WHITE & CASE

Thank you for joining us

The webinar will start at 4:30pm CET

Webinar Series Merger Control

Webinar 6:

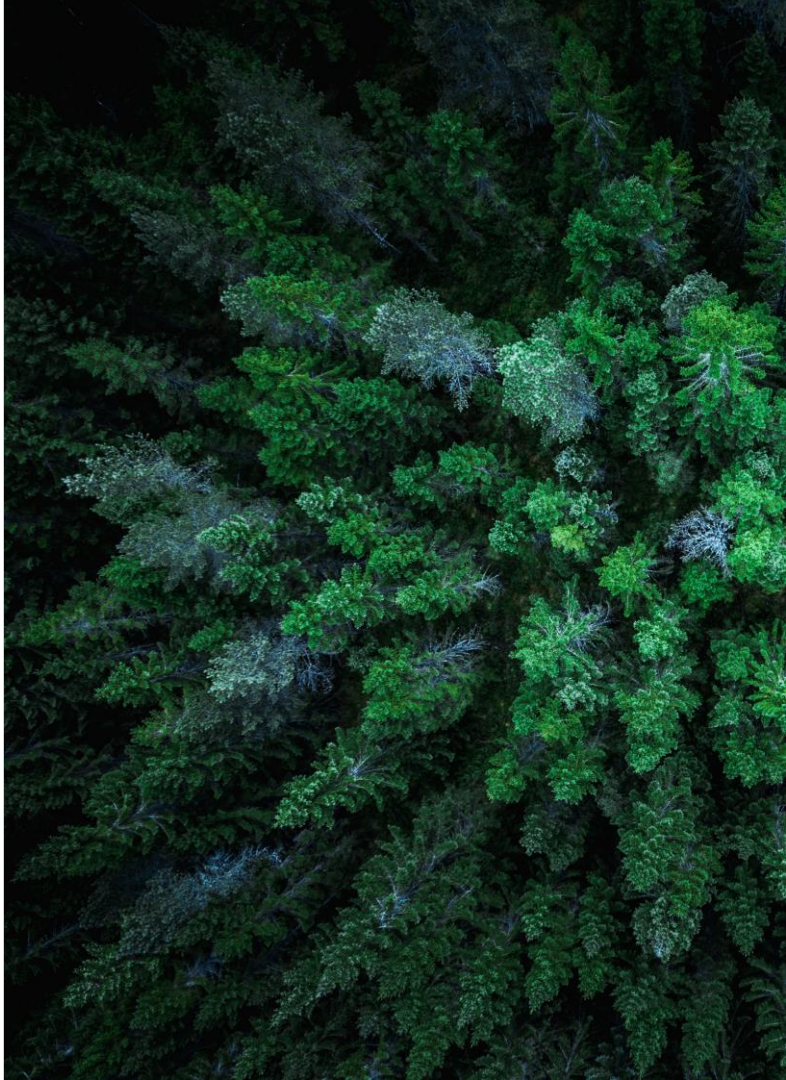
US, EU and UK Recap, Spain update

Initial experience with FSR

Merger control and sustainability

White & Case LLP

March 4, 2024



Session overview

- Introduction and overview of main recent developments US/EU/UK/ROW
- Initial experience with the FSR regime
- Merger control and sustainability
- Country update: Spain
- Outlook

Panelists

Tilman Kuhn – Moderator
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Anna Kertesz
Partner, Washington, D.C.

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Partner, London

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Partner, New York

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Local Partner, Madrid

Introduction and overview of main recent developments US/EU/UK/ROW

U.S. Update

Anna Kertesz, Kathryn Mims

New U.S. DOJ and FTC Merger Guidelines

- In July 2023, the DOJ and FTC released the Draft 2023 Merger Guidelines, which overhaul the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines.
- On December 18, 2023, the DOJ and FTC published the final 2023 Merger Guidelines.
  - The 2023 Merger Guidelines adopted 11 of the 13 Draft Guidelines, formalizing the notable shift toward more aggressive merger control enforcement.
- The new Merger Guidelines emphasize market shares over economics, signaling a shift back to 1960s policies.
- They reflect significantly lower HHI thresholds than established in the 2010 Merger Guidelines and a market share presumption of illegality.
  - Makes it easier for DOJ and FTC finding of presumptively unlawful merger concentration levels at lower market shares.

“The 2023 Merger Guidelines reflect the new realities of how firms do business in the modern economy and ensure fidelity to statutory text and precedent.”

– Statement of Chair Lina M. Khan

“These finalized Guidelines provide transparency into how the Justice Department is protecting the American people from the ways in which unlawful, anticompetitive practices manifest themselves in our modern economy.”

– Statement of Attorney General Merrick B. Garland

“The Guidelines we release today are faithful to the law and reflect how competition plays out in our modern markets. Ensuring that our merger enforcement protects that competition is our North Star.”

– Statement of Attorney General Jonathan Kanter

2023 Guidelines are a Significant Change from the Previous Merger Guidelines

- Goal is to capture more transactions!
- Protecting competition in labor markets has emerged as a top merger enforcement priority
- 2023 Guidelines address industry-specific concerns
  - Technology and digital platforms (e.g., multi-sided platforms, nascent competitors)
  - Private equity sponsors (e.g., concern about roll-up strategies)
  - Institutional investors (e.g., minority acquisitions)
- Include new frameworks for innovation (e.g., nascent competitors, moat-building)



Market Share Presumption

- Greater Than 30% Market Shares Are Presumptively Unlawful
  - **Much Lower Burden for the US Government.** The Guidelines create a low burden for the DOJ and FTC to find a structural presumption of illegality.
  - The 30% market share presumption comes from the U.S. Supreme Court's 1963 decision in *United States v. Philadelphia National Bank*, which many federal courts have rebuked as merger enforcement evolved over 60 years.
  - "*With these draft Merger Guidelines, we are updating our enforcement manual to reflect the realities of how firms do business in the modern economy*." Chair Lina M. Khan (July 19, 2023)
- However, the Agencies rarely brought cases close to the 2010 Guidelines thresholds
  - Recent actions and agency investigations have focused on higher shares

Agencies Merger Enforcement Track Record*

Parties Abandoned (Before Agency Challenge)	Agency Win or Parties Abandoned	Settled	Challenged
Amazon / iRobot	IQVIA / Propel Media (PI granted; parties abandoned)	Amgen Inc. / Horizon Therapeutics (consent order)	Novant Health / Community Health Systems, Inc.
Adobe / Figma	John Muir Health / San Ramon Regional Medical Center (parties abandoned)	Intercontinental Exchange / Black Knight (consent order)	
	Illumina / GRAIL (5th Cir appeal)		
	Sanofi / Maze Therapeutics (parties abandoned)		
	JetBlue/Spirit Airlines (district court blocked)		

*Since October W&C Quarterly Update

Illumina / GRAIL Acquisition – “Fix” Faced Challenges

illumina®

GRAIL

- During litigation, parties must be prepared to show that “fixes” rebut government evidence of competitive harm
- **Fifth Circuit Ruling:** In December 2023, Illumina’s proposed “fix” (the “Open Offer”) failed to defeat the FTC’s challenge to the acquisition, despite error by the Commission
- **Proposed Fix:** Illumina’s proposed “Open Offer” was a public, standardized supply contract for new and existing oncology test customers that included commitments to provide customers with the same access to genetic sequencing products and services as GRAIL, to offer competitive prices, and to protect confidential information from competitors
- The Fifth Circuit found that Illumina needed to do more than simply put forward terms of the Open Offer; it needed to affirmatively show why the Open Offer undermined the government’s case of substantially lessening competition.
- **Lessons:** Need to have binding fix upfront, and be prepared with rebuttal evidence
- **But you CAN litigate the fix in 2024**

Key Takeaways from Recent “Fixes”

- Instructive cases for recent “fixes”:
  - UnitedHealth/Change – proposed divestiture and issuance of a firewall policy
  - Microsoft/Activision – agreement for Microsoft to support Call of Duty on third party consoles
  - Illumina/GRAIL – “open offer”
- Government must show competition is likely to be **substantially** lessened despite a proposed fix, not that it would completely restore competition
- Thinking ahead → “fix it first”

A hypothetical, real-life, successful "Fix it First"

For confidentiality purposes, the parties' names, industry, products, and other facts have been changed.

Setting the stage:

“Apple Paint Co” Products

“Banana Paint Co” Products

Hurdle: TIME. The parties needed the deal to close very quickly.

Three options:

1. Acquisition Agreement → Divestiture Agreement → File HSR

   = the Divestiture Agreement would clearly be included in the agency's review

2. Acquisition Agreement & Divestiture Agreement → File HSR

   = the Divestiture Agreement would clearly be included in the agency's review

3. Divestiture Agreement → Close Divestiture → Acquisition Agreement → File HSR

   = the Divestiture Agreement and the divested product would *technically* not be part of the merger filing, and so they would *technically be* outside of review (because the Seller no longer owns the divested product)

Issues the parties had to consider:

- **Seller had no guarantee that Buyer would go through with merger agreement**
  - Seller had to go through with the divestiture prior to any contract with the Buyer
- **Risk that agency would feel that the early divestiture was an attempt to evade their review**
  - The overlap was already all over the parties' board decks, etc. – the agency would likely see it and ask what happened
- **Buyer had no way to ensure that the Seller was going to divest to the right divestiture buyer** (such that the agency would be satisfied if the divestiture *was* reviewed)
  - Buyer could not participate in or make demands of the seller in the divestiture process (no gun jumping!)

EU Update

Tilman Kuhn

Aggressive substantive enforcement | European Commission's Intervention Rate

European Commission

		2005-2010	2011-2014	2015-2019	2020-01/2024
Notifications	Total	1,957	1,172	1,875	1,525
	Average per year	326.17	293	375	373.47
Interventions	Total	166	77	160	90
	Average per year	27.67	19.25	32	22.04
Decisions in simplified procedure	Total	1,094	735	1,333	1,185
	Average per year	182.33	183.75	266.6	290.20
Intervention rate		8.48%	6.57%	11.72%	5.9%
Intervention rate (absent decisions in simplified procedure)		19.24%	17.62%	29.52%	26.47%

Revised market definition notice | Communication Notice on the definition of the relevant market (C/2024/1645)

- The EC provides a framework for defining a relevant market:
  - **Case by case**: The EC clarifies it is not bound by prior decisions.
  - **Non-price elements**: While price was the key competitive parameter in the 1997 Notice, the new notice codifies other competitive parameters like innovation, sustainability, resource efficiency, durability, value and variety of uses offered by the product, possibility to integrate with other products, image conveyed or security and privacy protection afforded, availability, and customers' purchasing behavior.
  - **Immediate competitive constraint**: Still primary focus on immediate competitive constraints from within the market, but the EC acknowledges – as before - constraints from outside the market (potential competition) should be taken into account at stage of competitive assessment.
  - **Market definition can be left open**: After common EC practice leaving the market definition open if there are no competition issues, the Notice now explicitly states that this is possible in situations where competition concerns arise regardless of the market definition.
  - **Forward-looking application**: The EC may consider *sufficiently likely* market transitions (backed by reliable evidence) that would change dynamics of supply.

Revised market definition notice | Remarks by EVP Vestager

*(…) Let me now highlight a few novelties. First, the notice provides **general principles** and obviously acknowledges that markets evolve over time. Second, it covers our approach to specific issues in **digital** and **innovation-intensive markets**. And third, it offers more **guidance on geographic markets** and the role of imports. (…)**

Margrethe Vestager

- In a speech on the adoption of the new Notice, Vestager elaborated on three novelties:
  - Update on general principles across sectors, so that the market definition accounts for evolutions in *what consumers actually look for in products* (other than price).
  - Accounting for specific circumstances like services on digital platforms that are monetized via advertising or collection of personal data; digital eco-systems; and R&D-intensive markets.
  - Guidance on EC's approach to geographic market definition, accounting for expanding markets due to globalization and competitive pressures exerted by imports

Aggressive substantive enforcement | Amazon/iRobot

M.10920 - Amazon/iRobot

- Although the CMA had cleared the deal unconditionally in Phase I, the parties abandoned the USD 1.7bn transaction in January 2024, seeing "*no path to regulatory approval in the EU*"
- iRobot manufactures robot vacuum cleaners (RVCs), which it also sells via Amazon's online market place
- After in-depth investigation, the EC issued a SO and was concerned that:
  - Amazon had ability and incentive to engage in several foreclosing strategies, like delisting or reducing the visibility of rival RVCs, limiting access to product labels or widgets (like the "Works with Alexa" label) or raising the costs of iRobot's rivals to advertise and sell
  - Amazon had the ability to foreclose rivals because its market place was a particular important sales channel for selling RVCs (especially in France, Germany, Italy, and Spain)
  - Amazon had the incentive to foreclose rivals because it would likely gain more from additional sales of iRobot's RVCs than losing from fewer sales of iRobot's rivals – such gains included the benefits from additional data gathered from iRobot's users
- Although the EC abandoned some of its preliminary concerns, it still found that Amazon may restrict competition on an EEA-wide and/or national market for RVCs by hampering rival RVC suppliers' ability to effectively compete

Aggressive substantive enforcement | Adobe/Figma

M.11033 - Adobe/Figma

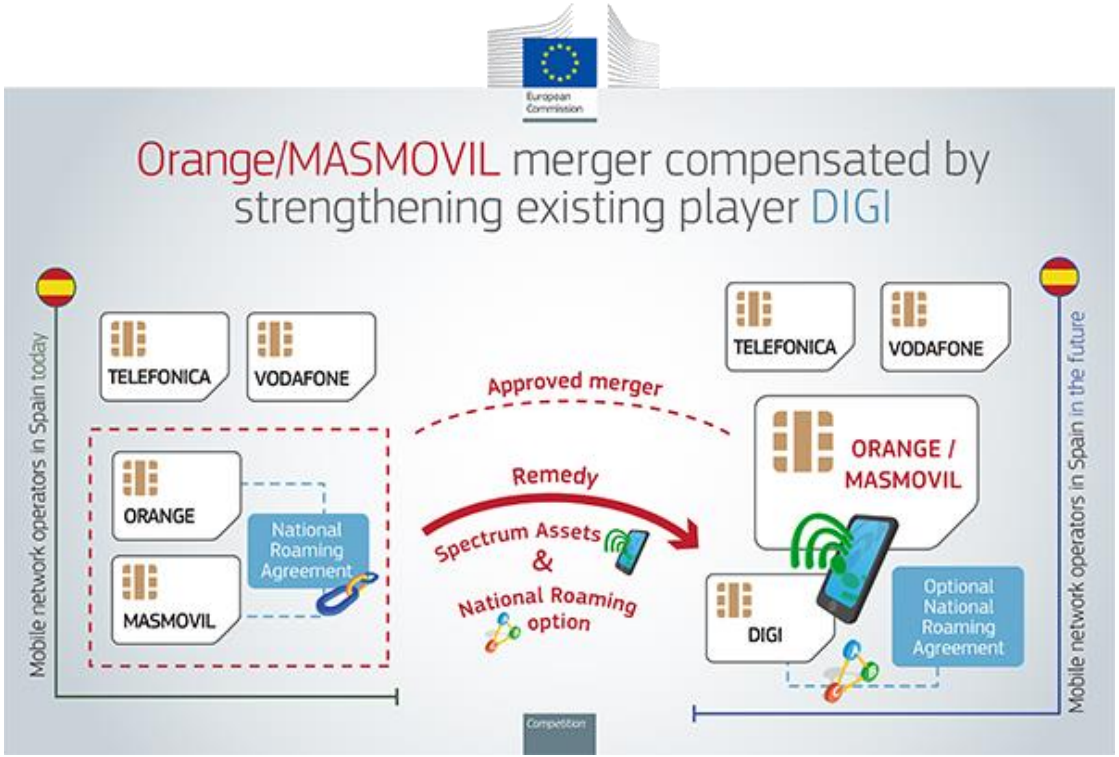
- Parties unable to *see a path toward regulatory approval (…) despite thousands of hours spent with regulators around the world detailing differences between businesses, products and markets* (Figma press release)
- On 15 February 2022, the EC accepted 16! requests under Art. 22 EUMR to review proposed US$ 20bn acquisition of web-first collaborative design platform *Figma* (Denmark) by *Adobe* (Australia)
- CMA and EC had both opened in-depth investigations and objected to the deal, the EC although the transaction had not been notifiable to the EC because revenue thresholds were not met
- EC's Statement of Objections:
  - Affected (global) markets: Supply of interactive product design tools and supply of vector editing tools and supply of raster editing tools
  - **Supply of interactive product design tools**: transaction likely to create a dominant player, with Figma being the clear market leader and Adobe one of its largest competitors; "reverse killer acquisition" concerns, as EC expected Adobe to discontinue its own interactive product design tool post-closing
  - **Supply of vector editing tools and supply of raster editing tools**: transaction would eliminate Figma as competitor and strengthen Adobe's dominance in these markets; Figma already exerted significant constraining influence on Adobe in these markets and was likely to grow into effective competitive force

Aggressive substantive enforcement | Orange/MásMóvil

M.10896 - Orange/MásMóvil

- EC approved telecoms JV between telecoms operators Orange and MásMóvil subject to conditions, effectively combining the second and fourth largest telecoms operators in Spain and reducing the number of mobile network operators from four to three
- Other players in Spain:
  - Two mobile network operators (Telefónica and Vodafone)
  - several mobile virtual network operators (MVNOs – MVNOs do not have their own infrastructure but instead use the infrastructure of mobile network operators to offer retail mobile services)
- Orange is a full mobile network operator while MásMóvil is a hybrid mobile network operator, relying partly on its own network and partly on Orange's network via a national roaming agreement
- EC concerned of allowing for creation of largest operator by customer numbers in Spain and the elimination of a close and important competitor (MásMóvil)
- The remedy package fully addressed the EC's concerns and consisted of:
  - Strengthening Digi, Spain's largest MVNO, via a divestment of MásMóvil's spectrum. The divestment would allow Digi to become a mobile network operator.
  - Entering into an optional national roaming agreement allowing to stay with Telefónica or switch to the JV as Digi's future mobile network would likely not cover the entirety of Spain.

Aggressive substantive enforcement | Orange/MásMóvil



Source: Commission's press release on ec.europa.eu

"Today, there's nothing from a competition policy angle that prevents telcos from consolidating cross border. (…) it is more likely that it is the burden of having to deal with different [national] regulations."

EVP Vestager (as cited by Reuters)

Further developments | Airline cases (1)

M.10149 – Korean Air/Asiana

- EC conditionally cleared the acquisition of Asiana by Korean Air
- Korean Air is South Korea's largest airline (offering international passenger and cargo services), while Asiana is the second largest airline in South Korea (providing similar services) – both parties with significant presence in the EEA
- Parties competed head-to-head in carrying cargo and passengers between the EEA and South Korea
- During their Phase II investigation, the EC had concerns the transaction would harm competition in the markets for air cargo transport services between Europe and South Korea and passenger air transport services on routes between Seoul and certain European destinations, specifically Barcelona, Paris, Frankfurt, and Rome
- Korean Air and Asiana competed head-to-head in cargo and passenger transport between the EEA and South Korea and would have been by far the largest carrier on these routes post-merger
- The following remedy package fully addressed the EC's concerns:
  - **Cargo commitments**: Divestment of Asiana's global cargo freighter business (aircraft, slots, traffics rights, employees, etc.) to a suitable buyer that is able and has the incentive to operate the business in a viable manner and compete effectively.
  - **Passenger commitments**: Providing rival airline T'Way with the necessary assets (incl. slots, traffic rights, access to the required aircraft) to enable it to start flight operations on the four overlap routes. **Korean Air has committed not to complete merger until T'Way started operating.**

Further developments | Airline cases (2)

Pending Phase II investigations in the EU

M.11071 – Deutsche Lufthansa/MEF/ITA

- Proposed acquisition of joint control of ITA Airways (formerly Alitalia) by Lufthansa and the Italian Ministry of Economy and Finance (MEF), the latter currently holding 100 % of ITA's shares
- Notified on 30 November 2023 / Phase II opened on 23 January 2024
- The EC both parties to be strong and close competitors in the provision of passenger air transport services on certain routes to and from **Italy**
- Preliminary concerns on the reduction of competition in the market for passenger air transport services on several short-haul and long-haul routes in and out of Italy
- According to EC, insufficient commitments in scope and effectiveness proposed by Lufthansa in Phase I (the EC did not market test the remedies)
- EC's 90 working days end on 6 June 2024

M.11109 – IAG/AIR EUROPA

- Multinational airline holding company IAG (Iberia, Operadora, Vueling, British Airways, Aer Lingus, FLYLEVEL) notified in December 2023 its intention to acquire sole control of Air Europa (airline division of Globalia) / Phase II opened on 24 January 2024
- Deal under review a second time, as it was previously abandoned in December 2021
- Both parties close competitors in the provision of passenger air transport services on certain routes within, to and from **Spain**
- Preliminary concerns on the reduction of competition in the market for passenger air transport services on several domestic, short-haul and long-haul routes in and out of Spain
- Publicly announced choice of IAG to wait until Phase II before offering its remedies

Further developments | Airline cases (3)

*We see some remedies are not efficient. In the past, the main request was to ask **slots to other companies**. (…) Some years ago, we were sure the slots solution was fine. Maybe the results are not there. Regulators need to seek other concessions from airlines, such as **forcing them to sell assets**.*

Didier Reynders (as cited by Financial Times)

- In an interview for the Financial Times (October 2023), at-the-time interim Commissioner for Competition Didier Reynders spoke about a new approach towards remedies in airline cases.
- The EC finds slot divestments problematic because in some cases, competing airlines do not pick up all divested slots.
- New approach: additional structural remedies (as can already be seen in Korean Airlines/Asiana with the divestment of Asiana's cargo freighter business and the prohibition to close before the new entrant "takes off").

Aggressive substantive enforcement | Virtual worlds and AI

- The EC recently increased its activities re. virtual worlds and generative AI by …
  - … launching two calls for contributions on competition in these areas; responses can be submitted until March 11.
  - … sending out RFIs to several large digital players.
  - … looking into some of the agreements concluded between large digital market players and generative AI developers and providers to assess impact on market dynamics.
  - … assessing whether Microsoft's investment into OpenAI is reviewable under the EUMR.
- Microsoft had announced multi-billion USD investment in OpenAI in January 2023 after prior investments in 2019 and 2021; reviewed by EC, CMA and FCO
- The FCO did not determine a filing obligation: It found that Microsoft's investments constituted competitively significant influence already in 2019 (or 2021 the latest). At that time, OpenAI had, however, no sufficient substantial operations in Germany to trigger a filing obligation pursuant to the German transaction value threshold.
  - ➢ When OpenAI had substantial operations in Germany (as of January 2023), Microsoft did then not further strengthen its already existing material influence.
- Microsoft has reportedly invested approx. USD 13bn in OpenAI to date

"(…) We are inviting businesses and experts to tell us about any competition issues that they may perceive in these industries, whilst also closely monitoring AI partnerships to ensure they do not unduly distort market dynamics."

EVP Vestager

Aggressive substantive enforcement | Solutions?

- Increasing merger scrutiny leads companies to look for creative “workarounds”?
- One form: agreements/ contractual collaboration
- Best example: AI cooperations – Microsoft just unveiled a new partnership with French AI company Mistral which the EC promptly announced to investigate (also under review: Microsoft/OpenAI)
  - A. Mundt, president of the German FCO, insinuated in a recent interview (26 Feb. 2024) that cooperations could be the new killer acquisitions
- Another form: minority shareholdings
  - Discussions about the EC reviewing the acquisition of minority shareholdings are not new. M. Vestager was not convinced this change was absolutely necessary in 2016. In light of recent increases in below threshold enforcement activity (*e.g.*, Art. 22, *Towercast*), this stance might change going forward.
- In one exceptional German FCO case (Four Artists/Eventim) the parties effectively circumvented a prohibition of the deal – the manager and a majority of the employees of the target (reportedly 27 of 45) left and signed with a newly created company controlled by the acquirer
- Back to the future - after the return of *Continental Can* (*i.e.*, *Towercast*), will we see the return of *Philip Morris*?

UK Update

Michael Engel

Sarah Cardell: 1 year in | Continuity or change?

- 10 years of CMA (1 April 2024) and 22 years of Enterprise Act 2002. Significant changes since then – financial crisis, pandemic, Brexit, rise of big tech, new geopolitical challenges etc.
- CMA's tougher approach widely seen as starting with Andrea Coscelli (07/2016 - 07/2022)
- Has Sarah Cardell been a champion of change or continuity? Arguably, both:

Change	Continuity
Phase 2 process reform	Continued perceived tough stance
DMCC	Commitment to pushing CMA's global agenda, post-Brexit

- CMA's interventionist approach widely publicized – but not always the "toughest" regulator. Some notable divergence recently (with unconditional approval by the CMA) include, e.g., *Amazon/iRobot, Booking/eTraveli and Broadcom/VMWare.*
- Impact of recent departures and replacements yet to be seen – Senior Director of Mergers and Executive Director of Enforcement left at beginning of 2024

"The CMA is now, necessarily and regularly, taking decisions in respect of large, high-profile international deals. This is a very different world to 2002." "consistency of outcome is not an end in itself […] some divergence is inevitable"

Sarah Cardell (27 Feb 2024)

CMA focus areas

- Continued sectoral focus on tech and pharma/healthcare
- Wider scrutiny in consumer-facing sectors and focus on protecting consumers in cost-of-living crisis (e.g., food and consumable goods)
- Intervention in local mergers (e.g., pubs, dental practices and veterinary practices)
- Continued expansive interpretation of the 25% share of supply test to assert jurisdiction
- CMA has taken “quite a conscious strategy” to focus on roll-up strategies (Sarah Cardell, March 2023)
- Focus on transactions giving rise to concerns on the basis of novel theories of harm in non-horizontal mergers (in particular in the tech and life sciences sectors)

Future developments | Phase 2 reform and DMCC

Phase 2 reform

- Consultation on proposed reforms ended on 8 January 2024
- Earlier direct interaction with Inquiry Group: 'teach in'; 'initial substantive meeting' allowing parties to present case
- Increased informal update calls with case teams
- Removal of Working Papers and Annotated Issues Statement
- Introduction of "interim report" (earlier than PFs), with 21 calendar days for parties to respond
- Emphasis on remedies at earlier stage (on a without prejudice basis)

Digital Markets, Competition and Consumers Bill (DMCC)

- Threshold for the target's UK turnover (except for media mergers) will increase from £70m to £100m – the first increase since 2003.
- Safe harbour for transactions where each party has UK turnover below £10m
- New threshold for "killer acquisitions", with no market share increment required, where the acquirer has
  - an existing UK share of supply of 33% or more; and
  - UK turnover of at least £350m
- Mandatory merger reporting for companies with strategic market status (SMS)
- Subject to amendments in Parliament and receiving Royal Assent, expected to come into force in Autumn 2024

RoW Update

Tilman Kuhn

Key developments RoW | (1/3)

- **Further Amendments to Competition Act:** In November 2023, the Canadian Government introduced another round of amendments to the Competition Act to the Parliament. Key merger control related changes include:
  - Modifications to the notification thresholds that will cause more mergers (in particular, large global deals) to require pre-merger notification in Canada (specifically, the size-of-transaction threshold would be revised to consider the target's sales into Canada, in addition to its sales in and from Canada; there would still be a requirement for the target to have some local Canadian presence).
  - For transactions that are not notified to the Competition Bureau, the merger challenge limitation period will be increased from one to three years (the limitation period remains one year for transactions that were notified).
  - Repeal of a provision providing that a merger cannot be found to be anti-competitive only on the basis of concentration or market shares. Consideration of concentration/market shares would also be added as an explicit factor to be considered in the substantive merger analysis.
  - Creation of an automatic prohibition on closing when the Commissioner of Competition files for a merger injunction, which prohibition will remain in effect until the Commissioner's application is disposed of.

- CADE's **Tribunal's quorum has been restored** on December 27, 2023 after 2-month hiatus, Brazilian senate endorsed four new commissioners, allowing for the closing of several approved merger filings → practitioners expect increase of quality and predictability of CADE's rulings due to the new commissioners technical background and experience.

Key developments RoW | (2/3)

- **United Arab Emirates (UAE) issues new Competition Law with new merger control regime (introducing a turnover based threshold):**
  - New law came into effect on December 29, 2023; implementing regulations are expected to be issued by June 2024 → until then, previous legal standard remains effective.
  - The new law adds a turnover threshold to the pre-existing market share threshold (filing obligation if parties' combined market share exceeded 40%); the specifics of the turnover threshold will be set out in the upcoming implementing regulations.

- **South Africa**: New SACC leadership is taking tough stance, making it more difficult and time-consuming to get mergers approved; SACC regularly uses full review-period even for deals with no competition law issues on public interest grounds.

Key developments RoW | (3/3)

- **New Filing thresholds effective**: As announced in the last webinar, the (significantly) increased value-based notification threshold is now effective (since January 26, 2024); the SAMR also has the discretion to request the parties to notify where there is evidence showing that the concerned concentration has the (potential) effect of eliminating or restricting competition, even if the filing thresholds are not met.
- **Gun jumping fines** have increased 10-times for deals that do not raise competitive concerns; for deals negatively affecting competition, the SAMR can impose fines of up to 10% of the acquirer's global revenues

- **Australia's current informal, non-mandatory merger control regime is under review**. The Government's Competition Taskforce is currently reviewing Australia's competition policy to determine if certain provisions remain fit for purpose. The Taskforce has closed its consultation period and the Government's views on any changes are expected in the coming months. The key issues of contention are:
  - Mandatory merger control – a shift to a mandatory and suspensory regime?
  - Debate over the burden of proof on the ACCC in its decision making
  - Appeal rights – whether any appeal will be a limited review on the merits of the ACCC's decision or a broader review, and the forum for that review
  - Key outstanding matters yet to be resolved: Filing thresholds, procedural elements, minimum filing requirements (documents and form), "call-in" powers and timelines.

Initial experience with the Foreign Subsidies Regulation (FSR) filing regime

Irina Trichkovska

FSR | Overview and when does it kick-in?

FSR Overview

- FSR is a new EU law, applicable as of 12 July 2023
- Aims to address distortions on EU internal market caused by non-EU subsidies given to companies active in the EU
- Confers far-reaching powers on the EC to investigate M&A deals or all market situations that are backed by non-EU subsidies; including the power to prohibit and break-up concluded deals
- It mandates **suspensory filing obligation to the EC for M&A deals with strong EU nexus**

When does the FSR kick-in?

€500 million of turnover in the EU (of one of the merging companies, the target or the joint venture)

+

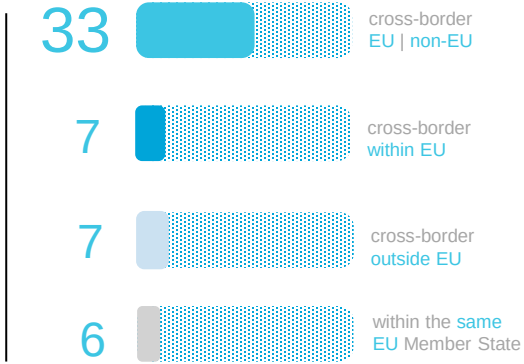
€50 million Foreign Financial Contributions (FFCs) | 3 years prior to the signing of the M&A transaction

100 DAYS of FSR

TELECOM | HIGHTECH | RETAIL | GAMBLING | FASHION | TRAVEL

Wide range of sectors and industries

NOTIFIED DEALS
1/3
Involve PE funds



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FSR | Practitioner's perspective

The EC takes a thorough approach in FSR filings

- Economic rationale of the deal and how the deal came about
- Financing of the deal
- Price paid for the Target
- Disclosure of all the relevant FFCs
- Heavy document disclosure

Preparedness is key

- Upfront FSR exposure analysis
- Collect the data on time
- Reflect the FSR in the transaction documentation

First Phase II FSR case (CRRC)

- Low thresholds for opening Phase II
- Focus on non-EU State-related companies
- Providing complete and accurate information in pre-notification is important

Merger control and sustainability

Kristen O‘Shaughnessy, Cristina Caroppo

ESG and Sustainability

Environmental criteria - resource use, pollution, climate change, energy use, waste management

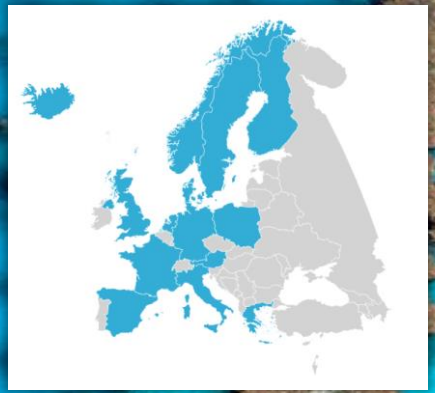
Social criteria - labour standards, health and safety, human rights, supply chain management

Governance criteria - company leadership, diversity, executive compensation, audits, internal controls, shareholder rights

Rise of Sustainability as a Factor in M&A

- “Green” deals drive value/resilience
- Investment in clean energy transition
- Green product lines as competitive advantage
- Consumer and investor focus on sustainability criteria
- Increasing global reporting requirements on ESG

Sustainability and Antitrust Globally



www.whitecase.com/map-sustainability

Sustainability in merger control: Does it matter to the FTC?

"ESG Won't Stop the FTC"

FTC Chair Lina Khan,
Wall St. Journal Op-Ed (Dec. 21, 2022)

"No such thing" as ESG exemption to antitrust laws

FTC Chair Lina Khan,
Senate Judiciary Comm. (Sept. 20, 2022)

"The antitrust laws don't permit us to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit . . .[t]hey don't ask us to pick between good and bad monopolies."

Sustainability in merger control | How does it come into play?

Market definition	Sustainability listed as a non-price parameter in **Revised Market Definition Notice**	Zero-waste *vs* non zero-waste recycling technology for salt slag M.10702 – *KPS Capital Partners/Real Alloy Europe*	Low-carbon aluminium *vs* non low-carbon aluminium M.10658 – *Norsk Hydro/Alumetal*
Closeness of competition	"Parameter of differentiation" when assessing how parties and competitors are competing	Purchaser and target **important and close competitors** in the development of electric/hybrid reach stacker products M.10078 – *Cargotec/Konecranes*	
Other competitive assessment considerations	**Innovation theories of harm** to protect "green innovation"	EC on guard for **green killer acquisitions** (potential candidates for Article 22 review)	Assessment of whether certain innovative technologies could represent **barriers to entry or expansion**
Efficiencies	Traditionally **very high standards** for Parties to demonstrate	Still **no case** where EC accepted **'out-of-market' efficiencies**	Parties argued deal would accelerate efforts for more sustainable waste processing – ACM considered sustainable measures needed to be implemented **anyway** and **could be achieved through collaborations** ACM/22/176503 – *AEB/AVR (blocked)*
Remedies	Where sustainability plays significant role in competitive assessment, **remedy packages have to reflect** that	EC assessed whether divestment business will continue to be green/sustainable by including a **specific purchaser criterion** (to continue investing in R&D) to the commitment M.10560 – *SIKA/MBCC GROUP*	

Sustainability in merger control – Case study

M.10702 – *KPS Capital Partners/Real Alloy Europe*

- **KPS (purchaser) activities**, through its subsidiary Speira: (i) production of recycled aluminium, (ii) manufacturing of flat rolled aluminium products
- **Real Alloy Europe (target) activities**: (i) manufacturing and supply of recycled aluminium, (ii) recycling services for (hazardous) by-products from the aluminium recycling process (such as dross and salt slag)
- As an introductory remark, the EC stresses broad industry developments within the 'green' transition, which sees an **increasing demand for recycled aluminium** (being a "*lever for the European industry to reduce its carbon footprint, helping to achieve the EU's Green Deal objectives*", para. 18)
- Sustainability was addressed in relation to:
  - **Market definition**: potential segmentation between zero-waste and non zero-waste recycling technology for salt slag (ultimately left open, but reviewed separately in competitive assessment)
  - **Competitive assessment** done specifically in view of "green transition" (*see above*); restricting access to recycling services considered a major concern with potential negative effects in other basic industries (incl. suboptimal recycling methods and lower yield)
- After its investigation, the EC considered the parties could restrict access to **recycled aluminium** and **dross and salt slag recycling services**; Parties offered divestment of the target's aluminium and dross recycling facility in the UK / salt slag recycling plant in France to secure Phase I clearance
- *See* also Case M.10658 – *Norsk Hydro/Alumetal (decision not yet published)*

Spain Update

José-Antonio de la Calle

Notifiable Transactions & Jurisdictional Thresholds

Notifiable Transactions

- Mergers, acquisitions of sole/ joint control, creation of full-function JVs

Turnover & Market Thresholds

EITHER

- Combined Spanish turnover of the undertakings concerned exceeded €240M in the last FY; AND
- Individual Spanish turnover of at least two of the undertakings concerned exceeding €60M each in the last FY

OR

- Market share of 30% or higher of the relevant product market either in Spain (or in any local market within Spain); UNLESS
    - Aggregate Spanish turnover of the Target did not exceed €10 million in the last FY; AND
    - Individual or aggregate market shares of the undertakings concerned in any affected market in Spain (or in any local market w/in Spain) is < 50%

Merger Control Investigation: A Snapshot

Mandatory Filing

Deadline

Pre-completion

Suspension:

- Suspension of transaction pending clearance
- Suspension may be lifted only under extraordinary circumstances
  - *Daimler/ Hailo/ myTaxi* (2016)

Fees:

The fee ranges from €1,500 for short-form filings to as much as €109,860 for standard filings, depending in the latter case on the Spanish turnover of the parties involved

Deadlines For Decisions

Pre-notification contacts:

3-4 weeks (as of lately)

Phase I:

- Short Form + Pre-notification contacts → **15 working days** from formal notification
- Others → **1 month** + 10 working days if parties submit commitments.

Phase II:

- **3 months** + 15 days if commitments are offered by the parties.

Phase III:

- Should the CNMC intend to prohibit the concentration or make it subject to certain conditions or commitments
- the Ministry of the Economy has a **15-day term** to submit the file for final approval by
- the Cabinet of Ministers, which, in turn, will have **1 additional month** to either confirm the Decision of the CNMC or authorise the concentration (with or without commitments/ conditions)
  - *Antena 3/ La Sexta* (2012)

Filing/ Procedural Penalties

Gun-jumping and non-compliance with final decision:

Fine of up to **5%** of the companies' **worldwide** turnover during the previous FY

Failure to notify:

Fine of up to 1% of the companies' worldwide turnover during the previous FY

Misleading or incorrect information:

Fine of up to 1% of the companies' worldwide turnover during the previous FY

Average Time for Clearance

- Short Form Filing → 6 to 7 weeks following pre-notification contacts
- Phase I Clearance/ No Remedies → 8 to 9 weeks following pre-notification contacts
- Phase I Clearance + Remedies → 18 to 23 weeks
- Phase II Clearance (w/wo Remedies) → More than nine (9) months

Future Trends

Increased Use of Remedies/ Commitments

- Increase demand of remedies/ commitments from parties already in Phase I to address competition concerns and secure approval (8 cases within 2021-2022)
    - See CNMC Cases C/1128/20 - ENOPLASTIC/ SPARFLEX, C/1144/20 - CAIXABANK/ BANKIA, C/1170/21 - SOFISPORT/ GRUPO MAXAM, C/1194/21 - UNICAJA BANCO/ LIBERBANK, C/1340/22 - HEFAME/COFARCU, C/1295/22 - KARNOV/ TR ESPAÑA/ WK ESPAÑA, C/1318/22 - WEDDING PLANNER/ ZANKYOU VENTURES and C/1321/22 - KKR/ IVI

Increased Gun-jumping Enforcement

- The CNMC is expected to step up enforcement of gun-jumping violations and take a tougher stance on companies that fail to comply with remedies imposed by the CNMC
    - In January 2023, Xfera Móviles received an EUR 1.5 million fine for not notifying the acquisition of Alma Telecom (see SNC/DC/144/22 - XFERA)

Greater Scrutiny of Mergers in Sensitive Sectors

- The CNMC will foreseeably scrutinize mergers in sectors that are considered to be sensitive, such as digital markets, healthcare, energy, and transportation

Outlook

EU Outlook

EC – Phase II cases

- Deutsche Lufthansa/MEF/ITA
- IAG/AIR EUROPA

GC – Pending cases

- Illumina/Grail (prohibition decision; interim measures; gun-jumping; divestment order)
- Vodafone Italia/TIM/INWIT – next step: hearing on 14 March
- Vivendi/Lagardère (against the decision to open gun-jumping investigation)
- Vodafone/Liberty Global cable business – probably in 2024
- Booking/eTraveli
- O2/CK Hutchinson (referred back from the ECJ after its July 2023 ruling)

ECJ – Pending cases

- RWE/E.ON
- Grupa Lotos/PKN Orlen
- ThyssenKrupp/TataSteel
- Illumina/Grail (Art. 22 referral) probably in 2024 – next step: Opinion of AG Emiliou on 21 March (hearing took place in Dec. 2023)

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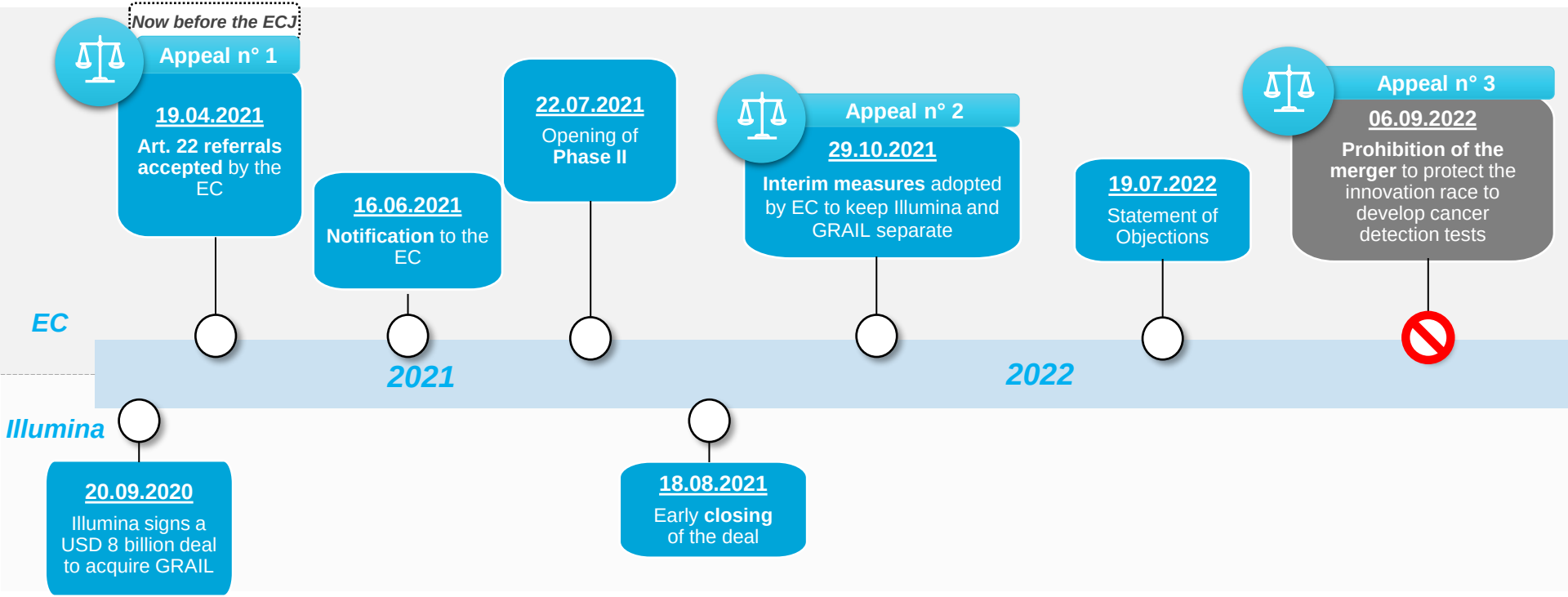
The *Illumina/GRAIL* proceedings in Europe



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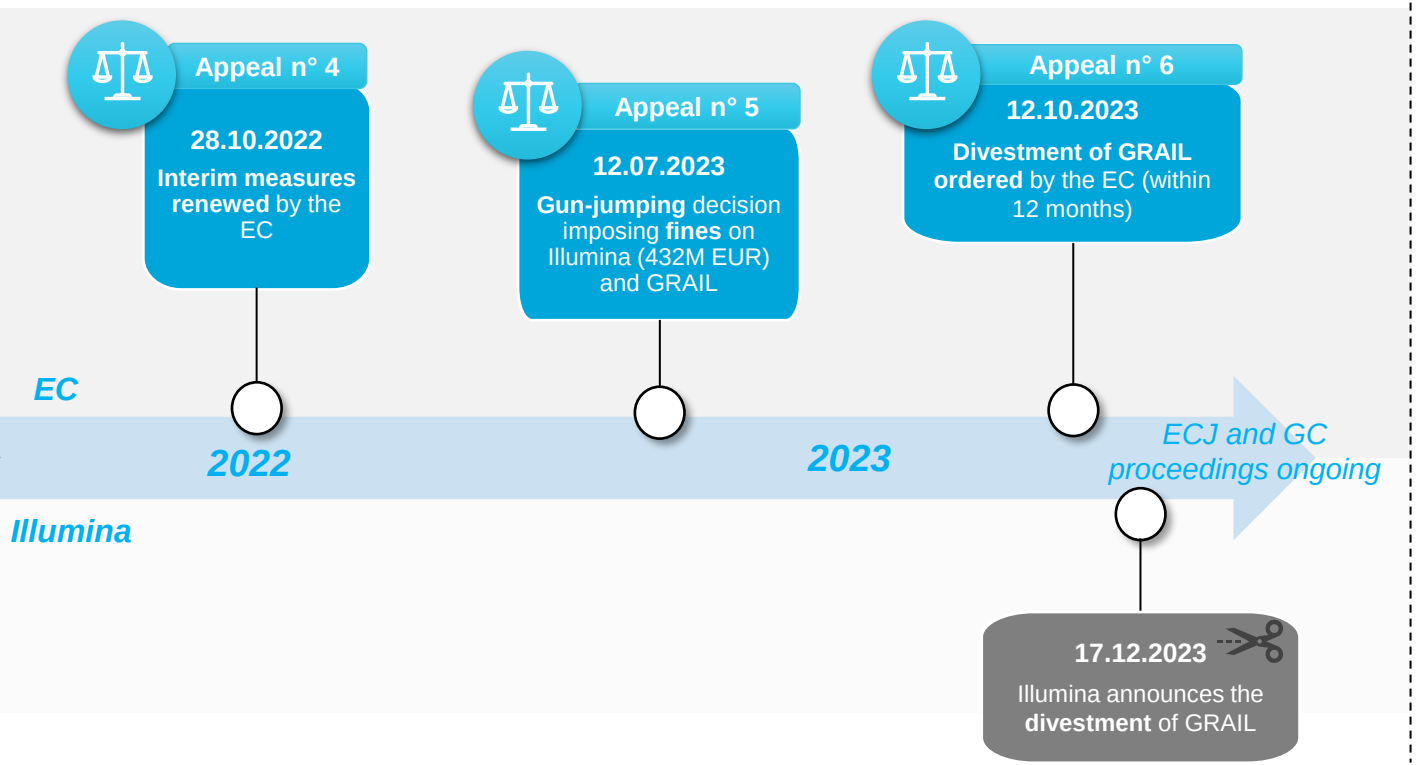

In a nutshell

1 appeal pending before ECJ

EC jurisdiction over Art. 22 referrals (upheld by GC)

5 appeals pending before GC

Interim measures, prohibition decision, gun-jumping, divestment order