July 2023

APRIL – JUNE 2023: KEY THEMES AND TAKEAWAYS

UNITED STATES

- **Federal Trade Commission Unveils Proposal Detailing Significant Changes to Hart-Scott-Rodino Act Merger Notifications**

On June 27, 2023, the Federal Trade Commission (FTC) issued its previously signalled proposal to overhaul the Hart-Scott-Rodino (HSR) Act merger notification regime. If the notice of proposed rulemaking (NPRM) is implemented in its current form, the changes stand to dramatically increase the burden on merging parties when making HSR filings. It is important to note that the final rules may differ in scope following the public comment period and will likely not take effect until at least Q1 2024.

Some key takeaways from the NPRM are as follows:

(i) Merging parties will be required to submit substantially more documents along with their filing. The revised rules call for the production of (1) key transaction documents from deal team leaders even if such documents were not provided to officers and directors; (2) drafts of any responsive final documents prepared by or for an officer, director or supervisory deal team leader; (3) a broader range of transaction-related documents; (4) ordinary-course-of-business and strategic plans (if the parties have a competitive overlap); (5) data on the parties' labor forces; (6) information on investors, limited

partners and financiers; (7) all board memberships; (8) all prior acquisitions within the prior 10 years (if the parties have a competitive overlap); (9) information on subsidies received from certain entities or countries of concern; and (10) data on any current defense and intelligence contracts valued at more than $10 million.

(ii) The HSR process, from the preparation of the filing to the end of the statutory waiting period, will be substantially longer. Given the increased size of the filings, the FTC may request parties to pull and refile their notification to allow for more review time. Additionally, filings can no longer be made on letters of intent that do not describe the transaction in sufficient detail, which means that parties will be required to produce a quasi-definitive agreement before filing. Based on these changes, the FTC estimates that it will take close to 144 hours to complete a filing, a substantial increase from the previous 37 hours per filing—and this may underestimate the burden.

- **Assa Abloy Settlement Raises Questions on Litigating the Fix and DOJ Consent Decrees**

On May 5, 2023, in the midst of trial, the US Department of Justice (DOJ) agreed to a proposed consent order, clearing the way for Assa Abloy to complete its proposed $4.3 billion acquisition of Spectrum Brands' hardware and home improvement business.

The parties and the DOJ had been "litigating the fix" proposed by Assa Abloy to divest to Fortune Brands the Emtek and Smart Residential divisions of Assa Abloy's smart-lock business. The government has had some success challenging transactions despite parties' proposed divestitures, including blocking the 2015 Sysco-US Foods transaction and the 2017 Aetna-Humana merger. More recent cases, such as UnitedHealth-Change Health, have favored defendants who placed robust divestiture packages before the courts. The Assa Abloy settlement came before the judge weighed in on the burden-shifting framework that had become a contentious issue for the parties, but—based on the judge's comments—the court appeared to have issues with the legal standard proposed by the DOJ. The DOJ's position was that it could prove its *prima facie* case based on concentration levels that existed if there were no fix, thus proving a violation unless the defendants could demonstrate that competition was entirely restored by the proposed divestiture. The consent order essentially adopted the divestiture proposal offered by Assa Abloy before the start of the trial, with some relatively minor modifications.

This is the first instance of the DOJ accepting a settlement offer from merging parties since Assistant Attorney General Jonathan Kanter's pronouncement that the DOJ would view consent decrees as the "exception, not the rule" and instead pursue structural remedies or injunctions to block alleged anticompetitive mergers. In explaining its acceptance of the settlement, the DOJ stated that the settlement offers more effectively maintained competition in the relevant markets than previous offers because it expanded the smart-lock intellectual property being divested, strengthened the supply agreement with one of the mechanical door brands businesses,

minimized entanglements between Assa Abloy and the divested businesses and left the door open for the DOJ to challenge the merger again within five years if competition is materially diminished. After accepting the remedy package, the DOJ maintained that it would continue to seek "complete divestitures of all relevant standalone business units" to ensure that divested assets are able to compete effectively.

- **Pharmaceutical Industry Remains in Regulators' Crosshairs**

The FTC's suit to block Amgen, Inc.'s (Amgen) proposed acquisition of Horizon Therapeutics plc (Horizon) is the latest salvo directed at the pharmaceutical industry. This transaction does not involve horizontal competition or a vertical theory of harm. Instead, the FTC's case relies on a conglomerate effects theory of harm, a theory that has not been used as the basis to block a merger since the 1960s. The FTC alleges that the transaction would allow Amgen to leverage its portfolio of "blockbuster drugs to entrench the monopoly positions" of two of Horizon's drugs. The FTC may have difficulty with this theory given that (1) Amgen has committed to not bundle its products and (2) Horizon does not face any current competition for its two drugs at issue.

This aggressive enforcement aligns with the FTC's continued scrutiny of the industry. In July 2022, the FTC initiated an industry study of pharmaceutical benefit managers (PBMs) under Section 6(b) of the FTC Act (which empowers the FTC to compel the production of information from industry participants for the purpose of studying industry practices). The FTC has since expanded the study to also include three group-purchasing organizations that negotiate pharmaceutical rebates on behalf of PBMs.

- **"Whole of Government" Competition Mandate Can Impact Deals the FTC and DOJ Do Not Challenge**

President Biden issued Executive Order 14036 on July 9, 2021, calling for a "whole of government" approach to antitrust regulation whereby all executive agencies collaborate to strengthen regulatory guardrails to promote competition. The effects of this executive order have come into view as transactions are being challenged or investigated by non-competition agencies.

Most recently, Standard General abandoned its proposed $8.6 billion acquisition of Tegna. Despite clearing the HSR statutory waiting period without challenge from the DOJ, the Federal Communications Commission (FCC) engaged in a merger review, under its public-interest authority, that delayed the closure of the deal to such a degree that the parties abandoned the transaction. The FCC based its challenge on the concern that the merger would result in higher prices in retransmission contracts. In another example of the whole-of-government approach resulting in increased scrutiny on merging parties, the US Department of Transportation recently voiced its support for the DOJ's lawsuit against the Jet Blue and Spirit merger and launched its own investigation of the deal under its public interest and

unfair methods of competition authority. These recent actions delaying or effectively blocking mergers serve as reminders that merging parties must account for threats from non-competition executive branch agencies when evaluating antitrust deal risk.

- **FTC's Constitutionality Comes Under Fire—Again**

Illumina Inc.'s (Illumina) opening brief, filed with the US Court of Appeals for the Fifth Circuit on June 5, 2023, attempts to overturn the FTC's decision ordering the unwinding of Illumina's repurchase of GRAIL, Inc. Illumina's filing raises, in part, constitutional arguments that (1) the FTC's in-house administrative process is unconstitutional because it violates due process and equal protection rights, and (2) the FTC's agency structure is unconstitutional due to improper removal protection for FTC commissioners.

Similarly, Intercontinental Exchange, Inc. (ICE), and Black Night, Inc. (as well as Amgen/Horizon), are arguing constitutional affirmative defenses in their merger challenge by the FTC. The parties allege that the FTC's administrative process violates equal protection rights, due process rights and is an unconstitutional delegation of legislative power, among other violations of the Fifth and Seventh Amendments and Article III of the Constitution.

These constitutional challenges follow Axon's unanimous victory at the US Supreme Court in arguing that the FTC's administrative process and agency composition are unconstitutional. The Court held that the statutory review schemes at the FTC and Securities and Exchange Commission (SEC) do not "displace a district court's federal-question jurisdiction over claims challenging as unconstitutional the structure or existence of the SEC or FTC." This ruling allows parties to challenge the constitutionality of the FTC's administrative proceedings in federal court prior to the conclusion of any administrative proceeding. At the end of June, the Supreme Court agreed to hear a case challenging the constitutionality of the SEC's administrative trial process on similar grounds, and that case will likely decide the fate of the FTC's administrative trial process.

Also, in June, the FTC modified its rules for its in-house proceedings so that administrative law judges will now issue "recommended" decisions that are reviewed automatically by the FTC commissioners, rather than "initial" decisions that can be appealed to the FTC commissioners. This change appears designed to address some of the constitutional issues raised in Axon, but it also creates some additional constitutional issues.

It appears that merging parties will continue to bring constitutional challenges if subjected to the FTC's administrative process. In response, the FTC may bring more cases in district court to avoid parallel constitutional challenges.

EUROPEAN UNION

- **Divergent Viewpoints in Video Games Sector: Microsoft's Takeover of Activision Blizzard**

The European Commission (EC) and the UK Competition and Markets Authority (CMA) reached different conclusions regarding Microsoft's proposed takeover of Activision Blizzard, leading to contrasting decisions.

On May 15, 2023, following an in-depth investigation, the EC adopted a conditional clearance decision. To address the Commission's concerns that the deal could harm competition in the distribution of games via cloud game streaming services and that its position in the market for PC operating systems would be strengthened, Microsoft committed, for a 10-year duration, to offer (1) a free license to consumers in the European Economic Area (EEA) that would allow them to stream all current and future Activision Blizzard PC and console games for which they have a license, via any cloud game streaming services of their choice, and (2) a corresponding free license to cloud game streaming service providers to allow EEA-based gamers to stream any of Activision Blizzard's PC and console games.

In contrast, the UK CMA disapproved the deal in April 2023. The UK CMA concluded that the merger would result in a substantial lessening of competition within the UK cloud gaming market, considering that Microsoft's proposed behavioral remedy failed to effectively address its concerns. In particular, the CMA was concerned that the combined entity would have an overwhelming market share and could potentially harm competition, innovation and consumer choice. Microsoft has appealed the CMA decision to the Competition Appeal Tribunal, but the CMA and Microsoft agreed in July to stay the appeal while they discuss a potential settlement.

The contrasting decisions between the EC and CMA show the possible different assessments of the potential impact of a merger on competition and consumers by regulatory bodies. This is an ongoing trend, as demonstrated by the divergent EC and CMA decisions in Konecranes/Terex and Facebook/Kustomer. Such variances can arise when parties have different competitive strengths in distinct jurisdictions. Differences also can arise from disparate approaches between jurisdictions—in the United Kingdom, the CMA appears to be taking an aggressive approach. In particular, the Activision matter demonstrates the EC's continuing willingness to accept behavioral remedies while the CMA continues to be skeptical of behavioral remedies.

- **New Merger Simplification Package from the EC**

On April 20, 2023, the EC adopted a new package to further simplify its procedure for reviewing mergers under the EU Merger Regulation. This package is designed to reduce the administrative burden and provide greater clarity to businesses engaging in

transactions within the European Union. It includes (1) a revised merger implementing regulation, (2) a notice on simplified procedure and (3) a communication on the transmission of documents.

The key objectives of the package are to facilitate the assessment of unproblematic transactions, reduce the amount of information required for notifying transactions and optimize the transmission of documents.

One significant change is that two new categories of transactions can both benefit from the simplified procedure:

(i) Where the individual or combined upstream market share of the merging parties is below 30% and their combined purchasing share is below 30%

(ii) Where the individual or combined upstream and downstream market shares of the merging parties are below 50%, the market concentration index (HHI delta) is below 150, and the company with the smallest market share is the same in the upstream and downstream markets.

The new package also introduces flexibility clauses that give the Commission the discretion to treat additional cases under the simplified procedure in certain circumstances. Additionally, the regulation introduces a new notification form for simplified cases and introduces electronic notifications by default.

ENFORCEMENT IN KEY INDUSTRIES[1]

Healthcare, Pharmaceuticals & Biotechnology

Technology, Media & Communications

Retail & Consumer Productions

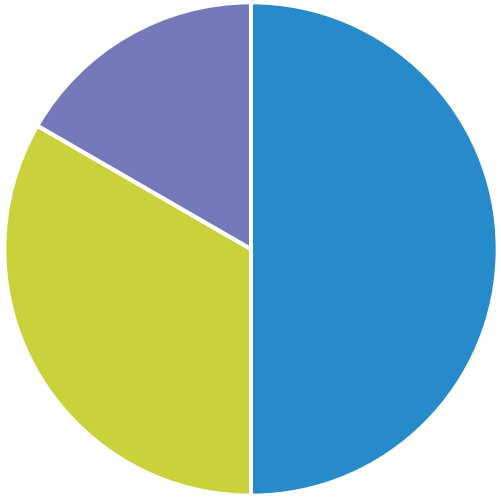
Chemicals & Industrial Prods. or Services

Transportation & Energy

Other

United States

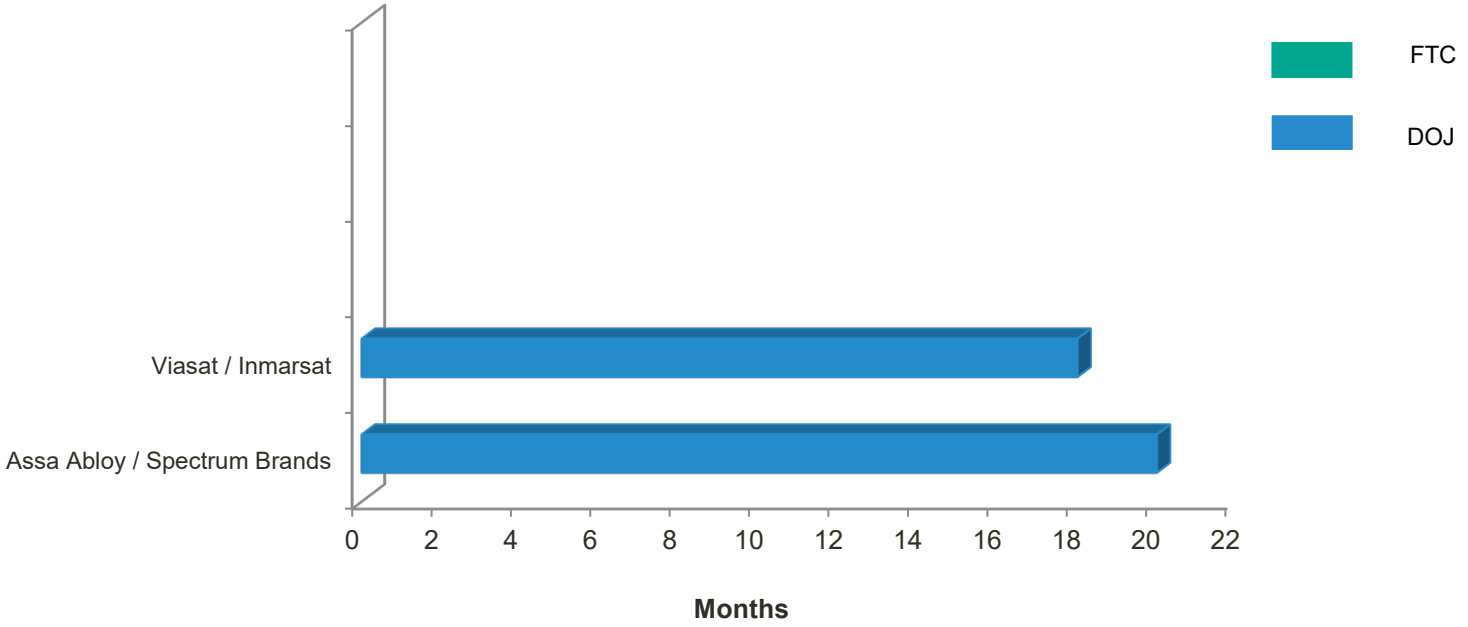
Europe & the UK



[1] For the United States, the graphs include cases we are aware of in which an antitrust enforcement agency issued a Second Request at some point and the investigation remained ongoing during the quarter, the agencies accepted a consent order or issued a complaint initiating litigation against 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.

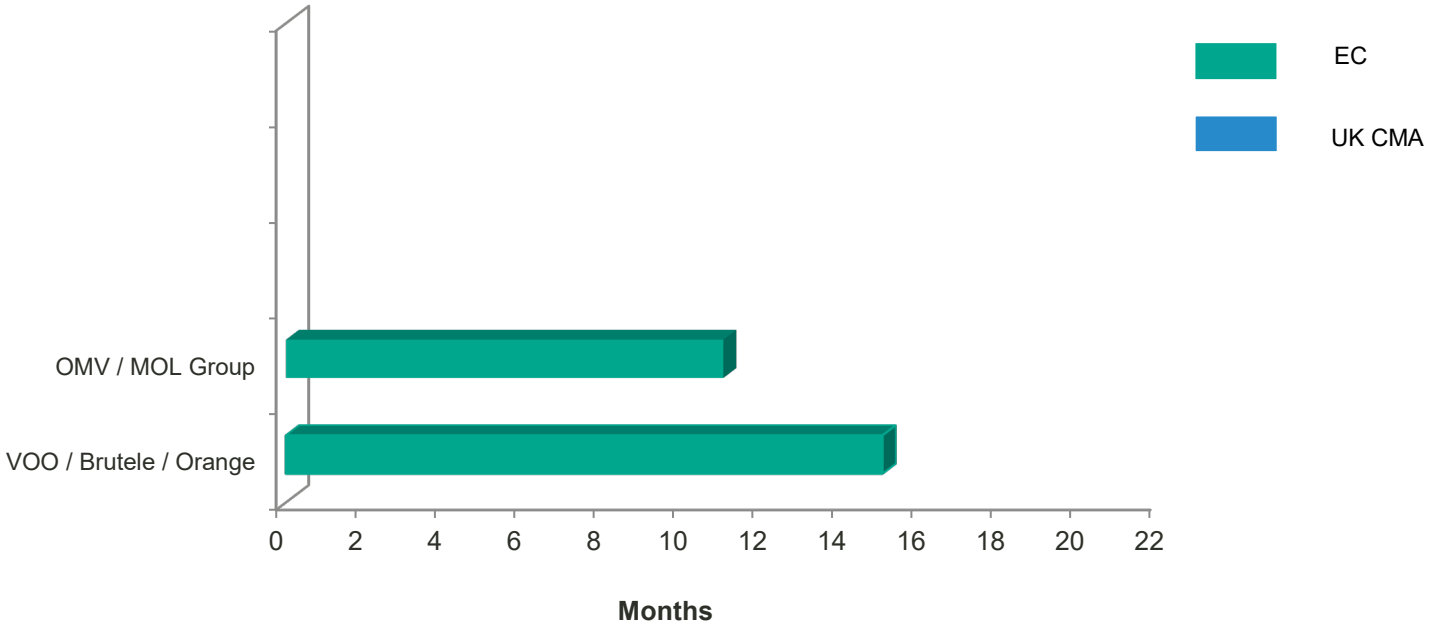
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS[2]

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



[2] These graphs do not represent a complete list of all matters within a jurisdiction. Certain matters involving Firm clients are not included in this report.

Europe & the UK (Time from Signing to Clearance)



Notable US Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CONSENT; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Amgen Inc. / Horizon Therapeutics	FTC	Challenged	FDA-approved drugs to treat thyroid eye disease (TED) and FDA-approved drugs to treat chronic refractory gout (CRG) in adult patients	On May 16, 2023, the FTC filed a complaint seeking to block Amgen's proposed $28 billion acquisition of Horizon. Amgen and Horizon are both biotechnology companies; Amgen manufactures a variety of human therapeutics and Horizon manufactures and sells products to treat rare autoimmune and severe inflammatory diseases. The complaint argues that Horizon currently has a monopoly for the two relevant products; these are Tepezza, which treats TED, and Krystexxa, which treats CRG. Despite the present lack of competition, the complaint describes multiple companies that are in clinical stage trials for products to compete with Tepezza and Krystexxa. FTC alleges that, post-close, Amgen would have the ability and incentive, by virtue of the leverage created by its broad product portfolio, to condition rebates to customers on the customers refusing to include on their formularies future products that will be created to compete against Tepezza and Krystexxa. The FTC asserts that clinical-stage companies would not be able to compete with the FTC's hypothesized future Amgen cross-market rebates, effectively foreclosing those companies from competing in the future. The FTC also alleged that there have been competitor complaints about Amgen's use of rebate leverage. Amgen asserts it has made commitments not to bundle the relevant Horizon products with Amgen's wider portfolio and has effectively eliminated competitive issues. The case is set for trial in September 2023.

PARTIES	AGENCY	CASE TYPE (CLEARED; CONSENT; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Assa Abloy / Spectrum Brands Holdings, Inc.	DOJ	Settlement during trial, consent order	Residential premium mechanical door hardware (the merging parties would have an approximately 65% combined share) and smart locks (the merging parties would have an approximately 50% combined share)	The DOJ filed suit to block Assa Abloy's proposed acquisition of Spectrum Brands on September 15, 2022. The DOJ stated that the allegedly anticompetitive transaction would eliminate head-to-head competition resulting in higher prices, lower quality, reduced innovation and poorer service in the sale of residential premium mechanical door hardware and smart locks. The DOJ alleged that the transaction would create a near monopoly in premium mechanical door hardware and would result in the combined firm controlling approximately 50% of the market for smart locks. After the DOJ filed its complaint, Assa Abloy announced a plan to divest two of its divisions, Emtek and Smart Residential, which are manufacturers of smart locks and other door-locking products that compete with Spectrum Brands. Assa Abloy lined up Fortune Brands, a manufacturer of smart locks and door hardware brands, as the acquirer of the divested assets. The DOJ argued that the defendants were trying "to cure their anticompetitive deal by unilaterally proposing a separate, conditional transaction" to "carve out and divest pieces of its integrated global business to a self-selected buyer." The case went to trial to "litigate the fix" proposed by Assa Abloy, but Assa Abloy ultimately amended its divestiture package to also include its August and Yale smart locks businesses to gain acceptance from the DOJ. The DOJ stated that the updated divestiture package was an improvement because it expanded Fortune's intellectual property (IP) and commercialization rights for smart locks and required that Assa Abloy supply Fortune with products for multifamily homes. It also allows the DOJ to reopen the case within five years if competition is materially diminished.

Louisiana Children's Medical Center / HCA Healthcare, Inc.	FTC	Challenged for alleged failure to comply with HSR Act requirements		On January 3, 2023, Louisiana Children's Medical Center (LCMC) announced that it completed its acquisition of three New Orleans area hospitals: Tulane Medical Center, Lakeview Hospital and Lakeside Hospital (collectively, the acquired hospitals). The acquisition was completed pursuant to the issuance of a certificate of public advantage (COPA) from the Louisiana legislature. COPA laws, also referred to as state action immunity, allow a legislature to approve medical-center acquisitions in concentrated markets that may otherwise violate antitrust laws, if the legislature believes the benefits of the acquisition outweigh the possible harm from a loss of competition. For state action immunity to apply to the acquisition, it must further a clearly articulated state policy and must be actively supervised by the state. LCMC announced that the deal includes $220 million in hospital investments and would add approximately 2,300 jobs in the state. The FTC alleged that, despite the COPA, the closing of this transaction occurred in violation of the HSR Act because the parties met the statutory notification thresholds but failed to file the necessary notification with the FTC and DOJ premerger notification offices. In addition to the alleged HSR Act violation, the FTC also opened an investigation into whether the transaction will substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. The parties filed suit in Louisiana on April 19, 2023, against the DOJ, the FTC and the US attorney general. In the suit, the parties sought declaratory judgment that the HSR Act does not apply to transactions that are exempt from antitrust laws under state action immunity applied through the COPA process. In response to the lawsuit filed by LCMC and HCA, on April 20, 2023, the FTC filed suit in Washington, DC, seeking to order the parties to cease integration of the hospitals and hold the entities separate to allow sufficient time for the FTC to investigate the effects on competition and for the court to determine whether the parties violated the HSR Act. This case was transferred to the Louisiana court.

PARTIES	AGENCY	CASE TYPE (CLEARED; CONSENT; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
JetBlue / American Airlines	DOJ	Challenged; district court blocked joint venture	Scheduled air passenger service Primarily for flights originating from Boston Logan, JFK / LaGuardia and Reagan National airports	On May 19, 2023, a Massachusetts federal district court found in favor of the DOJ holding that the JetBlue and American Airlines partnership known as the "Northeast Alliance" (NEA) was an anticompetitive combination in restraint of trade. The NEA was presented as a joint venture whereby the two companies shared ticketing data and engaged in joint scheduling, gate pooling and revenue sharing whereby the parties would divide revenues based on the capacity provided by each airline rather than the number of passengers seated on a specific flight. The court viewed this integration between the two competitors as effectively ending head-to-head competition, applying rule of reason analysis in determining the joint venture violated Sherman Act Section 1. The court required the DOJ to show proof of likely anticompetitive effects rather than specific harms as a result of the joint venture. JetBlue and American argued that the partnership was necessary to compete with Delta Air Lines in the northeast. The court rejected this argument, instead looking at the reduction in competition in certain areas and finding the partnership reduced competitors in New York City from four to three and in Boston from three to two. Given this reduced competition, the court found that the NEA resulted in a likely harm to competition and did not have any cognizable procompetitive benefits. The court stated that forming a joint venture that practically eliminates competition between two competitors for the sole purpose of competing more effectively against a more dominant competitor is anticompetitive and violative of the Sherman Act.

Notable European & UK Cases

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Broadcom / VMware	EC	Phase II	Hardware company / software provider	Broadcom is a hardware company based in the United States specialized in the production of network interface cards (NICs), fibre channel host-bus adapters and storage adapters. VMware is a leading global provider of server virtualization software for on-premises and private cloud environments, which interoperates with a wide range of hardware. The transaction, the acquisition by Broadcom of VMware, was notified to the European Commission on November 15, 2022. On December 20, 2022, the Commission launched an in-depth investigation to determine if Broadcom's acquisition of VMware could potentially hinder competition in the market for certain hardware components that are compatible with VMware's virtualization software. In addition, the Commission expressed concerns that Broadcom may (1) limit the development of SmartNICs by other providers, and (2) start bundling VMware's virtualization software with its own software and no longer offer VMware's virtualization software as a stand-alone. On April 12, the Commission sent Broadcom a statement of objections. The Commission had until June 21 to issue its final decision. Broadcom then offered interoperability remedies, and the Commission extended its deadline for a decision to July 17. The CMA is currently in Phase 2 and the FTC issued a second request last year.

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Viasat / Inmarsat	EC	Cleared without conditions	Satellite networks operators	On May 25, 2023, the European Commission approved, without conditions, Viasat's proposed acquisition of Inmarsat. Viasat and Inmarsat are vertically integrated satellite network operators and services providers, with Viasat owning four geostationary earth orbit (GEO) satellites and Inmarsat owning 15. They both use capacity from their own GEO satellites to provide services in the nascent market for the supply of broadband in-flight connectivity (IFC) services to commercial airlines in the EEA and globally. The Commission investigated whether the acquisition would have harmed competition in the market for the supply of broadband IFC services to commercial airlines in the EEA and/or globally; and whether new operators of non-GEO satellites are likely to exert sufficient competitive pressure on the merged entity. The Commission's investigation found that the parties' market position would remain moderate and that a number of sizable competitors would likely exert sufficient competitive pressure on the merged entity. As a result, the Commission found no competition concerns and consequently approved the transaction unconditionally.

PARTIES	AGENCY	CASE TYPE (CLEARED; CHALLENGED; ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Norsk Hydro / Alumetal	EC	Cleared without conditions	Producers of aluminum foundry alloys	On May 4, 2023, the European Commission announced that it raised no objections to Norsk Hydro's acquisition of Alumetal following an in-depth investigation launched on October 6, 2022. Norsk Hydro is a Norwegian aluminum company. Alumetal is a Polish producer of aluminum foundry alloys and aluminum master alloys. The aluminum foundry alloys of both companies are used as semi-finished products, especially in the automotive industry. Alumetal uses recycled material, while Norsk Hydro uses non-recycled material but uses renewable energy for production. The Commission investigated whether the acquisition of Alumetal would have further strengthened Norsk Hydro's leading position as a supplier of aluminum foundry alloys and whether the combination of Alumetal's upstream production of master alloys and Hydro's downstream production of foundry products would have left no competitors in the field of master alloys. However, the Commission's investigation found a sufficient number of alternative suppliers of aluminum foundry alloys, including environmentally friendly ones. The vertical relationship between Alumetal as a producer and Hydro as a potential customer was also deemed acceptable due to the number of suppliers and customers in the market. The Commission found no competition concerns and cleared the transaction unconditionally.
Eville & Jones / Vorenta	CMA	Cleared with conditions	Leading providers of specialized veterinary services	On April 28, 2023, the CMA accepted undertakings offered by Eville & Jones in its completed acquisition of Vorenta during a Phase I review. Eville & Jones and Vorenta are leading providers of specialized veterinary services that support the UK food supply chain. With its investigation, the CMA raised competition concerns in the provision of various veterinary public health inspections (including meat), official controls to the Food Standards Agency in England and Wales, export health certificates relating to products of animal origin in Great Britain, and outsourced inspectors to undertake certain agricultural inspections in England. To address these concerns, Eville & Jones proposed to divest the Vorenta business, including Hall Mark Meat Hygiene, Meat and Livestock Commercial Services, and all other Vorenta subsidiaries.

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