



ANTITRUST M&A SNAPSHOT

April 2020

UNITED STATES: JANUARY – MARCH 2020 UPDATE

The Federal Trade Commission (FTC) and Department of Justice (DOJ) faced new issues this quarter with the unprecedented challenges brought about by the COVID-19 global pandemic. In March, the agencies made certain changes to the merger review process to accommodate businesses and counsel working remotely. However, merger reviews, challenges, trials and consents have continued as usual at both agencies despite the additional obstacles.

EUROPE: JANUARY – MARCH 2020 UPDATE

The European Commission (EC) also put in place special measures to ensure business continuity in the enforcement of merger control during the COVID-19 crisis. The first quarter of 2020 also saw the United Kingdom's official departure from the European Union, which has consequences on the enforcement of EU competition law in the United Kingdom.

SNAPSHOT OF EVENTS

UNITED STATES

- **Merger Enforcement Agencies Respond to COVID-19 Challenges**

On March 13, 2020, the FTC announced that the Premerger Notification Office (PNO) would implement a temporary e-filing system for Hart-Scott-Rodino (HSR) premerger filings. The filings to both the PNO and DOJ's premerger office now occur only through secure file transfer, with no paper or DVD submissions accepted. For several weeks after the agencies implemented the e-filing system, they did not grant early termination of any review, but they resumed granting early terminations as of March 30. In addition to the electronic filing, on March 17, 2020, the DOJ announced that it would conduct all meetings by phone or video and all depositions by video. The DOJ also announced that for all mergers currently pending or that may be proposed, the Antitrust Division was requesting an additional 30 days for timing agreements and would revisit existing timing agreements "if circumstances require." The FTC has also been requesting additional time for reviews in its timing agreements with merging parties. Overall, the disruptions to the agencies' normal practices, as well as the overall disruptions to business at merging parties as well as third parties with relevant information, are likely to extend the merger review process. Congress is also considering legislation to extend the 30-day initial HSR waiting period in times of emergencies such as COVID-19.

- **New Vertical Merger Guidelines Released**

On January 10, 2020, the FTC and DOJ released joint draft vertical merger guidelines to update the long outdated 1984 statement on non-horizontal mergers. The new guidelines outline the enforcement policies and practices the agencies have been applying for some time. They focus primarily on the potential for competitive harm through the foreclosure of access to a key resource, either an input or a customer base, that rivals of the merging company need to access in order to compete effectively. Notably, the guidelines state that the agencies are "unlikely to challenge" a vertical merger when the companies have a combined share of the relevant market of less than 20%.

- **FTC's Increased Number of Challenges**

In January and February 2020, the FTC sought to block or unwind four deals, which matches the number of transactions it challenged in all of 2019. All four of the challenged deals involve the elimination of a direct horizontal competitor. Meanwhile, the DOJ has not yet announced any challenges in 2020.

EUROPE

- **European Commission (EC) Responds to COVID-19 Crisis**

The EC put in place special measures to ensure business continuity in the enforcement of merger control during the COVID-19 crisis. In particular, the EC now encourages submissions in digital format, either electronically by email or through its digital document exchange platform, *eTrustEx*.

The EC is encouraging companies to delay merger notifications until further notice, as it will be more difficult for the EC to collect information from third parties and to access information and databases.

National competition authorities have also put in place similar measures to maintain their merger review activities, but most of them, such as the French, German and Belgian authorities, encourage companies to delay merger notifications to the extent possible. Additionally, some authorities do not guarantee that they will meet the usual merger control deadlines. In particular, the French Parliament issued an act to suspend all legal deadlines regarding merger control during the period of the COVID-19 crisis.

- **The UK Exits the EU**

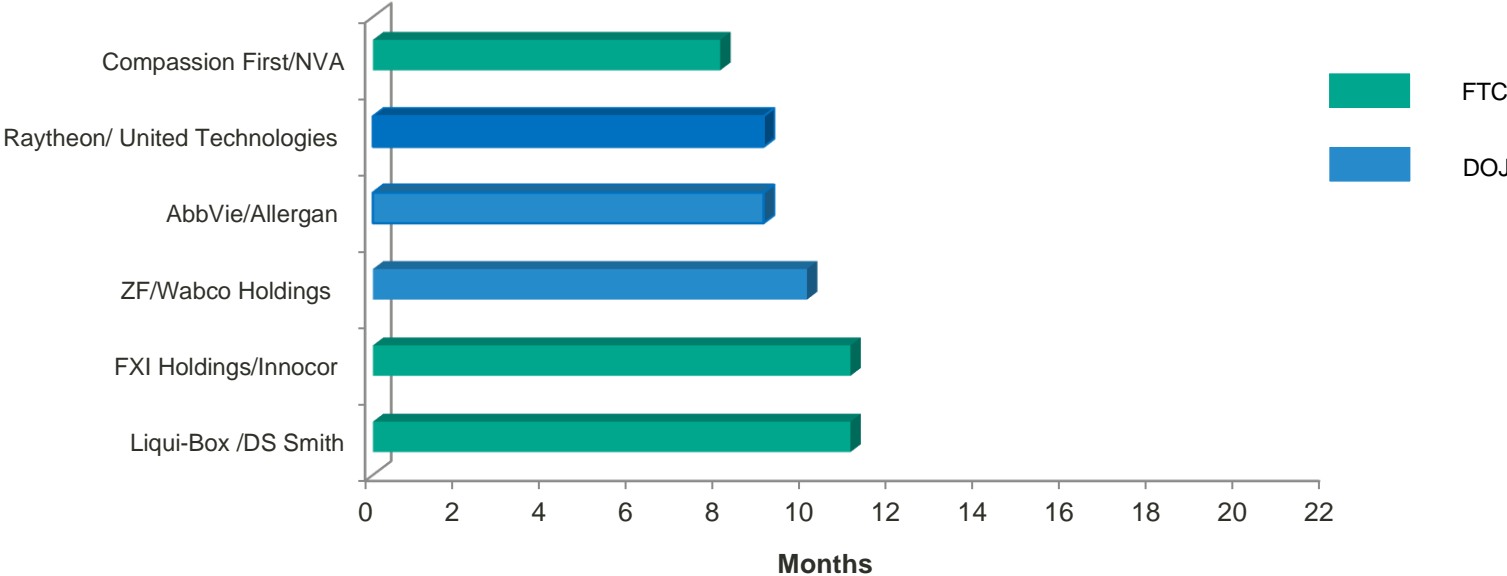
The UK and the EU agreed on a withdrawal agreement, which entered into force on January 31, 2020. This date marked the exit of the UK from the EU and the start of a transition period until the end of 2020, during which the UK will continue to apply EU law, including EU merger control rules. This means, for example, that UK revenue will be included when calculating EU merger control thresholds, and that the UK Competition and Markets Authority (UK CMA) will not look into a transaction that is already being investigated at the EU level.

- **National Economic Ministries Call for Revision of Merger Control Guidelines**

Economic ministries of France, Germany, Italy and Poland sent a letter to EC Vice-President Margrethe Vestager, pushing for a revision of the EC's merger guidelines regarding the assessment of horizontal mergers and the definition of the relevant market. The Member State Ministries asked the EC to protect strategic European interests, notably by taking into account potential competition from non-EU companies when defining the relevant market and by paying particular attention to non-EU state-backed companies. The ministers requested a proposal by the end of June.

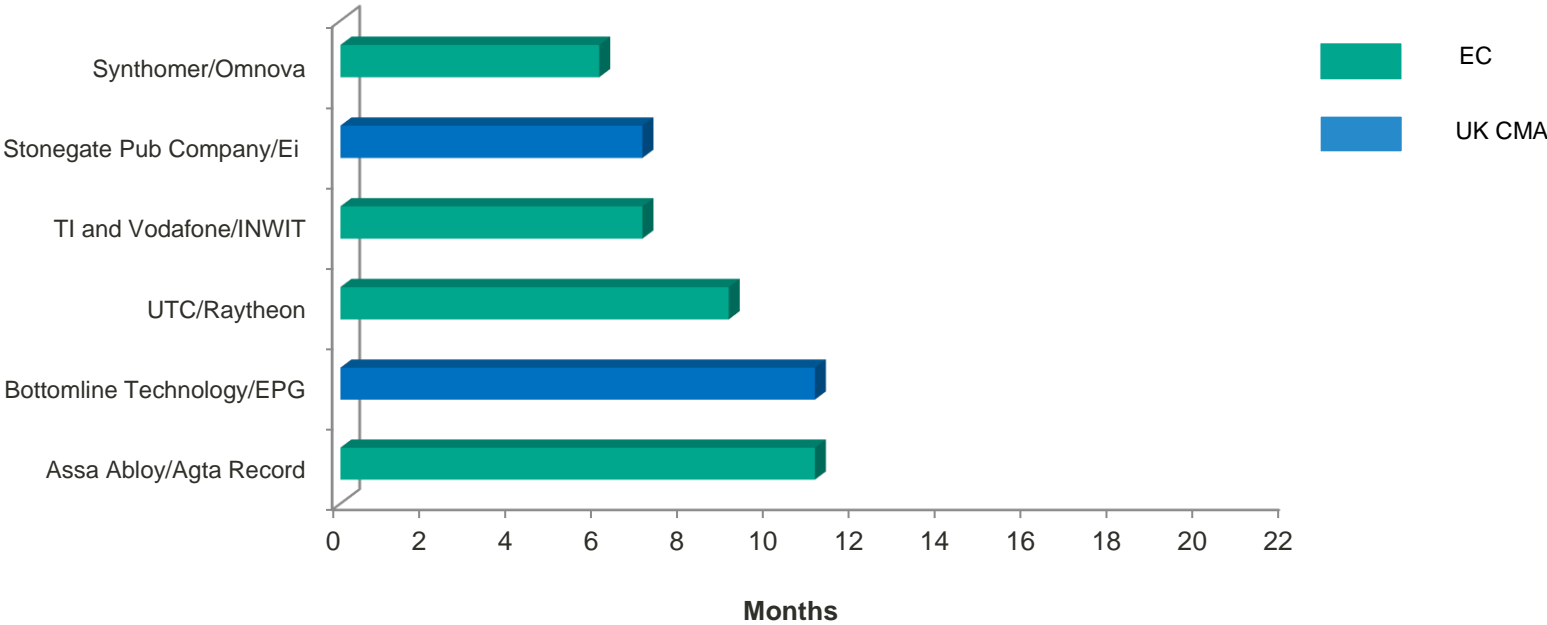
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS¹

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



¹ These graphs and the summaries that follow do not represent a complete list of all matters within a jurisdiction. Certain matters involving Firm clients are not included in this report.

Europe (Time from Signing to Clearance)



Significant US Trials

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
United States					
Sprint / T-Mobile	Multiple States	US District Court for the Southern District of New York	Mobile wireless telecommunica- tions services Four to three	Does relevant product market include mobile virtual network operators that lease wireless telephone and data service facilities- based wireless carriers? Does DOJ settlement and required divestiture setting up Dish as a new facilities-based competitor resolve the competitive concerns?	A coalition of states filed suit to block T-Mobile's acquisition of Sprint in June 2019. Several of the states maintained their lawsuit after the parties received federal approval from the DOJ and the Federal Communications Commission (FCC). In July 2019, the DOJ approved the proposed merger, subject to a settlement requiring the divestiture of Sprint's prepaid wireless business and certain spectrum assets to Dish Network Corp., a satellite television provider. Sprint and T-Mobile agreed to provide Dish with cell sites and retail locations, and T-Mobile agreed to provide Dish with access to its network for seven years while Dish begins building its own 5G network. The FCC formally approved the merger in November 2019. In December 2019, Judge Marrero held a two-week bench trial. The state Attorneys General (AGs) alleged that the merger would reduce the number of wireless competitors from four to three, eliminating head-to-head competition between Sprint and T-Mobile that has resulted in lower prices for consumers. The state AGs also argued that Dish's entry proposed in the DOJ settlement would be neither timely, likely nor sufficient to counter the deal's anticompetitive effects. On February 11, 2020, Judge Marrero denied the state AGs' motion to block the transaction. He found that Dish would be an effective fourth competitor with the divested assets and that Sprint's competitiveness was declining significantly.
Sabre Corp. / Farelogix Inc.	DOJ	US District Court for the District of Delaware	Provision of booking services for airline tickets sold through traditional	Will the proposed acquisition in booking services for airlines remove a disruptive competitor, and thereby reduce	The DOJ sued to block Sabre Corp.'s acquisition of Farelogix Inc. in August 2019, seeking an expedited ruling and permanent injunction of the transaction. The DOJ argued that the parties are direct competitors for global distribution systems for airline tickets and that the acquisition would eliminate Farelogix as a disruptive competitor. The parties argued that it is a procompetitive vertical merger.

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
			<p>travel agencies and booking services for airline tickets sold through online travel agencies</p> <p>Elimination of Farelogix as a “disruptive competitor”</p>	<p>competition and innovation in the market?</p>	<p>A nine-day bench trial took place in late January and early February before Judge Leonard Stark. On April 6, Judge Stark ruled in favor of the merger, allowing it to proceed.</p>
Arch Coal / Peabody Energy	FTC	FTC Administrative Complaint / US District Court for the Eastern District of Missouri	<p>Coal mining operations in the Southern Powder River Basin in Northeastern Wyoming</p> <p>Top two producers with combined share of 60%</p>	<p>Should the product market be limited to Powder River Basin coal production or include competition from natural gas and other alternative fuels?</p>	<p>The FTC filed a complaint against a proposed joint venture between Arch Coal and Peabody Energy on February 26, 2020. The FTC also sought a temporary restraining order and preliminary injunction from the US District Court for the Eastern District of Missouri. The FTC alleges that the merger would eliminate head-to-head competition between the two largest coal-mining companies in the United States, who control 60% of all coal mined in the Southern Powder River Basin of Wyoming. The parties argue for a wider product market definition, to include natural gas and other alternative fuels.</p> <p>The administrative trial is scheduled to begin August 11, 2020.</p>
Jefferson / Einstein	FTC / Pennsylvania AG	FTC Administrative Complaint / US District Court for the Eastern	<p>Inpatient general acute care hospital services and inpatient acute rehabilitation services in Philadelphia</p>	<p>Will the merger eliminate competitive pressure that has driven quality improvements and lowered rates, or will the merger result in</p>	<p>The FTC sued to block the merger of Jefferson Health and Albert Einstein Healthcare Network, two hospital systems in Pennsylvania. The FTC argues that Jefferson and Einstein compete to improve quality and service by upgrading medical facilities and investing in new technologies. The FTC believes that together, the parties would control 60% of inpatient general acute care hospital services in North Philadelphia and 45% in Montgomery County, and 70% of inpatient acute rehabilitation services in Philadelphia.</p>

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
		District of Pennsylvania	and Montgomery Counties, Pennsylvania Alleged combined shares of between 45% and 70% in different service lines in North Philadelphia and Montgomery County	price efficiencies and cost synergies? Is the relevant geographic market confined to the Northern Philadelphia and Montgomery County areas?	The FTC also filed for a temporary restraining order and preliminary injunction in the US District Court for the Eastern District of Pennsylvania. The administrative trial is scheduled to begin on September 1, 2020, though on March 19, the FTC issued a 30-day stay in response to the COVID-19 pandemic.
Novelis Inc. / Aleris Corp.	DOJ	Arbitration / US District Court for the Northern District of Ohio	Automotive body sheets	Does the relevant market include steel and aluminum automotive body sheets or only aluminum body sheets?	The DOJ invoked its authority to send the challenge of the Novelis Inc. / Aleris Corp. merger to arbitration. On March 9, 2020, the arbitrator, Kevin Arquit (a former FTC official), agreed with the DOJ that the relevant product market included only aluminum automotive body sheets, and not steel automotive body sheets. The DOJ will now file a proposed final judgment with the US District Court for the Northern District of Ohio to require the divestiture of Aleris' North American aluminum automotive body sheet operations, including a plant in Kentucky.
Axon / VieVu	FTC	FTC Administrative Complaint / US District Court for the	Sale of body-worn cameras and digital evidence management systems to	Is the body-worn camera product market limited to large police departments (500 or more sworn officers)?	The FTC filed an administrative complaint challenging Axon Enterprise, Inc.'s consummated acquisition of VieVu from Safariland, LLC. The FTC also challenged non-compete agreements that Axon and Safariland signed in connection with the acquisition. The FTC alleged that VieVu was Axon's closest competitor in the sale of body-worn cameras and digital evidence management systems to large metropolitan police departments. By defining a

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
		District of Arizona	<p>large metropolitan police departments</p> <p>Merger of two close competitors</p>	<p>Is entry into the body-worn camera market possible by other video technology companies?</p> <p>Does the Constitution allow the FTC to challenge consummated transactions in its own internal administrative proceedings?</p>	<p>narrow "price discrimination market" around a specific category of customer, the FTC determined that large metropolitan police departments have distinct requirements for these products that differ from other law enforcement organizations.</p> <p>In response, Axon filed a complaint in the District of Arizona, arguing that the FTC's administrative process is unconstitutional, and alleging that the structure of the FTC is unconstitutional due to the limited ability to remove FTC commissioners. Axon sought a preliminary injunction to place the administrative matter on hold. On March 10, 2020, Judge Dominic Lanza issued a tentative ruling stating that the court lacks subject matter jurisdiction and the issues should be raised during the administrative process, and if necessary, appealed to the Court of Appeals. In the second quarter, on April 8, 2020, Judge Lanza finalized his order and dismissed Axon's constitutional claims. On April 13, 2020, Axon filed a notice of appeal to the Ninth Circuit.</p> <p>The administrative trial was scheduled to begin May 19, 2020, but the matter has been stayed for 30 calendar days due to the COVID-19 pandemic.</p>

Significant US Consent Orders / Investigations Closing with Agency Statements

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS ²	BUYER UPFRONT
Compassion First (held by JAB Holdings)	National Veterinary Associates	Specialty and emergency veterinary services	8 months	FTC	Compassion First agreed with the FTC to divest three locations to proceed with its purchase of National Veterinary Associates. MedVet Associates LLC will buy the North Carolina, Connecticut and Virginia locations. The FTC alleged that the deal would hurt certain specialty services in each area.	Yes
Liqui-Box Inc.	DS Smith PLC	Dairy, post-mix, smoothie and wine bag-in-box products	11 months	DOJ	The DOJ agreed to allow Liqui-Box Inc. to purchase DS Smith PLC with a divestiture of all dairy, post-mix, smoothie and wine bag-in-box businesses in the United States. The DOJ alleged the merger would eliminate competition for packaging products used to transport food liquids to stores, restaurants and food processors.	No
FXI Holdings Inc.	Innocor Inc.	Low-density foam production for use in mattresses, couches and other home furnishings	11 months	FTC	FXI Holdings Inc. and Innocor Inc., two polyurethane foam producers, have agreed with the FTC to divest three plants in Washington, Indiana and Mississippi to assuage concerns that the merger would hurt competition in the market for low-density foam used in mattresses, couches and other home furnishings.	No
AbbVie	Allergan	Immunology	9 months	FTC	AbbVie is pushing forward with its \$63 billion takeover of Allergan, with an agreement to divest treatments and medications related to biological treatments for	Yes

² 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 ²	BUYER UPFRONT
					inflammatory bowel diseases such as ulcerative colitis and Crohn's Disease. The FTC agreed to the acquisition subject to the divestment of one treatment to AstraZeneca and two medications to Nestle SA. The parties expect to close the deal in May 2020.	
Raytheon Co.	United Technologies Corp.	Airborne tactical radios / military GPS	9 months	DOJ	In the merger of Raytheon Co. and United Technologies Corp. (UTC), the DOJ simultaneously filed a complaint and settlement outlining divestitures from each company. The DOJ alleged that the merger would have eliminated competition in the supply of military airborne radios, along with military airborne and naval GPS systems. DOJ alleged Raytheon and UTC were the only two, or two leading, suppliers of those products. DOJ also required divestiture of components for reconnaissance satellites based on a vertical theory of competitive harm. Raytheon must divest its airborne tactical radios business, and UTC must divest its military GPS business and its space-based optical systems business. The divested radio and GPS businesses will be purchased by BAE Systems Inc. No buyer was identified for the satellite components.	Yes (in part)

Significant European Clearance Decisions

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT
Europe						
Synthomer	Omnova	Vinyl pyridine latex (VP Latex)	6 months	EC	<p>The EC cleared the acquisition of Omnova by Synthomer, conditional on the divestment of Synthomer's global VP Latex business.</p> <p>The EC had concerns that the transaction would have reduced competition in the highly concentrated market for the supply of VP Latex in the EEA, where Synthomer and Omnova were the only two players with production capacity and where there are high barriers to trade across regions. The EC required Synthomer to divest all of its technology, brands, manufacturing equipment and other intangible assets related to the VP Latex business to a manufacturer with proven knowledge regarding the product. The EC concluded that the divestment addressed its concerns as it removed the entire overlap between Synthomer's and Omnova's activities in VP Latex.</p>	No
Assa Abloy	Agta Record	Automatic pedestrian doors and industrial high-speed doors	11 months	EC	<p>The EC cleared the acquisition of Agta Record by Assa Abloy, conditional on the implementation of a remedy package by Assa Abloy.</p> <p>The EC had concerns that the transaction would have significantly reduced competition in the supply of pedestrian doors in various EU member states and in the supply of industrial high-speed doors in France. The merged entity would have been either the largest supplier</p>	No

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					<p>or second-largest supplier of those products, with limited constraints from competitors. The EC's concerns also extended to after-sales services, including maintenance, repair and overhaul.</p> <p>To address the EC's concerns, Assa Abloy offered to divest Agta Record's automatic pedestrian door business in the Netherlands, Austria, Hungary and Slovenia and Assa Abloy's automatic pedestrian business in the UK and France. Assa Abloy also offered to grant a license to a third-party to market Agta Record's automatic pedestrian door products and/or use Agta Record's brands in Czechia, Finland and Iceland and an overall license to access and use Agta Record's technology in connection with the manufacturing of automatic pedestrian doors. The divestment package also included Agta Record's industrial high-speed door business in France.</p> <p>The EC found that these commitments removed the overlaps between the companies' activities in each of the national markets for which the EC had concerns.</p>	
Stonegate Pub Company Ltd.	Ei Group plc.	Bars and pubs	7 months	CMA (UK)	The UK CMA cleared the acquisition by Stonegate of Ei, creating the UK's largest pub operator. The CMA first identified a risk of substantial lessening of competition in 51 local areas and then accepted the undertakings offered by Stonegate, which included selling 42 pubs in no more than three divestment packages.	No
Bottomline Technology	Experian Payments Gateway (EPG)	Payment software for businesses	11 months	CMA (UK)	The UK CMA cleared the acquisition by Bottomline Technology of EPG after an in-depth investigation.	N/A
					<p>The CMA initially raised competition concerns about this transaction, but an in-depth investigation showed that the transaction would not raise issues because EPG is no longer a strong force in the market for the supply of payment software in the UK, and there are enough alternative providers competing with Bottomline for</p>	

					customers. The CMA thus cleared the transaction without any conditions.	
United Technologies Corporation (UTC)	Raytheon	Military GPS receivers and airborne radios	9 months	EC	<p>The EC approved the acquisition by UTC of Raytheon, combining UTC's aerospace business and Raytheon's defense business.</p> <p>During its investigation, the EC had concerns that the transaction would reduce competition in the market for military GPS receivers and airborne radios.</p> <p>To address the EC's concerns, UTC and Raytheon offered to divest to BAE Systems, a UK-based defense and aerospace company, (i) UTC's entire military GPS receivers and anti-jamming business and (ii) Raytheon's entire military airborne radios business. The EC found that those divestments were satisfactory and that the transaction would no longer raise competition concerns in the EEA.</p>	Yes
Telecom Italia and Vodafone (joint control)	INWIT	Telecom towers	7 months	EC	<p>The EC cleared the acquisition of joint control by Telecom Italia and Vodafone over INWIT, subject to conditions.</p> <p>Telecom Italia and Vodafone are both active in the provision of mobile and fixed telecommunications services to consumers and businesses in Italy. INWIT is a joint venture that will bring together Telecom Italia's and Vodafone Italia's telecommunication towers located in Italy and that will rent space on these towers mainly to telecommunication operators.</p> <p>The EC was concerned that in Italian municipalities with more than 35,000 inhabitants, the proposed transaction could (i) reduce competition in the market for renting space on towers to telecommunication operators and (ii) shut out telecommunication operators from the market by restricting their access to space on Telecom Italia's and Vodafone's towers.</p>	N/A

				<p>To address the EC's concerns, Telecom Italia and Vodafone offered several commitments, including making available to third parties free space on 4,000 towers in the problematic Italian municipalities, giving appropriate publicity to the towers made available and other measures to facilitate access to the towers (e.g., fast responses to requests, dispute resolution mechanism and extension of existing contracts).</p> <p>The EC concluded that the transaction, as modified by the commitments, no longer raised competition concerns.</p>	
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Significant Challenged or Abandoned Transactions

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS ⁴
United States				
Edgewell Personal Care Co.	Harry's Inc.	Wet shave razors	FTC	The FTC agreed 5-0 to challenge Edgewell's planned \$1.37 billion acquisition of Harry's. Edgewell makes Schick razors, while Harry's ran a mail-order subscription service for razors and had begun selling in brick-and-mortar stores. The FTC alleged that Harry's was a new competitive threat to Edgewell and Proctor & Gamble's duopoly, and that the merger would eliminate an important competitor. Edgewell abandoned the deal after the announcement of the challenge, stating that it planned to grow organically instead.

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