

29 April 2025

# Overview of the Lear Report and the DG-Comp Workshop: Ex-Post Evaluation Study into ‘Killer Acquisitions’ in the Pharma Sector

On 10 April 2025 DG Competition held an expert [workshop](#) to discuss its commissioned ex-post evaluation study into killer acquisitions in the pharmaceutical sector, published on 28 November 2024, in collaboration with economic consultancy Lear and other stakeholders (the “[Report](#)”).<sup>1</sup>

## Key takeaways

- The Report shows that scrutiny of killer acquisitions in the pharma sector is an effective but underenforced area. Thirty-seven per cent of all transactions in the pharmaceutical space could involve killer acquisitions, warranting detailed assessment by competition authorities.
- The Report is the first study on M&A transactions and non-M&A transactions, including research and development (“R&D”) and licensing agreements, with important implications for antitrust scrutiny of the sector. It finds that all transactions could involve potential killer acquisitions via “*suspicious discontinuations*” of R&D efforts, imbalances in (innovation) market power between the parties, and high deal values relative to the target’s activities.
- **For M&A transactions**, the Report finds that the European Commission’s (the “Commission”) substantive assessment is “*overall effective*” in detecting potential killer acquisitions, and that it imposes “*sufficient*” remedies where needed. Ex-ante merger control is a “*fundamental tool*” to assess potential killer acquisitions in the space. Art. 22 EUMR and call-in powers are a “*helpful corrective mechanism*” to capture any below-threshold transactions involving competitively important but relatively small innovators.<sup>2</sup> After *Illumina/GRAIL* (2024), we have seen an increase in EU Member States utilising call-in powers to refer-up transactions to the Commission (see, for example, the Italian Competition Authority’s referral of *NVIDIA/Run:AI* (2024)), and increased adoption of such powers in national regimes.<sup>3</sup>
- **For non-M&A transactions** which do not attract merger control scrutiny, the Report notes that the wider antitrust toolkit “*may be a powerful tool*”. We may see increased use of Art. 101 TFEU to capture anti-competitive agreement terms in

<sup>1</sup> DG-Comp and Lear, “*Ex-post evaluation, EU competition enforcement and acquisitions of innovative competitors in the pharma sector leading to the discontinuation of overlapping drug research and development projects*”, 28 November 2024.

<sup>2</sup> Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

<sup>3</sup> C-611/22 P *Illumina, Inc. v European Commission* (2024); M.11766 *NVIDIA/Run:AI* (2024).

R&D/licensing transactions.<sup>4</sup> We may also see Art. 102 TFEU, the prohibition against abuse of a dominant position, used to examine repeated acquisitions by pharma companies which have accumulated by transaction or R&D a high degree of market power in specific diseases or drug classes.<sup>5</sup>

- There is an **identifiable detection gap** for below-threshold M&A transactions and non-M&A transactions, predominantly due to a lack of public information on precise deal terms (i.e., exclusivity provisions which enable pre-emption of competitive threats) and pre-clinical pipelines (obscuring the true extent of portfolio overlaps). The Report: (i) calls for increased application of the antitrust toolkit to all transaction types across all development stages; and (ii) recommends a high-level registry or notification system for transactions in the pharma space, covering therapeutic indication and mechanism of action overlaps and periodic status updates on development and discontinuances.

### Evaluation against Commission decisional practice

The Report examined five high profile pharma merger decisions from 2014–2019.<sup>6</sup> It found that the Commission's "*substantive assessment is overall effective in detecting possible killer acquisitions*", and, where required, it imposes remedies "*sufficient*" to address the importance of and impact on (innovation) competition in the relevant market(s).

Where the Commission cleared a merger that indicated potential killer acquisition factors with no remedies, and one of the overlapping R&D efforts was subsequently discontinued, the Commission was correct to intervene and clear unconditionally. Either commercial, technical, or market reasons disappplied any potential finding of a killer acquisition.

Where the Commission cleared a merger with remedies to address a potential killer acquisition theory of harm, and one of the overlapping R&D efforts was subsequently discontinued, the Commission was again found correct to intervene and to have imposed sufficient remedies which addressed any identified concerns. The discontinuation was likely due to the drug design process itself – an inherently high risk space – rather than to the transaction.

The workshop discussed *J&J/Actelion* (2017) in detail. In that deal, Johnson & Johnson ("J&J") acquired Actelion and a minority interest in its newly formed subsidiary Idorsia, to which Actelion had (pre-merger) transferred its Phase II orexin-2 receptor antagonist ("ORA") insomnia R&D programme.<sup>7</sup> Concurrently, J&J was developing an overlapping Phase II ORA candidate with a third-party, Minerva. The Commission found that J&J would have the potential to engage in a killer acquisition via influence over Idorsia's strategic decisions and access to commercially sensitive R&D information. The Commission cleared the transaction, accepting remedies offered by J&J which limited its shareholding, strategic influence, and board representation in Idorsia. This removed J&J's incentives to negatively influence its concurrent ORA R&D programme with Minerva but enabled it to keep an economic interest in both overlapping products.

Subsequent market evolution presented an opportunity for Minerva to withdraw from its loss-making R&D effort with J&J, enabling it to realise deferred revenue and royalty interests. Under the deal terms, J&J had no obligation to continue developing this product for insomnia, and it redirected it into an alternative, unexpected, and more profitable therapeutic indication (major depressive disorder with insomnia symptoms). The Report, nevertheless, found that the accepted remedies were appropriate because the discontinuation was due to non-transactional factors, i.e., commercial and technical reasons. The workshop noted that the Commission could have imposed stronger behavioural remedies by considering second- and third-order effects of the transaction, which would have ensured that R&D efforts were "*implemented to expectations shared by the Commission and the parties at the time the remedy is adopted*". It is unclear how such ex-post market evolution and third-party behaviours could be

<sup>4</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012], OJ C 326/47.

<sup>5</sup> *Ibid.*

<sup>6</sup> Two of the five were "*very relevant*" for the ex-post evaluation study even though they were notified to the Commission outside of the fact-finding exercise.

<sup>7</sup> Along with financing and additional licensing rights.

accurately considered ex-ante, however. One panellist suggested that imposing stronger economic incentives in the initial agreements (i.e., more significant milestone payments) may be effective in practice.

## Conclusion

The Report may lead to increased scrutiny. Publicity around the Report is likely to further both lawyers' and clients' increasing awareness of merger control risk in collaborative agreements such as R&D and licensing agreements on all transaction types involving pharma R&D, including below threshold M&A transactions.

For merger control, we have already seen significant adoption of call-in powers by EU Member States following the decision in *Illumina/GRAIL* and this report legitimises that approach in the pharmaceutical sector. We may also see an increased focus on behavioural remedies (after the discussion concerning *J&J/Actelion* (2017)).

Importantly, for investment banks and private equity sponsors active in the health sector, the findings may embolden competition authorities worldwide to pursue potential killer acquisition theories of harm post-investment. Some competition authorities are increasingly scrutinising 'roll-up' acquisitions whereby investors accumulate/consolidate market power in pharma spaces or healthcare more generally, including the Dutch authority raising concerns for its national healthcare sector and the UK authority carrying out a market investigation into veterinary services.<sup>8</sup>

Competition authorities typically focus on the companies and not their investors. However, we may see increased antitrust scrutiny of investors due to their portfolio companies' anti-competitive behaviour. The US Federal Trade Commission has recently challenged a private equity firm over its portfolio company's roll-up of anaesthesiology practices in the US. The first instance decision found that the private equity firm's minority interest did not cause it to incur liability for its portfolio company's market conduct. However, the FTC indicated it would pursue further action, and this potential claim was settled in exchange for the investor freezing its investment, reducing its board representation, and committing to obtaining prior approval for future investments in the affected market. Investors should therefore be mindful of the market behaviour of all portfolio companies.

Finally, investors pursuing exit strategies from R&D-focused companies via out-licensing or collaboration arrangements may wish to negotiate more value in upfront payments or earlier milestone payments where they perceive a potential killer acquisition by the buyer (especially where the relevant clinical asset is at an early stage, and as such, there is an inherent higher chance that development does not proceed through to later clinical trials and/or commercialisation due to the uncertain nature of the drug discovery process). Similarly, investors may seek to require the relevant licensee or counterparty to commit to minimum R&D spends or incentivise more R&D effort by reduced royalty structures for faster development to reduce the likelihood of counterparties capriciously discontinuing potentially competing R&D. These companies are valued by assuming successful commercialised R&D candidates (with discontinuance preventing realisation of full potential) – therefore, earlier payments and/or increased obligations to invest in R&D may be used to maximise returns where there is a heightened risk of discontinuance.

Please contact [Nicole Kar](#) and [Henrik Morch](#) if it would be useful to discuss further.

\* \* \*

---

<sup>8</sup> <https://www.gov.uk/cma-cases/veterinary-services-market-for-pets-review>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

**Nicole Kar**  
+44-20-7601-8657  
[nkar@paulweiss.com](mailto:nkar@paulweiss.com)

**Henrik Morch**  
+32-2-884-0802  
[hmorch@paulweiss.com](mailto:hmorch@paulweiss.com)