Antitrust M&A Snapshot | Q3 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

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

IN THIS OCTOBER 2024 ISSUE

OVERVIEW

The US antitrust regulators continued to aggressively challenge transactions and associated Hart-Scott-Rodino (HSR) violations during the third quarter of 2024. The Federal Trade Commission (FTC) litigated two merger challengers involving Kroger/Albertsons and Tapestry/Capri. On October 24, 2024, Tapestry/Capri was decided in the government's favor and a Kroger/Albertsons decision is expected in the next month. The FTC filed a lawsuit in July challenging the Tempur Sealy/Mattress Firm transaction under a novel customer foreclosure theory and at least one transaction was abandoned due to FTC opposition. Both the Department of Justice (DOJ) and FTC also brought gun-jumping HSR violations, resulting in significant fines. In addition, the US antitrust agencies just released new rules for HSR filings, which will make HSR filings more costly and lengthy.

In Europe, the European Commission (EC) lost its challenge to the Illumina/Grail transaction under an Article 22 referral, which will likely make it more difficult for the EC to investigate and challenge smaller transactions. In the UK, the Competition Markets Authority (CMA) approved a transaction under a rarely accepted "failing firm defense."

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

third quarter of 2024.

UNITED STATES

- **The FTC Releases Final Rules Governing Premerger Notification Filings**

On October 10, 2024, the FTC voted 5-0 to issue the long-awaited final rules amending the HSR premerger notification filing requirements. While the final rules are pared back from the draft rules in several respects, the final rules will significantly increase the reporting obligations of filing parties. The most significant changes from the prior premerger filing regime include requiring (i) written descriptions for horizontal product overlaps and vertical supply relationships, (ii) broader production of transaction-related documents and ordinary-course documents regarding overlap products, and (iii) reporting on the activities of officers or directors that serve in similar roles at firms that compete with the target. In addition to these significant changes, there are a multitude of other changes to the HSR reporting requirements which, in the aggregate, will substantially increase the time required to make a filing. The McDermott antitrust team has published an in-depth review of the final rules providing a discussion of each notable change to the HSR reporting requirements.

These final rules require filing parties to take a more proactive approach to their deals from an antitrust standpoint. Antitrust counsel should be engaged earlier in the deal process to review drafts of ordinary course and deal documents, identify relevant overlaps, and determine the extent of a party's filings obligations.

- **The FTC Dusts Off the Customer Foreclosure Theory of Competitive Harm**

In a departure from the status quo, in July 2024 the FTC filed a lawsuit challenging Tempur Sealy's proposed acquisition of Mattress Firm under a customer foreclosure theory. Mattress Firm is a large downstream seller of Tempur Sealy and other competitors' mattress products, and the FTC alleges that Tempur Sealy's mattress competitors will be harmed by no longer being able to sell their mattresses at Mattress Firm stores. The customer foreclosure theory focuses on the likelihood of a vertically integrated firm's ability to restrict upstream rivals' access to a downstream customer base. The decision by the FTC to deploy the customer foreclosure theory, a theory of harm that has not been used to block a vertical merger in recent decades, is representative of the antitrust regulators' recent penchant for relying on novel theories of antitrust harm.

According to the FTC, the merger – which would combine the "world's largest mattress manufacturer and supplier," Tempur Sealy, with "the nation's largest mattress retailer," Mattress Firm – would foreclose Tempur Sealy's rivals from access to Mattress Firm stores. Tempur Sealy, the FTC alleges, could limit rival mattress manufacturers' access

to prospective customers by excluding their products from the retail floor space available for mattresses at Mattress Firm's brick-and-mortar stores. This would be competitively devastating for Tempur Sealy rivals, the FTC argues, because "[t]o reach the vast majority of consumers, premium mattress suppliers must have access to brick-and-mortar retail floor space to showcase their products" and Mattress Firm is "by far the most significant route to market for premium mattress suppliers." In addition to restricting floor space, the FTC alleges that Tempur Sealy could harm rivals by awarding Mattress Firm employees with higher commissions for the sale of Tempur Sealy products. Customer foreclosure was a popular tool of the DOJ in vertical merger cases from 1950 to 1970, but it remains to be seen whether this decades-old theory of harm will achieve similar success in court today.

- **The Biden Administration's Diminished Tolerance for HSR Act Violations**

The Biden administration has increasingly cracked down on HSR Act violations. Recent enforcement actions serve as a reminder that the current administration has little tolerance for HSR Act violations – even when it comes to first-time, individual offenders. Two recent examples of HSR Act violations are representative of this low-tolerance approach.

On September 18, 2024, the government filed an enforcement action against GameStop CEO Ryan Cohen. Cohen acquired 562,077 shares of Wells Fargo voting securities in an open market purchase. According to the complaint, this acquisition – when added to Cohen's total Wells Fargo holdings – exceeded the HSR filing threshold and triggered Cohen's obligation to file an HSR notification and abide by the mandatory waiting period before consummating the acquisition. Cohen, according to the complaint, failed to do so. Additionally, Cohen did not qualify for the HSR Act's "solely for the purpose of investment" exemption because his emails to Wells Fargo's CEO advocating for a board seat demonstrated to the government that he wasn't a passive investor. Cohen agreed to pay a $985,320 civil penalty to resolve the claims. In another matter, the government alleged the merging firms began to operate collectively before the HSR Act waiting period expired.

These examples are strong reminders that the antitrust regulators under the Biden administration are focusing on gun-jumping violations, meaning merging parties must exercise caution to ensure they maintain their independence during the post-signing and pre-closing stage.

- **The US Government Continues to Advance Novel Arguments to Block Retail Mergers**

In addition to the customer foreclosure theory of harm described above, in *Tapestry/Capri* the FTC argued that it does not need to show high market share levels to obtain a preliminary injunction against the transaction. Rather, the FTC argued that showing head-to-head competition between Tapestry and Capri brands in the market for "accessible luxury" handbags is sufficient. The FTC defined "accessible luxury" handbags as handbags sold at prices between $100 and $1,000, which, according to the FTC, includes most of Tapestry's Coach and Kate Spade lines and

Capri's Michael Kor's line. To argue closeness of competition, the FTC relied, in part, on the parties' internal emails, which showed that each side monitored the other's pricing and marketing decisions. This theory and evidentiary approach are encapsulated within the new 2023 Merger Guidelines, which place an emphasis on evaluating merging parties' strategic deliberations or decisions, including monitoring each other's pricing. On October 24, 2024, the FTC prevailed in blocking the merger with Judge Rochon adopting the FTC's product market definition. However, Judge Rochon neither adopted nor rejected the FTC's closeness of competition theory. Instead, the Judge found that the FTC had established high market shares under a traditional analysis. However, Judge Rochon did agree with the FTC that a 30% market share and the 2023 Merger Guidelines' HHI thresholds are sufficient to show a presumption that a transaction is likely to substantially lessen competition. Therefore, this decision demonstrates that the government must still establish a relevant product market and market shares, but potentially lowers the concentration levels necessary for the government to prevail.

EUROPEAN UNION

- **Illumina/GRAIL: The Rise and Fall of Article 22 EUMR and the Path Forward**

The *Illumina/Grail* saga has finally come to an end, with the European Court of Justice (ECJ) overturning the ruling of the General Court (GC) and annulling the EC decisions, concluding that Article 22 does not in fact allow for the EC to review concentrations below the thresholds in Member States. This judgment is a significant decision that should end the EC's practice of accepting referrals under Article 22 EUMR for transactions that do not meet the filing thresholds of a Member State of the EU.

For more detailed analysis of the ECJ's judgment, see our client alert here.

This outcome will frustrate the EC's plan to increasingly tackle "killer acquisitions," *i.e.*, those that could hamper innovation through small companies/teams, particularly in the tech and pharma sectors, as well as halt its aggressive stance in other significant mergers.

The *Illumina/Grail* decision has already impacted the EC's ability to review smaller transactions. In March 2024, Microsoft announced the hiring of the two co-founders of a US tech startup developing machine learning and generative AI hardware and apps, Inflection AI Inc., along with most of its staff, including a waiver of any legal rights by Inflection in connection with the hiring of its staff. Additionally, Microsoft entered into associated arrangements with Inflection (including a non-exclusive licensing deal to use Inflection IP in a range of ways).

Although the transaction did not meet the notification thresholds of the EUMR and was not notified in any Member State, seven Member States submitted a referral request upon invitation from the EC. However, following the ECJ's judgment in the *Illumina/Grail* case, all member states withdrew their referral requests, resulting in the end of this

procedure.

- **New Remedies Under the FSR**

Following the entry into force of the Foreign Subsidies Regulation (FSR) on July 12, 2023, several in-depth investigations have been initiated in the public procurement area by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW).

However, on the M&A side, the Directorate-General for Competition has only opened one in-depth Phase II investigation. This involves a state-controlled telecommunication operator based in Abu Dhabi, Emirates Telecommunications Group (e&), acquiring parts of European telecommunication operator PPF Telecom Group B.V. for approximately €2.2 billion. The EC investigated whether e& may have been granted foreign subsidies that distort the internal market and approved this transaction subject to remedies on September 24, 2024. These remedies include a 10-year commitment not to take advantage of an unlimited guarantee, that the bidder's articles of association do not deviate from ordinary United Arab Emirates (UAE) bankruptcy law, a prohibition of any financing from e& owner the Emirates Investment Authority (EIA) to PPF's activities in the EU, and a requirement that e& inform the EC of future acquisitions. It is important to note that it took the parties a little more than one year from deal announcement to acquire FSR approval.

- **Teresa Ribera to Lead the Future of EU Competition Policy**

On September 17, 2024, Spanish politician Teresa Ribera was appointed by EC President Ursula von der Leyen to oversee competition policy for the next five years, succeeding Margrethe Vestager. She will also serve as the executive vice president on climate change and decarbonization. She played a key role in initiatives to reduce carbon emissions and in negotiating major gas and power market reforms. Von der Leyen instructed Ribera to review merger control guidelines to "give adequate weight" to Europe's needs and to respect "resilience, efficiency and innovation." In the context of the EC's recent failure before the ECJ in the *Illumina/Grail* case, Von der Leyen also instructed Ribera to "focus on the particular challenges facing SMEs and small midcaps, notably to address risks of killer acquisitions from foreign companies seeking to eliminate them as a possible source of future competition." We will need to see if these instructions change the way the EC analyzes mergers in the future.

UNITED KINGDOM

- **The CMA Is Closing in on Big Tech**

With the new Digital Markets, Competition and Consumers Act (DMCC Act), passed in May 2024 and becoming effective this quarter, the CMA has a new formidable legal tool and is expected to become more aggressive in its

enforcement in the tech sector. The bill provides the CMA with the power to oversee digital markets and to "catch" more mergers for review (for more details on the DMCC, see our previous Antitrust M&A Snapshot, Q2 2024, here). In the meantime, its focus has been on small artificial intelligence (AI) companies/startups and their partnerships with big-tech companies.

The CMA recently cleared Microsoft's hiring of certain former employees of Inflection AI, Inc., and several agreements, including a non-exclusive licensing deal. The CMA found that the transaction did not give rise to a realistic prospect of a substantial lessening of competition as a result of horizontal unilateral effects from a loss of competition in the development and supply of consumer chatbots and foundation models. The CMA concluded that Inflection AI does not impose a substantial competitive constraint for chatbots now or in the future because competitors could easily replicate Inflection AI's technology. In addition, the CMA found that Inflection AI's AI-studio business for enterprise customers was still in its early stages and thus did not present a significant competitive challenge to its rivals in the market for foundation models.

- **The "Failing-Firm Defense": A Now-Realistic Option in the Eyes of the CMA?**

The CMA cleared T&L Sugars Limited's acquisition of Tereos UK & Ireland's retail sugar business on September 3, 2024, under a "failing-firm defense" theory. The CMA opened an in-depth investigation into the deal in March 2024 because Tereos and T&L were two of only three businesses supplying the vast majority of sugar to restaurants and supermarkets in the UK. Nevertheless, the CMA cleared the transaction because it found that Tereos's UK retail business had been consistently unprofitable and that, without this transaction, Tereos would likely close its UK retail business and there was no other viable alternative buyer. As a result, the CMA concluded that the parties were able to establish a failing-firm defense. This is one of the few transactions where companies have been able to meet the failing-firm defense.

ENFORCEMENT IN KEY INDUSTRIES

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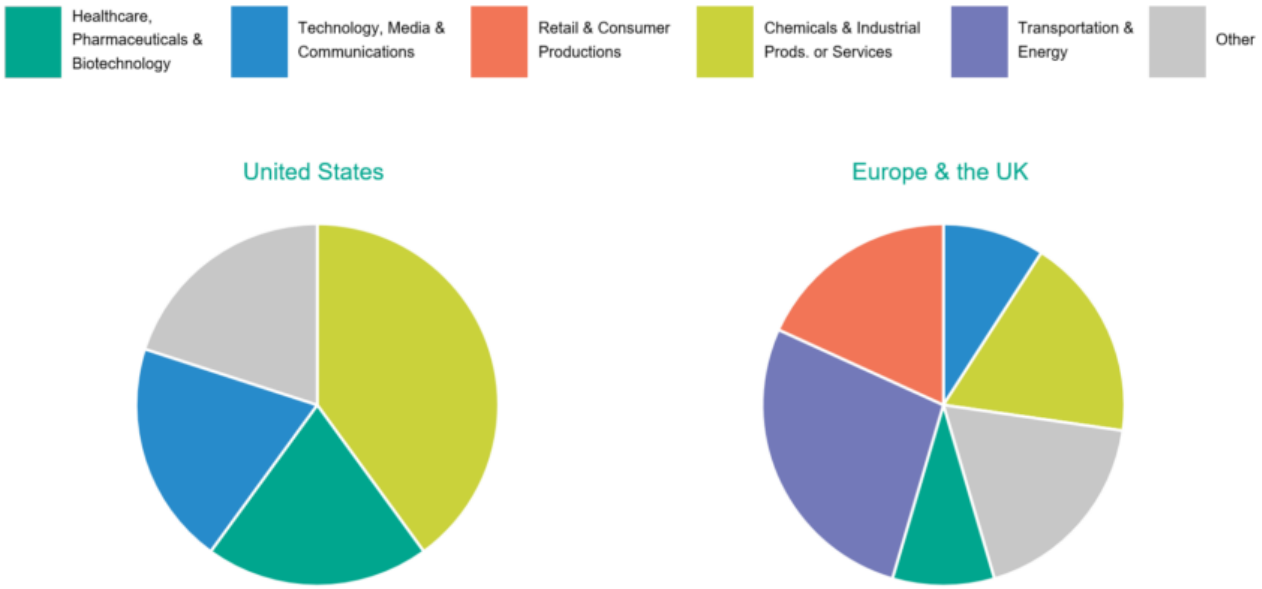

[1] For the United States, the graphs include cases we are aware of in which an antitrust enforcement agency issued a second request at some point and the investigation remained ongoing during the quarter, the agencies accepted a consent order or issued a complaint initiating litigation against the transaction,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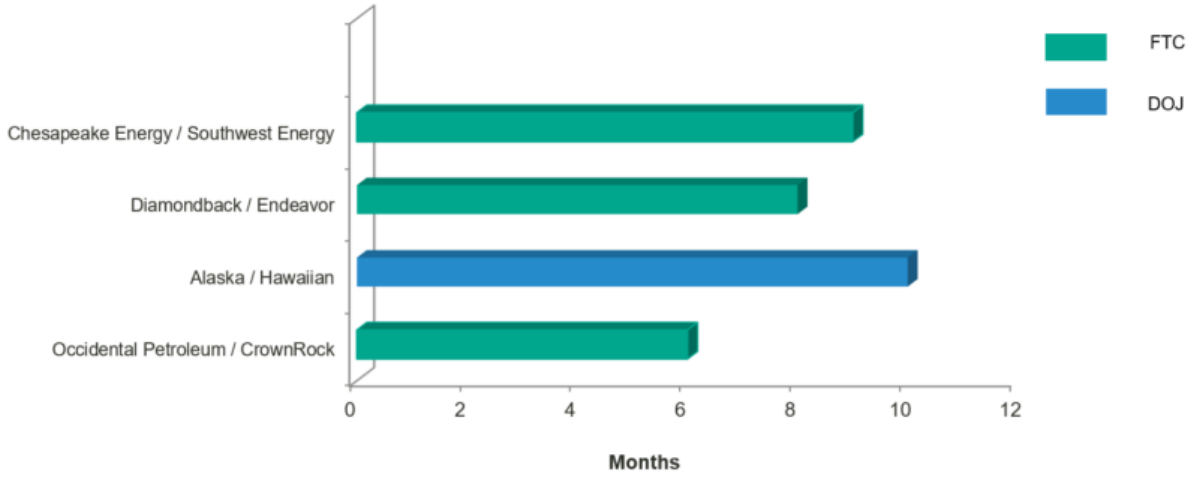
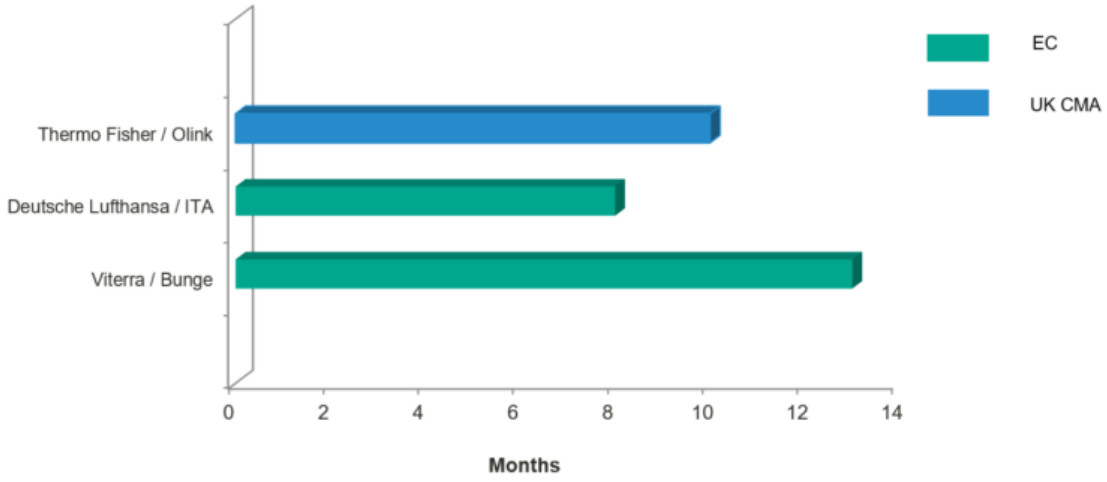
United States (Time from Signing to Consent or Investigation Closing)



[2] These graphs 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
Tempur Sealy / Mattress Firm	FTC	Challenged	Relevant market is "premium mattresses" sold in the United States; FTC alleged that the premium mattress market is concentrated with three companies, led by Tempur Sealy	