



# ANTITRUST M&A SNAPSHOT

October 2020

## **UNITED STATES: JULY - SEPTEMBER 2020 UPDATE**

Mergers and acquisitions in the United States appear to be bouncing back after a muted start to the year due to COVID-19. Hart-Scott-Rodino (HSR) filings in Q3 2020 were up significantly over Q2, but still down from the mergers & acquisitions (M&A) boom we saw in Q3 and Q4 of 2019. Against the backdrop of a pandemic, we also saw significant developments in the approaches taken by the Federal Trade Commission (FTC) and Department of Justice (DOJ) in reviewing proposed acquisitions. The FTC has recently announced an intention to expand its retrospective analysis of consummated mergers; DOJ has restructured its merger review operations to reflect changes in how the economy operates and to allow the regulator to further specialize its review efforts; and the regulators jointly proposed amendments to the HSR premerger notification regulations that are likely to increase the number of filings required for private equity organizations.

## **EUROPE: JULY - SEPTEMBER 2020 UPDATE**

As a result of the ongoing pandemic, the European Commission (EC) received a lower number of notifications (78) compared to the same period in 2018 and 2019 (106 and 116 respectively). In August, however, the number of notifications made to the EC returned to a level that has been seen in previous years (30). That being said, in September, the number of notifications fell again (24). In terms of key cases, the

EC approved the acquisition of Bombardier Transportation by Alstom. With respect to policy and legislative developments, the EC announced a new policy of accepting referrals from national competition authorities in cases where the national thresholds for notification have not been met. This new policy is expected to be implemented by mid-2021. The EC also plans to introduce changes to the merger control procedural rules with a view to bringing more deals within the ambit of the EC's simplified procedure, and to reduce the amount of information that parties are required to provide.

## SNAPSHOT OF EVENTS

### UNITED STATES

- **DOJ Reorganizes Antitrust Division and Issues Revised Merger Remedy Manual**

Assistant US Attorney General Makan Delrahim recently announced an overhaul of DOJ's Antitrust Division that reallocated civil enforcement authority to consolidate review of different sectors of the economy in response to the shifts and growth of different sectors in recent years. Merger review for all financial services firms, previously spread among four sections of the Antitrust Division, will be consolidated into a single section. Likewise, media and telecommunications review will be consolidated from two sections into one. DOJ will also form an Office of Decree Enforcement and Compliance within the Antitrust Division. In addition to the structural changes, DOJ issued a revised merger remedy manual to "more accurately reflect [] current practices and provide the business community with greater transparency about the way [DOJ] will address remedies in a merger." The manual reinforces DOJ's preference for structural remedies, and also indicates private equity buyers will often be good purchasers of divested businesses.

- **Q3 Spike in Premerger Notification Filings Suggests M&A Activity Is Rebounding as Regulators Propose New HSR Exemption**

The FTC's Premerger Notification Office received 471 HSR filings in Q3 (177 in September, 182 in August and 112 in July), which represented an almost 80% increase over the 263 filings received for Q2 (111 in June, 73 in May and 79 in April). While this increase suggests that merger activity is coming back to life after a subdued start to 2020 due to the pandemic, the Q3 HSR filings were still down approximately 6% from the 501 HSR filings submitted in Q3 2019.

Against this backdrop, the FTC and DOJ announced a Notice of Proposed Rulemaking on September 26, 2020, that would change the HSR reporting requirements, as well as add an exemption to those requirements. The amended HSR rules would require an HSR filer to report additional information about its corporate "associates" and aggregate acquisitions made by the different associates for purposes of HSR filing requirements. Associates include, for example, different funds that are managed by the same private equity sponsor. These changes, if implemented, are likely to increase HSR filing obligations for private equity companies, both in terms of the number of transactions reported and the information included in the filings. At the same time, however, the amended rules would provide a new exemption for acquisitions of less than 10% of a target, regardless if the investment is passive, if the acquirer does not have a pre-existing "competitively significant" relationship with the target company.

- **2020 Hindsight: FTC Bureau of Economics to Expand Merger Retrospective Program**

The Bureau of Economics announced in September that it will be expanding and formalizing its research efforts to "determine, after the fact, whether a merger has affected competition in one or more of the markets impacted by the merger." The FTC's stated goals in expanding its retrospective efforts include examining questions that have not previously been the subject of extensive study (for example, whether mergers create monopsony in labor markets) and more clearly explaining the import of the studies' conclusions for enforcement efforts. The expanded retrospective program will include: (i) issuing annual reports on the retrospective studies; (ii) evaluating the tools used for analyzing horizontal and vertical mergers, as well as preparing complete merger simulations; (iii) disseminating the retrospective research that has been conducted; and (iv) presenting regular sessions on retrospective merger analysis at various conferences.

## EUROPE

- **Directorate-General for Competition (DG COMP) Continues to Encourage the Electronic Submission of Merger Notifications**

Due to COVID-19, the EC continued to express a strong preference for electronic merger notification filings. Submissions by hand remain possible, but are discouraged. The EC reiterated that the pandemic has continued to hamper its investigations, particularly with respect to obtaining information from the merging parties and third parties, such as customers, competitors and suppliers.

Therefore, the EC continues to recommend that merging parties discuss the timing of notifications with the case teams. While teleworking remains the norm for EC staff until the end of September, it is understood that the EC envisages a more structured combination of teleworking and office presence starting in October.

- **Significant Changes to the EU Merger Control Regime**

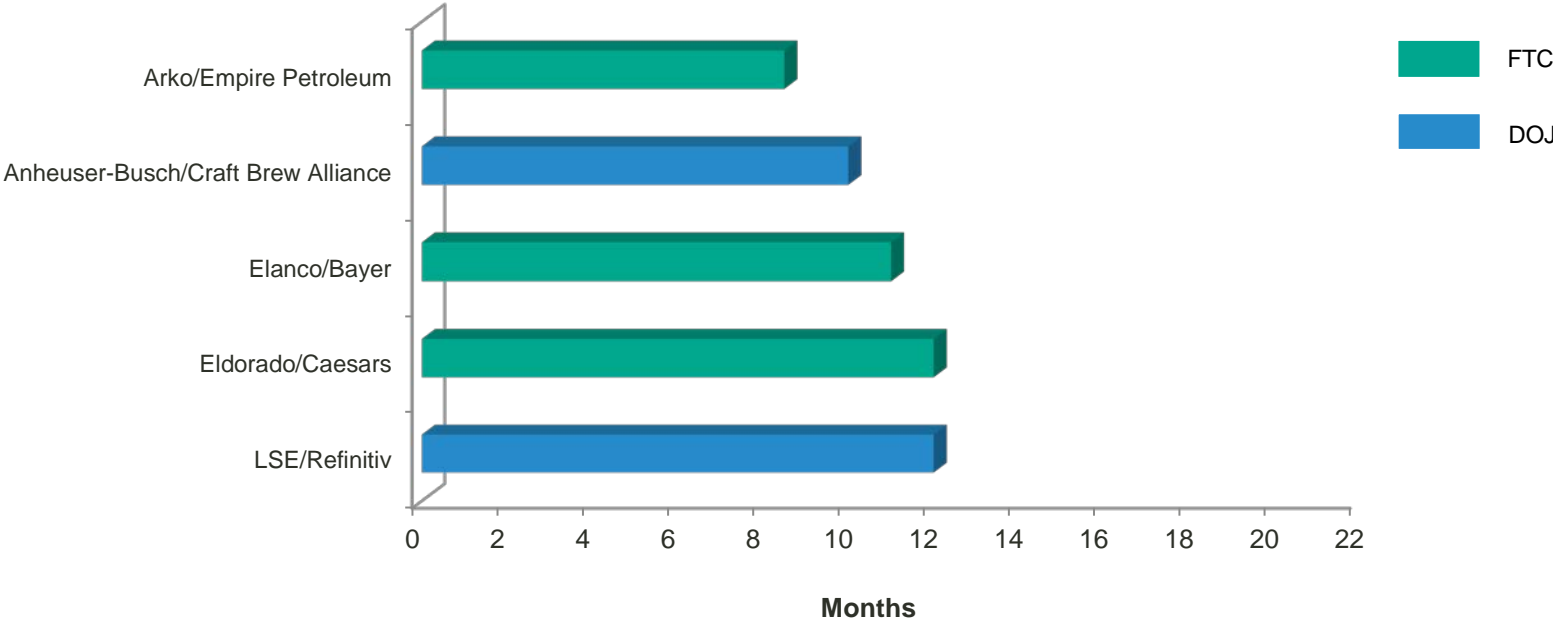
In September, Competition Commissioner Margrethe Vestager announced three important changes to the EU merger control rules. First, the EC will accept merger control referrals from National Competition Authorities that are “worth reviewing at the EU level,” even if the transaction does not meet the jurisdictional thresholds at a national level. The EC expects to issue guidance on this new policy in mid-2021. Second, the EC will also review key merger control policies and regulations to simplify and accelerate the merger control process. The EC aims to bring more deals within the scope of the simplified procedure; to reduce the amount of information that merging companies are required to provide; and to shorten the duration of pre-notification discussions in straightforward cases. Third, the EC plans to assess whether recent decisions resulted in more competitive pricing and increased choice, quality or innovation. As part of this assessment the EC intends to discuss how the merger control rules could be improved to account for digitisation and growing market concentration. However, the EC will not make changes to its substantive assessment of transactions at this time.

- **The UK Competition and Markets Authority (CMA) Continues to Take an Interventionist Approach**

In September, the CMA provisionally blocked the merger of FNZ/GBST, two close competitors for the supply of technology solutions to investment platforms in the United Kingdom. The CMA also provisionally accepted a remedy proposal from Ardonagh to fully unwind its August 2020 acquisition of Bennetts. This remedy proposal addressed the CMA's concerns that the merger may cause a substantial lessening of competition for the provision of motorcycle insurance to private customers.

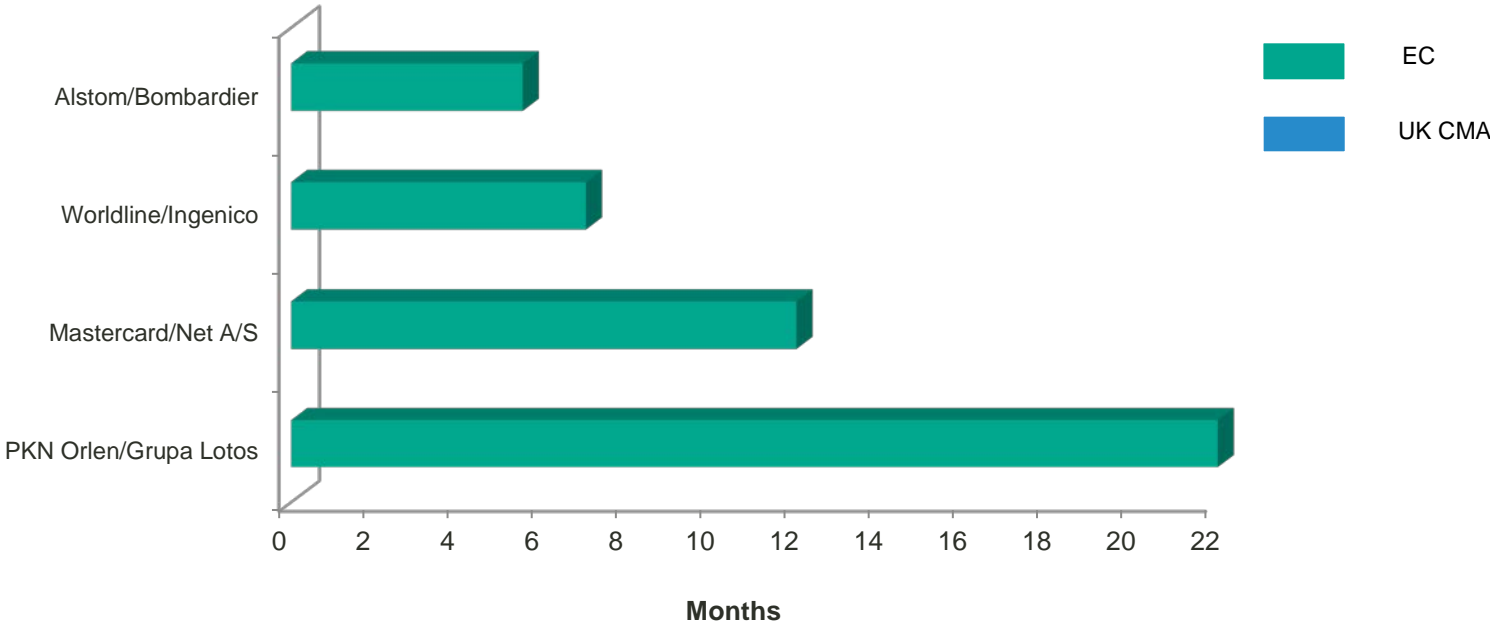
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS<sup>1</sup>

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



<sup>1</sup> These graphs and the summaries that follow do not represent a complete list of all matters within a jurisdiction. Certain matters involving Firm clients are not included in this report.

Europe (Time from Signing to Clearance)



Significant US Trials

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
<b>United States</b>					
Altria Group / JUUL Labs	FTC	Part 3 Administrative Proceeding	Closed-system electronic cigarettes  JUUL "dominated" the relevant market with 70% market share; Altria was the second-largest player	Did Altria's investment in JUUL and agreement to exit the e-cigarette market eliminate a competitive threat to JUUL?	The FTC filed a Part 3 administrative complaint against Altria Group and JUUL Labs to unwind certain agreements whereby Altria would allegedly exit the e-cigarette market in exchange for a 35% stake in JUUL. The FTC alleges that JUUL was the dominant player in the e-cigarette market at the time of the agreements, and that the agreements harmed competition by eliminating JUUL's largest competitor from the market. According to the FTC, consumers lost the benefit of current and future head-to-head competition between Altria and JUUL, and between Altria and other competitors.  The FTC proceeding has been stayed multiple times due to the COVID-19 pandemic, and the administrative trial is currently scheduled for April 2021.

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
Jefferson Health / Einstein Healthcare Network	FTC / Pennsylvania Attorney General	FTC Administrative Complaint / US District Court for the Eastern District of Pennsylvania	Inpatient general acute care (GAC) hospital services and inpatient acute rehabilitation services in Philadelphia and Montgomery Counties, Pennsylvania  Alleged combined shares of between 45% and 70% in different service lines in north Philadelphia and Montgomery County	Will the merger eliminate competitive pressure that has driven quality improvements and lowered rates, or will the merger result in price efficiencies and cost synergies?  Is the relevant geographic market confined to the northern Philadelphia and Montgomery County areas?	The FTC sued to block the merger of Jefferson Health and Albert Einstein Healthcare Network, two hospital systems in Pennsylvania, arguing that the parties compete on quality and service, which benefits consumers by resulting in increased investments in medical facilities and new technologies. Together, the parties allegedly control 60% of inpatient GAC services in north Philadelphia and 45% in Montgomery County, and 70% of inpatient acute rehabilitation services in Philadelphia.  The FTC also filed for a temporary restraining order and preliminary injunction in the US District Court for the Eastern District of Pennsylvania. The preliminary injunction hearing began September 14 and lasted approximately 2.5 weeks. Closing arguments are expected in late October. The administrative trial is scheduled to begin on January 5, 2021. The FTC issued several stays of the proceedings in response to the COVID-19 pandemic and set a new scheduling order on July 13, 2020.



PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
Axon Enterprise, Inc. / VieVu	FTC	FTC Administrative Complaint / US District Court for the District of Arizona / US Court of Appeals for the Ninth Circuit	<p>Sale of body-worn cameras and digital evidence management systems to large metropolitan police departments</p> <p>Merger of two close competitors</p>	<p>Is the body-worn camera product market limited to large police departments (500 or more officers)?</p> <p>Can other video technology companies enter the body-worn camera market?</p> <p>Does the US Constitution allow the FTC to challenge consummated transactions in administrative proceedings?</p>	<p>The FTC filed an administrative complaint challenging Axon's consummated acquisition of VieVu from Safariland, LLC. The FTC also challenged noncompete agreements that Axon and Safariland signed in connection with the transaction. The FTC alleged that VieVu was Axon's closest competitor in the sale of body-worn cameras and digital evidence management systems to large metropolitan police departments. By defining a narrow "price discrimination market" around a specific category of customer, the FTC determined that large metropolitan police departments have distinct requirements for these products that differ from other law enforcement organizations.</p> <p>In response, Axon filed a complaint in the District of Arizona, arguing that the FTC's administrative process is unconstitutional, and alleging that the structure of the FTC is unconstitutional due to the limited ability to remove FTC commissioners. Axon sought a preliminary injunction to place the administrative matter on hold. The district court dismissed Axon's complaint for lack of subject matter jurisdiction, and Axon appealed.</p> <p>The administrative trial was originally scheduled to begin May 19, 2020, but due to the COVID-19 pandemic was postponed until October 13. However, on October 2, the US Court of Appeals for the Ninth Circuit granted Axon's motion to stay the administrative trial to preserve the status quo pending consideration of Axon's appeal of its constitutional claims.</p>

Significant US Consent Orders / Investigations Closing with Agency Statements

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Tri Star Energy, LLC	Hollingsworth Oil Company, Inc.	Merger to monopoly in retail gasoline and diesel markets in White Creek, Tennessee, and Greenbrier, Tennessee	5 months	FTC	Tri Star proposed to acquire certain retail stores and other assets from Hollingsworth and affiliated companies. The FTC alleged that the acquisition would lessen competition for retail gasoline and retail diesel sales in two local markets in Tennessee. Tri Star agreed to divest its fuel assets in those local markets to Cox Oil Company, Inc.	Yes

<sup>2</sup> The information in this column summarizes the government’s allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Arko Holdings, Ltd.	Empire Petroleum Partners, LLC	<p>Retail fuel sales in seven "highly concentrated" local markets in Indiana, Michigan, Maryland and Texas; retail diesel sales in three "highly concentrated" local markets in Indiana, Michigan and Texas</p> <p>Merger would reduce the number of competitors to three or fewer in each local market</p>	8.5 months	FTC	<p>Arko supplies wholesale fuel to or operates approximately 1,400 retail fuel stores in 22 states throughout the South, Mid-Atlantic and Midwest. It proposed to acquire Empire, another fuel distributor and retail store operator in 30 states and Washington, DC. The FTC alleged that the acquisition would lessen competition for the retail sale of gasoline in seven local markets and would lessen competition for the retail sale of diesel in three local markets. The parties agreed to divest certain retail fuel assets to competitors in each local market.</p>	No

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Anheuser-Busch (ABI)	Craft Brew Alliance (CBA)	<p>The alleged market was beer, but DOJ alleged brands are segmented based on price and quality into value, core, core-plus, premium and super-premium segments</p> <p>DOJ alleged that ABI had a 28% share of all beer sales in Hawaii and CBA had a 13% share; the combined entity would allegedly control 41% of the relevant market</p>	10 months	DOJ	<p>Anheuser-Busch InBev (ABI) sought to increase its minority ownership of the Craft Brew Alliance (CBA) to a complete ownership interest and secured DOJ approval of the \$220 million deal by agreeing to divest its Hawaii-based Kona Brewing Co. brand and operations to PV Brewing Partners, LLC. DOJ alleged that the acquisition would limit competition between Kona and ABI's other brands, including Stella Artois and Michelob Ultra. This remedy is unique in that it allows ABI to own the Kona brand outside of Hawaii while giving the brand to the divestiture buyer in Hawaii.</p>	Yes

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Elanco Animal Health, Inc.	Bayer Animal Health GmbH	<p>Low-dose prescription treatments for canine otitis externa; fast-acting oral flea treatments for canines; and brand name cattle pour-on insecticides throughout the United States</p> <p>Combined the only two suppliers of some products, and two of three suppliers for others</p>	11 months	FTC	<p>The proposed acquisition allegedly would reduce competition in the US market for certain animal health products by combining the only two providers of canine otitis externa treatments and fast-acting canine flea treatments, and combining the market leader and one of the two other producers of brand name cattle pour-on insecticides. The parties agreed to divest the buyer's canine otitis externa product to Dechra, the buyer's fast-acting canine oral flea treatment product to PetIQ, and the buyer's brand name cattle pour-on insecticide to Neogen.</p>	Yes

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Eldorado Resorts, Inc.	Caesars Entertainment Corporation	Casino services in South Lake Tahoe, Nevada, Bossier City-Shreveport, Louisiana, and Kansas City, Missouri. The FTC alleged that the acquisition would be a 3-2 merger in South Lake Tahoe, a 5-4 merger in Bossier City-Shreveport and a 5-4 merger in Kansas City	12 months	FTC	The transaction would allegedly eliminate meaningful competition between Eldorado and Caesars in the markets for casino services in three local markets. The parties agreed to divest assets in each of the three markets, establishing a new independent competitor to the post-closing Eldorado in each relevant area. The parties agreed to divest South Lake Tahoe's MontBleu and Bossier City-Shreveport's Eldorado Shreveport casinos to Twin River, and to divest the Kansas City-area Isle of Capri casino to an independent buyer to be determined post-closing.	Partial
London Stock Exchange (LSE) Group	Refinitiv	Proprietary data feeds for use in financial indices and financial data products	12 months	DOJ	DOJ closed its investigation of the LSE's acquisition of Refinitiv without a challenge, following an 8-month investigation of the horizontal and vertical aspects of the proposed transaction. DOJ concluded that the post-merger entity would not be able to exercise significant market power for its products because the customers for its products themselves sell products to LSE and Refinitiv, and therefore retain significant bargaining power even against a combined LSE/Refinitiv.	N/A

Significant European Clearance Decisions

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS <sup>3</sup>	BUYER UPFRONT
<b>Europe</b>						
Alstom SA	Bombardier, global rail solution division	Rail transportation	5.5 months	EC	<p>Both Alstom and Bombardier compete in the manufacture and supply of high-speed, mainline and urban trains and signaling systems installed on rail networks and on-board units (OBUs) that provide safety controls.</p> <p>The EC found that the merged entity would have become the undisputed market leader for high-speed trains. The transaction also would have strengthened the parties' already large combined position in the markets for mainline trains in France and Germany. Moreover, the merged entity could make it difficult for other suppliers of European Train Control System OBUs to interface with its installed signaling systems.</p> <p>To address the EC's concerns, Alstom committed to divest Bombardier's assets relating to its joint high-speed platform with Hitachi. Alstom also agreed to divest one of its mainline platforms in France, as well as one of Bombardier's mainline platforms in Germany. Alstom also offered to supply its OBUs to competitors.</p>	No

<sup>3</sup> The information in this column summarizes the government's allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS <sup>3</sup>	BUYER UPFRONT
Wordline SA	Ingenico Group SA	Financial service activities	7 months	EC	<p>Both Worldline and Ingenico operate in the payment services sector. The EC's investigation focused on the markets for the provision of point-of-sale (POS) merchant acquiring services and POS terminal provision and management services, which enable merchants to facilitate credit card payments.</p> <p>The EC found the transaction would create or strengthen the merging parties' dominant position in certain markets, resulting in higher prices and less choice. In particular, the EC found Worldline was the leader for merchant acquiring services in Belgium, Luxembourg and Austria, and the leader for POS provision and management in Austria and Belgium. Ingenico was an important alternative to Worldline in these markets, where few other credible competitors would remain following the transaction.</p> <p>To address these concerns, the companies offered to divest Ingenico's Austrian POS merchant acquiring and POS provision and management business; Ingenico's Belgian POS merchant acquiring business; and part of Worldline's merchant acquiring business in Luxembourg. These commitments entirely removed the problematic overlaps between Worldline and Ingenico.</p>	No



BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS <sup>3</sup>	BUYER UPFRONT
Mastercard Incorporated	Nets A/S' account-to-account payment business	Financial service activities	12 months	EC	<p>Mastercard sought to acquire Nets A/S's account-to-account payment business (A2A CIS), which enables the processing of payments, directly from one bank account to another, without the need for a card. The EC found that the transaction would have strengthened Mastercard's leading position in the European Economic Area (EEA) market for A2A CIS as a managed solution and that the merged entity would face limited competition. Thus, the EC alleged that the proposed transaction would lead to higher prices and less choice.</p> <p>The parties offered to transfer to a suitable purchaser a global license to distribute, supply, sell, develop, modify, upgrade or otherwise use Nets' technology for A2A CIS tenders. In particular, the purchaser will have access to the licensed technology on an exclusive basis in the EEA and, on a non-exclusive basis, outside of the EEA. The transfer also includes all necessary personnel and services, such as consultancy services and transitional support services.</p>	No

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS <sup>3</sup>	BUYER UPFRONT
Polski Koncern Naftowy Orlen SA	Grupa Lotos SA	Diesel and gasoline motor and jet fuels	28.5 months	EC	<p>Grupa Lotos and PKN Orlen are two large Polish integrated oil and gas companies that operate in Poland, as well as several other Central and Eastern European and Baltic countries. The EC found that the transaction would harm competition for the wholesale and retail supply of motor fuels in Poland, the supply of jet fuel in Poland and the Czech Republic and the supply of related products in Poland.</p> <p>To address these concerns PKN Orlen agreed to: divest a 30% stake in Lotos' refinery, accompanied by strong governance rights, with the purchaser having the right to approximately half of the refinery's diesel and gasoline production; to divest nine fuel storage depots to an independent operator; to release most of the capacity booked by Lotos at independent storage depots; to divest approximately 80% of Lotos' retail stations; and to supply these with motor fuel. PKN Orlen also committed to sell Lotos' 50% stake in a jet fuel marketing joint venture with BP, to continue to supply the joint venture, to give the joint venture storage access at two Polish airports, and to make available up to 80,000 tonnes of jet fuel per year to competitors in the Czech Republic via an annual open tender.</p>	No

Significant Challenged or Abandoned Transactions

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS <sup>4</sup>
<b>United States</b>				
Alimentation Couche-Tard, Inc.	Holiday Companies	Retail fuel sales	FTC	Alimentation Couche-Tard agreed to pay \$3.5 million in civil penalties to settle FTC allegations that it violated a 2018 consent order requiring the divestiture of 10 retail fuel stations in Minnesota and Wisconsin by June 15, 2018. The FTC alleged that that Alimentation failed to divest fuel stations in the relevant divestiture markets, failed to maintain the viability of certain stations as going concerns and failed to provide accurate information in compliance reports submitted to the FTC.
Peabody Energy Corporation	Arch Coal Inc.	Coal mining and sales related to operations in the southern Powder River Basin, Wyoming	FTC	The FTC filed a complaint seeking a preliminary injunction to block the parties from consummating a transaction that would combine the coal mining and sales operations in the southern Powder River Basin (SPRB) into a joint venture owned 66.5% by Peabody and 33.5% by Arch. The SPRB coal is highly sought after by electric power producers because the coal is closer to the surface and easier and cheaper to extract, and because SPRB coal's chemical characteristics allow power plants to use more coal without violating environmental regulations than coal from other sources. On September 29, the US District Court for the Eastern District of Missouri granted the FTC's motion for a preliminary injunction after finding the joint venture would control between 65% and 70% of all SPRB coal and 5 of the 10 most productive coal mines in the United States. The parties subsequently abandoned the joint venture.

<sup>4</sup> The information in this column summarizes the government's allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS <sup>4</sup>
<b>Europe</b>				
FNZ (Australia) Bidco Pty Ltd.	GBST Holdings Limited	Retail investment platforms	UK CMA	<p>Following an in-depth Phase II investigation, the CMA provisionally blocked a consummated transaction between FNZ and GBST. FNZ acquired a controlling interest in GBST in 2019.</p> <p>The CMA provisionally found that the acquisition would substantially lessen competition in retail investment platform solutions in the United Kingdom. The CMA alleged that the parties were close competitors and combined would hold close to 50% of the market. Only one other supplier (Bravura) offers similar capabilities. The CMA continues to review the transaction and assess a potential remedy. A final decision is due November 17.</p>
Ardonagh Group Limited	Bennetts Motorcycling Services Limited	Distribution of motorcycle insurance to private customers	UK CMA	<p>The CMA provisionally accepted a proposal from Ardonagh to fully unwind its August 2020 acquisition of Bennetts. The acquisition combined the two largest motorcycle insurance distributors in the United Kingdom. The CMA found that the merged entity would be three times the size of its next largest competitor by number of policies and would face little competition. The CMA has a deadline of November 25 to decide whether to accept the proposed remedy.</p>

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