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COMPETITION AND REGULATORY NEWSLETTER

QUICK LINKS

Main Article
Other Developments
Merger Control
Antitrust

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European Commission conditionally approves proposed merger of Fiat Chrysler Automobiles and Peugeot

On 21 December 2020 the European Commission announced that, after a Phase II investigation, it has conditionally approved, under the EU Merger Regulation, the proposed merger between Fiat Chrysler Automobiles N.V. (FCA) and Peugeot S.A. (PSA). The proposed merger will lead to the creation of the fourth largest automotive group in the world, to be called 'Stellantis'.

BACKGROUND

FCA is headquartered in the UK. It manufactures, supplies and distributes passenger vehicles and light commercial vehicles under the brands Fiat, Chrysler and Jeep, among others. As well as providing financing to support the sales of its branded vehicles to both dealers and retail customers, FCA is also active in the provision of components through its automotive cast components business Teksid S.p.A., plastic components and modules business Plastic Components and Modules Automotive S.p.A. and its automotive production systems business Comau S.p.A..

PSA is headquartered in France. It manufactures, supplies and distributes passenger vehicles and light commercial vehicles under the Peugeot, Citroën, Opel, Vauxhall and DS brands. Through its subsidiary, Faurecia S.A., it is also active in the manufacture and supply of interior automotive components. PSA also provides ancillary services such as financing solutions for the acquisition of motor vehicles, as well as mobility services and solutions.

The proposed merger was formally notified to the Commission on 8 May 2020 which announced the opening of a Phase II investigation on 17 June 2020.

COMMISSION'S CONCERNS AND OPENING OF PHASE II INVESTIGATION

The Commission was concerned about the potential lessening of competition with respect to light commercial vehicles (vans) below 3.5 tonnes in the European Economic Area (EEA) and, more specifically, in Belgium, Croatia, Czechia, France, Greece, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Slovenia, Spain and the UK where either PSA or FCA is already the market leader. The Commission noted that in many of these countries, FCA and PSA combined would hold high market shares particularly within the smaller van segments where there were fewer competitors than in the passenger car market. The increase in market share the combined entity would enjoy, together with the wide range of brands and models across all sizes within its new portfolio, would place competitors at a disadvantage.

The Commission's preliminary investigation also showed that FCA and PSA had historically directly competed against one another for vans in a number of EU Member States and positioned the prices of their vans at a similar level. The merger would therefore remove

Main Article
Other Developments
Merger Control
Antitrust

an important competitive constraint for both of them with concerns about higher prices for customers.

A final area of concern for the Commission was the relatively high barriers to entry and expansion for the market for light commercial vehicles. This was characterised by the need to have a sufficiently large service network which is not quick and easy to set up, restricting the possibility of new entrants into the market on any significant scale. These barriers, together with the reduction in the number of direct competitors, raised concerns about the removal of an important competitive constraint for both companies, as well as the possibility of higher prices for customers. Executive Vice-President Margrethe Vestager, responsible for competition policy, observed that "*Commercial vans are important for individuals, SMEs and large companies when it comes to delivering goods or providing services to customers. They are a growing market and increasingly important in a digital economy where private consumers rely more than ever on delivery services*".

During the Commission's Phase I investigation, the parties did not offer proposed commitments.

PHASE II INVESTIGATION AND COMMITMENTS

In its press release, the Commission explained that it had concerns that the transaction, as initially notified, would have harmed competition in the market for small light commercial vehicles in nine EEA Member States (Belgium, Czechia, France, Greece, Italy, Lithuania, Poland, Portugal and Slovakia), where the companies have high or very high combined market shares and are particularly close competitors. The Commission therefore considered that the proposed merger would have likely led to higher prices for customers.

To secure approval from the Commission and address the concerns outlined in its investigation, FCA and PSA proposed the following commitments which were aimed at facilitating entry and expansion:

- extending the cooperation agreement currently in force between PSA and Toyota Motor Europe (Toyota) for small light commercial vehicles. This requires PSA to produce the vehicles sold by Toyota under the Toyota brand mainly in the EU and will involve an increase in the available capacity for Toyota and a reduction in transfer prices for vehicles and associated spare parts/accessories. The Commission noted that this commitment reflects the pervasive nature of platform sharing in the automotive sector.
- amending the '*repair and maintenance*' agreements for passenger cars and light commercial vehicles in force between FCA, PSA and their repairer networks. This is to facilitate and enable access to FCA and PSA's repair and maintenance networks for competitors in the light commercial vehicles market. Amending the agreement will, for example, remove brand specific receptions, waiting areas or entrances for FCA and PSA light commercial vehicles clients, and the prohibition on repairers to use FCA and PSA equipment to service light commercial vehicles belonging to competitors.

In commenting on the proposed remedies accepted by the Commission, the Commission noted that the first remedy will enable Toyota to compete effectively with the merged entity in the relevant markets in the future. In relation to the second commitment, the Commission observed that it will enable new entrants to expand and compete in the light commercial vehicles market. Furthermore, the Commission considered that the combination of these commitments will allow the maintenance of effective competition in the market after the transaction, effectively addressing all of its competition concerns.

The Commission concluded that the transaction, as modified by the commitments and subject to full compliance with them, will not significantly impede effective competition in the EEA or any substantial part of it. When announcing the conditional approval, Margrethe Vestager said: "*We can approve the merger of Fiat Chrysler and Peugeot SA because their commitments will facilitate entry and expansion in the market for small commercial vans. In the other markets where the two automotive manufacturers are currently active, competition will remain vibrant after the merger*".

The proposed merger was notified to competition authorities globally. Antitrust approval (sometimes subject to conditions) have been received in most jurisdictions (including China, Japan, South Africa and the USA). The transaction is expected to complete in early 2021.

Main Article
Other Developments
Merger Control
Antitrust

OTHER DEVELOPMENTS

MERGER CONTROL

COMMISSION CLEARS ACQUISITION OF FITBIT BY GOOGLE, SUBJECT TO CONDITIONS

The European Commission announced on 17 December 2020 that it has conditionally approved Google's proposed $2.1 billion acquisition of Fitbit, the manufacturer and distributer of wearable devices, following a Phase II investigation (Transaction).

Although there are very limited horizontal overlaps between the activities of Google and Fitbit, the Commission had concerns that the Transaction, as initially notified, would have harmed competition in the following areas:

- **Advertising**. The Commission's concerns related to the data Google would acquire from Fitbit, which would increase the amount of data Google could use for the personalisation of ads.
- **Access to Web Application Programming Interface (API) in the digital healthcare market**. Some players in this market access health and fitness data provided by Fitbit through a Web API. The Commission was concerned that Google might restrict competitors' access to the Fitbit Web API.
- **Wrist-worn wearable devices**. The Commission was concerned that Google could degrade the interoperability of competing manufacturers' wrist-worn wearables with Android smartphones.

The Commission accepted a revised package of commitments addressing competition concerns offered by Google following market participant feedback. The revised package will last for ten years, subject to further extension by up to an additional ten years and will be monitored by an appointed trustee:

- **Advertising commitment**. Google will not use European Economic Area (EEA) users' health and wellness data collected from wrist-worn wearable devices and other Fitbit devices for Google ads. Fitbit's user data will be stored separately from any other Google data which is used for advertising. Google will ensure that EEA users have an effective choice to grant or deny the use by other Google services of health and wellness data stored in their Google or Fitbit account.
- **Web API Access commitment**. Google will maintain access to users' health and fitness data to software applications through the Fitbit Web API, without charging for access and subject to user consent.
- **Android APIs commitment**. Google will continue to license for free to Android original equipment manufacturers (OEMs) the public APIs that cover current core functionalities that wrist-worn devices need to interoperate with an Android smartphone and any improvements and updates to those functionalities. Google must keep the functionalities afforded by the core interoperability APIs (including improvements) in open-source code. Google will grant wearable device OEMs access to all Android APIs that it will make available to Android smartphone app developers. Google also will not degrade users experience with third-party wrist-worn devices through the discriminatory display of warnings, error messages or permission requests or by imposing discriminatory conditions on access of their app to the Google Play Store.

The Commission's in-depth review of the Transaction continues a trend of heightened scrutiny over digital markets, as reflected in the publication on 15 December 2020 of the Commission's draft rules relating to digital services, the draft Digital Markets Act and the draft Digital Services Act. For details, see our previous newsletter.

ANTITRUST

CAT UPHOLDS CMA FINE IMPOSED ON FP MCCANN FOR PARTICIPATION IN PRE-CAST CONCRETE DRAINAGE PRODUCTS CARTEL

On 22 December 2020 the Competition Appeal Tribunal (CAT) upheld the UK Competition and Markets Authority's (CMA) fine of £25.45 million on FP McCann Ltd (FPM) for engaging in a price-fixing and market sharing cartel with two other construction firms (Stanton Bonna Concrete Limited and CPM Group Limited) in relation to the supply of pre-cast concrete drainage products cartel between 2006 and March 2013.

Main Article
Other Developments
Merger Control
Antitrust

The CMA's investigation found that the three construction companies agreed to fix and coordinate prices, share the market by allocating customers and regularly exchanged competitively sensitive information for nearly seven years. The CMA calculated the penalties in accordance with the CMA's guidance on fixing a penalty (Penalty Guidance). This resulted in the CMA imposing a fine on FPM of £25.45 million, which represented the statutory maximum penalty that could be imposed. FPM appealed against the decision and the fine.

The CAT rejected FPM's claim that the CMA erred in law by applying the Penalty Guidance and that it is ultra vires, void and of no effect. The CAT found that it is clear from the Competition Act 1998 that Parliament intended that questions such as the seriousness of the case, deterrence and all other relevant circumstances were to be the subject of guidance prepared by the CMA. The CAT found that it is also clear that when Parliament enacted the statutory maximum provision it was not seeking to express its view of the penalty which would be appropriate for the most serious infringements. Accordingly, the CAT found that the Penalty Guidance is valid and effective. The CAT assessed whether the CMA's penalty was appropriate by applying the Penalty Guidance's steps and considering the relevant grounds of appeal. The CAT unanimously upheld the CMA's decision to impose the £25.45 million fine on FPM.

The CMA welcomed this judgment stating that this "*reinforces the need for companies to engage in active competition and not cheat by colluding with their rivals to fix prices or share out the market between them*".

HONG KONG ANTITRUST AUTHORITY BRINGS FIRST ABUSE OF MARKET POWER CASE TO COURT

On 24 December 2020 the Hong Kong Competition Commission (HKCC) brought Hong Kong's first abuse of market power case against Linde HKO Limited (Linde HKO) and Linde GmbH (together, Linde) to the Competition Tribunal. Linde HKO's general manager, Tse Chun Wah, is also named as a separate respondent in these proceedings for allegedly assisting in the abuses.

The HKCC is alleging that, between 2015 and 2018, Linde leveraged its monopoly position in the medical gases supply market into the downstream medical gas pipeline system (MGPS) maintenance market by engaging in various exclusionary acts against MGI (Far East) Limited (MGI), the only other potential MGPS maintenance competitor for public hospitals. The alleged acts include unjustified denial of supply of medical gases and imposition of arbitrary and unreasonable trading terms. The HKCC considers that these actions harmed MGI's reputation and customers, violating Hong Kong's Second Conduct Rule (SCR).

Aside from being the first case brought under the SCR, the case is also noteworthy in that it is the first time that the HKCC is bringing proceedings against a non-Hong Kong based entity (Linde GmbH).

Previous cases brought by the HKCC have all been related to the First Conduct Rule (FCR), which targets anti-competitive agreements. The Tribunal has issued a number of judgments on these FCR cases, including a recent decision in the *Fungs E&M Engineering Company Limited & others* case shedding light on how fines for individuals will be assessed. These cases serve as reminders of the HKCC's determination to target individuals for competition law violations.

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