The Legal 500 & The In-House Lawyer
Comparative Legal Guide
United States: Merger Control (4th edition)

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in the United States.

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-4th-edition

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1. Overview

In the United States, the Federal Trade Commission (FTC) and the Antitrust Division of the US Department of Justice (DOJ) review transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), and the implementing regulations contained in 16 C.F.R. parts 801-803 (HSR Rules). Premerger notification under the HSR Act is mandatory for transactions that meet certain filing thresholds if no exemption applies. A transaction is potentially reportable under the HSR Act if either party to the transaction is engaged in commerce or in any activity affecting commerce, and the 'size-of-person test' and the 'size-of-transaction test' are satisfied. Both the 'size-of-person test' and the 'size-of-transaction test' are based on certain monetary thresholds and are adjusted annually to reflect changes in US GDP. The HSR Act contains

exemptions from filing for certain types of acquisitions, including acquisitions that do not have a sufficient nexus to US commerce.

For most transactions requiring a filing, each acquiring person and acquired person must submit a premerger notification form, containing a short description of the transaction and basic information about the filing party. The parties are also required to submit certain documents that analyse the transaction with respect to competition-related topics and expected synergies or efficiencies.

The HSR Act imposes reporting and waiting period obligations of 30 calendar days (or 15 calendar days for a cash tender offer or certain bankruptcy transactions). During the waiting period, the enforcement agencies assess the likely effect on competition of the proposed transaction. The parties to a transaction may not close until the statutory waiting period has expired, or the government has granted early termination of the waiting period. The reviewing agencies will only grant early termination if they have determined that the transaction is not likely to lessen competition.

If, after the initial waiting period, the government requires further information to determine whether the transaction would result in anticompetitive effects, the waiting period is extended through the issuance of a 'Request for Additional Information and Documentary Material' which consists of a lengthy set of document, data, and interrogatory requests (known as a 'Second Request'). The Second Request extends the waiting period until 30 calendar days after both parties have substantially complied with the Second Request (10 days for cash tender offers and certain bankruptcies).

At the end of this second waiting period, the reviewing agency must decide whether to close the investigation and allow the transaction to proceed, enter into a negotiated settlement with the parties, or block the transaction in federal district court. In practice, these considerations are underway throughout the Second Request process.

2. Is notification compulsory or voluntary?

Under the HSR Act, notification is compulsory for transactions that meet the filing

thresholds and are not subject to an exemption.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Transactions that are subject to the HSR Act are prohibited from closing until expiration or early termination of the waiting period under the HSR Act. Parties may not ‘carve out’ portions of the transaction for closing prior to expiration or early termination of the waiting period.

4. What are the conditions of the test for control?

A transaction is potentially reportable under the HSR Act if either party to the transaction is engaged in commerce or in any activity affecting commerce, and the ‘size-of-person test’ and the ‘size-of-transaction test’ are satisfied. The HSR Act covers various types of transactions including mergers and acquisitions of assets, voting securities, exclusive licenses to certain intellectual property, or a controlling interest in a non-corporate entity (e.g., a limited liability company or partnership). The formation of joint ventures is also covered by the HSR Act. In addition, the FTC and DOJ have jurisdiction to review the competitive effects of all transactions under the antitrust laws, even those that are not reportable under the HSR Act.

Under the HSR Act, acquisitions of interests in non-corporate entities that meet the notification thresholds and are not exempt must be reported only if the acquisition results in ‘control’ of the entity. The control test for non-corporate interests is whether, as a result of the acquisition, the acquiring party will have the right to 50% or more of the profits or 50% or more of the assets upon dissolution of the non-corporate entity.

For acquisitions of voting securities, the HSR Act and associated rules do not use a control test for determining reportability. However, in order to determine whether a corporate entity is controlled (i.e., is part of an acquiring person or acquired person),

the HSR Rules define control of a corporate entity as holding 50% or more of the voting securities of the issuer or having the contractual power to designate 50% or more of its board of directors.

Determining whether a non-US entity is a corporation or a non-corporate entity requires an examination of the shareholder rights. If the entity issues securities that allow the holders to vote for the election of a supervisory board of directors, then the entity is treated as a corporate entity for HSR purposes. If it does not, then the entity is treated as a non-corporate entity for HSR purposes.

5. What are the conditions on minority interest in your jurisdiction?

Under the HSR Act, an acquisition of voting securities that meets the monetary filing threshold is reportable even if the acquiring person does not obtain control of the acquired entity. However, the HSR Act exempts certain acquisitions of voting securities if made 'solely for the purpose of investment.' This 'investment-only' exemption is available if, as a result of the acquisition, an acquiring person holds 10% or less of the voting securities of the target issuer and has only passive investment intent (i.e., under rule 801.1(i)(1) has 'no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer'). In addition, acquisitions made directly by certain institutional investors, where the institutional investor holds less than 15% of the target issuer as a result of the transaction, may be exempt if the acquisition is made in the ordinary course of business and the institutional investor has only passive investment intent. In each of these cases, the acquisition is exempt even if the dollar value of the acquired voting securities is above the filing threshold. As a practical note, the 'investment-only' exemptions are narrow exemptions, and determining whether specific conduct is inconsistent with a claim of investment-only purpose is a fact-specific endeavour that requires careful scrutiny.

For acquisitions of interests in non-corporate entities (like an LLC or LP) that meet the notification thresholds and are not exempt, only acquisitions that confer control require notification.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

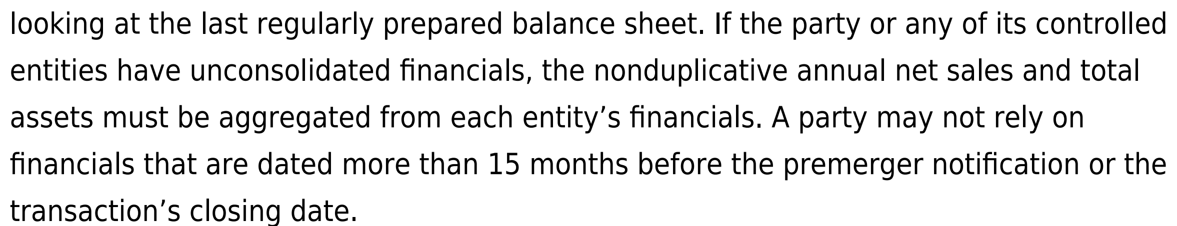
A proposed transaction is potentially reportable under the HSR Act if both the ‘size-of-person test’ and the ‘size-of-transaction test’ are satisfied and no exemption applies. In addition, the transaction must meet the commerce test, which is satisfied if either party to the transaction is engaged in commerce or in any activity affecting commerce. In practice, the commerce test is met for almost every transaction so the reportability analysis turns on whether the other monetary thresholds are met. The threshold values for the ‘size-of-person test’ and the ‘size-of-transaction test’ do not vary based on the particular sector in which the parties participate and are adjusted each February based on the change in the US GDP from the previous year. The threshold values listed below are as of April 2019.

Size-of-Transaction Test

The ‘size-of-transaction test’ is satisfied if, as a result of the transaction, the acquiring person will hold voting securities, non-corporate interests, or assets of the acquired person with a total value of at least $90 million. In the case of an acquisition of non-corporate interests, the transaction must also result in the acquiring person gaining control of the entity (described in response to question 4 above). For transactions valued between $90 million and $359.9 million, the parties must also meet the ‘size-of-person test.’ When a transaction’s size is greater than $359.9 million, the transaction is subject to the HSR Act regardless of whether the ‘size-of-person test’ is met.

Generally, the ‘size-of-person test’ is satisfied if one party has annual net sales or total assets of $180 million or more and the other has annual net sales or total assets of $18 million or more. To determine the size-of-person, the ‘ultimate parent entity’ (UPE) of each party to the transaction must be determined together with all entities ‘controlled’ by each UPE. A UPE is an entity that is not controlled by any other entity or individual.

Typically, a party’s annual net sales are determined by looking at the last regularly prepared annual income statement and a party’s total assets are determined by



looking at the last regularly prepared balance sheet. If the party or any of its controlled entities have unconsolidated financials, the nonduplicative annual net sales and total assets must be aggregated from each entity's financials. A party may not rely on financials that are dated more than 15 months before the premerger notification or the transaction's closing date.

Certain types of acquisitions are exempt from the requirements of the HSR Act even if they would otherwise meet the filing threshold requirements. The most common exemptions include (1) acquisitions of goods and realty in the ordinary course of business, (2) acquisitions of certain types of real property, (3) acquisitions of no more than ten percent of the voting securities of an issuer solely for the purpose of investment, (4) intra-person transactions, (5) acquisitions of non-voting securities, and (6) acquisitions of foreign entities or assets lacking a sufficient economic nexus to the US.

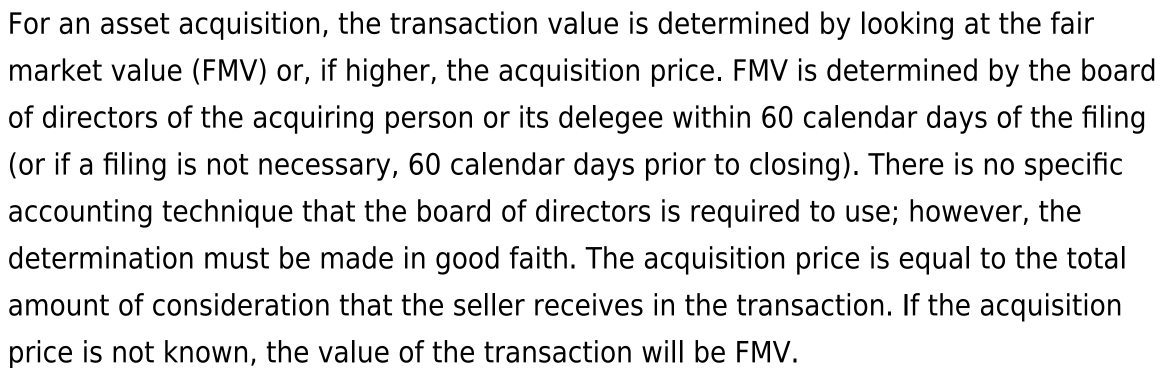
In addition, the HSR Act requires the aggregation of the value of certain past acquisitions with current acquisitions. The determination of whether aggregation is required varies based on whether assets, voting securities, non-corporate interests, or a combination of the three were previously acquired and which are going to be acquired in the proposed transaction. Sometimes earlier acquisitions do not need to be aggregated if the acquisition qualified for certain exemptions under the HSR Act.

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

Under the HSR Act and associated rules, the process of determining a transaction's value depends on whether voting securities, non-corporate interests, or assets are being acquired.

The threshold values listed below are as of April 2019 and are adjusted annually.

Assets



For an asset acquisition, the transaction value is determined by looking at the fair market value (FMV) or, if higher, the acquisition price. FMV is determined by the board of directors of the acquiring person or its delegee within 60 calendar days of the filing (or if a filing is not necessary, 60 calendar days prior to closing). There is no specific accounting technique that the board of directors is required to use; however, the determination must be made in good faith. The acquisition price is equal to the total amount of consideration that the seller receives in the transaction. If the acquisition price is not known, the value of the transaction will be FMV.

The acquisition of non-US assets is exempt, unless, in the aggregate, the non-US assets to be held by the acquiring person as a result of the acquisition generated sales in or into the US of greater than US$90 million in the acquired person's most recent fiscal year.

Voting Securities

For an acquisition of voting securities of a US entity, the value is based on the value of the voting securities that will be held as a result of the transaction. If the voting securities are publicly traded, the value of the shares to be acquired is the greater of the acquisition price or market price. If the acquisition price is undetermined, publicly traded voting securities are valued based on market price. For open market purchases, tender offers, conversions, or exercises of options or warrants, market price is determined based on the lowest closing stock quotation during the 45 calendar days prior to closing. For transactions subject to an agreement or letter of intent, market price is determined by looking at the lowest closing stock quotation within the 45 calendar days before closing but not earlier than the day before execution of the agreement or letter of intent. If both the acquisition price and market price are undetermined, the value of the voting securities is their FMV.

If the voting securities are not publicly traded, the value of the privately held voting securities is either the acquisition price, if determined, or the FMV if the acquisition price is not determined.

An acquisition of voting securities of a non-US entity by a US person is exempt, unless the non-US entity and any entity it controls has US assets with a FMV greater than

US$90 million, or made sales in or into the US of greater than US$90 million in its most recent fiscal year. An acquisition of voting securities of a non-US corporation by a non-US person is exempt unless the same thresholds are met, and the transaction confers control of the non-US corporation.

Non-Corporate Interests

For an acquisition of non-corporate interests in a transaction that will confer control of a non-corporate entity, the value is based on the acquisition price, if determined, or the FMV if the acquisition price is not determined.

8. Is there a particular exchange rate required to be used for turnover thresholds and asset values?

While the HSR Act does not have codified rules regarding the use of exchange rates when determining whether the HSR Act's thresholds have been met, the FTC has issued general guidance regarding foreign currency conversions. The FTC recommends that parties use the Interbank Exchange Rate and follow certain guidelines:

- For an annual statement of income - use the average exchange rate for the year reported
- For a regularly prepared balance sheet - use the exchange rate in effect for the date on the balance sheet
- For a pro forma balance sheet - use the exchange rate for the date the pro forma balance sheet is created
- For the acquisition price - use the exchange rate for the date of closing
- For a fair market value - use the exchange rate for the date the fair market valuation is calculated

9. Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing

business?

Joint ventures that do not involve the formation of a new corporate or non-corporate entity (i.e., involve existing entities) are HSR reportable if they meet the relevant size-of-transaction and size-of-person thresholds, one of the parties forming the joint venture is engaged in commerce, and no exemption applies.

When a joint venture involves the formation of a new entity (Newco), each contributing party is considered an acquiring person and the Newco is considered the acquired entity. The rules determining whether a formation triggers a filing vary depending upon whether the Newco is a corporation or an unincorporated entity.

The threshold values listed below are as of April 2019 and are adjusted annually.

Formation of a Corporate Entity

In the formation of a US Newco corporation, each acquiring person must submit an HSR filing if no exemption applies and the value of that acquiring person's shares of the new corporate entity is either over $359.9 million or between $90 million and $359.9 million and the 'size-of-person test' is met. The value of an acquiring person's voting securities of the Newco is based on the acquisition price of the Newco's voting securities, if determined, or the fair market value (described in response to question 7 above) of the acquiring person's contributions to the Newco if the acquisition price is not determined. The 'size-of-person test' is met if:

- The acquiring person has annual net sales or total assets of at least $18 million and (1) the Newco has assets of $180 million and (2) at least one of the other acquiring persons has assets or annual net sales of at least $18 million, or
- The acquiring person has annual net sales or total assets of at least $80 million and (1) the Newco has assets of $18 million and (2) at least one of the other acquiring persons has assets or annual net sales of at least $18 million.

Formation of a Non-Corporate Entity

In the formation of a US Newco non-corporate entity, the transaction is reportable if

that acquiring person acquires control of the Newco. An acquiring person that acquires control of the Newco must submit an HSR filing if the value of that acquiring person's shares of the non-corporate entity is either over $359.9 million or between $90 million and $359.9 million, the 'size-of-person test' is met, and no exemption applies. The value of an acquiring person's controlling interest in the Newco is based on the acquisition price of the controlling interest in the Newco, if determined, or the fair market value of the controlling interests. The 'size-of-person test' is met if:

- The acquiring person has annual net sales or total assets of at least $18 million and the Newco has total assets of $180 million, or
- The acquiring person has annual net sales or total assets of at least $180 million and the Newco has total assets of $18 million.

10. In relation to "foreign-to-foreign" mergers, do the jurisdictional thresholds vary?

Under the HSR Act, an entity is deemed to be foreign if it is not incorporated in the US, is not organized under the laws of the US, and does not have its principal offices in the US.

Foreign-to-foreign transactions can trigger an HSR filing if they exceed the filing threshold and are not exempt. There are certain exemptions that are specifically applicable to 'foreign-to-foreign' transactions.

The threshold values listed below are as of April 2019 and are adjusted annually.

Assets

The acquisition of foreign assets is exempt, unless the assets to be held as a result of the acquisition generated sales in or into the US greater than US$90 million during the acquired person's most recent fiscal year. If both the acquiring person and acquired person are foreign, an asset acquisition that exceeds the $90 million threshold may still be exempt if (1) the aggregate sales in or into the US of the acquiring person and acquired person are less than US$198 million in their respective most recent fiscal

years, (2) the aggregate total US assets of the acquiring and acquired persons are less than US$198 million and (3) the acquiring person will not hold assets or voting securities of the acquired person that exceed US$359.9 million as a result of the transaction.

Voting Securities

An acquisition of voting securities of a foreign issuer by a foreign person is exempt unless (1) the transaction confers control of the foreign issuer by the foreign person (i.e., if, as a result of the acquisition, the acquiring person will hold 50% or more of the voting securities of that issuer or will have the contractual right to designate 50% or more of the board of directors), and (2) the foreign issuer, along with any entity it controls, hold US assets with a fair market value of more than US$90 million, or made aggregate sales in or into the US of over US$90 million in its most recent fiscal year. Even if the US sales or assets thresholds are met, the acquisition of control of a foreign issuer by a foreign person may still be exempt if (1) the aggregate sales in or into the US of the acquiring person and acquired person are less than US$198 million in their respective most recent fiscal years, (2) the aggregate total US assets of the acquiring and acquired persons are less than US$198 million, and (3) the acquiring person will not hold assets or voting securities of the acquired person that exceed US$359.9 million as a result of the transaction.

11. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Not applicable.

12. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject

to remedies?

Section 7 of the Clayton Act prohibits mergers or acquisitions where ‘the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.’ The 2010 *Horizontal Merger Guidelines* set out the agencies’ framework and general approach to determining whether a merger is likely to enhance or create market power or facilitate an exercise of market power. Merger review is forward-looking and attempts to determine whether a merger may lead to anticompetitive effects by facilitating increased prices, reducing output, diminishing innovation, or would otherwise harm consumers as a result of a reduction in competition. The agencies analyse two ways in which a merger can reduce competition: by enhancing the ability of the remaining competitors to act in a coordinated way (coordinated effects) or by enabling the merged firm to independently raise prices profitably (unilateral effects).

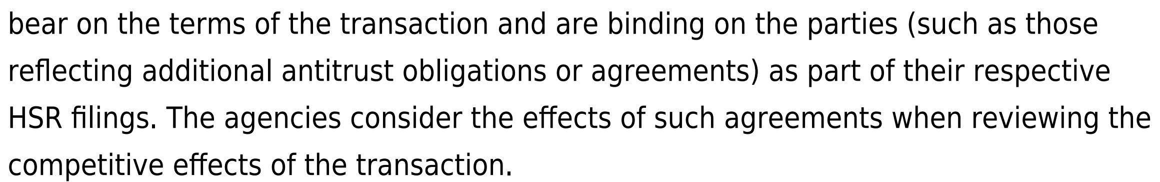
Regardless of the industry sector involved in a proposed transaction, the FTC or DOJ will conduct a fact-specific inquiry concerning the effects of the specific transaction on that industry. Across all industries, the FTC and DOJ apply the same test: Section 7 of the Clayton Act and the *Horizontal Merger Guidelines*.

13. Are non-competitive factors relevant?

Section 7 of the Clayton Act was designed to protect competition, not competitors. When reviewing a transaction, the FTC and DOJ focus on the transaction’s impact on competition, not other factors.

14. Are ancillary restraints covered by the authority’s clearance decision?

In addition to the executed agreement (or contract or letter of intent) relating to the transaction, parties are required to submit any ancillary agreements not to compete or any other agreements between the parties, including side letters or agreements that



bear on the terms of the transaction and are binding on the parties (such as those reflecting additional antitrust obligations or agreements) as part of their respective HSR filings. The agencies consider the effects of such agreements when reviewing the competitive effects of the transaction.

15. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

The HSR Act does not have a statutory filing deadline. Parties may make their respective HSR filings at any time as long as they have an agreement in principle that is reduced to writing, such as a signed term sheet or letter of intent, or if the buyer intends to make open market purchases. However, the parties may not close the notified transaction until the relevant HSR waiting period has expired or been early terminated. In practice, parties often agree to make their HSR filings within a certain number of days (e.g., five or ten business days) after signing a term sheet, letter of intent, or merger agreement.

16. What is the earliest time or stage in the transaction at which a notification can be made?

Parties may make their HSR filings at any time as long as they have an agreement in principle that is in writing, such as a signed term sheet or letter of intent, or if the buyer intends to make open market purchases. In a negotiated transaction, each party's notification must also include a sworn affidavit (or declaration under penalty of perjury) affirming, if applicable, that an agreement has been executed and the filing person has the good-faith intent to complete the transaction that is the subject of the notification.

17. What is the basic timetable for the authority's review?

Under the HSR Act, parties that meet the filing thresholds must file premerger

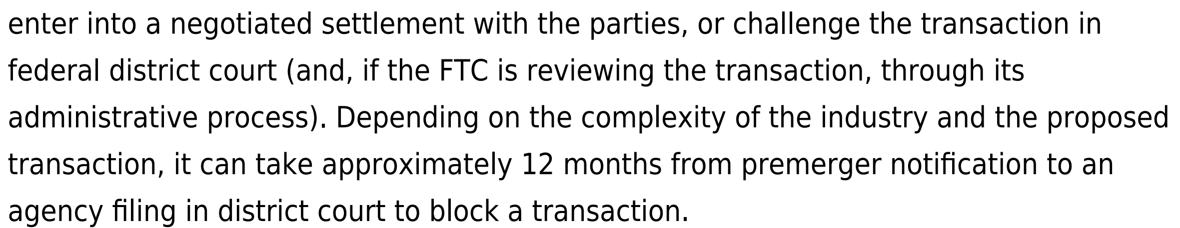
notification forms and wait for the FTC or DOJ to review the transaction.

Once the parties have submitted their filings, FTC and DOJ staff consult on the filing and determine if the transaction warrants an initial review. If so, the matter is 'cleared' to the agency with more expertise in the relevant industry. The assigned agency then conducts a review of the transaction during the initial waiting period (30 calendar days following submission of the premerger notification filing or 15 calendar days for cash tender offers or certain bankruptcy transactions). The vast majority of reviewed transactions are allowed to proceed after the initial waiting period expires or is terminated. If, however, at the end of the initial waiting period, the reviewing agency believes the transaction raises competition issues that merit further review, the reviewing agency may extend the waiting period by issuing a Second Request. On average, the FTC and DOJ issue a Second Request in less than five percent of filed transactions. When a Second Request is issued, the HSR waiting period is extended until 30 calendar days (10 days for cash tender offers and certain bankruptcies) following both parties' certification of substantial compliance with the Second Request.

As a practical matter, parties typically require several months to be in a position to substantially comply with a Second Request, due to production of potentially hundreds of thousands of internal documents and extensive sales, marketing, and production data. While the parties are complying with the Second Request or shortly after substantial compliance with the Second Request, the agencies may also notice depositions (known as investigational hearings at the FTC) of company executives and third party customers, competitors, and suppliers.

The agencies encourage the parties to negotiate the scope of a Second Request and the timing of substantial compliance, as well as the reviewing agency's timing to reach a decision. The FTC announced a new model timing agreement in August 2018, and FTC leadership has continued to stress the FTC's recommendation that parties execute the model timing agreement.

In practice, the agency's review is usually negotiated between the parties and the reviewing agency to extend beyond the second 30-calendar-day period after substantial compliance. At the end of the second waiting period, the reviewing agency must decide whether to close the investigation and allow the transaction to proceed,


enter into a negotiated settlement with the parties, or challenge the transaction in federal district court (and, if the FTC is reviewing the transaction, through its administrative process). Depending on the complexity of the industry and the proposed transaction, it can take approximately 12 months from premerger notification to an agency filing in district court to block a transaction.

18. Under what circumstances the basic timetable may be extended, reset or frozen?

The initial HSR waiting period also may be extended without paying a new filing fee if the acquiring person elects to 'withdraw and refile' its HSR filing. Under this process, at the end of the initial 30-day waiting period (or 15-day waiting period for cash tender offers and certain bankruptcy acquisitions), the acquiring person withdraws its filing, and submits the filing again within two business days (the acquired person is not required to withdraw). The refiling results in a new initial waiting period. The acquiring company may only take advantage of the withdraw-and-refile process without paying a new filing fee once and only if the proposed acquisition does not change in a material way. As described above, if at the end of the initial waiting period, the reviewing agency believes the transaction raises competition concerns that merit further review, the reviewing agency may extend the waiting period by issuing a Second Request.

Occasionally, the reviewing agency may discover that one of the parties failed to submit all required documents with its HSR filing. In such circumstances, the agency may restart the initial waiting period by requiring the party to resubmit its HSR filing with the requisite responsive documents.

19. Are there any circumstances in which the review timetable can be shortened?

Either party to a reportable transaction may request that the waiting period be terminated before the statutory HSR waiting period expires. This is known as a request for 'early termination' and requires the filing person to mark the appropriate section of

the HSR form. A request for early termination may be granted where one party to a transaction makes the request but the other does not. A party may also request early termination after filing, while the waiting period is still open, by sending letters to both agencies making a request for early termination. Similarly, parties may rescind a request for early termination by sending letters to both agencies.

A request for early termination will only be granted after the review of the filing has been completed and both agencies have determined not to take any enforcement action. Therefore, a transaction presenting no competitive concerns is more likely to receive early termination than a transaction with substantive overlaps.

There is no set time period for granting early termination – early termination may be granted as early as approximately one week after filing or not at all. While not required, in practice, if parties are requesting an expedited early termination determination (i.e., a decision by a certain date or if receiving early termination is critical), such a request should be included and explained in the transaction description found in item 3(a) of the HSR form.

All grants of early termination are published on the FTC's website in the early terminations index and in the Federal Register, which provides the issued transaction number, the date early termination was granted, and the names of the acquiring and acquired persons.

20. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

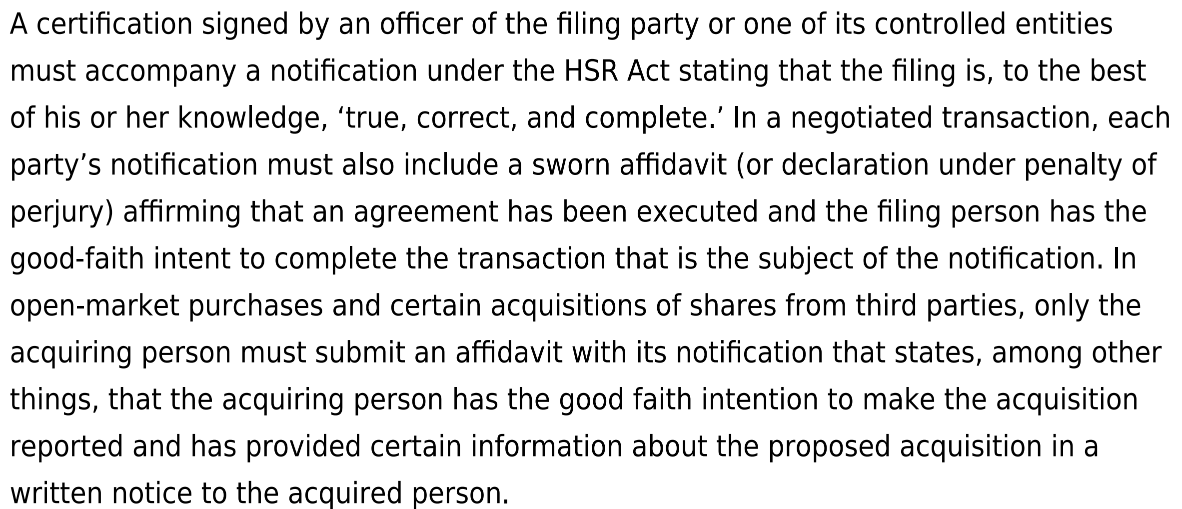
For reportable transactions, each filing person is required to submit its own HSR filing. In practice, counsel for the filing parties usually coordinate on certain portions of the filing that contain common information including the description of the transaction and confirming which documents are responsive to item 4(c) and 4(d) of the HSR form for both filing parties. The HSR initial waiting period begins when both agencies have received complete HSR filings from both parties to the transaction, with the exception

of § 801.30 transactions (tender offers and acquisitions of voting securities from third parties), where the acquiring party must notify the acquired party of the transaction, and the HSR waiting period begins upon the submission of the acquiring party's HSR filing. The HSR filing fee must also be paid before the waiting period will start.

21. What information is required in the filing form?

If a proposed transaction is reportable under the HSR Act and no exemptions apply, each party must submit a premerger notification to the FTC and DOJ. The HSR form and accompanying attachments provide information about, among other things, the structure and value of the transaction, the parties involved, certain financial information about each party, and each party's structure and holdings.

The introductory section and item 1 of the HSR form require certain preliminary information including how the filing fee will be paid, whether the party will request early termination, and certain basic information about the filing party. Items 2-3 require information regarding the transaction including the names and addresses of the transacting parties, a description of the transaction, the type and value of the transaction, and copies of the documents that constitute the agreement. Item 4 requires a registration number for certain entities that file annual reports with the US Securities and Exchange Commission (SEC), annual reports or annual financial statements, and certain competition-related documents. Item 5 requires the reporting of revenues from US operations from the last completed fiscal year. After September 25, 2019, parties submitting data in response to item 5 will be required to use 6-digit North American Industry Classification System (NAICS) codes for non-manufacturing revenue. Manufacturing revenue must be reported using both 6-digit NAICS codes and 10-digit North American Product Classification System (NAPCS) codes. Item 6 requires, among other things, information regarding certain subsidiaries, and five percent or greater shareholders as well as minority shareholdings in entities that may compete with the target. Items 6(c) and 7 require certain information to be submitted if both filing persons in a transaction report revenues in the same item 5 code (or codes). Finally, item 8 requires the acquiring person to disclose certain prior acquisitions within the past five years in any overlapping codes.



A certification signed by an officer of the filing party or one of its controlled entities must accompany a notification under the HSR Act stating that the filing is, to the best of his or her knowledge, ‘true, correct, and complete.’ In a negotiated transaction, each party’s notification must also include a sworn affidavit (or declaration under penalty of perjury) affirming that an agreement has been executed and the filing person has the good-faith intent to complete the transaction that is the subject of the notification. In open-market purchases and certain acquisitions of shares from third parties, only the acquiring person must submit an affidavit with its notification that states, among other things, that the acquiring person has the good faith intention to make the acquisition reported and has provided certain information about the proposed acquisition in a written notice to the acquired person.

22. Which supporting documents, if any, must be filed with the authority?

Several supporting documents must be submitted as part of the premerger notification filing. These include a copy of the documents that constitute the agreement along with any ancillary non-compete agreements (per item 3(b)), and certain annual reports and annual audit reports (per item 4(b)). In addition, parties are required to submit all final documents prepared by or for an officer or director for the purpose of evaluating the transaction to the extent the analysis relates to markets, market shares, competition, competitors, opportunities for sales growth or product or geographic expansion (per item 4(c)). These items also require the parties to provide certain information memoranda, documents prepared by investment bankers or other consultants, and documents related to synergies and/or efficiencies (per item 4(d)).

23. Is there a filing fee? If so, please specify the amount in local currency.

Parties that are required to report transactions under the HSR Act must pay a filing fee. The acquiring person is responsible for the payment of a filing fee, which varies depending on the value of the transaction, unless the parties agree between themselves to shift or split the fee. The various size-of-transaction monetary thresholds

dictate the amount of the filing fee for a particular transaction. As of April 2019, the filing fees are the following:

Size of Transaction	Filing Fee Amount
Greater than US$90 million, but less than US$180 million	US$45,000
US$180 million or greater, but less than US$899.8 million	US$125,000
US$899.8 million or greater	US$280,000

The fee is paid to the FTC and must be submitted in U.S. currency. The filing fee is typically sent via wire transfer and must be net of any service, transfer, or wiring fees charged by a bank or financial institution.

24. Is there a public announcement that a notification has been filed?

Under the HSR Act, all information about the filing, including the fact of the filing itself, is kept confidential (except in limited instances of an administrative or judicial proceeding or by request of Congress). The only exception is grants of early termination. In these instances, the contents of the filings and the supporting documentation remain confidential and only the identity of the filing parties, the date of the grant of early termination, and the assigned transaction number are published in the Federal Register and on the FTC’s web site.

25. Does the authority seek or invite the views of third parties?

When investigating a transaction that raises competitive issues, the reviewing agency will conduct interviews with the parties’ competitors, customers, suppliers, and other relevant industry participants. As part of its investigation, the reviewing agency may also issue subpoenas to third party industry participants for documents, data, and even deposition testimony. The reviewing agency uses the information from this outreach effort to gain a better understanding of how the affected markets operate, to assess the facts and arguments advanced by the parties, to gather evidence about the industry and the potential impacts of the transaction, and to identify supportive third-party witnesses for trial.

26. What information may be published by the authority or made available to third parties?

All documents and information submitted with the HSR form are confidential and are also exempt from disclosure under the Freedom of Information Act, except in limited circumstances such as when required as part of an administrative or judicial proceeding or if disclosed to Congress. If the parties do not request early termination of the HSR waiting period and the agencies do not take any action with respect to the proposed transaction, even the fact that a filing was made remains confidential. Under the HSR Act, if the parties request early termination, the FTC must give notice of such a grant, providing only the assigned transaction number, the identity of the filing parties and the date early termination was granted. In the event of an administrative or judicial proceeding to block the transaction, the reviewing agency could seek to use HSR documents. The parties to such an action typically seek a protective order to avoid public disclosure of their confidential information during the judicial proceeding.

27. Does the authority cooperate with antitrust authorities in other jurisdictions?

The US antitrust agencies may cooperate with authorities in other jurisdictions when investigating multi-jurisdictional transactions. In January 2017, the FTC and DOJ announced revised joint Antitrust Guidelines for International Enforcement and Cooperation (Guidelines) that discuss the agencies' international enforcement policy and investigative tools. The Guidelines explain in detail that, where relevant and appropriate, cooperation can include: initiating informal discussions and informing cooperating authorities of respective investigations; engaging in detailed discussions of substantive issues; exchanging information; conducting joint interviews; and coordinating remedy design and implementation. However, the HSR Act prohibits the US antitrust agencies from disclosing information obtained pursuant to the HSR Act without a waiver of confidentiality from the parties. Merging parties will often provide a waiver of confidentiality to the relevant foreign authority. Waivers generally allow the cooperating authorities to share documents, statements, data, and other information.

Parties contemplating complex, cross-border transactions should anticipate and plan to navigate merger control authorities who are cooperating across the globe.

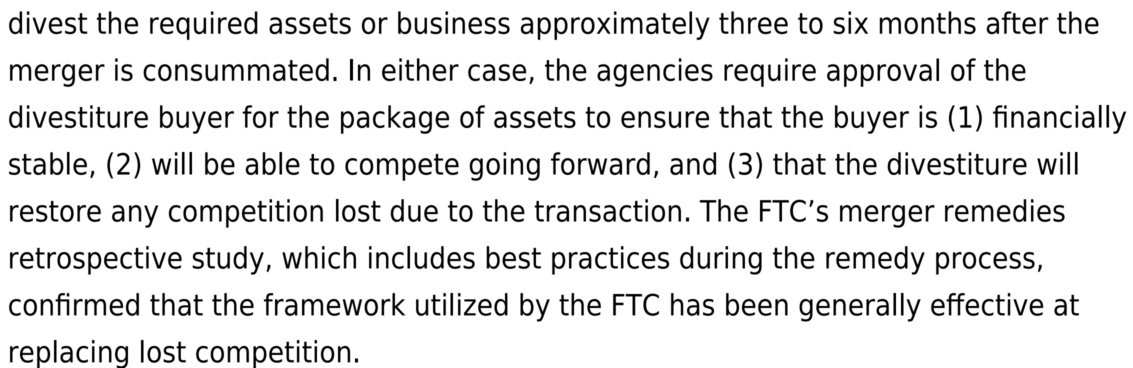
28. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?

The guiding principle for the antitrust agencies is that a merger remedy must effectively preserve competition in the relevant market. Historically, the FTC and DOJ utilised conduct remedies (such as firewall provisions, non-discrimination provisions, mandatory licensing provisions, transparency provisions, anti-retaliation provisions, and prohibitions on certain contracting practices) in limited circumstances, because conduct remedies require ongoing agency involvement and oversight. In September 2018, the DOJ announced the withdrawal of the 2011 DOJ *Policy Guide to Merger Remedies*, and instructed parties that the 2004 DOJ *Policy Guide to Merger Remedies* will be in effect until the DOJ releases an updated policy. This change reaffirms the general approach of the FTC and DOJ to require structural remedies (i.e., divestitures) to remedy competitive concerns.

29. What procedure applies in the event that remedies are required in order to secure clearance?

Typically, throughout the reviewing agency's investigation, the parties to the transaction and agency staff discuss any competitive issues raised by the transaction and potential remedies to address such concerns. Any proposed divestiture is scrutinised and evaluated by the agency to ensure it effectively remedies anticompetitive concerns identified during the investigation. Typically, parties offer a remedy after the reviewing agency has conducted its investigation, to ensure that any fix addresses the agency's concerns.

The agencies usually require a buyer up front in the vast majority of divestitures. In contrast to a buyer up front remedy, post-order consents typically allow the parties to



divest the required assets or business approximately three to six months after the merger is consummated. In either case, the agencies require approval of the divestiture buyer for the package of assets to ensure that the buyer is (1) financially stable, (2) will be able to compete going forward, and (3) that the divestiture will restore any competition lost due to the transaction. The FTC's merger remedies retrospective study, which includes best practices during the remedy process, confirmed that the framework utilized by the FTC has been generally effective at replacing lost competition.

If the reviewing agency has evidence that a transaction may be anticompetitive and the parties are unwilling or unable to offer a divestiture, the agency may file an injunction proceeding in federal court to block the transaction.

30. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Penalties for a failure to file a premerger notification, filing an incomplete premerger notification, or closing a reported transaction prior to expiration of the waiting period may result in civil penalties of up to $42,530 each day the person is in violation of the HSR Act. In practice, the agencies typically do not seek penalties for the first offense if parties inadvertently fail to file, but will seek penalties for a second mistake or for other types of violations. While $42,530 is the maximum daily civil penalty, the actual penalty will depend on the fact-specific circumstances of the case.

Failure to provide required item 4(c) and 4(d) documents as part of an HSR filing is taken very seriously by the FTC and DOJ. Substantial fines have been assessed for parties failing to provide these responsive documents. In some instances, if the omissions impacted the reviewing agency's investigation, the parties have had their filings 'bounced' and have been forced to restart the HSR waiting period.

Parties may not begin to consummate a transaction until the waiting period expires or is terminated by the agencies. If an acquiring person begins to exercise control over the operations or assets to be acquired before the expiration of the waiting period (referred to as gun-jumping) that person may face a civil penalty of up to $42,530 per

day for a violation of the HSR Act. The FTC and DOJ have initiated several multi-million dollar civil penalty actions for gun-jumping violations.

31. What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?

A certification signed by an officer of the filing party or one of its controlled entities must accompany a notification under the HSR Act stating that the filing is, to the best of his or her knowledge, ‘true, correct, and complete.’ If a filing has certain deficiencies, the antitrust authorities may ‘bounce’ an HSR filing and require that a party correct the deficiency and restart the HSR waiting period when the deficiency has been fixed.

The antitrust agencies have assessed sizable civil penalties (currently, up to $42,530 per day per violation) for failing to produce all required documents with their HSR filings.

In at least one exceptional case, criminal charges were brought for extreme violations in connection with the HSR Act. There, the DOJ pursued criminal obstruction of justice charges against an executive for intentionally altering pre-existing documents to mislead the US antitrust agencies.

32. Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?

If a proposed transaction presents competitive concerns, and the parties are unable or unwilling to remedy the reviewing agency’s concerns, the agency will challenge the transaction in federal court. The losing party at the district court level may appeal the decision to a US Court of Appeals. The FTC also has the authority under the FTC Act to pursue administrative proceedings before an administrative law judge and that initial decision can be appealed and is subject to review by the full FTC. The parties can then

appeal to any court of appeals within whose jurisdiction they conduct business.

33. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

Vertical Merger Scrutiny

The FTC and DOJ under the Trump Administration have largely stayed consistent with past Republican administration's approaches to antitrust merger enforcement. There have been a few notable departures, including – to the surprise of many in the antitrust bar – the DOJ's challenge of the AT&T Inc./Time Warner Inc. vertical merger in November 2017. This was the first fully-litigated challenge to a vertical merger in the US in 40 years. Because of the significant efficiencies that often result from vertical integration, vertical mergers, unlike horizontal mergers among competitors, do not typically raise competitive issues. In the past, the antitrust agencies either allowed vertical mergers to proceed without action or resolved these mergers with conduct (behavioral) remedies. The DOJ in this case lost in federal district court and the Appeals Court also ruled in favor of the merging parties. In contrast to the AT&T Inc./Time Warner Inc. challenge, the DOJ has cleared (with divestitures) large transactions with primarily vertical dimensions. For example, the DOJ settled the largest negotiated merger divestiture ever in May 2018 when it required Bayer AG to divest business and assets worth $9 billion in order to consummate its proposed $66 billion acquisition of Monsanto Co. In October 2018, the DOJ cleared Aetna Inc.'s acquisition of CVS Health Corp. for $69 billion, determining that the vertical issues were unlikely to harm competition. In January 2019, the FTC also cleared the nearly $483 million Staples Inc./Essendant Inc. transaction with the limited behavioral remedy of creating a firewall between the two companies.

State Antitrust Enforcement

State antitrust merger enforcement has become increasingly active, with states challenging mergers even absent any action undertaken by the federal antitrust

agencies. For example, on June 30, 2017, the California Attorney General sued to block the acquisition of two Northern California bulk petroleum terminals, despite the FTC declining to take action. Ultimately, the merging parties abandoned the deal. Additionally, in July 2019, the DOJ cleared the $26 billion acquisition of Sprint Corp. by T-Mobile US Inc.; however, as of September 2019, a number of state attorneys general continue to challenge the transaction in court.

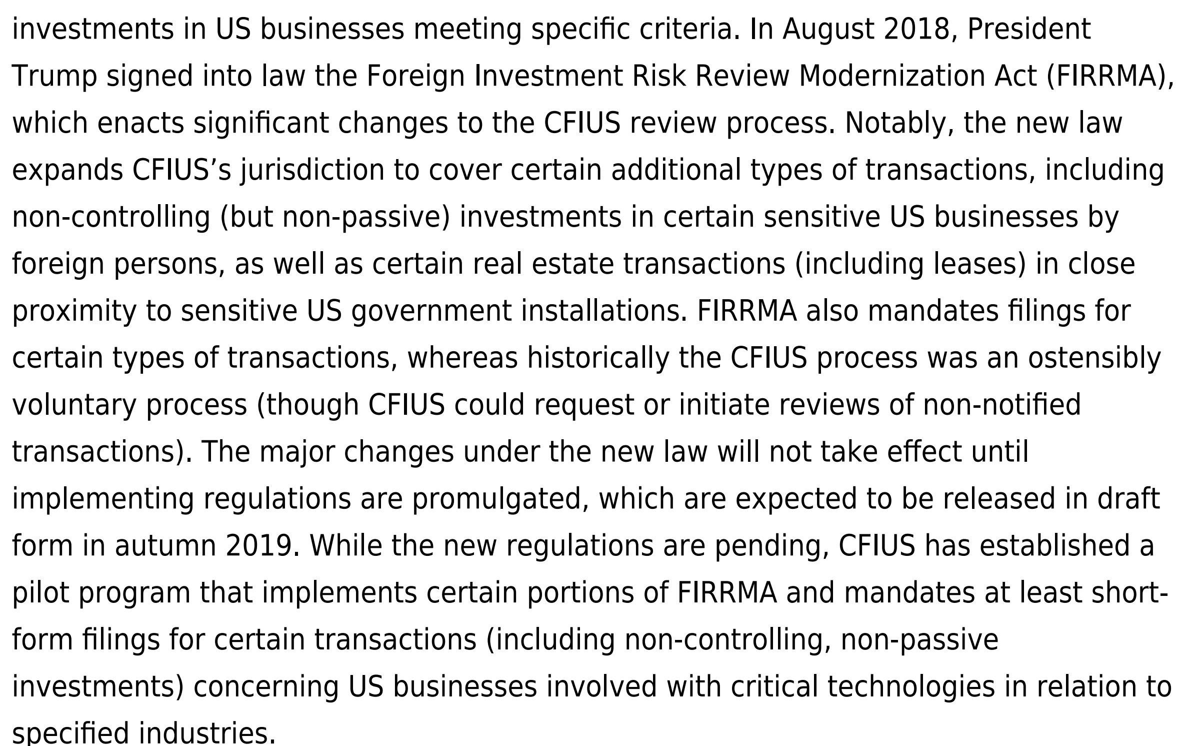
34. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

Standard Merger and Acquisition Reviews through Equal Rules (SMARTER) Act

In May 2018, the Standard Merger and Acquisition Reviews through Equal Rules (SMARTER) Act passed the House of Representatives and the Senate introduced its own version of the bill. The SMARTER Act sought to amend the Clayton Act and Federal Trade Commission Act to standardise the FTC and DOJ's review of proposed transactions. Currently, both the FTC and DOJ are notified about a proposed transaction, with certain industries generally assigned for review to the FTC and others to the DOJ. At the FTC, merger challenges are reviewed under the FTC Act and can be adjudicated administratively, whereas at the DOJ, challenges are only adjudicated in federal court under the Clayton Act. Under the SMARTER Act, the FTC would be required to litigate in federal court, eliminating the option for a challenge in the FTC's administrative court. The SMARTER Act would also create the same preliminary injunction standards – currently, the DOJ must make a showing of a substantial likelihood that the transaction violates Section 7 of the Clayton Act and the FTC must meet the injunction standard of Section 13(b) of the FTC Act (arguably a lower standard). The bill will have to be re-introduced for future consideration by Congress.

Foreign Investment Risk Review Modernization Act (FIRRMA)

Although not competition-related, the Committee on Foreign Investment in the United States (CFIUS), a US governmental interagency committee, has jurisdiction to conduct national security reviews of mergers, acquisitions, or investments that could result in foreign control over a US business as well as certain other non-passive foreign


investments in US businesses meeting specific criteria. In August 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act (FIRRMA), which enacts significant changes to the CFIUS review process. Notably, the new law expands CFIUS's jurisdiction to cover certain additional types of transactions, including non-controlling (but non-passive) investments in certain sensitive US businesses by foreign persons, as well as certain real estate transactions (including leases) in close proximity to sensitive US government installations. FIRRMA also mandates filings for certain types of transactions, whereas historically the CFIUS process was an ostensibly voluntary process (though CFIUS could request or initiate reviews of non-notified transactions). The major changes under the new law will not take effect until implementing regulations are promulgated, which are expected to be released in draft form in autumn 2019. While the new regulations are pending, CFIUS has established a pilot program that implements certain portions of FIRRMA and mandates at least short-form filings for certain transactions (including non-controlling, non-passive investments) concerning US businesses involved with critical technologies in relation to specified industries.

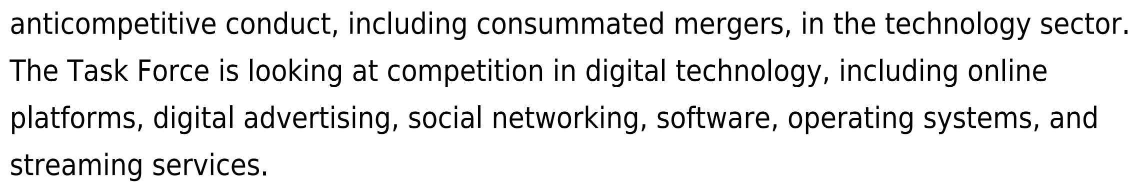
Since implementation of FIRRMA, CFIUS has pursued active compliance with its regulations. In April 2019, CFIUS imposed the first penalty of $1 million dollars for noncompliance.

Reforms to the Merger Review Process

In an effort to address concerns about the increased duration and scope of DOJ merger investigations, the DOJ announced a series of reforms to the merger review process. These reforms, announced in September 2018 and updated in November 2018, are intended to shorten and increase efficiency of the merger review process. The FTC is also assessing options to make the merger review process more efficient and less burdensome. However, based on available statistics regarding merger reviews that took place in 2018, the length of review has continued to increase.

FTC Technology Task Force

On February 26, 2019, the FTC established a task force to monitor competition in U.S. technology markets. The Technology Task Force is focused on investigating


anticompetitive conduct, including consummated mergers, in the technology sector. The Task Force is looking at competition in digital technology, including online platforms, digital advertising, social networking, software, operating systems, and streaming services.

Future Competition in Merger Review

The US antitrust agencies are focusing on potential violations of Section 2 of the Sherman Act (i.e., monopolization) in merger review. The general theory of harm is that the acquisition by an incumbent firm of a nascent or future rival could be anticompetitive and violate the antitrust laws. The FTC, for example, recently filed to block a merger based on harm to current and future competition in digital technology platforms, and the parties abandoned the transaction.