



Antitrust M&A Snapshot

United States: July – September 2018 Update

Both US antitrust agencies marked the third quarter of 2018 with significant policy announcements regarding the merger review process. The announced reforms seek to expedite the review process through cooperation between the agencies and the merging parties. Moving first, the Federal Trade Commission (FTC) revealed a Model Timing Agreement that provides the FTC Staff with earlier notice of the parties' intent to substantially comply with a Second Request. Earlier notice allows the FTC Staff to create a more effective timeline for meetings with division management, front office staff and the Commissioners. Less than two months after the FTC revealed its Model Timing Agreement, the Antitrust Division of the US Department of Justice (DOJ) announced procedural reforms aimed at resolving merger investigations within six months of filing. The DOJ will commit to fewer custodians and depositions in exchange for the merging parties providing key information earlier in the investigation. Overall, these reforms appear to be a positive step forward for parties considering future transactions, but their effectiveness remains uncertain as the agencies start a difficult implementation period. While the FTC timing agreement may provide more certainty around the process, it does not reduce the review timing and actually extends it.

EU: July – September 2018 Update

The European Commission (EC) remained quite active clearing mergers in the third quarter of 2018. Most notably, the EC cleared Apple's acquisition of Shazam without imposing conditions despite the EC's stated concerns about access to data as a competitive concern. The EC opened a Phase II investigation into the transaction to investigate the potential for Apple to obtain a competitive advantage over competing music streaming services by accessing Shazam's consumer data obtained through its music recognition services. In this case, the EC did not find evidence that the access to Shazam's data would provide Apple a competitive advantage. In addition, the EC found that there were no concerns about Apple potentially restricting Shazam as referral source for Apple's competitors. Going forward, it is clear that access to data is an issue that the EC will continue to investigate, but it is also clear that the EC is taking a careful approach in assessing when that access will truly lead to a competitive harm.

Snapshot of Events (Legislation/Agency Remarks/Speeches/News, etc.)

United States

- **FTC Released New Model Timing Agreement**

On August 7, the FTC published a new Model Timing Agreement with the goal to “streamline [the] merger review process in order to reach swifter resolutions.” The FTC expects to use the Model Timing Agreement in all transactions that receive a Second Request. One of the main provisions requires parties to agree that they will not close their transaction until 60 to 90 days following certification of substantial compliance with the Second Request, depending on the complexity of the case. This period is longer than the 30 days required by statute and is designed to provide staff sufficient time to review the materials provided.

- **FTC Commenced Competition and Consumer Protection Hearings**

FTC Chairman Joseph Simons announced in June that the FTC would host a series of multi-day, multi-part public hearings titled *Hearings on Competition and Consumer Protection in the 21st Century*. The series of hearings considered whether broad-based changes in the economy, evolving business practices, new technologies, and international developments warrant adjustments to competition and consumer protection law, enforcement priorities and policy. The hearings commenced in September and covered a review of the competition and consumer protection landscape, concentration and competitiveness in the US economy, privacy regulation, the consumer welfare standard in antitrust, vertical mergers, conduct by platform businesses, the state of US antitrust law, and mergers and monopsony or buyer power. The hearings continue on November 6–7, and 13–14.

- **Justice Brett Kavanaugh Comments on Merger Challenges in Confirmation Hearings**

During his confirmation hearings before the Senate Judiciary Committee in September, Justice Kavanaugh defended his opinions against the government on two merger challenges. In Whole Foods’ planned acquisition of Wild Oats Market Inc. (2008), Judge Kavanaugh agreed with the lower court that consumers would not be harmed because Whole Foods competes with traditional stores. In the Anthem / Cigna merger (2017), Judge Kavanaugh said in his dissent that the court should consider the efficiencies that the district court and DC Circuit panel rejected and that the case should be remanded to do so. Justice Kavanaugh defended both positions, explaining that both cases were “very fact-specific.”

- **Christine Wilson Replaced Maureen Ohlhausen at the FTC**

Maureen Ohlhausen left the FTC as of September 25, though she continues to await confirmation by the Senate to a judicial position on the US Court of Federal Claims. Christine Wilson has been sworn in to the FTC to a term that expires September 25, 2025. Wilson was Chief of Staff to former FTC Chairman Tim Muris and a senior vice president for regulatory and international affairs at Delta Air Lines, Inc.

- **Makan Delrahim (DOJ) and Joseph Simons (FTC) Discuss the Merger Review Process at Annual Global Antitrust Enforcement Symposium**

At Georgetown Law's annual global antitrust enforcement symposium on September 25, Assistant Attorney General Makan Delrahim announced that the DOJ is seeking to resolve most merger reviews within six months of filing. The announcement came in response to concerns that the agency takes too long to review transactions. The DOJ will accomplish this task by meeting earlier with companies and key executives, and narrowing the scope of Second Requests to lessen the burden on both sides. At the same symposium, FTC Chairman Joseph Simons announced that the FTC plans to conduct case studies to examine both expeditious and lengthy reviews to understand the problems before changing the FTC's approach. The FTC will also begin a new merger data collection program to compile data on the length of merger reviews at the FTC.

- **Bruce Hoffman (FTC) Expressed Skepticism about the Efficacy of Merger Remedies**

FTC Bureau of Competition Director Bruce Hoffman expressed skepticism about the efficacy of merger remedies in late September. Hoffman said that the FTC is examining mergers and looking critically at whether litigation may be better than settlement in certain cases. Hoffman warned not to assume that "if you convince the bureau, that you will convince the commissioners that a complex remedy in a case that otherwise shows significant risk is sufficient."

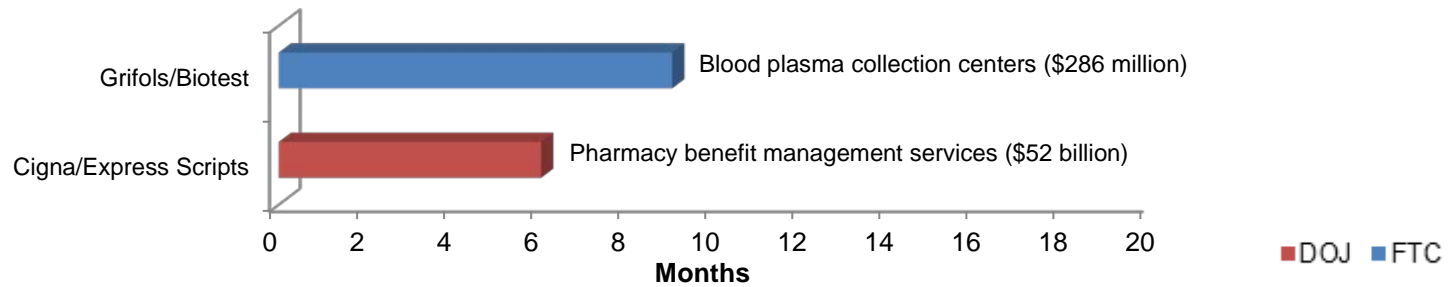
European Union

- **New Merger Control Guidelines for Transaction Value Thresholds in Austria and Germany**

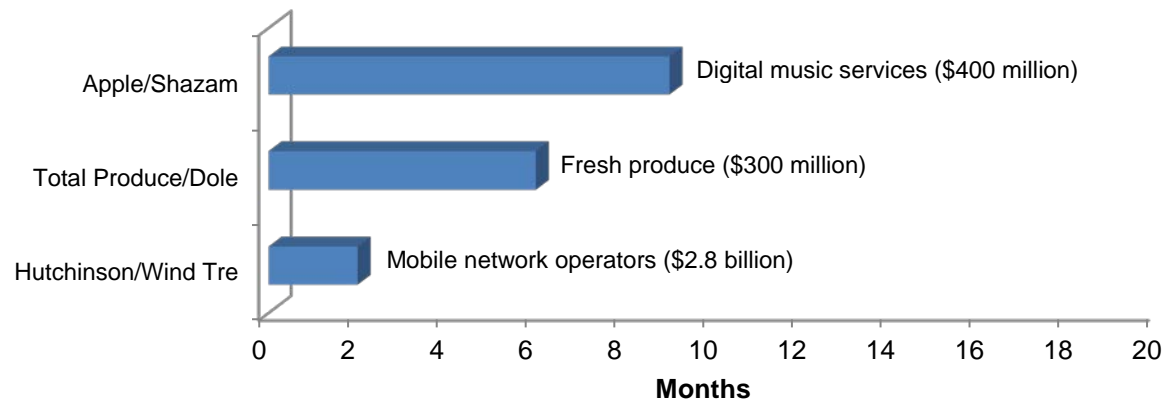
On July 9, the Austrian and German competition authorities published guidelines on the application and interpretation of the new "transaction value" and the "local nexus" merger control thresholds introduced in Germany and Austria in 2017. These additional merger control thresholds were introduced to capture deals in the digital and health care markets, in particular where the target has no or limited turnover but may still be an important/influential player on the market. Under the new thresholds, a transaction is notifiable where the transaction exceeds a certain value and the target company has significant activities in the domestic market. In Austria the value of the transaction must exceed 200 million euros; in Germany it must exceed 400 million euros. These thresholds supplement the established turnover thresholds.

Snapshot of Enforcement Actions

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



European Union (Timing from Signing to Clearance)



Significant Trials

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
United States					
Tronox Limited / Cristal USA Inc.	FTC	US District Court for the District of Columbia	Chloride process titanium dioxide (TiO ₂), a white pigment used in paints, industrial coatings, plastic and paper Combined 80% share of North America market	Will the merger between two of the largest suppliers of titanium dioxide significantly reduce competition in the North American market?	On July 10, the FTC filed a complaint seeking a preliminary injunction of the transaction. Beginning on August 7, the US District Court for the District of Columbia began a three-day evidentiary hearing on the FTC's motion for injunctive relief based largely on the evidentiary record from the FTC's administrative proceedings previously completed in May and June. On September 12, Judge McFadden granted the preliminary injunction. Judge McFadden wrote that the FTC had shown that the merger would create incentives for the incumbent firms in the market to coordinate higher prices by withholding supplies, and agreed with the FTC that North America represented a submarket for antitrust purposes, rejecting defendants' arguments that any increase in price would be offset by an influx of products from other parts of the world. Tronox stated that it plans to appeal the ruling.
Wilhelmsen Maritime Services / Drew Marine Group	FTC	US District Court for the District of Columbia	Supply of marine water treatment chemicals to global fleets	Will the merger of two large suppliers of marine water treatment chemicals substantially reduce competition to supply global fleet?	The FTC filed its administrative complaint in February, and on July 21, the US District Court granted the FTC's preliminary injunction against Wilhelmsen's proposed \$400M acquisition of Drew Marine. The court found that the FTC met its burden to "show a 'reasonable probability' that the proposed merger . . . would harm competition in the market for supply [marine water treatment] products and services to Global Fleets." On July 22, Wilhelmsen announced that it would abandon the transaction. The parties agreed to a termination fee of \$20M.

Significant US Consent Orders / Investigation Closing with Agency Statements

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS ¹	BUYER UPFRONT
Grifols S.A.	Biotest US Corporation	Blood plasma collection centers Hepatitis B immune globulin (HBIG)	9 months	FTC	<p>On August 1, the FTC required Grifols to divest blood collection centers in three US cities: Lincoln, Nebraska; Augusta, Georgia; and Youngstown, Ohio. The FTC's complaint alleges that the acquisition would result in a merger-to-monopoly in three cities for blood plasma collection centers.</p> <p>In addition, the FTC complaint also alleges that, absent a provision in the acquisition agreement divesting Biotest's interest in ADMA Biologics, Inc., Grifols would have owned a 41% share of its largest competitor for the sale of HBIG in the United States. For this reason, the FTC also prohibited Grifols from re-acquiring any ownership interest in its competitor for a period of 10 years.</p>	Yes
Cigna Corporation	Express Scripts Holding Company	Pharmacy benefit management (PBM) services	6 months	DOJ	<p>On September 17, the DOJ issued a statement closing the investigation of Cigna's \$67 billion acquisition of Express Scripts. The DOJ analyzed "whether the merger would: (1) substantially lessen competition in the sale of PBM services or (2) raise the cost of PBM services to Cigna's health insurance rivals." The DOJ concluded that the merger would not substantially lessen competition in the sale of PBM services because Cigna's PBM business had a small share nationwide. In addition, Cigna would not be able to raise the costs of PBM services for its rivals because there are a number of alternative vertically-integrated or independent PBM service providers.</p>	N/A

¹ The information in this column summarizes the government's allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

Significant EC Clearance Decisions

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ²	BUYER UPFRONT
Apple	Shazam	Digital music services	9 months	EC	On September 6, the EC approved Apple's acquisition of Shazam without imposing remedies. Despite a Phase II investigation, the EC did not find evidence that the transaction would result in competitive harm. Specifically, the EC concluded that "Apple and Shazam offer complementary services and do not compete with each other." Despite the lack of overlap, the EC investigated (1) whether Apple would obtain access to commercially sensitive data about customers of its competitors that would provide Apple a competitive advantage and (2) whether Apple could remove an important referral source for competitor music streaming services. On the first issue, the EC concluded that Shazam's data would not materially increase Apple's ability to target music streaming customers. On the second issue, the EC concluded that the app has limited importance as a referral source.	N/A
Total Produce	Dole	Fresh produce	6 months	EC	On July 30, the EC cleared Total Produce's acquisition of joint control over Dole subject to the condition that the companies' divest Dole's bagged salads business in Sweden. The EC found that there was only one other significant competitor in Sweden that would have remained post-transaction.	No

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BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ²	BUYER UPFRONT
Hutchison	Wind Tre	Mobile network operators	2 months	EC	<p>On August 31, the EC approved Hutchison's acquisition of sole control of Wind Tre, formerly a joint venture controlled by both Hutchison and VEON. The EC's approval is conditioned on Hutchison remaining responsible for fulfilling the conditions of the EC's 2016 decision clearing the creation of Wind Tre.</p> <p>In 2016, the EC raised concerns that the creation of Wind Tre would reduce competition in the Italian mobile network operations market by combining the third and fourth largest competitors. The EC cleared the 2016 transaction with structural remedies. In particular, these remedies allowed the market entry of the French telecommunications operator Iliad as a new mobile network operator in Italy.</p> <p>In August, the EC found that other than the creation of Wind Tre and the entry of Iliad on the market, no significant change has occurred in the competitive landscape. The EC concluded that the new transaction does not alter the existing competitive situation resulting from the first transaction, and no additional competition concerns have been identified.</p>	N/A

Significant Abandoned Transactions

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS ³
United States				
Qualcomm Inc.	NXP Semiconductors N.V.	Semiconductor industry	SAMR (China)	Qualcomm's planned acquisition of NXP Semiconductors was announced back in October 2016, but Qualcomm announced on July 26 that it would end the \$44B deal once it was clear that it would not be approved in China. Qualcomm had extended its share tender offer multiple times and the deal received clearance in the US in April 2017. The parties agreed to a \$2B termination fee.
Tribune Media Co.	Sinclair Broadcast Group Inc.	Broadcasting stations	DOJ (& FCC)	Sinclair announced its plans to acquire Tribune in May 2017. On August 9, Tribune ended the \$3.9B combination with Sinclair and sued Sinclair in Delaware Chancery Court. In July, the FTC voted unanimously to ask an administrative judge to look into whether Sinclair obscured that it would have effectively retained control of three divested stations. Tribune's suit says that Sinclair did not use its reasonable best efforts to obtain regulatory approval, including divesting the stations as required, and engaged in "unnecessarily aggressive and protracted negotiations" with regulators.

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