March 2019

UNITED STATES: OCTOBER – DECEMBER 2018 UPDATE

Both the Department of Justice (DOJ) and the Federal Trade Commission (FTC) were very active in the final quarter of 2018, closing seven cases that required in-depth investigations. In the UTC/Rockwell Collins merger, UTC agreed with the DOJ to divest two of Rockwell Collins' Aerospace businesses worldwide to preserve global competition in the supply of aircraft components critical to safety. The DOJ also issued a new Model Timing Agreement, which is aimed at reducing the burden of second request compliance while providing DOJ with adequate time to review the materials produced and prepare to block deals in court if needed. Having a model agreement likely will lead to more uniform processes in merger review proceedings. Meanwhile, the FTC continued its public hearings on the state and future of antitrust policy in the United States, with a focus on the potential need for updates in the methodology of reviewing high tech transactions. The FTC indicated that one area of focus is whether some high tech deals may be anticompetitive because it could allow a dominant firm to expand its strength into the new market even if there are no horizontal or vertical issues.

EUROPEAN UNION: OCTOBER – DECEMBER 2018 UPDATE

In the last quarter of 2018, the European Commission (EC) closed 10 merger control proceedings where remedies were required, including acquisitions by global players such as Mars, Takeda and Daimler/BMW. The recent acquisition of the innovative biopharmaceutical company Shire by Takeda and the creation of a joint venture (JV) between Daimler and BMW relating to their car sharing services demonstrates that the EC continues to focus on how transactions can reduce competition in innovation markets. The EC required Takeda to divest Shire's pipeline product to a purchaser that would have an incentive to develop the biologic treatment product. The EC required Daimler to provide third party car sharing providers with access to Daimler's integrator app. In addition, the EC also required that third party integrator app providers be able to redirect car sharing users to Daimler's and BMW's car sharing services, thus allowing new and innovative service providers to access the recently emerged market for free-floating car sharing services.

SNAPSHOT OF EVENTS (LEGISLATION/AGENCY REMARKS/SPEECHES/NEWS, *ETC.*)

United States

- **DOJ Releases New Timing Agreement**

On November 15, the DOJ released a new Model Timing Agreement in order to "help merging businesses and their counsel know what to expect as part of the merger review process." Timing Agreements are agreements between agency staff and the merging parties that outline timing for specific events in the agency review process after the issuance of a Second Request. The newly published Model limits the number of custodians and depositions for each party, in exchange for the parties' earlier production of data and documents.

- **House Win Offers Democrats Opportunity to Pursue New Antitrust Agenda**

After winning control of the lower chamber in the Midterm elections, Democrats may pursue new progressive antitrust priorities. Legislation previously introduced by Democrats would have required the agencies' merger review process to analyze a transaction's impact on wages and employment. Rep. Jerry Nadler (D-NY), the new House Judiciary Chairman, previously sponsored a bill titled the Restoring and Improving Merger Enforcement Act, which would preclude merging companies from justifying mergers through what Nadler described as "spurious efficiencies," such as laying off workers. While it is unlikely this type of legislation moves forward in the Republican controlled senate, Democrats will now have a platform to inject these issues into the public debate.

- **Antitrust Agency Heads Outline Enforcement Concerns at Senate Hearing**

On October 3, FTC Chairman Joseph J. Simons and DOJ Antitrust Division Chief Makan Delrahim testified at an antitrust enforcement oversight hearing held by the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights. The agency heads discussed a few of their priorities heading into the new year. Simons testified that "Big Tech Platforms" with significant market power are a "priority" for the FTC. Both Simons and Delrahim testified that labor-related issues arise in merger investigations. Simons explained that FTC staff look into any merger's potential effect on the labor market, while Delrahim indicated that DOJ staff use the merger review process to search for evidence of illegal "no poach" agreements.

- **FTC Commissioner Chopra Discusses the Problem of Excessive Debt in Divestitures**

At the FTC's Hearings on Competition and Consumer Protection on December 6, FTC Commissioner Rohit Chopra discussed the "explosion of corporate debt" and its effect on the merger review process. Chopra expressed significant concern about divestiture buyers with heavy debt loads that could limit the buyer's ability to compete effectively. Chopra criticized the FTC's past failures at securing safeguards in the language of consent decrees addressing risks associated with buyers with significant debt. Chopra compared the FTC's position to that of sophisticated lenders, suggesting that "[i]f Wall Street creditors can protect themselves from getting burned in these situations, enforcers should consider using similar provisions to protect the public." Chopra's remarks suggest that at least some of the commissioners will become increasingly skeptical of highly leveraged divestiture buyers.

European Union

- **Commissioner Vestager Continues Focus on "Big Data" in Merger Reviews**

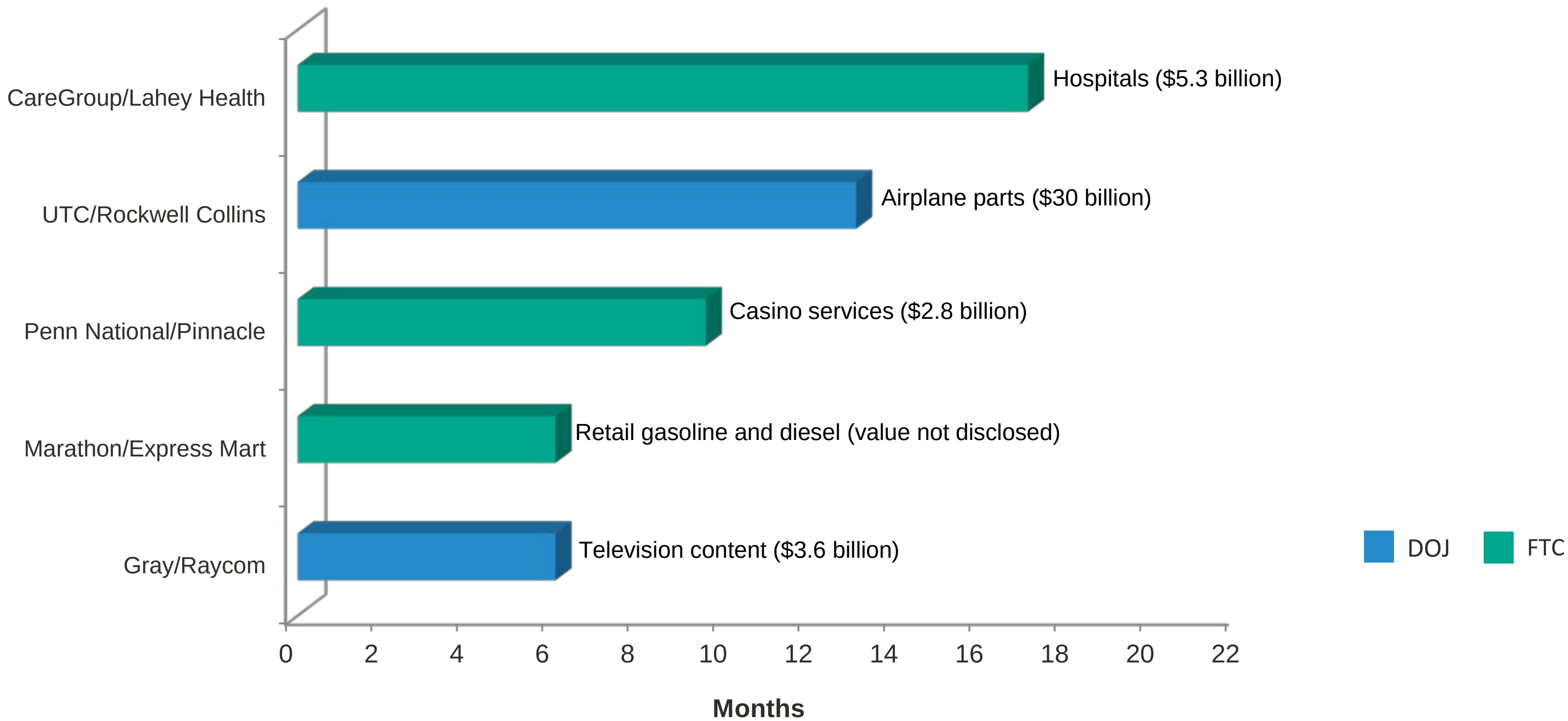
On December 4, Commissioner Margrethe Vestager delivered a speech on "protecting consumers in a digital world" highlighting the EC's analysis in prior merger cases where the merger may give a company access to data that would impact competition. Commissioner Vestager indicated that the EC would continue to make sure that powerful digital businesses do not misuse their control of data needed to compete in a given market and hold back innovation. The EC has hired three experts to advise Vestager on how a digital economy will affect markets and competition. These experts are expected to produce a report by the end of March.

- **Stricter Rules on Foreign Investments in Germany**

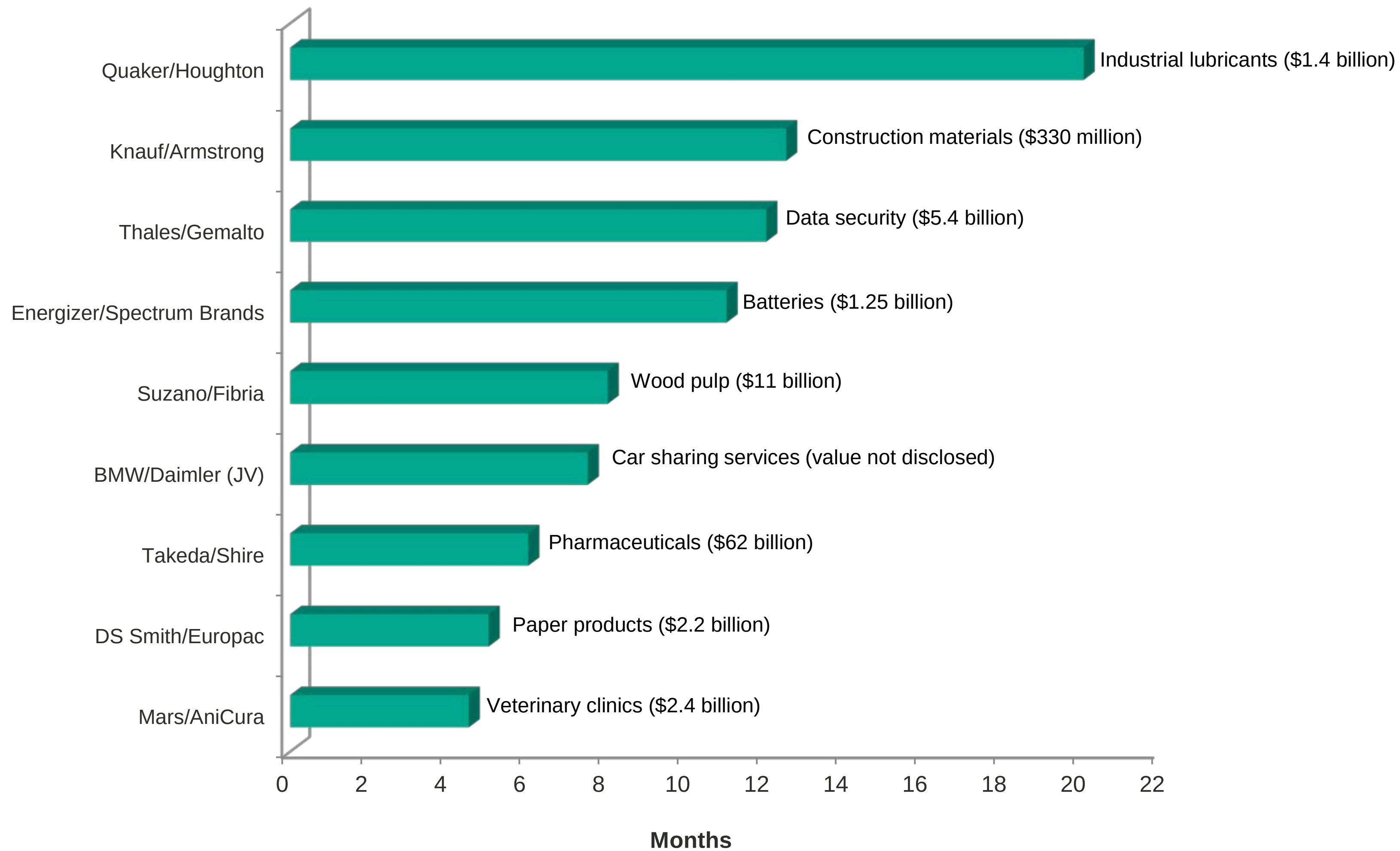
The German federal government has agreed on stricter rules for the acquisition of shares in German undertakings by foreign non-EU investors. Therefore, it decided to amend the German Foreign Trade and Payments Regulation. The tightening of the rules on foreign investments is a reaction to the recent large increase of takeovers of German companies by foreign—in particular, Chinese—investors.

SNAPSHOT OF ENFORCEMENT ACTIONS

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



European Union (Timing from Signing to Clearance)



SIGNIFICANT US CONSENT ORDERS / INVESTIGATION CLOSING WITH AGENCY STATEMENTS

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[1]	BUYER UPFRONT
United Technologies Corporation	Rockwell Collins	Pneumatic ice protection systems (3-to-2) Trimmable horizontal stabilizer actuators	13 months	DOJ	On October 1, the DOJ required United Technologies Corporation (UTC) to divest two business lines to proceed in its acquisition of Rockwell Collins. First, the DOJ required UTC to divest the Rockwell Collins' business involved in the manufacture and sale of pneumatic ice protection systems. These systems remove accumulated ice on an aircraft's wings. The DOJ alleged that there are only three competitors for the sale of pneumatic ice protection systems and that the combined UTC/Rockwell Collins would control more than 50% share post-closing. Second, the DOJ required UTC to divest Rockwell Collins' business responsible for the sale of trimmable horizontal stabilizer actuators (THSAs). THSAs help an aircraft maintain the proper altitude during flight by adjusting the angle of the horizontal stabilizer. The DOJ alleged that UTC and Rockwell Collins are each other's closest competitors for THSAs for large aircraft, each having won a significant contract in the space. While there are other competitors manufacturing THSAs, these competitors focus on smaller aircraft than UTC and Rockwell Collins. The DOJ required an upfront buyer for the sale of the THSA assets because "the assets are distributed among multiple sites in two countries." Some of the divested facilities produced products in addition to those that created the need for the divestiture, and those additional products were included in the divestiture package to keep the business operating as it had in the past.	Yes (for one of the two divested businesses)

[1] 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[1]	BUYER UPFRONT
Penn National Gaming	Pinnacle Entertainment	Casino services (5-to-4 / 4-to-3)	9.5 months	FTC	On October 1, the FTC required the merging casino operators to divest casino-related assets in three Midwestern cities: St. Louis, MO; Kansas City, MO; and Cincinnati, OH. Casino-related services include "gaming services such as slots and table games, as well as related lodging, entertainment, and food and beverage services." In each relevant area, the proposed consent order aims to preserve at least four independent casino operators by divesting one or two properties from the merging parties.	Yes
Marathon Petroleum	Express Mart	Retail gasoline Retail diesel (3-2 and 4-3)	6 months	FTC	On October 25, the FTC required Marathon Petroleum Corp. to divest retail fuel assets in five local markets in New York state in order to proceed with its acquisition of Express Mart. In four of the five local retail gasoline markets, the acquisition would reduce the number of significant competitors from three to two (four to three in the fifth). In three of the five local retail diesel markets, the acquisition will result in a merger to monopoly (three to two in the fourth market, and four to three in the fifth).	Yes
N/A	Entities listed below were combined under a new common parent CareGroup, Inc.; Lahey Health System, Inc.; Seacoast Regional Health Systems, Inc.; and Beth Israel Deaconess Care Organization	Hospitals	17 months	FTC	On November 29, the FTC issued a statement to close its investigation of a proposed transaction, which the FTC alleges would combine general acute care hospitals, a psychiatric hospital and physicians in eastern Massachusetts. Prior to the FTC closing its investigation, the Massachusetts Attorney General's office reached a settlement with the parties that included certain price caps over a seven-year period. In its statement, the FTC admitted that it does not typically pursue behavioral remedies in merger cases, but recognized that this settlement agreement seeks to satisfy the Massachusetts Attorney General's goal of preserving access to care and limiting price increases.	N/A (transaction cleared)

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[1]	BUYER UPFRONT
Gray Television	Raycom Media	Television content (4-3)	6 months	DOJ	On December 14, the DOJ required Gray Television and Raycom media to divest broadcast television stations in nine local markets in order to proceed with their merger. Absent the divestitures, the elimination of head-to-head competition between Gray and Raycom would increase the number of “Big 4” affiliate stations (affiliates of NBC, CBS, ABC or FOX) owned by Gray, causing Gray to own two or more of the Big 4 stations in these nine markets. The DOJ concluded that absent these divestitures the combined company would likely charge cable and satellite companies higher fees to carry its stations, resulting in higher monthly and cable satellite bills for millions of Americans. Additionally, according to the DOJ, the combined company would likely charge local businesses and advertising companies higher prices for spot advertising. The settlement contains provisions to ensure efficient operation of the divested stations, such as giving the divestiture buyer the option to have Gray provide the divested station with local news programming for at least one year.	Yes

SIGNIFICANT EC CLEARANCE DECISIONS

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[2]	BUYER UPFRONT
Thales	Gemalto	Data security	12 months	EC	On December 11, the EC approved Thales' acquisition of Gemalto, subject to conditions. According to the EC, Thales and Gemalto are the two largest manufacturers of general-purpose hardware security modules, a data security product that runs encryption software to generate, protect and manage encryption keys. Following an in-depth investigation, the EC concluded that the proposed merger would lead to high combined market shares in general-purpose hardware security modules. To remedy the EC's concerns, Thales offered to divest its global general-purpose hardware security module business, marketed under the nShield brand. This transaction is still waiting for DOJ antitrust approval.	No
Takeda Pharmaceutical Company	Shire	Pharmaceuticals	6 months	EC	On November 20, the EC approved Takeda's acquisition of Shire, subject to conditions. The activities of Takeda and Shire overlap with regard to treatments for inflammatory bowel disease (IBD). Shire's pipeline product is expected to compete closely with Takeda's product. Therefore, the EC was concerned that the acquisition, as originally notified, "would lead to a loss of innovation and a reduction of potential future competition." The EC's market investigation revealed that Takeda would be unlikely to continue developing Shire's IBD treatment product. Against this background, the EC accepted the commitment offered by Takeda to divest Shire's pipeline product, including the rights to its development, manufacturing and marketing, to a purchaser that would have an incentive to develop the drug. The FTC cleared this transaction without a Second Request.	No

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BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[2]	BUYER UPFRONT
DS Smith	Europac	Paper products	5 months	EC	On November 14, the EC approved DS Smith's acquisition of Europac, subject to conditions. DS Smith and Europac are both manufacturers of paper and paper products. The EC's investigation focused on the overlap in corrugated sheets and corrugated cases. According to the EC, the transaction would reduce the level of competition for these products in two local areas: Portugal and Western France. To resolve the EC's concerns, DS Smith offered to divest a Europac box plant in Portugal and two DS Smith plants in France. In addition to the divestitures, DS Smith and Europac also committed to divest the customer contracts associated with the divested plants.	No
Suzano	Fibria	Wood pulp	8 months	EC	On November 29, the EC approved Suzano's acquisition of Fibria, subject to conditions. Suzano and Fibria are the two largest global suppliers of bleached eucalyptus kraft pulp (BEKP), an input to the paper, tissue, and packaging industry. The EC investigation was concerned that the transaction would significantly reduce competition in the market for wood pulp, especially BEKP. The investigation also found that Fibria had an agreement with Klabin, another Brazilian producer of BEKP, which allowed Fibria to act as the exclusive sales agent for Klabin outside of South America. To resolve the competition concerns, the EC required the termination of Fibria's agreement with Klabin and the transfer of all assets and personnel necessary for Klabin to sell independently to Europe.	Yes

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[2]	BUYER UPFRONT
BMW (as JV Partner)	Daimler (as JV Partner)	Car-sharing services	7.5 months	EC	On November 7, the EC approved the creation of six joint ventures by the two German car manufacturers Daimler and BMW, subject to conditions. In the JV companies, Daimler and BMW intend to bring together their mobility services in the following business fields: free-floating car sharing services, ride hailing services, parking services, charging services and other on-demand mobility services. The EC found that the proposed JVs would raise competition concerns for car sharing in six cities: Berlin, Cologne, Düsseldorf, Hamburg, Munich and Vienna. Specifically, the EC found that Daimler and BMW would have the ability and incentive to shut out rival providers of integrator apps, to the benefit of Daimler's own integrator app. Integrator apps are mobile applications that aggregate several different transportation options including free-floating car sharing. In addition, the EC found that Daimler and BMW would have the ability and incentive to shut out rival car sharing providers to the benefit of their own sharing services. The EC's remedies packaged allowed for (1) application programming interface (API) access to third party aggregator platforms for mobility solutions, so that they can also re-direct users to Daimler and BMW's car sharing services; and (2) access to Daimler's integrator app to interested car sharing providers.	N/A (behavioral remedy)

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[2]	BUYER UPFRONT
Energizer	Spectrum Brands' batteries and portable lighting business	Batteries	11 months	EC	On December 11, the EC approved Energizer's acquisition of two businesses from Spectrum brands, both active in the sale of consumer batteries. The EC's investigation concluded that the proposed transaction would significantly reduce competition for disposable household batteries, rechargeable household batteries, specialty batteries, hearing aid batteries and portable battery chargers. To address these concerns, the EC required the divestment of Spectrum's Varta brand batteries business. In addition, the EC required Energizer to enter into an exclusive supply and license agreement with the purchaser of the Varta business for the sale of Rayovac-branded hearing aid batteries to mass retailers in EMEA.	No
Mars	AniCura	Veterinary clinics	4.5 months	EC	On October 29, the EC approved Mars' acquisition of AniCura, subject to conditions. AniCura is a veterinary clinic chain active in the EEA and owns VetFamily, a purchasing organization for independent veterinary clinics. VetFamily is in charge of negotiating framework contracts for the benefit of its member clinics, including for the procurement of dietetic pet food. Mars' petcare division is active amongst others in the supply of dietetic pet food. The EC was concerned that the transaction could have negative effects on the retail market of dietetic pet food sold by veterinarians because it could enable Mars to shut out its dietetic pet food competitors from the downstream retail channels, namely the AniCura veterinary clinics and the VetFamily member clinics, especially in Denmark and Sweden. Therefore, as a remedy, Mars offered to divest AniCura's VetFamily business in its entirety in the whole of Europe.	No

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS[2]	BUYER UPFRONT
Knauf	Armstrong World Industries' ceilings business	Construction materials	12.5 months	EC	On December 7, the EC approved Knauf's acquisition of Armstrong's ceilings business outside of the Americas, subject to conditions. Knauf and Armstrong both supply modular suspended ceilings in Europe. The EC's investigation found that the transaction would significantly reduce competition for (1) mineral fiber tiles for modular suspended ceilings in Austria, Lithuania, Spain and the United Kingdom and (2) grids for modular suspended ceilings in Austria, Spain and the United Kingdom. To address these concerns, the EC required the sale of Armstrong's plants in Team Valley, UK and the transfer of Armstrong's sales teams and customer base in each of the relevant countries and additional countries to ensure the divestment business is viable. These additional countries included Estonia, Germany, Ireland, Italy, Latvia, Portugal and Turkey.	No
Quaker	Houghton	Industrial lubricants	20 months	EC	On December 11, the EC approved Quaker's acquisition of Houghton, subject to conditions. Quaker and Houghton are both producers of industrial lubricants. The EC's investigation focused on the companies overlap in rolling oils, which are particular types of metal working fluids used in the production of metals, such as steel and aluminum. The EC's investigation found that the supply for three particular types of rolling oils is highly concentrated and that Quaker and Houghton are close competitors. To address these concerns, the EC required Quaker to divest Houghton's businesses for these three types of rolling oils to a French competitor.	Yes

SIGNIFICANT ABANDONED TRANSACTIONS

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS[3]
United States				
Vintage Capital Management LLC	Rent-A-Center Inc.	Rent-to-own furniture and electronics business	FTC	On December 18, Rent-A-Center exercised its option to terminate its takeover by Vintage Capital, and requested that Vintage Capital pay the $126.5 million reverse breakup fee. Rent-A-Center explained that it terminated the deal due to its "current financial and operational performance." The FTC had previously requested information about the deal due to Vintage Capital's ownership of other rent-to-own stores operating as Buddy's Home Furnishings, however at the time of the FTC request the parties expressed confidence about the deal obtaining regulatory approval.

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

AUTHORS

For more information, please contact your regular McDermott lawyer, or:

NOAH FELDMAN GREENE
ASSOCIATE
nfeldmangreene@mwe.com
Tel +1 202 756 8426

CARINA KANT
ASSOCIATE
ckant@mwe.com
Tel +49 211 30211 220

EDITORS

JON B. DUBROW
PARTNER
+1 202 756 8122
jdubrow@mwe.com

JOEL R. GROSBERG
PARTNER
+1 202 756 8207
jgrosberg@mwe.com

RYAN O. LESKE
ASSOCIATE
+1 202 756 8823
rleske@mwe.com

DAVID HENRY
COUNSEL
+32 2 282 35 69
dahenry@mwe.com

For more information about McDermott Will & Emery visit mwe.com