



# ANTITRUST M&A SNAPSHOT

May 2019

## UNITED STATES: JANUARY – MARCH 2019 UPDATE

In the first quarter of 2019, vertical merger enforcement continued to be a hot topic for the US antitrust agencies. The Court of Appeals upheld the district court's decision in the AT&T/Time Warner transaction, finding that the Department of Justice (DOJ) did not meet its burden of proof in challenging this vertical transaction. At the Federal Trade Commission (FTC), the FTC approved two vertical transactions with behavioral remedies, but the Democratic Commissioners strongly objected, arguing that the remedies did not adequately address the vertical aspects of the transaction. These cases point to divergence among the FTC Commissioners on the proper approach to vertical merger enforcement further complicating the vertical merger landscape under the Trump administration. However, there is some hope that merging parties will receive some clarification on vertical merger enforcement because the DOJ has been working on an update of its Non-Horizontal Merger Guidelines and may join forces with the FTC in drafting new guidance on vertical transactions.

## EUROPEAN UNION: JANUARY – MARCH 2019 UPDATE

In the first quarter of 2019, the European Commission (EC) closed and cleared six merger control proceedings where remedies were required, including acquisition by global players such as BASF and Spirit. The EC also prohibited two mergers, which is highly unusual, stating that the proposed remedies were not sufficient or too complex to address its competition concerns. Although the German and French governments placed political pressure on the EC to approve the Siemens/Alstom railway products transaction, the EC blocked the transaction, reaffirming that industrial policy objectives have no role to play when it comes to applying EU merger control rules.

## SNAPSHOT OF EVENTS (LEGISLATION/AGENCY REMARKS/SPEECHES/NEWS, ETC.)

### United States

- **FTC Announces Revised HSR Notification Thresholds**

On February 15, the FTC announced new thresholds for premerger notification filings under the HSR Act. The FTC revises the HSR thresholds annually, based on changes in the gross national product. The revised thresholds became effective on April 3 and apply to all transactions that close on or after that date. The “size of transaction” threshold increased from \$84.4 million to \$90 million. Other thresholds increased as well, including the thresholds for the “size of person” test and for determining filing fees.

- **Increasing Number of Merging Parties Filing Lawsuits over Deals that Don’t Close Because of Antitrust Concerns**

In a growing number of cases, parties have sued one another after their deals have failed to close for antitrust reasons. These cases have involved allegations that parties did not use their “best efforts” to obtain antitrust clearance or intentionally sabotaged the deal. In one case, a buyer brought suit against the seller while the parties were still defending the deal, claiming that the seller was unreasonably prolonging the antitrust approval process.

- **FTC Launches Technology Task Force Dedicated to Monitoring Competition in Technology Markets**

On February 26, the FTC announced the creation of a technology task force dedicated to monitoring competition in US technology markets, investigating any potential anticompetitive conduct in those markets, reviewing consummated transactions in high-tech industries and taking enforcement actions when warranted. The new task force team will include approximately 17 staff lawyers, who will join the team from other divisions within the Bureau of Competition. The task force is modeled on the FTC’s Merger Litigation Task Force, launched in 2002, which reinvigorated the FTC’s review of hospital mergers.

- **DOJ Plan to Streamline Merger Review Process Has Impacted Recent Merger Investigations**

At the DOJ agency update at the yearly ABA Antitrust Spring Meeting, Deputy Assistant Attorney General Barry Nigro said the Antitrust Division has been abiding by its plans for streamlining the merger review process. Since announcing its goal to resolve merger investigations within six months, the DOJ has received 30 HSR filings leading to investigations. Nigro stated that all of these investigations were completed or are on track to be completed

within six months. In addition, DOJ has not exceeded the deposition limit set out in its new model timing agreement and has exceeded the document custodian limit only three times.

- **Delrahim Advocates for Increased Burden of Proof for Merging Parties Claiming Efficiencies in Vertical Mergers**

Also on February 15, Antitrust Attorney General Makan Delrahim gave a speech on the elimination of double marginalization (EDM) in vertical mergers. Delrahim stated that he supports a legal test for vertical mergers that takes EDM into account as an affirmative defense. However, he emphasized that because not every vertical merger results in EDM, parties have the burden to come forward with evidence demonstrating the existence and size of this efficiency. Specifically, parties must show that they were able to charge prices above marginal cost pre-merger and that they have been unable to eliminate the double marginalization through contract. In addition, parties must present evidence of how much the EDM is likely to benefit consumers, given the shape of the downstream demand curve. Delrahim urged courts reviewing vertical mergers not to assume consumers will benefit from EDM and to require defendants to put forward the types of evidence that he outlined.

- **Recent Opinions Show Disagreement among Republican and Democratic FTC Commissioners on Vertical Merger Enforcement**

Two recent mergers, Staples/Essendant and Fresenius/NxStage (described in greater detail below), revealed disagreement between the Republican and Democratic FTC commissioners on the proper approach to vertical merger enforcement. In both cases, the two Democratic commissioners, Rohit Chopra and Rebecca Kelly Slaughter, dissented, arguing that the consent orders approved by their Republican colleagues did not go far enough in addressing the likely vertical harm. The commissioners wrote at length in Staples/Essendant about their general views on vertical merger enforcement. Commissioner Slaughter argued that the FTC's current approach has led to substantial underenforcement and suggested that the FTC conduct retrospective investigations of "close call" cases. The Republican majority defended its approach to analyzing vertical deals and emphasized that the FTC will only bring cases where its theories are supported by the facts.

- **DOJ and FTC Considering Revisions to Vertical Merger Guidelines**

At a roundtable at the ABA Antitrust Spring Meeting, Makan Delrahim showed willingness to work with the FTC on updating the DOJ's guidelines for vertical mergers. The DOJ has been working since last year on a revision to its Non-Horizontal Merger Guidelines issued in 1984. Delrahim stated that a joint product between the DOJ and FTC would be better because it would draw from the experience of both agencies, although he noted that the agencies have not yet shared drafts. FTC Chairman Joe Simons said that he would like any new guidelines to have broad, bipartisan support.

## European Union

- **EU Adopts a New Framework for Foreign Direct Investment Screenings**

On March 5, the Council of the European Union concluded the legislative process for the Regulation 2019/452 establishing a new framework for the screening of foreign direct investments (FDIs) into the Union. The main objective of the new framework is to ensure security and public order in the EU while leaving scope for Member States to screen FDIs in light of their individual situation. The Regulation does not have as its objective the harmonization of national screening mechanisms, but the enhancement of cooperation between Member States, and between Member States and the European Commission (EC). The final decision on a transaction remains with the Member States, as the EC has no power to block an investment.

- **EC Prohibits Two Mergers on the Same Day**

On February 6, the EC took the unprecedented step of blocking two mergers on the same day. The EC has only blocked a merger seven times over the past 10 years. First, the EC prohibited the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland. Aurubis and Wieland are two of the three biggest producers of rolled copper products, and with the merger, Wieland would have become the dominant player in this market. The EC found that the remedies offered by the parties were not sufficient to address its concerns that the merger would harm competition and raise prices for industrial customers. Second, the EC prohibited the proposed acquisition of Alstom's rail transport business by Siemens, stating that the merger would have harmed competition in markets for railway signaling systems and very high-speed trains. The EC found that the parties' proposed remedies were too complex, inadequate and late. The EC reaffirmed that industrial policy objectives have no role to play when it comes to applying EU merger control rules.

- **France and Germany Release a Manifesto in Response to the Siemens/Alstom's Prohibition**

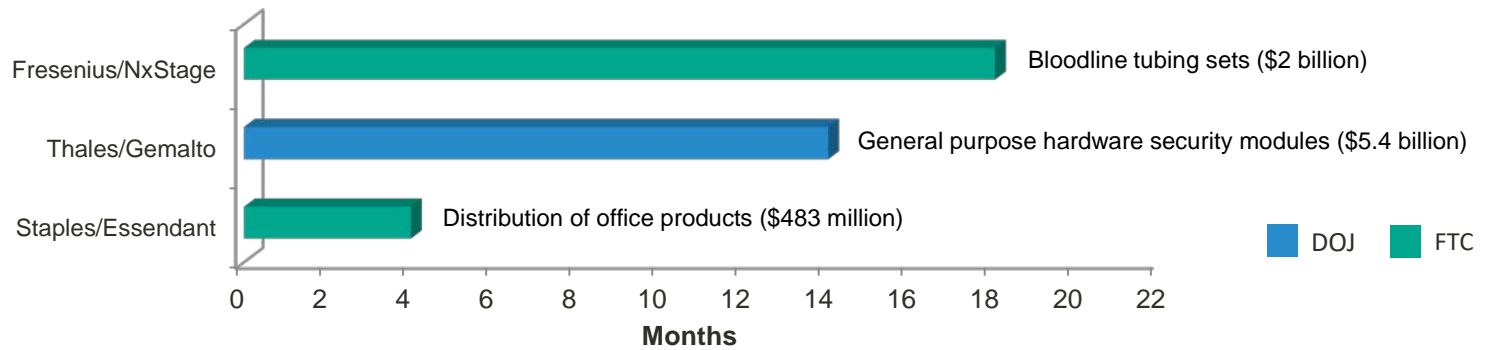
On February 19, France and Germany published a joint manifesto calling for a European industrial policy and strategy with clear objectives for 2030 built on three pillars. The first pillar is for the EU to invest in innovation. The second pillar is to adapt the EU regulatory framework. In particular, merger control rules should take into account industrial policies and should be more flexible when assessing the market definition, while giving the EU a right to appeal of the EC's merger decisions. State aid rules should also be updated to facilitate member states financing major projects. The third (and last) pillar gives measures to protect European markets, technologies and companies by urging member states to implement the new European foreign investments screening framework, or by encouraging an effective reciprocity mechanism for public procurement with third countries.

- **EC Publishes Report on Competition Enforcement in the Pharmaceutical Sector**

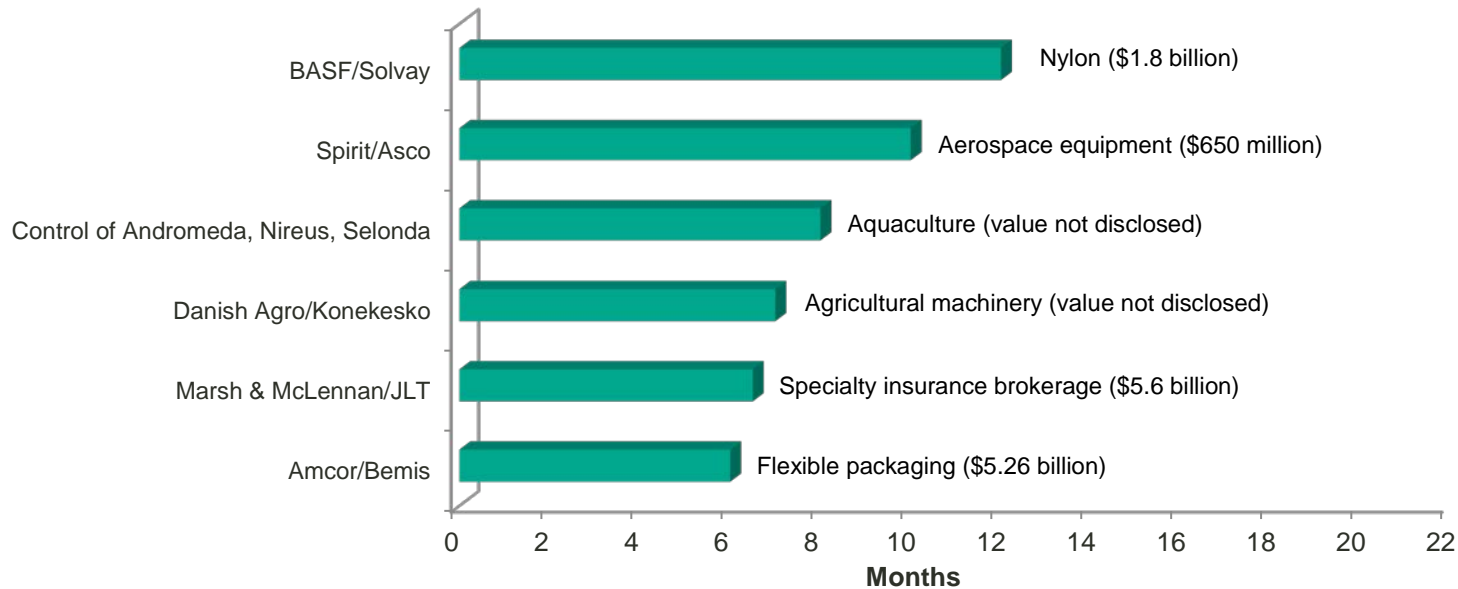
On January 28, the EC published a report summarizing the activities of both the EC and national competition authorities between 2009 and 2017 in the pharmaceutical sector. The EC found that generic and biosimilar medicines are the only source of price competition when the product is no longer patent protected, and that innovation was of key importance in the sector as it leads to new, more effective or even cheaper medicines. The EC thus found that companies had to constantly innovate to remain competitive and that they were setting up anticompetitive strategies to ease the pressure and delay generic and biosimilar entry on the market. The EC therefore concluded that competition authorities had to be vigilant when assessing mergers and when investigating competition law infringements (such as pay-for-delay agreements or unfair pricing) in the pharmaceutical sector.

SNAPSHOT OF ENFORCEMENT ACTIONS

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



European Union (Timing from Signing to Clearance)



SIGNIFICANT TRIALS / COURT OPINIONS

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
<b>United States</b>					
AT&T, Inc. / Time Warner Inc.	DOJ	US Court of Appeals for the District of Columbia Circuit	Television programming and distribution	Did the district court misapply economic principles and clearly err in rejecting the DOJ's quantitative model of anticompetitive harm in a proposed vertical merger?	On February 26, the US Court of Appeals for the D.C. Circuit affirmed a district court ruling denying the DOJ a permanent injunction blocking the merger of AT&T and Time Warner. On appeal, the DOJ claimed that the district court (1) misapplied economic principles and (2) clearly erred in rejecting the DOJ expert's economic model. The D.C. Circuit concluded that the district court accepted the economic model presented by the DOJ, "but rejected its specific prediction in light of the evidence the district court credited." It also found that "the district court reached a fact-specific conclusion, based on real-world evidence that, contrary to the Nash bargaining theory and government expert opinion on increased costs, the post-merger cost of a long-term blackout would not sufficiently change to enable Turner Broadcasting to secure higher affiliate fees." Notably, the court rejected calls from outside commentators to opine on the legal standards for evaluating vertical mergers. The court concluded that there was no need for clarification because neither party challenged the legal standards that the district court applied.

SIGNIFICANT US CONSENT ORDERS / INVESTIGATION CLOSING WITH AGENCY STATEMENTS

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>1</sup>	BUYER UPFRONT
Fresenius Medical Care AG & KGaA	NxStage Medical, Inc.	Bloodline tubing sets used in hemodialysis treatment  3 to 2	18 months	FTC	<p>On February 19, the FTC required healthcare company Fresenius to divest NxStage’s bloodline tubing set business to proceed with its acquisition of NxStage. The Commission voted 3-2 to accept the proposed settlement, with Commissioners Chopra and Slaughter issuing dissenting statements. The FTC alleged that Fresenius and NxStage are two of only three significant suppliers of bloodline tubing sets used in “open architecture” hemodialysis machines in the US, and together control 82% of the market. According to the FTC, the acquisition would allow the combined firm to exercise market power unilaterally. The FTC required the parties to divest NxStage’s bloodline tubing set business to B. Braun, a company that makes a variety of medical products, including other hemodialysis products. In addition, the FTC required the parties to supply B. Braun with bloodline tubing sets for a limited time while B. Braun establishes its own manufacturing capability.</p> <p>The FTC also analyzed the transaction from a vertical perspective, as it combined the largest supplier of in-home hemodialysis machines (NxStage) with one of only two major providers of dialysis services (Fresenius). The Commission majority concluded that the evidence did not support a theory of vertical harm, but the two Democratic commissioners dissented from this conclusion. Commissioner Slaughter argued that the deal would incentivize Fresenius to foreclose or raise the costs of rival dialysis clinics, while Commissioner Chopra argued that the combination would make new entry into the in-home hemodialysis machine market more difficult.</p>	Yes

<sup>1</sup> The information in this column summarizes the government’s allegations. McDermott Will & Emery LLP offers no independent view on these allegations.



BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>1</sup>	BUYER UPFRONT
Thales S.A.	Gemalto N.V.	General purpose hardware security modules  2 leading firms	14 months	DOJ	On February 28, the DOJ required Thales to divest its General Purpose Hardware Security Module (GP HSM) business to proceed with its acquisition of Gemalto. GP HSMs are tamper-resistant hardware devices used by government and private organizations to manage and protect their encryption keys. The DOJ alleged that Thales and Gemalto dominate the US market for GP HSMs, with a combined market share of 66%, and face limited competition from a few, much smaller rivals. The DOJ further alleged that Thales and Gemalto are each other's closest competitors. The EC accepted the same remedy several months earlier.	No
Staples Inc.	Essendant Inc.	Distribution of office products to midmarket business-to-business customers	4 months	FTC	<p>On January 28, the FTC imposed conditions on Staples' acquisition of office supply wholesaler Essendant. The consent order required the parties to establish a firewall limiting Staples' access to the commercially sensitive information (CSI) of Essendant's resellers and those resellers' end customers. Staples is the largest vertically integrated reseller of office products in the US, and one of two retail office supply superstores. Essendant is the largest US wholesale distributor of office products. The FTC alleged that the acquisition would give Staples access to the CSI of Essendant's resellers and those resellers' customers, which could allow Staples to offer higher prices than it otherwise would when bidding against a reseller for an end customer's business.</p> <p>The Commission majority considered and rejected several other theories of vertical harm, including that Staples would raise Essendant's prices. Commissioners Slaughter and Chopra dissented, arguing that the settlement did not fully remedy the merger's likely anticompetitive effects. Commissioner Slaughter included a general discussion of vertical merger enforcement in her dissenting statement, expressing concern that the FTC's current approach to vertical mergers has led to substantial underenforcement.</p>	N/A  Behavioral Remedy Imposed

SIGNIFICANT EC CLEARANCE DECISIONS

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Danish Agro a.m.b.a.	Konekesko's Baltic and Finnish agrimachinery businesses	Forage harvesters and combine harvesters  2 leading distributors	7 months	EC	On March 25, the EC approved Danish Agro's acquisition of Konekesko's agricultural machinery businesses in Finland, Estonia, Latvia and Lithuania, subject to conditions. The EC's investigation found that the transaction was likely to lead to higher prices and lower service quality for Estonian customers of forage harvesters and combine harvesters. Konekesko (distributor of CLAAS products) and Danish Agro (distributor of John Deere products) are the leading distributors in Estonia for these products. To address these concerns, the companies offered to divest Danish Agro's Estonian agricultural machinery business.	No
Marsh & McLennan Companies	Jardine Lloyd Thompson plc	Insurance brokerage services for aircraft operators and aerospace manufacturing	6.5 months	EC	On March 22, the EC approved Marsh & McLennan's acquisition of Jardine Lloyd Thompson, subject to conditions. The EC raised concerns that the transaction would significantly reduce competition in the insurance brokerage market for the specialties of aircraft operators and aerospace manufacturing. The EC found that barriers to entry were high for both markets, as customers require suppliers to have a proven track record, access to scarce expertise and global reach. To address the EC's concerns, the companies offered to divest Jardine Lloyd Thompson's global aerospace practice.	No

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BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
Spirit Aerosystems, Inc.	Asco Industries, N.V.	Aircraft slats for Airbus aircraft  Interlock among only two suppliers	10 months	EC	On March 20, the EC approved the acquisition of Asco by Spirit, subject to conditions. Belairbus is a JV between Asco, Sonaca and BMT Eurair to develop and produce slat systems for commercial Airbus planes. Sonaca is a leading supplier of slats and the only competitor of Spirit in this market. Therefore, by acquiring Asco, Spirit would have also become a shareholder of Belairbus, alongside its sole competitor for slats (Sonaca). The EC was thus concerned that the proposed acquisition, as originally notified, would significantly reduce competition in the worldwide market for the supply of slat systems in general and of slats in particular because the proposed merger would have increased the likelihood of companies in this market coordinating their behavior, in particular Spirit and Sonaca. To address the EC's concerns, Spirit offered to structurally modify the set-up of Belairbus to permanently eliminate its role as a commercial and technical platform for negotiations with Airbus. As a result, all future contract negotiations will be carried out bilaterally and independently between each supplier and Airbus. As a supplementary commitment, the companies have set up mechanisms to destroy any existing commercially sensitive information of Sonaca held by Asco, so this will not be transferred to Spirit after the transaction.	N/A  Behavioral Remedy Imposed

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
AMERRA Capital Management LLC; MDC Industry Holding Company LLC	Joint control of the following:  Andromeda Seafood Limited; Nireus Aquaculture S.A.; Selonda Aquaculture S.A.	Aquaculture	8 months	EC	On February 15, the EC approved the acquisition of joint control of Andromeda, Nireus and Selonda by Amerra and Mubadala, subject to conditions. Andromeda, Nireus and Selonda are based in Greece, and are active in aquaculture, notably of seabream and seabass. Under the proposed acquisition, the three companies would be acquired by two investment firms: Amerra, based in the US, and Mubadala, based in the United Arab Emirates. The EC was concerned that the transaction as notified could have led to higher prices for customers of Mediterranean farmed fish, as well as of seabream and seabass fry in the EEA. To address these concerns, the parties offered to divest fish farms and hatcheries, together with the know-how in research and breeding programs of Nireus and Selonda.	No
Amcor Limited	Bemis Company, Inc.	Manufacturing of flexible packaging products  Two leading suppliers	6 months	EC	On February 11, the EC approved the merger between Amcor (Australia based) and Bemis (US based) subject to conditions. The two parties are both manufacturers of packaging solutions worldwide, supplying a broad range of rigid and flexible packaging products for many different sectors, including the food, consumer, medical and pharmaceutical industries. Regarding the market for medical flexible packaging, the EC found that Amcor and Bemis are the most significant players in the EEA, and have been competing closely. The merged entity would have created a player three times larger than the second largest supplier, on a fragmented market with many small suppliers. The EC also found that barriers to entry are extremely high, and customers do not easily switch suppliers. As a result, the EC was concerned that the transaction would negatively affect competition on this market and could lead to higher prices, less choice and less innovation. To address the Commission's competition concerns, Amcor and Bemis agreed to divest Bemis' entire medical packaging business in the EEA.	No

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS <sup>2</sup>	BUYER UPFRONT
BASF SE	Solvay's polyamides and intermediates business and engineering plastics business	Nylon	16 months	EC	On January 18, the EC approved BASF's (Germany) acquisition of Solvay's (Belgium) nylon business, subject to conditions. According to the EC, Solvay is currently the only manufacturer in the EEA with production assets at all levels of the nylon production chain, from Adiponitrile (ADN) to nylon compounds and nylon fibers. Following its in-depth market investigation, the EC raised two competition concerns. Firstly the merger would lead to a reduction of the number of suitable suppliers and likely price increases in a number of markets related to the nylon industry in the EEA. Secondly, the merged entity would have the ability and incentive to restrict its competitors' access to essential inputs. To address the EC's concerns, the parties agreed (i) to divest some of Solvay's facilities, (ii) to create a production joint venture between the merged entity and the buyer of the divested assets, and (iii) to sign a long-term supply agreement for ADN to meet the divestment business' requirements. The EC concluded that these commitments fully removed the overlap between the parties in the markets where it had identified competition concerns and cleared the transaction.	No

SIGNIFICANT CHALLENGED OR ABANDONED TRANSACTIONS

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS <sup>3</sup>
European Union				
Siemens AG	Alstom S.A.	Rail	EC	On February 6, the EC prohibited the proposed acquisition of Alstom’s rail transport business by Siemens, stating that the merger would have harmed competition in markets for railway signaling systems and very high-speed trains, and that the parties’ offered remedies were to complex, inadequate and too late.
Wieland	Aurubis AG’s rolled products business; Aurubis’s shareholding in Schwermetall Halbzeuwerk GmbH & Co KG	Rolled copper products	EC	On February 6, the EC prohibited the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland. Aurubis and Wieland are two of the three biggest producers of rolled copper products, and with the merger, Wieland would have become the dominant player in this market. The EC considered that the remedies offered by the parties were not sufficient to address its concerns that the merger would harm competition and choice and raise rolled copper prices for industrial customers, and thus prohibited the transaction.

<sup>3</sup> The information in this column summarizes the government’s allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

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