



ANTITRUST M&A SNAPSHOT

May 2021

JANUARY – MARCH 2021: HIGHLIGHTS

UNITED STATES:

- As the United States rounds the corner toward getting the COVID-19 epidemic under control within its borders, the US antitrust enforcers have seen a major spike in Hart-Scott-Rodino (HSR) premerger filings. The spike, as well as other potential considerations under the new Biden administration, prompted the Federal Trade Commission (FTC) and the US Department of Justice (DOJ) to suspend grants of early termination, which remain in place.
- The healthcare and technology industries can expect to remain under close watch by US enforcement agencies as the Biden administration continues to appoint progressive antitrust scholars to key leadership and advisory roles.
- Senator Amy Klobuchar (D-MN) is leading the charge in progressive antitrust reform in Congress by introducing legislation that seeks to make significant changes in the antitrust laws, including easing the legal standards to challenge mergers.
- For the first time in many decades, the FTC has filed suit to block a vertical merger (Illumina's acquisition of Grail), indicating a more aggressive posture towards vertical transactions. In 2017, the US District Court for the District of Columbia ruled against the DOJ's

challenge to the AT&T/Time Warner vertical transaction. The outcome of this new FTC challenge therefore will have a significant impact on whether the antitrust agencies can successfully litigate a vertical merger.

EUROPEAN UNION:

- The European Commission is focusing on “green killer acquisitions,” highlighting the interplay between the EU competition rules and the European Union’s environmental protection objectives. The Commission does not expect its review of transactions to change significantly, however, even if “out-of-market” green efficiencies are taken more seriously, because it is difficult to quantify merger-specific green efficiencies.
- On March 26, after extensive analysis of deal activity and enforcement practice, the Commission published its evaluation of the functioning of the EU merger control rules in light of rapidly changing market realities, including lessening the burden to file transactions under the simplified merger procedure.
- In parallel with the publication of its evaluation findings, the Commission issued practical guidance on when it might be appropriate for an EU Member State to refer to the Commission a non-notifiable, yet potentially problematic, merger pursuant to Article 22 of the EU Merger Regulation (EUMR). This guidance has the potential to create meaningful new transaction risk for mergers by subjecting more deals to in-depth Commission review.

UNITED KINGDOM:

- In March, the UK Competition and Markets Authority (CMA) published updated guidelines on its approach to analyzing mergers. The updated guidelines reflect the significant market developments that have taken place (particularly in the digital arena) since the CMA last issued merger guidance in 2010.

KEY THEMES AND TAKEAWAYS

UNITED STATES

- **Record-Breaking Premerger Notifications Continue in 2021**

There were 837 premerger filings in the first quarter of 2021, with HSR premerger filings hitting a 10-year high in February. On February 5, the FTC announced that the transaction threshold for required HSR premerger filings has been adjusted from \$94 million to \$92 million for 2021. The threshold is adjusted on an annual basis relative to changes in the gross national product. The threshold normally increases year over year, but it declined this year because of the economic contraction arising from the pandemic.

On February 4, the FTC and DOJ temporarily suspended HSR early termination grants. The agencies cited the increased number of filings and the presidential administration transition as the reasons behind the temporary suspension. The agencies did not give a timeline for reinstatement, and will review the current early termination procedures and processes during the suspension period.

- **Antitrust Enforcers Expected to Closely Scrutinize Healthcare and Technology Sectors**

Healthcare

The healthcare industry likely will see an increase in M&A transactions this year after the sector took a beating in 2020 from the COVID-19 pandemic. The antitrust agencies, Congress and the Biden administration have indicated that healthcare mergers and acquisitions, including [vertical transactions](#), will face increased scrutiny. The FTC has already announced several initiatives aimed at the healthcare industry.

In January, the FTC also announced a retrospective study by the FTC's Bureau of Economics to analyze the effects of consolidation among physician groups and healthcare facilities from 2015 through 2020. The FTC issued orders to six health insurance companies to file special reports and provide data to aid the study. This may signal that the FTC is more likely to investigate and potentially challenge small non-reportable physician group and healthcare facility acquisitions.

In March, the antitrust agencies and state attorneys general announced their participation in a cross-border working group aimed at building a new approach to pharmaceutical mergers. The working group is spearheaded by the FTC and will include the DOJ Antitrust Division, state attorneys general, the Canadian Competition Bureau, the European Commission and the CMA. Among other issues, the working group plans to update theories of harm, assess characteristics of a successful divestiture buyer, and consider price-fixing and other “regulatory abuses” in merger review. One consideration that is likely to be part of this review is whether the traditional approach of evaluating transactions based on narrow product overlaps is the proper framework, or whether regulators should evaluate these transactions using a broader perspective.

Technology

We expect technology companies will remain under heavy scrutiny during the Biden administration. President Biden has nominated Lina Khan to fill one of the vacant FTC commissioner seats. An outspoken critic of “Big Tech,” Khan is well known for advocating that leading technology firms should be scrutinized for the alleged effect their conduct has on competitors. Khan has repeatedly argued for a departure from the consumer welfare standard, which is focused largely on prices to end consumers, and instead suggests that a broader framework of potential harms should be considered. On March 5, progressive antitrust author and law professor Tim Wu was named to the National Economic Council as a special assistant to President Biden on technology and competition policy. Wu is known as an outspoken critic of Big Tech and is an advocate for using enforcement power to break up monopolist firms.

- **Democrats Gain Control of Congress, Bring Antitrust Policy Ramp-Up**

Senator Klobuchar (D-MN) is leading an antitrust policy ramp-up that includes legislative proposals across the antitrust spectrum, including making it easier for the federal antitrust agencies to challenge transactions. For fiscal year 2021, Congress has approved a budget increase of \$20 million for the FTC and \$18 million for the DOJ Antitrust Division. The budget increase provides welcome relief to the antitrust agencies, whose resources have been taxed by aggressive merger enforcement, including several ongoing litigations.

The Competition and Antitrust Law Enforcement Reform Act of 2021, introduced on February 4, would increase the FTC and Antitrust Division budgets by more than \$300 million each for fiscal year 2022. Among many proposed changes, the bill would lower

the standard of proof for government enforcement actions by prohibiting mergers that “create an appreciable risk of materially lessening competition.” The current standard prohibits mergers where the effect “may be substantially to lessen competition.” The bill would also shift the burden of proof in certain enforcement actions from the government to the merging parties to show that the merger is not likely to materially lessen competition. Mergers or acquisitions subject to burden shifting include:

- Acquisitions that significantly increase market concentration
- Acquisitions by an acquirer with at least 50% market share
- Acquisitions of a “disruptive” firm by a competitor
- Acquisitions that would enable the acquiring firm to unilaterally exercise market power as a buyer or seller
- Mergers valued at greater than \$5 billion, or involving acquirers with assets, net revenue or market capitalization greater than \$100 billion.

These proposals, if ultimately enacted, would enhance the enforcement agencies’ ability to challenge and block large-firm transactions, in line with bipartisan calls for pushback on so-called unregulated monopolies, particularly in the technology sector.

EUROPEAN UNION

- **“Green Killer Acquisitions” Under Close Commission Scrutiny**

During the Organisation for Economic Co-operation and Development’s “Open Competition Day” event in February, Pierre Régibeau, Chief Competition Economist of the European Commission, highlighted the Commission’s ongoing efforts to thwart so-called “killer acquisitions” of green innovators, *i.e.*, acquisitions of disruptive green start-ups. Companies contemplating an acquisition of an innovative green competitor with a view to reducing their own need to invest in sustainable technologies should carefully consider the risks of increased Commission scrutiny before proceeding with a transaction.

Régibeau also explained that the Commission has been developing tools to better analyze and measure “green efficiencies” (such as a reduction in CO₂ emissions) that may offset the negative impact of a merger on competition. Such efficiencies tend by definition to be “out-of-market”, *i.e.*, outside the relevant market on which the competition concern arises, and affect society as a whole rather

than only those consumers purchasing the relevant product and directly impacted by the transaction. However, according to Régibeau, even if environmental “out-of-market externalities” are taken more seriously, in practice the Commission’s review of mergers is not expected to change significantly. This is because the assessment of efficiencies will continue to be conducted on a case-by-case basis and efficiencies must be merger specific. Green efficiencies are unlikely to be merger specific and often can be achieved through looser types of collaboration between companies, such as a licensing agreement.

- **Commission Publishes Results of Its Evaluation of EU Merger Control**

In March, following a public consultation and extensive analysis of deal activity and enforcement practice, the Commission published the findings of its evaluation of the functioning of the EU merger control rules in light of rapidly changing market realities. The Commission launched the study in August 2016. The Commission found that its turnover-based jurisdictional thresholds have been effective in capturing mergers that may have a significant impact on competition in the European Union, but recommended expanding the application of the Article 22 EUMR referral mechanism to enable the European Union to review smaller transactions that may not meet the current filing thresholds. The Commission further recommended reducing the scope of information required in simplified procedures.

Regarding the simplification of EU merger control review, the Commission’s evaluation concluded that the 2013 simplification package has been effective in increasing the use of simplified procedures in unproblematic mergers, thereby reducing the administrative burden both for businesses and the Commission in terms of resources and time. However, according to the Commission, there is scope for a further reduction in the amount of information required in a simplified case. The evaluation showed that the turnover-based jurisdictional thresholds, complemented with the referral mechanisms, have generally proved effective in capturing significant transactions in the EU internal market. The Commission also found that it needs to change the “restrictive approach” it has traditionally adopted towards accepting referrals by Member States under Article 22 of the EUMR because so-called killer acquisitions often fly under the merger control radar.

- **New Article 22 EUMR Guidance: Acquisitions of Nascent Competitors on the Commission’s Radar**

The Commission’s policy has been to discourage the use of Article 22 EUMR in merger cases that were not notifiable under the laws of the referring Member State(s) and thus unlikely to have a significant impact on the internal market. Recently, however, there has

been an increase in the number of mergers involving companies that have or may develop a significant competitive role in the market, despite generating little or no turnover at the time of the merger, particularly in the digital economy and in the pharmaceutical sector. Such transactions often escape assessment under national merger control rules because one of the parties has little or no turnover.

On March 26, the Commission issued practical guidance on when it might be appropriate for a Member State to refer such mergers to the Commission, with a view to ensuring that non-notifiable yet potentially problematic mergers undergo competition review. The Commission encourages referrals particularly where one party to the transaction:

- Is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model)
- Is an important innovator or is conducting potentially important research
- Is an actual or potential important competitive force
- Has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights)
- Provides products or services that are key inputs/components for other industries.

Since transactions involving nascent competitors—especially those in the digital economy and pharmaceutical sectors—are now more likely to be referred to the Commission for merger control review, merging parties may wish to preemptively approach the Commission to solicit an early indication of whether their intended transaction constitutes a candidate for referral under Article 22 EUMR.

UNITED KINGDOM

- **CMA Publishes Updated Merger Assessment Guidelines, Clarifies Notion of “Substantial” Lessening of Competition**

In March, the CMA published revised merger assessment guidelines reflecting significant market developments since it last issued guidance in 2010. The updated guidelines clarify that the notion of “substantial” in the context of a substantial lessening of competition (SLC) is to be assessed on a case-by-case basis. Notably, the guidelines provide that an SLC may be considered “substantial” even if the relevant market (or a segment thereof) is small in total size or value. The CMA may also take into account whether the relevant market is large or is otherwise important to UK customers, or whether there is limited competition in the market.

The CMA provided a non-exhaustive list of SLC scenarios in the updated guidelines, including where:

- The merger involves the market leader, and the number of significant competitors is reduced from four to three.
- The merging parties are close competitors in a differentiated market.
- Absent the merger, one of the merging parties would have entered or expanded and could become a strong competitor to the other party.
- The level or pace of future innovation or product development is threatened by the merger.
- The merger would prevent effective competition in other markets or services even nascent at the time of the merger.
- The merger would strengthen one or more of the conditions for coordination in the market.
- The merger between companies at different levels of a supply chain is expected to lead to the foreclosure of an important rival.

The CMA has also clarified that the SLC examples provided in its updated guidelines are merely indicative and do not constitute an exhaustive list of scenarios.

- **CMA Suggests It Will Seriously Consider Environmental Benefits in Merger Reviews**

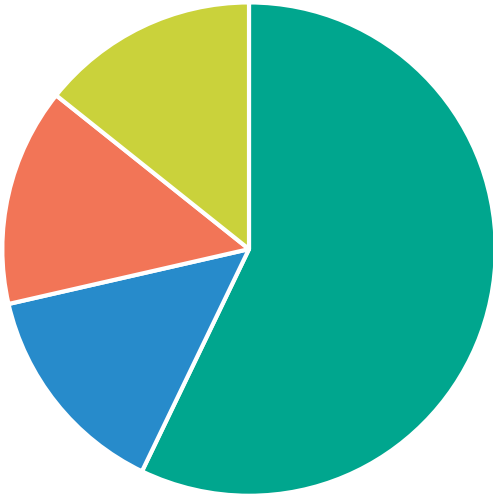
The CMA recognizes that the sustainability of a product or service is a “non-price” factor that may be considered a constitutive element of its “quality.” Environmental benefits, such as a reduction in carbon emissions, can therefore be considered a “relevant customer benefit” and could negate a finding of an SLC or be relevant when considering remedies. In this respect, the CMA will assess how such benefits would apply to “direct and indirect consumers” or “future customers,” and to society as a whole.

By providing more room for merging parties to invoke “green arguments,” the CMA takes a different approach from the Commission, which has stated that, in practice, it will not change the way it reviews mergers significantly, even if green efficiencies are taken more seriously. This difference in approach could result in conflicting findings in parallel merger reviews of the same deal by the Commission and the CMA post-Brexit.

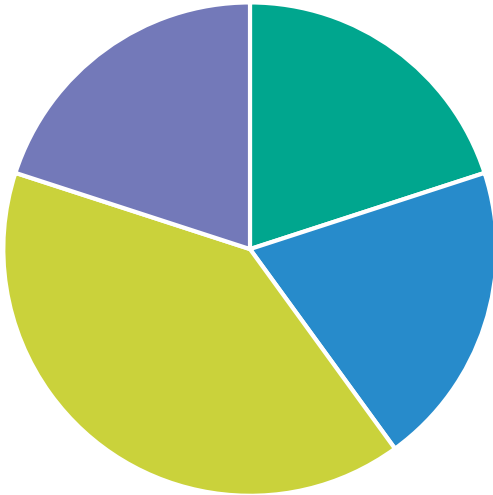
ENFORCEMENT IN KEY INDUSTRIES¹



United States



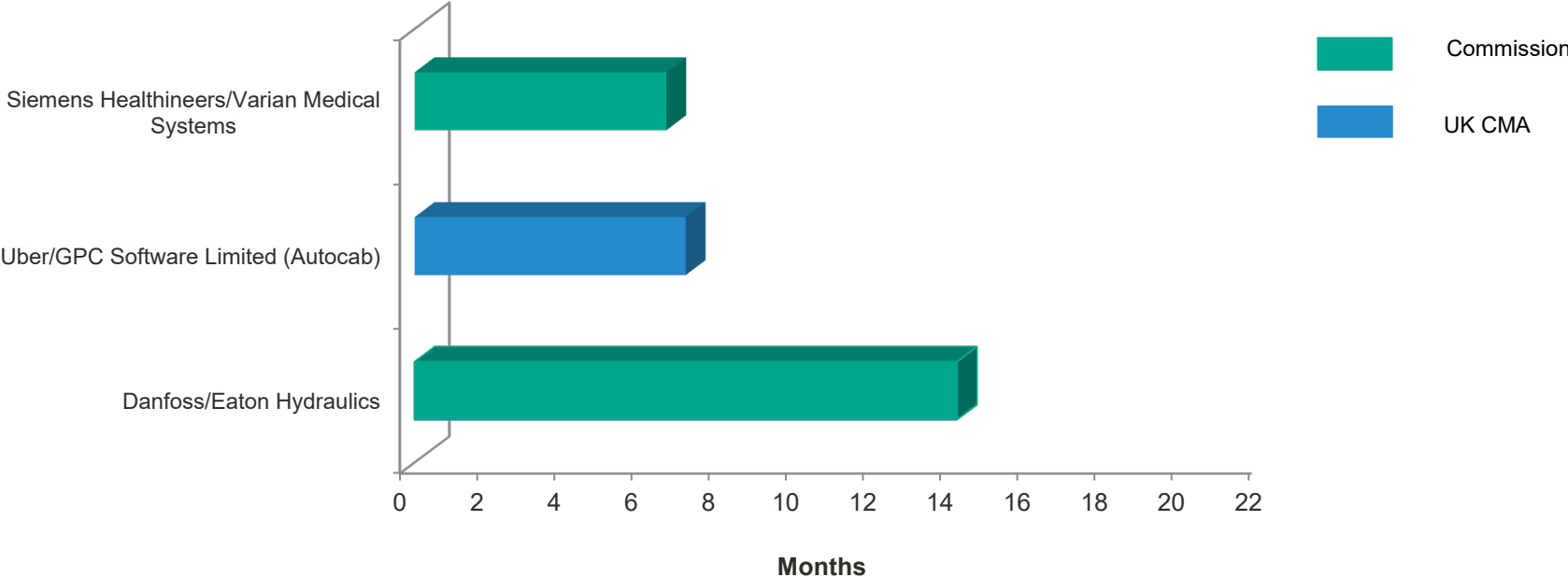
Europe & the United Kingdom



¹ For the United States, the graphs include cases where the FTC or DOJ 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 the European Union and the United Kingdom, the graphs included 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 ACTIONS²

European Union & the United Kingdom (Time from Signing to Clearance)



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.

³ DOJ opened an investigation into Geisinger Health/Evangelical Hospital 19 months after the parties consummated the transaction. The timeline shown above represents the duration of the investigation from the time DOJ filed a complaint until the issuance of a consent order.

Notable US Cases

PARTIES	AGENCY	CASE TYPE (CLEARED, CONSENT, CHALLENGED, ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Illumina, Inc. / GRAIL, Inc.	FTC	Challenged	<p>Non-invasive, multi-cancer early detection (MCED) test production in the United States.</p> <p>Illumina produces more than 90% of the world's next-generation DNA sequencing production, a critical input for the development and commercialization of MCED tests. GRAIL is a start-up firm that competes with other firms developing MCED tests.</p>	<p>The FTC filed an administrative complaint to block Illumina's \$7.1 billion proposed acquisition of GRAIL. The FTC also filed a motion for preliminary injunction in the US District Court for the District of Columbia. Illumina successfully transferred the case to the Southern District of California. GRAIL makes non-invasive MCED tests. The FTC alleges that Illumina is the only provider of the DNA sequencing that MCED competitors, including all of GRAIL's rivals, require. Illumina formed GRAIL in 2015, but has since reduced its ownership interest to 14.5% of GRAIL's voting shares.</p> <p>The FTC Commissioners voted to issue the complaint was 4–0. FTC Acting Chair Rebecca Kelly Slaughter said that the acquisition would “likely reduce innovation in [MCED testing], diminish the quality of MCED tests, and make them more expensive.” This is the FTC's first vertical merger challenge in decades, signaling follow-through on the Democratic FTC commissioners' approach to increase vertical transaction scrutiny. It also follows on the heels of the release of the vertical merger guidelines in 2020.</p> <p>The FTC argues that because Illumina is the only viable supplier of a critical input—DNA sequencing—Illumina will be in a position to raise prices charged to GRAIL's competitors. According to the complaint, Illumina's post-acquisition position would allow it to impede competitor research and development, and/or refuse or delay executing critical licensing agreements for MCED lab testing. The FTC also said that Illumina's dominant market position in critical inputs means it would take years for MCED test developers to switch to a competing DNA sequencing supplier, if one was later developed, and in some situations would require the developer to conduct new clinical trials.</p>

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Jefferson Health / Albert Einstein Healthcare Network	FTC	Defendants defeated FTC challenge	<p>FTC alleged two markets:</p> <p>(1) Inpatient general acute care services. FTC alleged the combined entity would have more than 60% market share in North Philadelphia and 45% market share in Montgomery County, Pennsylvania.</p> <p>(2) Inpatient rehabilitation services. FTC alleged the combined entity would control 70% of the market for these services in the Philadelphia area.</p>	<p>In February 2020, the FTC sued to block the merger, arguing that the parties compete on quality and service, which benefits consumers by resulting in increased investments in medical facilities and new technologies. The FTC also argued that the transaction would result in insurers choosing to pay more to maintain access to all hospitals in the market.</p> <p>In December 2020, the US District Court for the Eastern District of Pennsylvania denied the FTC and Pennsylvania Attorney General’s motion for preliminary injunction. The district court was unconvinced that the two systems actually compete, or that commercial insurers would be forced into paying more for hospital services as a result of the merger. The court found that the FTC’s geographic market definitions left out some of the hospital systems that compete with Jefferson. The court faulted the FTC’s economic expert testimony because it was substantially based on unconvincing payor testimony. The FTC appealed to the US Court of Appeals for the Third Circuit for an emergency injunction while it appealed the denial of a preliminary injunction. The Third Circuit panel summarily denied the FTC’s request without issuing an opinion.</p> <p>The Pennsylvania AG’s office dropped its opposition to the merger in early January 2021, after Jefferson agreed to invest an additional \$200 million in North Philadelphia.</p> <p>In early March, the FTC announced a 4–0 vote to voluntarily dismiss its appeal to the Third Circuit, and the FTC’s administrative complaint was dismissed March 15. This marks the FTC’s first loss in a hospital merger challenge since Advocate Health/NorthShore University Health System in 2016—a loss that the US Court of Appeals for the Seventh Circuit eventually reversed.</p>

Notable European Union & UK Cases

PARTIES	AGENCY	CASE TYPE (CLEARED, CHALLENGED, ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Danfoss / Eaton Hydraulics	European Commission	Cleared	<p>The markets for certain hydraulic components for mobile applications, including:</p> <ul style="list-style-type: none"> (1) Hydraulic steering units (HSUs) (2) Electrohydraulic steering valves (ESVs) (3) Orbital motors <p>Further details regarding product/geographic markets/structure/market shares are not yet publicly available.</p>	<p>Danfoss and Eaton Hydraulics are both leading global manufacturers of hydraulic components used to make hydraulic systems for mobile machinery, also known as “mobile applications” (for example, agricultural and construction machinery).</p> <p>The Commission opened an in-depth Phase II investigation into the transaction because it had concerns that the transaction as notified would lead to a reduction in choice of suppliers and higher prices in the markets for HSUs, ESVs and orbital motors. The Commission also identified high barriers to entry for new entrants and difficulties for customers to switch suppliers.</p> <p>To address the Commission’s concerns, Danfoss offered to divest parts of its HSU, ESV and orbital motors businesses. These include Danfoss’ plants in Wroclaw (Poland), Parchim (Germany) and Hopkinsville (United States). The structural divestiture will be complemented by the transfer of Eaton’s production lines for medium power orbital motors (HP and VIS models), Eaton’s Series 10 production line for HSUs, and production assets for Eaton’s ESV portfolio to the Hopkinsville plant. Danfoss also committed to transfer additional Danfoss and Eaton technology for HSUs.</p> <p>This is one of only a handful of ongoing Phase II investigations by the Commission, and was initiated with a view to gathering more in-depth feedback from competitors and customers, given that the transaction would remove a principal competitor for the supply of hydraulic components.</p>

PARTIES	AGENCY	CASE TYPE (CLEARED, CHALLENGED, ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Fincantieri / Chantiers de l'Atlantique	European Commission	Abandoned	<p>The Commission found that the global market for cruise shipbuilding is a concentrated and capacity constrained market.</p> <p>Further details regarding product/geographic markets/structure/market shares are not publicly available.</p>	<p>Fincantieri's proposed acquisition of Chantiers de l'Atlantique was initially notified to the French and German competition authorities, which subsequently referred the transaction to the Commission under Article 22 EUMR. The Commission accepted the referral in January 2019. In October 2019, the Commission opened an in-depth Phase II investigation into whether the transaction would reduce competition in the global cruise shipbuilding market. The Commission was concerned that the transaction would remove Chantiers de l'Atlantique as an important competitive force in the market, leading to higher prices, less choice and reduced incentives to innovate. The Commission identified high barriers to entry in this market because of the very complex nature of cruise shipbuilding.</p> <p>In March 2020, the Commission suspended its review of the transaction because of COVID-19. In July 2020, the Commission sent a letter to Fincantieri requesting that it provide additional information, including changes in the market structure caused by COVID-19. The parties failed to respond to the request. In February 2021, Fincantieri notified the Commission that it had abandoned the transaction. The French and Italian Economy Ministers had previously informed the Commission that the current economic context, the ongoing health crisis and the lack of certainty about the recovery of the shipbuilding industry did not allow for the merger to be pursued.</p> <p>The political aspects of the case are noteworthy. The Commission's strict approach in this case echoes the approach it took in Siemens/Alstom (2019) whereby the Commission argued that the need to create "European champions" cannot come at the expense of competition. In Fincantieri/Chantiers de l'Atlantique, the parties argued a powerful EU entity was necessary to face emerging competition from Asia. The Commission rejected this argument, prioritizing the preservation of competition over industrial policy objectives.</p>

PARTIES	AGENCY	CASE TYPE (CLEARED, CHALLENGED, ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Uber / GPC Software Limited (Autocab)	CMA	Cleared	<p>The CMA found that Uber and Autocab had a combined share of more than 25% in the supply of booking and dispatch technology (BDT) software in the United Kingdom.</p> <p>Although there are differences in the BDT supplied by the parties (with Uber only self-supplying its BDT), the CMA found that there is sufficient overlap in the core components of the parties' BDT services.</p>	<p>On March 29, 2021, the CMA cleared Uber's acquisition of Autocab following a Phase I investigation.</p> <p>Uber's main business is providing ride-hailing services, namely applications that connect consumers with drivers. Autocab primarily develops and supplies two types of software for taxi services: BDT enabling taxi companies to connect drivers to end customers, and the iGo network, which connects demand for taxi trips (generated by a party that cannot satisfy the demand, usually known as an "aggregator") with supply for taxi trips.</p> <p>The CMA reviewed a substantial volume of internal documents from both Uber and Autocab, and considered submissions from other market participants such as taxi companies, competing BDT suppliers and competing ride-hailing suppliers. Regarding whether the transaction would lead to a loss of competition between the parties in the supply of BDT, the CMA concluded that there was only limited indirect competition between Uber and Autocab. Post-transaction, the parties would continue to face sufficient competition from other BDT suppliers and ride-hailing rivals.</p> <p>The CMA also considered whether the transaction could put Autocab's taxi company customers that compete against Uber at a disadvantage by reducing the quality of BDT software sold to them, or by forcing them to pass on data to Uber. It found that there were other credible suppliers of BDT software and referral networks to which these taxi companies could switch if Uber were to reduce the quality of the Autocab service or force the company to share its data.</p> <p>A remarkable aspect of this case is the CMA's conclusion that it can assert jurisdiction when parties have similar products or technologies even if one party self-supplies and only the other party is active on the market selling to third parties.</p>

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