



United States of America

Global merger control handbook – update

APRIL 2020

Merger control legislation updates since 1 July 2018

The jurisdictional thresholds under the HSR Act are adjusted annually to mirror growth in the United States' gross national product. The new thresholds are below, with effect as of February 27, 2020:

ORIGINAL THRESHOLD	NEW (AS OF FEB. 27, 2020)	PRIOR (UNTIL FEB. 27, 2020)
USD10 million	USD18.8 million	USD18 million
USD50 million	USD94 million	USD90 million
USD100 million	USD188 million	USD180 million
USD110 million	USD206.8 million	USD198 million
USD200 million	USD376 million	USD359.9 Million
USD500 million	USD940.1 million	USD899.8 million
USD1 billion	USD1,880.2 million	USD1,799.5 million

For more information, see <https://www.dlapiper.com/en/us/insights/publications/2020/01/ftc-announces/>

Notable merger control cases since 1 July 2019

FEDERAL TRADE COMMISSION (FTC)

Boston Scientific acquisition of BTG plc (September 2019)

According to the FTC, Boston Scientific's acquisition of BTG would have harmed consumers in the U.S. market for drug eluting beads, or DEBs, which are microscopic beads used to treat certain liver cancers. The FTC alleged that Boston Scientific and BTG were head-to-head competitors in the highly concentrated U.S. DEBs market, and the transaction would have allowed the combined firm to exercise market power unilaterally, resulting in higher prices, reduced innovation, and less choice for consumers, according to the complaint. Under a negotiated consent decree, Boston Scientific was required to divest its DEBs business and bland bead product line to Varian Medical Systems. According to the FTC, the bland bead business had to be divested with the DEBs business to ensure the divestiture's effectiveness.

Nexus Gas Transmission's Acquisition of Generation Pipeline from North Coast Gas Transmission (September 2019)

The FTC sued to invalidate a non-compete clause preventing North Coast (the seller) from competing with Nexus (the buyer) in providing natural gas pipeline transportation in certain areas, even though North Coast retained pipeline assets that could reach those areas. The final order permitted the acquisition to go through but required the parties to remove the non-compete clause from the sales agreement.

Illumina Inc. attempted acquisition of Pacific Biosciences (December 2019)

The FTC sued to block the merger, charging that it would likely eliminate nascent competition in the U.S. market for next-generation DNA sequencing systems and allow Illumina to maintain its monopoly in that market. According to the FTC, next-generation DNA sequencing is a rapidly expanding technology used in genetic research and clinical testing, and Illumina was the world's leading supplier. Although Illumina's systems employed short-read sequencing technology and PacBio, one of three other suppliers in the U.S., employed long-read sequencing technology, the FTC maintained that PacBio was a closer alternative to Illumina than ever before and that some customers had switched some sequencing volume from Illumina to PacBio for certain use cases and applications. The FTC also alleged that the acquisition would harm competition by reducing the combined firm's incentive to innovate and develop new products. The parties abandoned the transaction following the FTC's filing of the complaint.

Peabody Energy Joint Venture with Arch Coal (February 2020)

The proposed joint venture would combine the parties' coal mining operations in the Southern Powder River Basin (northeastern Wyoming). The FTC claimed that the transaction would eliminate competition the two major competitors in the market for thermal coal in the Southern Powder River Basin, and the two largest coal-mining companies in the United States.

According to the FTC, owners of power generation units designed to burn Southern Powder River Basin coal have high fixed costs and cannot readily replace coal with natural gas, wind, sun, or nuclear fuels. As of this writing, the dispute remains pending in both federal court and before an administrative law judge.

Altria Group investment in Juul Labs (April 2020)

The FTC challenged global tobacco company Altria's USD12 billion acquisition of a 35% stake in e-cigarette supplier JUUL Labs. According to the FTC, "[f]or several years, Altria and JUUL were competitors in the market for closed-system e-cigarettes. By the end of 2018, Altria orchestrated its exit from the e-cigarette market and became JUUL's largest investor" and "Altria and JUUL turned from competitors to collaborators by eliminating competition and sharing in JUUL's profits." As of this writing, the suit remains pending before an administrative law judge.

Össur Hf acquisition of College Park Industries (April 2020)

Össur Hf and College Park Industries, Inc., both makers of prosthetic limbs, agreed to divest College Park's myoelectric elbow business to settle FTC charges that Össur's proposed acquisition of College Park would violate federal antitrust law. The acquisition was not reportable under the Hart-Scott-Rodino Act, but the FTC nevertheless sued to block it, claiming that it was likely to harm U.S. customers of myoelectric elbows. The complaint alleged that the U.S. market for myoelectric elbows is highly concentrated, that College Park is a leading supplier in that market, and that, absent the transaction, Iceland-based Össur would likely complete development of its own myoelectric elbow and enter the US market to compete with College Park. In settling the lawsuit, College Park agreed to divest all assets of its myoelectric elbow business to Hugh Steeper Ltd.

ANTITRUST DIVISION (DOJ):

T-Mobile US Inc. acquisition of Sprint Corporation (July 2019)

The DOJ cleared the merger of the third and fourth largest mobile telecommunications providers, subject to certain divestitures to satellite services provider The Dish Network. In an unusual development, the consent decree named Dish as a defendant, making Dish subject to an enforcement action in the event of failure to comply. The remedy required the divestiture to Dish of Boost Mobile, Virgin Mobile and a small number of Sprint's prepaid customers, as well as Sprint's 800 MHz spectrum licenses for a total USD5 billion, which Dish must use to build a fourth national carrier, replacing the loss of Sprint. Dish is obligated to build a 5G broadband network. In addition, the parties signed a mobile virtual network operator agreement under which T-Mobile must provide Dish with access to its network for seven years. T-Mobile must also facilitate Dish's taking over any retail stores and cell towers it decommissions if Dish wants to assume the leases. T-Mobile and Dish must negotiate an agreement for T-Mobile to use Dish's unused 600 MHz spectrum while the new network is being built. Several U.S. states joined the consent decree, but more than a dozen did not, suing instead to block the merger. The lawsuit was eventually resolved and the merger consummated.

Novelis acquisition of Aleris Corporation (March 2020)

The DOJ challenged the merger, alleging that the transaction would combine two of only four North American producers of aluminum auto body sheet. The decisive question in the case was whether the relevant product market for antitrust should be limited to aluminum body sheet or broadened to include other auto body sheet materials (such as steel). The DOJ agreed with the parties to refer the question of the relevant product market definition to binding arbitration. The arbitration hearing was held over ten days, with testimony from eleven fact witnesses and three expert witnesses, and under an agreement to dispense with certain evidentiary requirements to allow for a more flexible and efficient hearing. The parties further agreed that, if DOJ prevailed in the arbitration, Novelis would be required to divest certain agreed-upon assets, while if the merging parties prevailed in the arbitration, the merger would be permitted to close. The arbitrator ruled that aluminum auto body sheet was the relevant product market and Novelis was required to divest Aleris's entire aluminum auto body sheet operations in North America.

Sabre acquisition of Farelogix (April 2020)

DOJ sued to block the acquisition by Sabre Corporation, one of three global airline booking distribution systems (GDS), of Farelogix, a provider of booking technology that allows airlines to bypass GDS. DOJ claimed that the acquisition was "a dominant firm's attempt to eliminate a disruptive competitor after years of trying to stamp it out." A federal judge denied the DOJ's request for preliminary injunction, ruling that DOJ failed to establish a relevant product and geographic market, that the parties did not compete in a relevant geographic market, and that DOJ failed to show a reasonable probability of competitive harm. The parties nevertheless abandoned the transaction due to opposition from the Competition and Markets Authority in the United Kingdom.

Notable merger control cases 1 July 2018 to 30 June 2019

FEDERAL TRADE COMMISSION (FTC):

Agilent Technologies/Varian (October 2018)

In order to proceed with their USD1.5 billion merger, Agilent Technologies and Varian, two leading global suppliers of high-performance scientific measurement instruments, agreed to sell three product lines: 1) Micro Gas Chromatography (Micro GC) instruments; 2) Triple Quadrupole Gas Chromatography-Mass Spectrometry (3Q GC-MS) instruments; and 3) Inductively Coupled Plasma-Mass Spectrometry (ICP-MS) instruments.

Northrop Grumman/Orbital ATK (December 2018)

The FTC sought to block Northrop Grumman's USD7.8 billion acquisition of aerospace and defense contractor Orbital ATK, claiming it would provide Northrop with the incentive and ability to harm competition for missile contracts by either withholding access to its solid rocket motors (SRM) or increasing SRM prices to competitors. Under the settlement, Northrop must make its solid rocket motors and related services available on a non-discriminatory basis to all competitors for missile contracts and must separate the operation of its SRM business from the rest of the company's operations with a firewall.

Tronox/Cristal USA (February 21, 2019)

The FTC challenged the USD1.67 billion merger of two top suppliers of chloride process titanium dioxide (TiO₂), a white pigment used in a wide variety of products including paint, industrial coatings, plastic, and paper, alleging that the transaction, if consummated, would increase the risk of coordinated action among the remaining competitors and of future anticompetitive output reductions by Tronox. As of this writing, the matter has been stayed pending possible settlement involving divestitures.

Praxair/Linde (February 2019)

As a condition of allowing their merger, the FTC required industrial gas suppliers Praxair, Inc. and Linde AG to sell assets in nine industrial gases product markets in numerous U.S. geographic markets to four divestiture buyers. The nine product markets in which the FTC alleged harm are bulk liquid oxygen, bulk liquid nitrogen, bulk liquid argon, bulk liquid carbon dioxide, bulk liquid hydrogen, bulk refined helium, on-site hydrogen, on-site carbon monoxide, and excimer laser gases.

According to the FTC, the merger, as originally proposed, would have eliminated direct competition between Praxair and Linde in each of the nine product markets, and would have enabled the merged firm to exercise market power unilaterally by raising prices in those markets. Without the required divestitures, the proposed merger also would have made collusion or coordinated action among the remaining firms in the nine product markets more likely.

ANTITRUST DIVISION (DOJ):**AT&T/Time Warner (February 2019)**

A federal appeals court upheld dismissal of DOJ challenge to “vertical,” USD80 billion-plus merger between AT&T (owner of various distribution outlets including DirecTV) and Time Warner (owner of content providers including HBO and Turner Broadcasting (including CNN)). According to the federal court, the US government failed to show that the merged entity would have the incentive or ability to raise rivals’ costs.

UTC/Rockwell Collins (October 2018)

As a condition of allowing the merger, the DOJ required United Technologies Corporation (UTC) to divest two businesses critical to the safe operation of aircraft. First, UTC had to divest Rockwell Collins’s pneumatic ice protection systems business, which supplied systems to remove ice from the wing of an aircraft by means of an inflatable rubber de-icing boot. Second, UTC had to divest Rockwell Collins’s trimmable horizontal stabilizer actuators (THSAs) business. THSAs ensure that an aircraft maintains altitude during flight by adjusting the angle of the horizontal tail surface.

CVS/Aetna (October 2018)

As a condition to consummating their USD69 million merger, DOJ required CVS Health Corporation (CVS) and Aetna Inc. (Aetna) to divest Aetna’s Medicare Part D prescription drug plan business for individuals to WellCare Health Plans, Inc., an experienced health insurer focused on government-sponsored health plans, including Medicare Part D individual prescription drug plans.

Gray Television/Raycom Media (December 2018)

The DOJ required Gray Television Inc., and Raycom Media Inc., to divest broadcast television stations in nine markets as a condition of resolving a challenge to the proposed USD3.6 billion merger. According to the DOJ, without the divestitures the merger would eliminate head-to-head competition between Gray and Raycom in the nine local markets in which the divestitures were required. In each of those markets, the transaction would increase the number of “Big Four” affiliate stations (i.e., affiliates of NBC, CBS, ABC, or FOX) owned by Gray, leaving Gray with two or more Big Four stations in each area.

Thales/Gemalto (February 2019)

The DOJ required Thales S.A. to divest its General Purpose Hardware Security Module (GP HSM) business in order to proceed with its proposed USD5.64 billion acquisition of Gemalto N.V. GP HSMs are secure encryption processing and key management devices that are most frequently included as components of complex encryption solutions used by government and private organizations to safeguard their most sensitive data. The settlement requires Thales to divest, as a viable on-going business, Thales’ GP HSM Products business. Additionally, because Thales and Gemalto also competed to develop new products and services, the DOJ required the divestiture of certain intellectual property and research capabilities for products under development.

Web link to the national competition authority

FTC: www.ftc.gov

DOJ: www.justice.gov/atr

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