



Antitrust M&A Snapshot

July – September 2016 Update

UNITED STATES:

Continuing an active first half of 2016, the Federal Trade Commission (FTC) and US Department of Justice (DOJ) have challenged several large mergers and acquisitions. In fact, trials for the two national health insurer deals are slated to begin Q4 of 2016 in Washington, DC, where the agencies have had success in obtaining preliminary injunctions this year. Adding to the regulators' successes in Q3 was a victory for the FTC on appeal in the Penn State Hershey Medical Center/PinnacleHealth System transaction, in which the Third Circuit overturned the district court's formulation of the geographic market. Indeed, with another appeal in a hospital merger outstanding in the Seventh Circuit, Health Care M&A is an active sector to monitor.

In addition to the agencies' operations, the upcoming US presidential election has also propelled antitrust policy into a national discussion. For the first time in a few decades, antitrust has appeared on the Democratic Party's platform, and Hillary Clinton has also issued a statement promising to strengthen antitrust enforcement if elected president.

EU:

The July to September period has seen 87 merger control notifications, the vast majority being candidate cases for simplified procedure. There were also eight clearance decisions, five of which were Phase I cases with remedies—in each case, structural remedies were preferred by the European Commission (EC).

Antitrust intervention seems to have been focused more on the telecoms and pharmaceutical sectors, with divestitures being offered in every telecom and pharma Phase I and Phase II clearance decision since July.

In regard to current trends in merger control remedies at the level of the European Commission, an interesting observation can be made with respect to consolidations that raise issues relating to innovation and research and development. Traditionally, the EU merger control regulator has a strong preference for structural remedies. However, the EC has recently accepted behavioural remedies in its Phase II clearance decision of the Airbus/Arianespace transaction. Specifically, the regulator was concerned that the merger could result in decreased innovation in the markets for satellites and launch services. In order to remedy those concerns, the parties offered commitments aimed at ensuring that transparency in the market would not increase, and hence, that market players would continue to be incentivised to innovate. This is a very interesting development in light of the Dow/DuPont transaction, which is currently in Phase II review. When issuing its decision to launch an in-depth review of the transaction, the EC noted that one of its main concerns is the decrease in innovation of crop protection products. It remains to be seen whether such concerns could be severe enough to prevent the transaction from going forward, and whether behavioural remedies, such as those in Airbus/Arianespace, would even be feasible to implement and monitor in the agro-chemical industry.

Significant Trials

PARTIES	AGENCY	COURT	MARKETS	MAJOR ISSUES	OBSERVATIONS
United States					
Cabell Huntington Hospital/St. Mary's Medical Center	FTC	FTC Administrative Complaint and threatened preliminary injunction action	(1) General acute care inpatient hospital services and (2) Outpatient surgical services	Would the efficiencies of the merger outweigh any competitive harms?	The Commission voted to dismiss without prejudice its administrative complaint challenging the merger after the West Virginia Health Care Authority approved a cooperative agreement between the two hospitals. To receive approval, WVHCA board members and the attorney general of West Virginia were tasked with weighing the potential loss of competition with the benefits that the merger would bring. This approval immunized the merger from federal antitrust scrutiny under the doctrine of state action immunity.
Deere & Company/Precision Planting LLC	DOJ	District Court for the Northern District of Illinois	High-speed precision planting systems	Are Deere and Precision Planting the only two effective competitors in a high-speed precision planting systems market?	According to the DOJ, Deere's acquisition of Precision Planting would allow it to control "nearly every method through which American farmers can acquire effective high-speed precision planting systems and provide it with the ability to set prices, output, quality and product features without the constraints of market competition."
Anthem/Cigna	DOJ	District Court for the District of Columbia	National health insurers		According to the DOJ, the transaction would substantially reduce competition for the sale of commercial health insurance coverage to national employers throughout the United States; from large-group employers in at least 35 metropolitan areas, and from public exchanges created by the Affordable Care Act in St. Louis and Denver. The DOJ also alleges that the transaction would reduce competition among commercial insurers for the purchase of healthcare services from hospitals, physicians and other healthcare providers. Trial is slated to begin in November 2016.

PARTIES	AGENCY	COURT	MARKETS	MAJOR ISSUES	OBSERVATIONS
Aetna/Humana	DOJ	District Court for the District of Columbia	National health insurers		According to the DOJ, the transaction would substantially reduce Medicare Advantage competition in more than 350 counties in 21 states. The lawsuit also alleges that Aetna's purchase of Humana would substantially reduce competition to sell commercial health insurance to individuals and families on the public exchanges in 17 counties in Florida, Georgia and Missouri. Trial is slated to begin in December 2016.
Penn State Hershey Medical Center/ PinnacleHealth System	FTC	District Court for the Middle District of Pennsylvania Court of Appeals for the Third Circuit	General Acute Care Inpatient Hospital Services	Was the FTC's geographic market limited to hospitals in or very near Harrisburg correct?	The district court judge denied the FTC's motion for a preliminary injunction, ruling that the geographic market included hospitals outside of the Harrisburg area because evidence showed that many patients traveled from outside the Harrisburg area to receive care there. The judge also found the parties commitments not to raise rates to insurers for several years compelling evidence. On appeal, the Third Circuit reversed, finding that the lower court erred in both the formulation and the application of the proper legal test to determine the relevant geographic market. The court held that geographic markets in hospital merger cases are to be defined based principally on evidence from payors, and that payors had made clear that Hershey and Pinnacle needed to remain separate to ensure competitive bidding for payor contracts. The court further found that the government met its burden for a preliminary injunction and that the defenses advanced by the merging parties were inadequate to overcome the presumption that the merger would be anticompetitive. The Third Circuit remanded the case to the district court with instructions to enjoin the proposed merger pending the outcome of the FTC's administrative adjudication.
Health Care Network/ Advocate Health and Hospitals Corporation/ North Shore University HealthSystem	FTC	District Court for the Northern District of Illinois	General Acute Care Inpatient Hospital Services	Is the geographic market limited to selected hospitals in Chicago's northern suburbs while excluding other nearby hospitals?	The district court denied the FTC's request for preliminary injunction. The district court judge did not agree with the FTC's geographic market definition, limited to hospitals in Chicago's North Shore suburbs, finding it too narrow and excluding destination hospitals in Chicago. The FTC filed a notice of appeal with the United States Court of Appeals for the Seventh Circuit, and the district court granted the FTC's request for an injunction pending the appeal.

Consent Orders/Approvals

BUYER	TARGET	INDUSTRY	SIGNING TO CONSENT ¹	AGENCY	DETAILS ²	BUYER UPFRONT?
United States						
Mylan, N.V.	Meda AB	Generic drugs used to treat severe refractory epilepsy (felbamate) and generic drug muscle relaxers (carisoprodol)	5 months	FTC	The transaction would have reduced the number of competitors for felbamate tablets from 3 to 2. Mylan was required to divest its rights and assets related to felbamate tablets. For carisoprodol tablets, only two companies, Meda and another, originally had marketing rights. Mylan, which had recently received US marketing rights to carisoprodol, was required to divest those rights.	Yes
ON Semiconductor Corporation	Fairchild Semiconductor International, Inc.	Insulated-gate bipolar transistors used in automotive ignition systems (Ignition IGBTs)	9 months	FTC	According to the FTC, the merged entity would have a combined share of over 60 percent worldwide, which likely would substantially lessen competition in the worldwide market for Ignition IGBTs, resulting in higher prices and reduced innovation.	Yes
Teva Pharmaceutical Industries Ltd.	Allergan PLC's generic pharmaceutical business	Generic drugs used to treat a wide range of illnesses	12 months	FTC	FTC alleged Teva's acquisition would lessen current or future competition by reducing the number of current or future suppliers from 2 to 1, 3 to 2, 4 to 3, and 5 to 4 in the pharmaceutical markets for one or more strengths of 79 pharmaceutical products. The FTC required the parties to divest products to remedy the anticompetitive effects of the merger within each of these markets.	Yes (multiple buyers)
Koninklijke Ahold N.V.	Delhaize Group NV/SA	Supermarkets	13 months	FTC	According to the FTC, the merger would eliminate direct supermarket competition to the detriment of consumers in 46 local markets. As a result, the merger would increase the likelihood that the combined company could unilaterally exercise market power, and that the remaining competitors	Yes

¹ This column tracks the time from deal signing until the DOJ's filing of a proposed final judgment or the FTC's acceptance of a consent order, pending public comment.

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	SIGNING TO CONSENT ¹	AGENCY	DETAILS ²	BUYER UPFRONT?
					could coordinate their behavior to raise prices.	
Nexstar	Media General	Television stations	7 months	DOJ	DOJ alleged that transaction would give parties the power to impose higher prices on local and national advertisers and to demand higher retransmission fees from cable and satellite companies in six local markets.	Yes
Anheuser-Busch InBev	SABMiller	Beer	10 months	DOJ	<p>ABI would gain a majority interest in MillerCoors through its acquisition of SABMiller. The combined entity would account for roughly 70 percent of the beer sold in the United States and account for shares in excess of 90 percent in many highly concentrated local geographic markets. Accordingly, the parties are required to divest SABMiller's ownership stake in MillerCoors.</p> <p>The order also includes conduct relief designed to allow other beer suppliers to access ABI's distribution network.</p>	Yes

Clearance Decisions

BUYER	TARGET	INDUSTRY	NOTIFICATION TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT?
European Union						
Plastic Omnium	Faurecia	Automotive components (plastic exteriors)	7 weeks	EC	<p>The EC was concerned that the merged entity would not have faced sufficient competitive pressure from the remaining players in the market for (1) the production and supply of plastic bumpers in the north, east, and west of France, Belgium and Spain, and (2) front-end carriers, plastic hatchbacks/tailgates and front-end modules at the EEA level.</p> <p>The transaction was cleared following a Phase I review, however clearance was conditional on the divestment of:</p> <ul style="list-style-type: none"> • Five Faurecia plants mostly dedicated to the production of plastic bumpers, and • Two Faurecia plants dedicated to the assembly of front-end modules. 	No
Airbus Safran Launchers	Arianespace	Manufacturer of air and spacecraft and related machinery	6 months	EC	<p>The EC had preliminary concerns that potential flows of sensitive information between the companies could harm competition by slowing down innovation. This related in particular to (1) flows of information from Arianespace to Airbus about other satellite manufacturers and (2) flows of information from Airbus to Arianespace about other launch service providers.</p> <p>DG COMP's decision was conditional on the parties offering to:</p> <ul style="list-style-type: none"> • Implement firewalls between Airbus and Arianespace to prevent harmful information flows; • Put in place measures restricting 	N/A

³ The information in this column summarizes the government's allegations. McDermott Will & Emery LLP offers no independent view on these allegations.

BUYER	TARGET	INDUSTRY	NOTIFICATION TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT?
					<p>employee's mobility between the companies; and</p> <ul style="list-style-type: none"> • Provide for an arbitration mechanism to be included in all their future non-disclosure agreements signed with third parties, to ensure the effective implementation of the firewalls. 	
Mylan	Meda	Pharmaceuticals	1.5 months	EC	<p>The EC identified 15 markets where it had competition concerns, in particular because of the strong position of the two companies and the lack of sufficient alternatives on the market (products concerned: Progestogens, Povidone-iodine, Nabumetone, Multivitamins without minerals for paediatric use, Megestrol, Diltiazem, Amoxicillin and Antiarrhythmic agents belonging to the Vaughan Williams Class I-C).</p> <p>The transaction was cleared following a Phase I review, however clearance was conditional on the divestment of Mylan's own or Meda's local businesses in the markets concerned, including the relevant marketing authorisations, customer information and brands.</p>	No
Joint Venture	Vodafone/Liberty Global	Telecoms	8 weeks	EC	<p>The EC had concerns that the proposed transaction would have eliminated the benefits brought to the Dutch telecoms market by Vodafone's recent entry—Vodafone had the potential to become a strong competitor in the provision of fixed line and fixed-mobile multiple play services to consumers.</p> <p>The transaction was cleared following a Phase I review, however clearance was conditional on Vodafone divesting its retail consumer fixed line business in the Netherlands.</p>	No
Sanofi	Boehringer Ingelheim's consumer health business	Pharmaceuticals	7 weeks	EC	<p>The EC identified a few markets where the merging parties had very strong brands and where there was a lack of alternatives to the companies' products (antispasmodics, anti-</p>	No

BUYER	TARGET	INDUSTRY	NOTIFICATION TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT?
					<p>constipation, chesty cough and headache products).</p> <p>The transaction was cleared following a Phase I review, however clearance was conditional on Sanofi divesting either its own or Boehringer Ingelheim's local businesses in the markets concerned, including the relevant marketing authorisations, customer information and brands, and personnel.</p>	
Material Handling & Port Solutions (Terex)	Konecranes	Crane and container handling	7 weeks	EC	<p>The EC had concerns that the transaction would (1) create significant overlaps between Konecranes' and Terex's activities in the supply of electric chain hoists and wire rope hoists (which are components used to build cranes), as well as standard cranes and container handling equipment, and (2) have risked significantly reducing effective competition in the markets for electric chain hoists and wire rope hoists in the EEA.</p> <p>The transaction was cleared following a Phase I review, however clearance was conditional on Konecranes divesting its entire Stahl global business for hoists, cranes and other handling materials, including the associated production facility based in Germany.</p>	Yes
Joint Venture	Hutchison/VimpelCom	Telecoms	7 months	EC	<p>The EC had concerns that the transaction would have reduced competition and hampered the ability of mobile virtual operators to compete by:</p> <ul style="list-style-type: none"> • Eliminating competition between two strong players and creating the largest mobile network operator in the Italian retail mobile market; • Leading to a reduction in the number of competitors and the removal of H3G as a driver of competition, • Creating a market with three competitors that have similar market shares; and 	Yes

BUYER	TARGET	INDUSTRY	NOTIFICATION TO CLEARANCE	AGENCY	DETAILS ³	BUYER UPFRONT?
					<ul style="list-style-type: none"> Reducing the number of mobile network operators effectively willing to host virtual network operators. <p>DG COMP's decision was conditional on:</p> <ul style="list-style-type: none"> The divestment to Iliad (a new mobile network operator) of a certain amount of the JV's mobile radio spectrum from different frequency bands; The transfer by the JV to Iliad of several thousand mobile base station sites; and A transitional agreement (for access to 2G, 3G, 4G and new technologies), allowing Iliad to use the JV's network to offer customers nationwide mobile services until the new mobile network operator has built its own mobile network. 	
Energetický a Průmyslový Holding & PPF Investments	Vattenfall Europe Generation & Vattenfall Europe Mining	Electric power generation, transmission and distribution; mining of lignite	1 month	EC	The EC assessed the impact of the transaction on competition in the markets for (1) the excavation and supply of lignite, (2) the supply of pulverised lignite in Germany and (3) generation and wholesale supply of electricity. However, no adverse effects on the markets have been found by the EC.	N/A

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

United States

- **FTC Approves Amendments to HSR Premerger Notification Rules Allowing HSR Filings to Be Submitted on DVD**

The amendments are effective as of September 1, 2016.

- **FTC/DOJ Release 38th Annual HSR Report, Covering Fiscal Year 2015**

The report shows an uptick of filings received by regulators in 2015, roughly equaling the number of filings pre-recession in 2006. The report also shows a downward trend in the percentage of transactions resulting in second requests from 2009, when 4.5 percent of transactions resulted in a second request, to 2015 when 2.7 percent of transactions resulted in second requests.

- **FTC Announces New Competition Trial Chief**

Chuck Loughlin replaces Tara Reinhart as Chief Trial Counsel for the Bureau of Competition. He formerly served as Deputy Chief Trial Counsel, where he worked with Tara Reinhart on the successful challenge to the Staples/Office Depot merger.

- **DOJ Antitrust Division Head Says Federal Government Antitrust Model Has Moved into “Litigation Mode”**

Renata Hesse gave a speech at the Global Antitrust Enforcement Symposium, where she criticized the “presumption” that mergers often benefit competition, and stated that antitrust enforcers have “justifiably” become more skeptical about the likelihood that remedies can solve competitive concerns arising from a merger. Hesse concluded that this has caused agencies to settle less and enter “litigation mode” to challenge mergers they see as fundamentally problematic. FTC Chairwoman Edith Ramirez also delivered a speech in which she touted the enforcement record of the FTC over the past few years and stated that the FTC only intervenes “when necessary.”

- **Hillary Clinton Issues Statement Promising to “Promote Competition... and Reinvigorat[e] Antitrust Laws and Enforcement.”**

Under the presidential candidate’s plan, she will appoint “strong leadership” at the antitrust agencies to “aggressively enforce and strengthen merger reviews.” The next president will likely have the opportunity to nominate individuals to fill two existing Commission vacancies, as well as to replace current Chairwoman Edith Ramirez upon the expiration of her term in April 2017. The Clinton statement also calls for agencies to regularly conduct post-merger monitoring and retrospective analyses that examine how mergers impact competition and prices.

European Union

- **Consolidations in the Telecoms Sector are Not Necessary to Ensure Profitability**

EU Competition Commissioner, Margrethe Vestager, reiterated that competition, not consolidation, promotes investment in the telecoms sector. The EU antitrust regulator does not believe that telecoms consolidations result in “market repair”, ensuring that network operators remain profitable. On the contrary, the EU

Commission is of the view that markets are not repaired by reducing competition (e.g. 4 to 3 mergers), but by making sure that companies have the incentives to try to be better than their competitors in terms of price, quality of service and choice.

▪ **EU Consultation on Notification Thresholds, Treatment of Typically Unproblematic Cases and Referral Mechanisms**

The EC has launched a non-binding consultation to assess the functioning of a number of procedural and jurisdictional aspects of EU merger control. First, EU merger control is based on purely turnover-based notification thresholds. The consultation seeks to establish whether the inability to capture those acquisitions where target companies do not yet generate sufficient turnover, but have a high market potential, makes the current test ineffective in respect of those transactions. The consultation document highlights that such issues are typically present in the digital services sector (e.g. value of data) and the pharmaceutical industry (e.g. value of pipeline products). Second, the EU Commission wants to see whether there is any scope to simplify the treatment of certain categories of non-problematic cases where no competition concerns are present. Last, it is possible under EU merger control to reallocate responsibility over specific transactions between national competition regulators and the EU Commission. The consultation asks whether any reforms could be introduced to make this case referral system more efficient and effective.

Significant Selected Ongoing Public Investigations⁴

BUYER	TARGET	INDUSTRY	ANNOUNCED	AGENCY	STATUS
United States					
Sherwin-Williams Company	Valspar	Coatings, paint, and related products	March 20, 2016	FTC	The FTC Second Request investigation continues. The companies have stated they expect the transaction to close in Q1 of 2017.
Dow Chemical Company	DuPont	Agricultural Biotechnology	December 11, 2015	DOJ	DOJ Second Request investigation continues. Advocacy groups have asked the DOJ to oppose the pending merger. The Senate Judiciary Committee held a hearing on agriculture industry consolidation in which chair of the committee, Iowa Senator Chuck Grassley, expressed concerns about the loss of head-to-head competition.
Walgreens Boots Alliance	Rite Aid	Drug stores	October 27, 2015	FTC	The FTC Second Request investigation continues. The companies received the Second Request in December 2015 and expect to close in 2016. In July, the Walgreens CEO stated that the company would only have to divest about 500 stores to address regulators' concerns.
Lam Research	KLA-Tencor	Semiconducto	October 21, 2015	DOJ	DEAL ABANDONED. The DOJ expressed concerns that the merged firm would be able to

⁴ This is a subset of the ongoing merger investigations, but is intended to provide a snapshot of some of the major matters in which the agencies are engaged.

BUYER	TARGET	INDUSTRY	ANNOUNCED	AGENCY	STATUS
		rs			foreclose competitors' development of leading edge fabrication tools and process technology. Lam produces machines that etch silicon wafers used to make computer chips, while KLA-Tencor produces machines that inspect circuitry on chips during the manufacturing process. After the DOJ informed the parties that it had serious concerns that the proposed transaction would harm competition, the parties abandoned their plans to merge.
San'an Optoelectronics	Global Communication Semiconductors	Semiconductors and devices	March 11, 2016	CFIUS	After a 75 day review of the proposed transaction, CFIUS declined to clear the deal. CFIUS The parties abandoned the transaction on August 1 and decided to pursue a joint venture.
European Union (Phase II)					
Dow	DuPont	Agro-chemicals	December 11, 2015	EC	DG Comp opened Phase II proceedings on August 11, 2016. Case still ongoing.
Deutsche Borse	LSE	Financial markets	August 24, 2016	EC	DG Comp opened Phase II proceedings on August 28, 2016. Case still ongoing.

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