



ANTITRUST M&A SNAPSHOT

November 2019

United States: July – September 2019 Update

The Federal Trade Commission (FTC) and Department of Justice (DOJ) continue an active docket challenging M&A transactions. DOJ is resolving antitrust reviews significantly faster than the FTC, following DOJ's 2018 policy establishing a six-month target. The DOJ also made use, for the first time, of its authority to arbitrate a market definition dispute, potentially opening the door for a new tool the DOJ could employ to resolve challenges more rapidly.

EU: July – September 2019 Update

The European Commission (EC) agreed to clear, subject to conditions, the acquisition of broadband and energy networks following lengthy Phase 2 investigations. Meanwhile, the national European regulators opened new in-depth investigations into commercial radio advertising, software as a service for airlines, autonomous sea surface vehicles and the promotion of live music events (all in the UK) and prohibited the merger of two recyclers (Germany).

Snapshot of Events

United States

- **DOJ Employs Arbitration in Aluminium Deal**

The Administrative Dispute Resolution Act of 1996 gives the DOJ the authority to arbitrate cases under Section 7 of the Clayton Act. The DOJ recently agreed with the parties in the Novelis/Aleris deal to let an arbitrator decide their dispute on the relevant market. This case represents the first application of this authority. DOJ antitrust chief Makan Delrahim called the process “truly groundbreaking” and suggested it “could prove to be a model for future enforcement actions ... bring[ing] greater certainty for merging parties and [preserving] taxpayer resources.” It remains to be seen how frequently this new process will be employed.

- **CVS-Aetna Could Re-Shape Merger Review**

When parties enter into a settlement with the DOJ related to a proposed merger, that settlement is reviewed by a federal judge under the Tunney Act to ensure the settlement is in the public interest. Judge Leon’s decision to review antitrust violations alleged by outside parties during his Tunney Act review of a proposed settlement involving the CVS-Aetna transaction, rather than relying only on the allegations provided by the DOJ, marked a departure from past practice. The resulting mini-trial slowed down the Tunney Act process, but Judge Leon ultimately approved the settlement. Going forward, the DOJ may need more preparation before defending settlement agreements in court.

- **FTC Merger Review Taking Substantially Longer than DOJ**

A recent review of merger investigations found that significant merger investigations in the United States ending in the first half of 2019 took an average of 12.1 months, compared to 10.5 months for those ending in 2018. This upward trend has been fairly consistent for a number of years. An emerging trend is the discrepancy between the DOJ and the FTC. In the first half of 2019, more than 80% of DOJ investigations concluded in 10 months or fewer, while 75% of FTC investigations took 16 months or more. DOJ’s 2018 reforms aimed at completing merger reviews in six months appears to be working well.

European Union

- **The French Competition Authority Consults on Revised Merger Control Guidelines**

The French competition authority is expected to revise its merger control guidelines to provide clarity on identifying mergers that do not raise competition concerns, on procedural infringements, and the suitability of behavioural commitments to remedy specific concerns. The revised guidance should be helpful to assess what constitutes gun jumping.

- **UK CMA Publishes Guidance on Interim Measures in Merger Investigations**

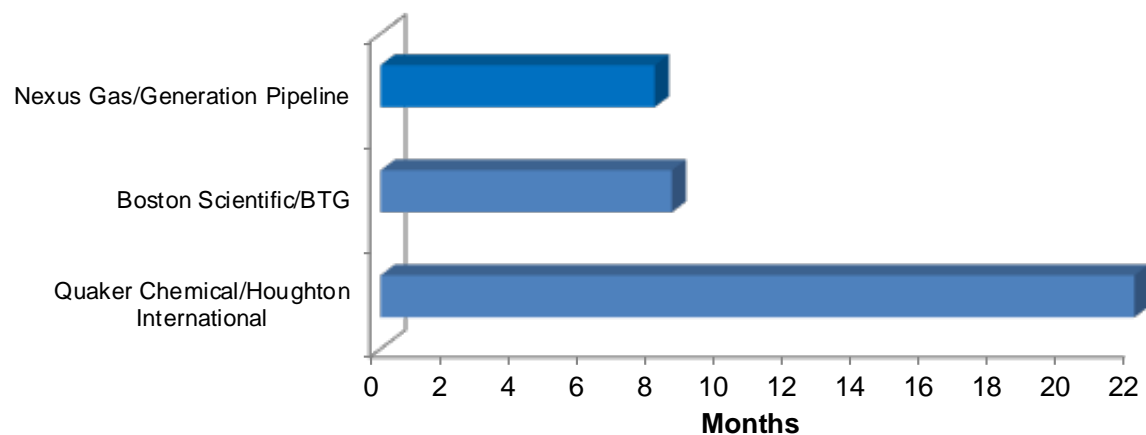
The UK Competition and Markets Authority (CMA) has updated its guidance on interim measures reflecting a move toward stricter adherence to procedural rules, particularly to prevent pre-clearance integration between parties to a transaction. The CMA has also been more aggressive in implementing interim enforcement orders to prevent merging companies from integrating assets while the CMA reviews the transaction.

- **Germany Considers Revision to Antitrust Laws to Catch “Killer Acquisitions” in Digital Markets**

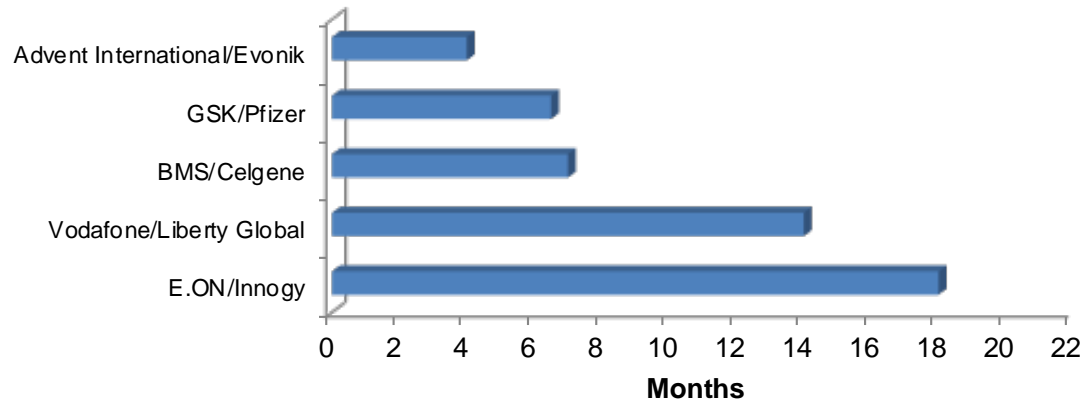
The German government is looking to provide new tools to the German Federal Cartel Office (FCO) to investigate “killer acquisitions” in digital markets through a revision of the German Act against Restraints of Competition (ARC). Ever since the acquisition by Facebook of Whatsapp, the FCO and the German government have searched for ways to investigate transactions where large firms acquire smaller innovative targets to discontinue innovative projects and thereby preempt future competition.

Snapshot of Enforcement Actions

UNITED STATES (TIMING FROM SIGNING TO CONSENT OR INVESTIGATION CLOSING)



EUROPEAN UNION (TIMING FROM SIGNING TO CLEARANCE)



Significant US Trials

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
United States					
Novelis/ Aleris	DOJ	Northern District of Ohio District Court	Automotive Aluminum sheet 4 to 3	Is automotive aluminum sheet a market separate from steel?	The DOJ filed suit to prevent Novelis from acquiring Aleris due to concern over higher prices for aluminum sheet used in car manufacturing. The deal would combine two of the four largest producers in North America of aluminum sheet and would result in the combined entity controlling 60% of projected domestic capacity, according to the DOJ. To resolve a dispute regarding the product market, the DOJ turned to binding arbitration for the first time, pursuant to the Administrative Dispute Resolution Act of 1996.
Ottobock HealthCare GmbH/ Freedom Innovations LLC	FTC	FTC Administrative Complaint	US market for microprocessor- driven prosthetic knees (MPKs)	Are MPKs a separate market from other prosthetic knees?	The FTC first challenged this consummated transaction in December 2017, arguing that the acquisition eliminated a significant and disruptive competitor in the US market for MPKs. The FTC alleged that Ottobock controls approximately 70% of the domestic market and that Freedom is a significant competitor poised to gain market share. The FTC further alleged that the competition from Freedom had caused Ottobock to offer new products and lower prices and that competition would be harmed by the acquisition. The FTC Administrative Law Judge found for the FTC, a decision that the Commission recently affirmed on appeal.
Sabre Corporation / Farelogix Inc.	DOJ	Delaware District Court	Provision of booking services for airline tickets sold through traditional travel agencies and booking services for airline tickets sold through online travel agencies	Does the proposed merger in booking services for airlines significantly lessen competition in violation of Section 7 of the Clayton Act?	The DOJ alleged the transaction represents a dominant firm's attempt to eliminate a disruptive competitor and, if allowed to proceed, would likely result in higher prices, reduced quality and less innovation for airlines and, ultimately, consumers. Sabre operates a global distribution system and has over 50% of airline bookings through travel agencies. According to the DOJ, Sabre operates older technology and resists innovation, but has become threatened by Farelogix's new technology. The DOJ cited Sabre's attempt to have Farelogix's technology blocked by the US Transportation Department as well as text messages between Sabre executives saying the deal would "entrench" Sabre.

Significant Abandoned Transactions

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS ¹
United States				
Quad/Graphics Inc.	LSC Communications Inc.	Marketing solutions	DOJ	The parties abandoned the transaction after the DOJ sued to block the acquisition. Trial was set to start mid-November at the earliest. Citing the delay, uncertainty and cost, the parties mutually agreed to terminate the merger agreement.
Fidelity National Financial	Stewart Information Services	Title insurance underwriting	FTC	The parties abandoned the transaction after the FTC moved to block the transaction. Fidelity paid a \$50 million reverse termination fee to Stewart in connection with the termination of the merger agreement.

¹ The information in this column summarizes the government's allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

Significant US Consent Orders / Investigation Closing with Agency Statements

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS ²	BUYER UPFRONT
United States						
Nexus Gas Transmission LLC	Generation Pipeline LLC	Natural gas pipeline transportation in the Toledo, Ohio, area	8 months	FTC	An FTC challenge was withdrawn after the parties agreed to strike a non-compete agreement that would have prevented the seller, North Coast Gas Transmission, LLC, from competing with Nexus in the area for three years, despite retaining some nearby assets.	N/A
Quaker Chemical Corp.	Houghton International Inc.	Aluminum hot rolling oil (AHRO) and associated technical support services, and steel cold rolling oil (SCRO) and associated technical support services 2 to 1	28 months	FTC	The FTC required the divestiture of Houghton International Inc.'s North American AHRO and SCRO product lines to Total S.A., a French oil and gas company. The FTC found that Quaker and Houghton were the only two commercial suppliers of AHRO in North America and the two most important commercial suppliers of SCRO in North America. Seven months earlier, the European Commission had cleared the transaction on the condition that Quaker divest Houghton's EEA business for the same product lines.	Yes
Boston Scientific Corp.	BTG plc	Drug-eluting beads (DEBs) 3 to 2	8,5 months	FTC	Boston Scientific Corp. agreed to divest its DEBs business to Varian Medical Systems to settle charges brought by the FTC. The FTC found that DEBs were not competitive with other treatment methods. The FTC alleged that the parties were the two largest suppliers of DEBs in the United States and that there was only one other supplier that was much smaller than the parties.	Yes

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Significant EC Clearance Decisions

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT
European Union						
Vodafone	Certain Liberty Global Assets	Retail supply of fixed broadband services and the wholesale supply of signal for the transmission of TV channels	14 months	EC	The European Commission reviewed the acquisition of Liberty Global's cable business in the Czech Republic, Germany, Hungary and Romania and approved the transaction after an in-depth Phase II investigation. The review initially focused on the cable networks in Germany and the Czech Republic. Following the Phase II investigation, the European Commission held that Vodafone post-transaction would not have the ability or incentive to foreclose standalone providers of fixed or mobile telecommunication services in the Czech Republic. In Germany, however, the European Commission found that Liberty Global acted as an important competitive constraint in the market for the retail supply of fixed broadband services. The European Commission also found that the merger would increase the market power of the combined entity in the market for the wholesale supply of signal for the transmission of TV channels. The European Commission found this could hinder broadcasters and prevent them from offering innovative services to consumers. Ultimately, Vodafone offered remedies, including granting access to its cable network to two competitors, and behavioral remedies, including the obligation to refrain from contractual restrictions that prevent innovative internet TV services.	N/A
E.ON	Innogy	Supply of electricity for heating purposes; supply of electric	18 months	EC	The European Commission cleared the acquisition by E.ON of Innogy after a Phase II review. The transaction was part of an asset swap between E.ON and RWE (Innogy's parent company) to allow each of them to focus on different levels in	No

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BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT
		vehicle charging stations on motorways; retail supply of gas and electricity; and supply of electricity to unregulated business			the energy supply chain. RWE's acquisition of certain generation assets from E.ON—the first swap—was cleared in Phase I in February. The European Commission's concerns regarding the acquisition of Innogy were related to the supply of gas and electricity for various purposes, including for heating and electric vehicle charging, in Germany, the Czech Republic and Hungary. The remedies offered by E.ON included divesting its heating electricity customers in Germany, specific charging stations on German motorways, and the Hungary and Czech retail businesses. Several energy utility firms have challenged the clearance decision in Europe, and have introduced litigation in the United States to access Innogy internal documents to assist their case.	
GlaxoSmithKline	Pfizer Consumer Healthcare Business	Topical pain management products	6.5 months	EC	The European Commission reviewed the contribution of both GlaxoSmithKline plc. and Pfizer, Inc.'s respective consumer healthcare businesses to a new venture, over which GSK would have sole control. The European Commission considered that the acquisition raised concerns in relation to topical pain management products, and that it could result in price increases in a number of EEA countries, including Austria, Germany, Ireland, Italy and the Netherlands. The European Commission approved the transaction after GSK offered to divest Pfizer's topical pain management business carried out under the ThermoCare brand globally.	No
Advent International Corporation	Evonik methacrylates business division	Methyl methacrylate and other methacrylate derivatives	4 months	EC	The European Commission cleared unconditionally the acquisition by Advent International Corporation of Evonik's methacrylates business. The European Commission's investigation focused on the vertical relationship between Advent's portfolio company Allnex and Evonik's business. In particular, the European Commission market tested the market definitions suggested by the parties. The European Commission concluded that the transaction would not give rise to vertical competition concerns given the size of the parties' competitors and the fact that the products were not considered essential components on the downstream product, (i.e., coating resins).	N/A

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT
Bristol-Myers Squibb	Celgene	Marketed and pipeline products in autoimmune diseases, oncology and fibrotic diseases	7 months	EC	The European Commission cleared unconditionally the acquisition by Bristol-Myers Squibb of Celgene. Even though the transaction gave rise to horizontal overlaps between the two companies' marketed and pipeline products in autoimmune diseases, oncology and fibrotic diseases, the European Commission concluded that the proposed transaction would raise no competition concerns given the number of actual and potential competitors, and the transaction's limited impact in the European Economic Area.	N/A

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