Antitrust M&A Snapshot | Q1 2025

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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

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

JANUARY – MARCH 2025: KEY THEMES AND TAKEAWAYS

UNITED STATES

- **FTC Loses Vertical Challenge to Tempur Sealy/Mattress Firm**

On July 2, 2024, the US Federal Trade Commission (FTC) filed suit in federal court seeking to block a proposed $4 billion merger between mattress manufacturer Tempur Sealy International, Inc., and mattress retail chain Mattress Firm Group Inc. The FTC expressed concern that the merger would result in anticompetitive behavior from the companies, allowing Tempur Sealy to raise premium mattress prices for consumers through a customer foreclosure theory. The FTC alleged several vertical theories of harm, including Tempur Sealy foreclosing other mattress manufacturers, such as Serta Simmons or Purple from selling their products through Mattress Firm or disadvantaging them by limiting the purchase of their inventory, the floor space designated for their products, or the commissions paid to sales representatives when they sell rival mattresses. The agency also argued that the proposed remedies, including agreements to carry a certain percentage of mattress competitors' products at Mattress Firm stores, were insufficiently limited in terms of timing and enforceability. In response, Tempur Sealy stated it planned to operate Mattress Firm as an independent chain, explaining that restricting mattress manufacturer competitors' access to Mattress Firm stores did not make business sense, as it would substantially shrink Mattress Firm's business.

On January 31, 2025, the US District Court for the Southern District of Texas denied the FTC's motion. The court disagreed with the FTC's premium mattress product market definition and found that Tempur Sealy's ability to foreclose rivals was unsubstantiated, despite evidence in the parties' documents that Mattress Firm was considered a 'kingmaker' in the industry. Even though the court found that Tempur Sealy would have the ability and incentive to foreclose rivals' access to mattress shoppers, the court found that consumers and competitors would not be harmed because Mattress Firm's in-store sales accounted for only 25% of all mattress sales in the United States. Furthermore, some rivals of Tempur Sealy did not even sell their products through Mattress Firm, opting to sell to department stores, furniture stores, online platforms, and via direct-to-consumer channels. For those competitors who sold through Mattress Firm, those sales accounted for only 9% of the manufacturers' total sales. In fact, in 2021, Mattress Firm chose to stop selling Tempur Sealy mattresses, but Tempur Sealy's sales for that time were not materially affected, discounting the assertion that Mattress Firm was a key retailer for mattress manufacturers. The district court found that the full record did not support the assertion that Mattress Firm was a critical sales channel that, if restricted, would result in foreclosure for Tempur Sealy rivals.

The district court also criticized the FTC economists' model predicting a post-merger price increase for not taking into account elimination of double marginalization, or discounts passed onto consumers, that could result from the vertical integration of a manufacturer and its retailer. This serves as a reminder that courts are far more willing to recognize the elimination of double marginalization as an efficiency defense than the regulators were under the Biden administration. It remains to be seen how the Trump administration will deal with efficiencies from vertical mergers, but it is worth noting that the Vertical Merger Guidelines issued during the first Trump administration did credit elimination of double marginalization as a benefit of vertical deals. The court also concluded that the proposed remedies reasonably addressed anticompetitive concerns by promising to maintain supply agreements with and reserve space on the floor of Mattress Firm store for other mattress manufacturers and divesting a number of Mattress Firm stores to Mattress Warehouse. The court found that the proposed remedies would ensure that rivals of Tempur Sealy will have alternative retailers to sell through and would ultimately reduce both Mattress Firm's market share and the likelihood of foreclosure by Tempur Sealy.

The outcome shows the difficulty in vertical challenges, especially ones based on customer foreclosure theories. Further, the district court's opinion strengthens the viability of litigating the fix and the willingness of courts to view divestitures and other remedies as sufficient to cure potential anticompetitive effects.

- **The Trump Administration Approach to Antitrust So Far**

Despite the expectation that the second Trump administration would dismantle some of the anti-business antitrust policies or procedures established under the Biden administration, new agency heads FTC Chair Andrew Ferguson and Assistant Attorney General Gail Slater of the US Department of Justice (DOJ) Antitrust Division have stayed the course on several policies created by the previous administration, citing a need for consistency in enforcement. The

agencies have retained the new Hart-Scott-Rodino (HSR) rules, which are far more burdensome on filing parties than the previous form and have led merging parties to agree to extended time-to-file provisions in merger agreements, now averaging around 20-25 business days to file. FTC leadership has stated that the level of detail required by the new HSR form has allowed enforcers to review deals and move quickly when there are no anticompetitive concerns. The agencies also have maintained and even cited the 2023 Merger Guidelines conceived by the previous administration, and plan to continue investigating novel theories of harm such as labor market issues.

Ferguson and Slater have also indicated their intention to focus on promoting dealmaking. They have brought back early termination to allow deals with no anticompetitive concerns to close without waiting the full 30 days for the waiting period to end and will seek to reduce bottlenecks around the HSR process. Additionally, the new administration has stated it will be far more receptive to settlement offers from merging parties allowing parties to cure anticompetitive issues to avoid injunction actions. Finally, Ferguson and Slater plan to protect average American consumers by focusing their efforts on the industries with which American consumers engage most often, including housing, healthcare, insurance, transportation, food, and entertainment.

Below is a chart of key antitrust policies, our assessment of the level of their importance to the Trump administration, and how the new approach differs from that of the Biden administration.

POLICY	PRIORITY TO TRUMP ADMINISTRATION	CHANGE FROM BIDEN ADMINISTRATION
New, More Burdensome HSR Rules	↑	→
2023 Merger Guidelines with Expanded Theories of Harm	→	→
Openness to Settlements and Remedies	↑	↗
Granting Early Termination	↑	↑
Elimination of Antitrust Regulations that Chill Dealmaking (*e.g.*, bringing novel complaints seeking abandonments, refusing to engage on remedies)	↑	↑
Big Tech as an Industry of Focus	↗	→
Anticompetitive Behavior in Labor Markets	↑	→
Populist Antitrust: Focus on Industries Affecting Everyday Americans	↑	↗
Private Equity as an Ownership Structure of Focus	↘	↓
Focus on Economics and Leveraging Agency Economists	↑	↗

McDermott is continuing to track new developments and providing timely updates on antitrust considerations coming out of the new administration, the latest of which can be found here.

- **Expansion of State Antitrust Laws**

Increasingly, individual states have developed and implemented their own set of antitrust laws and regulations, applying these laws to anticompetitive actions by national and local companies that operate in their states. At several panels at the American Bar Association Antitrust Section's annual spring meeting, state attorneys general (AGs) and representatives from those offices spoke of the states' strong sovereign authority to enjoin anticompetitive behavior negatively impacting their citizens in the absence of government action, pointing out that federal antitrust laws may not protect local interests. States are also better positioned to coordinate with other state agencies that can inform antitrust investigations, such as California's Office of Healthcare Affordability or Pennsylvania's Department of Insurance, and can even leverage other sets of state laws in the antitrust context, such as charitable trust laws to review nonprofit transactions. As a result, a handful of states have been working toward creating new regulations or expanding and strengthening existing antitrust laws in their state.

For example, although Nevada has pre-merger notification requirements for healthcare systems, on March 21, 2025,

state lawmakers introduced S.B. 218, a bill that would expand the notification requirement to all companies making HSR filings with the FTC and DOJ. In Washington state, lawmakers have introduced S.B. 5122, which requires parties with principal places of business in Washington or with annual net sales in Washington that are at least 20% of the HSR size-of-transaction threshold to submit a copy of their HSR filing to the state AG as well. S.B 5122 has passed the legislature and will go into effect on July 27, 2025. In New York, S.B. 335 proposes to amend the Donnelly Act, New York's antitrust law statute, expanding the scope of the law by implementing an abuse of dominance standard and creating a rigorous pre-merger notification program. Introduced on January 14, 2025, S.B. 335 would require any transaction by a person doing business in the state which is HSR-reportable to be simultaneously submitted for review by the state AG, who would review each transaction for its impact on labor markets in New York as well as its impact on competition.

Over the last few years, Colorado, Illinois, Massachusetts, Minnesota, Oregon, Vermont, and Washington have also introduced antitrust laws, and Pennsylvania was considering such a law in mid-2024. Given the concern from states that the Trump administration will not be a robust steward of the antitrust laws, it will come as no surprise if more and more state merger control regimes are promulgated over the next four years to address perceived enforcement gaps.

EUROPEAN UNION

- **The EC Published Its Competitiveness Compass, Signalling Future Changes to EU Merger Control**

On January 29, 2025, the European Commission (EC) published the "Competitiveness Compass for the EU", a flagship initiative aimed at shaping a coherent strategy to enhance Europe's global competitiveness. Building on the findings of the Draghi Report on EU Competitiveness (September 2024), the EC outlines a strategic roadmap to foster growth and resilience within the EU over the next five years and establishes targeted measures under three core pillars: (1) reigniting innovation, (2) achieving decarbonization while maintaining industrial strength, and (3) reducing strategic dependencies through enhanced economic security.

As part of this broader initiative to close the innovation gap, in early March 2025, the EC announced an overhaul of its horizontal and non-horizontal merger guidelines to ensure that "*innovation, resilience and the investment intensity of competition in certain strategic sectors are given adequate weight in light of the European economy's acute needs.*" This echoes the vision set out in the Draghi Report, which called for enforcers to consider the long-term innovation potential in strategic sectors, with a particular focus on defense and telecom, and a focus on strengthening European companies. This holistic review of merger policy is set to introduce a potential paradigm shift in EU merger control, aligning competition policy more closely with industrial and innovation objectives. In particular, the new merger guidelines will reflect the need to "*keep pace with evolving markets and tech innovation.*"

As Commissioner Teresa Ribeira has promised a consultative approach, a public consultation on both draft guidelines is expected in the second quarter of 2025, with further updates on the timeline to follow later this year. The revised guidelines are anticipated to be adopted for the fourth quarter of 2027.

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339.

- **EC Gathered Input for Upcoming FSR Guidelines**

On March 5, 2025, the EC issued a call for feedback on the main objectives, scope and context of the forthcoming guidelines for the Foreign Subsidies Regulation (FSR).

These guidelines aim to clarify important concepts of the FSR, such as how to determine if a foreign subsidy distorts competition, the application of the balancing test, and the evaluation of distortions in public procurement procedures. Furthermore, the guidelines will cover the EC's authority to mandate prior notification of concentrations or foreign financial contributions obtained in public procurement, even in instances that are below the notification thresholds established by the FSR.

Overall, the guidelines are intended to contribute to legal certainty, transparency and predictability in the enforcement of the FSR and assist companies in navigating its intricate provisions.

The EC has recently completed the initial stage, having closed its call for evidence on April 2, 2025. A draft version of the guidelines will be subject to public consultation at a later stage, with the final adoption of the guidelines planned prior to January 13, 2026, as mandated by the FSR.

UNITED KINGDOM

- **The UK CMA Sets New Standards: Review of Merger Remedies and Release of Merger Charter**

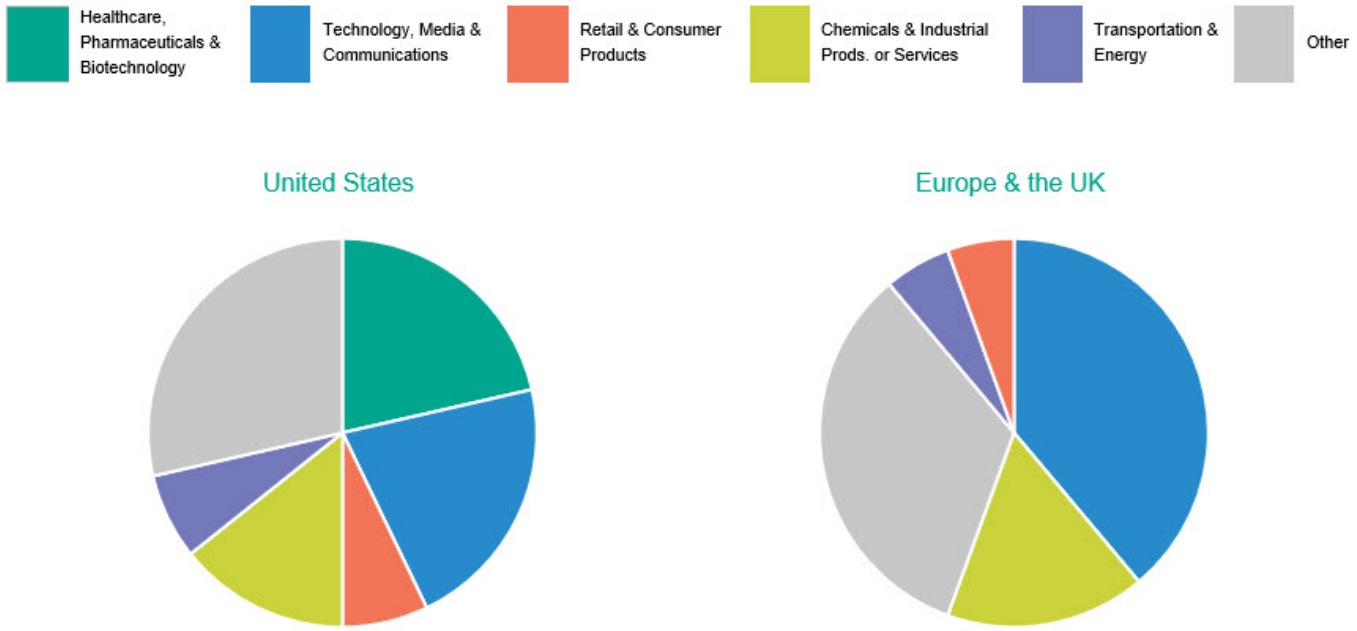
As part of its ongoing efforts to modernize and strengthen the UK's merger control regime, on March 12, 2025, the UK Competition and Markets Authority (CMA) launched a comprehensive review of its approach to merger remedies.

Through this review, the CMA is seeking feedback from stakeholders on how to strike an appropriate balance between the use of different remedy types. Key areas of focus include remedy assessment (including when behavioral remedies may be appropriate), how remedies can be designed to preserve pro-competitive effects and other customer benefits, and how the remedy assessment process can be streamlined to enhance efficiency. Stakeholders have until May 12, 2025, to submit feedback. The CMA plans to use the insights gathered to develop

detailed proposals, which will be published for consultation in autumn 2025.

Alongside this initiative, the CMA also introduced its new Mergers Charter. Designed first as a statement of intent, it outlines the principles that will guide its engagement with businesses and their advisors throughout merger investigations. The Charter is built around the "4Ps" principles – "pace, predictability, proportionality, and process" – and sets clear expectations for both the CMA and businesses to promote transparency, collaboration, and fairness. Consistent with the UK government's intent to be open to foreign investment, the Mergers Charter appears to suggest a less aggressive review of mergers. The CMA expects to issue further guidance to support the Charter's principles.

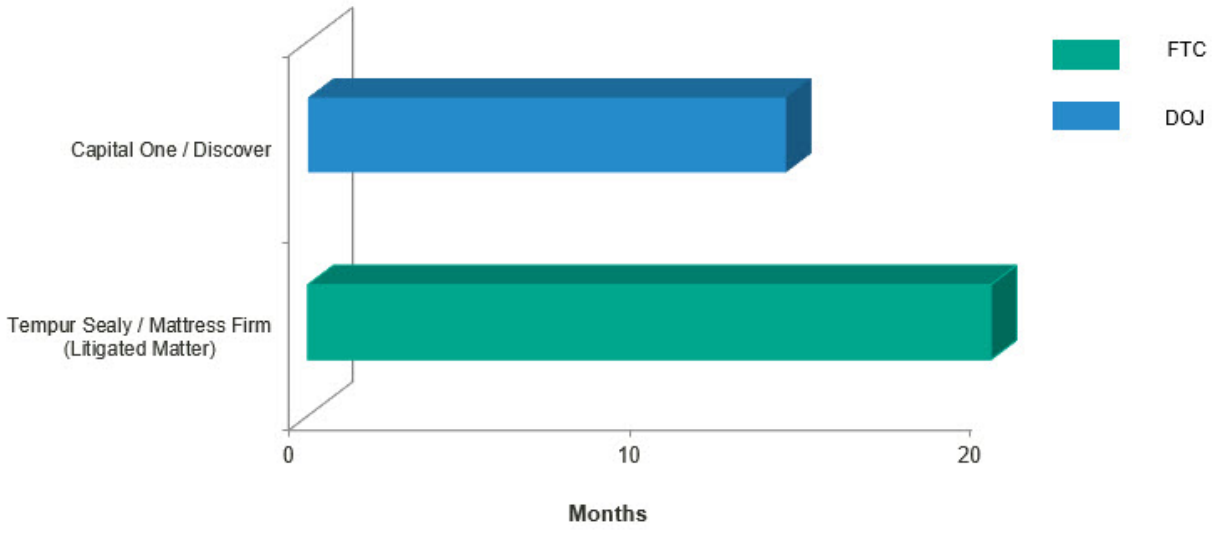
ENFORCEMENT IN KEY INDUSTRIES[2]



[2] 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.

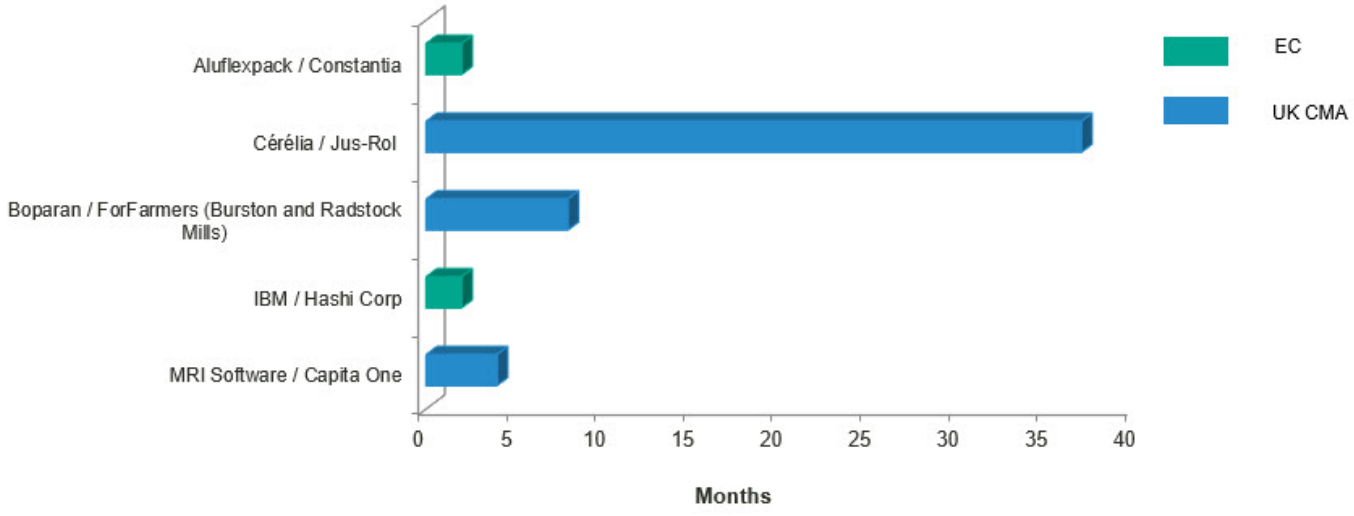
SNAPSHOT OF SELECTED ENFORCEMENT ACTIONS[3]

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



[3] 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.

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
GTCR BC Holdings, LLC / Surmodics, Inc.	FTC	Challenged: 13(b) preliminary injunction pending before the US District Court for the Northern District of Illinois		