BRUSSELS À JOUR – LA RENTRÉE 2025

Key Competition Law Developments to Watch After the Summer Break

Markus Röhrig, Christian Dankerl and Christoph Sielmann report on the latest developments from the European capital of competition law.

PART ONE: MERGER CONTROL & FOREIGN SUBSIDIES REGULATION

It's that time of year again: the squares and metros of Brussels are bustling, cafés and restaurants in the EU quarter have reopened, and the sun is setting over rue de la Loi a little earlier each day. *C'est la rentrée* – summer draws to a close, fall is almost here, time to get back to work. In keeping with our tradition, we present a roundup of the latest developments in competition law and a look ahead at what's on the horizon for the rest of the year.

In this first part, we cover merger control and Foreign Subsidies Regulation. The second part will address antitrust and State aid.

Merger Control

With or Without You? – UMG's Acquisition of Downtown Music

On 22 July, the European Commission opened a Phase II investigation into Universal Music Group's (UMG) proposed EUR 670 million takeover of Downtown Music (Case M.11956). UMG, headquartered in the Netherlands, is a globally active music record company, and, according to the Commission, the market leader in the EEA. Downtown Music, with headquarters in the US, is a global provider of artist and label (A&L) services through its FUGA music distribution platform, as well as royalty accounting services through its Curve platform. The investigation follows an (undisputed) Article 22 EUMR referral request by the Netherlands, which was joined by Austria.

What the Commission is particularly concerned about is UMG's post-deal access to commercially sensitive data of its competitors: Downtown Music processes sensitive data of its customers, which are UMG's competitors. After acquiring Downtown Music, UMG

could use this data for its own business activities, which the Commission states may harm rival record labels and further strengthen UMG's position on the market for the wholesale distribution of recorded music in the EEA.

The Commission is also concerned that the deal may remove Downtown Music as an "important competitive force" from the market for A&L services. A&L services consist mainly of distribution services to third-party labels and artists, including monetization, marketing, and promotion, as well as data analytics and management.

The Commission's decision to review the acquisition comes amid an open letter sent by 200 professionals from across the independent music sector. The letter stressed the deal's risks for competition in the independent music sector, highlighting that "*a concentration of this magnitude would narrow the range of voices, styles and cultures that reach the public*", and that the "*proposed acquisition poses a clear threat to effective competition, innovation and the growth of the music industry across the EU and globally.*"

When? After the original deadline was extended, the Commission had until 10 December to decide on the transaction. However, in early September, the Commission stopped the clock, potentially disrupting this timeline. In any case, we won't miss the beat on that one...

Trick or Treat? – Mars' Acquisition of Kellanova

Have you ever thought about combining your favorite stack of Pringles chips with a Snickers chocolate bar? Mars, a global supplier of confectionery, food, and pet food products as well as animal care services, is trying to do just that by planning to acquire Kellanova. Kellanova, formerly Kellogg Company, mainly sells salty snacks and cereals. Mars is particularly known for sweets such as Twix, Mars, M&M's, Skittles, and Airwaves, whereas Kellanova is renowned for Pringles chips and ready-to-eat cereals (e.g., Special K or Tresor). Both companies are headquartered in the US.

After clearance decisions from the CMA and the FTC (where the FTC expressly noted that the parties' product portfolios in the US differ from those in the EU), the final obstacle to the EUR 31 billion deal is in Brussels.

On 25 June, the Commission initiated its first Phase II investigation of the year (Case M.11753). The Commission's concerns focus on potential increases in consumer prices across the EEA, driven by the strengthened bargaining power of the merged entity vis-à-vis retailers. The Commission considers some of the parties' products to be the snack industry's "essential facilities", describing them as "must-have" products for end consumers. As a result, the Commission is concerned that retailers could become vulnerable to having to accept higher prices. As many consumers prefer to buy their groceries in a single supermarket, the Commission argues, retailers that do not offer the parties' products might be at a significant disadvantage.

When? The Commission's original deadline was 31 October. However, in late July, the Commission stopped the clock, giving it more time to render a tasty decision on this case.

Showdown in Gun-jumping Case? – Vivendi/Lagardère

Substantive proceedings in the *Vivendi/Lagardère* case have finally resumed. After a lengthy dispute over the extent of the Commission's investigative powers (on which we reported in last year's *Rentrée* issue), the Commission has now shifted its focus back to the core allegation of the case: gun-jumping.

On 18 July, about two years after opening formal investigations (and conditionally clearing the merger subject to commitments), the Commission issued a Statement of Objections. The Commission preliminarily found that Vivendi violated both the requirement to notify the transaction and the standstill obligation by regularly intervening in Lagardère's decision-making (Case M.11184). Both parties are French media companies. The Commission argued that Vivendi influenced strategic decisions regarding the editorial line as well as covers and articles of Lagardère's magazines and newspapers, such as Paris Match and Journal du Dimanche. Vivendi also allegedly influenced the program schedule of Lagardère's radio station *Europe 1*. According to the Commission, this conduct took place before notification, between notification and conditional clearance decision, and between conditional clearance and the Commission's last buyer approval decision. (Five months after conditionally clearing the deal, the Commission approved the purchaser of celebrity press magazine *Gala*).

When? After issuing the Statement of Objections, the Commission awaits Vivendi's response. There is no formal deadline, but we expect to hear news in the coming months.

The Post-Illumina World of Call-in Powers – General Court to Decide on Nvidia/Run:ai

Nvidia's action against the Commission's decision to review its acquisition of Israeli AI start-up Run:ai could further shape the scope of the Commission's jurisdiction over below-threshold "killer acquisitions" under Article 22 EUMR. The transaction was referred to the Commission by Italy last fall, after Italy had invoked its new call-in power. The Commission accepted the referral request on 31 October 2024, and cleared the transaction just before Christmas. However, Nvidia challenged the Commission's decision to review the merger before the General Court (Case T-15/25), arguing that accepting the request based on Italy's "loosely defined, ex post, discretionary" call-in powers ran counter to the Court of Justice's *Illumina/GRAIL* ruling and was incompatible with Article 22.

Following the Commission's recent court victory in *Brasserie Nationale* (Case T-289/24), which clarified that the 15-working-day referral period under Article 22 begins only once the national authority has received "relevant and sufficient" information, the upcoming judgment in Nvidia/Run:ai may prove crucial for the Commission´s future Article 22 strategy.

When? The General Court has not yet announced the date of the hearing, but it is possible that we hear something before the end of the year.

Call(-in) a Cab – DCCA Intervenes in Uber/Greenfleet

Speaking of call-in powers: Over the summer, the Danish competition authority (DCCA) exercised its new right for the first time to require a merger filing even though the transaction does not meet the "regular" thresholds. Under the new rules, the authority may call in a transaction if certain turnover thresholds are met and there is, in its view, a risk that the deal will significantly impede effective competition. The Danish authority did just that in the case of Uber and Greenfleet Holding A/S (which is the parent company of the Dantaxi group), requiring them to notify their proposed merger. The case may set an early precedent in the evolving competition landscape shaped by new call-in rights.

When? Uber and Greenfleet have until 15 September 2025 to file. The DCCA will then assess the transaction under the standard review procedure.

Ecosystem Theory of Harm – General Court to Decide on Booking/eTraveli

The *Booking/eTraveli* saga has entered its next procedural stage. To refresh your mind, the Commission, in September 2023, blocked the EUR 1.6 billion acquisition of eTraveli, a Swedish provider of online travel agency (OTA) services for flights, by Booking, headquartered in the US, a provider of OTA services mainly for hotels. The Commission argued that the transaction would have strengthened Booking's dominant position in the market for hotel OTA services. It found Booking's proposed remedies to be insufficient. The Commission based its position on a new "ecosystem theory of harm", arguing that "the transaction would have allowed Booking to expand its travel services ecosystem" to flights, which are often a first step before booking a hotel. In the Commission's view, cross-selling opportunities combined with alleged "customer inertia" would lead to more customers using Booking's platform as a "one-stop-shop" – to book not just flight services, but hotels as well.

The transaction had previously been cleared by the CMA and the FTC. Booking decided to appeal the decision to the General Court (Case T-1139/23). The oral hearing was held over two days in early July.

During the oral hearing, Booking complained that the Commission had departed from the application of the non-horizontal Merger Guidelines without sufficient justification. According to Booking, the Commission ignored the existing cooperation agreements between Booking and eTraveli, under which Booking sourced flights from eTraveli, and therefore wrongfully based its competitive assumption on a "zero-flight" counterfactual scenario. The Commission called this line of argumentation a "hoax". Responding to a question from the court, the Commission even hinted that, if the court were to dismiss Booking's appeal, it might investigate the cooperation agreement under Articles 101 or 102 TFEU. The court also focused on what made eTraveli "unique", and questioned whether the Commission's analysis would have differed had Booking sought to acquire a smaller flight-booking platform.

When? The oral hearings were held on 8 and 9 July. It seems likely that the General Court will issue its eagerly awaited ruling in the first half of next year.

Concepts of a Plan? – Review of Merger Guidelines

Booking/eTraveli may be considered a prime example of how the existing Horizontal and Non-Horizontal Merger Guidelines are outdated and may not meet the demands of today's competition landscape. In our June issue, we reported in detail on the ongoing revision process.

When? The 16-week consultation phase ended on 3 September 2025. The Commission is now expected to publish the findings, organize stakeholders' workshops and issue drafts of the guidelines. The final versions of both the Horizontal and the Non-Horizontal Guidelines are not expected before late 2027.

Foreign Subsidies Regulation

The FSR continues to trigger more notifications than the legislator initially expected. Against this backdrop, legal certainty in its application remains of particular importance. The Commission's draft guidelines on the application of certain provisions of the FSR are supposed to deliver on this. Let's take a look at whether this goal can be achieved.

Practical Guidelines Derived from (a Lack of) Practical Experience – The Commission's Draft FSR Guidelines

In line with the legislative mandate set out in Article 46(1) FSR, the Commission published draft guidelines on 17 July 2025 focusing on the application of certain key concepts of the FSR: the assessment of distortive effects, the application of the balancing test, and the Commission's powers to call in below-threshold transactions and public procurement bids. Since its inception, the application of the FSR has been criticized for a lack of transparency and guidance on the substantive test. The Commission now seeks feedback on the draft guidelines to tailor them to the needs of both the regulator and affected companies before adopting the final version.

Clarification on Distortion?

The assessment of the distortive effect of a foreign subsidy pursuant to Article 4(1) FSR is a two-step test. The Commission needs to find (a) that a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and (b) that this foreign subsidy actually or potentially negatively affects competition in the internal market. The draft guidelines provide some insight into each of these tests.

The competitive position of an undertaking on the internal market may be improved if the foreign subsidy is likely to benefit, directly or indirectly, the economic activity in which that undertaking engages in the internal market. The Commission lists different types of foreign subsidies that meet these criteria: subsidies used in the internal market, those intended for or directed to the internal market, and other foreign subsidies for which the Commission assumes a likelihood that the undertaking uses resources to cross-subsidize its economic activities in the internal market.

The Commission considers that a subsidy actually or potentially negatively affects competition in the internal market if it is likely to have a negative impact on the level playing field within the internal market. According to the draft guidelines, a negative impact on the level playing field may stem from an alteration of, or interference with, competitive dynamics to the detriment of other economic actors in the internal market. In this context, the Commission needs to demonstrate a reasonable link between the foreign subsidy, the improved competitive position of the subsidized undertaking, and the negative impact on competition in the internal market. The Commission is, however, not required to show that the subsidy had an actual impact. When carrying out this assessment, the Commission will compare the competitive situation with the subsidy to the competitive situation that would have existed in the absence of the foreign subsidy.

In relation to public procurement proceedings, the Commission focuses on the assessment of whether a foreign subsidy enables, actually or potentially, an economic operator to submit an unduly advantageous bid. It will compare its terms to those of other comparable bids or to the contracting authority's own estimates. In a second step, the Commission analyzes whether this advantage is undue. This is the case if the advantage stems from a foreign subsidy. In contrast, the advantage is considered due where it can plausibly be justified by factors other than the foreign subsidy.

Striking the Balance

Where a distortion has been found, the Commission will, on the basis of the information received, balance the negative effects of a foreign subsidy against its positive effects "*on the development of the relevant subsidized economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects of the foreign subsidy in relation to the relevant policy objectives, in particular those of the Union.*"

Positive effects to be considered in this balancing test are not only those which enable the subsidized economic activity to exist at all or trigger a change in its development. They also encompass effects which relate to EU policy objectives such as environmental protection and social standards. Even positive effects unrelated to EU policy objectives can be considered if they have an impact (also) on the EU.

In this context, the Commission disappoints several commentators who participated in the Call for Evidence and had hoped for a stricter alignment of EU State Aid rules and the FSR. These commentators called for an exemption—a "safe harbour," so to speak—for foreign subsidies that, if granted as State aid, would be exempt under the General Block Exemption Regulation. The Commission did not implement these ideas. Instead, it merely stated that "*policy objectives which are covered by [...] other frameworks adopted by the Commission in relation to State aid are of particular relevance when applying the balancing test.*"

When it comes to the balancing procedure itself, the Commission undertakes a comparison of the significance (read: severity) of both the negative and positive effects. In this context, the Commission also tests for some kind of proportionality, questioning whether the same positive effects could have been achieved with less distortion of the internal market.

Should the balancing test show that the negative effects of a subsidy prevail, the test also helps in determining the appropriate scope and nature of the commitments or redressive measures.

Call-in (Maybe)

The draft guidelines also provide clarification on the Commission's below-threshold call-in powers pursuant to Article 21(5) and Article 29(8) FSR. The Commission analyzes whether a concentration or a bid would merit *ex ante* review given its actual or potential impact within the internal market. When carrying out this assessment, the Commission focuses on elements such as contextual information indicating that the level of the relevant economic activity of the target does not reflect its current or future significance, or patterns in investments, acquisitions, or participation in public procurement procedures through which the undertaking concerned builds up influence or economic presence in certain sectors.

When: The public consultation period on the draft guidelines ends on 12 September 2025. The finalized version of the FSR Guidelines will be issued in January 2026. Six months later, in July 2026, the Commission will also publish an FSR review report on the implementation and enforcement of the regulation.

Thank you for reading, and be sure to check out the second part of our Rentrée issue, which will cover antitrust and State aid. We'll be sharing it soon. In the meantime, follow us on LinkedIn for the latest updates on EU competition law.

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