



Antitrust M&A Snapshot

United States: January – March 2018 Update

One year into the Trump administration, the US antitrust agencies are finally starting to implement their enforcement policies. Most notably, trial began in the US Department of Justice's (DOJ) challenge of the AT&T/Time Warner merger, which is the Antitrust Division's first significant vertical challenge in several decades. Judge Richard J. Leon's opinion in that case could alter the outlook for several other vertical transactions pending before the agencies. While the DOJ was preparing for trial, the Federal Trade Commission (FTC) was preparing for a transition to five new commissioners, who were approved by the Senate in April. It remains unclear whether the new, Republican-led FTC will be more moderate in its enforcement efforts, similar to prior Republican administrations, or will follow in the footsteps of President Trump's DOJ, which has been surprisingly aggressive.

EU: January – March 2018 Update

The European Commission (EC) continued to be quite active in the first quarter of 2018, clearing five mergers. The most significant decision was the approval of a megamerger in the agrochemical sector—Bayer/Monsanto—where the parties submitted a remedy package that totalled over €6 billion. This remedy package included divestitures of research and development assets that addressed the EC's concerns about innovation, similar to the EC's Dow/DuPont clearance last year. In addition to Bayer/Monsanto, two other proposed acquisitions in the chemicals sectors fell through, most notably Celanese/Blackstone, due to excessive divestiture requests required by the Commission.

Snapshot of Events (Legislation/Agency Remarks/Speeches/News, etc.)

United States

- **FTC Bench Finally Filling Out**

President Trump nominated Rebecca Kelly Slaughter to fill the final vacancy on the FTC. Slaughter is the current chief counsel to Senator Chuck Schumer. She will serve the remainder of former Chairwoman Edith Ramirez’s seven-year term, which ends in September 2022, and she will join Rohit Chopra as the second Democrat on the FTC. Chopra was previously nominated along with Joseph Simons, Noah Phillips and Christine Wilson—all four were unanimously confirmed by a Senate panel in February.

- **Size of Transaction Thresholds Updated for Premerger Notification**

The 2018 size-of-transaction threshold for reporting proposed mergers under Section 7A of the Clayton Act has been released. The adjusted threshold is \$84.4 million, up nearly \$4 million from last year. This threshold is revised annually based on changes in the gross national product.

- **DOJ Announces Modifications to Consent Decrees to Improve Enforcement Capabilities**

During a speech to the New York State Bar Association, Assistant Attorney General Makan Delrahim noted that three consent decrees filed in December contained “a set of procedural provisions designed to improve their function and enforceability.” The most significant change lowers the DOJ’s burden of proof for a violation of a consent decree from a clear and convincing evidence standard to a preponderance of the evidence standard. The DOJ will also require defendants to reimburse the DOJ for attorneys’ fees and other costs in connection with a successful enforcement effort.

- **FTC Reaffirms Structural Relief as Preferred Remedy, Even for Vertical Mergers**

On January 10, Bruce Hoffman, the FTC’s Acting Director of the Bureau of Competition, commented on vertical merger enforcement at the FTC. Hoffman noted that many people were surprised by the DOJ’s challenge of AT&T/Time Warner, but reiterated that the FTC prefers structural remedies. Hoffman specifically stated that the FTC “start[s] by looking at structural remedies for most vertical mergers.” It is only when the structural remedy is at odds with the “efficiencies that motivate the merger” that the FTC considers conduct remedies.

- **DOJ’s Nigro Notes Divestitures of Stand-Alone Businesses Are Most Effective Structural Remedies**

On February 2, Deputy Assistant Attorney General Barry Nigro clarified that the DOJ not only prefers structural remedies over conduct remedies, but when there is a structural remedy, the DOJ prefers “a clean divestiture of a stand-alone business” rather than an “asset carve-out.” According to the DOJ, these divestitures are more likely to create a successful, independent competitor post-closing.

European Union

- **Best Practice Guidelines for Submitting Merger Documents to European Commission Expected in the Coming Months**

Commissioner Margrethe Vestager said on January 25 that best practices guidelines for submitting merger documents will be issued by the EC in the coming months. The decision to publish these guidelines was prompted by the importance documents played in recent EU merger reviews. The EC recognizes that time is short in merger reviews and hopes that these guidelines will help businesses answering the Commission requests more efficiently.

- **Commissioner Vestager Warns of Potential Anticompetitive Effects from Common Ownership of Competitors by Investment Funds**

In a series of speeches throughout the first quarter of 2018, Commissioner Vestager noted that the EC is “seeing signs that companies are getting more closely linked.” She noted that it is becoming common for large investors to hold significant ownership shares of companies in the same industry. Vestager warned that this type of ownership arrangement could disincentivize competition. The EC is attempting to study these relationships and their potential effect on competition.

- **AAG Delrahim Highlights Importance of Cooperation Between DGCOMP and the DOJ in Brussels Speech**

Assistant Attorney General Makan Delrahim, spoke at the College of Europe in Brussels on February 21, addressing various issues concerning the cooperation between the Department of Justice and DG Competition. In particular, the Delrahim underlined the constant and continuous link between the two agencies, which communicate and cooperate at formal and informal levels during merger investigations. He especially voiced the similar shared between them: protecting consumers and competition during an era of rapid technological change.

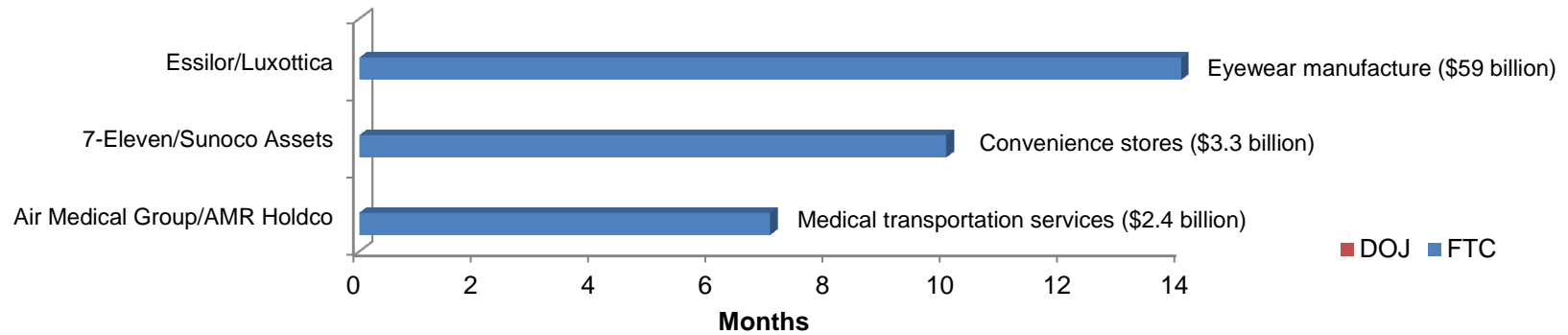
China

- **New Legislation Consolidates China’s Three Competition Agencies into One**

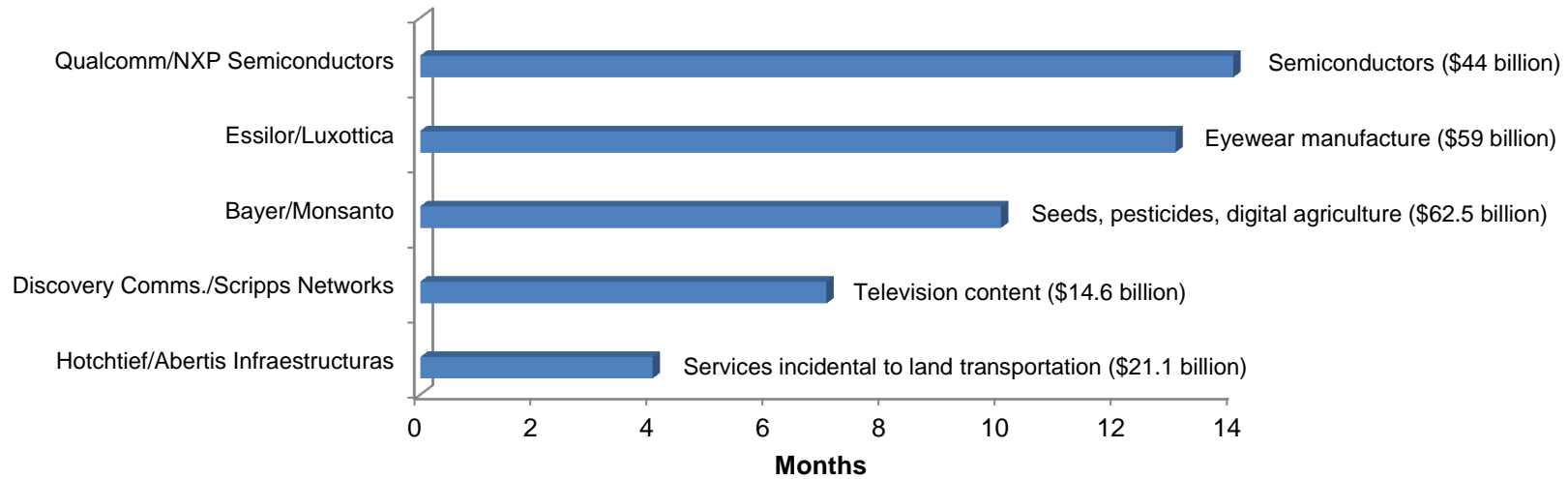
China’s National People’s Congress passed legislation on March 17 that will consolidate the nation’s three competition agencies into a new agency called the State Administration for Market Supervision (SAMS). Previously, the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) was responsible for merger control, the Price Supervision/Inspection and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC) was responsible for bringing enforcement actions for price-related violations of the Anti-Monopoly Law, and the Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce (SAIC) was responsible for non-price-related violations of the Anti-Monopoly Law.

Snapshot of Enforcement Actions

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



European Union (Timing from Signing to Clearance)



Significant Trials

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
United States					
AT&T / Time Warner / DirecTV	DOJ	US District Court for the District of Columbia	Television content production and distribution Vertical transaction	Would vertical integration of content production and distribution provide increased negotiating leverage (and thereby raise prices) and lead to collusion?	The DOJ challenged this proposed vertical merger after calling for a structural, rather than behavioral, remedy. When settlement negotiations broke down, the two sides ended up in court before Judge Richard J. Leon. DOJ alleges that vertical integration will alter leverage in future negotiations because AT&T's DirecTV competes with the purchasers of Time Warner's content. As a result, AT&T will theoretically gain some of the subscribers who leave their television provider if the provider cannot reach a deal with Turner networks. The trial began on March 19 and ended in late April with witnesses from several providers and distributors focusing on the complex negotiations for content and the dynamic market for distribution in the television industry.
Sanford Health / Sanford Bismarck / Mid Dakota Clinic, P.C.	FTC	Eighth Circuit reviewing decision by US District Court for the District of North Dakota	Four physician specialty markets: adult primary care, pediatric, OB/GYN, and general surgery	Does the acquisition of this physician group by the Sanford Health system result in anticompetitive effects in the markets identified?	The FTC, along with the North Dakota Attorney General, filed a complaint on June 23, 2017, to block the proposed acquisition of Mid Dakota Clinic by Sanford Health. The FTC alleged anticompetitive effects in four separate physician specialty markets in the Bismarck-Mandan, North Dakota area: adult primary care; pediatric; OB/GYN; and general surgery. In all four specialties, Sanford and MDC are the two largest providers of those services. In general surgery, they are the only providers. After prevailing on a motion for a preliminary injunction in December, defendants appealed the ruling to the Eighth Circuit. Minnesota, Alaska, California, Delaware, Hawaii, Idaho, Iowa, Mississippi, Massachusetts, Pennsylvania, Wyoming and Puerto Rico have filed amicus briefs.
Wilhelmsen Maritime Services AS / Drew Marine Intermediate II B.V.	FTC	Administrative complaint	Marine water treatment chemicals and services Combination of largest and second largest suppliers	Will the merger between two largest marine chemical and service providers substantially harm competition?	The FTC complaint alleges this proposed merger would combine the largest and second-largest suppliers of marine water treatment chemicals and services to global fleets. The FTC claims other competitors face significant disadvantages when competing for global fleet customers and that the combined entity would control over 60% of the market. The next closest competitor holds under 5% share and is an inferior option for global fleets.

PARTIES	AGENCY	COURT	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	MAJOR ISSUES	OBSERVATIONS
European Union					
United Parcel Service	EC	General Court of the European Union , Case T-834/17	Logistics	Annulled decision to block purchase	With this court action, UPS is seeking compensation from the EC for the alleged loss suffered due to the 2013 EC decision to block UPS' acquisition of TNT. The EC's decision was annulled by the General Court in 2017. With its claim, UPS states that the contested decision impeded the materialization of the benefits associated with the transaction and was tainted by serious breaches of law establishing the Union's liability ex article 340 TFEU.

Significant US Consent Orders / Investigation Closings with Agency Statements

BUYER	TARGET	INDUSTRY / STRUCTURE (AS AGENCY ALLEGED)	SIGNING TO CONSENT	AGENCY	DETAILS ¹	BUYER UPFRONT
United States						
Essilor	Luxottica	Eyewear manufacture No violation of antitrust law	Investigation closed after 14 months	FTC	The FTC concluded that Essilor and Luxottica provide primarily complementary products and services. Essilor is a manufacturer of ophthalmic lenses and a provider of wholesale laboratory services. Luxottica is the largest optical retailer in the US and a manufacturer of optical frames and sunglasses. Since both are large competitors in the optical industry, the FTC investigated (1) whether the merged firm would have the ability to foreclose or raise costs for independent eye care professionals; (2) whether the transaction would eliminate potential competition between the parties in the provision of "free-to-choose" wholesale lab services; and (3) whether the combined entity would be able to raise prices due to its significant retail market share.	N/A

¹ 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 ¹	BUYER UPFRONT
Air Medical Group Holdings, Inc.	AMR Holdco, Inc.	Medical transportation services	7 months	FTC	The FTC complaint alleges that Air Medical Group and AMR Holdco are the only two providers of air ambulance services in Hawaii that transport patients between facilities on different islands. To resolve this concern, AMR Holdco will sell its inter-facility air ambulance transport business to AIRMD.	Yes
7-Eleven, Inc.	Assets of Sunoco LP	Convenience stores	10 months	FTC	The FTC alleges that 7-Eleven's acquisition of nearly 1,100 retail fuel outlets from Sunoco would harm competition in 76 local markets across 20 metropolitan statistical areas. In each of these local markets the number of competitors post-merger would be reduced from four to three or worse.	Yes

Significant EC Clearance Decisions

BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ²	BUYER UPFRONT
European Union						
Bayer Aktiengesellschaft	Monsanto Corporation	Seeds, pesticides, digital agriculture	10 months	EC	The EC found that the parties' remedies, worth over €6 billion, met its competition concerns by ensuring effective competition in the seeds, pesticides and digital agriculture markets. Bayer proposed to: divest its assets and businesses in the overlaps in seed and pesticide markets; to grant a license to its entire global digital agriculture product portfolio and pipeline products; and to invest in R&D to develop a challenger product to Monsanto's glyphosate. Bayer proposed BASF as a purchaser for the divestment package, subject to the EC's approval.	No

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BUYER	TARGET	INDUSTRY	SIGNING TO CLEARANCE	AGENCY	DETAILS ²	BUYER UPFRONT
Luxottica Group SpA	Essilor International SA	Ophthalmic lens development, eyewear	13 months	EC	The EC concluded that the merger between Essilor and Luxottica would not adversely affect competition in the EEA. The companies sell complementary products which do not compete. The EC also concluded that the merged entity would not have the ability to use Luxottica's powerful brands to make opticians buy Essilor lenses or exclude other lens suppliers from the market through practices such as bundling or tying.	N/A
Qualcomm Incorporated	NXP Semiconductors N.V.	Chipsets for smartphones, Semiconductors	14 months	EC	<p>The EC raised three concerns: (1) the merged entity would have the incentive to raise its competitors licensing royalties or refusing to license certain NXP technology used as a ticketing and fair collection platform by transport authorities; (2) the merged entity would have the incentive to degrade interoperability of its chipsets with competitors' products; and (3) the merged entity would have a significant portfolio of near-field communication chips.</p> <p>To address these concerns, Qualcomm offered commitments: (1) to offer eight-year licences on terms at least as advantageous as available today; (2) to ensure, for an eight-year period, interoperability between its own baseband chipset; and (3) not to acquire NXP's standard essential near-field communication patents.</p>	No
Discovery Communications, Inc.	Scripps Networks Interactive, Inc.	Television content	7 months	EC	Discovery and Scripps are both television content producers in the EEA. Scripps is particularly active in the UK and in Poland. The EC concluded that the combined entity would have increased bargaining leverage with television distributors due to the acquisition of key networks. To address the EC concerns Discovery committed to make the flagship news channel and its sister channel (TVN24 and TVN24bis, respectively) available for a reasonable fee for a period of seven years.	No
Hochtief AG	Albertis Infraestructuras SA	Service activities incidental to land transportation	4 months	EC	The EC found that the proposed merger would not pose any competition concerns in the markets concerned, namely: toll motorway concessions; construction and maintenance of road infrastructure; and other markets related to motorway concessions. In fact, the EC noted first that in all of the mentioned markets the merged entity will still face strong competitors and that the structure of the toll motorway market itself, highly regulated bid market, further weakens the merger's competitive impact.	N/A

Significant Abandoned Transactions

BUYER	TARGET	INDUSTRY	AGENCY	DETAILS ³
United States				
Ultra Electronics Holdings plc	Sparton Corp.	Sonobuoys for US Navy	DOJ	Ultra Electronics Holdings and Sparton Corporation abandoned their \$234 million merger. The DOJ alleged the transaction threatened to permanently combine the only two qualified suppliers of sonobuoys to the US Navy. Sonobuoys are used in support of multiple underwater missions for detection, classification and localization of adversary submarines.
J. M. Smucker Co.	Conagra Brands, Inc.	Canola and vegetable cooking oils	FTC	Smucker dropped a planned \$285 million purchase of Conagra's Wesson cooking oil after the FTC sued to block the transaction. The FTC alleges that the acquisition would result in Smucker controlling 70 % of the market for branded canola and vegetable oil.
Broadcom	Qualcomm	High-speed mobile technology	CFIUS	Broadcom's attempted hostile takeover of Qualcomm was blocked by the Trump administration over national security concerns. The Committee on Foreign Investment in the United States (CFIUS) argued that ceding control of Qualcomm to a company in Singapore would harm American technological capabilities and advantage China.
CDK Global	AutoMate, Inc.	Dealer management systems for franchise car dealerships	FTC	The FTC filed a complaint alleging the franchise dealer management systems market is highly concentrated with two firms controlling roughly 70% of the market. Post-acquisition, one of those firms would control 47% of the market alone. AutoMate is described as a fierce head-to-head competitor in position to compete even more aggressively in the future absent this transaction.
European Commission				
Celanese Corporation	Blackstone Group LP	Manufacture of chemicals and chemical products (Cellulose acetate flake and acetate tow)	EC	In June 2017, Celanese and Blackstone, the second and third largest manufacturers of acetate tow globally, announced the intention to create a JV. In October, the EC announced the opening of an in-depth investigation into the proposed merger based on the recent acquisition of Acetow by Blackstone. The companies, following excessive divestiture requirements by the EC, decided to abandon the transaction in March 2018.

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AUTHOR

Matt Evola

+1 202 756 8766

mevola@mwe.com

EDITORS

Jon B. Dubrow

+1 202 756 8122

jdubrow@mwe.com

Joel R. Grosberg

+1 202 756 8207

jgrosberg@mwe.com

Melanie A. Hallas

+1 202 756 8109

mhallas@mwe.com

Ryan O. Leske

+1 202 756 8823

rleske@mwe.com

David Henry

+32 2 282 35 69

dahenry@mwe.com

For more information about McDermott Will & Emery visit

www.mwe.com

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