Antitrust M&A Snapshot | Q4 2024

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SUMMARY

McDermott'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, Lisa Rumin, *and* Elai Katz

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IN THIS JANUARY 2025 ISSUE

OVERVIEW

In the fourth quarter of 2024, US antitrust regulators continued their rigorous scrutiny of mergers and acquisitions. The US Department of Justice (DOJ), under the leadership of the outgoing Biden administration, and several state attorneys general filed a lawsuit to block UnitedHealth Group Inc.'s $3.3 billion acquisition of Amedisys Inc., citing concerns over competition in home health and hospice services as well as nurse employment. However, President Donald Trump's appointments to lead the antitrust agencies, including Gail Slater for the DOJ's Antitrust Division, signal a more predictable and business-friendly approach compared to the previous administration.

In Europe, the European Commission (EC) upheld its approach in merger control cases, as demonstrated by the Court of Justice of the European Union's (CJEU) affirmation of the EC's decision to prohibit the Thyssenkrupp-Tata Steel joint venture. The EC also assessed Nvidia's acquisition of Run:ai under Article 22 of the EU Merger Regulation, ultimately clearing the transaction unconditionally. In the UK, the Competition and Markets Authority (CMA) emphasized the importance of proportionality in merger examinations and explored mechanisms to secure rivalry-enhancing efficiencies.

Below we provide more detail on these developments, among other notable M&A events that occurred during the

final quarter of 2024.

UNITED STATES

- **DOJ and State AGs Sue to Block the $3.3 Billion UnitedHealth-Amedisys Merger**

On November 12, 2024, the DOJ Antitrust Division, together with the attorneys general (AGs) of Maryland, Illinois, New Jersey, and New York, sued to block UnitedHealth Group Inc.'s (UnitedHealth) proposed $3.3 billion acquisition of Amedisys Inc. (Amedisys), a home health and hospice services provider. The case is pending before the US District Court for the District of Maryland. According to the complaint, UnitedHealth and Amedisys are "two of the largest home health and hospice service providers in the country," and the proposed merger threatens to harm competition for home health and hospice services as well as nurse employment. In addition to the traditional economic theories based on competitive harm from post-merger consolidation, the complaint incorporates novel legal theories from the 2023 update to the merger guidelines. For example, the DOJ alleges a labor market theory of harm, asserting that the proposed merger will reduce competition for nurses working in the home health and hospice service markets. The DOJ relies on a closeness of competition argument to support the labor market theory of harm. Here, the DOJ alleges that UnitedHealth identified Amedisys as one of its three closest competitors when determining the value proposition for nurses. Additionally, the DOJ argues that UnitedHealth evaluates its working culture, employee recruitment processes, and other factors in direct comparison with Amedisys.

Similar to other recent challenges, the DOJ and state AGs allege that the parties' proposed divestiture to VitalCaring Group fails to resolve the competition issues. The regulators allege that VitalCaring – a relatively young company – is ill-equipped to take over a package of divested assets that would effectively double the company's size. The regulators further argue that even if VitalCaring were a workable divestiture buyer, the parties' proposed divestiture package is insufficient to ameliorate the transaction's threat to competition. UnitedHealth recently announced that it is terminating its agreement with VitalCaring and looking for alternative divestiture buyers.

The federal litigation is still in its early stages and the trial – which has not yet been scheduled as of this update's publication – will likely take place in Q3 or Q4 of 2025. In a recent US Securities and Exchange Commission (SEC) filing, the companies announced that they had decided to extend their agreed-upon deadline to close the merger by one year, from December 31, 2024, to December 31, 2025.

- **A Quick Look at President Trump's Antitrust Leadership Picks**

Following the November 2024 election, President Donald Trump wasted little time in announcing his nominees for leadership positions at the DOJ Antitrust Division and the US Federal Trade Commissions (FTC).

DOJ Antitrust Division: On December 4, 2024, Trump announced that he will nominate Gail Slater as the next assistant attorney general responsible for the DOJ Antitrust Division. Slater is an antitrust veteran whose career includes roughly a decade with the FTC in various roles. During her time at the agency, Slater worked on the team that litigated challenged supermarket mergers and also served as an advisor to then-FTC Commissioner (and Democratic appointee) Julie Brill. Since then, Slater has worked with several technology-focused corporations and associations in the private sector. During Trump's first term, Slater served as a special assistant to the president for technology, telecom and cyber policy on the National Economic Council. Also, since 2024, Slater has served as an advisor to Vice President JD Vance on antitrust issues.

Slater will likely adopt a more traditional approach to antitrust enforcement and shift away from the progressive positions of her outgoing-predecessor, Jonathan Kanter. However, given her prior experience during the first Trump administration and Trump's continued focus on large tech companies, Slater will likely continue to scrutinize tech transactions.

Federal Trade Commission: On December 10, 2024, Trump announced that he would nominate current Republican-appointed Commissioner Andrew Ferguson as chair of the FTC. The same day, Trump also announced Mark Meador as the third Republican-appointed commissioner at the agency.

Before joining the FTC as a commissioner in March 2024, Ferguson served as Virginia's solicitor general. Ferguson previously served as a law clerk for Judge Karen Henderson of the US Court of Appeals for the DC Circuit and for US Supreme Court Justice Clarence Thomas. Ferguson also spent time in private practice and as counsel to Republicans on the Senate Judiciary Committee.

When Ferguson takes over as chair with a Republican majority, he will almost certainly steer the FTC away from the more aggressive anti-merger positions taken by his predecessor, Lina Khan. It is unlikely that Ferguson will support merger challenges based on novel theories of antitrust harm such as those espoused in the 2023 merger guidelines. Ferguson is instead expected to turn the agency back toward an economics-first approach to merger analysis. Ferguson's voting record on the Commission shows that he is more likely to pursue merger challenges where party documents and traditional economic evidence suggest likely anticompetitive effects. While Ferguson has expressed skepticism about the 2023 guidelines, he also has suggested that repeatedly changing the guidelines with every new administration defeats the purpose of a guidance document. Ferguson also voted to issue the new Hart-Scott-Rodino (HSR) Act rules (slated to take effect on February 10, 2025), and his public statements have been largely supportive. He has stated that the rules' new provisions on ordinary course documents, minority interests, vertical relationships, and overlap assessments will provide important information and facilitate efficient and effective merger reviews by the agencies.

Mark Meador will join the Commission from private practice. He is currently a partner at Kressin Meador Powers.

This boutique antitrust firm was formed after the Kanter Law Group dissolved so that the firm's leader, Jonathan Kanter, could take over as Biden's head of the DOJ Antitrust Division.

Unlike Ferguson and Melissa Holyoak, the third Republican commissioner at the FTC, Meador has previously shown interest in the more populist views on antitrust enforcement espoused by Vance, among others. Meador has previously written articles criticizing Big Tech and pharmacy benefit managers, businesses that were in the Biden administration's antitrust crosshairs. Meador has also joined with sitting Democratic Commissioner Alvaro Bedoya in supporting stronger enforcement of the Robinson-Patman Act, which governs price discrimination. Nevertheless, Meador will likely have issues with – and may support rescinding or revising – the 2023 merger guidelines.

- **Trends and Changes to Look for in Antitrust Enforcement From the Incoming Trump Administration**

While Trump has named his nominees to lead the FTC and DOJ Antitrust Division, it remains to be seen what changes the new administration has in store for federal merger enforcement policy. On the one hand, much of Trump's rhetoric around antitrust enforcement has presented a populist message. Before the January 2025 inauguration, Vance had even spoken positively of some of the policies of Lina Khan, the outgoing FTC chair and progressive face of antitrust enforcement under the Biden administration. Nevertheless, Trump's new antitrust leaders will likely unwind many of the more aggressive changes implemented during Biden's presidency, like the 2023 merger guidelines, while maintaining other trends that align with the Trump administration's messaging, such as increased scrutiny on merger and acquisition (M&A) activity by Big Tech companies.

Upon confirmation, Trump's appointees at the FTC and DOJ Antitrust Division will likely consider withdrawing the Biden administration's 2023 merger guidelines. The 2023 guidelines are, if not overtly, hostile towards mergers generally. Under new leadership, we expect the agencies to return to a more traditional merger analysis that was in play before the new guidelines took effect.

It is less clear, however, what the fate of the new HSR Act pre-merger filing form/rules will be. On October 10, 2024, all five FTC commissioners voted unanimously to approve a substantial overhaul to the pre-merger notification process. The sweeping set of changes, which are slated to take effect on February 10, 2025, stand to increase the burdens and potential costs on parties pursuing transactions that meet the HSR filing thresholds. The fact that the new rules were passed with the approval of two Republican commissioners cuts in favor of the rules coming into force, perhaps with some business-friendly modifications. Notably, on January 10, 2025, the US Chamber of Commerce, American Investment Council, Business Roundtable, and Longview Chamber of Commerce filed a joint lawsuit challenging the HSR rule changes due to their substantial added burden, which may provide added pressure to the new antitrust leadership to pare back or engage in an administrative process to terminate the rule changes.

In sum, while the new administration will continue to review and scrutinize proposed mergers, the analysis they

apply will likely shift back to the more economics-based (and permissive) methods imposed under the prior merger guidelines. We also expect the FTC and DOJ Antitrust Division to be more willing to entertain traditionally acceptable merger remedies that the Biden administration turned away from. We also will see the return of early termination and a likely cessation of "close at your peril" letters from the agencies, and a rollback of the FTC policy of insisting on prior approval of future deals to settle a current investigation.

EUROPEAN UNION

- **EU Courts Confirm Commission's Approach in Merger Control Cases**

On October 4, 2024, the CJEU affirmed the EC decision to prohibit the planned joint venture between Thyssenkrupp and Tata Steel. This ruling demonstrates the challenges that parties face when challenging the EC's view on the negative effects of a merger.

As a reminder, on June 11, 2019, the EC blocked the transaction, which would have combined the second- and third-largest producers of flat carbon steel in the European Economic Area. The EC found that the transaction would have resulted in higher prices in a key industry in the EU. Thyssenkrupp lodged an appeal with the General Court of the European Union, challenging, in particular, the EC's product and geographic market definitions as well as its findings of a significant impediment to effective competition in the relevant markets. However, the General Court affirmed the EC's decision.

On appeal, the CJEU also confirmed the EC's analysis of the merger's effects and rejected the complaints regarding the level of proof required to establish a significant impediment to competition. The CJEU agreed with the General Court's analysis that market share is only a first indication for finding a party is an "important competitive force." Rather it should be viewed in combination with other factors, such as the effects of the concentration on competition between the parties and possible reactions from customers and competitors. Indeed, the CJEU considered the evidence found by the EC sufficient for the EC to conclude that the market share is not reflective of Tata Steel's market position, and therefore considered that Tata Steel was qualified as an "important competitive force."

This ruling reflects the broader trend of the CJEU consistently upholding the EC's approach to assessing effects, which had been in dispute following the General Court's agreement with the idea that the EC had misapplied the "significant impediment to effective competition test" under the EU merger regulation (which has since been overturned by the CJEU). The affirmation of the EC decision in the Thyssenkrupp and Tata Steel case reinforces this pattern, much like the General Court's recent validation of the Commission's analysis regarding Vodafone's acquisition of Liberty Global's telecommunications activities in Germany, the Czech Republic, Hungary, and Romania. In fact, the General Court rejected the appeal against the EC decision (cases T-58/20, T-64/20, and

T-69/20) which authorized the transaction with remedies.

- **EC Uses Member States' Call-in Power to Assess Nvidia's Acquisition of Run:ai Under Article 22 EUMR**

On October 31, 2024, the EC announced it would assess Nvidia's proposed acquisition of Run:ai, an Israel-based artificial intelligence (AI) workload management startup. This comes after Italy requested the EC to review the deal under Article 22 of the EU Merger Regulation (EUMR), which allows Member States to request the EC to review mergers that do not meet the EU's standard turnover-based notification thresholds. The EC determined that the transaction fulfilled the criteria for referral under Article 22 of the EUMR. In particular, the Commission analyzed whether the transaction posed a substantial risk to competition in the markets where NVIDIA and Run:ai operate. Ultimately, on December 20, 2024, the EC unconditionally cleared the transaction after a phase I review because the market test revealed that other software compatible with NVIDIA's hardware will remain accessible to competitors.

The upward referral stems from a request by the Italian Competition Authority (AGCM) that the proposed acquisition be notified in Italy (*i.e.*, making use of a new call-in power). The call-in power enables the AGCM to review transactions not meeting the relevant national turnover thresholds when it finds potential competition risks.

In 2020, the EC announced a new interpretation of Article 22, allowing it to accept merger referrals from national competition authorities for deals that fall below EU and domestic merger thresholds (*i.e.*, where the individual Member States had no jurisdiction). This interpretation was rejected by the CJEU, leading to the EC announcing on December 2, 2024, the withdrawal of its 2021 merger referral guidance. The CJEU overturned the ruling of the General Court concerning Illumina's takeover of Grail and annulled the EC decisions, concluding that Article 22 does not in fact allow for the EC to review concentrations below the thresholds in Member States

As such, while the European Courts highlighted the need for certainty in relation to notification obligations, the introduction at the Member State level of call-in powers muddies the waters. The EC seems intent to assert Article 22 jurisdiction in connection with the domestic call-in powers of national agencies. This underscores the Member States' desire to address potential competition issues, even when transactions fall below traditional thresholds.

UNITED KINGDOM

- **Shifting Regulatory Landscapes: Merger Remedies in the UK and FDI Rules in Europe**

On November 21, 2024, UK Competition and Markets Authority (CMA) Chief Executive Sarah Cardell delivered a speech on how the CMA is rising to the challenge of driving growth in the UK. In parallel, the EC released its Fourth Annual Report on Foreign Direct Investment (FDI) Screening, covering the year 2023. Together, these developments shed light on the changing regulatory landscapes in Europe and the UK, reflecting distinct but

complementary strategies to ensure fair competition and economic stability.

In her speech, Chief Executive Cardell emphasized the importance of proportionality when examining mergers, noting that last year, the CMA conducted just 54 phase I investigations, with only nine M&A deals progressing to phase II, of which five were cleared unconditionally and only one was subject to a prohibition decision. This opened the path to the CMA review, in 2025, of when behavioral remedies might be appropriate and its exploration of mechanisms to secure rivalry-enhancing efficiencies and preserve customer benefits that may offset anti-competitive effects. In addition, the chief executive stressed the importance of moving to effective remedy discussions, guided by a clear understanding of competition concerns and the commercial realities of the businesses involved.

The EC's Fourth Annual Report on FDI Screening revealed a significant increase in cooperation among EU Member States to address investments from third countries that might threaten EU security or public order. In 2023, notifications to the EU's FDI screening mechanism rose by 18%, with 488 cases notified. Of these, 92% were resolved within 15 days, while only 8% required a second phase involving more detailed assessments. This report also underscores the EU's vigilance amidst growing geopolitical tensions and economic security concerns. By 2023, 24 EU Member States had implemented FDI screening mechanisms, with the remaining three (Croatia, Cyprus, and Greece) progressing towards adoption. Despite this progress, notifications remain concentrated, with 85% originating from seven countries. In January 2024, the EC proposed revisions to the FDI Regulation to address system shortcomings, including making screening mandatory for all Member States and harmonizing national laws to improve procedural cooperation.

ENFORCEMENT IN KEY INDUSTRIES

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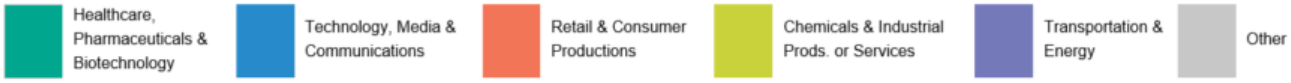

United States

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

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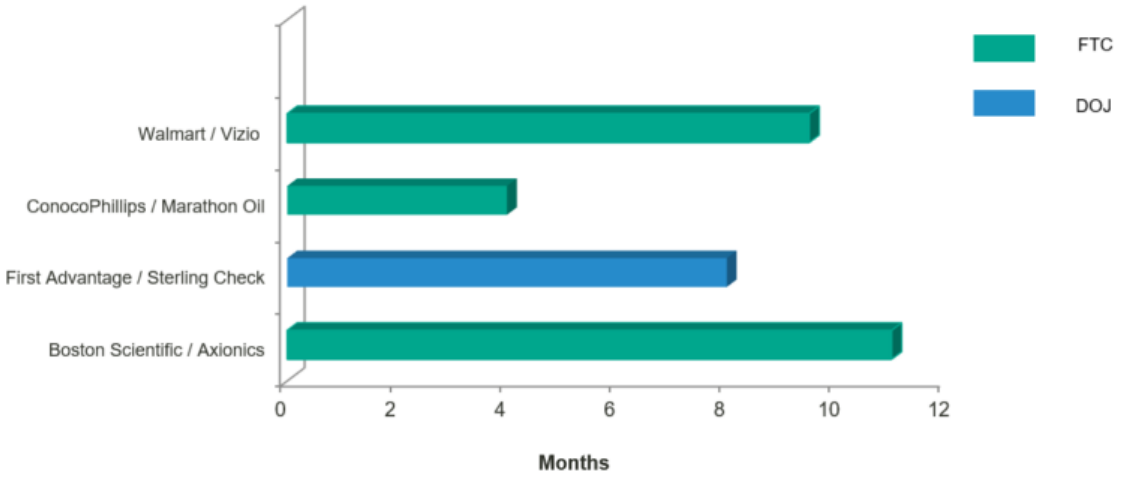
United States (Time from Signing to Consent or Investigation Closing)



[2] These graphs are based on McDermott internal analysis and public press reports and filings. These graphs do not represent a complete list of all matters within a jurisdiction.

NOTABLE US CASES

PARTIES	AGENCY	CASE TYPE (CLEARED, CONSENT, CHALLENGED, ABANDONED)	MARKETS / STRUCTURE (AS AGENCY ALLEGED)	SUMMARY & OBSERVATIONS
UnitedHealth / Amedisys	DOJ and state AGs	Challenged; preliminary injunction pending before the US District Court for the District of Maryland	Horizontal merger among competitors in the markets for hospice and home health services, as well as labor market for nursing services in home health and hospice spaces	