# Newsletter EU Law

## A bi-monthly review of EU legal developments affecting business in Europe

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## Merger of Fiat Chrysler and Peugeot approved

On 21 December 2020 the Commission conditionally approved the proposed merger between the automotive companies Fiat Chrysler Automobiles N.V. (FCA) and Peugeot S.A. (PSA).

FCA and PSA manufacture, supply and distribute passenger vehicles and light commercial vehicles. FCA owns components and systems companies. PSA's subsidiary Faurecia S.A. manufactures and supplies interior automotive components. Both companies provide ancillary services such as financing solutions and mobility services. The merger will lead to the creation of the fourth largest global automotive group.

The Commission had concerns that the transaction would have harmed competition in the market for small light commercial vehicles in nine Member States, where the companies have high or very high combined market shares and are close competitors. FCA and PSA offered two commitments aimed at enabling entry and expansion. Firstly, parties extend the agreement currently in force between PSA and Toyota Motor Europe for small light commercial vehicles under which PSA produces the vehicles for sale by Toyota. Secondly, an amendment of the "repair and maintenance" agreements between PSA, FCA and their repairer networks will facilitate access for competitors to PSA and FCA's repair and maintenance networks for light commercial vehicles; for example, by lifting the prohibition on repairers to use PSA/FCA tools and equipment to service competitors' light commercial vehicles. These remedies addressed the Commission's concerns.

## Acquisition of Fitbit by Google

On 17 December 2020 the Commission cleared the acquisition of Fitbit by Google, conditional on commitments hitherto made.

Google is active in online advertising, search, cloud computing, software and hardware. It develops licensable operating systems for smartphones and smartwatches, as well as health and fitness applications and services. Fitbit develops, manufactures and distributes wearable devices, smartwatches and fitness trackers, connected software and services. Fitbit has a limited market share in Europe in the fast-growing smartwatch segment where many larger competitors are present. There are limited horizontal overlaps between the activities of Google and Fitbit. The investigation focused on the data collected via Fitbit's wearable devices and the interoperability of such devices with Google's Android operating system.

Google offered several commitments. It will not use for Google Ads the health and wellness data collected from wearable devices. The data will be stored in a "separate data silo" and users can chose to grant or deny the use of their data stored in their Google Account or Fitbit Account by other Google services. Google will maintain access to data through the Fitbit Web Application Programming Interface (API), without charging for access and subject to user consent. Google will continue to license for free to Android original equipment manufacturers those public APIs covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone. Any improvements and relevant updates must be offered in open-source code to Fitbit's competitors. The duration of the commitments is ten years. A trustee will monitor the implementation of the commitments.

## ECJ annuls Commission decision in Paramount case

On 9 December 2020 the European Court of Justice (ECJ) annulled the Commission's decision making binding the commitments offered by a company in order to preserve competition on the markets.

Paramount Pictures International Ltd (Paramount) concluded licensing agreements on audio-visual content with the EU's main pay-TV broadcasters, including Sky and Groupe Canal+. In 2015 the Commission sent Paramount a statement of objections concerning two clauses which led to absolute territorial exclusivity and frustrated the objective of establishing a single market. Paramount offered commitments to no longer comply with or act in order to enforce the clauses. In 2016 the Commission accepted the commitments and made them binding. Paramount notified Groupe Canal+ of its intention to no longer to ensure compliance with the absolute territorial exclusivity granted to Groupe Canal+ on the French market. Groupe Canal+ brought an action before the General Court of the European Union seeking annulment of the Commission's decision. The General Court dismissed that action in 2018.

The ECJ found, however, that the General Court erred in law in its assessment of the proportionality of the adverse effects on the interests of third parties resulting from the Commission's decision. The ECJ pointed out that the Commission must verify commitments offered, and also with regard to the effect of the commitments on the interests of third parties, so that those third parties' rights are not rendered meaningless. The General Court could not refer such contracting partners to

the national courts in order to have their contractual rights enforced. Consequently, the Court set aside the judgment under appeal and, in giving final judgment on the matter, annuls the decision at issue.

## Commission proposes new rules for digital platforms

On 15 December 2020 the Commission proposed the Digital Services Act and the Digital Markets Act.

The Digital Services Act would rebalance the rights and responsibilities of users, intermediary platforms, and public authorities as well as protect consumers and their fundamental rights online. A rulebook would foster innovation, growth and competitiveness through the scaling up of smaller platforms and start-ups for digital services that operate in the EU.

The Digital Markets Act would address the negative consequences arising from certain practices operated by platforms acting as digital “gatekeepers” to the single market. These platforms could act as private rule-makers and function as bottlenecks between businesses and consumers. Examples of these practices include the unfair use of data from businesses operating on these platforms, or situations where users are locked in to a particular service and have limited options for switching to another one. The act would require gatekeepers to proactively put in place targeted measures allowing the software of third parties to properly function and interoperate with their own services. The Commission may impose fines of up to 10% of the gatekeeper‘s worldwide turnover.

## German corona scheme

On 1 December 2020 the Commission approved German plans to set up a scheme under which the German federal and regional authorities can invest through debt and equity instruments in enterprises affected by the coronavirus outbreak.

Germany notified to the Commission of an “umbrella” scheme allowing the German federal and regional authorities to provide capital support to enterprises that have been affected by the coronavirus outbreak. Support can be granted until 30 September 2021. The scheme, includes subordinated loans and recapitalisation instruments, in particular equity instruments and hybrid capital instruments, such as convertible bonds and silent participations. Individual measures will be limited to €250m per beneficiary and, according to German authorities, the total provisional budget of the scheme is around €3.5bn. The Commission found the scheme to be in line with the EU’s Temporary Framework for corona schemes.

## Commission fines Teva and Cephalon €60.5m

On 26 November 2020 the Commission fined pharmaceutical companies Teva €30m and Cephalon €30.5m for agreeing to delay for several years the market entry of a cheaper generic version of Cephalon‘s drug Modafinil after Cephalon‘s main patents had expired.

Modafinil is a medicine accounting for more than 40% of Cephalon‘s worldwide turnover and is used for the treatment of excessive daytime sleepiness. While the main patents protecting Modafinil had expired in Europe by 2005, Cephalon still held some secondary patents related to the pharmaceutical composition of the medicine. To defend itself against Teva‘s launch of Modafinil in the UK, Cephalon brought legal actions alleging an infringement of its secondary patents. Nonetheless, in 2005 Cephalon induced Teva not to enter the market with a cheaper version of Modafinil, in exchange for a package of commercial side-deals that were beneficial to Teva and some cash payments. By virtue of the settlement agreement, as of October 2012, Teva could have started selling generic Modafinil in exchange for significant royalty payments to Cephalon. Teva‘s limited entry under the licence eventually did not happen, as Teva acquired Cephalon in October 2011.

The Commission investigation found that this “pay-for-delay” agreement eliminated Teva as a competitor for several years and allowed Cephalon to continue charging high prices after the Modafinil patent had long expired. While generally patent settlements can be legitimate, in this case however, Teva committed to stay out of the Modafinil markets, not because it was convinced of the strength of Cephalon‘s patents, but because of the substantial value transferred to it by Cephalon.

**This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.**
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