



# ANTITRUST M&A SNAPSHOT

January 2022

## OCTOBER – DECEMBER 2021: HIGHLIGHTS

### UNITED STATES:

- Both antitrust agencies have now filled senior leadership positions, although the Federal Trade Commission (FTC) awaits the appointment of a fifth commissioner.
- Challenges to mergers continue apace at both the FTC and the Department of Justice (DOJ). The agencies challenged two mergers in the fourth quarter and a third transaction was abandoned. Additionally, nine consent orders were approved.
- The FTC is including prior approval provisions in consent orders across industries, requiring parties seeking to settle merger disputes to agree to provide the FTC with greater rights to reject potential future deals.

### EUROPEAN UNION:

- The European Commission (Commission) imposed interim measures for the first time in the context of the Commission's determination that Illumina's acquisition of GRAIL was premature.

- The Commission conditionally cleared, in Phase I, Veolia’s acquisition of Suez—a transaction involving two French incumbents in the water and waste sectors—following comprehensive commitments.
- IAG withdrew from its proposed acquisition of Air Europa following the Commission’s decision not to approve the transaction absent further concessions.

## UNITED KINGDOM:

- The Competition & Markets Authority (CMA) imposed a record fine of £50.5 million on Facebook for breaching an initial enforcement order related to its acquisition of Giphy, and ultimately required Facebook to sell Giphy.
- The CMA updated its merger guidance in parallel with the entry into force of the UK National Security and Investment Act.
- The CMA published a new template for initial enforcement orders and updated its guidance on interim measures.

## KEY THEMES AND TAKEAWAYS

### UNITED STATES

- **FTC and DOJ Fill Key Senior Leadership Positions**

On June 15, 2021, the Senate swore in Lina Khan as Chair of the FTC. On October 12, Rohit Chopra officially concluded his service as FTC commissioner, leaving the FTC with four commissioners (two Democrats and two Republicans). Although President Biden nominated Alvaro Bedoya to fill the final position, the Senate returned Bedoya’s nomination to the president in late December. President Biden has since renominated Bedoya to the Commission, but Bedoya awaits confirmation proceedings. Until a fifth commissioner is appointed, it is possible the FTC could deadlock on partisan lines on enforcement proceedings, consent orders or policy changes. Additionally, on November 26, Chair Khan named John Kwoka as chief economist to the Chair to work on an

“[updated approach to merger review policies](#).” Kwoka has written exhaustively on his view that FTC and DOJ merger enforcement has been too lenient and consent orders have failed to protect competition.

On November 17, Jonathan Kanter was confirmed as Assistant Attorney General for the DOJ’s Antitrust Division.

- **Aggressive Antitrust Enforcement Continues Apace**

Despite the shifting leadership landscape at the agencies, the DOJ and FTC continue to challenge mergers.

On November 2, 2021, the DOJ filed a complaint in the US District Court for the District of Columbia to block Penguin Random House’s proposed acquisition of Simon & Schuster. On November 23, the DOJ filed a complaint in the US District Court for the District of Delaware to block United States Sugar Corporation’s proposed acquisition of Imperial Sugar Company.

On December 2, the FTC filed a complaint to block a proposed \$40 billion vertical merger between Nvidia Corp. and Arm Ltd. Also on December 2, Great Outdoors Group, LLC (known for its Bass Pro Shops and Cabela’s stores), abandoned its proposed acquisition of Sportsman’s Warehouse following feedback from the FTC that they would not receive clearance to close the transaction after an 11-month investigation.

The DOJ and FTC also announced nine consent orders during the quarter, reversing the decline in the number of consent orders issued during the prior two quarters.

- **FTC Restores Practice of Routinely Restricting Future Acquisitions for Merging Parties in Consent Decrees**

On October 25, 2021, the FTC announced a return to the practice of including prior approval provisions in consent decrees for allegedly anticompetitive mergers. This means that in addition to divesting a business, the FTC is requiring companies to obtain FTC prior approval before purchasing any business that competes in the same market, even if the subsequent transaction is not Hart-Scott-Rodino Act (HSR) reportable. In explaining the policy, Holly Vedova, Director of the Bureau of Competition, noted “The FTC should not have to waste valuable time and resources investigating clearly anticompetitive deals that should have died in the

boardroom. Restoring the long-standing prior approval policy forces acquisitive firms to think twice before going on a buying binge because the FTC can simply say no.”

Since that announcement, prior approval provisions have appeared in multiple consent orders across various industries, including healthcare, pharmaceuticals, oil and gas, and retail. See, e.g., Global Partners LP / Wheels; ANI Pharmaceuticals, Inc. / Novitium Pharma LLC; and Price Chopper / Tops. The provisions typically are limited geographically and to the term of the order, which is generally 10 years. However, in one case involving a “particularly acquisitive company,” the geographic scope of the prior approval provision extends beyond the market directly impacted by the transaction.

In addition to requiring many merging parties to agree to prior approval provisions, the FTC has also required divestiture buyers to sign up to these provisions. In several consent orders, for a period of 10 years, the divestiture-buyer is required to obtain prior approval before selling the divested assets.

## EUROPEAN UNION

- **The European Commission Imposes Interim Measures for the First Time for Breach of the EUMR “Standstill” Obligation**

In October 2021, the European Commission imposed interim measures on Illumina and GRAIL to restore and maintain competition between the entities following Illumina’s decision to close its acquisition of GRAIL prior to the Commission completing its review of the transaction and in breach of the EU Merger Regulation (EUMR) standstill provision. The Commission is continuing its in-depth review of the transaction and a final decision on whether to clear or block the transaction is expected in February. This is the first time the Commission has imposed interim measures since the EUMR was entered into force in 2004.

The Commission imposed five measures: (i) “GRAIL will remain separate from Illumina and will be led by one or more independent managers responsible for ensuring the segregation of the business for the benefit of GRAIL only (and not that of Illumina);” (ii) “Illumina and GRAIL are prohibited from exchanging confidential business information, except when disclosure is required by law or is necessary in the normal course of their supplier-customer relationship;” (iii) “Illumina is required to provide additional funds necessary for the operation and development of GRAIL;” (iv) “The parties will interact commercially under normal competitive

conditions, without unduly favoring GRAIL to the detriment of its competitors;” and (v) “GRAIL should actively seek alternatives to the transaction in question in order to prepare for the possible scenario that the merger may be cancelled because the Commission considers it incompatible with the internal market.”

The Commission’s decision to impose interim measures serves as a stern reminder that it takes what the Commission determines to be procedural infringements of the EUMR seriously, even in the context of non-notifiable mergers that have been referred to it pursuant to Article 22 of the EUMR.

- **The Commission Gives Phase I Approval to Veolia’s acquisition of Suez, Subject to Far-Reaching Commitments**

On December 14, 2021, the Commission conditionally cleared in Phase I Veolia’s acquisition of Suez. The Commission deemed Veolia’s comprehensive commitments sufficient to assuage the Commission’s competition concerns, without the need for a Phase 2 investigation.

The Commission found that the merger between the two leaders in water treatment and waste management would lead to significant horizontal overlaps in several markets in France and in the European Economic Area (EEA): (i) municipal water management; (ii) industrial water management in France and mobile water services in the EEA; (iii) the collection and treatment of non-hazardous and regulated waste; and (iv) the treatment of hazardous waste in France. Veolia agreed to divest: (i) almost all Suez’s activities in the non-hazardous and regulated waste management markets and the municipal water market in France; (ii) almost all of Veolia’s activities in the mobile water services market in the EEA; and (iii) the vast majority of Veolia’s activities in the French segment of the industrial water management market.

Clearance of the transaction by the UK Competition and Markets Authority is still pending (currently in Phase 2).

- **IAG/Globalia: IAG Abandons Acquisition of Air Europa**

IAG, owner of leading airlines in Ireland, Spain and the UK, sought to acquire Air Europa from Globalia and provided notification of the transaction to the Commission in May 2021. IAG, owner of Iberia and Vueling, is the largest airline in Spain and Air Europa is the third-largest airline in Spain. The Commission opened a Phase 2 investigation into the proposed transaction in June 2021.

Competition Commissioner Margrethe Vestager stated that, even taking into account the impact of COVID restrictions, the merger would have negatively affected competition on some domestic, short-haul and long-haul routes within, to and from Spain. The parties abandoned the transaction in December 2021.

IAG/Globalia was the second transaction in 2021 to withdraw from a proposed acquisition in the passenger air transport sector: Air Canada withdrew from its decision to acquire Transat in April 2021. In both transactions, the companies failed to propose a remedy package that was sufficient to address the Commission's competition concerns.

## UNITED KINGDOM

- **Facebook/Giphy: A Record Fine of £50.5 Million and an Order to Divest Giphy**

In May 2020, Facebook purchased Giphy, the largest provider of GIFs (a format for image files that supports both animated and static images). Giphy operates an online database and search engine that primarily allows users to search and share GIFs and can be used indirectly on third-party apps, mostly social networks.

In June 2020, the CMA issued an initial enforcement order against Facebook, preventing Facebook and Giphy from further integrating their businesses while the CMA's investigation is pending. The CMA's Competition Appeal Tribunal denied Facebook's request to be released from the initial enforcement order. The CMA's decision was ultimately upheld by the Court of Appeal. The CMA referred the merger for a Phase 2 investigation in April 2021 after alleging competition concerns regarding digital advertising and the supply of GIFs, and following the parties' refusal to offer undertakings to address the CMA's concerns.

On October 20, 2021, the CMA fined Facebook a record £50.5 million for breaching the initial enforcement order. The CMA explained that "[it] warned Facebook that its refusal to provide important information was a breach of the order but, even after losing its appeal in two separate courts, Facebook continued to disregard its legal obligations." The CMA further explained that the record fine "should serve as a warning to any company that thinks it is above the law."

The CMA ultimately required Facebook to sell Giphy on the basis that Facebook would be able to increase its already significant market power in relation to other social media platforms. Facebook's proposed remedies were ultimately deemed insufficient to address the CMA's competition concerns.

- **The CMA Updates Its Merger Guidance in Light of the National Security and Investment (NSI) Act**

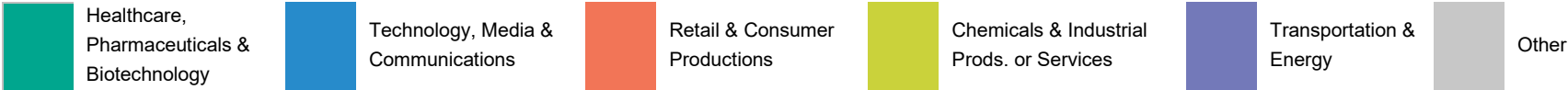
The CMA updated its merger guidance to account for the entry into force of the NSI Act on January 4, 2022. The NSI Act replaces the system of discretionary public interest intervention in mergers by the UK government under the UK Enterprise Act and creates a new mandatory notification system operated by the Investment Security Unit (ISU), part of the UK Department for Business, Energy and Industrial Strategy.

Mergers may now qualify for review under the UK merger control regime and the UK national security regime. The revised merger guidance provides that, in such circumstances, "the CMA and the ISU expect to coordinate, as may be appropriate, to manage the interactions between the two regimes that may arise in specific cases" and that, where a merger is investigated by the CMA on competition grounds and for national security reasons under the NSI Act, "the CMA may share confidential information with the ISU."

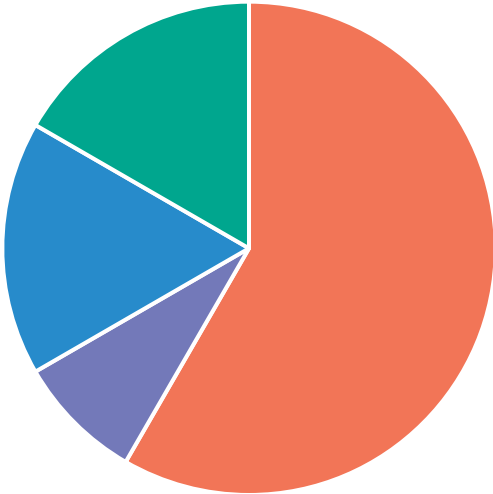
- **The CMA Updates Its Interim Measures Guidance**

On December 21, 2021, the CMA updated its guidance on interim measures in merger investigations and the initial enforcement order template. Interim measures take three forms, which depend on the stage of the investigation and whether they are imposed on the merging parties or agreed between the parties and CMA: (i) initial enforcement orders (imposed in Phase 1); (ii) interim orders (imposed in Phase 2); or (iii) interim undertakings (agreed upon with the merging parties in Phase 2). The CMA explained that this update aims to "provide further clarity in relation to whom interim measures will typically apply, and the CMA's expectations as to the steps that merging parties should take to ensure compliance with interim measures."

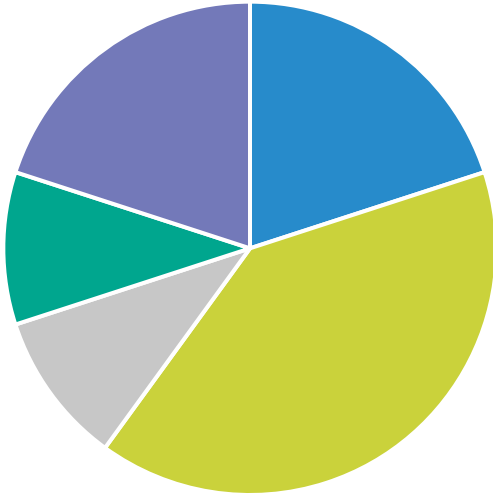
ENFORCEMENT IN KEY INDUSTRIES<sup>1</sup>



United States



Europe & the UK

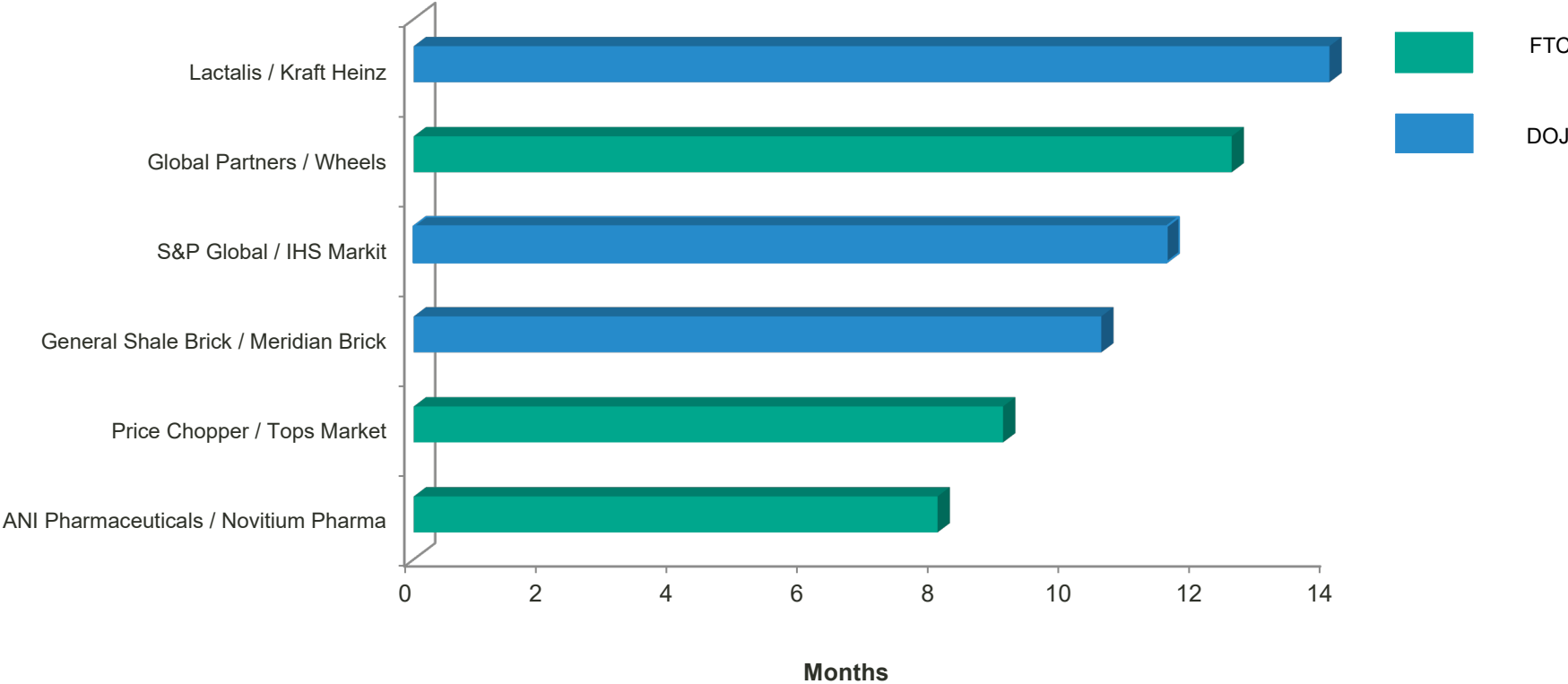


<sup>1</sup> For the US, the graphs include cases during the quarter where an antitrust enforcement agency issued a Second Request, consent order or complaint initiating litigation against the parties to the transaction, as well as transactions that were abandoned after an antitrust investigation. For Europe and the UK, 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.



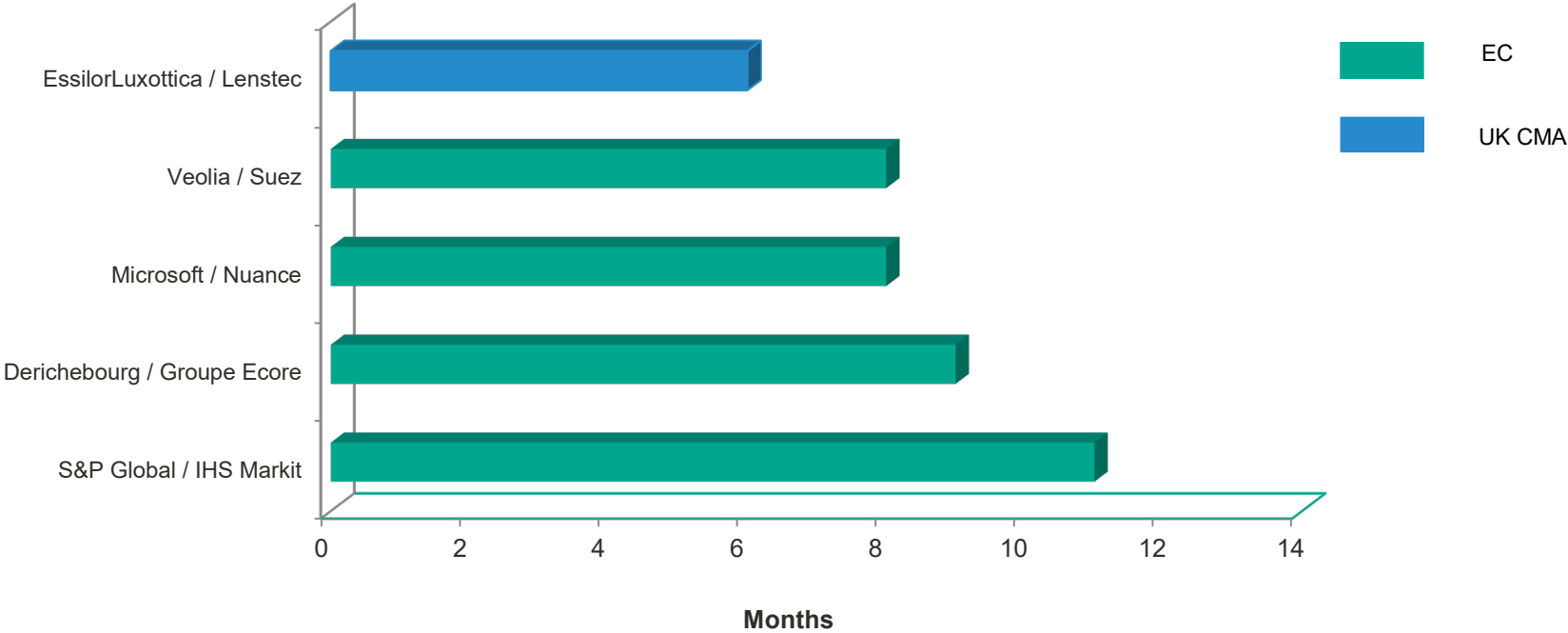
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS<sup>2</sup>

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



<sup>2</sup> 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; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Penguin Random House / Simon & Schuster	DOJ	Challenged	5-to-4, combining the largest and fourth-largest publishers in the United States.	<p>In November 2021, the DOJ filed suit in the District of Columbia to stop Penguin’s proposed \$2.175 billion acquisition of Simon &amp; Schuster. Attorneys general from 24 states, the District of Columbia, and Guam joined in the suit. The DOJ alleges that the publishing industry features five dominant firms, and this merger would see the largest publisher combining with the fourth-largest to “cement” their position as the dominant publisher in the United States. The DOJ further alleges that publishers compete to acquire manuscripts, which they edit, package, market and distribute as books. Authors receive compensation from publishers, typically in the form of an advance, for the right to publish their books. The DOJ alleges that the advance usually represents the author’s total compensation, and only the five largest publishers (known as the “Big Five”) are typically able to pay high enough advances and offer the extensive editorial and marketing support needed to attract best-selling authors.</p> <p>As a result of the transaction, Penguin would allegedly have “outsized influence” over which books are published and how much authors are paid. The DOJ’s case is based on a monopsony theory, asserting that authors will struggle to receive fair compensation for their work if this already-concentrated industry grows even more concentrated (which would, in turn, result in authors writing less, so that the quantity and variety of books available to consumers would be diminished).</p> <p>Under the current schedule, fact discovery will close in April 2022 and expert discovery is due in June. Trial is set to begin on August 1.</p>

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Nvidia / Arm	FTC	Challenged	<p>Computer processing designs and technology for three worldwide computer chip and device markets.</p> <p>Nvidia is one of the largest suppliers of finished computer chips and devices and the dominant supplier of standalone graphics processing units (GPUs) for personal computers and data centers. Arm develops and licenses central processing unit (CPU) designs and architectures to chip manufacturers like Nvidia.</p>	<p>In December 2021, the FTC sued to block Nvidia Corp.'s \$40 billion acquisition of Arm Ltd. The proposed vertical deal would combine one of the largest chip companies with Arm's computing technology and designs, which are used by many chip companies. The FTC's complaint alleges that the combined firm would have the means and incentive to stifle innovative next-generation technologies in three worldwide markets: high-level advanced driver assistance systems for passenger cars, data processing unit (DPU) smart network interface controllers (SmartNICs), and Arm-based CPUs for cloud computing service providers.</p> <p>The FTC alleges that Arm's technologies are the "de facto industry standard" for computer chip processing technology globally. It also argues the combined firm will have the incentive and ability to foreclose rivals from accessing Arm's processing technology because profits arising from additional sales of the downstream chips and devices will be higher than the foregone proceeds of licensing Arm's technology to Nvidia's rivals. The FTC also alleges the transaction will harm competition by giving Nvidia access to rivals' competitively sensitive information through Arm.</p> <p>Nvidia and Arm had offered the FTC a "comprehensive set of commitments that will guarantee their post-transaction commitment to competition," including implementing firewalls and offering to establish an independent licensing company that would have "the exclusive and sole right" to license Arm's technology on nondiscriminatory terms to any third parties, except in China. However, in January 2022, the FTC told an administrative law judge that while it remains "open" to negotiating a settlement with the merging parties, it "do[es] not see the likely prospect of settlement."</p> <p>The administrative trial is scheduled to begin on August 9. The FTC is not suing for a preliminary injunction because the transaction cannot close in Europe. As a result, only the FTC administrative case has been filed.</p>

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
ANI Pharmaceuticals / Novitium Pharma	FTC	Consent	<p>Individual generic drug markets.</p> <p>6-to-5, where one current supplier had manufacturing issues and Novitium was a potential near-term entrant; 4-to-3 where two suppliers were on market and both merging parties had products in development.</p>	<p>In March 2021, ANI Pharmaceuticals, Inc., agreed to acquire Novitium Pharma LLC for \$210 million. In November, ANI and Novitium agreed to divest to Prasco LLC ANI's rights and assets to one generic drug that is on market and development rights to a second generic drug.</p> <p>The first drug, generic sulfamethoxazole-trimethoprim (SMX-TMP), is an oral suspension antibiotic used to treat ear infections, urinary tract infections, bronchitis and other infections. ANI is one of five participants in the market, although at least one supplier had difficulty manufacturing the product. The FTC alleges Novitium is one of a limited number of suppliers well positioned to enter the market. The second drug, generic dexamethasone tablet, is an oral steroid used to treat certain types of arthritis, allergic reactions, skin diseases and breathing problems, among other uses. Only two companies currently sell the drug and both ANI and Novitium have products in development.</p> <p>Both drugs must be divested within 10 days after the acquisition is finalized. The parties are required to obtain prior approval before acquiring any other SMX-TMP oral suspension or dexamethasone tablet products for the duration of the consent order, which is 10 years. The proposed order also requires FTC approval before the parties may acquire any rights or interests in certain products that have erythromycin and ethylsuccinate as the active ingredients, even though ANI and Novitium do not currently compete in those products. This second prior approval provision was included because ANI sells an erythromycin and ethylsuccinate product and Novitium owns an unexecuted option to acquire a similar product.</p> <p>Divestiture-buyer Prasco is also required under the order to obtain prior approval for a combined period of 10 years after the order is issued before divesting the products it will acquire.</p>

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Price Chopper / Tops	FTC	Consent	<p>2-to-1 in three relevant geographic markets; 3-to-2 in four relevant geographic markets; 4-to-3 in three relevant geographic markets; and 5-to-4 in one relevant geographic market.</p> <p>The geographic markets are various local markets in upstate New York and Vermont.</p>	<p>The Golub Corp., which owns the Price Chopper grocery chain, and Tops Market Corp. have agreed to divest 12 Tops supermarkets in 11 local markets across upstate New York (Cooperstown, Cortland, Oneida, Owego, Norwich, Warrensburg, Lake Placid, Rome, Watertown and Plattsburgh) and Vermont (Rutland). The FTC alleged the proposed merger between Price Chopper and Tops would have resulted in highly concentrated markets in these areas, leading to higher prices for consumers due to unilateral or coordinated conduct.</p> <p>Pursuant to the order, the parties must begin divesting on a rolling basis (two stores per week for six weeks). The order also requires the parties to obtain prior approval before selling or acquiring supermarkets in the affected markets. Similarly, for three years the divestiture buyer must obtain prior approval before selling any of the divested stores and for an additional seven years must obtain prior approval if selling to a buyer that operates one or more supermarkets in the same county.</p>

Notable European & UK Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Nvidia / Arm	EC	Referred to Phase 2	Licensing of intellectual property for processing units (in particular, semiconductors and systems-on-chip).	<p>On October 27, 2021, the Commission announced it had opened Phase 2 proceedings to assess Nvidia’s proposed acquisition of UK-company Arm. The transaction was notified on September 8.</p> <p>The decision to subject the transaction to an in-depth investigation follows the submission of commitments by Nvidia on October 6, which the Commission considered insufficient to allay its competition concerns. The Commission did not carry out a market test of the commitments.</p> <p>The Commission is particularly concerned that (i) the acquisition could lead to higher prices, less choice and reduced innovation in the semiconductor industry and in a number of markets where semiconductors are used; and (ii) the merged entity would have the ability to restrict or degrade access to Arm’s technology by providers of processor products that Nvidia may compete with.</p> <p>On December 3, the Commission extended the Phase 2 deadline to April 12, 2022, to request additional information from the companies. Nvidia warned that the investigation “may result in the termination of the Purchase Agreement and the failure to close the transaction” if the deal continues to be held up by the Commission (among other jurisdictions reviewing the transaction).</p>

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Derichebourg / Groupe Ecore	EC	Cleared subject to conditions (Phase 1)	Collection and recycling of metal scrap, recycling of electrical and electronic equipment scrap, and commercialization of shredded ferrous scrap.	<p>The Commission was notified of the transaction on October 26, 2021, and gave conditional Phase 1 clearance on December 17.</p> <p>The Commission was concerned that the merged entity would have had a very strong position with respect to the collection and recycling of metal scrap in several regions in France, which would have eliminated an important alternative for customers and suppliers.</p> <p>Derichebourg proposed three commitments that were deemed to fully address the Commission’s concerns, namely: (i) to divest four recycling plants in France incorporating a shredder and four collection sites; (ii) to offer, at the option of the purchaser, up to five additional collection sites in France located in the same catchment area as the divested recycling facilities, which will contribute to the supply of metal scrap to the shredders; and (iii) to offer transitional service agreements, including access to all assets and services necessary to operate the divested business competitively, for a period of time enabling the divested business to become fully independent from Derichebourg.</p>
CHC / Babcock oil and gas offshore helicopter business	UK CMA	Challenged	<p>Supply of oil and gas offshore transportation services in the UK.</p> <p>4-to-3</p>	<p>On September 23, 2021, the CMA announced the launch of a merger inquiry into CHC’s proposed purchase of Babcock’s oil and gas offshore helicopter business. CHC and Babcock are two of four suppliers in this field and regularly compete against each other to win contracts.</p> <p>Given the CMA’s initial view that the merger could result in a substantial lessening of competition owing to significant horizontal overlaps leading to higher prices and lower-quality services for customers, the CMA decided to refer the completed acquisition for an in-depth investigation on November 29 with a statutory deadline of May 15, 2022.</p>



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