

# COMPETITION & REGULATORY NEWSLETTER

## QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

## European Commission publishes report on how conditions of competition have changed over the last 25 years

On 24 June 2024, the European Commission published a [report](#) titled “Protecting competition in a changing world”. The report presents and assesses new economic research on how and why the conditions of competition in the EU have evolved during the last 25 years, and why competition matters for broader economic outcomes.

### How have conditions of competition evolved?

The report uses various indicators to measure the strength of competition, including structural indicators (i.e. market concentration), outcome-related indicators (i.e. price markups and profits) and dynamic indicators (i.e. business dynamism, entry and exit rates and job allocation rates).

The research finds that, across the countries and industries considered, average industry and market concentration has increased, especially in already highly-concentrated sectors - the report infers from this an overall trend of industries converging to a more oligopolistic state. Despite the research suggesting a general increase in industry concentration in the EU, the report nevertheless notes that this is less pronounced than in North America. Similarly, the report finds that average concentration levels in the consumer-facing markets covered by the research were nevertheless lower than in Japan, Canada and South Korea.

The report notes a reduction in business dynamism across markets, particularly after the financial crisis. It also finds that firms competing in the global market experienced - on average - an increase in markups of 12%, while those competing in European industries experienced an increase of 7%, and domestic markets experienced the smallest increase (3%). According to the report, this increase in markups correlates with rising profits, suggesting they are not a reflection of rising fixed costs but - at least in part - a “*valid indicator of rising market power*”.

### Why have conditions of competition evolved?

The report considers that the drivers of this evolution have likely been structural (in particular, digitalisation and the rise of investments in proprietary IT solutions, the rise of other intangibles such as patents, globalisation and rising M&A activity) and institutional (in particular, regulatory barriers to entry and expansion).

Interestingly, the report does not attribute the evolution to a weakening of competition enforcement, instead noting that “*if anything [...] EU competition enforcement [...] may [...] have contributed to the observed [...] trends towards increased concentration, markups and profits being less pronounced in the EU compared to the U.S.*”.

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40  
1000 Brussels  
Belgium  
T: +32 (0)2 737 94 00

One Bunhill Row  
London EC1Y 8YY  
United Kingdom  
T: +44 (0)20 7600 1200

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

Nevertheless, the report finds that “overall on balance, the evidence presented [...] suggests that on average competition in the EU seems to be weaker than in the past, while the market power of firms at the top of the markup and profit distribution seems to be more pronounced”.

### Why does competition matter?

The report then examines how the state of competition affects broader economic outcomes in the EU - in this respect, it discusses the impact of competition on prices, competitiveness and economic growth.

It finds that those industries facing high levels of competition experience stronger productivity growth, since competition: (i) reallocates market share to more efficient firms and forces weaker firms to shrink or leave the market; (ii) forces managers to run the business more efficiently; and (iii) forces firms to invest and innovate. Moreover, the report finds that effective competition in a firm’s domestic market drives that firm’s competitiveness not just within that market but globally.

The report relies on models to simulate the impact of competition on economic growth - specifically, a backward-looking model looking at how the EU economy would have evolved if markups in the EU had not increased, and two forward-looking models exploring the potential benefits of measures improving competition in the EU. While warning that the results must be “considered with caution” (not least because “simulations [...] have limitations and are based on a number of simplifying assumptions”), the report concludes that the simulations illustrate that more effective competition “could offer substantial benefits in terms of a reduction in price levels, increased household consumption and private investment, a strengthening of productivity and overall economic growth”.

### Conclusion

Overall, the report finds that competition in the EU is weaker than in the past whilst market power of leading firms - especially “global superstars” - has become increasingly pronounced. The Commission concludes that this can contribute to adverse macro-economic effects such as slower productivity and reduced business dynamism.

The Commission hosted a conference in Brussels on 27 June 2024, bringing together experts and stakeholders to discuss the main findings in the report. It will be interesting to see the reaction to the report’s findings, and whether they ultimately translate into the competition policy of the next Commission.

## OTHER DEVELOPMENTS

### MERGER CONTROL

#### CMA clears SES Water takeover by Pennon with undertakings

On 24 June 2024, the UK Competition and Markets Authority (CMA) published its [decision](#) to clear the completed acquisition by Pennon Group Plc of Sumisho Osaka Gas Water UK Limited, including its subsidiary Sutton and East Surrey Water plc (SES), subject to undertakings.

The transaction was subject to the special water mergers regime under the Water Industry Act 1991 (as amended), as Pennon and SES each supply regulated wholesale and household water services in their respective regions in England. Under the water merger regime, the statutory question for the CMA is not whether the transaction may give rise to a substantial lessening of competition, but whether the transaction may prejudice the ability of the Water Services Regulation Authority (OFWAT) to make comparisons between water enterprises as part of its regulatory function.

The parties conceded that the test for reference to a phase 2 investigation may be met to fast-track consideration of undertakings in lieu of such a reference. Among other things, Pennon has committed to report data for SES separately from Pennon’s other water businesses, effectively preserving the *status quo* from Ofwat’s perspective and enabling Ofwat to maintain a separate wholesale water price control for SES. The undertakings build on those previously accepted by the [CMA](#) in the 2021 acquisition of Bristol Water Holdings UK Limited by Pennon.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

Following a public consultation, the CMA has decided to accept the undertakings as final. This represents the first use of the fast-track procedure under the water mergers regime.

## SAMR invites consultation on new horizontal merger guidelines

On 17 June 2024, China's State Administration for Market Regulation (SAMR) [published](#) its draft guidance on horizontal merger reviews, which is open for public comments until 6 July 2024. Notably, this is the first set of horizontal merger guidelines since the enactment of China's merger control regime in 2008, and follows the spate of regulatory updates after the revamp of the Anti-Monopoly Law in 2022.

Like the European Commission's [Horizontal Merger Guidelines](#), the draft guidelines aim to provide detailed guidance as to how SAMR will assess horizontal M&A transactions. This is the first time SAMR has specified indicative thresholds which, when compared with the EC guidelines, are more granular and conservative. For example, SAMR has proposed a threshold of 15%, below which the deal can be presumed not to raise competition concerns (compared with 25% in the EC guidelines).

In addition to assessing market shares and HHI, SAMR will also consider a range of other factors in its merger review process, such as potential efficiencies and public interest (including employment, energy conservation, environmental protection and, for "*data-driven horizontal transactions*", data privacy). Notably, it is proposed that SAMR will also consider the potential impact of foreign government subsidies on competition in the relevant market(s), in line with the EU's Foreign Subsidies Regulation.

The draft guidelines may be subject to further change, based on the feedback SAMR receives from the public consultation. However, the current draft appears to codify SAMR's current practice in reviewing transactions and offers greater insight into SAMR's thinking that can assist dealmakers in evaluating the regulatory risk in China.

## ANTITRUST

### European Commission imposes fine for deleting WhatsApp messages during dawn raid

On 24 June 2024, the European Commission [announced](#) that it has fined International Flavours & Fragrances Inc. and International Flavors & Fragrances IFF France SAS (together, IFF) €15.9 million for obstructing a Commission inspection in 2023, by intentionally deleting WhatsApp messages during the inspection. The messages - discovered upon the review of a senior employee's telephone - contained business sensitive information that were exchanged with a competitor, and were deleted after the senior employee had been informed about the inspection. Once discovered, IFF acknowledged the missing messages and fully cooperated with the Commission in its investigation to recover the deleted data.

The Commission can impose fines of up to 1% of the total turnover of companies which intentionally or negligently obstruct an antitrust investigation. In this case, IFF obstructed the Commission's inspection by producing the required business records for examination in incomplete form and the Commission made it clear that any subsequent restoration of the data cannot undo the fact that the submission was incomplete. Overall, the Commission imposed a fine constituting 0.3% of IFF's total turnover, given the very serious and intentional nature of the infringement. This was exacerbated by the infringement being committed by a senior employee of the inspected company who was a target person of the Commission investigation, and because the Commission was not informed of the data deletion. Nonetheless, the Commission ultimately awarded a 50% reduction of the fine on the basis of IFF's proactive cooperation during and after the inspection, thereby culminating in a fine of 0.15% of IFF's total turnover, amounting to €15.9 million.

Whilst the Commission has a history of fining companies for obstructing inspections, notably for breaching seals during inspections and in one case also for accessing a blocked email account and diverting incoming emails during an inspection, the imposition of a fine for the deletion of messages exchanged over social media on a mobile phone marks a first for the Commission. Margrethe Vestager, Executive Vice-President in charge of competition policy at the Commission expressed that "*Compliance with antitrust investigations is of paramount*

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

*importance. Companies that undergo an inspection must ensure that employees do not delete or manipulate business records. This includes communications on mobile phones.”*

London  
T +44 (0)20 7600 1200  
F +44 (0)20 7090 5000

Brussels  
T +32 (0)2 737 94 00  
F +32 (0)2 737 94 01

Hong Kong  
T +852 2521 0551  
F +852 2845 2125

Beijing  
T +86 10 5965 0600  
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2024.  
For further information, please speak to your usual Slaughter and May contact.

[www.slaughterandmay.com](http://www.slaughterandmay.com)