

Shifting Sands or Quicksand? Negotiating Antitrust Risk in Today's Climate

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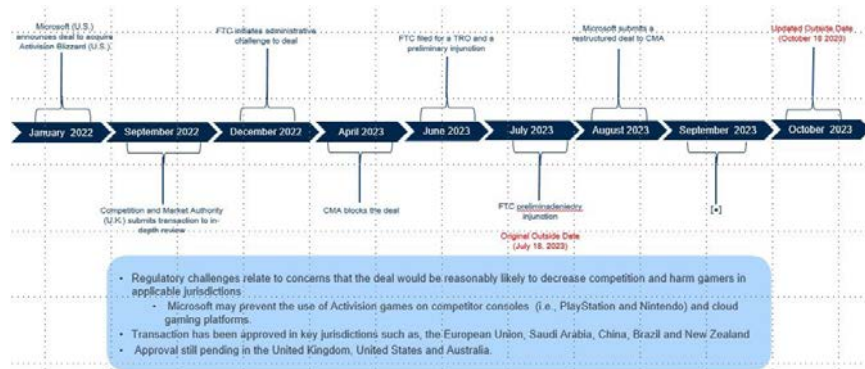
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Amgen / Horizon

DECEMBER 2022	<ul style="list-style-type: none"> — The companies announce the acquisition — Amgen and Horizon are both biopharmaceutical companies, though their portfolio's occupy different spaces in the biopharma industry 	Key Agreement Terms
JANUARY 2023	<ul style="list-style-type: none"> — Senator Elizabeth Warren writes a letter to the FTC Chair Lina Khan, FTC Commissioners Alvaro Bedoya and Rebecca Kelly Slaughter urging the agency to "carefully scrutinize [this] deal" as the acquisition could "threaten competition [and] reduce innovation". 	<ul style="list-style-type: none"> — An antitrust reverse termination fee of \$974,415,054 — Outside date that could be extended through the 1st anniversary of closing if antitrust approvals had not been received — Amgen obligation to use reasonable best efforts to seek regulatory approval was qualified by a burdensome condition standard which excluded (i) any disposition of assets that would be material to Horizon, (ii) certain scheduled items and (iii) any assets of Amgen
MAY 2023	<ul style="list-style-type: none"> — FTC files a lawsuit to block Amgen from acquiring Horizon Therapeutics <ul style="list-style-type: none"> — FTC relies on "conglomerate theory," an antiquated and discredited theory under U.S. law, alleging that Amgen would use the position gained through the acquisition to provide multi-product discounts to payors 	
SEPTEMBER 2023	<ul style="list-style-type: none"> — FTC reaches a deal with Amgen to allow the merger to proceed <ul style="list-style-type: none"> — As part of the order, Amgen will be prohibited from entering into any "cross-market bundles" without the approval of the FTC 	

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Microsoft / Activision Blizzard



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Illumina / GRAIL

- **Illumina** is a provider of a type of DNA sequencing (**NGS**). **GRAIL** is one of several small companies developing a blood-based multi-cancer early detection (**MCED**) test, where Illumina's NGS technology is an input
- Both the FTC and the EC investigated Illumina's proposed re-acquisition of GRAIL
 - Antitrust agencies were concerned that the merger would give Illumina the incentive to cut off GRAIL's rivals from the NGS technology, substantially lessening competition in the MCED test market and diminishing innovation, increasing prices, and reducing choice and quality of tests
- Illumina and GRAIL closed the deal while it was still under regulatory review, pursuant to a hold-separate commitment
- The EC blocked the deal and fined Illumina a record €432 million for closing the deal without prior EC approval. The FTC's ALJ ruled in favor of the deal, however, the FTC then overruled the ALJ and ordered Illumina to divest GRAIL
- Illumina appealed both decisions and is challenging the FTC's constitutionality at the Fifth Circuit – part of a trend in FTC merger litigation – and the EU's jurisdiction over the deal

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UnitedHealth Group / Change Healthcare

JANUARY
2021

- The companies announce the acquisition
- UHG is the largest US commercial health insurer; Change is a healthcare technology company providing solutions used by UHG's rivals
- As part of the merger agreement the companies agreed to:
 - Undertake "reasonable best efforts" to consummate the deal, including litigating any claims arising under antitrust laws
 - Affect any sales or divestitures in order to obtain consent under antitrust laws, as long as these sales or divestitures did not involve assets producing more than \$650 million in annual revenue

FEBRUARY
2022

- DoJ sues to block UHG's acquisition of Change over antitrust concerns, relying on three theories of competitive harm, including two vertical theories

APRIL 2022

- The agreement allowed for the extension of the outside date until April 5, 2022 if antitrust-related closing conditions were not satisfied by January 5, 2022
- On April 4, 2022, the companies agree to waive the outside date until the DoJ litigation is resolved
- UHG agrees to pay a \$650 million "Regulatory Termination Fee" in the event that either party terminated the agreement while there was legal restraint related to antitrust in place

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UnitedHealth Group / Change Healthcare

SEPTEMBER
2022

- The companies successfully "litigate the fix" after the court denies the DoJ's bid to block the merger on September 19, 2022
- As part of their litigation strategy, UHG proposes the divestiture of Change's horizontally overlapping first-pass claims editing business (ClaimsXten) to private equity firm TPG Capital
 - The DoJ argued that the divestiture would not address competitive concerns, but the court rejected their argument and found that "the divestiture [would] restore the competitive intensity lost because of the acquisition"
- "Litigating the fix" has become increasingly common as parties seek approval of proposed divestitures to remedy anticompetitive problems in a reasonable way

OCTOBER
2022 –
MARCH 2023

- The companies complete the deal on October 3, 2022, before the DoJ filed its notice of appeal in November 2022
- In March 2023, the DoJ dropped its appeal

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