April 2023

JANUARY – MARCH 2023: KEY THEMES AND TAKEAWAYS

UNITED STATES

- **Wilson Resigns as FTC Commissioner**

  On February 14, the Federal Trade Commission's (FTC's) lone Republican commissioner, Christine Wilson, announced that she was resigning. Wilson explained her decision in an op-ed published in *The Wall Street Journal* the same day, wherein she accused FTC Chair Lina Khan of disregarding the rule of law and due process and abusing the FTC's power. Wilson has been a consistent opponent of policy and process changes implemented by the Democratic commissioners. In her op-ed, Wilson highlighted several of her disagreements with her Democratic colleagues. For example, she criticized Chair Khan's decision not to recuse herself from the FTC's challenge of Meta's acquisition of Within, despite Chair Khan's prior statements arguing that all future Facebook deals should be blocked. Commissioner Wilson also expressed disagreement with the FTC's expansive new policy statement on policing "unfair methods of competition" under Section 5 of the FTC Act and argued that changes to the FTC's merger review process have imposed a "tax on all mergers." Wilson's term was not set to expire until 2025. The immediate practical impact of her departure likely will not be significant, as the FTC's three Democrats already had a majority on the Commission.

- **Merger Guidelines Delayed**

  The new FTC / Department of Justice (DOJ) Horizontal Merger Guidelines were expected to be released at the end of March, but they continue to be refined by the agencies, with the release now expected within the next several months. At the American Bar Association (ABA) Antitrust Section Spring Meeting in late March, DOJ officials signaled that the forthcoming updates to the Horizontal Merger Guidelines will be guided by a focus on certain relevant stakeholders, including the American people, workers and small businesses, and with a commitment to democratizing antitrust enforcement. This signals a continued move away from the Chicago School focus on "consumer welfare" toward the embracing of a broader set of considerations. We expect the new Guidelines will be far more enforcement-oriented than the current Guidelines.

- **Agencies Maintain Focus on Private Equity, Especially in Healthcare**

  Consistent with recent statements on private equity, at the ABA Spring Meeting, enforcers from the FTC and DOJ again highlighted their continued targeting of private equity transactions, particularly with regard to healthcare. Rahul Rao, deputy director at the FTC's Bureau of Competition, stated that the FTC's concern with private equity stems from many of the firms' business models. He said that, in many cases, private equity deals' debt financing and associated heavy debt loads can undermine a business's long-term health and its ability to compete, chiefly because the private equity owner focuses on short-term returns through drastic cost-cutting measures. Rao said, "This debt-fueled, strip-and-flip business model can hollow out long-term productive capacity." He also bemoaned nonreportable "serial acquisitions" by private equity firms in healthcare, asserting that private equity ownership of healthcare businesses is correlated with higher prices, lower wages and degraded quality of care.

- **Continuing a Trend: FTC Loses Challenge to Meta's Acquisition of Within**

  In February, a California federal judge rejected the FTC's challenge to Meta's acquisition of Within, developer of the virtual reality (VR) fitness app Supernatural. The FTC subsequently dropped its in-house administrative challenge to the transaction. The loss continues the recent trend of the FTC and DOJ losing merger challenges in federal court where the agencies rely on non-traditional theories of antitrust harm. In the Meta / Within case, the FTC put forward a theory that the acquisition would eliminate potential competition between Meta and Within. The judge concluded that Meta was not reasonably likely to enter the virtual reality fitness app market absent the deal with Within. Other recent merger challenges that the agencies have lost in court include Booz Allen Hamilton's acquisition of EverWatch, UnitedHealth's acquisition of Change Healthcare and US Sugar's acquisition of Imperial Sugar. DOJ dropped its appeal in the UnitedHealth / Change Healthcare case in late March.

- **Agencies Continue to Challenge Transactions Outright Rather than Negotiate Settlements**

  The FTC and DOJ continue to challenge transactions outright in court rather than negotiate settlements with merging parties. For example, DOJ is moving forward with its challenge to Assa Abloy's proposed acquisition of Spectrum Brands' hardware and home improvement business, despite the merging parties' plan to divest assets to a third party. That case is scheduled for trial in April and the trial will likely focus on the sufficiency of the parties' divestiture fix. DOJ also filed a lawsuit to block JetBlue's proposed acquisition of Spirit in March, despite the parties' offer to divest a number of gates at four airports. The FTC also challenged Intercontinental Exchange's proposed acquisition of Black Knight, despite the parties' divestiture proposal.

EUROPEAN UNION

- **New Regulatory Burden: The EU Foreign Subsidies Regulation Enters into Force**

  On January 12, the Foreign Subsidies Regulation (FSR) entered into force. The FSR will have a significant impact on M&A activity, as it provides for an additional regulatory hurdle for certain transactions where the acquirer (or party to a joint venture or merging parties) has received subsidies outside of the EU. A transaction is subject to a mandatory pre-closing notification (and standstill obligation) if both of the following conditions are met:

  - The EU-wide turnover of at least one of the parties, the acquired company or the joint venture amounts to at least EUR 500 million (taking into account group turnover).
  - The total amount of ex-EU financial subsidies received by the acquirer and the target, or the joint venture and its parent company, or the merging parties is in excess of EUR 50 million over the last three years.

  Failure to file a notification, breaching the standstill obligation, or providing incorrect or misleading information can subject parties to significant fines (depending on the nature of the breach, 1% or 10% of the notifying party's worldwide turnover in the last financial year). In addition, the European Commission under the FSR can require notification of transactions that fall below the thresholds or can initiate an investigation of foreign subsidies ex-officio, unrelated to any M&A activity. Following notification, the assessment focuses on the effects of third-country subsidies on competition by weighing possible negative effects that could lead to a distortion of the internal market against any possible positive effects. In addition to approving or prohibiting a transaction, the Commission can require structural or non-structural commitments from parties in order to remedy the distortion of competition on the internal market.

The FSR will go into effect on July 12, 2023, with parties being required to file notifications of transactions three months later in October 2023 (feedback to the public consultation of the draft Implementing Regulation ended on March 6, 2023).

On February 6, 2023, the Commission published a draft Implementing Regulation that provides the notification forms and content requirements. While the review process closely mirrors that of the EU merger control regime, FSR notifications require substantial additional information on financial contributions and their effects.

- **A New Route for Complainants: ECJ Towercast Ruling Confirms Non-Notifiable Acquisition Can Be Abuse of Dominant Position**

  With its judgment on March 16, 2023 (C-449/21 Towercast), the European Court of Justice (ECJ) held that the acquisition of a target that does not trigger a notification obligation under merger control rules may be subject to a proceeding by national competition authorities and national courts on the basis that the acquisition constitutes an abuse of a dominant position according to Article 102 of the Treaty on the Functioning of the European Union.

  The French competition authority, the *Autorité de la Concurrence*, had originally rejected an abuse-of-dominance complaint from French broadcasting services operator Towercast against competitor TDF's acquisition of rival Itas in 2016. Towercast appealed to the French courts, who asked the ECJ for a preliminary ruling. According to the ECJ, ex-ante merger control for transactions that meet the threshold for a notification under EU or EU Member State merger control rules "does not preclude an ex-post [merger] control [review] of a transaction that does not meet that threshold." National courts may therefore open investigations into transactions that fall outside the scope of such rules to investigate whether a transaction impacts competition. A few days after the judgment, the Belgian Competition Authority launched an investigation into the acquisition of edpnet by Proximus (the historical telecom incumbent) over concerns that the transaction would allow Proximus to wipe out its only remaining competitor for the wholesale and retail supply of fixed telecoms services on its own network.

  The judgment equips the European Commission and national competition authorities alike with another instrument to scrutinize below-threshold mergers, in addition to the revised application practice of referrals pursuant to Article 22 EUMR (see also Adobe / Figma, below). Moreover, since a claim that a company has abused its dominant position is only time-barred after five years, the ruling opens the door for potential complainants to take legal action to challenge non-notified transactions.

UNITED KINGDOM

- **CMA's New Leadership Team Focuses on Digitalisation and Supply Chain Issues Impacting Consumers**

  The UK Competition and Markets Authority (CMA) published its annual plan for 2023/24 on March 23, 2023. The plan is the first for the new CEO of the CMA, Sarah Cardell, and chair of the CMA, Marcus Bokkerink. It sets the focus of the CMA's work in the coming year and, new to this edition, provides a three-year outlook. The focus in M&A is largely familiar: The CMA intends to deal with digitalization and emergent technologies by protecting innovation and investment in new products and better service. New is an increased focus on how transactions may harm the supply chain.

  The plan reinforces statements made by both Cardell and Bokkerink in late February. Bokkerink, in relation to M&A, emphasized that any deal with the rationale "if you can't beat your competitor, buy them" will face scrutiny, as the transaction will likely harm investment and innovation. That said, Bokkerink noted that M&A is very positive, and the CMA only intervenes when transactions potentially raise concerns (the CMA reviewed a merger notification in less than 10% of the 800 transactions reviewed by the merger intelligence unit).

  Those sentiments were mirrored by Cardell, who highlighted the useful work of the merger intelligence unit in filtering out transactions that raise no issues, while also emphasizing that the CMA has jurisdiction and will review transactions where the center of gravity is outside the UK. Additionally, the CMA will look to use artificial intelligence, data and new technologies to better and more quickly assess the arguments submitted by parties.

INVESTIGATIONS / ENFORCEMENT IN KEY INDUSTRIES[1]

Healthcare, Pharmaceuticals & Biotechnology

Technology, Media & Communications

Retail & Consumer Productions

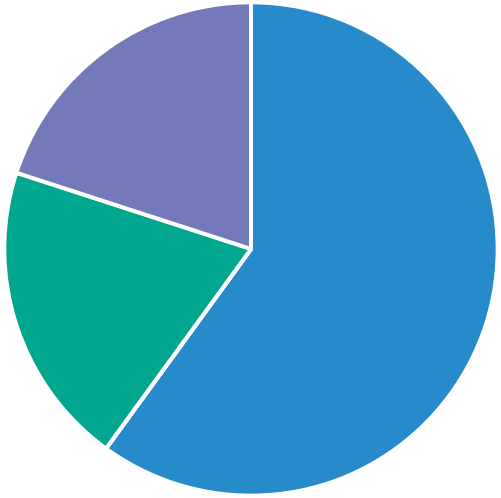
Chemicals & Industrial Prods. or Services

Transportation & Energy

Other

United States

Europe & the UK



[1] For the United States, the graphs include cases where an antitrust enforcement agency issued a Second Request (and the investigation remained ongoing during the quarter), 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 Phase II process or a clearance decision, or challenged the transactions, as well as transactions that were abandoned after an antitrust investigation.

Notable US Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CONSENT; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
JetBlue Airways / Spirit Airlines	DOJ	Challenged	Two of the largest "ultra-low cost" scheduled air passenger service providers	DOJ filed suit to block JetBlue's proposed acquisition of Spirit on March 7, alleging that the acquisition would eliminate the largest and fastest-growing "ultra-low cost" airline carrier in the United States. DOJ argued that Spirit is a unique competitive force in the marketplace and has forced other airlines to reduce their prices at airports across the country. The JetBlue acquisition would remove this growing competitive force from the market and lead to higher prices and fewer options for consumers. DOJ's complaint alleges that the transaction will lead to anticompetitive harm in several ways. First, the transaction would eliminate significant head-to-head competition between JetBlue and Spirit. According to DOJ, the merging parties are especially close and fierce head-to-head competitors today, and the acquisition would eliminate that competition. Second, the merger would make coordination between the remaining airlines easier to achieve because it would remove a disruptive, low-price competitor from the market. DOJ notes that JetBlue has shown more willingness to "follow the leader" on prices than Spirit, and points to JetBlue's Northeast Alliance with American Airlines (which DOJ has also challenged in court). Third, the acquisition would deprive cost-conscious customers of the option to choose Spirit and its low-priced, unbundled fares. DOJ emphasized that JetBlue plans to abandon Spirit's current business model and would reduce seats in Spirit's planes and charge customers higher prices post-transaction. DOJ frames the transaction as the latest example of consolidation in an already consolidated airline industry and alleges that the acquisition is presumptively unlawful in 150 local markets, including 50 nonstop routes. DOJ rejected the parties' proposal to divest 15 gates at four airports, labeling the proposed divestitures as merely "hypothetical." The parties have argued that the combination will create a new national challenger to the "Big 4" airlines and will allow JetBlue to bring lower fares to new markets. The case is currently scheduled for trial in October 2023.

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Meta Platforms, Inc. / Within Unlimited, Inc.	FTC	Challenged and rejected by court	VR-dedicated fitness apps	On February 3, Judge Edward Davila of the US District Court for the Northern District of California denied the FTC's request for a preliminary injunction blocking Meta's proposed acquisition of Within, developer of the fitness app Supernatural. The FTC's theory in challenging the transaction was that the acquisition would eliminate potential competition between the parties. Meta does not sell a dedicated fitness app like Within's Supernatural, although it does make other VR-related products (*e.g.*, the Quest VR headset). The FTC alleged that Meta would have developed its own competing VR fitness app if it had not pursued the Within acquisition. The FTC argued that the relevant product market was VR-dedicated fitness apps, meaning VR apps "designed so users can exercise through a structured physical workout in a virtual setting." The court accepted that market definition, rejecting the merging parties' arguments that other fitness apps and other non-VR fitness products should be included. The court also found that the FTC established high concentration within the VR-dedicated fitness apps market. Judge Davila, however, ruled that the FTC failed to demonstrate a reasonable probability that Meta would have entered the VR dedicated fitness apps market absent the transaction. Although noting Meta's considerable financial and VR engineering resources, the court found that Meta did not possess capabilities unique to VR-dedicated fitness apps. In particular, Meta did not have the ability to create fitness content and lacked studio production facilities. The court also found that Meta did not have strong incentives to enter the relevant market because, as a VR platform developer, it could enjoy the benefits of VR fitness growth without itself entering the VR fitness app market. Finally, the court rejected the FTC's argument that as a result of the Within deal, Meta shelved a plan to expand its Beat Saber VR rhythm app into fitness. The court concluded it was not reasonably probable that Meta would have repositioned Beat Saber into dedicated fitness absent the Within acquisition. Later in February, the FTC voluntarily dismissed its in-house administrative challenge to the transaction.

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Intercontinental Exchange, Inc. (ICE) / Black Knight, Inc.	FTC	Challenged	Loan origination systems / product pricing and eligibility engines: ICE and Black Knight are the two largest suppliers	On March 9, 2023, the FTC filed an administrative complaint to block ICE's proposed acquisition of Black Knight. The FTC alleges that ICE owns the "dominant" loan origination system (LOS) and that Black Knight owns the second-largest LOS. Mortgage lenders rely on LOS software tools to manage the residential mortgage loan origination process. According to the FTC, ICE's LOS processes nearly half of all residential mortgages that originated in the country. The FTC also alleges that Black Knight owns the leading product pricing and eligibility engine (PPE), and that ICE owns the second-largest PPE. PPE is software that allows a lender to identify potential loan rates for a borrower, determine the borrower's eligibility for a given loan and lock in the loan's terms for the borrower. According to the FTC, ICE and Black Knight compete vigorously to provide their respective LOS and PPE software, among other ancillary services, to mortgage lender customers. The FTC alleges horizontal and vertical theories of harm in its complaint. For horizontal harm, the FTC alleges that the loss of direct competition between ICE and Black Knight for LOS and PPE services will allow ICE to raise costs to lenders, which will then be passed to homebuyers. For vertical harm, the FTC alleges that the transaction will increase ICE's ability and incentive to harm third-party ancillary service providers by foreclosing or impeding their access to ICE's dominant LOS. The parties proposed divesting Black Knight's LOS to a third party, Constellation Web Solutions, Inc. (Constellation), but the FTC rejected the divestiture proposal. The FTC argues that the proposed divestiture will not restore competition because it does not include Black Knight's PPE product. In addition, the FTC contends that the proposed remedy will not restore competition as to LOS because it will require Constellation to rely on ICE for various ancillary services via a resale agreement. In their answer to the FTC's complaint, the merging parties argue that the FTC is challenging a "business combination that will never be," due to the planned divestiture.

Notable European & UK Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Adobe / Figma	EC	Article 22 EUMR referral	Software publishing	On February 14, the European Commission accepted a referral request regarding the acquisition of Figma, a provider of a collaborative web application for interface design, by global software company Adobe. Austria made the referral request and was joined by Belgium, Bulgaria, Cyprus, Czechia, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway and Sweden pursuant to Article 22 of the EU Merger Regulation (EUMR). The Commission will therefore require notification, even though it falls short of the EU jurisdictional turnover thresholds because it considers the criteria of Article 22(1) EUMR to be fulfilled. In the Commission's view, the transaction threatens to significantly affect competition in the market for interactive product design and whiteboarding software, which is likely at least EEA-wide, and, therefore, in the referring countries. The Commission also concluded that it is best placed to examine the potential cross-border effects of the transaction. After the Illumina / Grail transaction, which was eventually prohibited and whose unwinding is still legally disputed, Adobe / Figma is another seminal case to come under Commission scrutiny following the agency's reappraised enforcement practice of Article 22 EUMR, reflecting its willingness to make increased use of the referral mechanism.

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Orange / VOO / Brutélé	EC	Conditional clearance	Three to two in telecommunications	On March 20, following an in-depth investigation, the European Commission adopted a clearance decision for the proposed acquisition of VOO and Brutélé by Orange, subject to conditions. Orange is a provider of retail mobile and fixed telecommunication services in Belgium, based on its own mobile and third-party fixed networks. VOO and Brutélé together are leading providers of retail fixed and mobile telecommunication services, based on their own fixed and third-party mobile networks. Orange is the second-biggest mobile provider in Belgium, while VOO and Brutélé together are the second-biggest providers of fixed telecommunication services in the areas covered by their fixed networks. To address the Commission's concerns that the deal could lead to higher prices or lower-quality services (due to a reduction in the number of operators from three to two), Orange committed to providing access to the existing fixed-network infrastructure it is acquiring from VOO and Brutélé in the Walloon region and parts of Brussels, as well as its fiber-to-the-premises network under development, to telecom rival Telenet for at least 10 years.
Agrofert / Borealis	EC	Clearance	Manufacture of fertilizers and nitrogen compounds	On March 13, the European Commission unconditionally cleared the acquisition of Borealis's nitrogen business by Czech conglomerate Agrofert. Borealis AG and Agrofert are both active in the agricultural and chemical sectors. They compete in the production and sale of nitrogen fertilizers, AdBlue liquid and other technical nitrogen products. Based on its market investigation, the Commission found that the transaction would not significantly reduce competition in markets for: (i) nitrogen fertilizers, (ii) AdBlue non-toxic liquid used as exhaust fluid for diesel engines and (iii) technical nitrogen products such as aqueous ammonia and weak nitric acid. The Commission also found that the transaction would not raise concerns in relation to the distribution of nitrogen fertilizers in Czechia and Slovakia.

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Veolia / Suez	CMA / EC	Conditional clearance	Two of the three largest waste and water management companies in the UK	On February 22, the CMA announced that Veolia had complied with the divestment remedies accepted by it in November 2022, bringing the investigation into its acquisition of Suez to a close. The merger will bring together two of the three largest waste and water management companies operating in the UK. In accordance with the divestitures required under the CMA's final report, Veolia has now completed the sales of Suez's UK waste business, Veolia's European Mobile Water Services business, and Suez's UK Industrial Water Operation and Maintenance business to purchasers approved by the CMA. These divestment remedies are very similar to the structural commitments accepted by the European Commission when approving the same deal in late 2022. This commitments package included the divestment of almost all of Suez's activities in the non-hazardous and regulated waste management markets and the municipal water market in France, the divestment of almost all of Veolia's activities in the mobile water services market in the EEA, the divestment of the vast majority of Veolia's activities in the French segment of the industrial water management market, as well as the divestment of part of Veolia's and Suez's hazardous waste landfill activities and all of Suez's activities in the incineration and physico-chemical treatment of hazardous waste.

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