presumed to be dominant and must prove that their actions, such as self-preferencing, are not harmful to competition. This reverse burden compels SMS firms to justify their practices without clear guidance on what evidence will be deemed sufficient. Moreover, the triple burden imposed by the DMCC—overcoming the presumption of dominance, overcoming the presumption of harm from certain equivocal actions, and the proof proximity problem—effectively converts this into a strict legal prohibition.

The DMCC also imposes an obligation for companies to ensure interoperability. This further increases the regulatory burden on SMS firms and disrupts market dynamics—likely to the advantage of certain competitors. Interoperability requirements can also pose other risks, such as access to sensitive user data. The law's presumption that self-preferencing by an SMS firm is inherently harmful discourages SMS firms from developing innovative features that might advance their own products or services, whether at the expense of competitors *or not*.

As with the Italian law discussed above, this could have a dampening effect on long-term innovation, as companies may avoid introducing new offerings that benefit consumers due to the risk of violating the presumption. In other words, why would a company invest in developing something better when they cannot promote or position it any better than the *worst* product in the market? Rather, this could lead to an economic incentive to mimic other products and free ride off others' investments, *i.e.*, uniformity and stagnation. Which then, of course, incentivizes less investment across the market and a tendency toward tacit collusion.

Deterring anticompetitive conduct without discouraging investment or encroaching on legitimate business conduct is a challenging line to walk. The **European Commission**'s 2024 Draft Guidelines on Article 102 TFEU mark a significant shift in its approach to dominant firm conduct. While the Commission's prior Guidance (issued in 2008) was focused on assessing the economic effects of potentially abusive behavior, the Draft Guidelines heavily utilize presumptions. Five specific types of conduct – exclusive supply or purchasing agreements, rebates conditional upon exclusivity, predatory pricing, margin squeezes with negative spreads, and certain tying arrangements – all are presumed to be exclusionary, without an extensive experiential development in the law to justify such a shift (Draft Guidelines, at 60).

This rampant recent reliance on presumptions raises several concerns. First, the lack of clear definition for these presumed exclusionary practices can lead to unpredictable enforcement, especially when the Guidelines will be further interpreted by the Commission and EU Member

State competition authorities in their enforcement efforts. Businesses will be unsure whether their innovative conduct will be interpreted to fall under the presumption, creating uncertainty about their antitrust exposure and deterring investment. Second, the presumption itself may be overly rigid. Firms often engage in practices with similar characteristics, some of which are competitively beneficial and some of which are harmful. Presuming harm without any analysis of the specific market dynamics throws out the baby with the bathwater. Third, where is the lengthy course of experience required to justify such sweeping presumptions? Normally that history is established by court precedent which ordains such practices as reliably and nearly always anticompetitive. That record is lacking.

While the aim of the EC's Draft Guidelines may be to streamline enforcement and deter anticompetitive behavior, a more balanced approach is necessary (*see also* comments from Berkeley Research Group and the European Competition Lawyers Forum). Except for a few unequivocal practices, courts long ago dismissed the notion that competition lends itself to bright line rules. Retaining a focus on economic effects and market-specific evidence (and, in contrast to the U.S. and UK approaches, *specifying* the types of evidence that would be sufficient) would ensure that the Commission's interventions promote fair competition without hindering legitimate business practices. The OECD Secretariat proposed such a balance, concluding that a "*well-rounded enforcement strategy*" ideally integrates structural analysis (as an "*initial filter*") followed by in-depth economic analysis.

Recent amendments to **India**'s Competition (Amendment) Act have also introduced similarly hard-to-justify changes to prior practice. Specifically, the Act now provides for a presumption of an Appreciable Adverse Effect on Competition (AAEC) against participants in an agreement even if they are not engaged in identical or similar trades. This broadens the scope of the Competition Act, empowering the Competition Commission of India (CCI) to interfere with a wider range of agreements in digital markets.

But at least this new presumption acknowledges that digital markets can be complex and interconnected, aiming to introduce flexibility in examining agreements that may cross traditional market boundaries. By contrast, the UK's DMCC and other proposals that outline presumptions based on a very specific set of behaviors (e.g., self-preferencing) run headlong into the problem of future-proofing. Everyone acknowledges that the digital landscape evolves quickly, marked by rapid advancements and the constant emergence of new business models and there is good evidence that innovation produces far greater benefits than static efficiencies. Regulations anchored in rigid, behavior-specific presumptions may quickly become outdated, limiting their effectiveness in addressing unforeseen competitive dynamics. Moreover, laws and regulations designed to indiscriminately limit the behavior of large players do so broadly, to both their anticompetitive conduct and their innovative conduct. Without a flexible, robust analytical framework that enables authorities to critically evaluate novel practices, regulators risk stifling development and being ill-equipped to respond to future developments. A reliance on narrowly tailored presumptions, rather than on adaptable analytical tools, could impede authorities' ability to assess and respond to the complexities of an increasingly dynamic digital market – the very thing they purportedly are trying to do with many of these new laws.

However, the broad framework set out in the Amendment to the Indian Competition Act provides little clarity to companies trying to figure out whether their business arrangements could run afoul of CCI scrutiny. This problem could be softened, though not entirely fixed, by requiring that enforcement actions taken under this new presumption be publicly explained in writing. This would both provide guidance to companies and promote transparency and trust in enforcement.

Presumptions in competition enforcement are double-edged swords. While they offer practical tools for regulators to address complex market dynamics, they can also lead to overreach and unintended consequences when they are applied without the proper foundation of experience and evidence. Thus, presumptions should only be employed where there is a high probability or certainty of anticompetitive harm from specific conduct; otherwise, their use may result in more harm than good. As more jurisdictions consider the use of presumptions to regulate the technology sector, the focus should be on creating frameworks that allow for flexibility, anticipate the evolving nature of digital markets, and maintain appropriate review procedures. By striking this balance, regulators can sidestep the common perils of presumptions and ensure that their tools remain relevant, effective, and fair in an ever-changing market landscape.

Disclaimer: John M. Taladay is Partner and Christine Ryu-Naya is Special Counsel in the Antitrust and Competition Practice at Baker Botts LLP in Washington, D.C. The views expressed are those of the authors and not necessarily those of Baker Botts or any of its clients. The authors thank Jane Antonio for her assistance with preparing this piece.

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Hire And Higher? Employee Recruitment And German Merger Control

Florian von Schreitter, Anne-Kathrin Lauer (Hogan Lovells) · Tuesday, May 6th, 2025

Merger control has long been a cornerstone of competition enforcement in Germany, with the Federal Cartel Office ("**FCO**") known for wielding its mandate decisively and not shying away from blocking notifiable deals if they are perceived to cause competitive harm. One example was the prohibition of CTS Eventim's acquisition of the booking agency Four Artists (FCO press release). In response, the former established a new entity and swiftly hired most of Four Artists' staff – with the FCO finding that those moves did in fact *not* trigger German merger control, as FCO president Mundt stated to German media.

Recently, however, the FCO caused a stir with a press release in an AI-related case, declaring: "*Taking over employees may be subject to merger control in Germany*". This "**AI Case**" caused some legal scholars to argue that key employee recruitment can indeed trigger German merger control as a general rule. They posit that **direct hiring**, that is, offering employment to (a group of) employees that move away from their former employer, can have the same effect on the market structure as "**acqui-hiring**" (meaning the act of buying an entire company primarily for its talent) or indeed mergers in general. On this basis they conclude that direct hiring generally amounts to the acquisition of "control" over a business.

But can recruitment – however "aggressive" or disruptive – truly fall within the boundaries of German merger control? Or should one emphasise the word "may" in the FCO's formulation, suggesting that only specific situations are covered, and that pure direct hiring may not be one of them?

For German merger control, this article argues the latter. Analysing the legal definition of "concentration" under German law shows that only in very specific cases – such as when hiring is accompanied by an agreement to transfer intangible assets or business-critical infrastructure – might a personnel-related transaction qualify as a concentration. Absent such additional elements, direct hiring remains outside the statutory remit.

Past Practice, Present Puzzles: The FCO and Talent Transfers

The FCO has previously dealt with employee hiring in its cases, suggesting that this is hardly a novel issue. Historically, its approach has been marked by restraint – some would say comforting predictability – when assessing whether recruiting talent falls within the ambit of merger control.

A notable early example is *WAZ/Ostthüringer Nachrichten*, a regional newspaper merger. The FCO prohibited WAZ's acquisition of a 40% share in the publisher of the *Ostthüringer Nachrichten*. Following this, WAZ launched a rival paper, the *Ostthüringer Zeitung*, and extended job offers to most of the editorial and other staff from its erstwhile target. These employees joined WAZ, prompting the *Ostthüringer Nachrichten* to shut down operations. The FCO did not intervene again, apparently seeing no merger control issue. A second, more recent example is the *CTS Eventim/Four Artists* case mentioned above which resulted in a prohibition regarding the merger attempts. Notably, CTS formed its "All Artists" company while litigating the prohibition decision and soon after hired a significant number of Four Artists' employees, following which Four Artists ceased operations. Again, however, the FCO declined to step in, reinforcing the precedent that employee recruitment alone does not amount to a "concentration" within the meaning of German merger control.

Despite this established line, the AI Case has sparked a debate whether the FCO is now deviating from its previous practice. In its press release, the FCO states that the hiring of certain employees together with agreements regarding the hiring and the use of key intellectual property could amount to a notifiable concentration under Section 37 of the German Act against Restraints of Competition ("**ARC**"). Crucially, the FCO did not clarify whether it regarded the arrangement as an "asset acquisition" (Section 37(1) No. 1 ARC) or a "control acquisition" (Section 37(1) No. 2 ARC), nor did it elaborate on the reasons why either route applied. Frustratingly for practitioners, this leaves vital questions unanswered. Were the employees considered "assets"? Or was this about acquiring control? And regardless of the basis: what precisely distinguished this case from prior ones? The authority's press release offered little guidance.

Time, then, to explore these questions more closely.

Only Mergers in the Building? The relevant "Concentrations" under German Law

Pure direct hiring scenarios do not involve any transfer of share capital or other corporate links between the former and the new employer. As a result, Section 37(1) Nos. 3 and 4 ARC – which concern share acquisitions and structural combinations allowing for material competitive influence – do not apply. This leaves two possible avenues:

- Section 37(1) No. 1 ARC (acquisition of assets), and
- Section 37(1) No. 2 ARC (acquisition of control).

We begin with asset acquisitions – and whether employees can sensibly fall within that definition.

"They're our best Assets!" But are they?

Under Section 37(1) No. 1 ARC, a concentration exists if "all or a substantial part of the assets of another undertaking" is acquired. In the context of employee recruitment, two questions arise:

1. Can employees be considered "assets"?
2. If so, does hiring them qualify as an "acquisition" sufficient to trigger merger control – that is, do they represent at least a substantial part of the current employers' assets in which full ownership is transferred?

(a) The Concept of "Asset"

By its plain meaning an "asset" is something that can be bought or sold independently, enabling the acquirer to obtain ongoing control over that asset. It must have identifiable market value and be alienable in a manner that permits an acquirer to assume it, i.e., it must be capable of transfer and of conferring ownership.

Employees, by contrast, are not "transferred" like factories or trademarks. Their movement is governed by individual autonomy and fundamental rights. In a direct hiring scenario, employees are not being alienated from one firm and handed over to another in a transactional sense. The situation therefore differs from acqui-hiring, where the current employer transfers existing employment contracts – which may indeed be considered assets – to the new employer. In fact, equating employees with assets would effectively reduce them to tradeable objects, ignoring that the employer does not acquire ownership over them. It follows that, under the commonly accepted interpretation of Section 37(1) No. 1 ARC, employees themselves do *not* constitute "assets".

But what about the intangibles they bring? Could know-how or customer relationships embedded in certain individuals qualify as "assets"?

Clearly, know-how and business relationships in these cases are intrinsically tied to individual employees. Unlike, for instance, machinery, they are not standalone, self-sustaining economic resources. Nor are they comparable to proprietary intangible assets such as patents or software licences, which remain separate and identifiable irrespective of the personnel involved.

Nonetheless, German courts and legal scholars have traditionally treated know-how and customer relationships as assets. But these views have generally arisen in the context of conventional transactions – that is, they were based on formal purchase agreements between a seller and buyer and involved transferring *additional* tangible or documented intangible assets. These might include recorded procedural know-how, operational manuals, client lists, or even complete production facilities – assets capable of independent transfer separate from any particular employee. Yet, in the digital age, an increasing number of businesses rely heavily on knowledge workers and maintain minimal physical infrastructure, such as brokerage firms or recruitment agencies whose employees operate remotely. Here, employees' expertise and client networks effectively become the company's core assets. Arguably, although inherently personal, these assets remain accessible to the employer through its contractual authority to direct and instruct employees, allowing it to leverage their knowledge and relationships to the company's advantage.

So, can know-how and customer relationships alone, without the concurrent transfer of other tangible assets, legitimately be considered standalone assets under merger control law? Ultimately, the answer hinges on how closely one views modern employment practices as comparable to past scenarios explicitly involving asset transfers. To date, no clear case law exists addressing whether assets that exist solely within the knowledge and relationships of individual employees – who independently switch employers without the previous employer's involvement – constitute a stand-alone asset transfer.

(b) Full Transfer of Ownership

The same goes for the question whether this could at all constitute a "transfer" under the law. The legal requirement in this case is a 'full transfer of ownership'. Under this concept, referred to in German as *Vollrechtserwerb*, an asset acquisition must result in the permanent vesting of substantive ownership rights in the acquirer, enabling them to fully and comprehensively assume the position held by the previous owner.

As previously noted, know-how and customer relationships are intrinsically bound to individual employees. An employer cannot "own" these intangible assets in the same sense it owns machinery or intellectual property rights. Employees retain autonomy over their skills, knowledge, and business relationships beyond the employment period, typically unaffected by employer constraints. However, it's important to note that "full ownership" doesn't necessarily demand absolute or exclusive control over the asset. While simply acquiring a licence from a patent owner doesn't qualify as a transfer of ownership, transferring an *existing* licence can indeed constitute such a transfer if it allows the acquirer to fully assume the licensee's prior legal and economic position.

One could argue similarly that a new employer indirectly accesses an employee's know-how through the contractual right to instruct that employee. However, a significant counterargument arises: employees remain free to terminate their employment, either after a fixed term or at their discretion following an agreed notice period. This inherent flexibility raises questions about whether the new employer genuinely obtains a secure and transferable legal interest in the know-how and customer contacts brought by employees.

Ultimately, this issue remains unresolved by existing case law. Nevertheless, a definitive answer is unnecessary if direct hiring already fails to meet the final criterion outlined in Section 37(1) No. 1 ARC.

(c) "All or a Substantial Part"

Section 37(1) No. 1 ARC also requires that the acquiring party takes over "all" or "a substantial part” of the target’s assets. A “substantial part” in this sense can be assumed if the assets form the foundation of the seller’s market presence – allowing the buyer to effectively assume the seller’s market position and continue its economic activities seamlessly.

This requirement notably underscores the key distinction between direct hiring and transactions typically subject to merger control. In conventional asset transfers, buyer and seller agree explicitly on transferring assets collectively. By contrast, pure direct hiring involves employees independently and individually choosing to move to a new employer. When viewed separately, each employee hire usually does not constitute a “substantial part” of the former employer’s assets. Even if (very) exceptional circumstances should raise doubts, merger control thresholds under Section 35 ARC, which consider turnover or transaction value, will in practice never be met through a single employee hiring. Consequently, and assuming theoretically that the other questions raised so far are answered in the affirmative, direct hiring might only trigger German merger control if the law allowed multiple independent hires to be combined into a single transaction.

The statutory method for combining transactions appears in Section 38(5), sentence 3 ARC (modelled after Article 5(2), subparagraph 2 EUMR), which covers asset acquisitions from the same seller to the same buyer occurring within two years. Pure direct hiring clearly does not fit this provision: the previous employer, not participating in the employees’ decisions, cannot be considered a seller. Employees themselves also cannot be classified as “sellers” because they do not “sell” or “transfer” themselves as assets. Instead, each employee autonomously decides on their employment situation, often without the previous employer’s involvement or consent. Thus, this legal provision provides no basis for consolidating individual hiring decisions into a single merger transaction.

Besides Section 38(5) sentence 3 ARC, German case law offers another pathway to combining individual asset acquisitions into one transaction, provided that, from an economic point of view, they are brought about by a single event that is likely to influence the market structure (BGH, KVR 95/10; OLG Düsseldorf, VI-Kart 5/16 (V)). While EU case law mostly requires that the individual events be contractually conditioned upon each other, German case law does not regard this as a mandatory requirement. However, what is the “single event” supposed to be in cases of direct hiring?

When deciding on employment, individuals exercise their constitutionally protected freedom of occupation as private citizens. While an employee might consider whether former colleagues have joined or will join the new company, decisions usually hinge on highly personal factors – such as salary, career advancement, commuting convenience, and work-life balance. Such individualized and personal choices cannot reasonably be viewed as a unified or coordinated event. This point becomes even clearer when the employer’s hiring decisions are staggered or opportunistic rather than systematically coordinated.

As employment contracts in these cases are not conditional upon on each other, will often neither be concluded nor executed simultaneously and do not involve any coordinated actions between former and new employers, the only potential “single event” could be the new employers unilateral decision to hire (*en masse*) with the intent of creating or expanding specific economic activities. However, considering such a decision alone as sufficient for merger control would contradict existing case law and fail to acknowledge the particular nature of the involved stakeholders, their interactions, and the contractual specifics.

Artificially grouping independently acting employees into a hypothetical unified transaction would misrepresent reality. Employees decide individually about their own employment situation, not collectively about other colleagues or the future of an enterprise as a whole. Furthermore, the abovementioned court decisions concerned cases where there were a single buyer *and* seller who agreed on the acquisition of legally distinct businesses based on a "uniform entrepreneurial decision". This context underscores that an entrepreneurial decision alone is insufficient; specific transactional interactions between the companies involved must occur. Direct hiring starkly contrasts with this scenario, as it involves independent, individual decisions made by private individuals rather than structured negotiations between undertakings.

Additionally, assuming a single transaction in these cases would dangerously blur distinctions between transactions requiring merger control notifications and those not requiring them. If merely deciding to hire employees could amalgamate independent contracts into a single, hypothetical transaction, every subsequent opportunistic hire after such a decision would also need to be considered part of that transaction. This approach would significantly complicate predicting when merger notification thresholds are triggered. It would also create an inconsistency with the established (and correct) view that a strategic rationale behind acquisition patterns by serial acquirers, such as private equity firms or strategic investors, does not itself justify bundling separate acquisitions into one notifiable event.

What then led the FCO to assume a concentration in the AI Case? While the authority's rationale remains unclear, the crucial factor may have been alignment between the former and new employers. Reports suggest that the previous employer contractually waived its rights to challenge the new employer's recruitment, arguably signifying consent to the transfer of the employees. Additionally, the two companies entered into agreements on the financing of the new employer's future business operations and licencing of IP. Contrary to some commentary, this scenario differs significantly from pure direct hiring – with that difference likely marking the reason the FCO assumed a "concentration" in this case.

"Control" – or Ctrl/Alt/Del?

The second – and final – avenue to consider under German merger law is the "acquisition of control" pursuant to Section 37(1) No. 2 ARC. This concerns the acquisition of direct or indirect control by one or several undertakings of the whole *or parts* of one or several other undertakings. The latter term aligns closely with the interpretation of 'substantial part of the assets' in Section 37(1) No. 1 ARC. Central to both concepts is whether the object of acquisition represents a market presence transferable to the acquiring entity. Crucially, German law – consistent with EU merger control rules – requires that such a transaction confer market presence *on a lasting basis*.

In conventional M&A transactions, the lasting nature of transferred control typically emerges from a shared intention of buyer and seller regarding the future of the acquired asset. Forecasting the duration of this control inherently relies on evaluating forward-looking scenarios and indicators present at the time of transaction completion. Absent express contractual terms indicating a temporary arrangement, such as a predetermined shift from joint to sole control, control may generally be presumed permanent. Similar logic may be found to apply to direct hiring of employees: unless concrete indications suggest an imminent termination, the default assumption is that employment contracts are intended to endure beyond just the short term.

At the same time, direct hiring differs markedly from traditional asset acquisitions because it lacks an explicit counterpart ("seller") who jointly defines the asset's destiny – and is different from the asset (as a means of control). Instead, employees themselves, serving as the purported asset, exercise substantial autonomy by deciding independently how long they wish to remain employed. This autonomy introduces an inherent uncertainty: employees can terminate their employment unilaterally without employer consent, disrupting the anticipated permanence of the market presence conveyed. On the other hand, licensing, leasing, or supply agreements – assets frequently acquired in conventional M&A transactions – often permit unilateral termination by the contractual partner without the acquirer's agreement, posing comparable risks to the enduring nature of control. If direct hiring indeed proved capable of transferring control over part of a business, such control might well be regarded then as conferred on a lasting basis. Ultimately, this depends on whether this scenario is treated as sufficiently analogous – or fundamentally distinct – from other contractual arrangements granting control. The distinguishing factor remains the unique position of the "asset" itself, which here retains the agency to independently determine the continuity of its status.

Notwithstanding this assessment, however, the principles outlined regarding asset acquisitions remain equally relevant: the concept of a single transaction, suitable to bundle, the individual decisions of various employees, does not apply here. While advocates of broader merger control interpretations might find some support for categorizing employees' know-how and business contacts as assets, a sufficient legal basis is lacking to justify aggregating individual, independently concluded employment contracts – even if executed concurrently – into a coherent (part of a) business over which control could be acquired. As there are no grounds in the law or decisional practice to aggregate these independent contractual relationships in a manner that fulfils the turnover or transaction value thresholds set forth in Section 35 ARC, the assessment would not even change if each employee were viewed as individually constituting a distinct business unit within the former employer's organization; individual employees will not meet the thresholds.

It follows that without supplementary agreements between the previous and new employer – such as coordinated hiring efforts or additional asset transfers – the mere recruitment of employees, irrespective of their strategic value, fails to meet the requisite legal standard for acquiring control as stipulated in Section 37(1) No. 2 ARC. From a merger control perspective, direct hiring is not about acquiring control over an existing business – but (re-)starting one's own.

Where do we stand? Enforcement Gap vs. Enforcement Stretch

While some have suggested that applying German merger control rules to direct hiring has become "conventional wisdom", the analysis above shows this is far from true. Mere recruitment of employees – no matter how skilled or senior – does not constitute a notifiable "concentration" under German merger control law. Regardless of ongoing debates about the interpretation of "assets," "full transfer of ownership," or the "lasting" nature of control, the only conceivable "assets" to be "acquired" here are the employees' know-how and customer relationships – which by their nature are inherently personal to the employee as an *individual* human being – rendering the legal tests for assuming a single transaction particularly crucial here. However, direct hiring fails these tests. The simple act of entering into independently negotiated and maintained employment contracts lacks the necessary "bracket" to treat these hires as a transfer of "a substantial part" of the former employer's assets or part of its business. Direct hiring is not a case for merger control.

For the sake of legal certainty – and in light of the fines attached to violations of merger notification rules – the FCO should reaffirm this interpretation. This would not only be consistent with established case law, but also in keeping with the principle that legal provisions carrying sanctions must not be expanded by analogy or creative interpretation beyond their statutory wording and purpose.

One might argue that this doctrinal restraint permits a "loophole" – allowing firms to sidestep merger control by hiring talent instead of acquiring businesses. But this objection is not compelling. Harm to competitors does not automatically signal a regulatory gap, as such "harm" will not only be found as a result of anti-competitive behaviour but also (and often) as the consequence of lawful conduct and working competition – including competition for scarce input factors such as labour. Furthermore, the AI Case shows that the "loophole argument" is grossly overstated to begin with. The more any dealings involving the recruitment of personnel resemble a traditional concentration, namely, showing active involvement of the previous employer and including the transfer of additional assets (with the previous employer effectively acting as a "seller"), the more likely it is a notifiable concentration may exist.

Finally, there are other legal avenues to combat hiring practices that undermine competitors' positions and run the risk of anti-competitively excluding them from a market. If a company with a certain market strength aggressively poaches employees from another company against the latter's will, such case may be examined against the yardstick of Article 102 TFEU and Sections 19 and 20 ARC. And in addition, unfair competition law (*Lauterkeitsrecht, UWG*) sets limits on aggressive poaching practices.

Where do we go from here? Recruitment and the Limits of Merger Control

If policymakers nevertheless wish to limit certain hiring strategies through merger control, such a change would require legislative action – not administrative improvisation. That step would also necessitate a careful balancing of interests, as it would amount to creating a new category of "concentration" alongside the current text of Section 37 ARC. Such a move would have to grapple with a range of open questions, both legal and practical, including:

- How can the new category of concentration be defined with sufficient legal certainty? Would merger review be triggered only for experienced, pre-trained staff? Only for hires from the same sector? Would it apply to high-potential graduates? Interns? And how many employees would suffice – one? A group? A group of how many?
- What is required in order to consider the individual hiring act a single concentration? Do the employment contracts have to be conditioned upon each other? Does a general interest of a company to opportunistically hire another company's employees suffice?
- How can the new legislation be reconciled with fundamental rights, particularly freedom of occupation and employee mobility? This will also need to sufficiently take into account the constitutional principle of proportionality – especially in light of the heavy restrictions such a rule might impose on all employees, in order to capture a handful of sensitive cases per year.
- How does the new legislation relate to the ongoing enforcement campaign against no-poach agreements, which aims to promote, not restrict, employee fluidity?

- How should the turnover or transaction value be attributed to the employees for the purposes of the notification thresholds? This is particularly difficult if only part of the workforce is hired, and this part was not assigned to a specific business area at the previous employer. The salary of the employees is unsuitable as a benchmark, as it relates to the internal relationship between the employee and the employer, but not to the external market position that is supposedly being transferred.

Despite the considerations set out above, the FCO’s recent case – cited at the outset – demonstrates that, in practice, the picture remains muddled. In transactions involving more than simple hiring, companies must assume that the authority may seek to apply merger control rules. The more a transaction approximates a classic asset or control acquisition – in other words, combining talent recruitment with essential IP rights, critical infrastructure, or identifiable business operations – the more likely merger thresholds are to be met.

This position was recently echoed by DG COMP officials in the EU context (where this question is also relevant in relation to gatekeepers’ information obligations under Article 14 DMA). According to their interpretation, a transfer of employees will constitute an acquisition of control, if it involves a transfer of key personnel *together with* other important tangible or intangible assets, such as IP rights or critical know-how. Pure hiring, without accompanying asset transfers, generally fails this test.

This reasoning from Brussels further underscores both the cross-border implications of large-scale hires and the friction between labour mobility and the structural focus of merger rules. By remaining attuned to these nuances – and any future legislative developments – companies can position themselves to avoid falling within the scope of merger control. And while they are entitled to compete for talent until the legislature should redraw the lines, it will be wise to watch the FCO’s evolving stance as closely as any headline deal.

Posted in Germany, Labour market, Merger control | No Comments »

Important Changes in Swedish Merger Control

Trine Osen Bergqvist, Josephine Olsson (Schjødt, Stockholm) · Monday, May 5th, 2025

The Swedish Competition Authority (“SCA”) is sharpening its tools for tackling harmful mergers. On 27 March 2025, the Authority adopted new regulations and general guidelines for merger notifications. The new regulations extend the list of documents and market data that must be included in the notification, increase the expectations for the parties to engage in pre-notification contacts and bring Swedish merger control requirements more in line with those of the EU merger control procedure. In addition, the SCA and a public inquiry have made several proposals for amendments to the merger rules in the Swedish Competition Act. If adopted, these amendments would significantly strengthen the SCA’s powers to detect, investigate and intervene against harmful mergers.

The main changes and proposals and their key implications are described below.

New Regulations on Merger Notifications

On 27 April 2025, the Swedish Competition Authority adopted new regulations, KKVFS 2025:1, and general guidelines for merger notifications under the Swedish Competition Act, which will become effective on 26 May 2025 ("the Regulations"). The amendments are based on the SCA's experience with the current regulations from 2010, KKVFS 2010:3. The Regulations aim to optimise the merger control process. They broaden the scope of information and data required in the merger notifications and increase the expectations on the parties to engage in pre-notification contacts. The SCA believes that the information requirements in the Swedish merger control procedure should be roughly the same as the requirements in the EU merger control procedure. Where deemed appropriate, the Swedish information requirements have been aligned with the requirements in the European Commission's notification form, Form CO. In order to streamline the notification process, the SCA has also introduced the possibility of submitting electronically signed notifications. This means that the current requirement to provide a physical original signed declaration will be removed, which is welcome.

The Regulations expand the list of information and the volume of market data to be submitted in Swedish merger notifications.

Some of the new obligations apply to all mergers, i.e. including those with no horizontal overlaps or vertical relationships between the merging parties' activities. For example, all notifications will have to include a description of the strategic and economic rationale for the merger. Notably, the Regulations also introduce a requirement to disclose the identity of the ultimate controlling entity of the merging parties in a non-confidential summary. Today, the merging parties usually argue that ownership information is covered by secrecy and request that such information be kept confidential.

However, but most of the extended requirements apply only where the merging parties have overlapping activities, i.e. where the merger gives rise to affected markets, reportable markets, or other markets in which the merger may have a significant impact. For such mergers, the Regulations introduce an obligation to discuss all plausible alternative market definitions, extend the list of internal documents and the volume of market data that must be attached to the notification, and clarify that the parties are expected to engage in pre-notification contacts with the SCA.

For mergers that give rise to **affected markets**[1] the list of documents and data to be attached to the merger notification is extended to include

- minutes from all meetings of the notifying party's management, board of directors and shareholders' meetings at which the merger has been discussed,
- analyses, reports and similar documents prepared in the last two years to assess any affected market in terms of market shares, competitive conditions, competitors, potential for sales growth or expansion into other product or geographic markets,
- information about economic data that the merging parties collect and store in their business and that may be useful for quantitative economic analysis,
- estimated market shares and contact details for all competitors with a market share of more than 5 percent, and

- estimated market shares of the merging parties over the next three years for planned (pipeline) products or services.

For mergers that give rise to **reportable markets**[2] or **other markets where the merger may have a significant impact**[3] the list of documents and data to be attached to the merger notification is extended to include

- presentations prepared by or for the notifying party's management, board of directors or shareholders' meeting to assess the notified merger, and
- the market size and estimated market shares of the merging parties for the preceding three years (today one year is sufficient).

The Regulations increase the expectations on the mering parties to engage in pre-notification contacts with the SCA. They do not impose any formal requirements to take pre-notification contacts, but they clarify that such contacts are encouraged

- for mergers that may give rise to affected markets,
- for mergers that may give rise to other markets where the concentration may have a significant impact,
- for questions concerning the competence of the SCA to review a merger, and
- for requests for exemption from information requirements.

Proposals for Amendments in the Swedish Competition Act

The new regulations were accompanied by proposals for legislative amendments both from the SCA and a public inquiry. If adopted, the proposed amendments will significantly strengthen the SCA's powers to detect, investigate and intervene against harmful mergers.

SCA proposal

The SCA's proposal, which was submitted to the government on 24 February 2025, contained a call for both substantive and procedural changes in the merger control rules.

First, and most importantly, the SCA proposes to relax the substantive test for intervention by abolishing the geographic requirement, i.e. the requirement that the merger must restrict competition in a substantial part of Sweden. Today, the SCA can only block mergers with local effects if the relevant geographic market affected by the merger constitutes a significant part of Sweden, either in terms of size or in terms of population. The SCA has on several occasions stressed the need for more flexibility to block mergers in smaller, local markets. It refers to a 2019 decision in which it cleared a merger in the food retail sector that would have a negative impact in two local markets, as the turnover represented only 0.09 per cent of the total turnover in the market. In its submission to the legislator, the Authority notes that most EU/EEA Member States do not have similar geographical requirements in their substantive test.

Second, the SCA also proposes several procedural amendments, i.a. that the investigation period for Phase 2 is extended from 3 calendar months to 90 working days, and that the periods for judicial review are extended from 6 to 8 months for the Patent and Market Court and from 3 to 4 months for the Patent and Market Court of Appeal. With regard to liability for legal costs in court proceedings, the SCA proposes a new provision stipulating that the State is not liable for the merging parties' legal costs if the case is dismissed on the grounds that the notified merger cannot be implemented.

Public inquiry proposal

Moreover, on 7 March 2025, a public inquiry tasked with investigating the need for a new broader competition tool in Swedish law proposed two important amendments to the SCA's powers to investigate mergers.

First, the inquiry proposes that the SCA be given the power to impose a duty on undertakings to provide information about mergers that fall below the thresholds for mandatory notification. The purpose of this power is to ensure that the SCA is informed about, and has the possibility to call in and review, mergers that do not meet the turnover thresholds, but which may nevertheless give rise to competition concerns (e.g. where companies with significant market shares acquire many small companies that do not meet the turnover thresholds (salami slicing), or where the turnover of the merging parties underestimates their competitive position in the market). According to the proposal, the SCA's power to impose such orders should not be limited to certain sectors but rather allow the SCA to target any market where competition is already weak or at risk of weakening. The orders are proposed to have a maximum duration of two years. Companies subject to such orders will have to provide details of the merger, the parties involved and the timing of the transaction. Upon receipt, the SCA will have 15 working days to decide whether to call in the merger. During this period, and the possible review period (if the merger is called in), a stand-still obligation will apply.

Second, the inquiry proposes that the SCA be given the power to impose fines on merging parties that provide incorrect, incomplete or misleading information in response to a request for information ("RFI") from the SCA or fail to provide the required information within the deadline. Today, the SCA's power to impose fines for non-compliance during an investigation is limited to investigations under Articles 101 and 102 TFEU and their Swedish equivalents. The inquiry proposes to introduce a similar power for the SCA to impose fines of up to 1 % of the group's worldwide turnover during merger investigations. Notably, the proposal does not cover information provided in the merger notification. When submitting the merger notification, the notifying party certifies that the information contained therein is true, accurate and complete, which means that the information is provided under criminal liability pursuant to Chapter 15 Section 10 of the Swedish Criminal Code. For this reason, the inquiry considers that the SCA should, as a starting point, be able to assume that the information in the merger notifications is correct and accurate.

Impact on Merging Parties and the SCA's Review

The Regulations mark a shift towards a stricter approach and a more time-consuming merger control procedure in Sweden.

Compared to the Commission and many other competition authorities in the EU/EEA, the SCA has been known to take a rather pragmatic approach in merger cases, especially when it comes to mergers that are clearly unproblematic. This approach has been appreciated by companies and legal advisors. However, some controversial clearance decisions in recent years have led commentators to question whether the Authority's approach has been too relaxed. The SCA, for its part, has questioned whether the market definition and other market information provided by the merging parties give a true and accurate picture of the merger.

The Regulations increase the requirements on the merging parties and bring Swedish merger control requirements more in line with those of the EU. By introducing an obligation to discuss all plausible alternative market definitions and extending the list of internal documents that must be attached to the notification, the SCA aims to increase the chances of having a true and unadulterated picture of the merger, its rationale and the potential effects of the merger.

While most of the additional information requirements are clear and straightforward to apply (albeit more time-consuming), the obligation to discuss all plausible alternative market definitions leaves considerable room for interpretation and uncertainty. The purpose of this requirement is to ensure that the SCA is not misled by the parties' primary market definition and wastes time by focusing its investigation in the wrong direction. However, considering that the market definition is a legal assessment, and not an exact science, the SCA will hopefully be reluctant to conclude that a merger notification is incomplete and restart the deadlines on the basis of diverging views on the market definitions to be included. In practice, uncertainty in this regard is likely to be resolved in the pre-notification contacts.

The clarified expectations on pre-notification contacts are welcome. And the expectations run both ways. In order for pre-notification contacts to be constructive, the SCA must ensure that the case handlers participating in such contacts are familiar with the matter and prepared to be transparent about their findings and concerns at an early stage. The regulations do not provide any details on the procedure for pre-notification contacts, e.g. on the deadlines for information from the merging parties and feedback from the SCA, but the SCA has signalled that the process will be formalised and more aligned with the Commission's procedure, which is welcome.

Going forward, companies involved in Swedish mergers should be prepared to spend considerably more time preparing the merger notification and providing the Authority with the information necessary to obtain approval. When setting the timetable and drafting the transaction documents, it is important to ensure that the increased requirements are taken into account. To avoid unexpected delays in the timetable, the parties' overlapping activities should be identified and analysed at an early stage. In addition, as the SCA's focus on internal documents is clearly increasing, merging parties should have routines in place to review and cleanse internal documents for exaggerations, ambiguities and aggressive sales language before they are put into final form.

It remains to be seen whether the proposed amendments to the merger rules in the Swedish Competition Act will be adopted. If they are, as seems likely, they will further increase the administrative burden on merging parties who are already subject to a complex regulatory landscape. Arguably, the amendments would strengthen the SCA's powers to detect, investigate and intervene against harmful mergers, to the benefit of competition and consumers. In some respects, however, the SCA might want to be careful what it wishes for. While the power to impose fines would increase the incentives for merging parties to ensure that the information provided to the SCA is correct, accurate and complete, it may prove to be a double-edged sword. As the merger investigations become increasingly data intensive, RFIs are often issued with very short deadlines. If inaccurate or incomplete responses may be sanctioned with fines, the SCA may need to adjust its deadlines to give the parties a real chance to ensure that the response is indeed complete and accurate.

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[1] Combined market shares of 20 percent or more, or vertical links with market shares of 30 percent or more.

[2] Horizontal overlaps with combined market shares below 20 percent or vertical links with market shares below 30 percent.

[3] E.g. where one of the merging parties has a market share of more than 25 percent and the other is a potential competitor in that market, or where the merging parties are active in closely related neighbouring markets and their individual or combined market share in any of these exceeds 30 percent.

Posted in Legislation, Source: OECD“>Market definition, Merger control, Merger notification, Sweden | No Comments »

A Pitch to J.D. Vance – Make “VCs-in-Residence” Your Antitrust Legacy

Sean Norick Long (Georgetown Law and Harvard Kennedy School) · Friday, May 2nd, 2025

This article makes a modest pitch: The Trump?Vance Administration should hire venture capitalists (“VCs?in?Residence”) in antitrust agencies to help predict the trajectory of emerging technologies. Just as antitrust agencies enlisted technologists to understand the technology *behind* today’s challenges, they should now partner with VCs to anticipate the technology *ahead*.

The Republican senator from Ohio declared: “We threw off the chains of monarchy in the early republic—we didn’t mean to replace them with the chains of private monopoly.” This statement was not made by John Sherman, who stood on the Senate floor in 1890 to introduce the antitrust legislation bearing his name, but by J.D. Vance in February 2024 at a conference hosted by Silicon Valley startup incubator Y Combinator.

For seven hours, entrepreneurs, technologists, and politicians presented “glimpses into alternative scenarios enabled by different regulatory landscapes.” Tim Wu gave opening remarks; Lina Khan delivered a keynote. Speaking between them, Vance described his time as a VC in 2015, seeing ad tech startups that showed “rapid growth” but were “fundamentally uninvestible” because the market was “already dominated by such powerful incumbents.” Vance appreciated what Khan recognized: Economists miss “something very fundamental” when focusing narrowly on price, ignoring “a broader understanding of how we think about competition.”

The Lawyer-Economist Gap

Despite attempts to label future competition as "nascent" or "potential," these terms confuse even seasoned antitrust attorneys. Paul Denis, who drafted the 1992 Merger Guidelines, admitted mixing these terms. Debbie Feinstein, former director of the FTC's Bureau of Competition, said she "never figured out how one could actually ever bring a perceived potential competition case," preferring the term "future competition." Given the blurred terminology, she conceded, "fundamentally the labels you put on it aren't the question."

A coming wave of overlapping technologies threatens to break the fragile legal framework of future competition. Some technologies—blockchain and synthetic biology—have arrived but remain early in development, while others—quantum computing and nanotechnology—are still years from practical deployment. They can reshape existing markets or create entirely new ones, "blurring the lines between physical, digital and biological spheres." Meanwhile, market shares will be volatile as AI breakthroughs disrupt competitive positions. The labels around future competition need updating, but lawyers and economists can't do it alone.

Why VCs Fill the Gap

Lawyers are trained to look to history, but antitrust requires predicting future harm. In February 2020, the DOJ and Stanford co-hosted a workshop on Venture Capital and Antitrust. Stanford Law's Doug Melamed noted that economists excel with established markets (e.g., T-Mobile/Sprint) but offer "less value in answering the Facebook/Instagram question," which demands intervention "under conditions of substantial uncertainty." When defendants claim that "disruptive innovation is just around the corner," Trump's AAG for Antitrust, Makan Delrahim, urged enforcers to think "a bit like venture capitalists."

The VC industry has propelled American innovation, providing early capital for Apple, Google, and Facebook. It fueled major advances in semiconductors and mainframe computing (1960s), personal computing (1970s), biotechnology (1980s), internet/e-commerce (1990s), and mobile/cloud (2000s, 2010s). VCs bring new products to market by providing risk capital that banks or private equity can't or won't. In 2019, VC-backed companies made up half of U.S. public firms but were responsible for nearly 90% of total R&D spending. By seeding technological developments over decades, VCs shape the modern economy. However, limited fund sizes mean they favor unclaimed markets over ones controlled by entrenched incumbents.

When asked to predict the nascent future, judges oversimplify. In *Illumina-Grail*, the nascent technology was multi-cancer early detection (MCED) testing. Illumina was "the monopoly supplier of a key input," and its purchase of Grail—"the first mover" in MCED testing—raised fears that Illumina might foreclose Grail's rivals. The court worried this deal would "chill[]" investment in "numerous firms" developing MCED tests. While the court attempted a VC mindset, it oversimplified, making a binary distinction between "highly experimental" liquid biopsies and MCED testing that "all of the players" expected would "one day generate tens of billions of dollars."

In August 2024, a court found Google had monopolized the search market, noting, "venture capitalists…have stayed away from funding new search ventures." When Google urged the court to consider how nascent AI might erode barriers to entry, the court replied, "AI may someday fundamentally alter search, but not anytime soon"—oversimplifying AI as a distant, binary event.

Proposing "VCs-in-Residence"

Over the past decade, the FTC and DOJ have recognized that lawyers and economists alone are insufficient for modern enforcement. In 2011, Obama's FTC appointed its first Chief Technologist—a position filled eight times overall, including once under Trump. In 2019, Trump's FTC launched the Technology Enforcement Division, whose technologists even right-leaning commissioners praised for filling "research gaps outside economists' typical areas." In February 2023, Biden's FTC established a dedicated Office of Technology.

Parallel shifts at the DOJ reinforced this trend. In 2022, the Antitrust Division hired a "technology economist" as Chief Economist. Recognizing the need was more than one person could fill, the Division launched a strategic realignment: hiring a Ph.D. data scientist as its first Chief Technologist, rebranding the Economic Analysis Group as the "Expert Analysis Group," and securing a $45 million Technology Modernization Fund (TMF) investment. As of April 2025, more than $35 million remains unobligated and available to spend, suggesting room to fund a pilot "VC-in-Residence" as the agencies retool for the future.

The world might look different had VCs been in the room with antitrust enforcers during Facebook's 2012 acquisition of Instagram. That deal, challenged by Trump's FTC in 2020, went to trial last week. UK regulators noted Instagram had "generated no revenue" and cited "one third party" seeing no "significant marketing opportunities." Meanwhile, Mark Zuckerberg emailed a colleague that businesses like Instagram "are nascent, but the networks are established [and] the brands are already meaningful." A VC-in-Residence might have understood that a 13-employee photo app with filters could, in Zuckerberg's words, "be very disruptive" to Facebook's social network.

VCs-in-Residence can also develop agency guidance. The 2010 Horizontal Merger Guidelines recognized "maverick" firms that play a "disruptive role in the market," yet offered little clarity on weighting intangible assets (e.g., Instagram's brand). The 2023 Merger Guidelines mention "nascent threats" and "ecosystem competition" but do not clearly distinguish good from bad acquisitions. VCs routinely scrutinize intangibles—vision, talent, product potential, and ability to access data—that economists and lawyers struggle to quantify.

An Alternative to Heavy-Handed Regulation

If the Biden Administration was too heavy-handed, VCs-in-Residence carefully weigh trade-offs. For example, regulation reshapes startup incentives. Without viable exit strategies, the incentives to invest time (for founders) and money (for investors) into the ecosystem diminish. Proposed rules that prevent incumbents from buying nascent competitors could stifle investment precisely where needed. Meanwhile, Michael Kratsios, director of the White House Office of Science and Technology Policy, has said, "There needs to be a place for Big Tech to …allow space for little tech to be able to grow and flourish."

Would VCs-in-Residence create conflicts of interest? Revolving door conflicts are *already* rampant: 75% of top FTC officials over two decades came from or went to firms appearing before the agency, and 60% had technology-related conflicts. Because many venture investors back startups, not incumbents, VCs-in-Residence could equally act as a counterweight to existing capture by Big Tech. Strict disclosure and recusal rules, hiring retired VCs, or limiting their role to advisory functions mitigates the risk of capture. An open, multi-phase application (e.g., Presidential Innovation Fellows) or alternating the profile of appointees (between Silicon Valley and emerging geographies) would make selection more transparent.

Still, can't enforcers just pick up the phone to call experts for free? While one-off questions may be free, most expertise is not. An open line of dialogue is far more valuable than an ad hoc phone call. Further, while agencies have expertise in fields they routinely scrutinize (e.g., hospitals and pharmaceuticals), nascent competition lacks frequent transactions. VCs often miss big trends—Airbnb was repeatedly rejected—but they also develop pattern recognition that provides an early warning system about new business models. When the DOJ closed four of its seven antitrust field offices, VCs invested less in those regions. Startups in more concentrated industries were hit hardest. An enforcer once quipped, "I personally find it to be scary…to consider having actual technologists at the FTC." Scarier is not being equipped to manage the coming wave.

The Next Century

In 2015, the FTC celebrated its 100-year anniversary by commissioning artwork that featured a "winged flywheel"—symbolizing "progress" and commitment to protecting consumers "in a world of evolving technology." Nearly a decade later, the FTC sued Amazon for "fuel[ing] a flywheel of anticompetitive harm," and Live Nation-Ticketmaster for a flywheel that "suffocate[d] competition." Had the FTC consulted J.D. Vance, they may have picked a different symbol.

The Trump-Vance Administration recognizes the need to retool antitrust review for the next 100 years. Pairing VCs with technologists, economists, and lawyers fosters cross-pollination, leaving behind future-savvy lawyers and law-savvy investors. Never have VCs been so close to DC. VCs-in-Residence are a practical way to put this expertise to use.

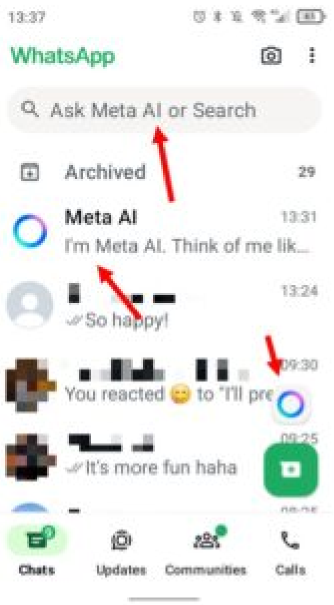
The author declares no conflicts of interest.

Posted in Competition policy, Digital economy, Regulation, United States of America | No Comments »

Did Meta Tie its AI Assistant to WhatsApp?

Todd Davies (University College London) and Marina Iskander (University of Cambridge) · Wednesday, April 30th, 2025

In March 2025, Meta rolled out its AI assistant in Europe, which is accessible through its WhatsApp Messenger and will soon be available on Instagram and Facebook Messenger, too. The feature grants users of its platforms access to a "*reliable and intelligent assistant*" via a "*new blue circle icon*" on the apps. Trans-Atlantic observers may note that the launch comes almost a year after the same features launched in the United States, which, in Meta's words, is a result of it having to "navigate [Europe's] complex regulatory system".



A screenshot showing the new AI Assistant integration in Meta's WhatsApp Messenger.

Some commentators view Meta's move as evidence of its "*dynamic efficiencies*" and "*value creation*", made possible by the synergies originating from the 2014 Facebook/WhatsApp merger, which is now being leveraged in the intense "*race of LLMs*". But, the firm's decision to integrate its assistant directly into its consumer apps may, however, be of interest to competition regulators.

Indeed, the firm has been under intense competition law scrutiny as of late. This past Monday (April 17, 2025), Meta's Mark Zuckerberg took the stand against the Federal Trade Commission (FTC), which is seeking to break up Meta based on concerns that it excluded competitors as a result of its 2012 and 2014 acquisitions of Instagram and WhatsApp. The firm was also recently fined almost €800 million by the European Commission for integrating Facebook Marketplace into Facebook, a decision which it is appealing.

Given that everything is to play for in today's AI market, competition authorities should be on high alert when it comes to looking for anti-competitive behaviour which could tip the market in favour of an incumbent, not least since experience shows that other digital markets have often ended up being dominated by a single firm. In this blog post, we consider whether Meta's launch of its AI Assistant in WhatsApp could see it running afoul of competition law once again.

A Tying Case

Tying is a well-established abuse under Article 102 TFEU. It entails a firm making one product (the tying product) available only together with another product (the tied product). A long line of case law has established that four elements must be present in order for an abuse to be found. First, there must be two distinct products; second, the undertaking must be dominant in the market for the tying product; third, the undertaking must not give its customers a way to obtain the tying product without the tied product; and fourth, the tying must be capable of having exclusionary effects. Our view is that Meta's recent AI assistant launch could satisfy each of these elements. Accordingly, we will briefly examine each.

First, as explained in the Commission's recent draft guidelines on exclusionary abuse, it can be established that the tying and the tied products are two separate products if there is separate consumer demand for both. It seems highly plausible that WhatsApp and Meta's AI Assistant have separate consumer demands, not least in light of AI assistants such as ChatGPT, Claude, or Le Chat, each of which offers a paid tier.

The second element, finding that Meta holds a dominant position through WhatsApp, depends principally on market definition, although it should be noted that the presence of network effects in social media markets may increase the likelihood that Meta may be found to hold a dominant position (as was the case in the Commission's recent Facebook Marketplace decision).

The third element – that it must not be possible to obtain the tying product without the tied product – is the most interesting one. At the time of writing, it appears that Meta does not allow users to turn off its AI assistant from within its tying services, as has been reported in several news outlets. Although users of WhatsApp are not forced to use the AI assistant *per se*, the Commission has said in its *Facebook Marketplace* decision (paragraph 750) that "*compulsion or coercion can still exist where the party accepting the tied product is not required to use it or is entitled to use the same product supplied by a competitor of the dominant undertaking*". Indeed – just as certain features of Facebook's social network were exclusively available to its Marketplace product – only Meta's own AI assistant is available through the AI button and search bar on WhatsApp. Once a consumer has interacted with the AI, it appears in the list of conversations, as shown in the image above.

The fourth element, that the conduct has exclusionary effects, could hinge on an argument that users would be less likely to use competing AI assistants from third-party providers (regardless of whether they multi-home or not). Such an argument could be buttressed by arguing that Meta could benefit from increasing returns to scale as a result of its conduct, while simultaneously denying that same scale to rivals, particularly with regard to accruing data on its users, which can be used to train its LLM.

This would be in line with a pattern of behaviour – first observed in programming forums – whereby users increasingly interact directly with LLMs inside a closed ecosystem, which forecloses valuable interactions that other undertakings seeking to develop competing LLMs could use to train on. For instance, platforms like Stack Overflow or Reddit have experienced a notable decline in activity, as many users now prefer to consult LLM-based tools such as ChatGPT. Unlike open forums, whose content constitutes "a collective digital public good due to their non-rivalrous and non-exclusionary nature", which has historically been scraped and used as training data, closed platforms do not make their user interactions publicly accessible. This shift not only reduces the availability of high-quality, domain-specific training data in the public domain but also reinforces the advantage of incumbents who already operate at scale and can leverage proprietary data flows to improve their models.

A self-preferencing case

Another potential theory of harm is that Meta could have privileged its own AI assistant over those of rival firms, as occurred in Google Shopping. Such a theory of harm would require that other AI assistants be accessible over the WhatsApp user interface. As of today, it appears that this is not the case – just about. In fact, the infrastructure to supply an AI assistant over WhatsApp actually already exists; Meta offers business accounts, which allow other companies to communicate with customers via WhatsApp in order to offer promotions, provide customer service, share updates on order status, etc. These functions are increasingly powered by AI chatbots, and are surprisingly simple to set up, although we are not aware of any that are marketed as a general AI assistant.

If a competing AI assistant, such as ChatGPT, Claude, or Le Chat, were to launch on WhatsApp, then it would strengthen the case for self-preferencing. In light of the recent Android Auto decision – which widened the essential facilities doctrine, finding that not allowing competitors to utilise the dominant firm's platform could constitute an abuse, so long as the infrastructure was intended to be open in the first place – Meta would likely not be able to deny rival undertakings from launching AI assistants on its platform, given that its business account infrastructure was built 'with a view to enabling third-party undertakings to use it'. In other words, Meta would risk abusing its dominant position if it were to deny other providers of AI assistants access to the WhatsApp platform under its existing business account infrastructure.

Here, we already start to see the effects of Android Auto play out. At first glance, the ruling appears to encourage firms to create closed ecosystems, as it imposes a duty to deal on dominant firms to any infrastructure developed "with a view to enabling third-party undertakings to use it." This is likely to give dominant firms pause when deciding whether to allow third-party undertakings access to their infrastructure.

However, a more dynamic and innovation-first perspective on competition yields a different set of incentives. Closed ecosystems are less likely to benefit from the complementarities arising when different firms contribute to value creation, since innovative firms may be excluded from participating. Indeed, ecosystems derive much of their value from third-party innovation, which depends on the extent to which third parties can access the infrastructure they need to innovate. For instance, the Android Auto ecosystem would be less valuable if third parties such as ENEL were not able to create apps for it. Opting for a closed ecosystem that relies exclusively on first-party infrastructure would mean that the dominant company must therefore shoulder the innovation costs for whatever products are built on that infrastructure. In the medium to long term, such ecosystems may struggle to compete with open, permissionless alternatives with greater possibilities for innovation.

Thus, the trade-off facing a dominant firm is not simply about access, but about the broader design of the ecosystem itself. On the one hand, an open ecosystem maximises the value of the ecosystem as a whole, yet limits the ability of the dominant firm to capture value within that ecosystem. On the other hand, a closed ecosystem maximises the dominant firm's ability to capture value, yet forces it to bear the burden of more innovation costs, and may result in it losing out against a rival ecosystem which is more open and vibrant.

Potential Remedies

Our post has so far explored two theories of harm related to Meta's recent practices: tying and self-preferencing. While finding Meta to be in violation of Article 102 TFEU would entail a deeper analysis, the post highlights some potential, real-life harms that may materialise if Meta does not change its approach. Accordingly, we make some suggestions, which need not involve large changes to Meta's approach, but would protect the effective structure of competition and minimise harm to consumers, as well as reduce Meta's risk of violating competition law in the EU or elsewhere.

First, the firm could avoid the third element of the above test by giving its consumers a way to opt-out of any AI integrations in its products and thereby allow users to obtain WhatsApp without its AI assistant being integrated. This may, however, lead to concerns that innovation would be harmed by the firm not being able to use AI in its products and offer that AI to its consumers in a convenient and accessible way.

Second, therefore, Meta could nullify the fourth element of the above test by allowing consumers to use competing AI assistants inside the WhatsApp UI. Given that much of the functionality already exists within WhatsApp, this could be surprisingly easy. WhatsApp could offer its AI assistant as a chatbot through the same interface that its business account customers use and then give its end consumers a choice of which AI 'backend' they would like to use. In that case, Meta would have to make a modest change to its WhatsApp interface, such that when consumers use AI-powered features, they would be taken to the AI assistant of their choice, perhaps one provided by a third-party firm, rather than Meta's own AI assistant (similar remedies have been proposed for online advertising and content moderation).

This would let other AI assistants be offered via exactly the same interface to exactly the same users and therefore compete on a level playing field. Since this functionality for third-party integration with WhatsApp chats already exists, and users already interact with Meta's AI assistant through the same chat interface, the technical burden on Meta would likely be extremely reasonable. This path forward would allow rival AI assistants to compete with Meta's offering, while entailing low overhead costs in terms of implementing the remedy on Meta's side and still retaining the benefits of AI assistant integration in WhatsApp.

It is worth noting that Meta's rivals may not want to be intermediated by WhatsApp if Meta has access to data produced through consumers' interactions with their LLMs through the WhatsApp platform. Given that digital markets are prone to tipping, rivals may be reluctant to allow Meta access to the chats produced with consumers, on which it may also be able to train its AI models and ultimately gain a competitive advantage. There is, however, a technical means to address this challenge, which is to simply ensure that any chats with third-party AI assistants have end-to-end encryption turned on, such that Meta could not view and train on the interactions with its competitors' AI assistants. This would remove disincentives for rivals to offer their AI assistants through Meta's interfaces and ensure a level playing field to facilitate competition on the merits.

Conclusion

In fast-moving digital markets, it is important to quickly identify potential abuses before anti-competitive harm can accumulate. In this blog post, we put forward a case that Meta's choice to integrate its AI assistant directly into its social networks may harm competition in the adjacent AI assistant market. We considered whether such behaviour could constitute tying or self-preferencing under EU competition law and found that the possibility could indeed warrant further investigation, at least beyond what is possible within the scope of a blog post. Regardless, it would appear that there are several adjustments that Meta could proactively make to its current approach, which would help preserve the effective structure of competition – and give its consumers wider choice – and thus limit its exposure to competition law scrutiny.

The author Todd Davies discloses that he was employed at Google as a software engineer between 2016 and 2022. All relations with the firm ended in March 2022.

Posted in Digital markets, European Union, Self-preferencing, Tying and Bundling, Whatsapp | No Comments »

On the Japan Fair Trade Commission's Google Decision: Some Early Reflections

Sangyun Lee (Kyoto University) · Tuesday, April 29th, 2025

Google's 'Be Evil' transformation (if not merely a narrative) and the antitrust efforts to avenge it (if not exact revenge) are no longer novel. Most notably, following Judge Amit P. Mehta's historic 2024 ruling from the U.S. District Court for the District of Columbia against Google's exclusive agreements, including ISA (Internet Services Agreement), MADAs (Mobile Application Distribution Agreements), and RSAs (Revenue Share Agreements), Judge Leonie Brinkema of the Eastern District of Virginia delivered another landmark decision on April 17, this time targeting Google's digital advertising business model. Of course, these cases were preceded by the EU's pioneering decisions, such as *Google Shopping*, *Android*, and *AdSense*.

While Judge Brinkema's latest ruling has drawn most of the spotlight lately, there has also been a noteworthy development in Japan. On April 15, for the first time in a formal infringement decision accompanied by a cease-and-desist order against a Big Tech company, the Japan Fair Trade Commission (JFTC) found that Google violated Japan's competition law, commonly referred to as the Anti-Monopoly Act (AMA), through contracts with smartphone makers and mobile carriers aimed at promoting its search engine and Chrome browser.

Although the JFTC's decision may not appear particularly novel—largely echoing competition concerns already well documented and addressed in other jurisdictions, notably the EU's *Google Android* case—it nonetheless deserves attention. Not only does this case contribute to global efforts to rein in tech giants, but it also gives rise to cautious optimism that Japan's competition enforcement may be entering a more proactive phase (although, as I will note at the end of this piece, such cautious optimism is somewhat tempered by concerns, about whether any meaningful change will actually take hold).

Facts and Key Findings

To begin with, let us outline the key facts and findings. The practices challenged by the JFTC were not substantially different from the practices sanctioned by the European Commission in July 2018. In its 2018 decision, the Commission found the following three contractual practices to be anticompetitive: MADAs, RSAs, and AFAs (Anti-Fragmentation Agreements). These findings (except the RSAs) were broadly upheld by the General Court in September 2022.

Similarly, in October 2023, a year after the General Court's decision, the JFTC launched an enforcement action against Google alleging that the first two practices, MADAs and RSAs, had the potential to exclude competitors or restrict other firms' business activities, thereby violating the AMA. Just a year and a half after the announcement, in April 2025, the JFTC issued its formal decision finding that the two practices violated Article 19 of the AMA, which prohibits unfair trade practices (UTPs).

Specifically, the JFTC identified the following two practices as illegal, implemented since July 2020 (Decision, p.8):

- (MADAs). In a situation where pre-installing Google Play was 'necessary' for Android smartphone makers—since (i) Android smartphone users 'typically' installed apps via app stores, (ii) Google Play was 'the most widely used' among them, and (iii) Google did not offer users a way to install Google Play independently (Decision, p.6)—conditioning the license of the Play Store on Android smartphone makers' agreements to preinstall Google Search and Chrome on Android smartphones, place their widget and icons on the initial home screen, and not change Chrome's default settings where Google Search is selected (which served as '*de facto* restrictions' that made it difficult to install or feature competing search apps or browsers). (Decision, pp. 6-7 and 8)
- (RSAs). In exchange for sharing revenues from search advertising, requiring makers and mobile carriers of Play Store–licensed Android smartphones to comply with several conditions favoring Google's search and browser services, such as excluding and restricting other search services and setting Google Search and Chrome as defaults, and/or placing them in advantageous positions. (For details, see Decision, pp. 7, and 8-9).

The practices were found to be, among the various types of UTPs, imposing restrictive conditions, as defined and prohibited under paragraph 12 of the General Designation (GD). The paragraph describes "trading with another party on conditions which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party" as a type of UTP prohibited under Article 19 of the AMA. The GD is a notice issued by the JFTC pursuant to Article 2(9)(vi) of the AMA, which designates specific types of UTPs that are not explicitly listed under Article 2(9)(i) to (v). While the latter statutory UTPs must be sanctioned with administrative fines (see Articles 20-2 to 20-6 of the AMA), the designated UTPs under the GD are not subject to such financial penalties.

Upon finding the violation, the JFTC ordered Google to stop the practices and imposed several behavioral remedies, including passing a board resolution to end the conduct, notifying business partners about the changes, and training staff, as well as appointing an independent third party to monitor compliance for five years and submit reports annually. No fine was imposed.

Among other aspects, what I find particularly noteworthy in this case is that the JFTC addressed Google's practices—widely challenged around the world—not through concerns over dominance or market power, which could have been pursued under Article 3 of the AMA (akin to illegal monopolization under Section 2 of the Sherman Act or the prohibition of abuse under Article 102 TFEU), but through the frame of UTPs. The practical and legal implications of this approach will be discussed below.

Legal Discussion

Legally speaking, the application of UTP framework, by framing the conduct as the imposition of restrictive conditions, entails that Google's practices were sanctioned not because they substantially restricted competition, but because they only *lessened* it. (Not all types of UTPs are interpreted as requiring a lessening of competition, see Masako Wakui (2018), pp. 141-142 for a quick overview.)

As I understand it, the threshold for establishing a lessening competition in Japan is lower than the threshold placed for finding a substantial restriction of competition—much like the incipient violation doctrine under Section 5 of the U.S. Federal Trade Commission (FTC) Act, which prohibits unfair methods of competition (UMC). Of course, whether UMC—beyond its historical origins—can serve as an appropriate yardstick to UTPs is open to debate. However, at least following the stance of the FTC's 2022 Policy Statement, which departed from the rescinded 2015 Statement's narrower approach and embraced a broader interpretation of UMC, I find that it still offers a meaningful point of comparison with the UTP framework in Japan.

Once a practice is framed as a (lessening-competition-type) UTP, the burden of proof borne by the JFTC becomes considerably lighter—even though administrative fines cannot be imposed for those designated UTPs, as mentioned above. No relevant market definition is required, and no full-scale analysis of anti-competitive effects needs to be conducted. The JFTC can establish a breach *without* having to demonstrate a "substantial restraint of competition" (required in private monopolization cases, under Article 2(5) of the AMA)—that is, establishing or reinforcing market dominant power, which is, roughly speaking, equivalent to those required in cases of exclusionary abuse of dominance or more closely aligned with illegal monopolization under the Sherman Act. Additionally, the "restrictive condition" under paragraph 12 of the GD need not take the form of 'exclusive' dealing (unlike paragraph 11 of the GD, which does).

Indeed, the Google decision illustrates this point. In the section discussing the consequences of the conduct (Decision, p. 9), which spans less than half a page, the JFTC merely stated the following: that in at least 80% of Android smartphones (excluding Pixel phones) sold in Japan, the Google Search app and Chrome browser were pre-installed, their icons and/or widget were placed on the initial home screen, and in Chrome's case, the browser's search setting was selected to use Google's search function; and that more than 50% of Android smartphones licensed with the Play Store in Japan were partially or entirely subject to the RSAs.

From these descriptions, one might infer some relevant markets and exclusionary effects the JFTC may have considered, but these were neither explicitly defined nor substantively analyzed in the decision. Had the JFTC engaged in a more detailed market definition and economic analysis, as is often the case in other jurisdictions, the decision would likely have included discussions on the validity of the market definition, the existence of market power, and the capability of the conduct to exclude efficient rivals. And if the JFTC had done so, the decision would have been substantially longer than the current 16-page version.

To be clear, I am not arguing that such deliberation on economic effects lacks value. Rather, I am simply describing the succinct approach the JFTC took in this case. As a general rule, of course, and particularly in light of the legitimacy of competition law enforcement, such deliberation is essential. In fact, I personally find that this case, by being resolved without detailed assessment, raises certain legitimacy-related concerns—namely, whether such an approach sufficiently revealed the competitive harm posed by the conduct in question, and whether the decision served as a meaningful precedent capable of guiding firms to self-assess and appropriately modify their conduct in the future. Still, in this specific case against Google, such concerns are unlikely to draw much attention in Japan, given the extensive global precedents against Google's similar practices.

At any rate, the absence of requirements for sophisticated market definition and full-scale effects analysis may make the prohibition of UTPs seem like an ideal tool, especially for competition authorities eager to modify the practices of large tech platforms without bearing a heavy burden of proof. Indeed, Saiko Nakajima, a senior digital platform investigator at the JFTC, reportedly stated that the agency chose to rely on the UTP tool to address the issue 'speedily' (given the drastic changes happening in the market with the rise of generative AI), while other experts have commented that the JFTC's choice of framework may also have been intended to reduce the risk of losing in court and its potential consequences. As a purely personal observation, considering the ongoing efforts by other competition authorities to ease the evidentiary burden in abuse cases (for instance, the EU's current discussions on 'naked restrictions' in the context of abuse) and assuming that such efforts are seen as legitimate and necessary, the fact that the JFTC already has such an efficient and flexible tool, and has made effective use of it, might be worth celebrating.

Some Early Reflections

Given the JFTC's traditionally milder approach (the JFTC has resolved most cases through commitments or voluntary measures, see Simon Vande Walle's summary of the JFTC's enforcement record from 2013 to 2022) compared to that of its counterparts (see my comparison of enforcement in Korea and Japan, at 14-15), the fact that it has now issued its first formal infringement decision against a major Big Tech company is certainly encouraging. This case is significant not only because it contributes to global efforts to rein in tech giants, but also because it raises expectations for a more proactive enforcement stance from the JFTC going forward.

That said, from the perspective of a non-Japanese researcher based in Japan, it is true that the recent decision, in which the JFTC sanctioned Google's practices by using the existing competition tool, the prohibition of UTPs, still raises some lingering questions. Among other aspects, the necessity for, or justification of, *ex ante* platform regulation in Japan, remain somewhat an uneasy question for me.

The *ex ante* platform regulation refers to the Smartphone Software Competition Promotion Act (SSCPA, or the Smartphone Act). As Alba Ribera Martínez and I once wrote, Japan recently introduced the SSCPA, inspired by the EU's Digital Markets Act. The JFTC is now set to enforce it by designating Google (as an OS, app store, browser, and search engine operator) and Apple (as an OS, app store, and browser operator) in March 2025, and undoubtedly, this Google decision will embolden the JFTC's further enforcement of the SSCPA, which will enter fully into force by the end of this year.

Assuming that there is a market failure in Japan's mobile ecosystem jointly dominated by Google and Apple (setting aside counterarguments for now), enabling such an effective governmental response could undoubtedly be a welcome development. However, before celebrating too quickly, it may be worth asking whether, and why, Japan needed to introduce the SSCPA in the first place—particularly given that, unlike the EU, it already had a competition law tool, like the UTPs prohibition, which is, at least theoretically, capable of addressing concerns more flexibly and across a broader scope. For example, the SSCPA is unlikely to cover issues such as those arising from RSAs.

If the introduction of the SSCPA can still be justified despite the presence of existing legal tools, the most compelling argument would likely be that the current AMA provisions, while adequate on paper, may not, in practice, function as effectively as expected. Because, from a normative perspective, competition-related regulation is, arguably, best justified when the following two conditions are met: first, there is a market failure; and second, competition law, either in its statutory scope or in practical application, is insufficient to address it. In this case, we have already assumed the existence of a market failure and confirmed that, from a substantive perspective, the AMA offers a sufficiently broad and flexible set of tools to address abusive conduct—even in the absence of dominance or market power.

If, as the Google case seems to suggest, UTPs may be able to serve as a functional tool to complement the AMA's monopolization provision, but such success remains an exception rather than the rule, and if we cannot reasonably expect the AMA to operate as a generally effective and robust mechanism for addressing market failures, then the question arises: why is that the case?

While still purely hypothetical, I find that the suspected (not yet established) unworkability of the AMA in practice may plausibly be attributable to several institutional, organizational, and/or political factors. These may include: a lack of incentives for enforcers to pursue more experimental enforcement efforts, particularly when facing the risk of losing in court; the agency's budget or staffing constraints; the judiciary's conservative interpretation of competition law provisions, especially in monopolization cases; limited political backing for the JFTC; and, more fundamentally, the absence of broad-based public support for an assertive competition policy.

Of course, these remain hypotheses. It is far from certain which of these accounts will ultimately prove most compelling. Nevertheless, it is worth noting that if the AMA's unworkability is indeed attributable to these such structural and societal barriers, then the global contribution and revitalization of Japan's competition enforcement—which I had cautiously hoped for through the recent Google decision—may be constrained, at a more fundamental level, by the deeper and hardly resolved barriers. If such barriers do exist, they are highly likely to erode the foundations of the SSCPA's effectiveness over time -not to mention the forthcoming appeal (should there be one) and other major enforcement cases that may follow the Google case. And that, frankly, gives me pause.

The recent Google case in Japan is indeed a noteworthy one. This is not only because it forms part of the global efforts toward tougher antitrust scrutiny, particularly of Big Tech, but also because it raises hopes for a more vigorous future of competition enforcement in Japan, while at the same time highlighting persistent, and perhaps systemic, barriers that may possibly continue to impede such progress. This case seems to stand at the intersection of promise and constraint, after all.

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Posted in Competition enforcement, Digital markets, Exclusionary Abuse, Google, Japan | No Comments »

The DMA's Teeth: Meta and Apple Fined by the European Commission

Alba Ribera Martínez (Deputy Editor) (University Villanueva, Spain) · Monday, April 28th, 2025

Fast and furious: that was the premise that would make the DMA's enforcement effective. Overcompensating for past grievances in the application of Article 102 TFEU in the digital markets in terms of speed and remedies justifies the DMA's need for having regulatory teeth. And teeth it has.

On 22 April 2025, the European Commission (EC) finalised its non-compliance procedures against gatekeepers Meta and Apple for DMA infringements. The enforcer imposed €200 million and €500 million fines, respectively. Both fines come one year and one month after their initial triggering by the enforcer through punitive proceedings aimed at curtailing (~~per se~~) anti-competitive conduct in their own tracks. Additionally, the enforcer also shaped the rest of its enforcement action via a number of press releases released on that same day. Transparency *en bloc* to counter the geopolitical tensions with the US, some would argue. This post considers both non-compliance decisions and the rest of the developments highlighted by the European Commission at the end of April.

Non-compliance procedures: nothing to see here, EDPB and Article 102 TFEU

The EC declared, for the first time in its history, that a gatekeeper infringes the DMA in some shape or form. Meta and Apple were the two winners of the DMA lottery for breaches of Article 5(2) and 5(4) DMA.

Meta's pay or consent subscription model

Meta has been found to breach the prohibition on personal data combinations across first-party and third-party contexts under Article 5(2) DMA via the introduction of the pay or consent subscription model. In November 2023, anticipating the DMA's impending application, Meta introduced its renowned pay or consent model on its Facebook and Instagram services in the EU, EEA, and Switzerland. The subscription model presented the user with a binary option: either the user chose to carry on navigating the social networks for free (the caveat being that consumer choice would be equated to granting consent in the sense of the GDPR) or the user chose to subscribe (for €9,99/month) to stop seeing personalised ads on Meta's services.

Data protection authorities (DPAs) voiced their concern about the grave consequences introduced by such a model in terms of the risks posed to informational self-determination, despite the fact that news outlets and publishers streamlined them into the generation of revenue online. They were right to do so. Meta's pay or consent model came as a response to previous findings from the Irish DPA that it could not rely on the legal bases of legitimate interest or contractual necessity to justify their processing of personal data for the purpose of delivering personalised advertising. DPAs had, therefore, proclaimed that consent as a legal basis was the only available legal venue to process personal data in this context.

Building on the research of data protection and privacy scholars, in my own view, this was not a satisfactory stance to take. The prevalence of consent within data protection frameworks points to a double fallacy: when users are asked to choose between a privacy and no-privacy scenario, they choose the latter; and when they make that choice, they are rational and fully informed economic agents. Although it might sound like a paternalistic viewpoint to defend, consumers do not read privacy statements in full (100-plus pages of fine print do not make the mark) nor can they, at times, understand them, due to their complexity. Shifting Meta's available legal bases away from legitimate interest and contractual necessity and onto consent just misses the point, building on the misconstruction surrounding the ode of user consent.

Within this framework, Meta (as usual in its drafting of privacy policies) challenged the whole European data protection regime by considering fundamental rights to be alienable. That is, one can detach one's fundamental right to the protection of one's personal data in exchange for a price. The most extreme representation of such alienability points to the possibility of citizens selling their livers as a legitimate choice (let's say, in exchange for a sum of money), whilst trading their fundamental right to physical integrity. In a less provocative proposal, Meta basically certifies the barter between a fundamental right and monetary compensation. In turn, the whole discussion also impacted the DMA regime in full, given that the prohibition under Article 5(2) can be simply lifted for those cases where gatekeepers can collect end user consent in the sense of Articles 4(11) and 7 DMA. By this token, if the GDPR regime does not sign off on the pay or consent subscription model, the DMA can rarely exempt the prohibition based on the same grounds.

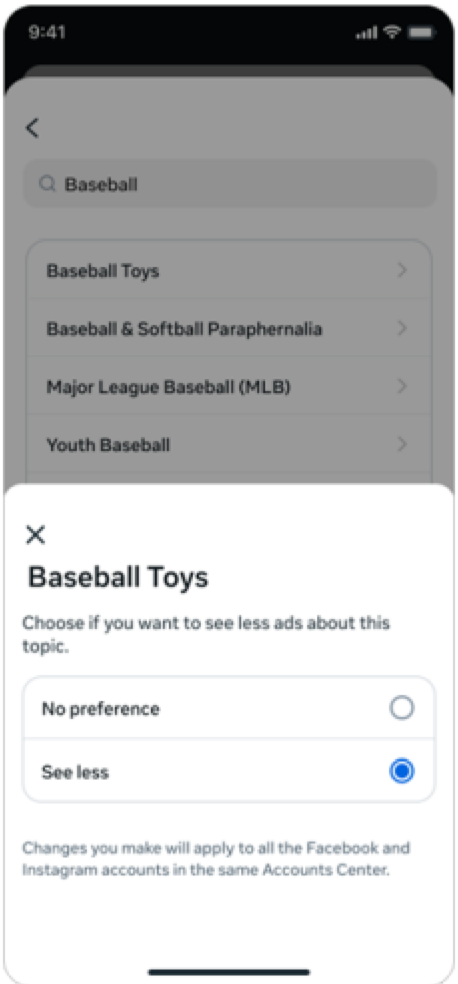
The broader question arising from this interplay between regulations precisely stems from this illusory alienation among authorities. The DMA establishes under Recital 12 that it operates without prejudice to the GDPR. In principle, the European Commission is not dependent on the DPAs' or EDPB's opinions and decisions to secure a harmonised set of digital rules. Nor can the European Commission impose an interpretation of the GDPR on those authorities. The overlapping of authorities is quite unprecedented, and not covered by the Court of Justice's *Meta v. Bundeskartellamt* ruling (Case C-252/21), since those cooperation and coordination mechanisms apply exclusively to EU competition law within a decentralised enforcement system where NCAs and DPAs can exchange information. In any case, within this latter set of cases, NCAs may still deviate from a DPA's conclusions due to their autonomy in finding a breach of competition law.

The same would seem to be true in this instance. In principle, the European Commission could deviate from the opinions and decisions of DPAs and the EDPB to the extent that consent in the DMA terms may not be equivalent to the GDPR's protected values underlying a data subject's granting of consent.

Despite the detachment of both pieces of regulation, the enforcer decided to replicate the EDPB's Opinion 08/2024 on valid consent in the context of consent or pay models implemented by large online platforms. In the opinion, the EDPB basically declared that large online platforms (which, coincidentally, covers those types of economic agents designated as gatekeepers under the DMA, see para 28) implementing pay or consent subscription models will not, in most cases, comply with the requirements for valid consent if they confront users only with a binary choice between consenting to processing of personal data for behavioural advertising purposes and paying a fee.

Following this same line of thought, the EC establishes that Meta's subscription model is not compliant with the DMA because: i) "*it did not give users the required specific choice to opt for a service that uses less of their personal data but is otherwise equivalent to the 'personalised' ads service*" (in the Opinion, for instance, in para 73); and ii) "*it did not allow users to exercise their right to freely consent to the combination of their personal*" (paras 67-71). In accordance with a wish to coordinate and cooperate with the EDPB, the EC's stance in sanctioning this type of conduct via the DMA for these reasons is not particularly objectionable. That is, if the EDPB's reasoning on pay or consent subscription models was impeccable (see comment here). Going back, once again, to the Court of Justice's *Meta v. Bundeskartellamt* ruling, the connection of both arguments is much less apparent, since Meta's proposed model builds directly on the CJEU's backdoor statement that fee-based alternatives could still sustain the foundations of valid consent (para 150 of the ruling).

Against this background, the European Commission decided to impose a €200 million fine on Meta. However, the fine only covers March 2024 to November 2024. By November 2024, Meta introduced another version of the free personalised ads model, offering a new option that allegedly uses less personal data to display advertisements. According to Meta on its latest compliance report, users in the EU who choose the 'free' version of the subscription model will be able to choose to see 'less personalised ads' (page 21 of the compliance report). For instance, let's imagine that a user prefers to see behavioural ads on the social network of certain categories (e.g., the wider category of baseball). From the vast interests comprised under the baseball category, the user can simply choose the 'see less' option for particular aspects of baseball (e.g., baseball toys) by opting out of the processing of personal data individually through a toggle, as shown in the image below:



Toggle for selecting less personalised ads.

The European Commission is currently assessing whether the slight change introduced by Meta meets the regulatory requirements set out in Article 5(2) DMA. In my own view, if the EC is going to take the case with all seriousness and make the EDPB's reasoning good, there is a great chance that Meta will face further challenges from the enforcer. Due to the contingent nature of the newly-released features (that the EC has not yet assessed under the lens of Article 5(2) DMA), the non-compliance decision issued against Meta does not fare well against the requirements of Article 29 DMA. At face value, Article 29(5) DMA reads that "*in the non-compliance decision, the Commission shall order the gatekeeper to cease and desist with the non-compliance within an appropriate deadline and to provide explanations on how it plans to comply with that decision*". As opposed to its non-compliance decision against Apple for its breach of Article 5(4) DMA, the EC's non-compliance decision is incomplete, since it does not declare the cessation and desisting of Meta's unlawful conduct. End result? The pay or consent subscription model will have to be removed by Meta at some point in time, but not within the 60 day-deadline that the enforcer has set out for Apple to comply with. Bottom line: the EC's non-compliance decision will have to be complemented with further enforcement action, either via the issuing of a new non-compliance decision (fast and furious, no more) or by amending the recently issued non-compliance decision. Given that Article 5(2) cannot be subject to specification proceedings under Article 8(2), there is no scope for those implementation measures to be 'formally' imposed by the European Commission via non-punitive means.

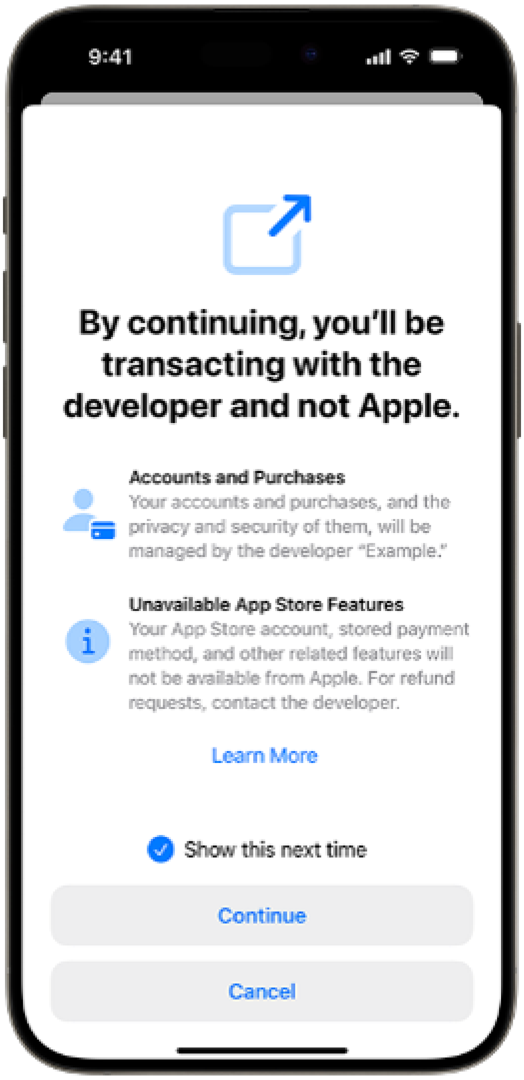
Apple's steering of users: Article 102 TFEU 2.0

The European Commission also fined Apple €500 million for infringing the steering provision under Article 5(4) DMA. The provision reads that "*the gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper*". In short, anti-steering provisions cannot longer be enforced by Apple on its iOS and, additionally, it must actively put forward technical implementations to make that possible.

Apple's 2024 compliance report was mute on the subject. The 2025 version of the compliance report was not much better, despite that the gatekeeper had *de facto* in August 2024, proposed changes to the ability of developers to perform steering.

As per the proposal, Apple enables app developers who have opted into the new terms and conditions generated *ex profeso* for European developers as a consequence of the DMA to steer users under certain circumstances. First, they are subject to a number of recurring fees when they manage to steer users. Those fees went up to 17% in their first pitch to the European Commission, at the time that the non-compliance procedure was triggered. By August 2024, steering ignited a 5% initial acquisition fee (for the acquisition of an end user from the App Store) on the sales of digital goods and services occurring within a 12-month period after the initial install and an additional 10% store services fee on the purchases made via the link-outs.

Second, Apple imposed upon developers to show an in-app disclosure sheet when taking users to their destination using an actionable link, as shown in the image below:



In-app screen to be shown by developers.

Apple also restricted the in-app prompt's format and style as well as the moment when it should be issued within the end user's experience. By doing that, developers were discouraged from performing steering and, even in the cases where they did, consumers ended up being discouraged through the 'scare screen' alerting them of the fact that their privacy and security would be managed by the developers, and not by Apple directly.

In this context, the European Commission found that Apple failed to comply with Article 5(4) DMA not due to the way by which it complied with the provision, but rather through the restrictions it imposed by doing so that, in the end, result in "*consumers (not) fully benefit(ting) from alternative and cheaper offers as Apple prevents app developers from directly informing consumers of such offers*". On top of that, the European Commission declared that Apple had "*failed to demonstrate that these restrictions are objectively necessary and proportionate*". Unlike Meta's case, the EC does order through the issuing of the non-compliance decision to "*remove the technical and commercial restrictions on steering and to refrain from perpetuating the non-compliant conduct in the future, which includes adopting conduct with an equivalent object or effect*".

Recital 40 DMA fleshes out the possibilities open to a gatekeeper when implementing the steering technical implementations under Article 5(4) DMA. In theory, gatekeepers can (and do) monetise the direct or indirect remuneration by the business users for facilitating the initial acquisition of the end user by the business user. As a matter of fact, EC officials have reiterated that the "free of charge" clause under Article 5(4) DMA does not necessarily entail that steering possibilities must be provided at zero cost to the business users. From what one can guess from the press release, it seems that two separate and recurrent fees do not abide by this premise or, at least, that the 10% store services fee does not fall under the scope of the gatekeeper's capacity to be remunerated for a developer's initial acquisition of end users from its app store. In a parallel non-compliance procedure opened by the European Commission, Google faces similar allegations relating to its imposition of recurrent fees and restrictions on developers for monetising its Google Play services. The Court of Justice's recent *Android Auto* ruling (Case C-233/23) also points to the fact that dominant undertakings (let's say, gatekeepers) are not necessarily precluded from requiring an appropriate financial contribution from the undertaking that requests interoperability (in this case, the developer steering end users). Such contribution must stay as fair and proportionate, having regard to the actual cost of such development, to derive an appropriate benefit from it (para 76 of the ruling). Perhaps the European Commission disagrees with Apple's approach because the 5% initial acquisition fee does not seem to be proportionate, because it does not correspond with the actual cost of such implementation, although it can, in fact, exist in a more reduced fashion. If this is the discussion that gatekeepers v. Commission are having relating to those provisions which explicitly flesh out that they must be provided "free of charge", one also starts to wonder whether each of the DMA implementations could, potentially, be exercised by business users in exchange for a fair and proportionate remuneration to the gatekeeper.

On a more provocative note, there is no indication under Article 5(4) DMA that the gatekeeper must justify that its implementation of the steering provision should be necessary and proportionate. The DMA explicitly requires the proportionality test to be applied for Articles 6(11), 6(12) or 6(7), whereas those same requirements are not entirely clear under the steering mandate. Despite that the regulation does not include such proportionality test, the Compliance Template Form (discussed in depth here) requires gatekeepers to disclose what actions it has taken to protect, integrity, security, or privacy to comply with the provision and why these measures are strictly necessary and justified and there are no less restrictive means to achieve these goals (Section 2.1.2.m) of the Compliance Template Form). The enforcer has introduced such necessity and proportionality tests through the back door, so to speak. The EC's fine on Apple just demonstrates the first step in enlarging the DMA's contours.

23 core platform services, browser choice screens and a new set of preliminary findings

Fine imposing is always shinier for enforcers. However, the EC issued three additional developments to its roster of on-going enforcement actions surrounding the DMA.

The first one corresponds to its closing of the non-compliance procedure against Apple for its compliance with Article 6(3) DMA relating to the default settings regarding browsers, search engines, and other features, following Article 29(7) DMA. Despite the EC being quite concerned in March 2024 about Apple's uneven compliance with the provision, the gatekeeper's further changes on its compliance have satisfied the EC's appetite for effective enforcement. In August and October 2024, the gatekeeper amended the choice screens for browsers and search engines to be displayed on iOS devices and also made a wide range of its legacy apps (such as Safari, Camera, or the App Store) deletable by users through a centralised default control centre embedded in its settings.

The second development that took place on that same day relates to the EC's non-compliance procedure relating to Article 6(4) DMA. That is, the provision compelling Apple to open alternative app and app store distribution on iOS services. The EC triggered the non-compliance procedure in June 2024 for a wide range of reasons, including Apple's imposition of its 0,5€/download Core Technology Fee on third-party app marketplace providers and app developers. The European Commission has put pen to paper and issued its preliminary findings to the gatekeeper, opening the possibility for the non-compliance decision to be issued later this year.

Bearing in mind those two developments relating to the enforcer's ongoing non-compliance procedures, the cases against the gatekeepers remain as follows from the table below:

Gatekeeper and CPS	Provision	Phase of proceedings
Meta (Facebook and Instagram).	Article 5(2) DMA.	Fine imposed on 22 April 2025 (and pending findings on new features).
Apple (App Store).	Article 5(4) DMA.	Fine imposed on 22 April 2025 (and 60 days to comply with cease-and-desist order).
Apple (iOS).	Article 6(3) DMA.	Closed non-compliance procedure on 22 April 2025.
Alphabet (Google Play).	Article 5(4) DMA.	Preliminary findings issued on 19 March 2025.
Apple (iOS).	Article 6(4) DMA.	Preliminary findings issued on 22 April 2025.
Alphabet (Google Search).	Article 6(5) DMA.	Preliminary findings issued on 19 March 2025.
Apple (iOS and iPadOS).	Article 6(7) DMA.	Implementation measures imposed on 19 March 2025.

Finally, the EC also reduced the DMA's scope by de-designating the first CPS of its history: Facebook Marketplace. As of 22 March 2025, Facebook Marketplace is no longer captured by the CPS as a standalone nor integrated within Facebook's wider service. As the European Commission declared, abiding by the procedure under Article 4(1) DMA, Meta requested the EC on 5 March 2024 "*to reconsider the designation of Marketplace*". After a whole year of reconsidering Facebook Marketplace's situation, the EC comes to the conclusion that it "*no longer meets the relevant threshold giving rise to a presumption that Marketplace is an important gateway for business users to reach end user*". If anything, the development is a delayed rebuttal of the quantitative presumption applied to Facebook Marketplace back in September 2023, where the EC stressed that the service did surpass the thresholds by far and, thus, would merit DMA designation.

On the designation decision, the EC went to great lengths to demonstrate that there were, in fact, any business users within the service, since Facebook had hampered businesses from publishing listings on their professional profiles since January 2023 (para 239 of the designation decision). To the end of estimating the service's yearly active business users, the EC took recourse to the best approximation possible: it would only consider Facebook business pages with one or more listings on service as well as users, established or located in the Union, who had created 28 or more listings in at least one month of the financial year, with 80% or more listings being made in the same category (para 277). By doing so, the EC highlighted that the "*figure largely exceeds by a factor of more than 5-10 yearly active business user threshold, even without factoring in the number of Facebook business pages with one or more listing on Marketplace*" (para 278). In other words, the end users factored as business users for the purposes of estimating Marketplace's yearly active business users surpassed by far the number of actual business users present in the service. Meta's appeal to the designation decision questioned such an approximation. The hearing of the appeal is set to be held the next 15 May, so the European Commission decided to backpedal its approach before its estimations were questioned directly by the General Court.

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