



Antitrust M&A Snapshot

United States: January – June Update

The Federal Trade Commission (FTC) and US Department of Justice (DOJ) have been actively challenging mergers and acquisitions in the first half of 2016. In some instances, the parties abandoned their deal once the FTC or DOJ issued a complaint, in others, the parties entered into consent agreements with the agencies. In matters where a divestiture is an acceptable remedy, the FTC and DOJ have required robust divestitures with financially and competitively viable buyers. There is increasing pressure for broad divestitures and for upfront buyers in industries where the agencies do not have ample experience and where there may not be multiple competitive buyers willing to acquire the assets.

In merger challenges, the agencies have been successful in obtaining preliminary injunctions in Washington, DC, but have been less successful outside of their home court. The agencies have successfully argued price discrimination markets, where sales of products to a narrow group of customers were the market, and courts are accepting the agencies' narrow market definition. We also see a trend in challenges due to innovation, where the merging parties are the market leaders in new developments and research and development in particular areas. Investigations continue to take many months, with many approaching or exceeding a year.

EU: January – June Update

In the EU, there has been a noticeable increase in the number of notified transactions to the European Commission (from 277 notifications in 2013 to 337 in 2015). Most of these transactions have been cleared by the EU regulator in Phase I without any commitments. However, there have still been a number of antitrust interventions requiring the merging parties to offer, often far-reaching, remedies.

One industry that has recently seen a particularly high ratio of antitrust intervention is the telecoms sector. For example, in the merger between the mobile operators Telenor and TeliaSonera, the parties abandoned the transaction due to European Commission opposition to the transaction. The European Commission publicly announced that the transaction would not have been cleared, and that the remedies offered by the companies were not convincing. A prohibition decision was also

issued, despite the offered remedies, in the failed combination of Telefónica UK's "O2" and Hutchison 3G UK's "Three". This transaction involved the longest merger control review by the European Commission to end up in a prohibition decision (243 calendar days, compared to the average of 157 calendar days to block a deal).

With regard to current trends in merger control remedies at the level of the European Commission, there continues to be a strong preference for structural remedies. Approximately 70 percent of merger remedy decisions between 2011 and 2015 involved divestitures. The European Commission prefers structural remedies because they entail a lasting structural change and there is no need for long-term monitoring.

Significant Trials

PARTIES	AGENCY	COURT	MARKETS	MAJOR ISSUES	OBSERVATIONS
United States					
Staples/ Office Depot	FTC	District Court for the District of Columbia	Consumable office products for large customers	Can relevant product market be limited to large customers? Will Amazon Business enter the market and constrain the parties?	The court granted the FTC's motion for a preliminary injunction. The court was very critical of the FTC's presentation and treated declarations as hearsay. Defendants rested their case after the FTC's presentation. The court found that Amazon Business is not likely to restore the lost competition in the business-to-business space in a timely and sufficient manner. The court defined the market as a cluster market of consumable office supplies, which excluded ink and toner, and limited it to sales to large customers and found the merging parties were the two leaders. The parties abandoned the deal after the preliminary injunction was granted.
Tribune Publishing Company/ Freedom Communications	DOJ	US District Court for the Central District of California	Newspaper	Are the parties closest competitors, and do other media (e.g., internet) compete with newspapers?	This was a non-reportable deal. The DOJ sought a preliminary injunction, and obtained a TRO. Following the lawsuit, the bankruptcy judge approved the sale of Freedom to Digital First Media.
VA Partners I, LLC, ValueAct Capital Master Fund, L.P., ValueAct Co-invest International, L.P.	DOJ	US District Court for the Northern District of California	HSR – Acquisition of Holdings	Did ValueAct's large dollar but small percentage acquisition qualify for the investment purposes only exemption?	This litigated case on the investment purposes only exemption resulted in a settlement, where ValueAct agreed to pay \$11 million to settle the DOJ's allegations. This is the highest fine ever paid for an HSR violation. DOJ brought a civil action against Defendants for failure to comply with the requirements of the HSR Act. ValueAct acquired significant holdings of Baker Hughes Incorporated and Halliburton Company after the announcement of the merger. DOJ alleged that ValueAct intended to influence the merger, so ValueAct's acquisition was not exempt as an acquisition solely for the purpose of investment. ValueAct explained its reasoning for the settlement: "ValueAct Capital fundamentally disagrees with DOJ's interpretation of the facts in connection with our investments in Halliburton and Baker Hughes. However, due to the sudden and unanticipated 150 percent increase in the potential penalties associated with alleged Hart-Scott-Rodino violations effective August 1, we felt we had no choice but to resolve this case as quickly as possible. We are pleased to have come to a resolution to this litigation that will not impact our business or strategy."

PARTIES	AGENCY	COURT	MARKETS	MAJOR ISSUES	OBSERVATIONS
Haliburton Company/ Baker Hughes Incorporated	DOJ	US District Court for the District of Delaware	Oil Field Services and Products (over twenty discrete products)	Was this a 3-2 merger in 20 or more products and for innovation in oilfield services?	DOJ alleged that the transaction would combine two of the three largest producers of oilfield services in the world. The DOJ rejected the parties' proposed divestiture package because it was not a complete, stand-alone operating business but involved pieces and parts carved out of both companies, and would not replicate the competition lost by the transaction. The parties abandoned the deal after the DOJ filed a complaint.
Health Care Network/ Advocate Health and Hospitals Corporation/ North Shore University HealthSystem	FTC	US 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, finding it too narrow and excluding destination hospitals. 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.
Penn State Hershey Medical Center/ PinnacleHealth System	FTC	US District Court for the Middle District of Pennsylvania	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 to not raise rates to insurers for several years to be compelling evidence. This case is on emergency appeal to the Third Circuit.
Superior Plus Corporation/ Canexus Corporation	FTC	FTC Administrative Complaint and threatened preliminary injunction action	Sodium Chlorate	Was this a highly concentrated market with no meaningful substitutes and high entry barriers?	Superior and Canexus are two of the three major producers of sodium chlorate in North America. The FTC alleged that the combined entity would control approximately 80 percent of the total sodium chlorate production capacity in North America. Following the FTC's complaint, Canexus announced that it would abandon the transaction.

Consent Orders/Approvals

BUYER	TARGET	INDUSTRY	SIGNING TO CONSENT	AGENCY	DETAILS ¹	BUYER UPFRONT
United States						
BBA Aviation Plc	Landmark US Corp LLC and LM US Member LLC	Fixed Base Operations (and other airport fueling services)	5 months	DOJ	Airport services operations are defined around individual airports.	No
Hikma Pharmaceuticals PLC	Roxane Laboratories, Inc. and Boehringer Ingelheim Roxane, Inc.	Development, License, Manufacture, Marketing, Distribution and Sale of Generic Injectable Pharmaceutical Products	10 months	FTC	FTC challenged the acquisition, arguing that the acquisition would likely lessen competition and create a monopoly, and would increase the likelihood that the combined entity would forego or delay the launch of the products. Hikma required to divest the rights and assets for two generic drugs, prednisone tablets and lithium carbonate capsules, and to relinquish to its drug development partner, the right to market certain tablets in the US.	Yes
Iron Mountain	Recall Holdings, Ltd.	Records Management	9 months	DOJ	DOJ challenged 4 to 3 markets in several cities. Iron Mountain required to divest records management assets in 15 metropolitan areas.	Yes, for certain assets/facility locations, where Access was a named purchaser in the proposed final judgment. However, the parties could divest the facilities to a post-divestiture buyer, other than Access, once the buyer was approved by the DOJ.
Key Corp.	First Niagara Financial Group Inc.	Bank	6 months	DOJ	Parties agreed to sell 18 of First Niagara's branches in Buffalo, NY.	Yes
Lupin Ltd.	Gavis Pharmaceuticals LLC and Novel Laboratories, Inc.	Generic Drugs (used to treat bacterial infections and ulcerative colitis)	9 months	FTC	FTC alleged that Lupin and Gavis are two of only four competitors that offer certain doses of the generic drug, and are two of only a limited number of suppliers capable of entering the generic market for capsules used to treat ulcerative colitis. The FTC required divestiture of the Doxycycline Assets and Mesalamine Assets and a grant of the related product license to G&W Laboratories, Inc.	Yes

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	SIGNING TO CONSENT	AGENCY	DETAILS	BUYER UPFRONT
Charter Communications, Inc.	Time Warner Cable Inc., and Bright House Networks, LLC	Cable Television	11 months	DOJ	DOJ accepted conduct remedy regulating merged firm's behavior in negotiating exclusivity rights with programming suppliers rather than requiring structural relief or challenge.	N/A
Airgas, Inc.	American Air Liquide Holdings, Inc.	Bulk Gases	6 months	FTC	FTC alleged the markets for several industrial gases were highly concentrated, and in some cases the parties were the only two suppliers.	No. The FTC did not require a buyer upfront because "there are a number of parties interested in purchasing the assets to be divested that have the expertise, experience and financial viability to successfully purchase and manage these assets and retain the current level of competition in the relevant markets."
Energy Transfer Equity, L.P.	The Williams Companies, Inc.	Firm Transportation of Natural Gas by Interstate Pipeline	9 months	FTC	The transaction would combine the ownership of one pipeline with a 50 percent interest in another pipeline, when those two assets were the only ones serving Florida.	No. The FTC did not require a buyer upfront because the "ownership interest is a high-value, low-risk asset likely to generate substantial interest among more than one potentially acceptable buyer."
Heidelberg	Italcementi	Portland Cement	11 months	FTC	Cement markets are local or regional due to high transportation costs. The transaction would have reduced the number of competitors from 3 to 2 in the relevant markets. The parties were required to divest Italcementi's cement plant in West Virginia, and up to eleven cement terminals and all related assets to a buyer approved by the FTC.	No for all markets, except Indianapolis, where an upfront-buyer was required. The FTC has significant experience in cement divestitures / packages.
Ball Corporation	Rexam PLC	Standard 12-ounce Aluminum Beverage Cans and Specialty Beverage Cans	16 months	FTC	Parties are required to divest seven aluminum can body plants, one aluminum can end plant and other innovation and support functions.	Yes

BUYER	TARGET	INDUSTRY	SIGNING TO CONSENT	AGENCY	DETAILS	BUYER UPFRONT
GTCR Fund X/A, AIV LP, CISION US INC.	UBM PLC, PRN Delaware, Inc. and PWW Acquisition LLC	Media Contact Database	6 months	DOJ	<p>DOJ alleged that only one other competitor gained more than a <i>de minimis</i> market share. After the merger, the two remaining companies would have limited incentive to discount. Defendants are required to divest PR</p> <p>Newswire's business of providing the Agility and Agility Plus-branded public relations workflow software to customers located in the United States and the United Kingdom.</p>	Yes, the DOJ required the parties to divest Agility to Innodata Inc. or another acquirer acceptable to the DOJ.
European Union						
Staples	Office Depot	Office Supplies/ Stationery	<p>EC decision not published.</p> <p>Notification to clearance: 5 months</p>	EC	<p>Following its investigation, the EC concluded that the merger, as proposed, would have critically reduced competition in the already concentrated market for international contracts for office supplies, the markets for national contracts with large business customers in the Netherlands and Sweden, as well as in the wholesale supply of office products in Sweden.</p> <p>DG Comp's decision was conditional upon the divestment of:</p> <ul style="list-style-type: none"> The whole of Office Depot's contract distribution business in the EEA and Switzerland to address both the competition concerns in international contract sales, as well as in national contract sales in Sweden and the Netherlands; Office Depot's entire business operations in Sweden to also address the competition concerns in the Swedish wholesale market for the supply of office products. 	Yes

BUYER	TARGET	INDUSTRY	SIGNING TO CONSENT	AGENCY	DETAILS	BUYER UPFRONT
Liberty Global	BASE	Telecoms	Signing to clearance: 10 months Notification to clearance: 5.5 months	EC	The EC was concerned that the merger would have significantly reduced competition in the Belgian retail mobile market, with a risk of higher prices and less choice and innovation for Belgian mobile consumers. DG Comp's decision was conditional upon the divestment of BASE's share in Mobile Vikings, and a transfer of part of BASE's customer base to Medialaan.	Yes
Dentsply	Sirona	Manufacturer of Medical and Dental Instruments and Supplies	Signing to clearance: 5.5 months Notification to clearance: 1.5 months	EC	The EU found that the transaction, as notified, would potentially have given the post-merger entity the ability and incentives to exclude competitors by closing Sirona's chairside CAD/CAM system to other block providers to favor its own blocks. DG Comp's decision was conditional upon the extension of certain licensing agreements with competitors of the post-merger entity, the implementation of certain duration-based safeguards in those licensing agreements and the inclusion of a fast track arbitration procedure for dispute settlement.	N/A
Teva	Allergan Generics	Pharmaceuticals	EC decision not published. Notification to clearance: 2 months	EC	The EC had concerns that the merging parties, being among the top four generic pharmaceutical manufacturers worldwide, would have faced insufficient competition from the remaining players for a number of generic pharmaceuticals, as well as regarding the overall generics business in the UK, Ireland and Iceland. DG Comp's decision was conditional upon the divestment of a number of assets, including the great majority of Allergan Generics' business in the UK and Ireland.	Decision not published and therefore unclear.

BUYER	TARGET	INDUSTRY	SIGNING TO CONSENT	AGENCY	DETAILS	BUYER UPFRONT
Alimentation Couche-Tard (Statoil Fuel and Retail)	Dansk Fuels	Retail Sale of Automotive Fuel in Specialized Stores; Wholesale of Solid, Liquid and Gaseous Fuels and Related Products	EC decision not published. Notification to clearance: 2 months	EC	The EC had concerns that the merger as initially notified could have led to higher prices for fuel, diesel, gasoline and light heating oil customers in Denmark DG Comp's decision was conditional upon an extensive commitments package, which included the divestment of over 200 petrol stations and Shell's commercial fuels business.	Decision not published and therefore unclear.
CMA CGM	Neptune Oriental Lines	Container Liner Shipping	Announcement of offer until clearance: 5 months Notification to clearance: 2 months	EC	The EC found that the proposed merger would have created new links between previously unconnected shipping consortia in the O3 and G6 alliances. The EC had concerns that these potential new links would have resulted in anticompetitive effects on two trade routes: (1) between Northern Europe and North America, and (2) between Northern Europe and the Middle East. DG Comp's decision was conditional upon the target leaving the G6 liner shipping alliance.	N/A
AB InBev	SABMiller	Manufacturer of Beer	EC decision not published. Notification to clearance: 2 months	EC	The EC was concerned that the proposed transaction could have led to higher beer prices in Member States where SABMiller was previously active, because it would have removed an important competitor and made tacit coordination between the leading international brewers more likely. DG Comp's decision was conditional upon AB InBev selling practically the entire SABMiller beer business in Europe (i.e. in France, Italy, the Netherlands, UK, Czech Rep., Hungary, Poland, Romania and Slovakia).	Yes
HeidelbergCement	Italcementi	Manufacturer of Cement and Ready-Mixed Concrete	EC decision not published. Notification to clearance: 2 months	EC	The companies' activities had substantial overlaps in Belgium and its neighboring regions with combined market shares above 50 percent. The EC had concerns that the merged entity would have faced insufficient competition from the remaining players, and that the takeover would have led to higher prices for cement and ready-mix concrete in the area concerned. DG Comp's decision was conditional upon HeidelbergCement selling Italcementi's entire business in Belgium.	Decision not published and therefore unclear.

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

United States

- **House Passed SMARTER Act to Make the FTC’s Merger Challenge Procedures the Same as the DOJ’s:**
 FTC Chairwoman Ramirez expressed concern that the SMARTER Act “risks undermining the effectiveness of the FTC.” The SMARTER Act passed in the US House of Representatives on March 23, 2016. It is not clear if this will become law.
- **FTC Is Left with Only Three Commissioners:**
 Commissioner Brill resigned at the end of March. She served as a commissioner of the FTC since April 2010. This impedes the Commission’s ability to act, as two members equal a quorum, limiting commissioners’ abilities to communicate in unofficial settings.
- **Size of Transaction Threshold for HSR Pre-Merger Notification Increases**
 The size of transaction threshold, which frequently determines whether a transaction requires an HSR notification, increased from \$76.3 million to \$78.2 million. The FTC adjusts the HSR thresholds annually to represent the increase or decrease in gross national product.
- **FTC Raises Civil Penalty Maximums to Adjust for Inflation**
 The maximum penalty increased from \$16,000 per day to \$40,000 per day for violations of the HSR pre-merger notification requirements.
- **DOJ Antitrust Sees Turnover in Leadership**
 In April, Bill Baer, the Assistant Attorney General of the DOJ’s Antitrust Division, was appointed to serve as interim Associate Attorney General. Renata Hesse was named the Principal Deputy Assistant Attorney General responsible for overseeing the DOJ’s Antitrust Division. And in June, David Gelfand, the Deputy Assistant Attorney General for Litigation at the DOJ’s Antitrust Division, stepped down.

European Union

- **Non-Controlling Minority Shareholdings Not to Be Assessed under EU Merger Regulation**
 EU Competition Commissioner Vestager is not convinced at the current time that the EU Merger Regulation needs to be changed so as to bring non-controlling minority shareholdings within its purview.
- **Consideration of Change to EU Notification Threshold**
 EU Competition Commissioner Vestager states that DG Comp is looking into the *potential* introduction of a new notification threshold under the EU Merger Regulation to reflect the value of a merger. The new threshold would apply alongside the current turnover thresholds under the EU Merger Regulation. A change would align the EU system more closely with the US, which has a “size or transaction” test for HSR reportability.

▪ **Competition, Not Consolidation, Promotes Investment in the Telecoms Sector**

In the context of the European Commission’s decision to prohibit Hutchison’s proposed acquisition of Telefonica UK, EU Competition Commissioner Vestager stated that the regulator has not seen compelling evidence to support the argument that telecoms consolidation in Europe is necessary in order to ensure that network operators remain profitable and can invest in networks.

Significant Selected Ongoing Public Investigations²

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.
European Union (Phase II)					
Westinghouse Air Brake Technologies Corporation	Faiveley Transport	Manufacturer of railway equipment systems	April 4, 2016	European Commission (DG Comp)	DG Comp opened Phase II proceedings on May 12, 2016. Case still ongoing.
Airbus Safran Launchers	Arianespace	Manufacturer of air and spacecraft and related machinery	January 8, 2016	European Commission (DG Comp)	DG Comp opened Phase II proceedings on February 26, 2016. Case still on-going.

² 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.

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