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# CLEARING M&A HURDLES IN EUROPE IN 2024 AND BEYOND: NEW CHALLENGES, LESS CERTAINTY, SOME SIMPLIFICATION

Recent regulatory and case law developments in Europe have introduced some simplification but also new challenges to parties seeking to shepherd transactions through the European regulatory approvals processes. This note reviews these developments, considers their implications for the transaction timeline and closing, and how to manage them.

**Quick read:**

New challenges and less certainty arise due to:

- The introduction of new notification requirements under expanding FDI regimes and the new EU foreign subsidies regulation;
- Highest EU court validation of the European Commission's assertion of jurisdiction over transactions that fall below the EU merger review thresholds;
- EU court case law accepting challenges to dominant acquirers' transactions falling below merger thresholds based on abuse of dominance law, even after closing;
- Highest EU court validation of more lenient standards of review for the EC to object to a transaction, overturning a lower EU court that had imposed stricter standards;
- EC application of a new "ecosystem" theory of harm where the acquisition strengthens an existing position of market power; and
- The continued manifestation of the UK CMA alongside the EC as an independent and activist authority

Some simplification results from changes to the EU notification form and the increased scope of transactions falling under the EU simplified merger review procedure.

## NEW CHALLENGES AND LESS CERTAINTY

### *Expanded notification requirements.*

#### 1. A new onerous EU foreign subsidies regime imposing a parallel notification requirement for transactions with non-EU funding

**What is it?** On 12 July 2023, the EU's Foreign Subsidies Regulation ("**FSR**") entered into force. The FSR gives the European Commission ("**EC**") exclusive competence to assess the existence of distortive foreign subsidies in transactions and public tender bids. In particular, although primarily aimed at foreign (non-EU) acquirers, it gives the EC powers to intervene in M&A transactions by both EU and foreign acquirers involving EU targets (and EU and foreign bidders in EU public procurement exercises) where any party to the transaction (or members of their group) received "financial contributions" from third countries which the EC judges to be a distortive subsidies in the last three years prior to the transaction. Such financial contributions are very widely defined and can capture anything from grants, tax breaks, loans, even to the purchasing or selling of goods or services from third countries, even if they are on market terms or otherwise confer no selective advantage. The FSR creates a new, pre-closing, mandatory review process in case of a merger, acquisition or the creation of a full-function joint venture, where:

- One of the companies (*i.e.*, at least one of the merging undertakings, the acquired undertaking, or the joint venture) is established in the EU and generates aggregate revenue of at least EUR 500 million in the EU; and
- The undertakings concerned received from third countries combined aggregate financial contributions of more than EUR 50 million in the preceding three financial years. Given the broad definition of foreign financial contributions, this threshold will usually be met by parties that are

large enough to engage in transactions meeting the revenue threshold above.

Similar to the EU merger control process, the EC has 25 working days after receipt of a complete notification to review the transaction, extendable by 90 working days in case the EC opens an in-depth investigation. Further extensions of the waiting period can apply in specific situations.

In terms of the administrative burden that FSR imposes on companies needing to file transactions, the required level and detail of reporting under the FSR depends on the type of foreign financial contribution that the parties have received in the last 3 years prior to the transaction:

- For foreign financial contributions exceeding €1m, that fall into one of the categories of "most likely highly distortive subsidies," detailed disclosure obligations apply for both the acquirer and the target. This includes details such as the amount and type of contribution, the granting authority, the purpose and economic rationale, along with supporting documentation.

- For all other types of foreign financial contributions reporting requirements only apply to the acquirer who must provide, with certain exceptions, high level information on any foreign financial contributions that exceed € 1 million.

*"Given the absence of a worldwide combined revenue threshold, transactions which do not trigger an EU merger control filing might still trigger an FSR notification."*

**Implications**. The FSR creates yet another notification regime for qualifying transactions that might already be caught by EU or member state merger control notifications and/or foreign direct investment notifications. Moreover, given the absence of a worldwide combined revenue threshold, transactions which do not trigger a merger control filing under EUMR might still trigger an FSR notification. The application of the FSR's additional notification requirement and related review has the potential to complicate the timeline towards the closing of the transaction. Finally, FSR provides an added layer of uncertainty as the EC under the FSR has the power to call in certain non-notifiable transactions before closing, or otherwise investigate closed transactions.

**Parties' response.** An FSR notification carries with it the submission of extensive information, the gathering and preparation of which is time consuming. The additional burden of a foreign subsidies filing might be unavoidable for qualifying transactions, but the burden and time pressure can be alleviated by adequate preparation (including, for example, collection of the relevant data on foreign contributions), which in appropriate cases can be initiated well before a specific transaction arise. Parties should also set up a solid internal compliance system and conduct regular self-assessments to determine whether the financial contributions received could be considered distortive in nature to prompt an ex officio investigation. Parties should integrate the FSR preparation and review process in their global timeline towards closing of the transaction.

## 2. New EU member state Foreign Direct Investment regimes are multiplying notification requirements and timing uncertainties for deals in sensitive sectors

**What is it?** The number of foreign investment control regimes is multiplying, complicating the timeline towards closing of transactions and creating additional uncertainty.

Member state foreign direct investment regimes are not new: various EU member states have had requirements to subject transactions in sensitive sectors for review for some time. The EU's FDI Screening Regulation (Regulation 2019/452 -- the "FDI Regulation" for short), which entered into force in 2019, aimed to establish common criteria to identify risks relating to the inward acquisition of control by non-EU investors of strategic assets that might threaten security or public order. The FDI Regulation does not replace national FDI regimes or even harmonize them. Member states retain primary responsibility for defining and enforcing their national FDI regimes. Following the entry into force of the FDI Regulation, the number of pre-closing FDI notification regimes in the EU has multiplied – from 11 in 2019 to well over 20 today (for example, in July 2023, a new far-reaching Belgian regime entered into force).

**Implications.** Because the member state regimes are not harmonized, the definition of the scope of what is a sensitive investment, the procedures and related timing, as well as enforcement can vary significantly from one member state to another. Unlike under merger control regimes, the criteria for the substantive assessment of mergers are not subject to the logic of economics, the review can be influenced by political considerations, and decisions of the authorities that might help to understand their decisional practice are not published. The growing number of pre-closing EU FDI regimes has thus further increased the substantive uncertainty and timing unpredictability of transactions involving non-EU acquirers. In transactions involving sensitive sectors, it is entirely possible that the timing of closing is driven significantly not by merger filing requirements globally but an individual member state's FDI review. At the same time, the consequences of ignoring the growing number of member state FDI notification requirements can be severe, with significant penalties and even the possibility of criminal prosecution of executives in some member states.

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**Parties' response.** In the face of a growing number of member state FDI regimes with diverging procedures and timelines, careful planning and coordination of the timeline to closing for merger review, FDI and foreign subsidies regulation purposes (as applicable) is critical. Local legal expertise is important in order to fully understand the reach of the FDI requirements, the likely approach of the relevant authority and the levers that might influence the timing of the review. Parties will need to factor in the impact of any FDI review on cooperation, timing and liability in their transaction documents.

### 3. EU lower court confirmed that deals below the EU merger notification thresholds might still be reviewed by the EC

**What is it?** The EU General Court validated the EC's assertion of jurisdiction over transactions that fall below the EU merger review thresholds in the context of the appeal of the EC's prohibition of the *Illumina/Grail* merger.

Transactions triggering the relevant revenue thresholds outlined in EU merger control rules ("**EUMR**") must be notified to and approved by the EC prior to closing. If the relevant revenue thresholds are not met, the transaction could still be caught by the notification requirements of the EU member states. A provision of the EUMR (Article 22) did provide already in 2004 that one or more member states could still request the EC to review a concentration not caught by the EU's notification thresholds. The EC initially discouraged member state competition authorities from making use of this possibility if the relevant transaction did not trigger a notification under their national merger control regime.

In 2021, driven by the perception of an "enforcement gap" that let "killer acquisitions" of nascent competitors escape review, the EC issued guidance reversing past practice as regards Article 22. It announced it would encourage and accept a referral initiated by a member state authority even if the relevant transaction is not notifiable to that authority (even though Article 22 previously applied and continues to apply to – more numerous – instances where a member state refers a transaction that *does* meet its local notification requirements for review to the EC). This policy now is sometimes referred to as the EC's "Article 22 policy" as shorthand.

In July 2022, in *Illumina/Grail*, the General Court confirmed the EC's policy reversal in an appeal involving the first case in which the EC tested its new policy. An appeal against the General Court's *Illumina* judgment is pending before the EU's highest court, the European Court of Justice ("**ECJ**"). The EC has to date sparingly made use of the Article 22 referral mechanism, relying on it only a handful of times in 2023.

*"The EC's policy on asserting jurisdiction over mergers not meeting the EU merger review thresholds can result in parallel reviews where some member states do not join the EU review but instead continue their review under their national merger control procedures."*

**Implications**. Unless the policy is overturned by the ECJ, the EC will continue to be able to review transactions that would ordinarily not be notifiable under the EUMR or national merger control rules of EU member states, even after closing.

As *Illumina/Grail* shows, the consequences can be significant. The EC ordered the *Illumina* transaction – which initially escaped merger review in the EU – to be unwound on 19 October 2023, more than 2 years after the parties closed the transaction (a decision that is also under appeal as of the date of this note).

The EC's Article 22 policy might also result in parallel reviews where the EC takes up a referral from one or more member states with no competence to review the transaction but where some member states — which are competent to review the transaction under their national merger control laws — do not join the referral but instead continue their review under their national merger control procedures. Parties could thus face increased costs, and the additional complexity of managing such parallel reviews.

Moreover, for leading players in the information technology space, the risk of an Article 22 referral of non-notifiable transactions is likely heightened as a result of Article 14 of the 2022 Digital Markets Act (the "**DMA**"). Article 14 of the DMA provides that companies designated as "gatekeepers" under the DMA (currently, Google, Apple, Meta, Amazon, Microsoft, and Bytedance) are required to inform the EC of any intended concentration involving services in the digital sector or the collection of data, irrespective of whether it is notifiable under the EUMR or any national merger control rules. The EC must then inform member states, which are then free to make any an Article 22 reference to the EC.

**Parties' response**. For transactions not meeting EU or member state notification thresholds, parties will need to determine based on past EC practice and its Article 22 guidance whether a transaction might be subject to a referral despite not being notifiable with a member State. Parties might need to adapt transaction documents to the possibility that the EC might initiate an Article 22 review. This could affect provisions in relation to cooperation by the parties, the timing and closing of the transaction (for example, it might be necessary to foresee the possibility to renegotiate the long stop date should a referral be made). In addition, parties need to consider whether proactively to

approach the member states and/or the EC to assess whether an Article 22 review is likely.

## *Changes to the substantive assessment of transactions*

### 4. The EC's new expansive interpretation of leveraging concerns regarding a merger

**What is it?** On 26 September 2023, the EC prohibited Booking.com's proposed acquisition of the online flight booking service eTraveli on the basis that the transaction would have allowed Booking to expand its travel services ecosystem, which revolves around its hotel online travel agency ("**OTA**") business. Booking offers hotel OTA services in which it is (according to the EC) the dominant player in the EEA, as well as some flight OTA services for which it holds a small share. eTraveli on the other hand is the second largest flight OTA provider in the EEA. As per the EC's own acknowledgment, the prohibition presents the embodiment of a new policy direction focused on ecosystem competition.

*"The EC's new ecosystem theory of harm presents a novel way by which the EC may seek to prohibit transactions in the future"*

In the past, the EC already considered the ways in which a transaction relating to entities offering complementary products could harm competition. The most obvious concern with such transactions being that further to a transaction a combined entity would be able to leverage its existing strong position in one market to the market in which the acquired company is active. By contrast, the EC's ecosystem theory looked at how the combination of two undertakings offering services in complementary digital markets can entrench the dominant position of one of those undertakings in one of the markets – a theory of harm that is not envisaged in the EC's own guidelines for assessing such mergers.

In the case at hand, the EC found that flight OTAs can be a strong customer acquisition channel for the hotel OTAs (for example, most people book flights before booking hotels), and that the proposed transaction would further entrench Booking's dominant position, rendering it harder for competitors to compete for some customers and raising barriers to new entrants. Thus, the *Booking/eTraveli* decision represents a novel theory by which the EC may seek to prohibit transactions in the future.

**Implications**. The *Booking.com/eTraveli* case highlights that the EC does not consider itself bound by its own merger guidelines and will develop new theories to address what it perceives to be new market challenges. It indicates that EC merger control enforcement can be (even) less predictable than these guidelines suggest. As regards the ecosystem theory of harm, it presents an expansion of the bases on which the EC can challenge mergers, particularly in digital markets where the issue of ecosystems is most likely to arise.

Whether this expansion will be a factor long term is yet to be seen, insofar as Booking.com has already announced it will challenge the EC's decision blocking the deal. The EU General Court and/or possibly the ECJ could still reject the legitimacy of the EC's approach. However, the issuance of their judgments could take over a year to three years or more, and the EC has given no indication of holding off from applying its newfound approach in the meantime.

**Parties' response**. Parties assessing transactions involving a significant player and a target in a neighboring market should consider and account for the potential impact of the EC's resolve to apply the ecosystem theory to their transaction, in particular if they are active in the digital sector. Anticipating that possibility will allow the parties to have a better view of the regulatory hurdles

before entering into the transaction, and to be better prepared to confront the EC should they proceed, including, for example, by considering potential remedies.

### 5. Confirming former case law and a lower bar for the EC to challenge mergers

**What is it?** On 13 July 2023, the ECJ issued its judgment in *CK Telecoms*. The judgment overturned a previous judgment of the General Court that had held the EC to a stricter standard of proof, a stricter test for prohibitions of transactions not creating a dominant position, a price-based criterion for a target to be qualified as an important competitive force, a stricter test of closeness of competition, and precedent levels of price increases in order for a price increase to be predicted to be problematic. The ECJ ruled in favor of the EC with respect to all these elements, effectively re-setting the bar for a prohibition to where it was prior to the General Court's judgment. In short, the ECJ held that the EC has only to show that it is more probable than not that a transaction could lead to a substantial impediment to effective competition.

**Implications**. The General Court's judgment had given hope to parties considering transactions in highly concentrated markets by holding the EC to a more rigorous test and evidential standards, but the Court of Justice effectively dashed those hopes. Ultimately, the ECJ's *CK Telecoms* judgment did not *lower* the bar for merger review in the EU as much as *return it* to where it was prior to the General Court judgment, restoring the EC's ability to prohibit mergers based on more lenient and flexible standards. As a result of the CJEU's ruling, it will be harder to hold the EC to a rigorous standard for assessing parties' arguments and evidence in support of the transaction, and to challenge their rejection by the EC. Each case will be fact specific, and it will be for the EC to demonstrate based on sufficient and consistent evidence that the transaction is more probable, than not, to be problematic. However, the ECJ's judgment could arguably embolden the EC in future transactions.

*"The ECJ's CK Telecoms judgment did not lower the bar for merger review in the EU as much as return it to where it was prior to the General Court judgment, restoring the EC's ability to prohibit mergers based on more lenient and flexible standards."*

**Parties' response.** Although the *CK Telecoms* judgment disappointed players in concentrated industries contemplating M&A by rejecting the General Court's exigent standards, it did further clarify the law applicable to merger review. This should aid parties in their assessment and merger review preparation of potential M&A.

### 6 Transactions involving dominant acquirers could be reviewed even if they do not meet the relevant thresholds for a notification based on abuse of dominance law

**What is it?** The EU highest court's 16 March 2023 *Towercast* judgment held that EU member state competition authorities and courts can review acquisitions by dominant entities under the prohibition on abuse of dominance under Article 102 of the Treaty on the Functioning of the EU ("**TFEU**"), even if those acquisitions are not notifiable under EU or national merger control laws. The ECJ thus brought back to life an old theory allowing mergers to be challenged under Article 102 TFEU that was last applied prior to the entry into force of the original 1989 EU Merger Regulation. As with the Article 22 referral policy, *Towercast* leaves open the possibility for a review of dominant companies' unnotified transactions under Article 102 TFEU even after closing of the transaction. *Towercast* also leaves open the possibility that third parties bring private actions to challenge a transaction based on Article 102 TFEU.

**Implications**. The impact of the *Towercast* judgment is limited to the extent that it only applies to transactions of dominant companies. But for those

companies, a transaction that is not caught by the quantitative merger review thresholds of the EU or the member state concerned could still be challenged by the member state's competition authority, on its own initiative or following a complaint (or even see a private action in that member state's court). It is unclear how often member states will ultimately apply this enforcement option, but the Belgian authority has already investigated a transaction of an allegedly dominant telecommunications provider on this basis which ultimately culminated in the dominant undertaking divesting the undertaking it had acquired. Similar investigations have been run in Italy and the Netherlands.

In the worst case, actions by the member state authorities or courts in application (where the local procedural rules permit so) might lead to the unwinding of a transaction that is already closed. The only deadline to which a challenge of a transaction under Article 102 TFEU is subject is the member state's limitation period. This period is often five years, but often acts only to restrict the imposition of fines, and in any event national courts could find that as long as the acquired business remains under control of the dominant company, there is an ongoing infringement of Article 102 TFEU, as a result of which the limitation period never starts. Companies that might face allegations of being in a dominant position could therefore face significant deal timing and closing uncertainty, on top of any added uncertainty resulting from the EC's Article 22 policy. This adds yet another layer of complication especially for dominant companies in the pharma and tech sectors identified in the EC's Article 22 Guidance as prime candidates for Article 22 referrals (above).

*" The only deadline to which a challenge of a transaction under Article 102 TFEU is subject is the member state's limitation period."*

While the possibility to review non-notifiable transactions under Article 102 TFEU was always present in theory, the *Towercast* judgment arguably has reinvigorated the risk and uncertainty faced by dominant companies in the EU by reaffirming this additional enforcement avenue. At the same time, the Article 22 and *Towercast* developments align the EU more closely to other jurisdictions where mergers below the jurisdictional thresholds are potentially subject to review, such as the U.S. and China.

**Parties' response:** Acquirers who might be dominant on a relevant market, engaging in mergers that fall below the threshold for review under the EU Merger Regulation and some or all national merger control rules of EU member states should consider whether their transaction might meet the substantive test for an abuse of dominance by undertaking at least some preliminary competitive assessment of potentially affected markets. Based on such a review, parties could decide to seek or trigger a referral to the EC under the EU Merger Regulation (under Article 4(5) or Article 22 EU Merger Regulation) in an attempt to preclude a national enforcement action, or to file a notification in a voluntary jurisdiction to anticipate an enforcement action post-closing (however in the EU this is limited to Hungary, Ireland, and Latvia). Finally, parties might also consider approaching the member state to assess the risk of an enforcement action based on Towercast. These courses of action are fact-specific and none of them guarantees success. Parties might in the relevant circumstances provide for the risk arising from *Towercast* in their transaction documents. To the extent such language is specifically tailored to address the *Towercast* risk, care should be taken not to acknowledge the possibility that the acquirer holds a dominant position (which could potentially negatively influence any subsequent merger review). If necessary and not detrimental to the parties' strategy, parties may also offer pre-agreed remedy packages to any authorities that they consider as high risk in investigating the transaction. Such remedies can mirror those they would be expected to give in a normal merger control filing.

### 7. Inconsistency of approach between the EU and the UK CMA

**What is it?** The developments above have focused on changes in the EU. But ever since Brexit was implemented in January 2021, the CMA has increasingly asserted its role on the global antitrust enforcement stage. This is evidenced, for example, by its prohibition of *Facebook/Giphy* and its requirement for more extensive remedies than those accepted by the EC in *Microsoft/Activision*. All things being equal, the UK is arguably now higher on the worry list of parties contemplating M&A than the EU, which traditionally has been perceived as an activist enforcement jurisdiction.

*" …the CMA has asserted its role on the global antitrust enforcement stage as a force to be reckoned with."*

**Implications.** The UK merger control regime has a voluntary notification regime, supplemented by a system of own-initiative investigations to large transactions. Since 2021 this regime applies in parallel with the EU merger control regime. Given that developments such as the Article 22 policy mean that parallel EU and member state merger reviews are potentially increasingly common, the fact that the UK might apply its regime in parallel to an EU review is perhaps in and of itself not necessarily noteworthy – even accounting for the fact that in global transactions a parallel UK regime is likely to be the rule rather than the exception. But the fact that the UK is taking forceful action in global mergers means that parties will often have another high-profile regulator to worry about – absent the approval of which they may not be able to close the transaction. The CMA has not hesitated to prohibit a transaction or extract significant remedies where it deemed it appropriate to do so, even where other leading regulators were less exigent. At the very least the UK regime can generate diverging outcomes (witness for example, *Booking.com / eTraveli* or *Microsoft / Activision* in the UK and the EU).

**Parties' response**. Parties should consider carefully whether their transaction might trigger a CMA investigation, in which case they might wish to approach the CMA proactively. Before doing so, however, the parties should invest time understanding the specificities of their UK operations and the risk of potential complaints. The UK regime and the various scenarios that might materialize under it need to feature prominently in the parties' global filing (and as the case may be remedies) strategy and timeline to closing.

## SOME SIMPLIFICATION

### 8. New EU notification forms and processes

Finally, having reviewed the various ways in which the review of transactions in Europe has become more complex and overall increased uncertainty, there is some good news on which to end: the EC did recently introduce measures that to a limited extent has reduced the burden of notifications under the EUMR. The impact of the initiative is relatively limited however, and brings with it some practical challenges as well.

**What is it?** As of 1 September 2023, the EC's merger simplification package entered into force. It is aimed at lightening the burden of notifying many mergers to the EC, although it also introduces new burdens. The merger simplification package (1) marginally increased the scope of transactions falling under the less burdensome simplified procedure and (2) introduced new filing forms, enabling much of the information to be provided in tables or yes/no tick-boxes, while expanding the information to be provided for some areas (for example, pipeline products) and the potential scope for waivers to provide the information for others. In addition, the EC now in principle requires all submissions to be filed and signed electronically.

**Implications**. The most significant implication of the EC's merger simplification package is the expansion of cases in which the simplified procedure can apply. It also increases the discretion that the EC has to apply the simplified procedure in cases in which the criteria for its application are not fully met. At the same time, it expands the ability of the EC to reject the application of the simplified procedure where it would otherwise apply because of the presence of specific circumstances such as non-controlling shareholding links between the parties and third-party competitors.

A very practical if only minor added complexity results from the EC's requirement to sign documents such as the notification form electronically by virtue of a qualified electronic signature. Obtaining a qualified electronic signature requires some advance preparation and parties needing to sign should ensure, or ask their external counsel to ensure, that they have the ability to apply qualified electronic signatures – a requirement that has already presented unanticipated hurdles for some parties and poorly prepared external counsel in merger practice.

*"New filing forms enable much of the information to be provided in tables or yes/no tick-boxes, while they expand the information to be provided for some areas..."*

**Parties' response.** The EC's merger simplification package is a rare recent instance of the EU reducing the administrative burden (at least in theory) of the EU merger control process, that starkly contrasts with some of the other developments in this note that have raised new challenges for parties engaging in M&A. The simplification package is modest and provides little solace in the face of these other challenges, however, and also presents some very practical imperatives. Parties and external counsel should ensure they are prepared in a timely fashion to use the new forms and apply the new electronic filing requirements, including by ensuring they are able to affix qualified electronic signatures.

## CONCLUSION

The regulatory landscape for M&A clearance in Europe has seen significant changes in recent years that are increasing the regulatory burdens and increasing uncertainty for all but the most unproblematic deals. Not all new challenges will arise for every transaction, but few transactions will escape all of them. This evolution has not made the job of inhouse M&A counsel or antitrust counsel who must advise their business counterparts any easier. There are no magic solutions for eliminating the added uncertainty completely, but enhanced coordination of the different workstreams across different EU and global jurisdictions and thorough preparation can go a long way in mitigating the challenges.

# EUROPEAN MERGER CONTROL CONTACTS

**Aniko Adam**
Counsel, London
T +44 207006 2201
E aniko.adam
@cliffordchance.com

**Begoña Barrantes**
Counsel, Madrid
T +34 91 590 4113
E begona.barrantes
@cliffordchance.com

**Marc Besen**
Partner, Düsseldorf
T +49 211 4355 5312
E marc.besen
@cliffordchance.com

**Richard Blewett**
Partner, Brussels
T +32 2 533 5023
E richard.blewett
@cliffordchance.com

**Luciano Di Via**
Partner, Rome
T +39 064229 1265
E luciano.divia
@cliffordchance.com

**Jan Dobrý**
Counsel, Prague
T +420 222 55 5252
E jan.dobry
@cliffordchance.com

**Chandralekha Ghosh**
Counsel, London
T +44 207006 8438
E chandralekha.ghosh
@cliffordchance.com

**Sue Hinchliffe**
Partner, London
T +44 207006 1378
E sue.hinchliffe
@cliffordchance.com

**Belén Irissarry**
Counsel, Madrid
T +34 685157716
E belen.irissarry
@cliffordchance.com

**Paschalis Lois**
Lawyer, Brussels
T +32 2 533 5906
E paschalis.lois
@cliffordchance.com

**Nelson Jung**
Partner, London
T +44 207006 6675
E nelson.jung
@cliffordchance.com

**Katharine Missenden**
Counsel, Brussels
T +32 2 533 5913
E katharine.missenden
@cliffordchance.com

**Alex Nourry**
Consultant, London
T +44 207006 8001
E alex.nourry
@cliffordchance.com

**Miguel Odriozola**
Partner, Madrid
T +34 91 590 9460
E miguel.odriozola
@cliffordchance.com

**Greg Olsen**
Partner, London
T +44 207006 2327
E greg.olsen
@cliffordchance.com

**Dieter Paemen**
Partner, Brussels
T +32 2 533 5012
E dieter.paemen
@cliffordchance.com

**Michel Petite**
Of Counsel, Paris
T +33 1 4405 5244
E michel.petite
@cliffordchance.com

**Carmen Puscas**
Lawyer, Brussels
T +32 2 533 5094
E carmen.puscas
@cliffordchance.com

**Milena Robotham**
Partner, Brussels
T +32 2 533 5074
E milena.robotham
@cliffordchance.com

**Ashwin van Rooijen**
Partner, Brussels
T +32 2 533 5091
E ashwin.vanrooijen
@cliffordchance.com

**Katrin Schallenberg**
Partner, Paris
T 33 1 4405 2457
E katrin.schallenberg
@cliffordchance.com

**Michael Rueter**
Counsel, London
T +44 207006 2855
E michael.rueter
@cliffordchance.com

**Caroline Scholke**
Counsel, Düsseldorf
T +49 211 4355 5311
E caroline.scholke
@cliffordchance.com

**Joachim Schütze**
Of Counsel, Düsseldorf
T +49 211 4355 5547
E joachim.schutze
@cliffordchance.com

**Dimitri Slobodenjuk**
Partner, Düsseldorf
T +49 211 4355 5315
E dimitri.slobodenjuk
@cliffordchance.com

**Jennifer Storey**
Partner, London
T +44 207006 8482
E jennifer.storey
@cliffordchance.com

**Torsten Syrbe**
Partner, Düsseldorf
T +49 211 4355 5120
E torsten.syrbe
@cliffordchance.com

**Iwona Terlecka**
Counsel, Warsaw
T +48 22429 9410
E iwona.terlecka
@cliffordchance.com

**Aleksander Tombiński**
Counsel, Brussels
T +32 2 533 5045
E aleksander.tombinski
@cliffordchance.com

**Anastasios Tomtsis**
Partner, Brussels
T +32 2 533 5933
E anastasios.tomtsis
@cliffordchance.com

**Georgios Yannouchos**
Counsel, Brussels
T +32 2 533 5054
E georgios.yannouchos
@cliffordchance.com

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