Antitrust M&A Snapshot | Q2 2024

July 25, 2024

Glenna Siegel | Mary Hecht | Jon B. Dubrow | Joel R. Grosberg | Stéphane Dionnet | Graham J. Hyman | Max Küttner

SUMMARY

McDermott Will & Emery's global competition practice can assist clients with antitrust M&A issues in various jurisdictions around the world. Feel free to contact one or more of our partners in our various offices. The individuals below can assist or can refer you to one of our many other lawyers in our competition team who can help with a specific question.

United States: Jon Dubrow, Joel Grosberg, Ray Jacobsen, Stephen Wu, Ryan Tisch *and* Elai Katz

Europe: Jacques Buhart, Christian Krohs, Hendrik Viaene, Frédéric Pradelles, *Stéphane Dionnet* *and* Axel Schulz

IN THIS JULY 2024 ISSUE

UNITED STATES

- **Agencies Revisiting Consummated Mergers**

What's old is new again, as agencies are increasingly scrutinizing consummated mergers from years past. In May 2024, the US Department of Justice (DOJ), Antitrust Division, together with 30 states and the District of Columbia, sued Live Nation, alleging monopolization and other claims. If successful, the lawsuit could result in Live Nation being forced to sell Ticketmaster despite regulators clearing the combination in 2010. This is not the first time regulators have revisited Live Nation's purchase of Ticketmaster. The 2010 deal involved a consent decree with the DOJ requiring Live Nation to sell off certain assets and license software to competitors as well as prohibiting, for 10 years, retaliation against venues for considering working with ticketing services other than Ticketmaster. In 2019, the DOJ found that Live Nation violated the agreement; the DOJ subsequently extended the consent decree and imposed additional costs and fees on Live Nation. At the time, the DOJ advertised the extension as "the most significant enforcement action of an existing antitrust decree by the Department in 20 years."

This lawsuit aligns with recent agency rhetoric and the recent enforcement trend of re-opening investigations into closed deals. The DOJ's 2023 lawsuit alleging Google monopolized digital advertising technologies – including through “serial acquisitions” – is set for trial this fall. Additionally, in June 2024 the Federal Trade Commission (FTC) asserted, in its ongoing lawsuit against Meta challenging its acquisitions of Instagram in 2012 and WhatsApp in 2014, that the company withheld documents as part of the earlier Hart-Scott-Rodino (HSR) reviews of those acquisitions. The agency represented, in June, that if it had access to the pre-acquisition documents it now has, the outcome of the initial review could have come out differently.

The agencies also have signaled, through their recent public requests for information (RFIs), that they will make other inquiries into past acquisitions. The FTC, DOJ, and US Department of Health and Human Services (HHS) issued an RFI in March 2024 asking the public to comment on deals by “health systems, private payors, private equity funds, and other alternative asset managers” in the healthcare space. The FTC and DOJ followed in May with a second RFI specifically soliciting information on serial acquisitions and roll-up strategies across all sectors. These extensive fact-gathering efforts indicate that the agencies are eager to evaluate deals with a retrospective lens. The Live Nation, Google and Meta lawsuits may therefore function as test cases for later actions.

- **Less Enforcement, More Abandonment**

Recent reports indicate that, over the past three years, companies have abandoned 37 deals in the face of FTC pressure. Some were abandoned prior to formal enforcement actions and others were post-complaint. These abandonments spanned industries including pharma, defense, healthcare, energy and technology. Among them, in May 2024, Atlus Group abandoned its purchase of Situs Group’s real estate valuation business.

Assistant Attorney General Jonathan Kanter has separately stated that 21 deals were abandoned following merger investigations by the DOJ, indicating an even stronger link between regulatory action generally and further expanding the count of abandonments.

Because many deals require review by multiple agencies and countries, it can be difficult to know which pressure points or combination thereof led to the abandonment of deals. Some firms, though, announce their reasoning outright. For example, Amazon and iRobot publicly stated earlier this year that “[u]ndue and disproportionate regulatory hurdles” led to the mutual termination of their deal, specifically noting that European authorities disapproved of the deal. Amazon-iRobot also faced FTC scrutiny. Regardless of the definitive reasons, these reports confirm that merger abandonment is in a historic upswing, making breakup fees more important than ever in evaluating and allocating risk.

- **Oil and Gas Deals Flowing**

Merger activity in oil and gas markets remains high. Although agencies are scrutinizing the deals, they have engaged in little enforcement activity this quarter. On April 29, 2024, Diamondback Energy received a second request from the FTC looking into its $26 billion acquisition of its privately held competitor Endeavor Energy Resources. Diamondback announced to stockholders that it still anticipated a fourth-quarter closing as originally planned. The combined entity would be the third-largest oil and gas producer in the Permian Basin, located primarily in Texas and partly in New Mexico, but the US gasoline market generally is highly fragmented. This second request follows four others in the oil and gas sector in recent months:

- Occidental and Crownrock reported that they received a second request in January that just received FTC clearance on July 18, 2024.
- Chesapeake Energy and Southwest Energy received a second request in April that is ongoing.
- Chevron-Hess received a second request in January that is ongoing, and Hess is party to an arbitration with Exxon related to ownership rights implicated by the deal.
- Exxon Mobil-Pioneer Natural Resources was cleared with conditions following a second request, as explained further below.

Exxon Mobil closed its $64.5 billion acquisition of oil producer Pioneer Natural Resources on May 3, 2024, following a second request. In public documents explaining the clearance, the FTC did not allege concerns about the actual merits of the transaction despite the acquisition doubling Exxon's footprint in the Permian Basin, as described by Exxon's press release on the acquisition. The FTC complaint stated the geographic market for analyzing crude oil was global, and therefore combined firm's share presumably falls well below the 2023 Merger Guidelines' presumption of unlawfulness (30% combined market share). Nevertheless, the FTC filed a complaint focused on alleged collusive conduct by Pioneer's CEO. The settlement required the parties to enter into a consent decree, prohibiting Exxon from appointing Pioneer's CEO to the Exxon board and limiting which other Pioneer employees Exxon could appoint to its Board. Similar to the FTC's recent consent decree for EQT's acquisition of Quantum Energy's Tug Hill entity, the FTC's action in Pioneer is another example of a FTC settlement focused on Clayton Act Section 8 interlocking directorate issues in the energy space.

EUROPEAN UNION

- **The (Possible) End of the Notorious Article 22 Referral of the European Merger Control Regulation**

On March 21, 2024, Advocate General Nicholas Emiliou issued his opinion in the Illumina/Grail case and concluded that Article 22 of the EU Merger Regulation (EUMR) is not the European solution for dealing with "killer acquisitions." In particular, he stated his view that Article 22 EUMR does not permit national competition authorities (NCAs) to ask the European Commission (EC) to examine a concentration that does not have a community dimension under the EUMR and where the NCAs have no competence to review such a concentration under national law.

As a reminder, the EC reviewed and blocked Illumina's acquisition of Grail, a US biotechnology company, that develops blood tests for early detection of cancer, despite Grail not having any European revenue. Therefore, the parties did not submit a notification to the EC or any European competition authority, as no revenue threshold was triggered.

Historically, Article 22 EUMR was introduced to address a perceived gap where EU member states did not yet have their own merger control rules. The EC interpreted this provision more broadly to allow it to review mergers not meeting the revenue thresholds in Member States (as opposed to a country not having merger control rules in the first place).

In April 2021, the EC accepted a referral request from France, joined by Belgium, Greece, Iceland, the Netherlands and Norway. This eventually led to the EC prohibiting the proposed acquisition in September 2022, and Illumina was compelled to divest Grail in October 2023. The EC recently (April 2024) approved Illumina's plan to divest GRAIL following the restorative measures requiring Illumina to unwind its completed acquisition of GRAIL. On June 24, Illumina announced the completion of the spinoff of GRAIL.

The lower General Court (GC) previously upheld the EC's position. The higher EU Court of Justice is now required to assess whether Article 22 of the Merger Regulation enables the EC to review a merger referred to it by national competition authorities who lack jurisdiction to review it, since the merger falls below the thresholds of the national legislation.

The purpose of the Advocate General's opinion to propose an independent legal analysis to the Court of Justice. The judges will generally take the opinion into account in making a final ruling. Advocate General Emiliou concluded that the GC erred in its interpretation and application of Article 22 of the EUMR. In this regard, he considered the wording, origin, context and purpose of Article 22 and considered the logic of the EU merger control system to conclude that Article 22 cannot be used where the Member States have no jurisdiction to review a concentration under its national law.

The actual position of the EC continues to raise substantial uncertainty for merging parties, as this interpretation of Article 22 EUMR gives the EC the power to review pre- or post-closing almost any concentration, occurring anywhere in the world, regardless of an undertakings' turnover and presence in the European Union or the value of the transaction. As a reminder, the Advocate General's opinion is not binding, and thus we await to see the decision of the Court of Justice to evaluate (or not!) the risk of an Article 22 referral when drafting transactional agreements.

- **The EC Often Considers Non-Price Competition Parameters When Assessing Transactions Under EU Merger Control Regulation**

In April 2024, the EC issued a competition policy brief on the topic of non-price competition in EU merger control, citing case practice examples. The EC reported that it is increasingly evaluating non-price competition parameters such as innovation, quality, data protection, sustainability and supply reliability alongside traditional price effects for its merger reviews. While price effects remain significant, assessing non-price captures broader effects on consumer welfare, as endorsed by the Horizontal Merger Guidelines and permitted under the EUMR. These factors are considered on a case-by-case basis throughout the merger assessment process, including market definition, competitive assessment, potential efficiencies and remedies. Their importance varies by industry and the specific transaction but has grown due to digital and green transitions and other evolving market dynamics.

Non-price competition parameters to be considered include the following:

- **Innovation**: Vital for economic progress, evaluated through R&D expenditure, industry trends, IP protection and ongoing innovation requirements, especially in pharmaceuticals, agrochemicals and high-tech sectors.
- **Quality and Product Differentiation**: Critical in markets with differentiated products and limited price competition; quality aspects like durability, reliability, functionality and brand perception are critical in industries such as steel manufacturing and medical devices.
- **Data Protection and Privacy**: Crucial in digital and tech industries, where data control is a competitive advantage, with data protection and privacy seen as quality and differentiation factors.

In May 2024, the EC published another policy brief on antitrust in labor markets. Helpfully, the brief underscores that as part of a non-problematic transaction, as long as a restriction on employees is directly related, objectively necessary and proportionate, companies will be able to justify no-poach agreements in transaction documents. However, the policy brief does note that when agreeing to such a restriction, companies should consider whether a confidentiality or nondisclosure agreement would not be sufficient and limit the clause to key personnel.

- **(Not So) Kind Reminder from the EC to Provide Correct Information When It Comes to the Review of a Transaction Under EUMR**

The EC suspects Kingspan to have intentionally, or negligently, provided incorrect, incomplete and misleading information while the EC investigated Kingspan's planned acquisition of Trimo in 2021 under the EUMR. The information concerns basic facts related to Kingspan's internal organization, as well as basic facts aimed at assessing (i) the scope of the relevant product and geographic market, (ii) the existence of barriers to entry and expansion, (iii) the importance of innovation, and (iv) the closeness of competition between Kingspan and Trimo, and vis-à-vis their competitors.

Kingspan ultimately abandoned the transaction in April 2022 If the EC were to conclude that Kingspan intentionally, or negligently, provided incorrect, incomplete or misleading information, it could impose a fine for each violation of up to 1% of the company's annual worldwide turnover.

UNITED KINGDOM

- **Focus on the M&A Aspects of the Digital Markets, Competition and Consumers (DMCC) Act to Come Into Force**

The DMCC Act will grant the Competition & Markets Authority (CMA) with powers to enforce the new digital markets competition regime and will apply to firms that are designated as having strategic market status (SMS). The SMS designation will be applied to firms that have substantial and entrenched market power and a position of strategic significance in at least one digital activity linked to the UK. The threshold for SMS will include having a global turnover exceeding £25 billion, or a UK turnover exceeding £1 billion.

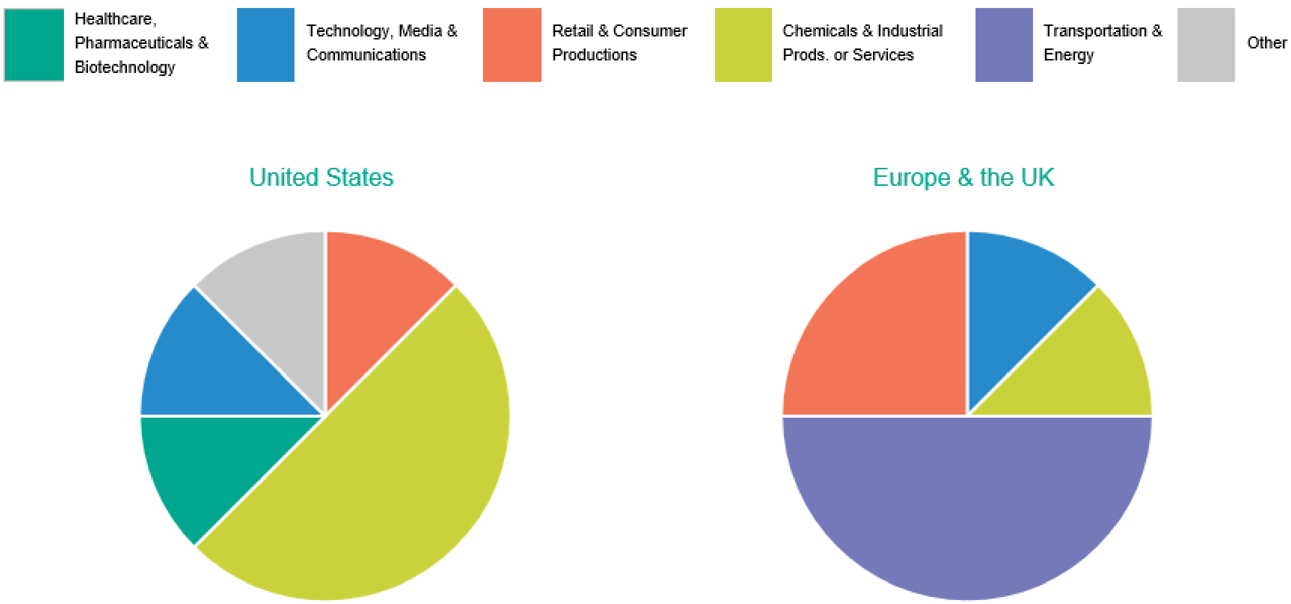
Along with the other two pillars of the new Digital Markets Competition regime (conduct requirements and pro-competition interventions to address adverse effects on competition), this SMS designation comes with new merger reporting requirements: SMS firms will have to report to the CMA prior to closing on intended transaction, where they have a value of £25 million or more and a UK connection.

Aside from this new merger control regime, the DMCC Act also includes a new merger control review jurisdictional threshold applicable to all sectors, where the parties' activities do not overlap – namely, to address "killer acquisitions." The CMA will be able to review deals when one of the parties to the transaction (i) supplies or purchases 33% of goods or services in the UK/a substantial part of the UK and (ii) has UK turnover exceeding £350 million; and (iii) another party to the transaction has a UK nexus (carries on activities in the UK, including through supplying goods or services into the UK).

The DMCC Act received royal assent on May 24, 2024, but is expected to come into force in autumn 2024 (depending in part on the prioritization of any new government). The CMA opened at the same time as the royal assent, a consultation on the Digital Markets Competition regime guidance and on the specific guidance for merger reporting requirements for SMS firms.

ENFORCEMENT IN KEY INDUSTRIES

ENFORCEMENT IN KEY INDUSTRIES[1]

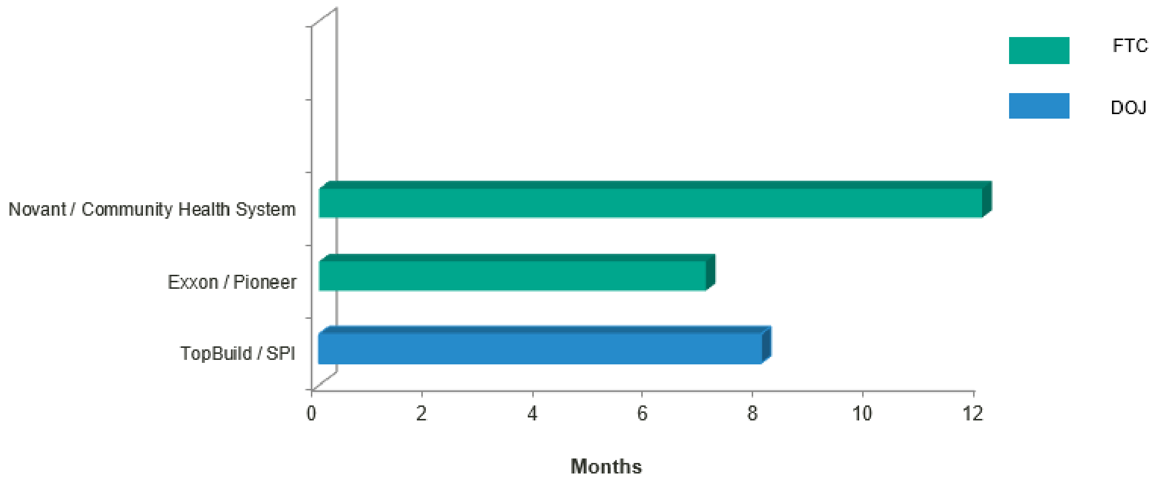


[1] For the United States, the graphs include cases we are aware of in which an antitrust enforcement agency issued a second request at some point and the investigation remained ongoing during the quarter, the agencies accepted a consent order or issued a complaint initiating litigation against the transaction, 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

SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS[2]

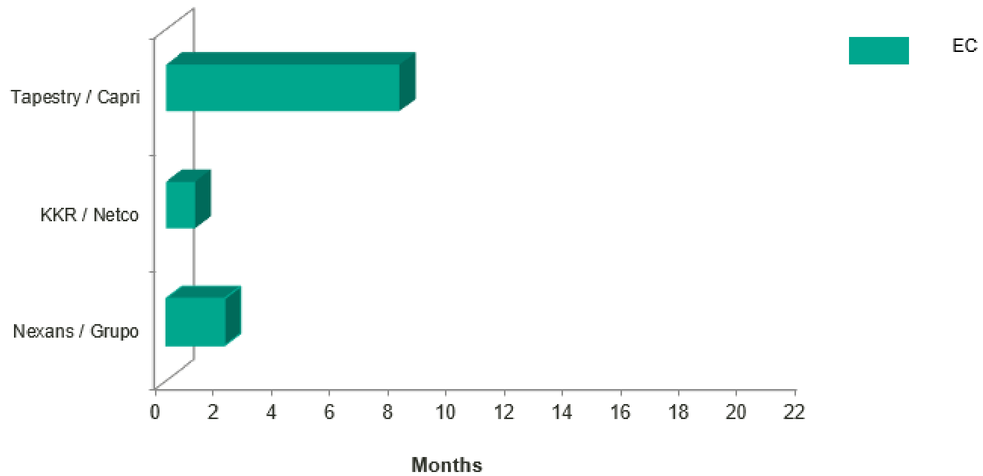
United States (Time from Signing to Consent or Investigation Closing)



---

[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
Tapestry Inc. / Capri Holdings	FTC	Challenged	Accessible luxury handbag market, described as including three	

PARTIES	AGENCY	CASE TYPE (CLEARED, CONSENT, CHALLENGED, ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
Ltd.			"top players" in market to create presumptively unlawful post-acquisition market share of more than 30%	