WHITE & CASE

Global merger control: Charting a route to port

As investors scour the world for growth, regulators are placing cross-border deals under ever greater scrutiny, and a new regulatory world order is emerging. Understanding it is essential.

Table of contents

Merger control: Getting your deal across the finish line

The global M&A market has returned to its previous highs but what sets this cycle apart is the rise of the mega-deal. According to Dealogic, during the first nine months of 2015, 45 deals worth more than US$10 billion accounted for more than a third of total M&A activity.

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With size comes complexity. A greater portion of deals are now cross-border in nature, and as economies have become more interconnected and global, companies navigate the globe in search of growth. Shareholder activism is putting pressure on company boards to break up or seek growth through acquisition, but finding the right target and negotiating a deal that will deliver value is only part of the challenge. Big cross-border transactions are attracting greater scrutiny from regulators and governments than ever before.

Deals that make strategic sense may be welcomed by investors, but can be repelled by regulators. Since the last M&A boom of 2007, there has been a proliferation of new merger control regimes across the globe, and this proliferation has led to heightened execution risk for big cross-border deals. National governments have also added a further layer of complexity and control, and they scrutinise the impact of foreign acquisitions on local jobs, economies and on national security. Regulatory and political risk can have serious consequences for a deal. It can cause parties to withdraw from their transaction altogether, or force them to re-think the deal and make disposals, which could undermine its original strategic logic.

Fortunately, having a detailed understanding of this new regulatory world order can equip potential acquirers with the tools they need to navigate it. With forward planning, companies can coordinate their efforts across borders and anticipate where and in what form they will face antitrust investigations. That enables them to gain a more realistic understanding of what it will take to get a deal across the finish line.

As global M&A activity is projected to continue to grow in 2016, companies that can identify the best opportunities of today and understand how to execute them will be the winners of tomorrow.

Global ambitions, global challenges

Pfizer, the world's largest pharmaceutical company by revenues, has completed almost US$242 billion M&A transactions globally in the last 30 years, according to Thomson Reuters. **Marc Brotman**, Pfizer's Vice President, Assistant General Counsel and Chief Antitrust Counsel, discusses the challenges of doing deals in a complex regulatory world.

Global M&A activity is running at near record levels, and cross-border transactions are on the rise as companies seek to expand their global footprints.

Nowhere is this trend more evident than in the global healthcare sector, where announced deal activity for the first six months of 2015 hit US$342.7 billion, the highest half-year volume on record, and that figure continues to grow following the US$45 billion acquisition in July 2015 of Allergan by Teva Pharmaceuticals. Healthcare is seen as one of the few industry sectors that is delivering growth for shareholders.

But with scale comes complexity, and the increase in global cross-border transactions has been accompanied by a similar proliferation in the number of antitrust regimes.

More than ever before, buyers need to understand the rapidly changing regulatory environment.

What have been the biggest changes to the antitrust landscape during your career?

I've been at Pfizer for 16 years, and the first large transaction I worked on was the company's US$90 billion acquisition of Warner-Lambert. Although Warner-Lambert was a US company, it had operations across the globe. We signed the deal in February 2000, and the transaction closed in June 2000. We were required to file with regulators in the United States and Europe. The relative speed and simplicity in completing that transaction would be unheard of today.

Since then, there has been a tremendous expansion of merger regimes and antitrust laws, a proliferation in the number of countries in which we've had to file, with differing requirements and timelines. For example, companies only had to start filing with the Chinese authorities in 2008, and that has now become an extremely significant merger control regime.

At the same time, the antitrust analysis we have to carry out is much broader and more intense, and the implications can be significant

How do you navigate this uncertain terrain?

The increased regulatory review places uncertainty on when and whether transactions will close. So we now expect transactions to take longer to close, and we plan accordingly. We also have to rely more on our local, specialist legal teams within markets to interact with regulators. And with greater dialogue between regulators in different jurisdictions, consistency and coordination is key. It's important that what your local counsel is saying in Australia is consistent with what your EU counsel is telling the European Commission.

At Pfizer, there are two internal lawyers who focus on and have expertise in antitrust law. We also work closely with our outside counsel for a variety of matters. In some jurisdictions we are more hands-on than in others, depending on a multitude of factors.

$342.7 bn

announced deal value in global healthcare sector in H1 2015

Source: Thomson Reuters

$242 bn

total value of Pfizer's global M&A transactions since 1985

Source: Thomson Reuters

Last year, when Pfizer made a bid for AstraZeneca, there was considerable interest from the UK government. Did that surprise you?

The proposed transaction would have been one of the largest in UK history if it had proceeded at that time, so it's understandable that it attracted interest from politicians. As is often the case when managing potential cross-border transactions, at times issues and concerns raised are not always directly related to antitrust law, which makes it challenging to formulate a legal response and adds complexity to the process.

Is the global antitrust process fit for purpose?

First and foremost, an open, constructive dialogue is vital to every antitrust process. Because there are so many disparate regulatory regimes, we do need clearer global standards to ensure all regimes live up to a set of common antitrust principles.

The longer a country has had an antitrust regime and infrastructure, the more sophisticated, reliable and transparent it tends to be. However, there needs to be greater dialogue and transparency between some of the newer regulatory jurisdictions and the companies whose deals they are reviewing.

In addition, as part of these principles, I believe that much more effort should be made to accelerate the regulatory process. Given varying experience levels, the speed of information requests can be inconsistent, which decelerates the merger process. Time is money, so faster timelines are an imperative.


WORLD
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Lessons to keep in mind for your next complex global deal

Antitrust assessment by regulators around the world is becoming increasingly more complex and less predictable. And with global M&A activity approaching boom levels, companies need to plan carefully when preparing for their next big deal.

By Mark Powell, Strati Sakellariou

Global deals generally have to be notified in the EU (or its member states) and the United States, but filing requirements in a number of other jurisdictions are also often triggered, depending on the companies' worldwide activities. From the outset—when contemplating or negotiating the deal—the parties need to identify the jurisdictions where an antitrust filing is required, become familiar with each jurisdiction's precedents and processes and understand how their deal is likely to be assessed and if they need to make any concessions.

Having a grasp of these issues helps CEOs and companies to build a merger timeline and reduce execution risk and uncertainty.

Working backwards in time and in a consistent manner across jurisdictions

Once the relevant jurisdictions and the respective clearance deadlines have been set out, the parties, outside counsel, and the economists involved need to identify what needs to be done each day of the transaction calendar per jurisdiction. The work plan should be set out by working backwards, starting from the date where clearance is required, in order to ensure that no step is overlooked.

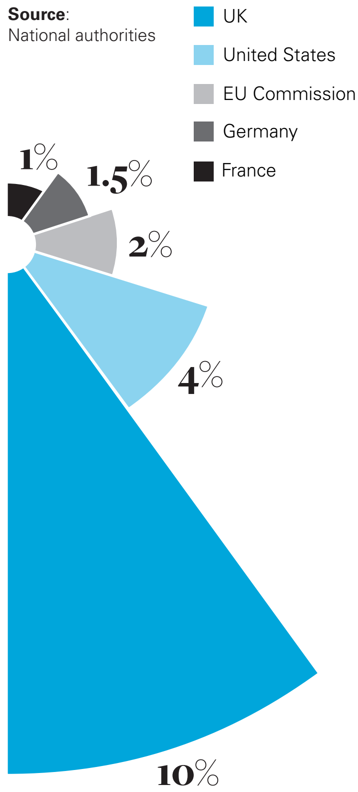
When a deal is notified in a number of jurisdictions, the regulators involved will exchange views and information about the transaction. Since the aftermath of attempted merger of General Electric and Honeywell in 2001—the first time that a proposed tie-up between two US companies had been blocked solely by European regulators—merger agencies in the EU and the US have adopted a consistent approach for global mergers and cooperate closely based on best practice guidelines. Even in jurisdictions that have traditionally been less predictable, like China, there is evidence of increased cooperation with other agencies involved.

Against this background, the parties need a coordinated, global approach to ensure that they provide consistent information and tell a coherent story across jurisdictions. The goal is to avoid conflicting assessments and outcomes and inconsistent remedies by regulators when they review deals with global implications.

Be proactive, be organized, communicate with the regulators

Companies must be in the driving seat of the antitrust process. Frequent contact with the regulators helps to avoid surprises in timing and process. Has everything relevant been addressed? Have the agencies involved spoken to each other? Would it help to make an extra submission on a specific issue?

Phase II decisions as percentage of total decisions by authority 2009 – 2014

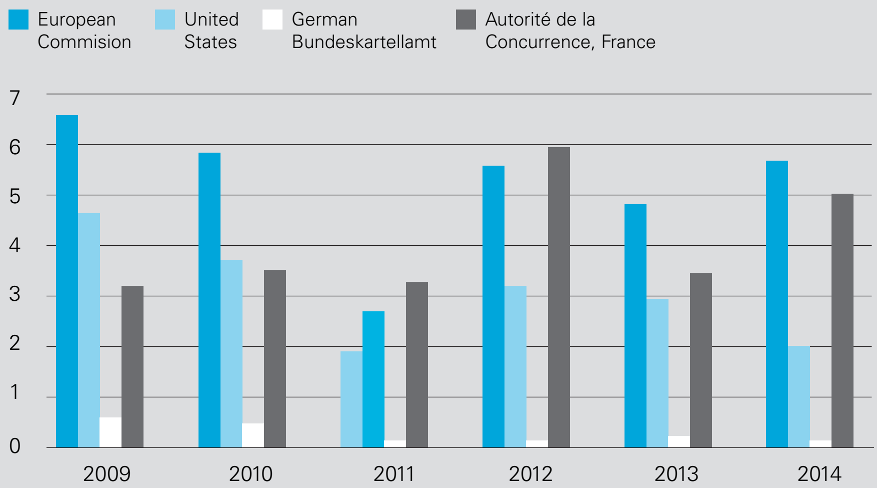


These are some of the questions companies need to ask in order to ensure a smooth process.

In complex cases with multiple products and markets, it is useful to identify early in the process areas where there are no concerns. This brings efficiency and speed to the process since both the parties and the regulators can focus on the issues that are actually problematic. Educating the agencies about the relevant products is key in this respect. Companies can make business people available for interviews, provide product presentations or offer site visits to enhance the regulators' understanding of the relevant industry. The companies' economists and the agencies should hold technical, informal meetings in order to define the areas on which data gathering should focus.

Companies should also look at their internal records to identify

Percentage of decisions requiring remedies



Source: National authorities

evidence in support of their competition arguments, and proactively provide such evidence to the authorities. With in-depth antitrust reviews, regulators (mainly in the US, but recently also in the EU) ask companies to produce large amounts of internal documents, which could be relevant to the competitive landscape affected by the merger.

It is important to ensure that the internal documents do not jeopardize the antitrust review; too bold statements often do not reflect reality and can be used by the authorities to the parties' disadvantage. Supporting evidence could mitigate such concerns. In addition, limiting the scope of the investigation is crucial for the document production exercise in terms of resources and potential risk of providing unhelpful documents.

Finally, companies need to be prepared to reply to lengthy requests for information by the authorities on very tight deadlines. Although extensions are sometimes granted, the case teams rarely take account of the real-life practicalities of extracting detailed and precise information from global businesses in a very short time frame. To deal with these deadlines, companies should set up a pool of business persons who take ownership of specific areas relevant to the antitrust process and are responsible for responding to such requests. These persons understand the urgency of the requests, the relevant antitrust process, the purpose of the data-gathering exercise and the message that the company wants to convey when responding to the questionnaire.

To settle or not to settle, and when?

Despite the companies' efforts to convince the regulators about the benefits of a merger, there are instances in which a consolidation may lead to a dominant position of the merged firm in specific markets, with limited competition left. The parties need then to be prepared to offer a remedy package to alleviate competition concerns.

Where markets are well-defined, numerous legal precedents exist and reliable data are available, it is easier to identify potentially problematic areas. In such cases, if a structural divestment solution is possible and relatively obvious, companies may opt to provide to the regulator a remedy proposal early in the process in order to avoid an in-depth review. During 2015, a number of pharmaceutical mergers were approved by the EU regulator very quickly because the parties presented a comprehensive remedy package from the outset. On the other hand, if a structural solution is not immediately available or desirable and the parties prefer to defend the case, the parties may start considering remedies later in the process.

Negotiating remedies in one jurisdiction must always take into consideration possible repercussions in others. In some cases, a global remedy will successfully address the concerns of the regulators across all jurisdictions. In other cases, remedy packages will differ from jurisdiction to jurisdiction. It is therefore key to ensure that the overall integrity of the deal is not harmed.

Finding potential buyers for the divested assets early in the process and having them approved in good time by the regulators is also crucial. In most cases, identifying a global buyer is the simplest approach, as it ensures seamless divestitures, one set of transaction documents, negotiations with one purchaser only and approval of the same buyer by the various agencies. In other cases, companies may prefer to have different buyers in each jurisdiction to avoid strengthening a global competitor, or in case some buyers are deemed unsuitable by certain authorities.

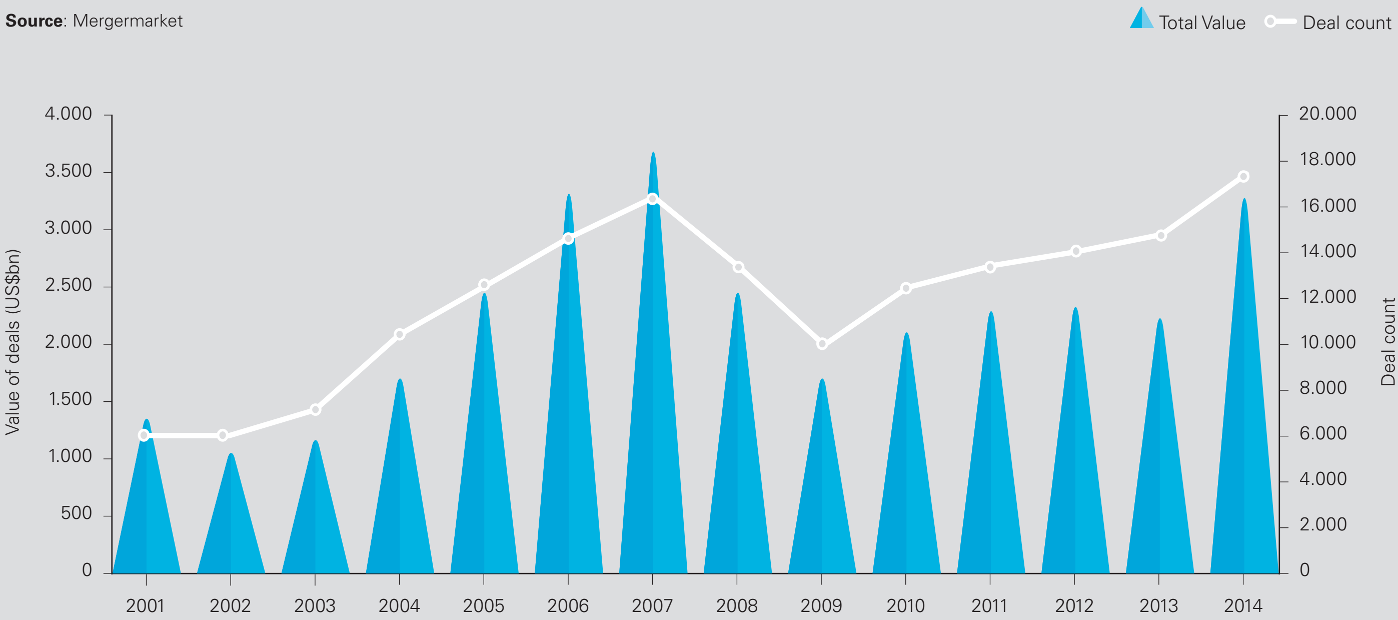
The process of implementing a remedy can also be complex, and therefore advance planning is necessary. Often a trustee will be appointed to review the appropriate implementation of the remedy and the transition of the business to the relevant buyer. The parties need to ensure a smooth transition so that the trustee's reports to the regulators do not raise any concern.

> **“Merger agencies in the EU and the US have adopted a consistent approach for global mergers and cooperate closely based on best practice guidelines**

The world of global M&A: Trends, notifications and timelines

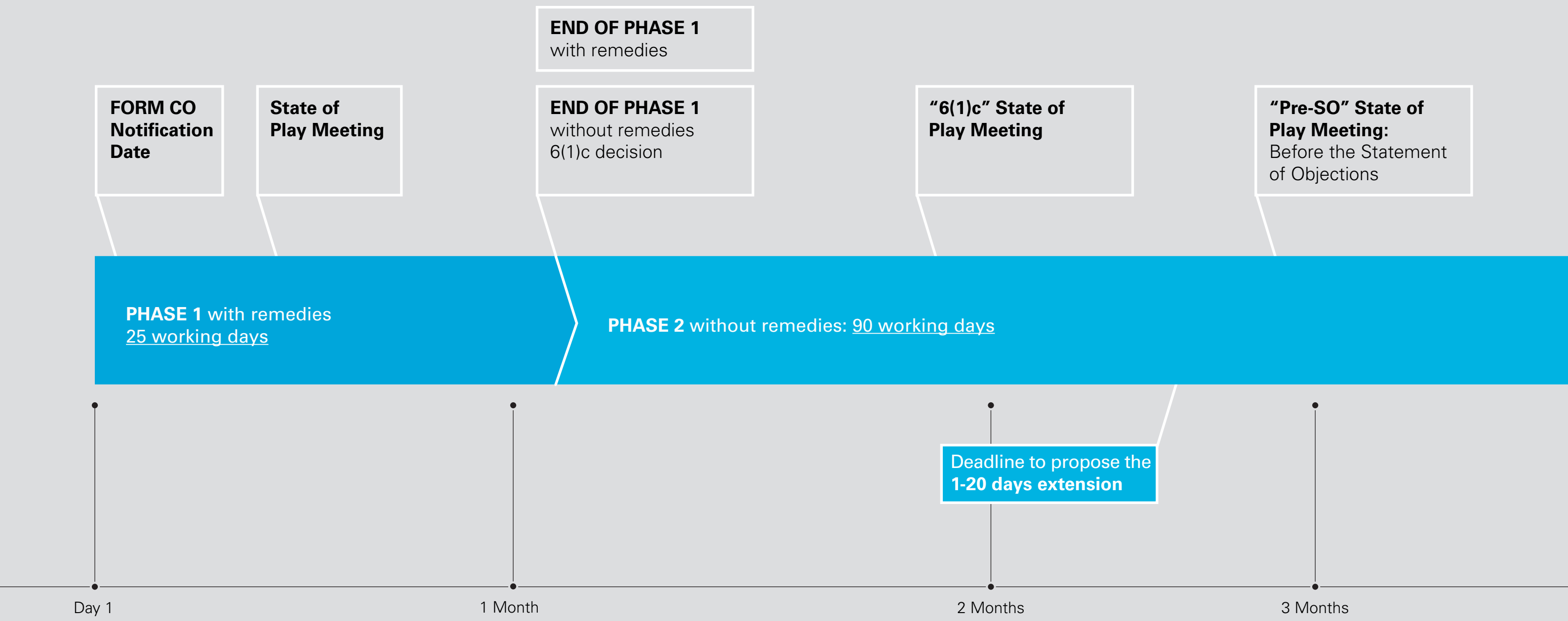
Global M&A trend

Source: Mergermarket



EU merger notification timeline with and without remedies

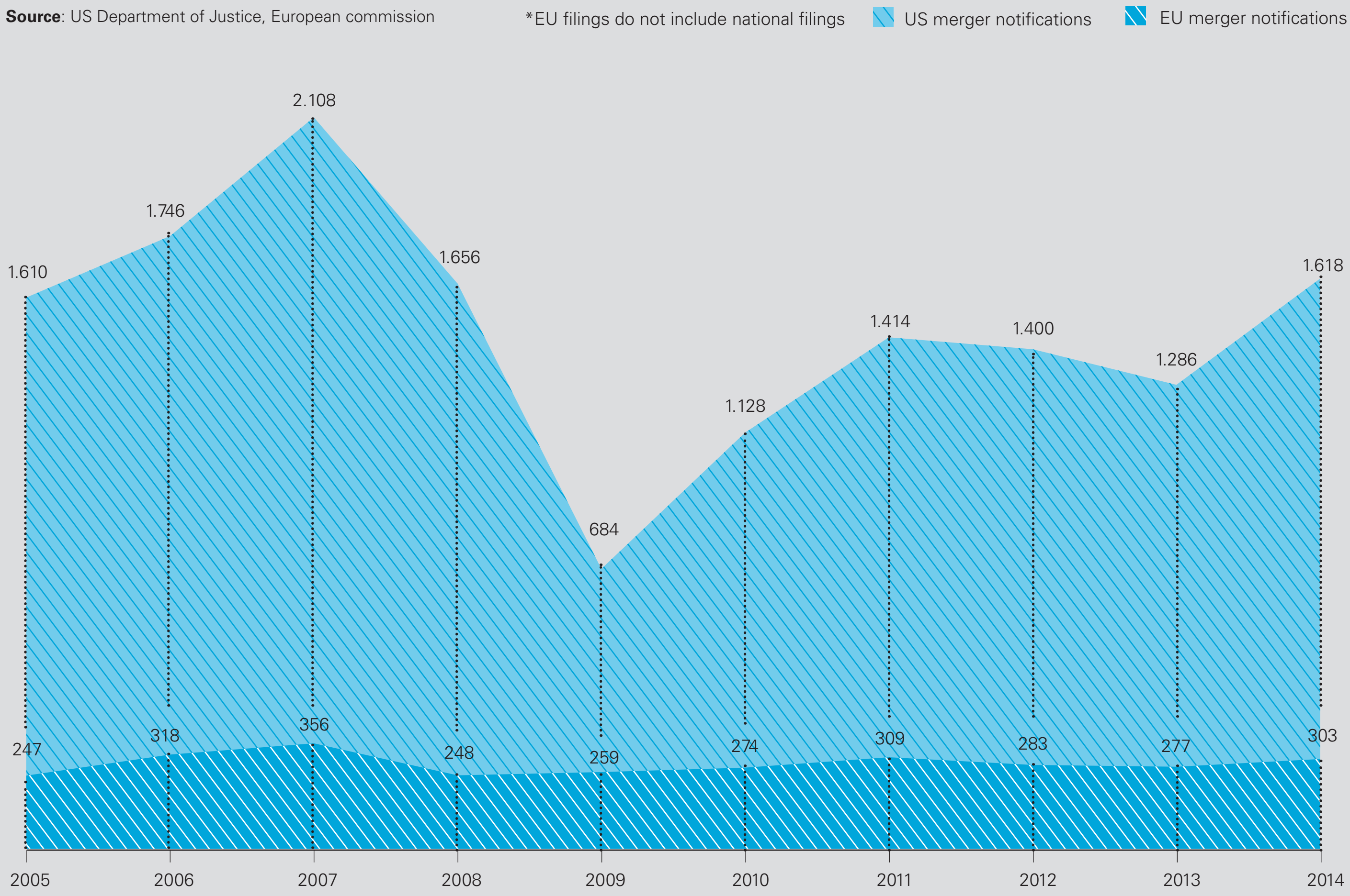
Source: White & Case

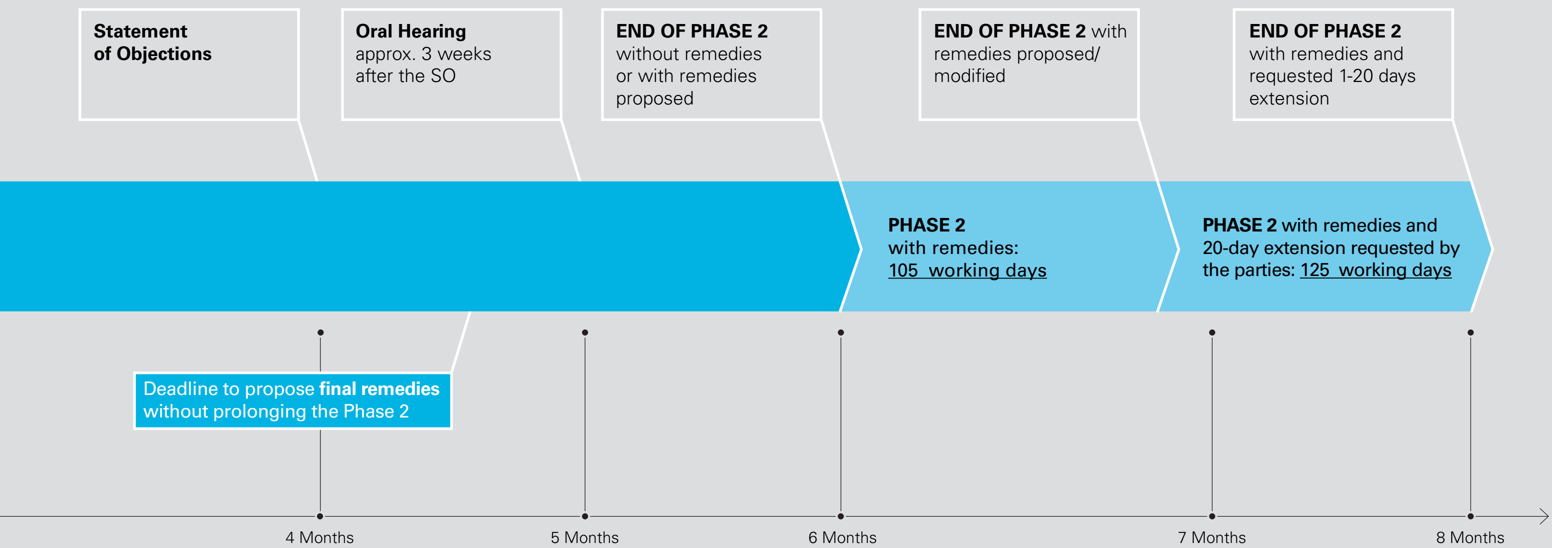


US and EU merger notifications*

Source: US Department of Justice, European commission

*EU filings do not include national filings





The globe-trotter's guide to merger control: How to avoid falling into traps

Having a sound knowledge of the intricacies of merger control regimes and thresholds is essential when guiding a complex cross-border M&A deal over regulatory hurdles to successful completion.

By Jérémie Jourdan, Mina Gregow, Sophie Sahlin

With global cross-border M&A activity running at its highest level since the peak of the previous deal boom in 2007, most big M&A transactions now have a significant cross-border dimension. That has wide-ranging regulatory implications as companies are obliged to file to merger authorities in multiple jurisdictions, including far-flung locations where either the bidder or the target may not even have operations or revenue streams.

Multijurisdictional merger filings have proliferated in recent years in line with the growing number of merger regimes around the world. Today, more than 140 countries have adopted some version of a merger control regime, adding a layer of complexity to international M&A deals.

Aside from the time and cost burden involved in gaining clearance in every country where the parties operate, companies must now be up to speed with the adoption of new merger filing regimes and their different timetables and nuances.

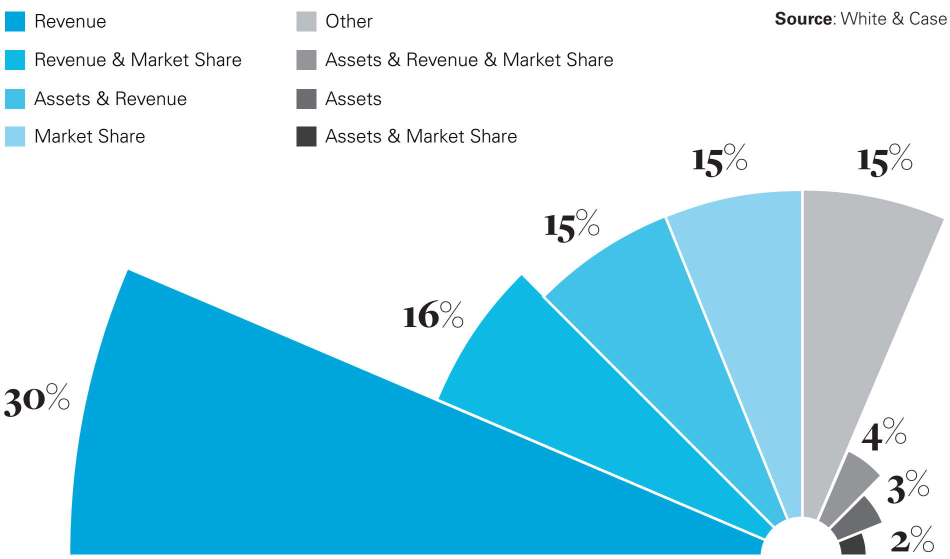
In any transaction, companies must conduct an analysis of which jurisdictions they will need to file in, and gain an understanding of key differences in requirements between jurisdictions in order to file with the relevant merger authorities, and avoid disrupting the deal. Here are some of the key questions that need to be addressed in the process:

"Is this a merger?"
Although a large majority of jurisdictions require merger filings in the case of a merger or an acquisition of control, some jurisdictions have chosen to create additional "triggering events" that may cover situations in which an acquirer is not seeking control, such as in a joint venture or the purchase of a minority stake. Sometimes this only applies to certain industries.

"Meeting the thresholds?"
Although there is some level of harmonisation among different countries, important discrepancies remain between merger filing regimes. Merger filing obligations may be triggered by different factors such as the size of the

> "Companies must be up to speed with the adoption of new merger filing regimes and different timetables and nuances between jurisdictions

Threshold type



Source: White & Case

parties' turnover and assets, as well as market share.

The market share thresholds are particularly tricky, since they require that the parties define the relevant market, a notoriously complex task. It may be intuitive to a business person to define the market in a certain way, but any legal practitioner knows that competition authorities sometimes work in mysterious ways. In the case of complex transactions, it may sometimes be advisable to initiate pre-notification contacts with the competition authority, bearing in mind that once started, it may be difficult to backtrack.

While turnover and assets may be easier to measure, companies should bear in mind that different rules may be used in different jurisdictions. For example, while the EU Commission considers that only 50 percent of the turnover must be accounted for in a joint venture (JV) co-controlled with another company, in Germany 100 percent of the JV's turnover would have to be taken into account.

"We don't have to file, why would we?"

Particular attention to the relevant competition landscape is normally warranted in jurisdictions with voluntary merger control regimes, where it is recommended to file if the transaction is likely to raise competition concerns or else the risk is that the authorities will start investigating the transaction on their own account.

This forces the parties to make certain difficult strategic decisions, which can have a significant impact on timing. For example, in Australia—which has a voluntary merger regime—the parties can decide to make a full filing, a very simplified filing or wait for a potential information request. The parties can also decide to close, even when the merger authority is reviewing a transaction, although that can be risky if the authority raises concerns.

"No overlap, no filing?"

The majority of merger control regimes worldwide today require that at least two of the parties to the transaction are active in the relevant jurisdiction for the regime to be triggered. There are, however, a few exceptions to this general rule, and these countries are generally referred to as "single-trigger" jurisdictions, meaning that it is enough that only one party to the transaction be active in the relevant jurisdiction.

In the EU, such exceptions can be found in Spain and Portugal, where transactions may be subject to merger control even when the investing company has no permanent business there, provided the target meets the market share thresholds (no increment is required). In Austria, it is possible for the acquirer alone to trigger the filing obligation.

Outside the EU, different regimes prevail. The Ukraine is notorious for its low thresholds, a transaction requiring notification where either party generates €1 million in the country.

"How long will this take?"

Obtaining merger clearance is time-consuming and the review period is regularly protracted as parties often have to enter into pre-notification discussions with merger authorities. As a rule of thumb, it usually takes at least a month to gain clearance, and in jurisdictions with fledgling merger regimes and inexperienced authorities, it can take considerably longer than that.

In Japan, for instance, the Japan Fair Trade Commission (JFTC) will send multiple extensive questionnaires during the pre-notification process, which can significantly delay the date of filing. The JFTC will carry on sending multiple detailed requests during the official 30-day review period, and if it considers that the parties have not responded quickly enough, it could take even the most straight-forward looking transaction to a phase two review, which can take at least 90 days.

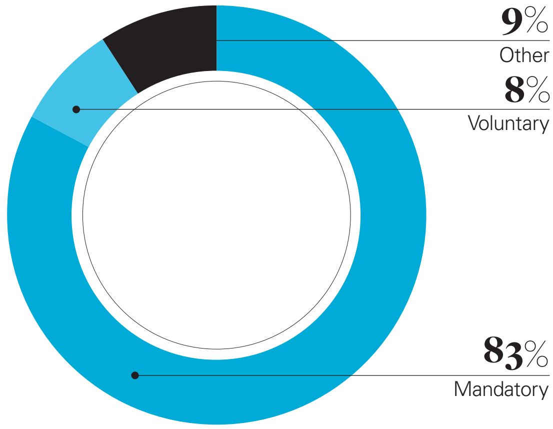
Similarly, in Indonesia, the official review period does not start until the Commission for the Supervision of Business Competition (KPPU) has declared the filing complete, which can take two to three months. Indonesia adds an additional layer of difficulty with a voluntary pre-merger filing and a mandatory post-merger filing (which must be submitted within 30 business days of signing) that is required even if a voluntary pre-merger filing was submitted.

Timings of merger reviews are hard to predict. France is notorious for its "incompleteness letters", that is, letters declaring the filing incomplete and restarting the clock. They may come your way on the penultimate day of the merger review period, sometimes without much warning. They are a powerful tool for the authority to obtain hard-to-get information.

China is known for its unpredictable timing. The pre-notification period can be very long, and the Ministry of Commerce (MOFCOM) can even ask that the parties withdraw their filing to gain time. China did, however, introduce a simplified procedure in 2014, which, when applied, has led to speedier reviews.

In sum, it takes experience and skills to navigate through the maze of merger control regimes around the world. It also requires an extensive network of offices or legal contacts around the world to ensure appropriate local assistance. Guiding a complex deal over the finish line is like making soufflé: it requires experience, skill and rigour but it's not as hard as it's puffed up to be.

Percentage of jurisdictions with voluntary/mandatory merger control regimes



Source: White & Case

National security clampdown on foreign deals

Countries around the world have been increasingly focusing on national security reviews of foreign direct investments into their markets.

By Orion Berg, Richard Burke, Farhad Jalinous, Nathalie Negre-Eveillard, Karalyn Mildorf

The three countries where national security reviews can potentially have a significant impact on transactions are China, the United States, and France.

US: CFIUS continues to play a significant role

In the US, national security reviews of foreign direct investment are conducted by the Committee on Foreign Investment in the United States (CFIUS). CFIUS has jurisdiction to review any transaction that could result in control of a US business by a foreign person. Notably, "control" is defined broadly and can include many minority investments. Moreover, the types of transactions that can be reviewed by CFIUS are quite varied, including deals structured as stock or asset purchases, debt-to-equity conversions, foreign-foreign transactions where the target has US assets, private equity investments and joint ventures where the foreign partner is investing in an acquired or contributed US business.

Unlike the French and Chinese regimes, the CFIUS statute and regulations do not specify what types of industries or activities are relevant to national security. This has provided CFIUS with substantial leeway to review transactions covering a wide variety of areas, including identity authentication, biometrics, information technology, energy, telecommunications, food safety, cyber security and healthcare, as well as industries with a more direct link to national security such as aerospace and defence.

External issues unrelated to the structure of the transaction, such as the US business being located in close proximity to sensitive US government assets, can also pose substantial national security concerns. Accordingly, it is important to consider CFIUS issues in connection with any transaction involving foreign investment (direct or indirect) in a US business with a potential link to US national security.

In recent years, there has been a significant broadening of the foreign investor base represented in CFIUS reviews, with greater activity from emerging markets, such as China, Japan, India, and the Middle East, and relatively less participation by more traditional European and Canadian investors. As a result, the risk factors CFIUS considers in its national security analysis have changed to reflect a broader pool of investors.

A CFIUS review is ostensibly a voluntary process, but in some cases it is effectively mandatory

57
industry sectors in China are likely to trigger national security reviews

Source:
Ministry of Commerce, China

33·33%
acquisition of capital or voting rights by a non-EU investor will be subject to prior authorisation

Source:
Ministry of Economy, France

(e.g., acquisitions of cleared defence contractors or assets likely to qualify as critical infrastructure). CFIUS actively looks for transactions of interest that were not notified and will "invite" parties to submit a filing regarding transactions it would like to review. Where CFIUS has national security concerns, it can impose mitigation conditions that can have significant implications on the foreign investor's involvement with the US business or even ultimately lead to the need to divest the asset. Accordingly, it is critical to consider CFIUS issues in planning and negotiating transactions, including with respect to allocation of CFIUS-related risk.

> "Sectors that typically fall within the scope of national security reviews include oil, gas, electricity, water, transportation, electronic communication, and healthcare

China: Full implications of national security review process not yet clear

China is looking to implement a national security review for foreign investors in a new law governing foreign investment.

Since 2011, the Chinese Ministry of Commerce has subjected foreigners looking to invest in Chinese industries that could have an impact on national interest to reviews, however, this is based only on anecdotal evidence; nothing has been published. As a result, it remains unclear if the rules have had a material impact on foreign investment into China. This could now become enshrined in law.

China has rejected several transactions on national security grounds. As a result, companies looking to invest in China should carefully consider national security review requirements.

Under Chinese law, a foreign investment transaction may be subject to national security review following voluntary filings, referrals from other governmental agencies or reports from third parties. The Ministry of Commerce has also published a list of 57 industries in which national security review is likely to be triggered. Where the Chinese government has national security concerns about a transaction subject to review that was not approved, the parties could be subject to sanctions, including a requirement to divest the acquired Chinese assets.

As of May 2015, foreign investors targeting assets in free trade zones are subject to more stringent national security reviews than for deals that lie outside them. Greenfield investments and investments into cultural and Internet businesses through offshore and other contractual arrangements are also more susceptible to national security reviews inside of those free trade zones. Due to enforcement uncertainties and the broad scope of captured industries, foreign investors interested in sensitive industries often schedule voluntary meetings with Ministry of Commerce officials to determine the national security review risk regarding a potential transaction before commencing the formal application processes.

France: Scope of its national security review process expanded

Following the acquisition of French engineering group Alstom by General Electric of the US last year, the French foreign investment regime was modified by the so-called "Montebourg decree," which significantly expanded the scope of industries for which M&A transactions may require authorisation by the French Ministry of the Economy. Among others, sectors that now fall within the scope of control include oil, gas, electricity and other energy production activities; water; transportation networks and services; electronic communication networks and services; and healthcare.

The criteria for triggering the French control authority are somewhat subjective. In order to be subject to prior authorisation, the French company's products and services must be "material to secure the interests of France in terms of public order, public security or national defence." French law does not provide for any materiality threshold, however, meaning that even transactions of modest size can be captured. Accordingly, any transaction involving the foreign acquisition of a French business in one of the specified industries should be carefully screened to assess if prior authorisation is required. EU as well as non-EU investors can potentially be caught by the French foreign investment regime. Notably, the acquisition by a non-EU investor of 33.33 percent of the capital or voting rights of a company whose headquarter is located in France is also subject to prior authorisation (however this does not apply to EU investors).

When facing a review, foreign investors should consider how the duration of any review could impact the time frame of the transaction, as well as potential commitments (for example, obligation to maintain capacities and productions on the French territory, supply chain controls, government access requirements, etc…) that could be requested by French authorities as a condition of approving any deal. Foreign investors should anticipate potential discussions with administrative services in charge of public security and national defence.

Failure to obtain an approval can have harsh consequences, including pecuniary sanctions of up to twice the value of the investment and the nullity of the transaction.

European merger control: Well-oiled machine or spluttering engine?

Commissioner Margrethe Vestager was in a celebratory mood when she addressed an audience in Brussels in March 2015 as the EU merger control body celebrated its 25th anniversary: "There is reason to celebrate because the system hums along nicely," she said. But practitioners and companies closely involved in the EU merger process are unlikely to describe the merger control engine in such glowing terms.

By Axel Schulz, Marika Harjula

There's no doubt that the European Commission, which has received 5,876 merger notifications between 21 September 1990 and 31 June 2015, is an experienced and sophisticated merger regulator.

EU Merger Regulation (EUMR) has evolved considerably since its formation, and the EC has tried to reduce the burden of the merger notification process on participants. Since 2000, transactions that are unlikely to cause competition concerns under the EUMR have benefitted from a more streamlined approach. In December 2013, the EC adopted amendments in an attempt to further simplify the notification process and broaden the scope of transactions that can benefit from it.

The new amendments mean that a non-problematic transaction can be notified under a "simplified procedure" for which considerably less information is required. Having said that, often a lengthy debate ensues with the Commission on whether the simplified procedure actually applies, so that it can be easier to just file under the usual procedure. The Commission also introduced a "super-simplified procedure" for extraterritorial joint ventures—JVs that are active entirely outside the European Economic Area (EEA), but which must be notified to the EC purely on the basis of the parent company's takeover. While these changes are welcome, they fail to address the question of why extraterritorial joint ventures need to be notified at all, even in a super-simplified format.

Furthermore, while the burden under the simplified and super-simplified procedure has been reduced, more information is required than ever before for transactions that do not fall under the simplified rules.

One of the reasons for the increased burden is the obligation to provide market information not only on the relevant product and geographic markets, but also on all "plausible alternative relevant product and geographic markets".

The Commission says that plausible alternative markets can be identified on the basis of previous Commission decisions and judgments by the EU Courts and by reference to industry reports, market studies and internal documents, "in particular where there are no Commission or Court precedents". In practice, however, the Commission goes beyond this remit, and it

Selected JVs with no link to the EEA reviewed by the EC

- Acquisition of joint control by TNK-BP (which acquired its stake from BP, its then parent) in a gas pipeline wholly located within Vietnamese territory.
- Acquisition of joint control by Goldman Sachs and Abertis Infraestructuras in a company managing and operating toll road concessions exclusively in Puerto Rico.
- Acquisition of joint control by Siemens and Sinara in a company manufacturing and selling Russian locomotives that could not be used on tracks in the EEA.
- Acquisition of joint control by Mitsui and Penske of a Lexus car dealership in Siberia.
- Creation of a JV by JCDecaux and Bolloré to provide outdoor advertising in Cameroon.
- Acquisition of joint control by Statoil and Svitzer of a tugboat operator on Grand Bahama.

increasingly requests market data for a large number of very narrow micro-markets so it can be comfortable that the transaction would not lead to high market shares in any imaginable market.

As well as requiring parties to devote considerable resources simply to meet these new requests, the results of such onerous data-gathering exercises will likely amount to little more than "guestimates" and therefore have questionable value for the Commission's analysis. They will also unnecessarily inflate the standard merger notification Form CO, which would likely already have exceeded the boundaries of user-friendliness in any relatively complex case.

Another illustration of the Commission's increasing tendency to hoard information in the context of merger investigations is the new trend towards a document production similar to the "second request" discovery process in the US merger procedure.

In addition to the list of documents that must be prepared for the board or management of the notifying companies required in the Form CO, the Commission now requires an enormous number of internal documents, including emails from employees with management, sales, business development and other functions, to be provided within a very short time frame. By contrast to the US "second request" discovery process, which usually takes many months, in the EU the parties may be given a week to produce the required documents. As such, the process is not only extremely burdensome for the parties, who need to locate, identify, collect and process the potentially responsive documents within a tight deadline; it also compromises the rights of the parties who may not have sufficient time to properly review the documents prior to production so as to extract privileged and private documents, let alone review the contents of what is being produced.

Furthermore, the Commission is working under procedural deadlines that are not designed for such extensive document requests and thus hardly has sufficient time to conduct a thorough and reflective review of the documents required to form a balanced overall view of their contents. This potentially could lead to a superficial and unsatisfactory review focused on isolated points in a small number of documents.

The timing of merger services has also become less

A note on extraterritorial joint ventures

By James Killick

The EC's merger system will remain flawed as long as the rule requiring notification of extraterritorial JVs remains in place. This situation is unsatisfactory for a number of reasons. Firstly, it is at odds with public international law. In the case of South African mining firm Gencor, the Court of First Instance held that the application of the EU merger regulation is only justified "when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community". The obligation to notify is also inconsistent with the views of the International Competition Network (ICN). The ICN's recommended practices for merger notification state: "jurisdiction should be asserted only with respect to those transactions that have an appropriate nexus with the jurisdiction concerned".

Secondly, given the Commission's global standing as a merger regime, it has the responsibility to set a good example to the rest of the world. Going against established ICN recommendations is not compatible with this responsibility. If other countries follow the Commission, it could lead to multiple needless reviews of JVs by jurisdictions where there is no local nexus.

Thirdly, the requirement to notify transactions with no actual or foreseeable effect within the EEA diverts Commission's resources away from scrutiny of concentrations that do effect competition within the EEA. From the industry's perspective, the current rules impose a disproportionate burden. Although the revised notification rules decrease the amount of information required for extraterritorial JVs, this has only had a limited impact on the overall filing burden.

The way forward

Perhaps the way forward is for the Commission to cease requiring notification of JVs with no impact on the EEA. This would require an amendment of the EU merger regulation to state that a JV would only be notifiable if it produced actual or potential effects within the EEA. Alternatively, the regulation could include a specific turnover threshold for the EEA activity of the JV itself. This would bring the merger regulation in line with public international law and ICN recommendations and provide clarity in respect of the acquisition of joint control of existing businesses.

> If your deal does not fall into the "easy" category, life will be busy for a very long time for a large number of people

5,876
merger notifications were received by the EC between September 1990 and June 2015

Source: European Commission

25 years
EU merger control authority marked its 25th anniversary in March 2015

Source: European Commission

predictable. When it unveiled the amendments in December 2013, the Commission said the "overall reduction of information requirements that result from the Merger Simplification Package will shorten the time that is needed for pre-notification contacts."

In practice, the reverse has happened, with increasingly lengthy pre-notification periods appearing to be the norm. Given that the deadlines kick in once a merger is notified, the Commission understandably wants to cram a fair amount of substantive analysis into the pre-notification stage so as to have its market investigation questionnaires ready on day one of the procedure.

However, that means the parties involved are receiving increasingly numerous Requests for Information in the pre-notification stage and, given the scope of such requests, may suffer long delays in notifying the transaction. The problem is exacerbated by the requirement to provide market information on plausible markets, which extends the scope of the Commission's enquiries as its preliminary analysis advances. This leads to further Requests for Information and delays in making the filing.

The uncertainty of the duration of the pre-notification process is a genuine concern for those working within the broader time frame of a planned transaction, also prior to actually filing the notification.

But even once the deadlines start running following formal notification, the duration of the process remains unpredictable and has been made more so by the increasing use of the stop-the-clock option to extend the deadlines of the Merger Regulation. While these options give the procedure some flexibility, they make the timing of clearance increasingly difficult to predict. Since it is difficult to estimate when the overall process will end, the parties would certainly benefit from being able to estimate at the initial stages of their transaction when the formal review will begin.

These are some of the issues preventing the system humming along as nicely as Commissioner Vestager claims. Relief, however, appears to be arriving in one form: the requirement to notify the acquisition of certain non-controlling minority shareholdings was proposed in the July 2014 White Paper, but the response was overwhelmingly negative, leading Commissioner Vestager to acknowledge that "the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further".

To put it into a nutshell: if you have an easy deal that is only notifiable because the turnover thresholds are met, life has become easier since 2013; if your deal does not fall into the "easy" category, life will be busy for a very long time for a large number of people.

Gun-jumping triggers trouble

In merger control, gun-jumping refers to two distinct types of prohibited practices: failure to notify authorities of a transaction triggering merger thresholds, and implementing a notified transaction before receiving merger clearance from the relevant merger authority. Both behaviours can result in hefty fines.

By Juliette Goyer, Jérémie Jourdan, Jérôme Schall

Gun-jumping for failure to notify a transaction

EC

In July 2014, the European Commission found that Norway-based Marine Harvest, the largest salmon farmer and processor in the European economic area, had implemented an acquisition of a 48.5 percent shareholding in local rival, Morpol, in December 2012 without prior notification. According to the Commission, this acquisition gave Marine Harvest de facto sole control of Morpol since it enjoyed a stable majority at the shareholders' meetings as a result of the wide dispersion of the remaining shares and previous attendance rates at these meetings. Marine Harvest only notified the transaction eight months later in August 2013 following its acquisition of the remaining 51.5 percent shareholding in Morpol as part of a mandatory public offer. In its response to the Commission's decision, Marine Harvest stated that the takeover of Morpol was clearly structured as an acquisition of an initial shareholding followed by an immediate mandatory offer and that its decision to notify only after full takeover was in accordance with the exception applying to public takeovers under Article 7(2) of the EU merger regulation. In addition, it said it made clear that no control would be exercised over Morpol until the Commission had cleared the transaction. Marine Harvest's appeal against its €20 million fine is ongoing in the General Court. The European commission first showed that failure to notify can be a costly process in 2009 when it fined Belgian electricity producer Electrabel €20 million for allegedly failing to alert the merger watchdog about the acquisition of a minority stake that it argued gave it control of Compagnie Nationale du Rhone until 2007—four years after the initial transaction.

Electrabel appealed but the fine was upheld in the General Court, which in 2012 found that it was highly likely that Electrabel "would obtain a majority at the shareholders' general meeting, even without holding a majority of the voting rights", and would have required shareholder attendance of 95.84 percent or greater and for all other shareholders in attendance to adopt a common position against the applicant. The judgment of the General Court was eventually upheld by the Court of Justice in 2014.

CHINA

In December 2014, MOFCOM, the Chinese competition regulator, issued its first ever fine for a failure to notify, imposing a penalty of CNY 300,000 (approximately €45,600) on Unigroup for failing to notify its acquisition of RDA Microelectronics after MOFCOM concluded that this transaction constituted a business operators' concentration and met the filing threshold. Under Chinese competition law, MOFCOM is able to impose a maximum fine of CNY 500,000 (approximately €76,000). The decision followed the Chinese regulator's announcement in March 2014 that it will make public decisions sanctioning companies for failing to notify mergers that meet filing thresholds in China. In late October 2015, MOFCOM announced that 52 investigations into deals that were not notified for merger review have been opened. According to its antitrust chief, the regulator has so far imposed penalties in 15 of these cases.

PORTUGAL

On 28 December 2012, the Portuguese competition authority considered that the National Pharmacy Association (NPA), Farminveste 3 and Farminveste failed to notify the acquisition of control of ParaRede/Glintt. The concentration was eventually approved but failure to notify lead to fines of €150,000—the first time that the Portuguese competition authority had taken such a step.

FRANCE

French national merger regulators are also getting tough on companies that jump the gun.

The French Competition Authority (FCA) can impose a fine of up to 5 percent of the annual turnover of the acquiring company for failure to obtain prior clearance of a notifiable merger.

In December 2013, the FCA imposed a €4 million fine (est. at 0.15 percent) on Bordeaux-based wine-maker Castel Frères group for failing to obtain pre-closing clearance for its

acquisition of six companies that were part of the rival Patriarche group in 2011. The €4 million fine is the highest that the FCA has imposed to date, and in setting the fine the FCA said that the Castel group should have known that the deal was reportable and that it deliberately chose not to notify the deal to ensure speedy clearance.

The FCA has imposed smaller fines where companies have shown a greater willingess to cooperate. In May 2012, it fined supermarket chain Colruyt €392,000 for failing to notify acquisitions it made in 2003, 2004 and 2009. The fine, which represented only about 0.05 percent of Colruyt's turnover, took into account the fact that Colruyt denounced spontaneously the infringement and cooperated actively during the investigation. In February 2013, the FCA levied a similar fine of €400,000 (0.1 percent of turnover) on pension and health insurance fund Réunica for failing to notify its acquisition of Arpège. Réunica informed the FCA itself of its failure to notify.

Gun-jumping for implementing the transaction prior to obtaining merger clearance

USA

In the US, Department of Justice (DOJ) has prosecuted companies for illegal pre-closing activities on numerous occasions. In November 2014, the DOJ announced a U$5 million (€4.7 million) settlement with two companies for illegal pre-merger coordination. According to the complaint, Flakeboard America Limited and SierraPine had executed an asset purchase agreement, and while the transaction was under review, SierraPine had closed one of its mills producing medium-density fibreboard, which competed with Flakeboard's mill. Flakeboard was ordered by the DOJ to disgorge the profits it earned (US$1.15 million) as a result of the parties' arrangement, and the DOJ issued a fine of US$3.8 million for coordinating their actions prior to clearance, a violation under the US's Hart-Scott-Rodino Antitrust Improvements Act.

NORWAY

In February 2014, Norway's competition regulator Konkurransetilsynet issued a fine of approximately €2.9 million on NorgesGruppen for acting too fast in its acquisition of ICA Maxi grocery stores. NorgesGruppen bought the stores from rival ICA Maxi in April 2012 and began operating 22 of 24 of the stores without having received approval from the regulatory body.

FRANCE

At a national level, Article L. 430-8 II of the French Commercial Code expressly prohibits companies from implementing a notified transaction until it has been cleared by the French Competition Authority (FCA). Convicted companies expose themselves to the same penalty that they would encounter for failing to notify—a fine of up to 5 percent of the annual turnover of the acquiring party. Although the FCA has not enforced a fine since the article was introduced into law in 2001, that may be changing. During a practitioners' conference held in Paris in April 2015, the Head of the FCA's Merger Service indicated that it intends to start applying this aspect of the Commercial code, both for illustrative and educational purposes. In April 2015, the FCA conducted a dawn raid in the premises of the newly merged telecommunication provider Numéricable-SFR. The merger between Numéricable and SFR was first announced in Spring 2014 and approved by the FCA on 27 October 2014. According to press reports, following the merger clearance decision, several competitors informed the FCA that the two companies had begun to deal commercially prior to the transaction receiving competition clearance. Reportedly, the particular concern was that Numericable was already in charge of commercial and strategic decision-making at SFR.

Never say never

When circumstances change, regulators can reverse previous decisions on merger rulings, encouraging companies to reconsider transactions that they initially believed were too challenging to pursue.

By Assimakis Komninos, Jan Jeram

Many potential mergers and acquisitions have been shot down or simply abandoned on competition law grounds. Sometimes, when the initial merger control analysis indicates that there may be substantial trouble on the horizon, the prospective parties quickly drop the idea of the transaction because they are pessimistic about an eventual merger clearance or are simply not willing to invest significant resources and time into a fight with the competition authorities.

Other times, the parties may initially proceed with the transaction but later become unwilling to accept the prolonged timing that comes with a long and demanding pre-notification process. Or they may abandon a transaction after they decide that the potential remedies sought by the competition authorities are simply too onerous for or threaten to reduce the value of the deal below an acceptable level.

But our involvement in the successful Aegean/Olympic II showed that any initial negative experiences should not preclude the parties from trying again. When the circumstances are right, antitrust authorities are willing to reconsider their previous theories or conclusions. Companies and their legal counsel should therefore also be willing to rerun their analysis on transactions they had previously ruled out because of competition risks.

On rare occasions, antitrust authorities prohibit a transaction between two companies. This happened in January 2011, when the European Commission blocked a merger between Aegean Airlines and Olympic Air, Greece's two biggest airlines, on the grounds that the merger "would have resulted in a quasi-monopoly on the Greek air transport market."

Fast-forward to October 2013, and the Commission unconditionally approved a similar transaction, allowing Olympic to become part of Aegean Airlines, after concluding that the "merger

> **If the conditions are right, the authorities can change their position when assessing the impact of a transaction**

caused no harm to competition." Less than two years after the Commission took the prohibition decision in Olympic/Aegean I, the situation on the Greek aviation market in general, and within the two companies in particular, had changed and the Commission saw the transaction in a different light. This was the first time the Commission later cleared a merger that it had previously prohibited, illustrating how a deal once considered incompatible with the Merger Regulation might become possible not so far in the future.

In 2011, the Commission had expected that Greek GDP would "become positive again in 2012". Instead, output fell by 7.3 percent in 2012 and continued to fall in 2013. The Commission's assessment of the robustness of the demand in the aviation segment was also off the mark. In blocking the deal in 2011, the Commission expected that the number of domestic flights in Greece would grow on average by 2.3 percent. In reality, domestic traffic to and from Athens declined by 4.6 percent in 2013, and total traffic at Athens International declined by 3.2 percent. As a consequence, the two airlines' respective turnovers dropped considerably in this short period.

By 2013, the failure of Olympic had become unavoidable. The Commission had no other option but to take this into account under the so-called "failing firm defence" analysis, and approved the transaction. Only two years earlier, this scenario had been rejected without much hesitation.

Aegean/Olympic II signals that, if the conditions are right, the authorities can change their position when assessing the impact of a transaction. However, for this to happen, there must have been changes in the overall economy, or in the specific economic sector that result in a change in the market position of the companies involved.

Examples of the circumstances that might prompt a rethink by a competition authority could include:

- a significant decrease in the parties' market shares (maybe due to a new entrant or one party's decreased ability to compete)
- seriously reduced financial health of the parties (similar to what we observed in Aegean/Olympic II)
- the removal of significant barriers to entry (such as regulatory procedures)
- significant changes in the number of customers and to market behaviour, and many others

A combination of these circumstances pointing in the same direction could make the case even more compelling.

The fact that an authority previously held a negative view does not stand in the way of a fresh consideration in light of new circumstances. The second time around, conclusions might be different and a deal might be possible. We would urge companies to reconsider abandoned transactions when the antitrust assessment was made sufficiently long ago for the market circumstances to have changed.

4.6%
decline in domestic air traffic to and from Athens in 2013

3.2%
decline in total traffic at Athens International Airport in 2013

Private equity firms: In the line of antitrust fire?

There was a time when private equity firms may have seen themselves as arms-length financial investors but regulators are increasingly holding them responsible for the behaviour of their portfolio companies.

By Pontus Lindfelt and Sophie Sahlin

A new type of cartel fine emerged in 2014. For the first time ever in Europe, a group of investors were fined more than €30 million (US$32 million) for the behaviour of their portfolio companies, indicating a new and serious risk—that of private equity parental liability.

In April 2014, the European Commission (EC) found Goldman Sachs' private equity unit to be "jointly and severally liable" with its portfolio company Prysmian, in connection with an alleged underground submarine high voltage power cable cartel. Goldman Sachs was fined €37 million, Prysmian €104 million, and Pirelli, another investor, €67 million.

Private equity firms are not "traditional" parent companies, but they can be held responsible for the actions of their portfolio companies if regulators believe that they exercise decisive influence or control over the portfolio company. According to the Commission's decision, Goldman Sachs controlled Prysmian for almost two years, appointed board members who influenced strategic decisions and was regularly updated on Prysmian business.

Over the past 25 years, Commission cartel fines have risen significantly, amounting to approximately €23 billion in total. These ever-growing fines are now being extended to PE firms charged with parental liability for the actions of their portfolio companies. The Commission may impose fines of up to ten percent of the worldwide turnover of the entire PE group for the actions of one portfolio company. Further, the Commission can increase a fine by 100% for each prior infringement of any entity in the portfolio, with no time limit.

The Commission's new stance in holding private equity firms liable for the actions of their portfolio companies has been followed by the Netherlands. In November 2014, for the first time in its history, the Dutch regulator ACM imposed fines on a number of investment companies because their former portfolio company engaged in cartel conduct. The ACM fined three private equity firms €1.9 million for exercising decisive influence over one of their portfolio companies Meneba, a Dutch flour producer.

These groundbreaking cases should act as a warning to private equity firms to add an extra layer of due diligence when contemplating an acquisition or once the transaction has closed. In the light of these fines, private equity firms should develop a proper understanding of what constitutes control and an awareness of the liability associated with acquiring portfolio companies.

€23bn

total cartel fines imposed by EC over the past 26 years

Source: European Commission

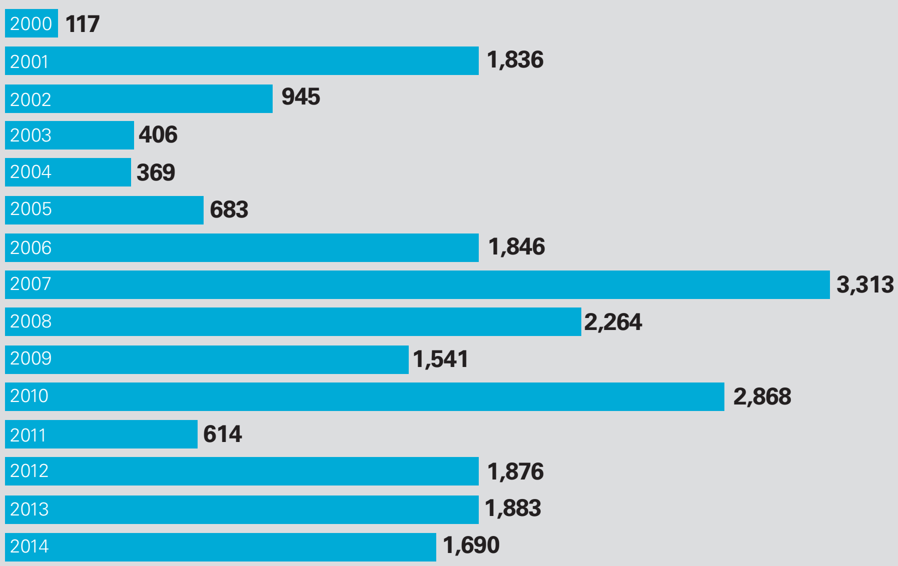
Beware of acquiring control: You are liable when you least expect it

Most PE firms probably do not think that they acquire control from an antitrust perspective, in particular when they purchase a minority shareholding. PE firms will often say that they are simply "financial investors" as they do not get involved in the daily management and as a consequence, they should not be held liable for their portfolio companies' wrongdoings. Of course, PE firms are not per se parent companies in the traditional sense of the term, but the same criteria that show a parent company has decisive influence are applicable to PE firms.

There is not a strict list of criteria based on which decisive influence is established. In fact, multiple factors come into play when a regulatory

Cartel fines imposed by the Commission

€ millions, before court adjustments — **Source**: European Commission



authority judges whether a traditional parent company or a private equity firm has control, such as veto rights over strategic decisions (budget, business plan, senior management etc.), its shareholding, its ability to influence the board of directors, whether it has an absolute majority at shareholding meetings or if it has representatives on a portfolio company's supervisory board.

Even when a portfolio company is not owned fully by the PE firm, risks still exist. For example, in 2011, the EC judged that Fuji Electric exercised influence over Japan AE Power Systems Corporation, even though it held only 30 percent of the shares. In the Dutch flour cartel, one of the private equity firms, CVC, only held 40 percent of the shares and yet was still considered to exercise decisive influence. The ACM reached that conclusion because the 40 percent shareholding gave CVC a veto right over important strategic decisions, such as the adoption of the business plan and the appointment of Meneba's Board. Moreover, the CVC group had a representative on Meneba's Supervisory Board who simultaneously held a position at another CVC wholly owned portfolio company.

Mitigate your risk: Do your homework

A. Engage in thorough due diligence before an acquisition

Fear of assuming responsibility for the illicit behaviour of a purchased portfolio company is understandable, but the risk can be mitigated. Proper due diligence can reduce the risk that a PE firm be tied to the pre-acquisition behaviour of its portfolio company and be held responsible for activities in which it played no part. It is also essential in identifying risky conduct and patterns that could give rise to antitrust scrutiny in the future. Antitrust is not systematically covered by due diligence. Although the intensity of the review could vary based on the industry and parties at stake, some level of diligence should be conducted through document review and targeted questions, covering the following areas:

(i) Horizontal behaviour, such as price-fixing, market sharing and customer allocation, bid-rigging, and exchanging sensitive information. Such infringements not only signal high fines but also, in some jurisdictions, prison. When investing in industries which have a history of antitrust condemnations (or display high concentration and some closeness between competitors), a firm may wish to pay special attention to antitrust issues during the due diligence and in preparing the deal documents.

(ii) Vertical behaviour, which occurs between the portfolio company and its distributors, clients and suppliers. Activities which should raise serious concern during due diligence include: resale price maintenance, restriction on active and passive sales outside the exclusive territory, and banning Internet sales. These actions could invalidate the entire agreement and result in high fines. Other types of conduct, such as a longer exclusivity agreement, should also be reviewed carefully as it could lead to the invalidation of the clause or the agreement, as well as fines.

(iii) Abuse of dominance, which includes the unilateral conduct of companies that are dominant on a particular market. The acquisition of a dominant company should lead the acquirer to pay special attention to issues such as exclusivity, rebate and pricing practices.

The discovery of any of these issues during the due diligence should lead to a reconsideration of the purchase price and/or the inclusion of specific provisions in the purchase agreement, or even to rethink the entire transaction if the risks are too high.

B. Seller's warranties

The purchase agreement should provide for any ongoing litigation and for conduct discovered during the due diligence and which could give rise to litigation. The purchase agreement should also provide for the event in which the portfolio company is sanctioned for conduct which occurred before closing, but which was only uncovered after closing. For instance, it is typical to hold the seller liable for conduct uncovered within a defined time frame from closing.

> **"EC may impose fines of up to ten percent of the worldwide turnover of the PE group for the actions of one portfolio company**

C. Set up a compliance programme post-acquisition

Establishing compliance programmes is one way private equity firms can tackle the risk of inappropriate behaviour among its portfolio companies, particularly where the due diligence process has showed inappropriate conduct or simply risky patterns. The compliance programme can range from a simple guidebook and live training sessions to in-depth document review and interviews with key personnel—but whatever form it takes, it's vital for private equity firms to put them in place to mitigate their exposure.

Price pressure tests: A reliable crystal ball to control horizontal mergers?

Competition authorities develop quantitative tools to gauge the magnitude of potential post-merger price increases.

By Benoît Durand, Tania Van Den Branden, RBB Economics

The assessment of horizontal mergers

The primary concern of any competition authority is to avoid clearing a merger that would lead to price increases. This is particularly true for horizontal mergers, in which companies that operate in the same space as competitors consolidate. Such a merger would relax the competitive pressure that the merging parties exert on one another. Anticompetitive effects occur when the loss of competition is significant, and there is no countervailing force that would prevent prices from rising post-merger.

Other competitors in the same market can also benefit because the merging firms' price increase would cause some demand to switch to rival firms, which, in turn, may find it profitable to elevate prices.

In order to gauge price increases that could result from a horizontal merger, authorities have incresingly sought to employ in recent years tools developed to predict their magnitude, in particular the so-called price pressure tests (PPTs).

To date, competition authorities have relied heavily on market shares and other concentration measures to screen horizontal mergers. For example, the Commission would consider mergers resulting in firms holding a combined market share between 40 percent and 50 percent as potentially problematic and even in some cases below 40 percent. However, in differentiated products industries, market shares may not reflect the extent to which the merging parties exert a competitive constraint on one another.

PPTs are one way in which authorities have sought to address the shortcomings of traditional market share tools. PPTs have started to gain momentum in Europe, where they have been consistently used by the Commission to assess mergers in the mobile telecommunication industry. In the UK, the Office of Fair Trading, now called the Competition and Markets Authority, has also applied these tests when reviewing retail mergers. Surfing on this wave, competition authorities are likely to apply these tests to other industries, in particular if the data that is required for their implementation are available.

The logic of PPTs is in line with unilateral effects as described in the Commission horizontal merger guidelines. In this framework, a horizontal merger between two competitors gives the merged entity an incentive to raise prices, absent a reduction in marginal cost. The logic goes as follows. Suppose that two competing firms, Firm A and Firm B, merge. Before the merger, Firm A and Firm B have no incentive to unilaterally raise prices, as they would lose sales to the other if they did. The merger, however, alters the merged firm's incentives. Once merged, Firm A may find it profitable to raise its price above the pre-merger level as some of the sales if would have lost to Firm B previously will no longer

> **"Even when the data available permits the use of PPTs, some care must be exercised when drawing conclusions of a merger**

be lost. The magnitude of this effect depends on how closely Firm A and B were competing pre-merger and, of course, the significance of competition from other firms.

PPTs seek to gauge the incentive of the merged entity to raise price, by accounting for the size of the diversion of lost sales between the merging parties as well as their respective margin. This is because the incentive to raise price depends on these two factors:

Diversion ratio

If a substantial fraction of sales lost by Firm A when it increases price is recaptured by Firm B, the loss of sales post-merger is relatively limited. This would give the merged entity a strong incentive to elevate prices. In sum, the greater the diversion ratio between the parties, the more likely and the larger the price effect associated with the proposed transaction. Conversely, if the diversion ratio is low, so is the incentive to raise price.

Profit margins

Profit margins determine the value of sales diverted from Firm A to Firm B following the price increase. If the margin of Firm B is relatively high, a substantial portion of the lost profit from the price increase of Firm A would be recouped. In this case, the merged entity would have a strong incentive to raise price. Conversely, if the margin of Firm B is relatively low, then the profit loss recaptured by Firm B would be small. In this case, the incentive to increase price is low.

The possibility to satisfactorily approximate these two variables is thus a critical condition for applying these tests in a real transaction.

Limits of price pressure tests

Even when the data available permit the use of PPTs, some care must be exercised when drawing conclusions on the likely effects of a merger.

First, PPTs always predict positive price increases because they hinge on a static model. Using such an approach to predict the effect of a merger instead of a dynamic setting can lead to erroneous conclusions because dynamic aspects of competition (investments, expansion, entry and exit) could have substantial effects on the market. For example, a static analysis might indicate that the merger will give rise to a price increase, but a dynamic analysis may show that such an increase would trigger entry and/or expansion, thus counterbalancing the increase in concentration and/or increase the level of investments in the market. Competitors may have an incentive to invest in repositioning their product offering and/or expand capacity to undercut the merged entity and accommodate migration of the merged entity's customers. Such reactions would mitigate or completely offset the predicted price increase.

Second, PPTs are partial. These tests focus only on price, but there are other parameters of competition that matter. For example, a merger may positively impact the quality of the product or service offered by the merged entity. This would be the case if the merging firms have also complementary assets that enable them to supply an improved product.

Thus, it is useful to remember that these tests were developed as a practical tool to screen potential problematic mergers that require in-depth investigation. As such, PPTs can only be sensible ***first phase tools***, and the merger assessment should include multiple facets and not blind application of a formula.

Likewise, pre-transaction, PPTs may be a useful tool for parties to anticipate whether the merger control process will be a bumpy road or a quiet ride. But it would be unwise to make predictions on the outcome of the authorities' review process based on such models only.

Remedies in multijurisdictional merger control: Curse or cure?

The rising number of enforcers imposing remedies in international merger control increases the level of uncertainty around whether and in what form a complex deal can be navigated through competition authorities.

By Börries Ahrens

On 20 April, 2015, almost one and a half years after Applied Materials and Tokyo Electron, two manufacturers of equipment for semiconductor producers, had decided to merge, the parties announced that they abandoned their plan. The remedy package submitted to the US Department of Justice (DOJ) failed to address the authority's competition concerns, triggering the decision to shelve the deal because the parties had hoped that authorities in China, Germany, Japan and South Korea would align around the DOJ.

The Applied Materials/Tokyo Electron case illustrates the challenges and possible consequences of the remedy stage in multijurisdictional merger control. Commitments can clearly be a boon in case of a transaction raising competition concerns, as they may enable its antitrust clearance. But there is a catch. The proliferation of merger control regimes means that merging parties may face remedy requests from multiple competition authorities. The increasing likelihood of such requests may create uncertainty about the regulatory outcome of a deal and produce a chilling effect on strategic M&A deals. The willingness of business decision-makers to embark on such deals may suffer. Similarly, sellers may increasingly favor financial investors over strategic investors if the latter can no longer present reliable plans on how to overcome regulators' concerns.

Remedies in an ever-changing multijurisdictional merger control landscape

In the last ten years, the international merger control landscape has changed in three notable aspects. First, the number of jurisdictions that must be considered as a matter of priority in merger review has substantially increased. Second, the threshold, above which possible concessions from the merging parties for obtaining antitrust approval may be requested, has been lowered. Finally, there is a trend away from classical structural remedies towards behavioral and rather novel remedies.

Proliferation of merger control regimes

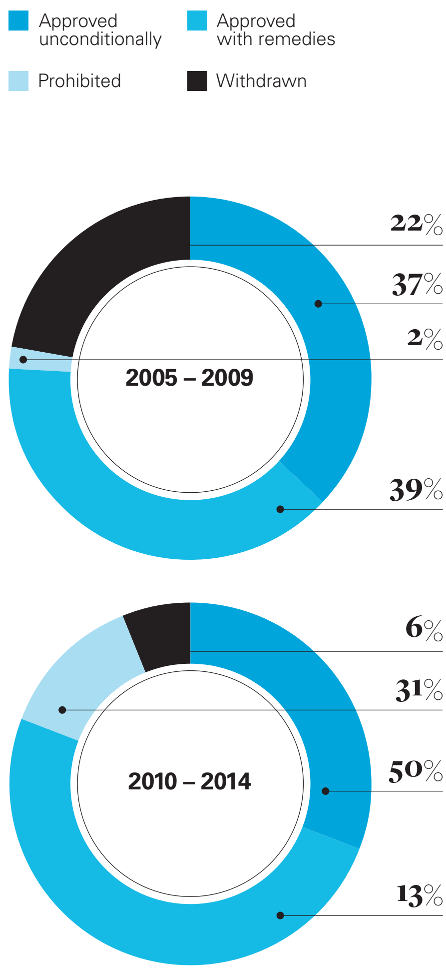
Not that long ago, the EU, the US and Germany were the core jurisdictions where antitrust clearance was crucial to the approval of an M&A transaction. The emergence of merger control across Latin America and Asia as well as the intensified enforcement by regulators in Japan, Korea, Mexico or South Africa have extended the list of "priority" jurisdictions and increased the risk of remedies being requested and the complexity of rules on remedies that need to be navigated.

Lower intervention threshold due to flexible substantive tests

Complex and substantial remedies

Outcome of EU Commision Phase II investigations

Source: European Commission



were in the past most common in transactions that raised concerns about a potential dominant position of the parties post-merger. Now, remedies cannot be excluded even in transactions where the parties' combined market share is far from any dominant level. This is because the dominance test, which was purely market-related, has been replaced in the EU and within some of its member states, by a more flexible test called the "Significant Impediment to Effective Competition" (SIEC). In addition, several newcomers in international merger control have either adopted the SIEC or similar tests. The threshold for intervention by an authority through a request for remedies has thus decreased.

This can be exemplified by the merger between global mining companies Glencore and Xstrata, which was announced in 2012 and notified to competition authorities around the world. Among them, China's MOFCOM focused its review on the markets for copper, zinc and lead concentrates. Even though the parties' combined market share in the market for copper concentrate in China was around 12 percent and there was no overlap on the segments for zinc and lead concentrates in China, MOFCOM only cleared the transaction after imposing the obligation to divest a production facility in Peru and to continue supplying Chinese customers at specific favourable terms.

Use of behavioural and novel remedies

We have seen the emergence of behavioural and unconventional remedies. One example of this are hold-separate obligations, which require companies to maintain certain operations independent post-merger. Other examples of behavioural remedies are obligations to maintain a specific commercial behavior such as the duty to maintain import levels for certain goods or the obligation to freeze prices at pre-merger levels for several years. Novel remedies also include obligations to abstain from further acquisitions or expansion of production capacity.

Risks for businesses from proliferation of remedies in merger control

Despite the upward trend in complex M&A deals in recent years, the fact remains that various factors related to the increased use of remedies in international merger control render navigation of a complex deal through merger control very difficult:

Protracted reviews

Having to deal with a remedies phase in several jurisdictions can lead to protracted review procedures. Offering remedies usually stops or extends the review clock. The additional time required from the authority to assess whether the remedies allay its concerns and to gather third-party opinions on the remedies offered extends the review procedures, which in certain jurisdictions, such as China or Mexico, are already lengthy.

Diverging outcomes and conflicting remedies

Coordination of reviewing authorities is important in the remedies phase, as it can help to avoid the imposition of conflicting remedies by different authorities. In recent years, cooperation among competition authorities has increased due to the development of a set of bilateral agreements between regulators, the work done in international forums such as the International Competition Network (ICN), and the growing practice of merging parties to grant waivers that allow reviewing authorities to exchange confidential information. A recent example of such successful coordination is General Electric's acquisition of Alstom's energy business, which was cleared simultaneously by the Commission and the DOJ subject to aligned and partially identical remedies.

Even when reviewing authorities coordinate their assessment of remedies, inconsistencies can emerge. This could be due to non-competition-related aspects in certain jurisdictions or differing lobbying opportunities for competitors and customers. Examples of the possibility of different outcomes are the acquisition by Marubeni, a Japanese trading company, of US grain trader Gavilon, which was unconditionally cleared in the EU and the US, but approved in China after the imposition of a hold-separate obligation, and the Glencore/Xstrata merger, where the DoJ and the Australian Competition & Consumer Commission did not impose any conditions, the Commission, however, imposed on Glencore the obligation to terminate relations to a zinc supplier, while MOFCOM imposed on Xstrata the obligation to divest a mine project in Peru and on Glencore the obligation to continue supplying Chinese customers at favourable conditions.

Remedies addressing not only competitive harm

Remedy-related uncertainty is further aggravated by the fact that some enforcers also consider non-competition aspects when designing remedy packages, particularly in some of the newer competition regimes. When MOFCOM cleared Marubeni's acquisition of Gavilon on the condition that Marubeni undertook to hold its own and Gavilon's soybean businesses separate, MOFCOM imposed this remedy despite the fact that the parties' combined market share on the market for import of soybeans to China was less than 20 percent and there were several other strong competitors. It seemed that the hold-separate obligation was motivated by industrial policy considerations related to the import of soybeans.

"The proliferation of merger control regimes means that merging parties may face remedy requests from multiple competition authorities

140+

countries have adopted some version of merger control system

Meanwhile, employment policy issues seemed to be the background of the remedies imposed by the South-African Competition Appeal Court on US retailer Wal-Mart in its acquisition of South African wholesaler and retailer Massmart. Notwithstanding Wal-Mart's lack of presence in South Africa and the Competition Commission suggesting unconditional approval of the deal, the Competition Tribunal cleared the deal subject to conditions, which included a prohibition of dismissals for two years post-merger.

Use of remedies stage by third parties

Offered remedies have to be market-tested as to their suitability to allay the competition concerns voiced by the authorities. The remedies stage offers thereby to competitors, customers or other third parties an opportunity either to undermine the deal by declaring the offered remedies inadequate or to influence the remedies package in a way that best serves their interests.

Mitigation of uncertainty from remedies in multijurisdictional merger control

Parties to a strategic M&A transaction should take all available steps, in order to prevent or prepare for diverging remedies in multijurisdictional merger control. This starts with the allocation of merger control risk among the merging parties in transaction agreements.

Merging parties should also consider facilitating cooperation between reviewing authorities, so as to increase the chances of a consistent remedies approach. In this regard, it will often be advisable to grant the reviewing authorities a waiver for the exchange of confidential information. Notifying parties should, of course, also take a consistent approach regarding the information they submit and the remedies they offer.

Finally, merging parties may also consider putting the EU or/and the US review from a timing perspective ahead of review in other, less sophisticated jurisdictions, so that the latter have more incentives to follow suit regarding the remedies.

However, the main uncertainty—mitigating action—is required from competition authorities and policy makers. Enforcers should intensify harmonisation of procedural and substantive aspects of remedies through best practices or guidelines. The ICN and other international organisations provide a platform for such efforts. On top of such "soft" harmonisation, legislators should take steps towards a further convergence of merger control regimes. Such approximation could become part of the negotiation agenda for bilateral or multilateral trade agreements and aim to remove considerations that are unrelated to competition from remedies in merger control and to harmonise the remedy tool box and procedure.

Merger clearance in Japan: Getting your timing right

By Takako Onoki, Seiji Niwa

Although the business combination review process in Japan bears many similarities with other jurisdictions, there are also some important but subtle distinctions that bear examination. One such distinction relates to time management when seeking clearance before the Japan Fair Trade Commission (JFTC). Exercising control over the timing can help to reduce the burden on the filing parties, make the process smoother and more predictable, and secure a better outcome.

First, some background: the review period for the first phase of a business combination filing in Japan ("Phase I") is 30 calendar days. Although Phase II begins immediately after Phase I, the Phase II "review period" does not start until the JFTC is satisfied that it has the necessary information. The Phase II review period is 90 calendar days.

The important point to understand is that, unlike in some other jurisdictions, the JFTC does not have the authority to "stop the clock" or extend the time for either the Phase I or the Phase II review periods. If time runs out before the JFTC is ready to make a decision, therefore, the agency's incentive is to allow the matter to proceed to Phase II (as in the case when the Phase I period expires) or to ban the combination from proceeding (as when the Phase II period expires). For this reason, an earlier filing is not necessarily better and indeed, it may be ill-advised.

Getting the ball rolling

Effective clock control starts before the business combination filing is even made with the JFTC. Although Japan no longer has an official pre-merger consultation period, parties are still well-advised to begin consulting with the JFTC in advance of their filing. Because the notification form itself requires so little information (unlike, for example, the European Form CO), it is often advisable at this stage to submit a briefing paper fleshing out the background and key issues.

The more complex and difficult the business combination is likely to be, the more important it is to start the process early. In the 2011 Nippon Steel/Sumitomo Metal merger, for example, the parties reached out the JFTC more than three months before their official filing and began preparing materials for the agency even before that.

Communicate and educate

Beginning in this pre-filing period and throughout the process, the parties should be regularly communicating with and educating the JFTC. Communications should not only be embodied in formal documents, such as the briefing papers and company documents submitted in other jurisdictions, but should also take the form of regular, even daily, conversations with the JFTC. The agency has shown itself to value a near-constant dialogue that can sometimes appear unusual from the perspective of practice in other jurisdictions. There is no substitute for these conversations when it comes to understanding the JFTC's thinking or to establishing credibility with the agency. The best way to build the rapport necessary to have these conversations is to start them as early as possible.

Withdraw and refile

In the event that the parties find themselves coming up to the impending end of Phase I, in some cases there may be the option of withdrawing and refiling their application. This would restart the Phase I 30-day period. This may be necessary in certain cases but can also sometimes be obviated by starting the consultation process early. Delaying the start of Phase II, even if it is inevitable or very likely, has the added benefit of delaying the publicisation of the case that would happen when Phase II starts.

Managing Phase II

Finally, filing parties may not always want to start the 90-day Phase II review period as soon as possible because they may wish to avoid placing time pressure on the JFTC to review the deal within that limited time frame. In addition to starting a ticking clock that may actually harm the parties, this can also build goodwill with the JFTC. Delaying the start of the Phase II review period does not necessarily prejudice the parties, because the JFTC will start reviewing materials from the parties even before the Phase II review period has commenced. In addition, the parties can usually negotiate with the JFTC to reduce the 90-day period and secure clearance faster.

Below-threshold transactions: Enforcement and exposure

Whether a jurisdiction will investigate a consummated deal that did not require pre-close notification varies widely by country. The US and China provide examples to highlight the range of approaches to merger control where no notification is required.

By Rebecca Farrington, Noah Brumfield, George Paul, Yi Ying, Lee Czocher

Many jurisdictions retain authority over below-threshold transactions and can either unwind or impose conditions on deals that have been consummated. Because these transactions do not affect closing conditions, the practical effect is to shift the antitrust risk onto the purchaser.

When considering a merger or acquisition, companies must pay attention to the risks of doing a deal that does not trigger pre-close notification. That's because enforcement agencies possess regulatory authority to investigate and prosecute a wider range of transactions than those for which advance notice is required by law.

In the US antitrust agencies actively investigate transactions that fall below filing thresholds and take action against those transactions deemed harmful to competition. China's merger control authority, by contrast, has yet to take any action unwinding a deal that did not require prior notification.

No safe harbour for non-reportable deals

Falling below notification thresholds does not provide a safe harbour from antitrust scrutiny. The risk to a closed transaction, however, varies.
While the US and China are similar in requiring parties to clear their respective pre-close notification procedures for reportable transactions, the jurisdictions represent different approaches to non-reportable deals. Recent developments suggest those differences are narrowing, however.

Under US law, the outer bounds of the Federal Trade Commission's (FTC) and Department of Justice's (DOJ) enforcement powers extend to mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." This authority is not bound by the formal merger notification procedures set out in US law under the Hart-Scott-Rodino Act, but can extend to challenging and unwinding deals that did not require pre-close notification. Likewise, China's Anti-Monopoly Law contains a broad prohibition on concentrations of undertakings that lead, or may lead, to elimination or restriction of competition. Even when filing is not required, both US and Chinese authorities may legitimately collect information from a variety of sources, including whistleblowers, media, government agencies and even competitors, in order to determine if sufficient evidence exists that the concentration has or may have the effect of eliminating or reducing competition. The agencies each have investigation procedures for the below-threshold transaction that parallel the procedures applicable to reportable transactions.

Legislation may be invoked to impose severe sanctions in an attempt to restore the market to pre-merger competitive levels. This can include disgorgement of profits, divestitures, compulsory licensing of intellectual property and other equitable remedies deemed necessary to restore competition. For example, the DOJ recently announced a settlement with a joint venture between two New York City bus tour operators that requires both asset diversities and the disgorgement of US$7.5 million in profits.

Recent enforcement of non-reportable deals

The US

In recent years, the FTC and DOJ have actively pursued non-reportable transactions. In the last four-year period, the two US agencies initiated 73 preliminary enquiries. This represents nearly one-fourth of all substantial merger investigations. Notable recent challenges to non-

> **"Falling below notification thresholds does not provide a safe harbour from antitrust scrutiny**

reportable deals include Bazaarvoice Inc.'s US$168 million acquisition of PowerReviews Inc., Heraeus Electro-Nite Co. LLC's US$42 million acquisition of Midwest Instrument Co. Inc., and the US$26 million deal between New West Health Services Inc. and Blue Cross and Blue Shield of Montana Inc. Even deals in the single-digit million dollar range can draw antitrust scrutiny, as illustrated by recent challenges to deals between Solera Holdings, Inc./Actual Systems of America, Inc. (US$8.7 million deal), Tyson's/George's Food LLC (US$5 million deal), and Election Systems and Software, Inc./Premier Election Solutions, Inc. (US$3 million deal).

China

While US antitrust authorities regularly investigate and challenge non-reportable deals, China's Ministry of Commerce (MOFCOM) has not.

Since China enacted its Anti-Monopoly Law in 2008, MOFCOM has challenged only a handful of the 1,000 transactions it has reviewed, and blocked just two. None of its reported enforcement actions have involved a challenge to or sanctions against a deal that did not require prior notification.

MOFCOM has announced 52 investigations of deals that were not reported to MOFCOM by the parties and imposed penalties in 15 of those cases that have been closed to date. These cases however, involved failure-to-file sanctions where notification was found to be required, including a US$50,000 fine against Tsinghua Unigroup in 2014. So, while MOFCOM is certainly not restricting its merger review to submitted filings, the review of deals that do not require notification remains uncertain.

MOFCOM's rules regarding non-reportable transactions remain in draft since they were published for comment in 2009. To date, MOFCOM has provided little authority as to the circumstances in which MOFCOM will intervene and seek sanctions for a closed deal that did not require notification. Article 16 of the Measures on Declaration of Concentration of Undertakings references the possibility of a review of non-reportable deals and of a

> **"Non-reportable transactions may be investigated years after closing, long after the assets and operations of the merging parties have been fully integrated**

73
preliminary enquiries initiated by FTC and DOJ in non-reportable transactions between 2009 - 2013

Source: Department of Justice

party's potential responsibility for any consequences, but unlike the US, in China there is no record of guidance and precedent to consider.

Key considerations in assessing antitrust exposure

Customer complaints are perhaps one of the most significant red flags that can attract unwanted regulatory attention, particularly in the US where recent FTC data showed that, over a 15-year period, the FTC took enforcement action in 97 percent of mergers associated with vocal customer complaints. When compared with the 43 percent rate of FTC enforcement actions for mergers executed without provoking strong customer complaints, this suggests companies can reduce the likelihood of regulatory interference by adopting an outreach strategy designed to "sell" the merger to the existing customer base.

Even with the best customer outreach efforts, a buyer should anticipate strategic complaints to regulators from a competitor or an industry association. Complaints could also come from a supplier that has been terminated in the course of integration. Not only do competitors and frustrated suppliers have an incentive to tell the agencies about non-reportable deals in their markets, they can provide significant market information and direction on issues for greater focus.

Competitor complaints can carry significant weight in China, where domestic competitors will often have close ties to the government. An industry association may even be an arm of the government. Both can exercise significant influence over the investigative process.

With the focus of a post-close investigation on actual anticompetitive effects, integration planning should give careful attention to product and pricing plans. For example, it is prudent to avoid rapid and sudden price increases in the first year after closing, particularly if they are not tied to cost increases.

Anticipating which market dimensions could plausibly be framed as insulating the parties from competition, particularly in highly concentrated industries, is crucial to comprehensive analysis of a potential transaction. Thus, understanding how courts evaluate entry and sophisticated-buyer arguments is an essential component of limiting future exposure. In light of the deferential standard that governs courts' review of FTC orders, it is especially important to consider such factors throughout the lifespan of the transaction.

Parties to a non-reportable transaction should be aware that an investigation and challenge may occur years after closing and long after the assets and operations of the merging parties have been fully integrated. This not only creates business risk, but can further complicate the ability of the purchaser to comply with regulator's demands.

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