May 2024

JANUARY – MARCH 2024: KEY THEMES AND TAKEAWAYS

UNITED STATES

- **New Merger Guidelines Deployed**

  The 2023 Merger Guidelines are a non-binding statement that provides clarity on aspects of federal agencies' deliberations and enforcement practices undertaken in individual merger cases under the antitrust laws. The new merger guidelines closely reflect the objectives of the Federal Trade Commission (FTC) and US Department of Justice (DOJ) to broaden the definition of what constitutes anticompetitive effects in order to modernize antitrust law in the face of current commercial and market realities. The merger guidelines that were released in December 2023 were walked back from the draft merger guidelines released in July 2023 but are still a substantial departure from the prior merger guidelines.

  The agencies have begun implementing the new merger guidelines in their enforcement actions. For example, the FTC alleged that a transaction would impair competition in the labor market, in addition to being unlawful, due to the loss of head-to-head competition for customers. In addition to labor market concerns, the FTC has incorporated the new merger guidelines' theories of harm relating to a trend toward concentration and serial acquisitions. These "creeping" theories of harm seem to focus on private equity platform

transactions. It remains to be seen whether the FTC will succeed with these theories of harm, but stakeholders should pay close attention to forthcoming litigation as it will serve as an important litmus test for how courts will take the new merger guidelines into account.

- **FTC Focuses on Private Equity in Healthcare**

  On March 5, 2024, the FTC hosted "Private Capital, Public Impact: An FTC Workshop on Private Equity in Health Care," a virtual workshop examining the role of private equity investment in healthcare markets. At this workshop, the FTC highlighted its focus on private equity (PE) acquisitions of healthcare service providers such as outpatient clinics, nursing homes and physician practices.

  The FTC noted many of its concerns about PE in healthcare, including allegations of punishing hours, staffing cuts, sharp declines in patient care, shortages of basic drugs and supplies, patients traveling further for lower-quality care, patients choosing to forego care because of disenfranchisement in the healthcare system, medical professionals having to subordinate their medical judgment to corporate decision makers, and a lack of research and development. During this workshop, Chairwoman Khan stated, "These short-term profit extraction strategies can undercut long-term value in the context of healthcare, [and] have life or death consequences." Khan further emphasized that PE companies cannot sidestep antitrust review by rolling up markets with serial acquisitions that undermine competition incrementally. Khan emphasized that the 2023 merger guidelines made clear that the agencies "will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies."

  The workshop also confirmed that the FTC, DOJ and the Department of Health and Human Services (HHS) are actively exchanging data and information to help identify potentially unlawful transactions that might otherwise be below the Hart-Scott-Rodino (HSR) filing thresholds. The agencies reiterated their intention to use their authority under Section 8 of the Clayton Act to prevent PE firms from appointing directors to competing companies.

  McDermott's Health Transactions Resource Center highlights the latest regulatory developments impacting healthcare transactions.

- **FTC Amplifies Scrutiny on Emerging Technology Investments**

  On January 25, 2024, the FTC's Office of Technology (OT) hosted its inaugural Tech Summit to facilitate conversations about artificial intelligence (AI) and its influence on antitrust and consumer protection. The FTC has enhanced its focus on AI's antitrust implications, in particular, as it relates to transactions involving chips and cloud infrastructure data and models, and consumer applications.

Henry Liu, director of the FTC's Bureau of Competition, noted that "too often AI tools have been used to limit opportunities and prevent access to critical resources," warning that excessive market power can distort the path of innovation when dominant firms control key inputs like computing power, cloud storage, semiconductors, talent and data. Liu further noted that "fair, open, and competitive markets should be the hallmarks of AI" and that the FTC intends to use its Section 5 enforcement authority to identify unfair forms of competition arising from AI.

On the very same day as the FTC Tech Summit, the FTC announced that it issued orders to five companies (Alphabet Inc., Amazon.com Inc., Anthropic PBC, Microsoft Corp. and OpenAI Inc.) requiring them to provide information regarding recent investments and partnerships involving generative AI companies and major cloud service providers. The agency's inquiry under 6(b) of the FTC Act will scrutinize corporate partnerships and investments with AI providers to build a better internal understanding of these relationships and their impact on the competitive landscape. It remains to be seen how the 6(b) findings will impact merger and acquisition (M&A activity within the AI space), but it seems likely that these types of transactions will lead to some degree of agency involvement.

EUROPEAN UNION

- **Super-Simplified Procedure Used in Approximately One-Third of All Merger Decisions by the EC**

In 2023, the European Commission (EC, or Commission) introduced a "super-simplified procedure" as part of its major reforms to the EU Merger Regulation (we covered this topic in Q2 2023 here). This initiative was designed to further streamline the review process for certain types of mergers that are unlikely to raise competition concerns, thereby reducing the administrative burden on the merging parties and allowing the Commission to more efficiently allocate its resources to cases that require in-depth investigation (two such complex cases are shown in the table below).

The super-simplified procedure applies, in particular, to categories of cases such as extra-European Economic Area (EEA) joint ventures and transactions where there are no horizontal overlaps or non-horizontal relationships between the merging parties' activities. One of the most notable aspects of this procedure is that it allows the parties to skip the pre-notification discussions with the Commission and proceed directly to the notification of their transaction. This represents a significant departure from previous practice and is intended to speed up the clearance process for mergers that are clearly unproblematic from a competition point of view.

In the first quarter of this year, more than 30% of all merger control decisions were already taken under this super-simplified procedure. Overall, the importance of the simplified procedure continues to grow, and the super-simplified procedure is a key component in this process.

- **Commission Takes Tougher Approach to Merger Control Review**

  In the first quarter of 2024, a remarkable number of cases were cleared only after the merging parties offered concessions. This development was highlighted by State Secretary Sven Giegold of the German Federal Ministry for Economic Affairs and Climate Protection during his keynote speech at the 22nd International Conference on Competition held in Berlin. Giegold's remarks point to a tougher stance by the Commission in reviewing mergers, reflecting an overarching commitment to maintaining competitive markets within the European Union (EU), even in so-called entrenched markets.

  The need for concessions typically arises when the Commission identifies potential competition concerns with a proposed merger, which could range from reducing consumer choice to raising prices or stifling innovation. To address these concerns and secure clearance, companies often propose remedies, including divestiture of certain businesses, granting competitors access to technology or infrastructure, or other measures designed to preserve competition.

  Giegold's comments underscore a broader regulatory approach in which the Commission is increasingly vigilant in its merger review to ensure that market dynamics remain pro-competitive and pro-consumer. This trend is reflected in the two decisions below (CMA CGM / Bollore Logistics and Orange / MásMóvil / JV), where the Commission required strong structural remedies to address vertical and horizontal issues, each of which affected different sectors.

ENFORCEMENT IN KEY INDUSTRIES[1]

Healthcare, Pharmaceuticals & Biotechnology

Technology, Media & Communications

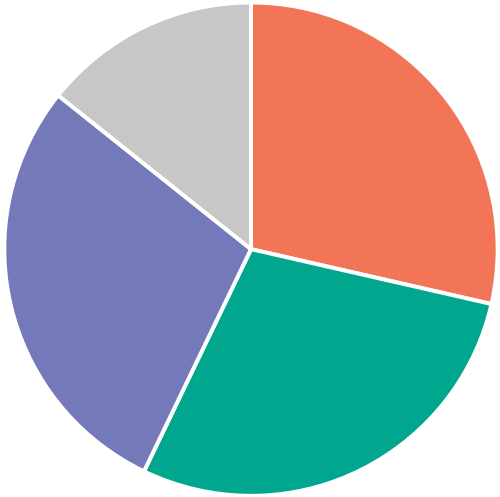
Retail & Consumer Productions

Chemicals & Industrial Prods. or Services

Transportation & Energy

Other

United States

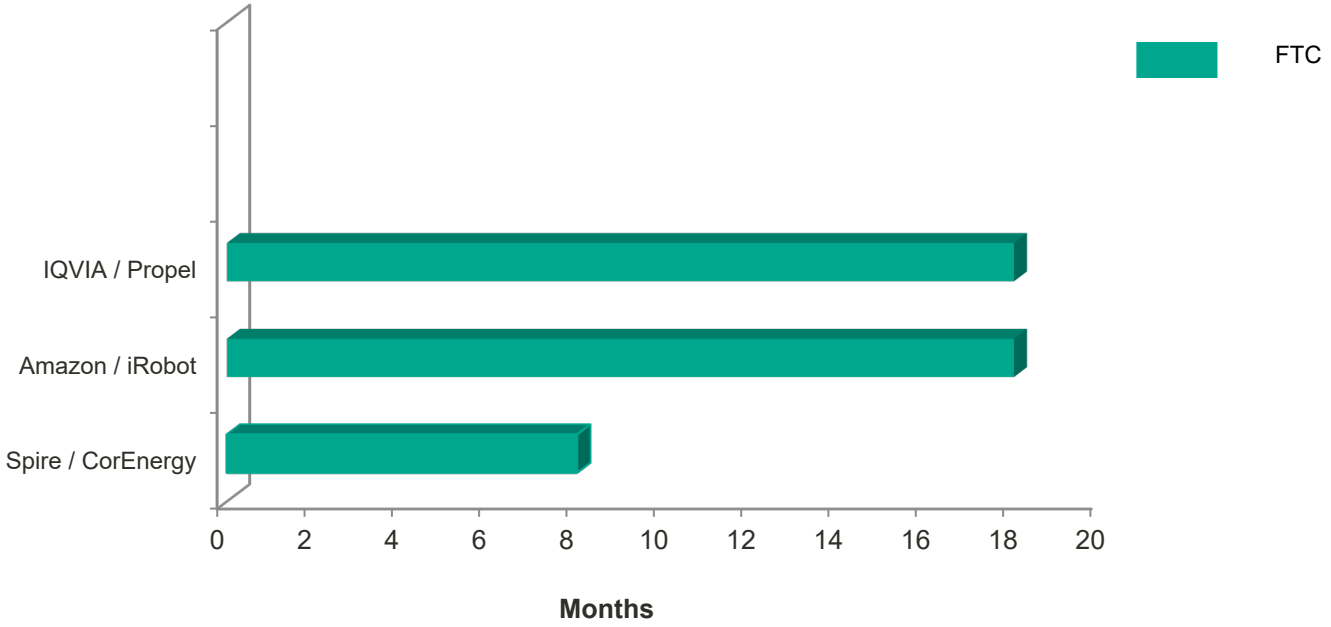


Europe & the UK

[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, or the transaction was 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, or the transaction was abandoned after an antitrust investigation.

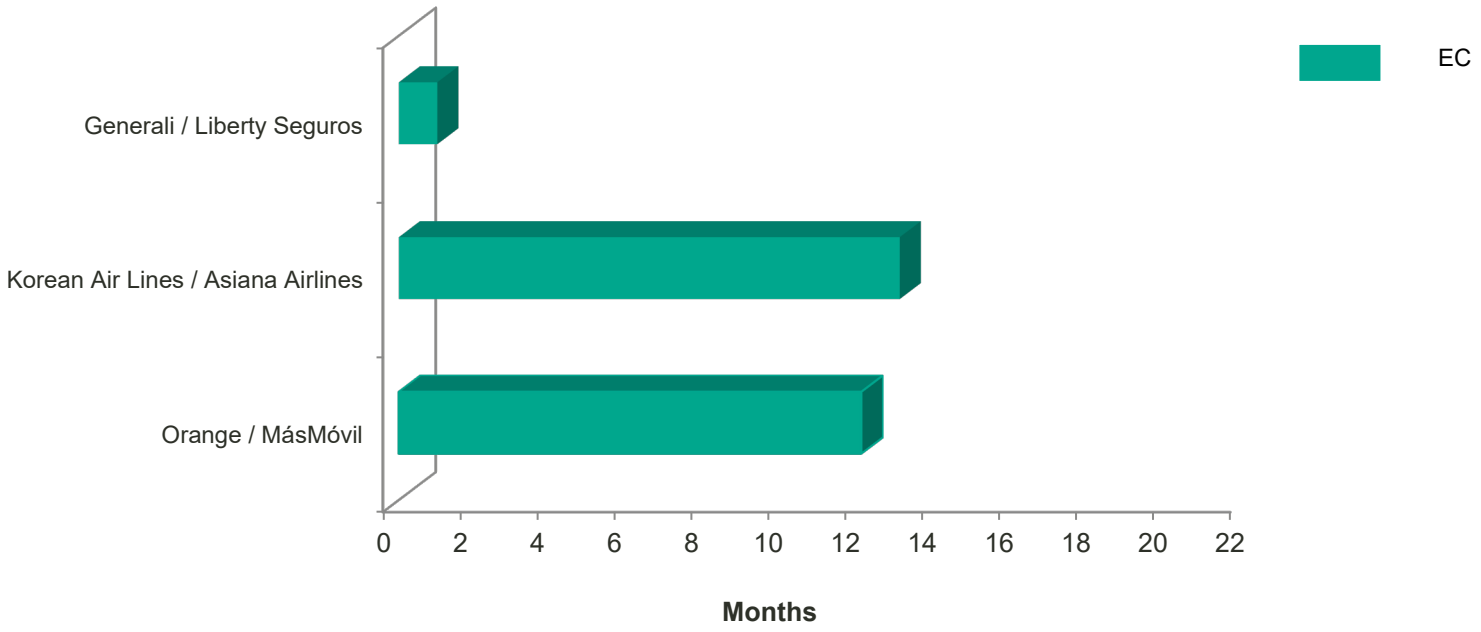
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS[2]

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.

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
Novant / Lake Norman and Davis regional hospitals	FTC	Challenged	Inpatient general acute care (GAC) hospital services sold and provided to insurers and their enrollees in the eastern Lake Norman, North Carolina area.	In an already highly concentrated market containing four GAC hospitals, the FTC alleges the proposed transaction between Novant and Lake Norman and Davis regional hospitals would lead to Novant controlling 65% of the market for inpatient GAC in the eastern Lake Norman area. A hearing date for the FTC's motion for a preliminary injunction is set for April 29, 2024. A hearing is scheduled on June 26, 2024, for the administrative matter. The FTC alleges the transaction would eliminate fierce competition between Novant Huntersville and Lake Norman, a lower-priced alternative. Combining the hospitals allegedly would eliminate price competition and result in higher reimbursement rates from insurers. It would also allegedly reduce non-price competition, decreasing the incentive to invest in service offerings and facilities. Consequently, the FTC alleges prices would increase and quality of care would decrease.
Choice Hotels / Wyndham Hotels & Resorts	FTC	Abandoned	Not clear (abandoned without challenge).	After merger negotiations broke down between the parties in Q4 2023, Choice Hotels issued an exchange offer for Wyndham's stock and nominated a slate of directors to replace Wyndham's eight-member board. Wyndham had previously rejected Choice Hotels' bids, in part, due to antitrust risk associated with the merger. Choice and Wyndham each possess a large portfolio of hotel chains, with Choice owning 22 hotel brands and Wyndham owning 24 hotel brands. Choice and Wyndham are two of six companies that control approximately 80% of all branded hotel rooms. In January 2024, a day after Choice Hotels disputed allegedly "false and misleading antitrust claims" made by Wyndham to the Securities and Exchange Commission, Wyndham

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				received an FTC second request. The issuance of the second request made the timeline and outcome more unpredictable, which reduced the value of Choice's offer. In addition to head-to-head competition, the FTC also appeared to be examining the effect the transaction on the hotel franchise market where the combined firm would allegedly have between 50% and 60% market share post-closing. Hotel franchisees typically purchase land and develop the buildings according to each hotel brand's standards, which results in significant investment for the franchisee. The Asian-American Hotel Owners Association (AAHOA), which represents approximately two-thirds of Choice and Wyndham franchisees, expressed concern about the reduction in competition among franchisors for the economy-scale segment. The AAHOA appeared to be concerned that by combining these two large brands the royalty fees franchisees are required to pay would increase. Ultimately, Choice Hotels abandoned its takeover attempt in March 2024, stating that the shareholder response to the exchange offer did not create a path forward.

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JetBlue Airways / Spirit Airlines	DOJ	Blocked	Two of the largest "ultra-low cost" scheduled air passenger service providers.	Following closing arguments in December 2023, a federal judge blocked JetBlue / Spirit's merger in January 2024, holding that the transaction violated antitrust law. Due to the significant legal obstacles of completing the transaction by the end date, the parties abandoned the transaction. The court ruled that the transaction would substantially lessen competition because it would eliminate one of the airline industry's few primary competitors that provides unique innovation and price discipline. In particular, the court found that the elimination of Spirit would harm cost-conscious travelers who rely on Spirit's low fares. Although JetBlue offered to divest gates in Fort Lauderdale, Boston, Newark and New York to address antitrust concerns, the court found that the divestments were not sufficient to rebut the anticompetitive effects.

Notable EU Cases

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CMA CGM / Bollore Logistics	EC	Conditional clearance	Provision of sea freight.	On February 23, 2024, the Commission cleared, subject to conditions, the proposed acquisition of Bolloré Logistics SE (Bolloré Logistics) by CMA CGM S.A. (CMA CGM). The Commission concluded that the acquisition, as initially notified, would have reduced the competition in the markets for the provision of sea freight forwarding services in Martinique, Guadeloupe and French Guiana. In particular, the Commission found that the transaction would have created significant vertical relationships between (i) CMA CGM's upstream container liner shipping activities on routes between Europe and Martinique, Guadeloupe and French Guiana and (ii) Bolloré Logistics' downstream sea freight forwarding activities in these territories. The Commission found that CMA CGM may have the ability and incentive to favor Bolloré Logistics to the detriment of competing freight forwarders, particularly in view of CMA CGM's very high market shares on these overseas routes and the competitive structures in these territories. In order to address the Commission's competition concerns, the parties offered the following remedies: • The divestiture of all of Bolloré Logistics' activities in Guadeloupe, Martinique, Saint Martin, and French Guiana; and • The divestiture of a number of assets in mainland France related to these activities. These commitments fully address the competition concerns identified by the Commission, by eliminating the vertical link between CMA CGM's container liner shipping activities and Bolloré Logistics' sea freight transport activities in the territories concerned. Following the positive feedback received in the market test of the commitments, the Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns.

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Orange / MásMóvil / JV	EC	Conditional clearance	Telecommunications	On February 20, 2024, the Commission reviewed and cleared, subject to conditions, the proposed creation of a joint venture between Orange and MásMóvil. Orange is a full mobile network operator while MásMóvil is a hybrid mobile network operator. MásMóvil relies on its own mobile network, which does not cover the whole of Spain, and on a national roaming agreement with Orange for the provision of retail mobile services. Following its investigation, the Commission had concerns that the transaction, as initially notified, would restrict competition in the retail markets for the provision of mobile and fixed internet services in Spain, whether offered as a standalone or bundled services. In particular the Commission found that: • The transaction would create the largest operator in Spain in terms of customers, with a significant increase in market share in all relevant retail markets. • Orange and MásMóvil are direct competitors in the Spanish retail markets for the provision of mobile and fixed Internet services. MásMóvil has a very competitive offer and has grown steadily over the years. Its main brands, Yoigo and MásMóvil, have attracted a significant number of Orange customers in Spain. The transaction would therefore eliminate a close and important competitor. • The transaction could also have led to significant price increases for consumers in Spain, well above 10%. • Any efficiencies that the transaction might have generated, such as cost savings or additional 5G or fiber roll-out, would not have been able to offset the significant anti-competitive effects of the transaction. The parties offered the following remedies: • MásMóvil offered to divest spectrum assets that will allow a competitor to develop its own mobile network in order to become a strong competitor to the joint venture.

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				• The joint venture will offer the abovementioned competitor the opportunity to enter into an optional roaming agreement in order to strengthen the competitor's mobile network. These commitments fully address the identified competition concerns and, therefore, maintain a competitive telecommunications market in Spain.

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