October 2023

JULY – SEPTEMBER 2023: KEY THEMES AND TAKEAWAYS

UNITED STATES

- **Proposed Merger Guidelines Outline Fundamental Change of Approach to Merger Investigation and Enforcement**

  On July 19, 2023, the Federal Trade Commission (FTC) and the US Department of Justice (DOJ) released new proposed merger guidelines. The agencies have requested comments on these new guidelines and will work to finalize them in the coming months. The proposed guidelines detail how the agencies will evaluate horizontal (transactions with competitors), vertical (transactions integrating firms up/down a supply chain) and other transactions. When finalized, the proposed guidelines will replace the current 2010 Horizontal Merger Guidelines and the short-lived 2020 Vertical Merger Guidelines, which the FTC withdrew in September 2021.

  The proposed guidelines embody the antitrust agencies' current, aggressive posture towards merger enforcement. Some of the most significant changes in the proposed guidelines include:

  i. *Substantial reduction in threshold for presuming competitive harm in horizontal mergers*: Under the proposed guidelines, the agencies will presume that mergers with a post-merger Herfindahl-Hirschman Index (HHI) of more than 1,800 or a combined market share of 30% or more and that involve an HHI increase of more than 100 will substantially lessen competition. This

means that a six-to-five merger in a market of six equally sized competitors would be presumptively unlawful under the proposed guidelines. This is a significant change from the current 2010 guidelines, which apply a presumption only to mergers resulting in a 2,500 post-merger HHI and an HHI increase of 200, which presumes that a merger of two firms in a market of five equally sized participants is unlawful (a five-to-four merger). The HHI is derived by squaring the market share of companies in the market and then summing those shares.

ii. *New structural presumption for vertical mergers*: The proposed guidelines announce a new structural presumption applicable to vertical mergers. If a merger involves a company with 50% or more market share of an upstream input product, the agencies will presume that combining with a company that incorporates that input product into its own products will harm competition in the downstream market that uses that input.

iii. *Aggressive theories on potential competition*: The proposed guidelines significantly lower the threshold for concluding that acquisitions involving a potential competitor will lead to competitive harm. They also make it significantly easier for the enforcement agencies to label a merging party as a "potential competitor." Merely having the capability or the resources to enter a particular market (or being perceived by industry participants as a potential entrant) is enough to label a merging party a potential competitor, regardless of any evidence of actual intent to enter or concrete actions taken towards entry.

iv. *Heightened scrutiny of mergers involving already "dominant" companies*: The proposed guidelines introduce a new theory not reflected in the 2010 guidelines and focus on mergers that entrench or extend a company's dominant position. In the proposed guidelines, "dominant" is used to describe companies with as little as 30% market share.

v. *Targeting of serial transactions and roll-up strategies*: The proposed guidelines state that "a firm that engages in an anticompetitive pattern or strategy of multiple small acquisitions in the same or related business lines may violate [the antitrust laws], even if no single acquisition on its own would risk substantially lessening competition or tending to create a monopoly."

The proposed merger guidelines—even when finalized—will not be the law. They reflect aggressive theories of antitrust enforcement, some of which have been explicitly rejected in court in recent cases. In interactions with agency staff, it is important for merging parties to advocate in terms of these new theories; at the same time, however, merging parties must be prepared to defend their deal in court, where merger case law governs.

- **FTC Reaches Settlements with Merging Parties Just Before Start of Trial**

  In two separate cases, merging parties reached settlements with the FTC on the eve of trial following months of litigation.

  In August 2023, Intercontinental Exchange Inc. (ICE) and Black Knight Inc. reached a deal with the FTC to resolve the agency's concerns surrounding ICE's proposed acquisition of Black Knight. The FTC challenged the transaction in March 2023, despite ICE and Black Knight's announcement of a deal to divest Empower, Black Knight's loan-origination system business, to Constellation Web Solutions, Inc. (Constellation). The FTC stated that the proposed divestiture was insufficient because it didn't include Black Knight's leading product, pricing and eligibility-engine business, Optimal Blue. In July 2023, ICE and Black Knight announced a deal to also divest Optimal Blue to Constellation, leading the FTC to drop its lawsuit days before the scheduled trial and ultimately reach a consent agreement. This matter appears to be a significant FTC win. It refused to accept the party's initial remedy and obtained a much larger divestiture by taking the case to trial.

  In September 2023, less than two weeks before a preliminary injunction hearing was set to take place, Amgen, Inc. reached a deal with the FTC to resolve the agency's concerns related to its acquisition of Horizon Therapeutics. The FTC challenged the transaction, which was neither horizontal nor vertical, under the theory that it would entrench Horizon's dominant position in several products by combining them with Amgen's larger portfolio. As part of the settlement, the FTC's order prohibits Amgen from bundling an Amgen product with Horizon's Tepezza or Krystexxa drugs, or conditioning any terms related to an Amgen product on the sale or positioning of these Horizon drugs. In a joint statement about the FTC settlement, Amgen stated that it "has no reason, ability or intention to bundle Horizon's [Tepezza or Krystexxa] with any of its products," and thus the commitment in the consent order will have no impact on its business. In prior administrations, this is the type of matter that likely would have been resolved through a consent order without litigation.

- **New Director of the FTC's Bureau of Competition**

  In August 2023, FTC Chair Lina Khan announced the appointment of Henry Liu as the new director of the FTC's Bureau of Competition. Formerly a partner at Covington & Burling LLP, Henry Liu has litigated several complex antitrust cases.

EUROPEAN UNION

- **Two New Referrals Under Article 22 of the EU Merger Regulation: Is the European Commission Asserting Jurisdiction to Review Non-Notifiable Transactions?**

  In August 2023, the European Commission accepted two referral requests under Article 22 of the EU Merger Regulation (EUMR) from EU Member States to assess Qualcomm's acquisition of Autotalks and European Energy Exchange AG's (EEX) acquisition of Nasdaq Power. Neither of these transactions met the EU merger control thresholds and were not notified in any EU Member State.

  i. In *Qualcomm/Autotalks*, 15 Member States submitted referral requests to the Commission regarding Qualcomm's proposed acquisition of Autotalks, which would combine two suppliers of V2X semiconductors in the European Economic Area (EEA).

  ii. In *EEX/Nasdaq Power*, four Member States requested referral of the proposed acquisition by EEX of Nasdaq Power, which would combine two providers of services facilitating the on-exchange trading and clearing of Nordic power contracts.

  Under Article 22 EUMR, a Member State may request the Commission to examine a transaction that does not meet the applicable EU merger control thresholds where it affects trade between Member States and threatens to significantly affect competition within the territory of the requesting Member State(s). Since 2021, the Commission, which previously opposed such referrals, has adopted a new approach to Article 22 EUMR by actively encouraging Member States to request referrals to address, in particular, the perceived enforcement gap relating to "killer acquisitions" in innovative sectors.

  Since the Commission's landmark decision in Illumina/Grail in 2021, these transactions are the second and third referrals under Article 22 EUMR where no EU Member States had jurisdiction. While the status of the revised interpretation of Article 22 EUMR is currently being challenged by Illumina before the European Court of Justice, these decisions show that the Commission is asserting its jurisdiction over transactions in innovative sectors, which are not limited to technology or pharmaceuticals.

  As a foreseeable consequence, businesses operating in innovative sectors will need to assess whether their transaction is likely to attract scrutiny from the Commission and national competition authorities and address this potential risk of an EU referral in their transaction agreement, even when no merger-filing requirement in the EU is triggered.

- **ECJ CK Telecoms Ruling Clarifies When Transactions in Concentrated Markets Can Be Prohibited Under EU Merger Control Rules**

  In July 2023, the European Court of Justice (ECJ) annulled the General Court of the European Union's judgment from 2020. That 2020 judgment, appealed by CK Telecom, had overturned the European Commission's decision to prohibit CK Telecom's acquisition of Telefonica UK business in 2016. The Commission found that the transaction would have reduced the number of mobile network operators in the UK from four to three, removing a significant competitor and making the merged entity the largest operator in the UK.

  In this judgment, and following an appeal brought by the Commission, the ECJ clarified several key concepts in the interpretation of EU merger control rules:

  i. With regard to the standard of proof applicable to mergers that may lead to a significant impediment to effective competition (SIEC) but do not create or strengthen a dominant position, the Commission must demonstrate that it is "*more likely than not*" that the merger would significantly impede effective competition.

  ii. When assessing mergers below the dominance threshold, the ECJ considered that the finding of an SIEC cannot be limited to two cumulative conditions set out in recital 25 of the EUMR, namely "the elimination of important competitive constraints that the merging parties had exerted upon each other" and "a reduction of competitive pressure on the remaining competitors," as this is a restrictive approach and would be incompatible with the objectives of the EUMR to establish effective control of all mergers.

  iii. For an undertaking to be considered an "*important competitive force*," it is sufficient that the undertaking has "*more of an influence on the competitive process than its market share or similar measures would suggest.*"

  iv. In assessing the concept of "*closeness of competition*" between merging firms, the Commission does not have to show that the undertakings are "*particularly close competitors*" in order to establish an SIEC, which means that the Commission does not have to demonstrate a high level of substitutability between the undertakings' products or services in a differentiated product market.

  As this judgment endorsed the Commission's more-stringent approach to EU merger control enforcement, it could also provide the Commission with the confidence to challenge more transactions, with particular focus on oligopolistic markets.

UNITED KINGDOM

- **Public Consultation on Phase II Merger Review Process: The Competition and Markets Authority Seeks Feedback**

  At the end of June 2023, the Competition and Markets Authority (CMA) sought feedback from interested parties on how to improve its in-depth merger investigations. In particular, the CMA sought input on how the merging parties could engage more effectively with the CMA on the competitive assessment of a merger or remedies; whether the existing key opportunities for written submissions or direct in-person engagement are working well; whether there are barriers to engagement on possible remedies prior to the CMA's provisional findings; and whether aspects of regimes in other jurisdictions could work well within the UK merger-control regime.

  However, the CMA emphasized that its focus was on changes that could be made under the existing legislation, taking into account the impact of proposed changes to the UK merger control in the Digital Markets, Competition and Consumers Bill (April 2023), which is currently being debated.

ENFORCEMENT IN KEY INDUSTRIES[1]

Healthcare, Pharmaceuticals & Biotechnology

Technology, Media & Communications

Retail & Consumer Productions

Chemicals & Industrial Prods. or Services

Transportation & Energy

Other

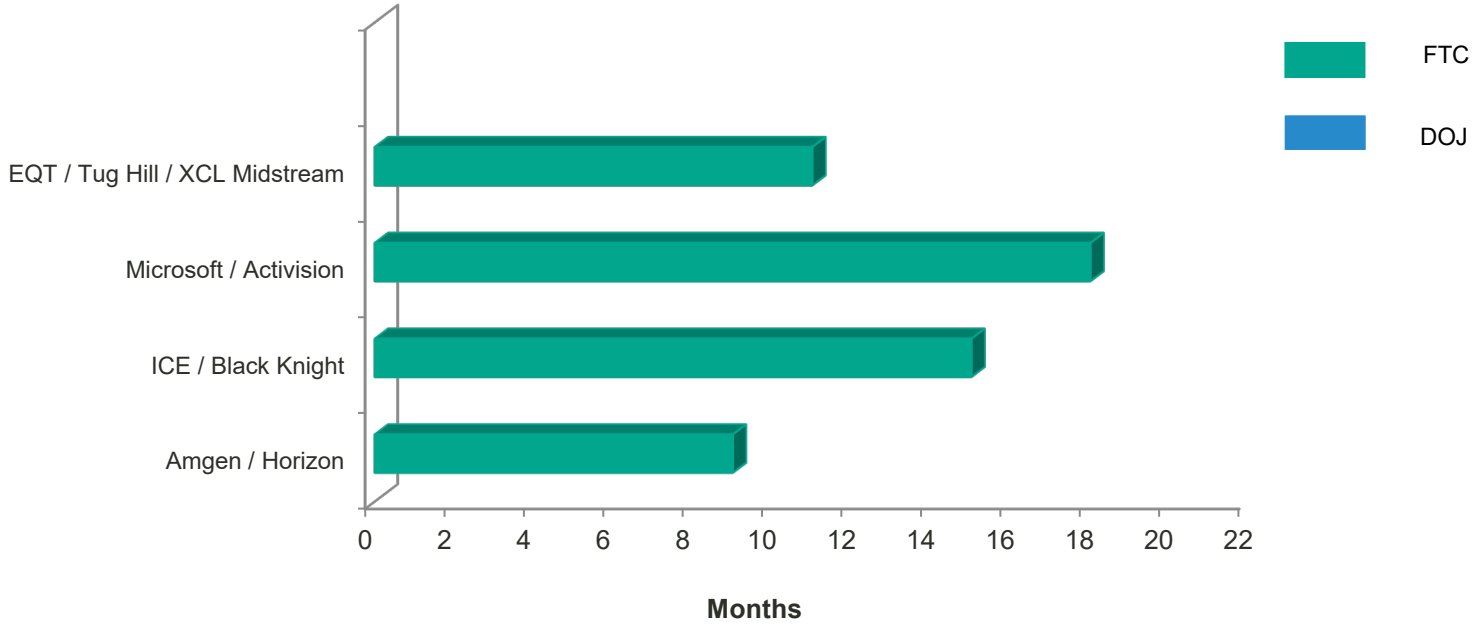
United States

Europe & the UK

[1] For the United States, the graphs include cases we are aware of in which an antitrust enforcement agency issued a second request at some point and the investigation remained ongoing during the quarter, the agencies accepted a consent order or issued a complaint initiating litigation against the transaction, or the transaction was abandoned after an antitrust investigation. For Europe and the United Kingdom, the graphs include cases where an antitrust enforcement agency issued a Phase II process or a clearance decision, or challenged the transactions, or the transaction was abandoned after an antitrust investigation.

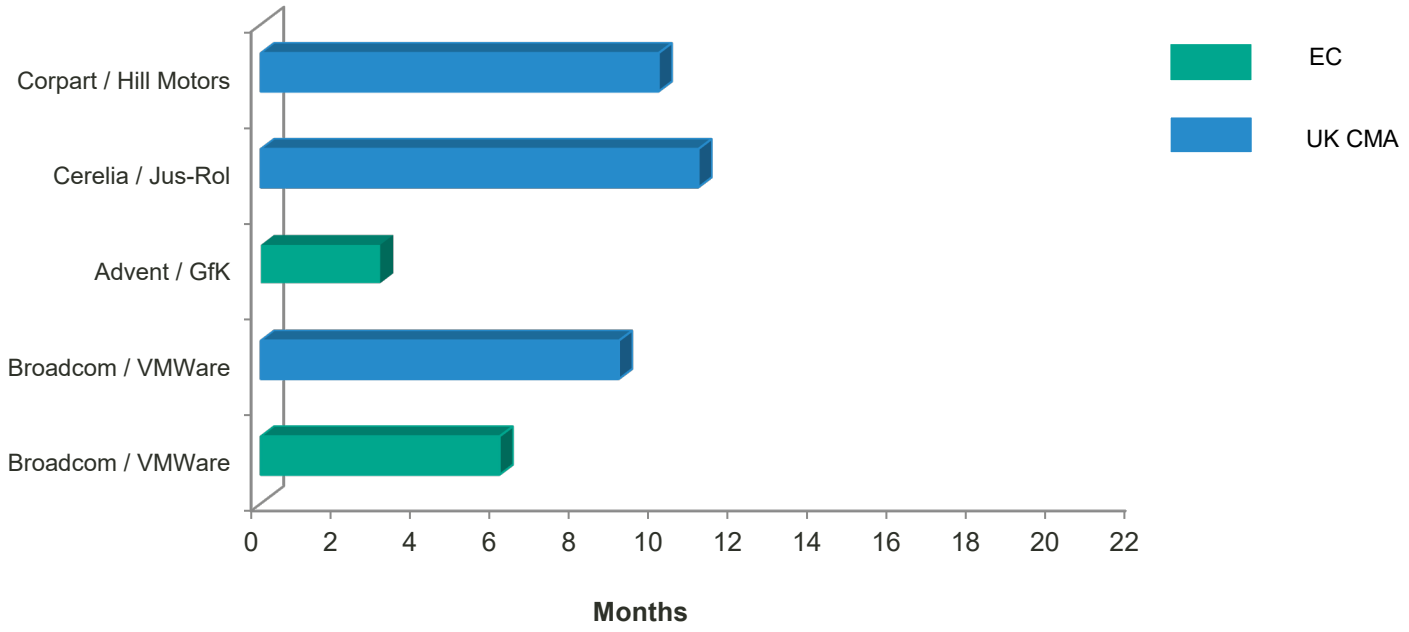
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS[2]

United States (Time from Signing to Consent or Investigation Closing)



[2] These graphs do not represent a complete list of all matters within a jurisdiction.

Europe & the UK (Time from Signing to Clearance)



Notable US Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CONSENT; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
IQVIA Holdings, Inc. / Propel Media, Inc.	FTC	Challenged	Programmatic advertising for healthcare products, namely prescription drugs, to doctors and other healthcare professionals. FTC alleges the merging parties are two of the top three providers.	On July 17, 2023, the FTC filed a complaint seeking to block IQVIA Holdings Inc.'s (IQVIA) acquisition of Propel Media, Inc (PMI). According to the complaint, IQVIA's Lasso Marketing and PMI's DeepIntent are two of the top three providers of programmatic advertising, known as demand-side platforms (DSPs), that specifically targets healthcare professionals with advertising for pharmaceutical drugs and other healthcare products. The complaint alleged that although "generalist" DSPs offer programmatic advertising for other industries, healthcare DSPs exclusively serve the healthcare industry and possess unique characteristics and capabilities to serve healthcare advertising clients, and thus healthcare DSPs operate in a distinct market. The FTC alleged that the transaction would eliminate head-to-head competition between Lasso and DeepIntent, leading to increased prices, reduced quality and diminished innovation. The complaint also alleges that IQVIA controls data that make up a key input for healthcare programmatic advertising. Healthcare DSPs rely on IQVIA's "identity data," which includes online information for healthcare professionals, and "prescribing data," which includes detailed prescription and claims data that reveals prescribing behavior. The complaint alleges that IQVIA, post transaction, may leverage its data to disadvantage current and/or emerging rivals to DeepIntent and Lasso. The case is set for trial at the end of November 2023.
Quantum Energy Partners / EQT Corporation	FTC	Consent order	Parties are direct competitors for the production and sale of natural gas in the Appalachian Basin	On August 16, 2023, the FTC reached a settlement with Quantum Energy Partners and EQT Corporation, requiring the parties to restructure their proposed transaction to resolve FTC allegations that the transaction's original terms create an illegal interlocking directorate in violation of Section 8 of the Clayton Act and facilitate the exchange of competitively sensitive information in violation of Section 5 of the FTC Act.

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				Quantum and EQT are both producers of natural gas in the Appalachian Basin. EQT agreed to acquire Tug Hill, a natural gas producer in the Appalachian Basin, and XcL Midstream, a natural gas gatherer and processor in the Appalachian Basin, in exchange for Quantum receiving cash and a significant amount of shares of EQT stock, making Quantum one of EQT's largest shareholders (controlling about 11% of EQT's outstanding voting securities). Additionally, EQT agreed to grant Quantum a seat on EQT's board. The FTC's complaint alleged that Quantum's position as a significant shareholder in its rival EQT would give it the ability to influence EQT's competitive decision-making and grant it access to EQT's competitively sensitive information. The complaint further alleges that the EQT board seat granted to Quantum would create an illegal interlock. The consent order requires Quantum to forego its right to a seat on the EQT board. Quantum is further prohibited from serving on the board of any of the top seven Appalachian Basin natural gas producers without FTC approval. Quantum must also sell its EQT shares by a non-public date; until then, the shares must be held in a voting trust (making Quantum's EQT shares effectively a passive investment until sold). The order also requires Quantum and EQT to unwind a joint venture they separately formed about two years prior to their transaction agreement, which joint venture served as a vehicle for purchasing mineral rights. This was the FTC's first action to enforce Section 8 of the Clayton Act's prohibition against interlocking directorates in more than 40 years. Also, it has been an open question whether Section 8 applied to limited liability companies or limited partnerships that are not "corporations," to which the language of Section 8 specifically refers. FTC Chair Lina Khan stated that the consent order "makes clear that Section 8 applies to businesses even if they are structured as limited partnerships or limited liability corporations." This proposition has not, however, been established by the courts. The FTC also alleged that the Quantum seat on EQT's board, the acquisition of a significant share of EQT stock, and the previous joint venture all amounted to unfair methods of competition in violation of Section

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				5 of the FTC Act, due to the potential for information sharing. This consent order represents the first use of the FTC's "standalone" Section 5 authority in decades. The FTC alleges that the transaction violates Section 5 as an "unfair method of competition" without alleging a violation of another antitrust statute such as Section 7 of the Clayton Act, which prohibits transactions that substantially lessen competition. This development is consistent with the FTC's November 2022 policy statement asserting its intention to rigorously enforce and expand the scope of Section 5's prohibition against unfair methods of competition.
Louisiana Children's Medical Center / HCA Healthcare, Inc.	FTC	Challenged for alleged failure to comply with Hart-Scott-Rodino (HSR) Act requirements; federal court held no HSR Act violation	N/A	On January 3, 2023, Louisiana Children's Medical Center (LCMC) acquired three New Orleans-area hospitals from HCA Healthcare, Inc. (HCA). The acquisition was completed pursuant to the issuance of a certificate of public advantage (COPA) from the Louisiana legislature. COPA laws outline a process for certain transactions to receive immunity from federal antitrust laws under the state action immunity doctrine. For the state action immunity doctrine to apply, the action (here, the transaction) must be undertaken in furtherance of a clearly articulated state policy and there must be active supervision by the state. COPA regimes address these two prongs of the test. After obtaining the COPA, LCMC and HCA did not make any premerger filings under the HSR Act before completing the transaction. The FTC alleged that, despite the COPA, the closing of this transaction occurred in violation of the HSR Act because the hospitals met the statutory notification thresholds but failed to file under the HSR Act. In addition to the alleged HSR Act violation, the FTC also opened an investigation into whether the transaction will substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. The hospitals preemptively filed suit in Louisiana on April 19, 2023, against the DOJ, the FTC and the US Attorney General. In the suit, the hospitals sought a declaratory judgment that the HSR Act does not apply to transactions that are exempt from antitrust laws under state action immunity applied through the COPA process. In response, the FTC filed suit in Washington, DC, on April 20, 2023, seeking to order the parties to cease integration of the hospitals and to hold the entities separate to allow

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				sufficient time for the FTC to investigate the effects on competition and for the court to determine whether the parties violated the HSR Act. This case was transferred to Louisiana federal court. On September 27, 2023, a federal court judge in Louisiana sided with the hospitals and ruled that the LCMC and HCA did not need to make an HSR filing because the state action immunity doctrine exempts the hospitals from the federal antitrust laws, including the HSR Act.

Notable European & UK Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Broadcom Inc. / VMware Inc.	EC / CMA	Conditional clearance (EC) and clearance without conditions (CMA)	Hardware company / software provider	Broadcom is a hardware company specializing in the manufacture of network interface cards (NICs), fiber channel host-bus adapters (FC HBAs) and storage adapters, which are hardware components that connect servers to storage or networks. VMware is a software supplier offering mainly virtualization software that interoperates with a wide range of hardware. On July 12, 2023, following an in-depth investigation, the European Commission cleared the acquisition, subject to conditions. To address the Commission's competition concerns in the worldwide market for the supply of FC HBAs, Broadcom committed to provide access and interoperability commitments to Marvell (the only competitor in the market) and to any potential future entrant. The transaction was also subject to an in-depth investigation by the Competition and Markets Authority but, contrary to the Commission's decision, the CMA cleared the proposed transaction without conditions on August 21, 2023. The CMA concluded that the transaction would not substantially reduce competition in the supply of server hardware components in the UK.

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Advent / GfK	EC	Conditional clearance	Providers of market research services	On July 4, 2023, the European Commission cleared the acquisition of GfK by Advent, subject to conditions. Advent (through its subsidiary NielsenIQ) and GfK are both providers of consumer panel services and retail measurement services in the European Economic Area. NielsenIQ is a leading provider of retail measurement services for fast-moving consumer goods, while GfK is a leading provider of consumer panel services. Based on its investigation, the Commission found that the transaction would have raised serious competition concerns for the following reasons: The merged entity would have been the sole provider of consumer panel services in Germany and Italy; NielsenIQ would likely not have provided consumer panel services to competitors that need such services to compete in the market for retail measurement services for fast-moving consumer goods; and the transaction would permit the merged entity to bundle its services across several EEA countries (thus foreclosing its competitors). As a result, Advent committed to divest GfK's global consumer panel services business (excluding its activities in Russia) and to provide transitional services to the purchaser following the divestiture for a transitional period of up to one year (which may be extended for up to two additional years).

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Vivendi / Lagardère	EC	Acquisition cleared with conditions Formal investigation for possible gun-jumping violation of EUMR	Media and entertainment groups	On June 6, 2023, following an in-depth investigation, the European Commission approved the proposed acquisition of Lagardère by Vivendi, subject to conditions. Vivendi and Lagardère are two large French media and entertainment groups. They compete in the book publishing and press magazine markets. To address the Commission's concerns that the transaction could strengthen the merged entity's position in various book publishing markets, reduce choice and increase prices in the press-magazine markets, Vivendi committed to the full divestment of Editis (a publishing business) and Gala (a celebrity press magazine). On July 25, 2023, following the clearance decision, the European Commission opened a formal investigation to determine whether Vivendi, when acquiring Lagardère, breached the notification requirement and the standstill obligation, as well as the conditions and obligations attached to the Commission's decision to clear the transaction.

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Booking Holdings / Flugo Group Holdings AB (eTraveli)	EC	Prohibition	Hotel online travel agencies	On September 25, 2023, following an in-depth investigation, the European Commission prohibited the proposed acquisition of eTraveli by Booking. Booking and eTraveli both operate online travel agencies (brands such as Booking.com, Rentalcars, Priceline and Agoda for Booking, and Gotogate, My Trip, Seat24 and SuperSaver for eTraveli). The Commission found that the transaction would have enabled Booking to strengthen its dominant position in the market for hotel online travel agencies (OTAs) in the European Economic Area (EEA), in particular because Booking is the dominant hotel OTA in the EEA; the transaction would have allowed Booking to acquire a main customer acquisition channel (*i.e.*, the flight OTA); and it would have allowed Booking to expand its travel services ecosystem. Ultimately, the Commission found that by increasing traffic to (and sales by) Booking's platforms, the transaction would have reinforced network effects and increased barriers to entry and expansion. The strengthening of Booking's dominant position would have resulted in higher costs for hotels and, possibly, consumers. After conducting an analysis of the behavioral commitments offered by Booking, the Commission concluded that these proposed remedies did not adequately address the competition concerns identified. As a result, the Commission blocked the transaction.
Microsoft Corporation / Activision Blizzard, Inc. (excluding non-EEA cloud streaming rights)	CMA	Phase I	Technology company / Developer and publisher of video games	On August 22, 2023, Microsoft and Activision Blizzard notified the CMA of a transaction by which Microsoft would acquire Activision Blizzard, excluding Activision Blizzard's cloud streaming rights outside of the European Economic Area. This transaction is considered to be a separate merger investigation from the earlier "initial" transaction, which was prohibited by the CMA on April 26, 2023. In a previous investigation, the CMA found that the initial transaction could lead to a substantial lessening of competition in cloud gaming services in the UK. The deadline for the Phase 1 investigation is set for October 18, 2023.

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