September 2022

APRIL – JUNE 2022: KEY THEMES AND TAKEAWAYS

UNITED STATES

- **An Overview of Agency Merger Challenges from January 2021 through June 2022**

  Parties continue to be cautious in litigating challenged transactions. Since January 2021, the US Federal Trade Commission (FTC) and Department of Justice (DOJ) filed lawsuits (or threatened to sue) to block 16 transactions. Of those transactions, 12 were abandoned and six are in various stages of litigation.

  Of the 12 abandoned transactions, four were abandoned by the parties pre-suit, following in-depth investigations by the FTC, but before the issuance of a complaint. The other eight were abandoned after the FTC or the DOJ filed a complaint initiating litigation.

  The data suggest that the FTC's and DOJ's aggressive merger enforcement policy is raising the stakes for parties to potential mergers and acquisitions, including an increased willingness by the agencies to litigate potentially problematic transactions. Of the 16 challenged transactions, two-thirds were led by the FTC. The DOJ, however, is currently in trial challenging three mergers and waiting for the decision on a trial that was recently completed. The agencies challenged mergers in all sectors, but the healthcare industry was the most heavily targeted.

- **DOJ and FTC Remain Focused on the Healthcare Industry**

  In recent remarks, FTC and DOJ personnel have emphasized a heightened interest in mergers and acquisitions in the healthcare and pharmaceutical sectors. In a June 2022 workshop on antitrust merger enforcement within the pharmaceutical industry, agency speakers emphasized their ongoing work to revise the Horizontal Merger Guidelines to focus on competition in research and development. Agency leaders also questioned whether it is appropriate to continue their longstanding approach to resolving competition concerns to pharmaceutical mergers with limited structural remedies (*i.e.*, divestitures of overlap products) rather than outright blocking problematic transactions.

  The FTC also recently announced the creation of a pharmaceutical merger task force and a study into the pharmaceutical benefit manager (PBM) industry. Antitrust enforcers expressed concerns over high drug costs and the importance of innovation in evaluating anticompetitive effects within the healthcare sector. The FTC also issued a policy statement on rebates and fees paid by drug manufacturers to PBMs in exchange for lower drug costs. In that policy statement, agency leaders reiterated concerns regarding high drug prices and put manufacturers on notice that the FTC will continue to use its enforcement authority to combat concentration within the industry.

- **Increased Focus on Nascent Competition**

  Although the FTC announced only four consent orders requiring divestiture during this quarter, two of the orders were based on allegations that the merger could pose a *future* threat to competition. In April, the FTC issued a complaint against Hikma Pharmaceuticals, PLC's acquisition of Custopharm, Inc., regarding injectable corticosteroid drug triamcinolone acetonide (TCA). While Hikma Pharmaceuticals does not currently manufacture an injectable TCA, it is developing a product that is expected to launch in the near future. Custopharm already produces an injectable TCA, and the complaint alleged that the acquisition would lead Hikma Pharmaceuticals to stop developing its injectable TCA. To remedy this potential harm, the FTC required Hikma to divest the Custopharm marketed drug rather than Hikma's pipeline drug. In June, the FTC also required a divestiture in Medtronic, Inc.'s proposed acquisition of Intersect ENT, Inc. The FTC alleged that Medtronic was the dominant competitor for ear, nose and throat (ENT) navigation systems and, through the acquisition, Medtronic would eliminate a "nascent competitive threat," with Intersect recently having obtained regulatory approval to compete in that market. These consent orders demonstrate the agency's continued focus on innovation and potential competition theories to demand divestitures.

- **Vigorous Enforcement of Private Equity Roll-Ups**

  Private equity firms seeking to consummate transactions should expect longer reviews as the FTC and DOJ scrutinize roll ups (*i.e.*, when a private equity firm acquires several companies in the same market). FTC Chair Lina Khan expressed alarm in an interview with the *Financial Times* about the "life and death consequences" of buyout groups owning broad sectors of the economy and warned that the agency is exploring how to sharpen its toolkit for enforcement. DOJ officials, likewise, have committed to aggressive action regarding private equity firms, particularly under Section 8 of the Clayton Antitrust Act, which prohibits anyone from serving as a director or officer of any two competing companies.

  Parties involved in a private equity transaction should expect an increased prevalence of novel theories in analyzing the harmful effects of an acquisition. Historically, the FTC and DOJ have focused their analyses of anticompetitive harm primarily on price, but recent private equity transactions have also considered the impact on jobs and innovation. A few acquisitions even received second requests initiating in-depth investigations despite no horizontal or vertical relationship between the parties. Firms should prepare for potential inquiry into effects on separate product markets and an expansion beyond the traditional review of geographic markets.

  Further, the antitrust agencies have expressed disapproval of private equity firms as divestiture buyers in consent decrees. Repeat players in the same industry should prepare for scrutiny beyond Hart-Scott-Rodino Act (HSR) reportable acquisitions, as the agencies may consider consummated and/or non-reportable acquisitions in evaluating the impact of a long-term corporate strategy. The DOJ has also expressed concern with HSR "filing deficiencies" in the private equity space, so firms are advised to work closely with counsel to ensure proper compliance.

EUROPEAN UNION

- **European Commission Holds Consultation on Draft Revised Merger Implementing Regulation and Notice on Simplified Procedure**

  Between May 6 and June 3, 2022, the European Commission (Commission) held a public consultation to seek views on the draft revised Merger Implementing Regulation (Implementing Regulation) and the Notice on Simplified Procedure. This consultation was launched in the context of the Commission's review process of the procedural and jurisdictional aspects of EU merger control.

  The draft revised Implementing Regulation and the Notice on Simplified Procedure propose a number of changes, including to (i) expand and clarify the categories of cases that can be treated under the simplified procedure, (ii) introduce refined safeguards so

that the simplified procedure does not apply to cases that merit a more detailed review, (iii) ensure effective and proportionate information gathering, by introducing a new notification form for simplified cases in a "tick-the-box" format, (iv) reduce and clarify information requirements to streamline the review of non-simplified cases, and (v) introduce electronic notifications and the possibility for the parties to submit certain documents electronically.

The Commission will further revise the drafts with the objective of having the new rules in place in 2023.

- **European Council and European Parliament Reach Provisional Political Agreement on Foreign Subsidies Regulation**

  On June 30, 2022, the European Council and the European Parliament reached a provisional political agreement on the Foreign Subsidies Regulation. The Foreign Subsidies Regulation provides for new mechanisms, running alongside the EU merger control rules, that would enable the Commission to address the potential distortive effects of foreign subsidies in the EU internal market.

  The Foreign Subsidies Regulation provides for two investigation tools that could have an impact on mergers. First, the Commission would be able to review transactions (i) where at least one of the merging undertakings or the acquired company generates at least €500 million of turnover in the EU and (ii) which involves a foreign financial contribution (*i.e.*, subsidy) of at least €50 million received in the three financial years prior to notification. If a transaction meets these requirements, the transaction should be notified to the Commission prior to its implementation.

  In addition, the Commission could also make use of a general investigation tool, which could be applied to transactions not meeting the above thresholds for mandatory notification. The Commission would be able to start an investigation on its own (ex-officio) or request an ad hoc notification.

  The Foreign Subsidies Regulation will enter into force once it is formally adopted by the Council and the Parliament and published in the Official Journal. It will become directly applicable in the EU six months after entry and the notification obligations will start to apply nine months after entry.

UNITED KINGDOM

- **UK Government Proposes New Measures to Strengthen the CMA's Powers**

  On April 20, 2022, the UK government proposed new measures to boost consumer protection rights and competition rules. In particular, the UK government's reforms aim to strengthen the Competition & Markets Authority's (CMA) powers and alleviate burdens on smaller companies.

  With regard to mergers, the UK government proposed several important changes, including:

  - Adjusting the CMA's jurisdictional thresholds to better target the mergers most likely to cause harm, including (i) raising the turnover threshold in line with inflation (from greater than £70 million to greater than £100 million UK turnover) and (ii) providing additional bases to review "killer" acquisitions (*i.e.*, acquisitions of an innovative nascent competitor by an incumbent to preempt future competition) and other mergers that do not involve direct competitors
  - Creating a small merger safe harbor, exempting mergers from review where each party's UK turnover is less than £10 million; and
  - Accepting commitments from businesses that resolve competition issues earlier during a phase 2 investigation.

- **UK Competition Appeal Tribunal Principally Upholds the CMA's Prohibition of *Meta / Giphy***

  On June 14, 2022, the UK Competition Appeal Tribunal (CAT) largely upheld the CMA's decision to block Meta's acquisition of Giphy. In November 2021, the CMA concluded that Meta's acquisition of Giphy would allegedly reduce competition between social media platforms and that the transaction allegedly removed Giphy as a potential challenger in the display advertising market. The CMA alleged that competition concerns arising from the acquisition could only be removed if Meta divested Giphy to an approved buyer. In December 2021, Meta filed an appeal against the CMA's decision challenging (i) the CMA's findings that the acquisition would result in a horizontal substantial lessening of competition, (ii) the CMA's findings with regard to market definition, (iii) the counterfactual, (iv) the remedies and (v) procedural flaws.

  The UK CAT confirmed the CMA's findings that the acquisition could harm competition and dismissed all of Meta's claims except for one procedural argument. The UK CAT ruled in favor of Meta with regard to the treatment of certain third-party confidential information, thus breaching Meta's rights of defense. The UK CMA is currently conducting its remittal inquiry process.

- **UK Government Publishes First Report on the National Security and Investment Act**

  On June 16, 2022, the UK Business Secretary published the first report on the National Security and Investment Act (UK NSI Act). The UK NSI Act entered into force on January 4, 2022, and introduced a screening mechanism, running alongside the UK merger control rules, to review acquisitions that could harm the UK's national security. The report covers the first three months of the UK NSI Act's operation.

  According to the report, the Investment Security Unit (ISU) received 222 notifications in the period from January 4, 2022, to March 31, 2022. Of these notifications, 196 concerned mandatory notifications, while 25 of the notifications were voluntary. The ISU also received one retrospective validation application (*i.e.*, an application for notifiable acquisitions that have already been completed without approval and are therefore legally void) to be retrospectively recognized as being valid in law. The government called in 17 out of the 222 notifications for further assessment.

  In terms of timing, the average number of working days from receipt of a mandatory notification to informing parties of a decision to accept that notification was three working days. There is no statutory time limit for the ISU to accept a mandatory notification, but they try to evaluate notifications as quickly as possible. With regard to the number of working days to call in a mandatory notification once accepted, the government took on average 24 working days to call in transactions. The statutory time limit to call in a mandatory notification is 30 working days.

ENFORCEMENT IN KEY INDUSTRIES[1]

Healthcare, Pharmaceuticals & Biotechnology

Technology, Media & Communications

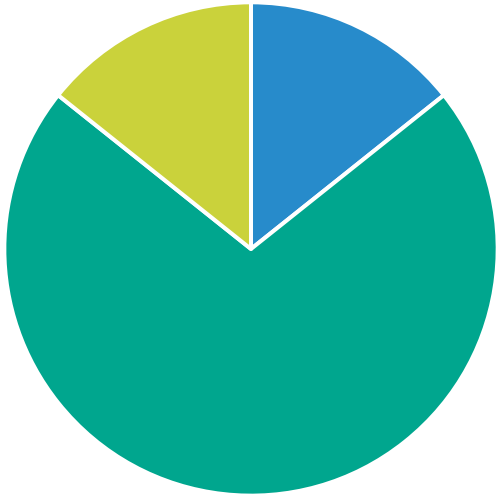
Retail & Consumer Productions

Chemicals & Industrial Prods. or Services

Transportation & Energy

Other

United States

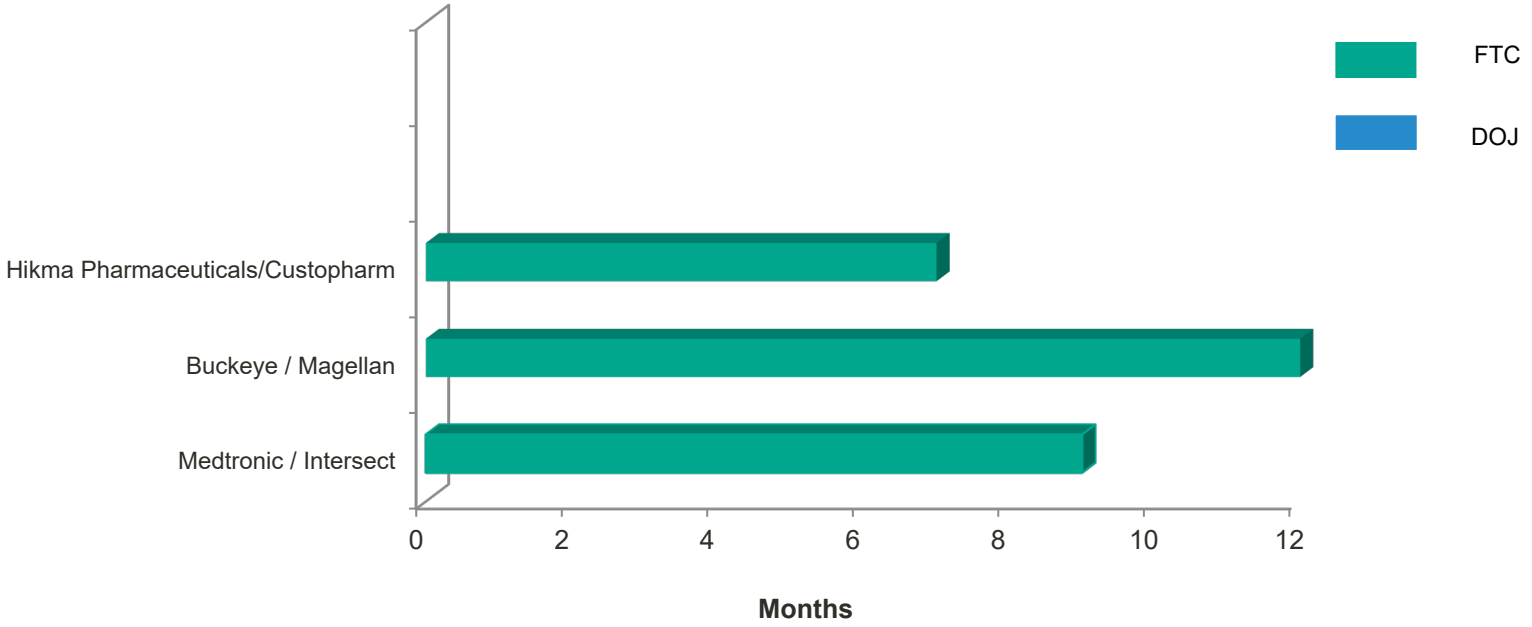


Europe & the UK

[1] For the United States, the graphs include cases during the quarter where an antitrust enforcement agency issued a second request, consent order or complaint initiating litigation against the parties to the transaction, as well as transactions that were abandoned after an antitrust investigation. For Europe and the United Kingdom, the graphs include cases where an antitrust enforcement agency issued a clearance decision or challenged the transactions, as well as transactions that were abandoned after an antitrust investigation.

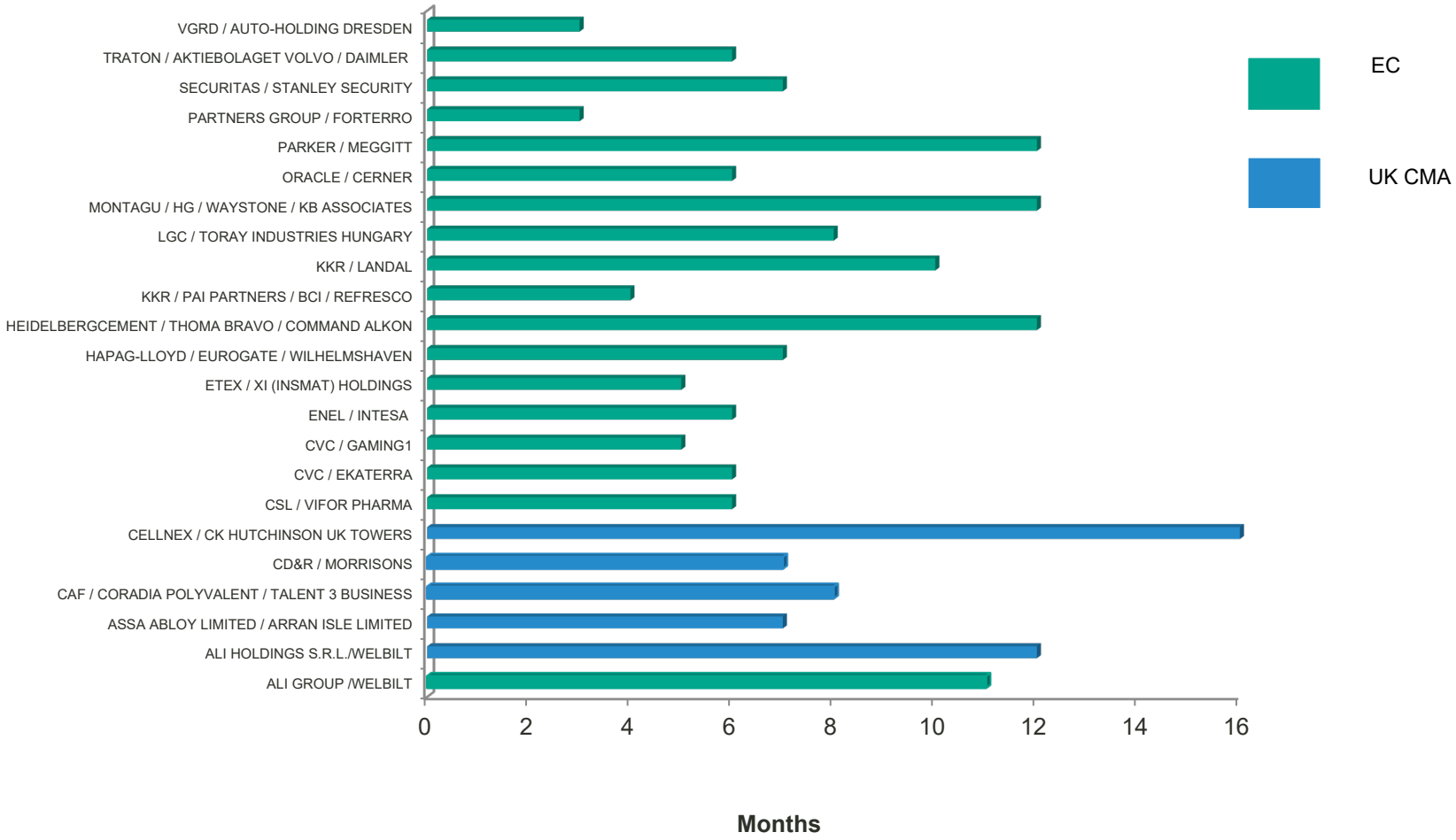
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS[2]

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. Certain matters involving Firm clients are not included in this report.

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
HCA Healthcare / Steward Health Care System	FTC	Abandoned	Three to two for general acute care hospital competitors in the northern and southern markets of Salt Lake City, Utah. Four to three for the general acute care hospital competitors in the central market of Salt Lake City, Utah.	In June 2022, the FTC sued to block HCA Healthcare's acquisition of Steward Health Care System. HCA is the second-largest general acute care provider along the Wasatch Front in Utah, operating six hospitals in the area. Steward is the fourth-largest general acute care provider. The proposed transaction would give HCA control of Steward's five hospitals in the area. The FTC's complaint alleged that the combined firm would reduce competition, innovation and quality of care in Salt Lake City, Utah. The complaint alleged HCA receives higher reimbursement rates than Steward, while Steward offers low-cost services with more innovative contractual terms. The FTC argued that the transaction would eliminate Steward as a low-cost provider and HCA's resulting increased bargaining power would pass higher reimbursement rates onto consumers. The Commission voted 5-0 to issue an administrative complaint and sought a preliminary injunction in the US District Court for the District of Utah to halt the transaction pending the administrative proceeding. The parties abandoned the proposed merger.

Notable European & UK Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Parker / Meggitt	EC	Cleared, subject to conditions	Aircraft wheels and brakes (AWB) for various aircraft (business jets, helicopters, military fixed-wing UAVs and turboprop aircraft) where Parker and Meggitt had combined market shares of 30-40%, 60-70% or 70-80% in each of the relevant markets.	On February 21, 2022, Parker-Hannifin (Parker) notified the Commission of its proposed acquisition of Meggitt. Parker and Meggitt are both leading suppliers of aerospace components. The Commission assessed the impact of the proposed acquisition on competition in the markets for (i) the manufacturing and supply of AWB and relevant subsegments and (ii) aerospace pneumatic valves. With regard to the markets for the manufacturing and supply of AWB, the Commission found that the merged entity would have large combined market shares in AWB for general aviation (>40% general aviation overall, >60% for AWB for turboprop, >50% for original equipment parts); AWB for business jets (>60%); AWB for helicopters (>80% overall, >50% for civil and >90% for military); and AWB for military fixed-wing UAVs (>50%). The proposed acquisition would reduce the number of active suppliers from four to three in the market for AWB for military fixed-wing UAVs. On the other hand, the Commission found that the proposed acquisition did not raise serious competition concerns in relation to military fixed-wing trainers. With regard to the market for the manufacture and supply of aerospace pneumatic valves, the Commission found that the proposed acquisition did not raise serious competition concerns. The parties' combined market share would be moderate in the overall market for engine pneumatic valves and in the narrowly defined markets for engine control and for engine anti-ice. Furthermore, post-acquisition, several other important players would remain active on this market. To address the Commission's concerns, Parker will divest its AWB division. The divestiture includes a production site located in Ohio, as well as other tangible and intangible assets necessary to operate the business in a viable manner (*e.g.*, Cleveland Wheels & Brakes brand, licenses and staff). The Commission cleared the proposed acquisition subject to the conditions on April 11, 2022. In August, the parties announced they received all regulatory approvals. The DOJ did not require a public settlement / consent decree despite having issued a second request, and despite the fact that the assets the Commission required to be divested were all located in the United States.

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Ali Group / Welbilt	EC, CMA, US DOJ	Cleared, subject to conditions	Combined entity would become the largest manufacturer and supplier of ice-making machines in the European Economic Area (EEA).	On July 14, 2021, Ali Group agreed to acquire Welbilt. Ali Group and Welbilt design, manufacture, market and service food-service equipment, such as ice-making machines, ovens, fryers and grills, used in commercial and public venues. The European Commission, the CMA and the US DOJ investigated the transaction. The Commission found that the combined entity would become the largest manufacturer and supplier of ice-making machines in the EEA. The Commission alleged the market is characterized by high barriers to entry due to brand loyalty and importance of local after-sales services. The Commission found that competitors would not exert sufficient competitive pressure on the combined entity, and that new entry in the market would be unlikely. The CMA investigated the proposed acquisition in relation to the market for (i) the supply of speed ovens in the UK and (ii) the supply of ice machines in the UK. With regard to the market for the supply of speed ovens in the UK, the CMA did not find serious competition concerns as the share of supply increment brought by the acquisition would be relatively small, the parties are not close competitors, and the combined entity would continue to face competition from other players. With regard to the market for the supply of ice machines in the UK, the CMA found that the proposed acquisition would raise serious competition concerns, as the parties are strong and globally active competitors. To alleviate the Commission's and CMA's concerns, Ali Group offered to divest its global ice machines business, which operates under the Manitowoc and Koolaire brands. The divestment includes three manufacturing facilities in China, Mexico and the United States. Ali Group proposed to divest its business to Pentair, a US manufacturer of water treatment systems. Both the Commission and CMA accepted Pentair as a suitable purchaser of the divestment business. The Commission cleared the proposed acquisition subject to conditions on June 17, 2022.

AUTHORS

CLAIRE DANBERG
ASSOCIATE
cdanberg@mwe.com
Tel +1 202 756 8047

KAROLIEN VAN DER PUTTEN
ASSOCIATE
kvanderputten@mwe.com
Tel + 32 2 282 35 91

EDITORS

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

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

LISA RUMIN
PARTNER
lrumin@mwe.com
Tel +1 202 756 8235

HENDRIK VIAENE
PARTNER
hviaene@mwe.com
Tel +32 2 230 57 13

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

McDermott Will & Emery's global competition practice can assist clients with antitrust M&A issues in various jurisdictions around the world. Feel free to contact one or more of our partners in our various offices. The individuals below can assist or can refer you to one of our many other lawyers in our competition team who can help with a specific question.

UNITED STATES

JON DUBROW
jdubrow@mwe.com
Tel +1 202 756 8122
WASHINGTON, DC

JOEL GROSBERG
jgrosberg@mwe.com
Tel +1 202 756 8207
WASHINGTON, DC

RAY JACOBSEN
rayjacobsen@mwe.com
Tel +1 202 756 8028
WASHINGTON, DC

STEPHEN WU
swu@mwe.com
Tel +1 312 984 2180
CHICAGO

EC AND MEMBER STATES

JACQUES BUHART
jbuhart@mwe.com
Tel +33 1 81 69 15 01
BRUSSELS / PARIS

CHRISTIAN KROHS
ckrohs@mwe.com
Tel +49 211 30211 221
DÜSSELDORF

HENDRIK VIAENE
Hviaene@mwe.com
Tel +32 2 230 57 13
BRUSSELS

FRÈDÈRIC PRADELLES
fpradelles@mwe.com
Tel +33 1 81 69 99 43
PARIS