Merger Control: 'Around the World in 80 Days: Management of the Merger Review Process of Global Deals'†

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Introduction

The proliferation of merger review regimes around the world over the past two decades has given rise to a very broad range of commercial and strategic issues for those parties intending to engage in merger activity. For any merger, acquisition or joint venture with an international dimension, the management of the merger review process around the world has added significant layers of complexity and expense to deal-making.

An increasing number of jurisdictions is now involved in the merger review process; the thresholds for merger filings are many and varied; the timing of merger reviews is very different and subject to different levels of procedural complexity; the scope of remedies is becoming increasingly intrusive; the risks posed by gun-jumping and the submission of incorrect information have assumed significant proportions; while the growth of ever-more-complex theories of harm arising from mergers (and the necessity of coordinating remedies to address such concerns around the world) is adding greater uncertainty to the merger clearance process.

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† With all thanks to Jules Verne for inspiration for the title to this article. The 80-day reference reflects the average time it takes to prepare, file and receive clearance for a relatively straightforward merger filing across most jurisdictions.

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This article seeks to provide an overview of the range of issues that arise in a typical merger review situation, with the aim being to provide a coherent analytical structure through which in-house and external counsel can plan their merger review strategy around the world.

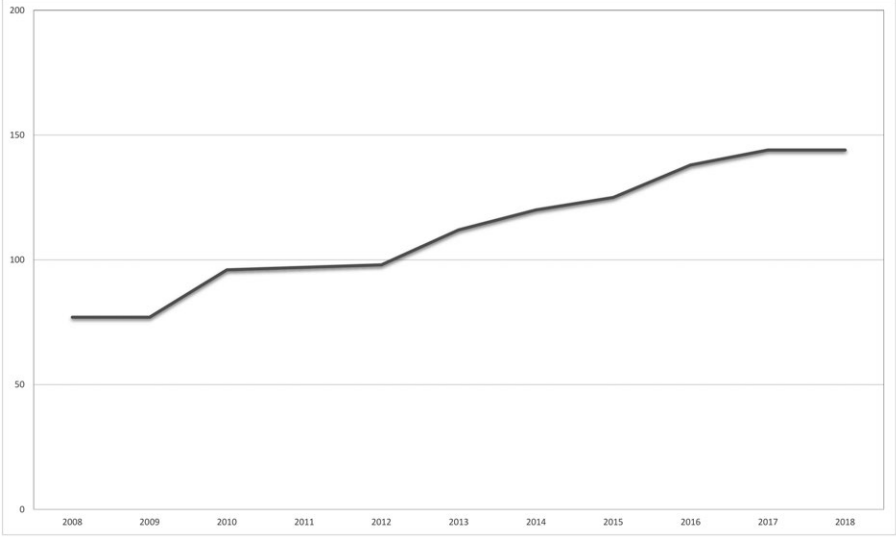
Developments and trends

Evolution of global approach to merger control

The past decade has seen an enormous growth in the number of merger control regimes around the world that are either active or in development, almost doubling from around 80 in 2008 to over 150 in 2018 (see Figure 1). In parallel with this proliferation of merger regimes, the importance of merger control in M&A planning has grown exponentially, from an essential but geographically limited set of considerations, to a fundamental gating item of global implications.

As the international scope and active enforcement of merger control has expanded, the United States- or European Union-centric approach taken historically by many companies to merger clearance planning begins to look a little outdated, and even risky. A comprehensive multi-jurisdictional risk analysis, including prudent strategic planning that factors in the various jurisdictional thresholds likely to be crossed, should take due account of timing considerations for clearance decisions likely to delay review timetables, anticipate national procedures, and acknowledge the importance of an increasing number of political and socioeconomic drivers intruding into traditional merger review analysis.

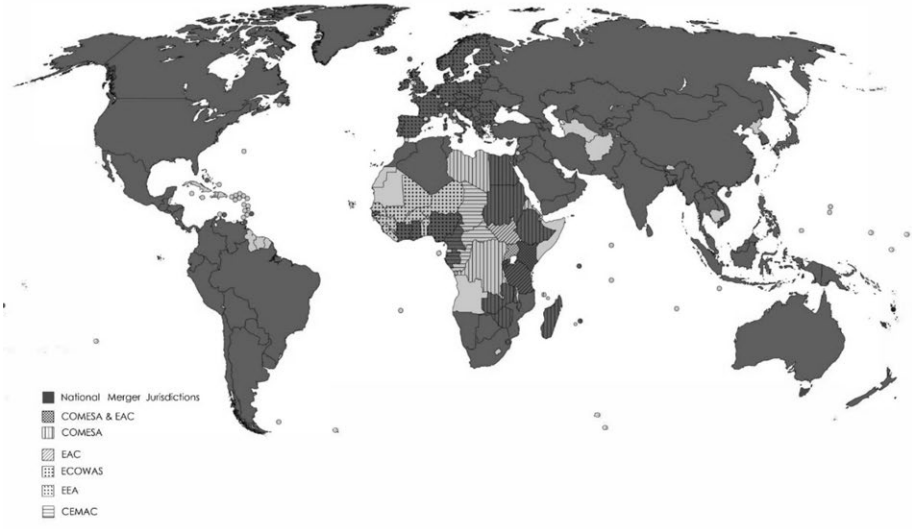
Figure 1: Growth in merger control regimes since 2008



It is commonly observed that there are two main analytical models of substantive merger review – the US and EU – which are echoed to some extent by most other regimes around the world. The adoption of these models largely follows these two jurisdictions' historic and geo-political influence, with the US model prevailing in the Americas and parts of Asia such as Korea. By contrast, the EU model holds more sway in Africa and certain parts of South America, and has significantly influenced parts of Asia, especially China. In each situation, the prevailing US or EU model has been modified to take due account of local policy concerns or enforcement priorities.

However, while the evolutionary roots of newer regimes remain clear, practitioners should not overestimate the newer authorities' deference to these 'parent' jurisdictions. The influence of the *ancien régime* appears to be diminishing over time, as newer authorities gain more confidence in their analytical abilities, with new regional leaders emerging in key jurisdictions such as China, Russia, South Africa, Brazil and India.

Figure 2: Global coverage of merger control[1]



1 In the maps in this article (Figures 2 and 4 to 7), block tints refer to national regimes, while patterns refer to supranational regimes.

Figure 2 illustrates the current geographical coverage of merger control worldwide, indicating jurisdictions that are already active or that are in the process of development.

Not all jurisdictions that have merger control laws on their statute books enforce their rules actively or efficiently. Some jurisdictions are still in the process of drafting implementing legislation and/or developing dedicated enforcement authorities. Other jurisdictions, meanwhile, appear to be more interested in paying mere lip service to the recommendations of the OECD and other international advisory bodies on the importance of effective merger control to functioning economies.

Collectively, all these jurisdictions boast a wide variety of rules and regulations, ranging from their definition of what constitutes a 'notifiable transaction' and the jurisdictional thresholds identifying notifiable transactions, through their procedural steps and their substantive tests for assessing the likely competitive effects of a transaction, and finally to the remedies that they may require or accept from the merging parties, and the legal procedures available for redress.

New national regimes

Merger control was originally the preserve of so-called 'First World' economies. However, the concept rapidly gained international traction and, in the past decade or so, a great many developing economies have also adopted merger regimes. Since 2016, for example, Bangladesh, Ethiopia, Laos, Myanmar, the Philippines and Samoa have all joined the list of jurisdictions where a merger control regime is now either active or in the process of being realised. Merger control is also gaining popularity in countries that have been regarded traditionally as lower-regulation jurisdictions, such as the United Arab Emirates and Curaçao.

Conversely, some jurisdictions – including, notably, Liechtenstein and Luxembourg – have thus far withstood the tide of change and remain some way from establishing national merger regimes (although the supranational regimes of the EEA and EU, respectively, apply). In other small jurisdictions (eg, the Bahamas, Hong Kong, Malaysia and Peru), a hybrid situation prevails, with merger control being limited to specific economic sectors of particular national importance, such as electricity and telecommunications.

Supranational regimes

In addition to what now number almost 150 national merger regimes, the past decade has seen a rise in supranational regimes. Aside from the four cross-

border regimes now exist in Africa alone (the Common Market for Eastern and Southern Africa (COMESA), Central African Economic and Monetary Community, East African Community (EAC) and Economic Community of West African States), while proposals have been drawn up for two new cross-border merger regimes in the Caribbean (Caribbean Community and Organization of Eastern Caribbean States).

The development of such supranational regimes raises interesting jurisdictional questions, particularly as not all states falling within these economic regions have recognised fully the authority of the supranational authority and continue to assert their own national jurisdiction in parallel (eg, Kenya). Equally, more jurisdictional questions are likely to arise in the future, given that some States enjoy membership of more than one supranational body with overlapping jurisdictional competence.[2] In the absence of such potential conflicts being resolved, the benefits of a 'one-stop-shop' system of regional merger review may prove to be illusory.

Evolution of existing regimes

The merger review landscape also continues to evolve in those jurisdictions with longer-standing merger control regimes. This evolution has seen two strongly divergent trends, namely: on the one hand, a narrowing of scope in certain jurisdictions in order to focus their resources more efficiently; versus a broadening of scope in other jurisdictions (intended to capture certain transactions deemed to have a disproportionate economic impact beyond traditional revenue-based threshold tests, especially in response to rapidly-developing technologies).

Thus, a number of regimes have raised their revenue-based thresholds (or otherwise loosened their rules) so as to reduce the number of deals triggering notifications, and to focus their resources on mergers that raise a realistic prospect of anti-competitive effects occurring within their jurisdiction. Significant examples of this trend include States such as Russia, which, in 2016, *inter alia*, increased by 40 per cent its thresholds regarding the target's global assets, and Ukraine, which abolished its market share threshold and

2 For example, Burundi, Kenya, Rwanda and Uganda are members of both COMESA and (as yet inactive) EAC.

increased significantly its revenue thresholds (that had previously been widely regarded as being unduly low).[3]

India has also introduced, and subsequently expanded, a *de minimis* exception that now exempts from notification requirements a large number of foreign-to-foreign deals with limited or no local effects. Hungary, Korea and South Africa have also significantly increased their revenue thresholds – in Korea's case by 50 per cent.[4]

On the other hand, a number of regimes have lowered their notification thresholds, or made other procedural changes, with a view to scrutinising more transactions. Most notably, Germany and Austria have both introduced a new – and somewhat controversial – threshold designed to catch high-value acquisitions of small target companies with a sufficient local nexus, which would otherwise fall beneath the merger review radar due to the target's low revenues.

Italy has lowered its individual local revenue threshold by 40 per cent, while Colombia has made an equivalent reduction to its turnover and asset thresholds (both of which are pinned to the national minimum wage level). Latvia has reduced its combined revenue thresholds by a small margin, while also introducing a low individual revenue threshold for both parties and abandoning its market share threshold test altogether. Chile has introduced thresholds based on revenues rather than on a market concentration (HHI) measure, and has moved from a voluntary filing regime to a mandatory pre-closing regime.

In sum, the charges are many and varied and the merger control landscape is subject to a significant state of flux. The phenomenon of 'Brexit' will also inevitably lead to an even greater state of flux, as the EU may ultimately be compelled to lower its existing European Economic Area (EEA)-wide revenue thresholds in order to take due account of the fact that such a significant Member State as the United Kingdom is leaving the EU.

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3 Note that Russia also extended its thresholds to cover joint ventures, and both Russia and Ukraine continue to take into account the revenues and assets of the seller's ultimate corporate group, which means that both regimes still take a very broad view of their own jurisdictional competence. Ukraine, for example, which implicitly recognised that its historical merger regime was arguably over-inclusive, signalled a moratorium in 2015, applicable until September 2016, in which it allowed amnesty to closed mergers that had not sought the requisite clearance.

4 However, Hungary simultaneously introduced a 'soft' threshold, which requires a notification to be made if the parties' Hungarian revenues exceed around US$16m, and if 'it is not obvious that the contemplated transaction would not significantly decrease competition in the relevant market'. The practical application of this soft threshold requires some clarification.

Initial concerns: filing requirements and strategic considerations

Before determining whether a particular transaction should trigger a clearance obligation, a number of fundamental issues regarding the characterisation of the transaction as a 'notifiable event' need to be addressed.

Notifiable transactions

A multi-jurisdictional merger control assessment must always begin with an analysis of the type of transaction in question in order to determine whether the nature of the deal is such that merger clearance is required. This is usually a straightforward exercise in the case of a merger or an acquisition.[5] However, it can be a significantly more complex issue, for example, in the case of a joint venture or in the case of an acquisition of a minority shareholding. The impact of certain types of financing arrangements, options, directorship appointments and contractual obligations also needs to be taken into account, as in some situations these can lead to notification requirements, while other merger regimes are *only* triggered if a material change in corporate identity is achieved within the jurisdiction in question (eg, jurisdictions such as Nigeria, Kenya and Zambia).

For example, some regimes (such as the US) adopt a very legalistic view of the types of transaction that trigger a notification – one that revolves around specific corporate structures and explicit contractual rights – while others (such as the EU and the many jurisdictions modelled on it) take a much more nuanced and fact-specific approach, which is based around the concept of a change in 'control'.[6]

The concept of 'control'

Under EU law, 'control' refers to the possibility of 'decisive influence' being exercised over an 'undertaking'. The concept of control essentially equates to whether a potential parent entity has the power to force or to block decisions in relation to key strategic matters such as annual budgets, business plans and substantial investments (eg, as opposed to day-to-day

5 That said, the technical nature of the deal may still need to be carefully analysed for the purposes of any notification: many deals that are publicly described as 'mergers' are in fact acquisitions. This distinction can affect the notification burden and the allocation of risk between the parties.

6 The EU merger control regime goes further, requiring a notification where the cumulative effect of a series of transactions (when conditioned upon each step taking place, and within a reasonable period of time) amounts to a change in control: Article 5 and Recital 20 of Council Regulation (EC) No 139/2004.

management operations). The line between strategy and management is at times difficult to draw in relation to certain types of business. The criterion of 'decisive influence' is clearly satisfied if outright legal control is obtained through the acquisition of all or a majority of an undertaking's shares. This test can also be met in less obvious circumstances, depending on factors such as the rights that are attached to the shares acquired, ancillary contractual rights, the ownership of assets and the rights to use them, rights to appoint and remove directors, and the extent to which one entity relies on another for its commercial throughput, supplies and sales.

Assessing whether one party is acquiring control over another in accordance with EU rules is therefore a highly case-specific issue, even though as a matter of general principle it is clear that a notification at EU level is only appropriate if there is an acquisition of sole or joint control, or if there is a change in the *quality* of control, between sole and joint control.

MINORITY STAKES

Some jurisdictions (including some EU Member States) go considerably further in their definition of notifiable concentrations that fall far short of the concept of 'control'. Figure 3 lists those merger control regimes that can assert jurisdiction over acquisitions that fall short of a relationship of 'control'.

Figure 3: Jurisdictions where notifications can be triggered by the acquisition of a non-controlling interest

Minimum qualifying acquisitions	
Any acquisition	Australia, USA
Material influence	Gambia, Kenya, Nigeria, UK*, Uruguay
Decisive influence (%)	China, India, Poland
0–10	Brazil, Chile, Kazakhstan, Oman
>10–25	Armenia, Austria, Azerbaijan, Belarus, Germany**, Israel, Japan, New Zealand, South Korea, Philippines, Russia, Tajikistan, Ukraine, New Zealand
>25–35	Canada, Taiwan, Uzbekistan

* Additional thresholds may apply

** Indicative percentage % (may be lower in practice)

The acquisition of a minority stake that does not confer control does not constitute a notifiable transaction at EU level. By contrast, four EU Member States require the notification of non-controlling stakes.[7] The UK, for example, establishes three levels of influence ('legal control', '*de facto* control' and 'material influence'). Any transaction that results in a change between these levels of influence is, in principle, notifiable, with material influence having been found to exist at shareholding levels as low as 10 to 15 per cent.

Other jurisdictions specify particular percentage shareholdings with respect to which merger clearance is required. For example, in Germany and Austria, acquisitions of as little as 25 per cent of the shares in a company will trigger a notification requirement. In Brazil, the threshold is set as low as five per cent, if other conditions are satisfied.

The issue of whether minority stakes should result in a merger filing has recently become a vexed question, largely because many industrial sectors are becoming increasingly concentrated. Some commentators question whether even minority shareholdings may raise genuine competition concerns where there are cross-shareholdings involved.[8]

Joint ventures

Additional complications apply in some jurisdictions with respect to the notifiability of joint ventures. While the assessment of 'control' outlined above typically applies equally to joint ventures as it does to sole acquisitions,[9] further issues need to be considered.

Most notably, in the EU (and hence, in the many jurisdictions modelled on the EU template), a joint venture is only notifiable if it is considered to be a 'full function' joint venture. In essence, this means that a joint venture is only notifiable if it performs on a lasting basis all the functions of an autonomous economic entity and is functionally independent of its parents. Hence, a joint venture that is only established to perform a specific activity or for a specific period of time is unlikely to require merger clearance. Similarly, a joint venture is unlikely to be notifiable if it is established in order to serve

7 On this basis, a transaction that does not trigger an EU notification may nevertheless be notifiable in certain EU Member States.

8 See European Commission, *Commission Staff Working Document: Towards more effective EU merger control*, 2014.

9 The key difference being that (at least within the EU) positive control need not be demonstrated in the case of joint ventures. Instead, control stems from the ability of one party to a joint venture to exercise negative veto rights over the critical strategic management decisions of the joint venture.

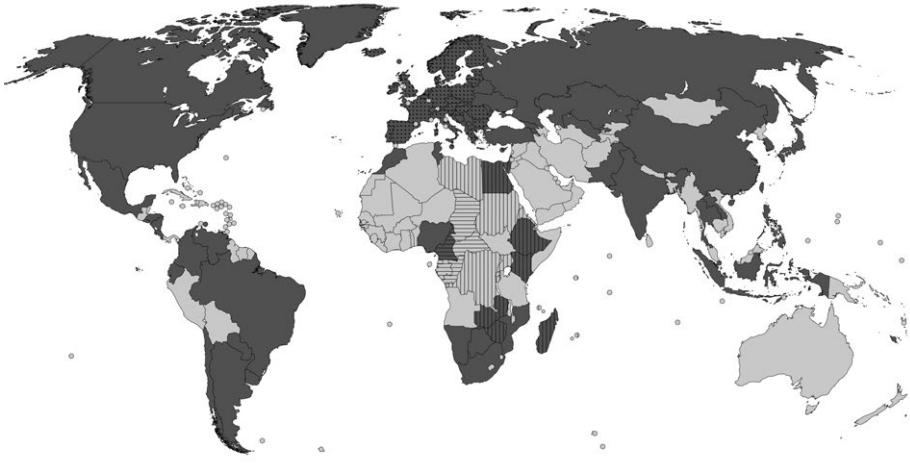
the needs of its parents, while having only a low proportion of throughput with other customers.[10]

Moreover, in some jurisdictions, both 'greenfield' joint ventures (ie, newly created entities) and 'brownfield' joint ventures (ie, pre-existing entities or business lines) may create notifiable concentration situations.[11] In other jurisdictions, such as Israel and Uzbekistan, for example, brownfield joint ventures are also likely to require merger clearance, whereas greenfield joint ventures do not.

Jurisdictional thresholds

The greatest discrepancy between merger regimes can be found in the triggering thresholds upon which they rely to determine whether or not the size of a transaction justifies a notification. While nearly all merger regimes have some form of revenue-based threshold, it is not uncommon for notification to be based on other triggering criteria deemed to measure the value or significance of a transaction (or a combination of these criteria).

Figure 4: Revenue thresholds



10 Note that a notification requirement can arise over time without a clear triggering event occurring, if a joint venture, which previously supplied only its parent entities, begins to devote a significant proportion of its output to supplying external customers.

11 The European courts have recently clarified that the full-functionality requirement applies equally to greenfield and brownfield joint ventures, see Case C-248/16 *Austria Asphalt v Bundeskartellanwalti*, ECLI:EU:C:2017:643.

Figure 5: Asset share thresholds

Figure 6: Market share test thresholds

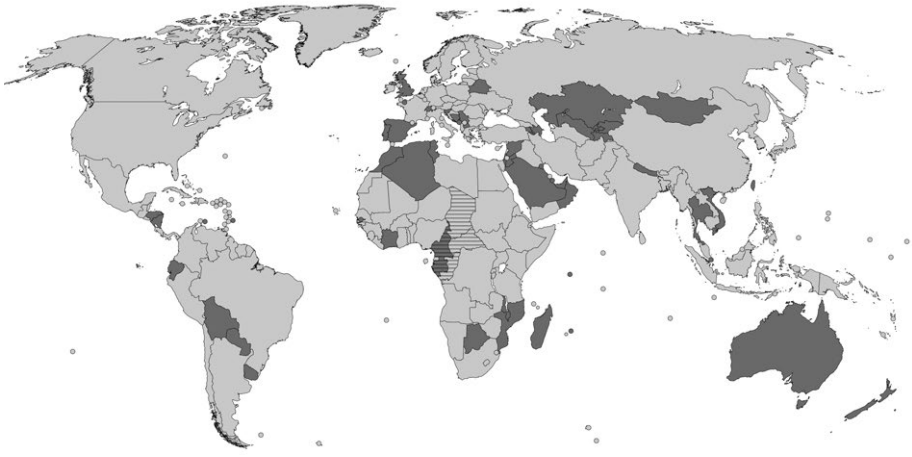


Figure 7: Effects, foreign-to-foreign, and local nexus jurisdictions

Revenues

A significant majority of merger control regimes base their notification thresholds on the *revenues* of the parties involved in the merger (see Figure 4). In most instances, the local revenues of the target entity are the most significant factor in determining whether a deal is to be notified. In a number of instances, however, the local revenues of the buyer are also taken into account while, under some regimes, even the global revenues of the parties may be relevant.[12]

While most regimes establish a revenue threshold based on absolute financial values, a number of regimes (particularly those in Latin America and Central Asia) link their revenue thresholds to other criteria such as multiples of the prevailing minimum wage. Other regimes (eg, Canada, Italy and US) apply an indexation mechanism to their revenue thresholds, which means that they periodically increase those thresholds without the need for the enactment of primary legislation.

Care needs to be taken, however, in terms of how 'revenues' are to be computed (in terms of which figures are relevant or to be excluded) and allocated as between jurisdictions. In certain industries, it is often difficult

12 In a handful of regimes (notably, Brazil, Russia, Ukraine and Philippines), the revenues of the seller of a target entity are also taken into account. The economic rationale of this approach is questionable, unless the seller is to retain a material interest in the target entity, or the merged entity, after completion of the transaction.

to determine if revenues are more appropriately allocated to where sales are logged, customers are located or goods are exchanged.

Some jurisdictions also specify separate revenue calculation criteria for particular industries,[13] or develop rules ad hoc to calculate revenues in certain industries.[14]

Assets

Many regimes also take into consideration the value of the *assets* of the parties being contributed to the transaction (see Figure 5). Again, it is principally the parties' assets located in the relevant jurisdiction in question that are taken into account; nevertheless, in some instances, worldwide values may also be relevant. Each merger regime has its own rules on matters such as what constitutes an 'asset' (including whether intangible assets count towards the total figure), the methodology to be used for the calculation of the asset value and on the relevant accounting measure (such as net book value) to be utilised in making any such calculation.[15]

Market shares

There are a number of merger regimes that base their notification thresholds on the relevant *market shares* of the parties, or on their *share of the supply* of goods or services affected by the transaction, in the relevant jurisdiction (see Figure 6).[16] These shares can range from 20 per cent in a jurisdiction such as Australia, through 25 per cent in Taiwan, to 50 per cent in Israel and the Ivory Coast. Some jurisdictions clearly specify that an incremental shift in market shares post-transaction is required to trigger a notification (ie, the threshold will not be triggered unless there is a horizontal overlap between the parties), while others explicitly state that the threshold can be satisfied by one party alone, or that no incremental change is required; other legal regimes unhelpfully remain silent on the point. The latter category tends to generate uncertainty

13 For example, special rules exist in the EU for the calculation of revenues associated with the insurance industry. See Article 5(3)(b) of Council Regulation (EC) No 139/2004.

14 Ireland, for example, endorses in its case practice a method of revenue calculation that is very *sui generis* in the online gambling sector.

15 As is the case with revenues, it is usually the assets of the buyer and the target entities that are relevant. However, in a handful of regimes (notably, Brazil, Russia, Ukraine and Philippines), the assets of the seller of a target entity are also taken into account.

16 The 'share of supply' test (used, eg, in the UK and Jersey) is a narrower test than a true market definition test, and is applied at the jurisdictional stage without prejudice to any conclusion that might eventually be reached on substantive market definition. It is designed to bring within its scope any deal in which the specified share might be reached under any plausible market segmentation.

in any multi-jurisdictional analysis, with merging parties ultimately having little option other than to take a commercial (as opposed to a legally definitive) view as to whether a notification is appropriate.[17] Moreover, a number of jurisdictions only require notification if the parties create or strengthen a position of dominance (eg, Qatar), or involve a company that has previously been found to hold a position of dominance (eg, Switzerland). Finally, certain jurisdictions have *sui generis* market share thresholds for specific, sensitive sectors of the economy (eg, Bolivia, Vietnam or Croatia).

Combined threshold tests

Many regimes rely on a combination of the above revenue, asset or market share measurements in establishing jurisdiction. Others take into account whether the parties have subsidiaries or other places of business in the jurisdiction in question (eg, Israel, Russia); whether there is a vertical link between the parties (eg, Colombia); or the value that can be attributed to the transaction locally (eg, Mexico). Some regimes even impose different thresholds depending on whether the transaction is horizontal, vertical or conglomerate in nature (eg, Armenia, Jersey).

Exemption to filing

Finally, a number of regimes specifically exempt deals that would otherwise trigger their notification thresholds if they do not have a sufficient 'local nexus' (see Figure 7). These exemptions can take the form of: specific exceptions for transactions between foreign companies, so-called 'foreign to foreign' deals that do not meet specific financial thresholds, such as the US and Korea; deals that do not have a direct impact upon an enterprise located within the jurisdiction (eg, Kenya); or deals that do not have any competitive effects within the jurisdiction.[18] This position stands in marked contrast to other jurisdictions such as the EU and China, where a transaction is subject to review as soon as

17 In certain industries, determining the scope of relevant antitrust 'markets' (as opposed to trading products or services) is a notoriously difficult task, especially since many administrative precedents do not take definitive positions as regards market definitions. In these circumstances, it is often the case that a definitive view on market shares cannot be made with any degree of legal certainty, or parties often have recourse to a 'scientific' test such as the application of a 'hypothetical monopolist' or small but significant non-transitory increase in prices (SSNIP) test.

18 The latter criteria are arguably met for purely horizontal deals where there is no active competitive overlap in the jurisdiction. In a jurisdiction such as Germany, the local merger test is satisfied relatively easily, eg, foreign-to-foreign mergers are caught if they have an 'appreciable effect' within Germany, with Germany's Federal Cartel Office applying this concept very broadly.

the formal revenue thresholds are triggered, and irrespective of whether the deal has any competitive effects within those respective jurisdictions.[19]

Timing and procedures

Once a mandatory filing requirement has been established, or a voluntary filing has been determined to be appropriate, a key element in coordinating a multi-jurisdictional transaction is the timing of the merger clearance by the competent competition authorities. These timelines vary greatly as between jurisdictions, depending on the time expected to be incurred in:

1. preparing the documentation for the required merger notifications (pre- or post-closing);
2. engaging in pre-notification discussions with various competition authorities;
3. the formal review process; and
4. the possibility of extensions of time in the review procedure, including developments that justify a 'stop-the-clock' situation.[20]

Given that most jurisdictions impose a suspension obligation on the parties until a clearance has been granted,[21] the coordination of filings across jurisdictions with varying timelines is vital to ensure the timely implementation of the transaction upon the necessary clearances having been obtained.

Preparing a filing

Pre- or post-closing filings

While merger control regimes in most jurisdictions require the parties to submit their merger filing before completing the transaction, some jurisdictions retain a post-closing review system. This includes, at the time of writing, jurisdictions such as Costa Rica, Indonesia and Paraguay. Argentina is currently in the process of transitioning from a post-closing to a pre-closing

19 This is frequently the situation in the EU and China in the case of private equity acquisitions or of joint ventures that are based and active only in third countries. However, in an attempt to mitigate the impact of this rule, both the EU and China offer a simplified notification procedure, which is usually available in such cases.

20 A 'stop-the-clock' situation is one where the authority in question can halt the review timetable if it holds insufficient information. This can result in a significantly lengthier review process. Under EU merger reviews, recourse to this mechanism is becoming more prevalent, as substantive competition issues become more complex.

21 One notable exemption is the UK, where there is no formal suspension power in Phase I. The Competition and Markets Authority (CMA), however, may impose injunctive measures where circumstances require such action.

regime. South Korea has a dual regime in place: larger notifiable transactions require pre-closing notification, while smaller notifiable transactions must be notified within 30 days of closing.

Mandatory or voluntary filings

While the majority of merger control regimes are mandatory in nature, some are voluntary, leaving it to the parties to assess whether it is appropriate to file their transaction for merger clearance (ie, in case of the creation or enforcement of a dominant position, the creation of a significant impediment to effective competition (SIEC) situation, or in the case of particular public interest concerns). These jurisdictions include highly active merger control regimes such as the UK, Australia, New Zealand and Singapore, as well as Venezuela, Mauritius and Panama. Determining whether or not a filing should be made in a voluntary filing jurisdiction is often made simpler by the issuance of guidelines by merger authorities regarding which situations are most likely to attract their scrutiny (eg, horizontal overlaps, particular market shares, etc), although it is not uncommon for the authorities in such jurisdictions to seek explanations from the parties as to why no notification has been made.[22]

Suspension obligations

Almost all (pre-closing) merger control regimes include a suspension obligation that requires parties to a transaction to suspend its implementation until the competition authority in question has reviewed and cleared the transaction. While some jurisdictions such as COMESA do not have an explicit suspensory obligation, parties that choose to implement the transaction before receiving clearance do so at their own risk. In other words, the risk would run in such circumstances that the competition authority might require remedies, or even that the transaction be unwound, where it identifies significant restrictions to competition that result from the transaction. The respective review timelines between the different merger control regimes can vary to a significant extent (see below). This fact, in combination with the suspension obligation, means that jurisdictions where the parties have (relatively) limited activities could in theory delay the implementation of a global transaction. In this regard, a 'carve out' is typically considered by the parties, whereby they implement the transaction everywhere other than in the jurisdiction where the merger clearance remains pending. However, this

22 For example, in the UK, refer to the OFT's *Merger assessment guidelines*, September 2010 or the CMA's *Guidance on changes to the jurisdictional thresholds for UK merger control*, June 2018.

option – which is not available to the parties in many jurisdictions – should generally be effected with full disclosure to the competition authorities in question, in order to avoid potential gun-jumping sanctions.

Deadlines

Another important feature that should be taken into account in the preparatory stage of a global merger filing strategy is that several jurisdictions have legal filing deadlines that start to run from the signing of the merger agreement, or some other triggering event (see Figure 8).[23] Several post-closing regimes also specify a legal filing deadline within a certain number of (working) days from closing (see Figure 9). While the number of jurisdictions that impose a legal filing deadline is relatively limited, where relevant, the impact of such deadlines on the process, preparations and coordination of filings across multiple jurisdictions can be significant. This is particularly the case for jurisdictions such as Serbia and Montenegro, where in theory only one party's activities could trigger the filing threshold without the other party even being present on the national market. As such, the range of potential competition filings should be identified as early as possible in the merger negotiation process, in order that the required documentation and data can already be collected prior to the signing of the merger agreement for those jurisdictions that have tighter filing deadlines.

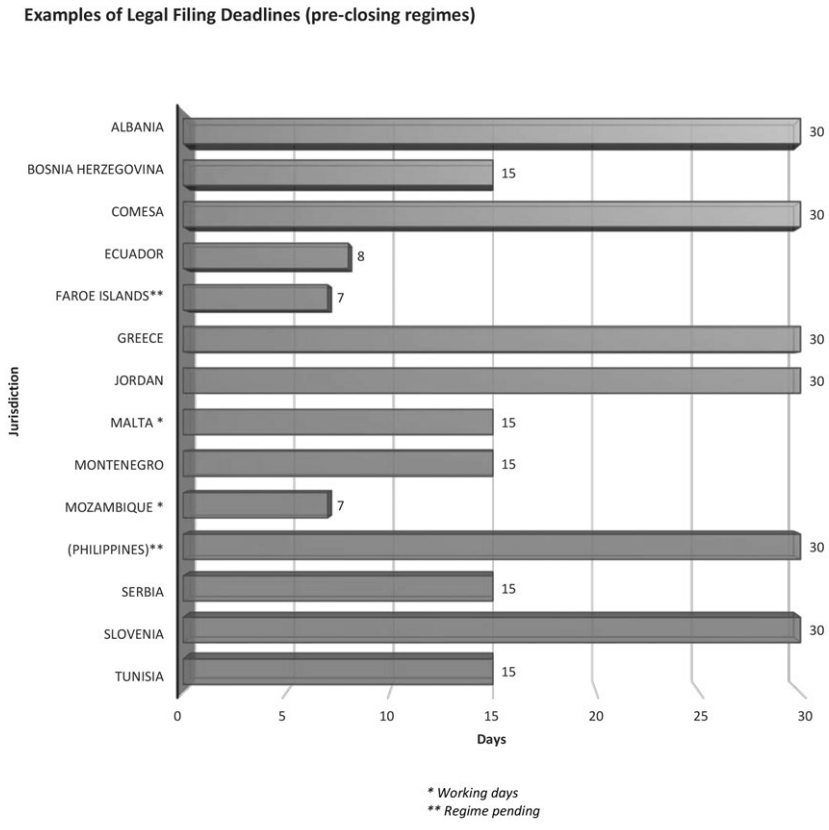
On the other hand, most jurisdictions are moving away from the concept of a legally binding filing deadline, preferring to rely simply on the requirement that the parties file at a point in time of their choosing prior to any closing (eg, in the EU and the EU Member States). In 2017, India adopted a new rule that *de facto* removed its former mandatory filing deadline for transactions, irrespective of the industry in which they occur.

Such tight deadlines can cause practical difficulties, leading to potential analytical conflicts, in large deals with cross-border implications. For example, the practice of the Ministry of Commerce of the People's Republic of China (MOFCOM), until very recently, required the notifying parties to state clear positions on market definition issues at the earliest pre-notification stage. This had meant that notifying parties were reluctant to commence the notification procedure too early in China, at least until the scope of relevant market had been defined clearly on a global scale – a strategy that could have been jeopardised if early notification was required due to

23 Many jurisdictions, including the EU, allow the merging parties to notify even though their formal legal agreement has yet to be finalized. In such cases, notification can be triggered by even a Memorandum of Understanding (MoU), at least insofar as the MoU is sufficiently detailed, precise and likely to result in some form of legal obligation or penalty if not ultimately concluded by the parties.

notification deadlines in other relevant jurisdictions.[24] Finally, interactions with the European Commission increasingly suggest that the instinctive habit of filing a global deal quickly in the US to obtain early clearance is frowned upon where there are perceived to be serious competition law issues arising in relation to the same transaction in European markets.

Figure 8: Pre-closing regimes with filing deadlines



24 This is despite the fact that the longevity of the Chinese notification process is such as to otherwise require that it commence as soon as possible if an expeditious closing is paramount in the minds of the parties. This approach can be contrasted with many other jurisdictions, notably the EU, which do not feel compelled to commit themselves to any particular market definitions when granting clearing to a deal at least when it is clear that such a definitive position on market definition would be immaterial to its finding that the merger is not likely to create a 'SIEC' situation.

Figure 9: Post-closing regimes with filing deadlines

Documentation

Many jurisdictions require the parties to a transaction to submit a range of internal documentation.[25] This includes corporate documents of each party (eg, annual reports, certificates of incorporation, powers of attorney), and may also include internal documents relating to the specific transaction being notified and the relevant markets affected by the transaction (including board presentations, market studies, etc, specific to the notifiable transaction).

In the EU and the UK, there is an increasing emphasis on the assessment by the reviewing competition authority of the internal documents submitted in the context of a merger filing and a detailed analysis of presentations, internal communications relating to the transaction, as well as to market studies or reports. While such documents will typically support the argumentation of the parties, inconsistent or contradictory information in such documents can delay or harm the clearance of the transaction. It is therefore important for the parties to take due consideration, from the earliest stages of analysing M&A opportunities, through negotiations, to the signing of the merger agreement and the implementation of the transaction, of the fact that such documents are highly likely to be reviewed by competition authorities and

25 For a detailed analysis of recent developments in the disclosure of internal documents, refer to Johnson et a., "The stories merger documents tell – the US, EU, Asia, Brazil and South Africa perspectives", (2018) European Competition Law Review, Vol. 39, Issue 4

might raise questions that will then be required to be clarified, or that might even raise serious competition concerns.[26]

Some jurisdictions (notably, Russia, Ukraine, Colombia, Mexico, China, Macedonia, as well as Argentina and Costa Rica) have document-intense filing requirements that require the parties to submit a range of corporate documentation that is not directly relevant to a competition analysis. Further, the documents may be required to be submitted in a notarised and apostilled format, and/or accompanied with certified translations. This may include the merger agreement, the articles of incorporation and the bylaws, the (latest) annual report or balance sheet, a power of attorney, company or trade register extracts, etc. Given the time expected to collect such documentation, obtain the necessary notarisations and apostilles, translations and so forth, such work streams should be taken into account as early as possible in the filing preparation process. This factor is also important in determining when to initiate contact with the relevant competition authorities and assessing the time likely to be required to receive clearance (and thus the duration of the suspension obligation). It is also particularly important to take due account of the time required to collect and prepare the required documents for jurisdictions that have a strict filing deadline.

Misleading information

Merger authorities are increasingly reminding notifying parties of the degree of diligence that is required of them in bringing together notifications. In recent years, the European Commission has opened several infringement proceedings against parties to a transaction where it had concerns that the parties had provided incorrect or misleading information, in breach of their obligations under the EU Merger Regulation. Under that legislation, fines of up to one per cent of the parties' combined turnover can be imposed for intentionally or negligently providing incorrect or misleading information to the Commission in the context of a merger notification.

In 2014, discrepancies between market share estimates provided in the merger notification and pre-existing internal documentation led to the Commission opening an infringement investigation into Munksjö/Ahlstom, after the merger had been cleared. The Commission sent the parties a formal Statement of Objections in February 2014 raising concerns that they had provided misleading information in their merger filing. Following their

26 Recent examples where internal documentation played a very material role in the European Commission's Decision can be seen in the cases of Dow/DuPont, M.7932, at paragraph 81, and Hutchison 3G/Wind, M.7758, at paragraph 243 ff; and at UK level in Case ME/6659-16 *Just Eat / Hungryhouse*, 16 November 2017.

responses to the statement of objections, which contained 'contemporaneous evidence explaining the discrepancies', the Commission was satisfied that the notifying parties had not provided incorrect or misleading information in this instance.[27]

Further, in May 2017, the European Commission imposed a €110m fine on Facebook for providing incorrect or misleading information in the context of its 2014 acquisition of WhatsApp. In its decision, the Commission concluded that the company had provided incorrect or misleading information in its 2014 merger review as to the technical possibilities that already existed at that time regarding the availability of an automated matching between Facebook and WhatsApp accounts. This was allegedly contrary to the parties' statements in their notification and their responses to the Commission's requests for information. Facebook's cooperation with the Commission in the infringement proceedings served as an important mitigating circumstance in the Commission's calculation of the fine. Moreover, the Commission decision did not affect its original merger clearance decision.

Pre-notification discussions

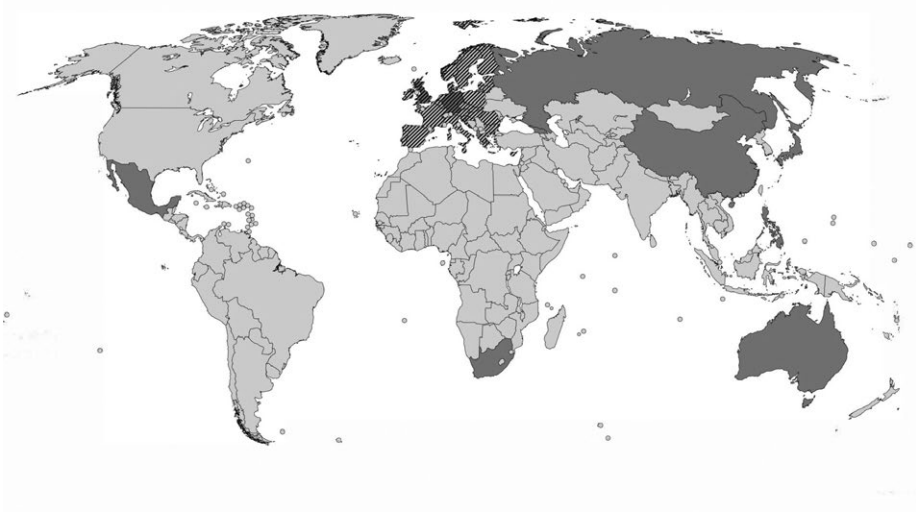
With respect to those jurisdictions without a legal filing deadline, the precise point in time at which communications with the competition authorities should commence (either in the form of pre-notification talks or through the submission of a formal filing) is often difficult to determine.

Some jurisdictions *require* pre-notification discussions with the authority and the submission of at least one draft filing form before accepting that a formal filing has been accepted as 'complete', so as to commence the formal review period. Others merely *encourage* the parties to engage in pre-notification discussions to avoid the risk of an incomplete filing. Among these jurisdictions are the EU, the UK, Germany and other EU Member States, Albania, Australia, China, Georgia, Guernsey, Japan, Mexico, Philippines, Russia and South Africa. There are no statutory periods for the pre-notification phase, as the discussions and additional information identified by the competition authority in question to complete a filing will depend on the specific facts of the transaction, the relevant markets identified and the parties' activities in the jurisdiction concerned. In some jurisdictions such as the EU and some of its Member States, the pre-notification phase of a standard transaction that qualifies for a Phase I review would typically take two-to-four weeks, depending on the information and market share data available. In other jurisdictions such as China, even a simple transaction can

27 Case COMP/M.7191 *Munksjö/Ahlstrom* (Recital 14.1).

result in a significantly lengthier pre-notification phase; in more complex transactions, the pre-notification phase of an EU filing has been known to take many months.

Figure 10: Prescribed, recommended or possible pre-notification and/ or submission of draft filings in key jurisdictions (additional jurisdictions may have similar local practices)



Formal filing and review

Submission of notifications

Where a competent competition authority considers a filing to be incomplete, it will inform the notifying parties and require that additional information or documentation be submitted. This reinforces the importance of the pre-notification discussions in those jurisdictions where this procedure is available, as it reduces the likelihood of a filing being declared to be incomplete. The clock for the substantive review of the filing will only start ticking once filing is deemed to be complete. In some jurisdictions, such as Bulgaria, Colombia, Costa Rica and Denmark , the competition authority will issue an interim decision or notice within a specified timeframe as to whether or not the filing is complete. In other jurisdictions, such as the EU, China or Russia, there is no formal decision declaring the filing to be complete, but the competition authority in question will indicate by some appropriate means in the pre-notification phase, or informally after a formal filing has occurred, whether it considers the filing to be complete.

In certain jurisdictions, the verification of whether a filing is complete can take some time (eg, Albania, Bosnia – where a two-month period is not uncommon – China, Colombia, Serbia). A complete filing will also often include the need for payment of a filing fee.[28]

Review timeline

Once the merger review clock starts ticking, the suspensory review period during which the competition authority analyses the impact of the transaction on the relevant markets can vary greatly between jurisdictions. For those unproblematic transactions, which qualify for a so-called 'Phase I' review without remedies, the majority of merger control regimes have statutory review periods of around one calendar month. There are also many jurisdictions that have review periods in the range of two-to-six months. In this respect, Brazil and China are 'outliers', with their review periods often lasting around six months.

Although the statutory review periods are typically rather limited, almost all jurisdictions have one or more 'stop-the-clock' mechanisms. For example, many merger control regimes stop the review clock when the competition authority in question issues a request for information or additional documentation and/or extends the review period once the parties have submitted the requested information. In some jurisdictions (eg, Turkey), the clock will start anew only once the requested information has been submitted. As such, it is important to coordinate filings and the collection of documents and data before the formal filing of notifications, and to ensure that the filing is as complete as possible, consistent with other filings, in order to align with the anticipated review deadlines in those other jurisdictions.

The relevant competition authority will also in many instances request that the notifying parties inform it of the other jurisdictions where the transaction is being notified. For transactions raising potentially significant competition issues, competition authorities may request waivers from the notifying parties regarding the confidentiality of their notification in order engage in dialogue with their counterparts in other jurisdictions, and to be able to request additional information or documents based on those discussions.

For relatively small or simple transactions, a fast-track procedure may be available, depending on the jurisdiction involved. This procedure is generally available where the parties' activities have no or limited overlaps or vertical links, and/or where their market shares are modest. Many jurisdictions apply a threshold of a combined market share of 20 per cent for horizontal overlaps

28 This can be relatively modest, or even free, in some jurisdictions (including the EU), but US$200,000 in COMESAor up to £160,000 (approximately US$215,000) in the UK.

or 30 per cent for vertical links to determine eligibility for their fast-track procedure. The review period under a fast-track procedure typically ranges between 15 and 30 working days. Further, the competition authority's decision is typically much abbreviated as compared with a standard 'Phase I' decision.

Procedural changes

Procedural aspects of merger control can also have an impact on the success of a transaction, given the importance of the suspension obligation, the scope of the document collection exercise, the length of the review period, and the potential avenues for the extension of that review period.

Several merger control regimes have undergone significant procedural changes in the past few years. In Australia, the Competition and Consumer Act was amended in October 2017 (the so-called 'Harper' amendments), which included major changes to the merger control procedures. Whereas there were until recently three different types of merger clearance procedures, the amendments have combined the 'formal' clearance procedure (which had never been used) before the Australian Competition and Consumer Commission (ACCC), and the 'merger authorisation' process before the Competition Tribunal, into a single 'authorisation' process. As such, the ACCC now reviews all mergers at first instance (either through the previous 'informal' process or through the 'authorisation' process), with the resulting decisions being reviewable by the Competition Tribunal.

In Argentina, a new Antitrust Law was passed in May 2018, and introduces a mandatory, pre-closing regime with new thresholds, timeframe amendments, an increase in maximum fines, as well as a fast-track procedure for simple transactions. In 2017, the South Korean jurisdictional thresholds were amended insofar as: 1. the two thresholds under the 'size of parties' rule increased for both notifying parties; and 2. the threshold under the 'local nexus' test also increased. New legislation introduced in 2016 in the Netherlands increased the maximum fines applicable for infringements of the Competition Act, including the failure to file a merger, gun jumping and for the provision of incorrect or incomplete information. Maximum fines are now set at the higher end of €900,000 or ten per cent of annual turnover. In Singapore, the Competition Commission adopted new guidelines in 2016 regarding the procedural framework for, and the substantive assessment of, mergers; guidelines regarding the 'appropriate amount of penalty' also introduced amendments to the method of calculating the relevant turnover of an undertaking.

Several other jurisdictions also have draft legislation pending that would introduce significant changes to their respective merger control regimes. For

example, there are currently jurisdictions with proposals pending to overhaul their competition laws to move away from a post-closing merger control regime and introducing a mandatory pre-closing merger control regime. In Indonesia, draft legislation would amend the Competition Law and, among others, change the merger control regime to a mandatory pre-closing review system with new thresholds aimed also at capturing asset-based transactions. The draft legislation was approved by Parliament in April 2017 and the government has created a special task force to assess the draft amendments.[29]

Similarly, in 2017, the Competition Commission of Serbia announced that work was under way to draft a new Competition Law to replace the 2009 Competition Law (as amended in 2013), which includes changes to the merger control regime to bring it more in line with the EU rules. To this end, the Competition Commission is preparing the first draft of the new Law in cooperation with the Ministry of Trade, Tourism & Telecommunications.[30]

In smaller jurisdictions such as Jersey and Guernsey, the competition and regulatory authorities (which operate under the combined name of the Channel Islands Competition & Regulatory Authorities or CICRA) are to be the subject of common merger control review rules applying across the Channel Islands. Finally, in Luxembourg, an advisory group to the Competition Council issued its advice in October 2016 on the introduction of a voluntary merger control regime. To date, no legislative proposals have been introduced to this effect.[31]

Other considerations

In some jurisdictions, and particularly in some specific cases, broader (ie, non-competition-based) policy considerations need to be taken into account as part of the formal merger control or foreign investment process; in others, non-competition law considerations will inevitably influence decision-making more obliquely and behind-the-scenes. Those considerations that occupy a formal place in review proceedings are considered below.

Sector-specific regimes

As noted above, several jurisdictions have merger control regimes that only apply in specific sectors. Several other regimes have specific derogations from

29 Commission for the Supervision of Business Competition (KPPU), *The Parliament finished drafting its new competition law*, 29 April 2017.

30 Available at https://emerging-europe.com/in-brief/serbia-drafts-new-competition-law.

31 Refer to Conseil de la concurrence, *Contrôle des concentrations, Raport du groupe de travail institué par le Conseil de la concurrence*, October 2016.

their standard rules for the review of mergers in industries that are identified as being of particular economic or social importance. Typical sectors that may be subject to specific rules and regulations include finance, media, telecommunications, energy, natural resources, utilities and defence. Other less common derogations include retail, food, pharmaceuticals and healthcare.

These rules may manifest themselves in a number of ways. Some jurisdictions apply differentiated thresholds or different methods of revenue calculation in particular industries, in order to bring important deals within the scope of their merger review powers. Other jurisdictions define the concept of a notifiable merger more widely in specific sectors, by lowering the percentage threshold at which an acquisition requires clearance, or otherwise increasing the national regulator's powers of intervention.[32]

In turn, some merger regimes apply tailored substantive tests in specific sectors, which can be more onerous than the rules applied more generally.[33] Other regimes carve out merger review powers from their competition authority's remit in particular sectors and instead confer jurisdiction upon the sector-specific regulator.[34]

It is also commonplace that sector-specific authorisations are required in addition to competition approval, especially where an operator holds a right *in personam*. Thus, mergers occurring in sectors where operators are required to hold individual licences typically require the relevant national regulator to approve a change in control of the licensee (eg, airlines, banking, electricity, gas, media, telecommunications and water).

Sector-specific concerns can also interact with supranational merger regimes. Most notably, the EU one-stop-shop merger regime allows for national authorities to intervene on public interest grounds in strictly limited circumstances: namely, those of public security, the plurality of the media and 'prudential' rules.[35] This process allows EU Member States to intervene on non-competition grounds in those limited circumstances in relation to any merger that has been notified to the European Commission for supranational

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32 For example, Bahrain, which requires transactions in the telecommunications sector to be notified if they involve a change of control over the licensee on a lasting basis, or Peru, where undertakings in the electricity sector are required to notify if the combined market share is at least 15 per cent on a horizontal basis, or five per cent on a vertical basis.

33 For example, Chile, where the notifying parties need to obtain special consent for acquisitions in the banking sector where more than ten per cent of the bank's capital is involved (50 per cent for acquisitions in the water sector) or the Netherlands, in which undertakings active in the healthcare sector must notify if at least two of them have achieved turnover of €5.5m or more and a global turnover exceeding €55m.

34 For example, in a jurisdiction such as Greece, mergers in the telecommunications sector are addressed by the sector-specific regulator, the EETT, rather than the Hellenic Competition Commission.

35 Refer to Article 21 of the EU Merger Regulation Council Regulation No 139/2004.

review. In such cases, the European Commission retains full jurisdiction over the competition aspects of the merger review, while the competent authority at Member State level reviews the non-competition aspects of the deal.[36]

Foreign direct investment ('FDI') rules

Aside from competition concerns, many jurisdictions regulate the extent and nature of foreign investment into their territory. This is a field in which political implications are likely to carry more weight than in pure competition reviews.

The list of jurisdictions with sector-specific foreign investment rules is lengthy.[37] Some jurisdictions focus on one or two strategic sectors only, such as real estate, media and defence. Others monitor a broad range of sectors, such as banking and finance, telecommunications, gambling, defence and energy. Some single out the acquisition of shareholdings of local companies for notification, while others are more concerned with scrutinising investment by foreign state-controlled entities.

In China, all foreign investment is subject to discretionary approval, with some sectors requiring additional regulatory approvals and others being restricted for, or entirely closed to, foreign owners.

Jurisdictions such as Australia and Canada, for example, have particularly wide-ranging and onerous legislation on foreign investment, requiring all foreign purchasers of specified stakes in national companies, irrespective of the economic sector, to obtain prior approval from the national investment regulator.

Certain jurisdictions have the power to intervene when foreign investments are being made in specific sectors. Russia, in particular, maintains and enforces an extensive list of industries in which foreign investment must be pre-approved by the relevant state department, such as nuclear and radioactive materials, aviation and space, oil and gas, minerals, coding and cryptographic equipment, mass media and telecommunications.[38] India also takes a particular interest in foreign investment, by capping overseas shareholdings in strategic sectors such as pharmaceuticals, airports and airlines, broadcasting and private security.

At EU level, one notable foreign direct investment restriction that is in place explicitly relates to acquisitions by non-EU companies of interests in EU energy

36 See, eg, Case *E.ON/Endesa*, COMP/M.4110, Case *Unicredito/HVB*, COMP/M.3894.

37 The list includes merger regimes as diverse as Bangladesh, Bolivia, Bulgaria, Estonia, Finland, France, Germany, Israel, Japan, Kazakhstan, Kenya, Korea, Mongolia, Panama, Saudi Arabia, Turkey and Uzbekistan.

38 The review may be conducted under the auspices of the national competition authority.

companies.[39] The exercise of this power has already led to the abandonment of one large merger in the energy sector.[40] In 2017, the European Commission issued a proposal to establish a framework for the review of foreign direct investment into the European Union. The consultation is ongoing, but could significantly change the face of merger review in Europe if ultimately adopted.[41] In the meantime, the European Commission arguably retains a degree of 'soft' power in a foreign direct investment situation. For example, it has been known to take a broad view of its own jurisdiction in certain cases that have an impact on very sensitive sectors.[42]

There are a number of other non-competition law considerations that can have a material effect on the outcome of a merger review, ranging from the positive discrimination requirements set forth under South African merger rules, to the sweeping 'public interest' considerations in the UK merger regime.[43]

COMPETING MERGER REVIEW FORA

A further peculiarity of the EU regime is the possibility for jurisdiction over merger reviews to be reassigned between the Member States and the European Commission. This shift in the allocation of jurisdiction can occur at various stages in the notification process, sometimes at the request of the notifying parties and sometimes at the initiative of the Member State authorities concerned.

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39 Arts 11 of Directive 2009/72/EC and 2009/73/EC concerning common rules for the internal market in electricity and natural gas respectively. The newest proposal on FDIs, Proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, also maintains in Article 3 that Member States may maintain, amend or adopt mechanisms to screen FDIs on the grounds of security or public order.

40 Refer to M.7095 *SOCAR/DESFA*, 2014.

41 The review is being conducted under the auspices of the Commission's Directorate General for Trade, as opposed to the Directorate General for Competition. Refer to European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions Welcoming Foreign Direct Investment while protecting essential interests, COM(2017) 494 final.

42 In Case M.7850 *Electricité de France (EDF)/China General Nuclear Power*, the Commission defined very broadly the corporate group of the Chinese state-owned enterprise that was proposing to acquire joint control with EDF over three holding companies, incorporated specifically for the purpose of investing into newly built nuclear power plants in the United Kingdom. Based on this approach towards the characterisation of the corporate group, the revenues of the parties were found to be sufficiently high to trigger the jurisdiction of the EU.

43 In South Africa, refer to paragraph 6, *Guidelines for the Assessment of Public Interest Provisions in Mergers*, 2016. In the UK, refer to ss 42 and 43 of the Enterprise Act 2002.

Before a formal notification is made, a notifying party can request that a deal which does not trigger an EU merger notification but which meets the notification requirements of at least three Member States, be referred to the European Commission, with the consent of the Member State Authorities concerned. Conversely, a deal that triggers EU jurisdiction, but has a particular impact on the conditions of competition within a Member State, can be referred to the national authority of that Member State (in whole or in part), again at the request of the parties and with the consent of the competition relevant authorities. Equally, after a formal notification has been made, a notified Member State can request that the European Commission assert its jurisdiction over the case if it has sufficient cross-border impact; and *vice versa*. The European Commission always retains a degree of discretion regarding its treatment of any referral request, although its reasons for assuming or denying jurisdiction are always reasoned.[44]

While the referral process often has certain procedural benefits for those who seek to take advantage of it, it can also raise certain strategic issues. On the one hand, a deal that is particularly important to the economy of a particular Member State or Member States (such as in the defence sector) might be given a slightly smoother ride at Member State level than at EU level. Conversely, a deal that is highly sensitive in particular jurisdictions (as in the energy, healthcare, gambling or media sectors) might find itself less buffeted by political winds if reviewed at a supranational level,[45] where a less politicised environment prevails. Obtaining access to the most appropriate forum for review can therefore be an important element to the success of a deal – or at least securing its smoother passage.

Role of interveners

A further element to consider in the preparation of any merger clearance procedure is the involvement of third parties. Many jurisdictions, including for example, the EU and the UK, conduct formal consultations with a variety of stakeholders during the course of a merger review. Once a deal has been officially notified, it is announced to the market, and any third party has the right to submit comments to the reviewing competition authority. This allows customers, suppliers and competitors to voice their views about the competitive implications of the notified deal.

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44 Refer to *Commission Notice on Case Referral in Respect of Concentrations*, 2005/C 56/02).

45 For example, under the national competition authority's 'public interest' intervention powers in the UK, a major merger in the media sector was scrutinised – and ultimately abandoned – despite having received merger clearance under the EU Merger Regulation on competition law grounds alone. See COMP/M.5932, *NewsCorp/BSKYB*.

In many cases, these opinions may be neutral or even positive (including those from competitors who may wish to engage in similar concentrations themselves), but in others they may be highly critical of the notified deal. Particular weight is attached to the negative comments lodged by customers and consumers.

It is not uncommon for interveners' comments to shape the course of the more complex merger reviews. In some cases, third party opposition from unexpected quarters has derailed notifications completely, resulting in prohibition decisions. Merging parties in potentially controversial cases are therefore well advised not only to prepare their own positive arguments in favour of the deal, but also to identify and buttress potential points of challenge. This is particularly true in the case of less obvious areas of competition concern such as mergers dominated by vertical and conglomerate concerns. These types of mergers, while rarely leading to a veto decision, nevertheless often require a disproportionate amount of time for the notifying parties to master the relevant economic evidence necessary to rebut any anti-competitive allegations.[46]

In all but the most simple of cases, the competition authority is likely to test the notifying parties' submissions on matters such as market definition, market size and shares, and the competitive effects of the proposed deal. Equally, in the case of a complex deal that is likely to be cleared only subject to conditions, the parties' remedies proposals will typically be subject to a 'market test'. At EU level, should the case reach the stage of an oral hearing, interested third parties will usually be given the opportunity to attend and make representations in front of the full decision-making hierarchy of the European Commission.

There is also the possibility that third parties (who are either not invited to comment, or who wish to involve themselves in proceedings before the formal comment phase is opened) will make informal submissions to the European Commission of their own volition. In particularly complex and/or controversial cases, this can even begin in the pre-notification phase, once the deal has been publicly announced.

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46 A notable recent example of a high-profile 'vertical' merger conducted of the DOJ's unsuccessful attempt to veto the proposed AT&T/Time Warner merger, which did not withstand an appeal to the courts: see *United States of America v AT&T Inc, et al*, Civil Case No 17-2511, July 2018. The most notable instance of a controversial merger prohibition that raised 'conglomerate effects' issues was that of *GE/Honeywell* (COMP/M.2220), which withstood legal challenge on appeal (Cases T-209/01 and T-210/01).

Substantive considerations

Based on statistics from the European Commission, widely regarded as one of the more interventionist of competition authorities around the world, less than five per cent of transactions raise the sort of competition concerns that justify an extended period of review, with the vast majority of those involved in a lengthy review resulting in clearance, following the extraction of detailed remedies from the notifying parties.[47] . The number of transactions either abandoned or blocked because of serious competition law concerns is far less than one per cent. In those more complex instances of merger review, however, a number of substantive concerns arise that compel the notifying parties to bring together compelling economic evidence to rebut various theories of harm alleged to result from the notified merger, or at least to allow meaningful remedies to be crafted to address those various theories of harm. The most controversial and complex of these issues that have arisen recently at EU level are discussed below.

Innovation competition

In recent times, the European Commission has concluded on a number of occasions that innovation is a key parameter of competition that needs to be taken into account in merger control analysis. The theory of harm revolves around the idea that reduced competitive constraints will lead to consumer harm as a result of fewer innovative products being introduced in the longer term.

A recent example of innovation-related competition analysis is Case M.7932 *Dow/DuPont*, regarding crop protection products. Innovation was found to be a key parameter in this industry, and the merging parties were found to constitute two out of a total of five global players active in all stages of the product lifecycle. The case was cleared in Phase II after the parties proposed a comprehensive remedy package that sought to ensure sustained innovation in the sector, by enabling the creation of another global vertically integrated R&D company. In addition to removing the direct horizontal overlap by divesting the relevant DuPont pesticide business, DuPont divested its entire global R&D organisation.

Several other merger cases have dealt with concerns about innovation, including Case M.7275 *Novartis/GlaxoSmithKline* in the pharmaceutical sector (concerns about the reduction in the development of innovative drugs), and

47 Frequently, such remedies are arguably disproportionately wide-reaching in cases where the parties seek early clearance.

Case T-175/12 *Deutsche Börse AG v European Commission*,[48] where the General Court upheld the European Commission's decision that the merger would diminish the incentives of Deutsche Börse and NYSE Euronext to innovate in financial products, since their merger would lead to a near monopoly for European financial derivatives traded on exchanges (resulting in a prohibition of the merger).[49]

The application of the 'SIEC' test to 'gap' cases

The 'SIEC' test was established in the EU in 2004 through amendments to the EU Merger Regulation, after the identification of an enforcement 'gap' between the traditional pillars of single firm dominance, on the one hand, and collective dominance, on the other. The new concept was designed to cover non-coordinated effects, in addition to coordinated effects and single firm dominance. The European Commission's objective in recasting the substantive test of review (which was previously based on the creation or reinforcement of a 'dominant position') was to shift from an approach based on a narrow range of structural criteria to one that was more sensitive to the likely effects of a merger on the affected market more widely, thereby also plugging any enforcement gaps.

As early as 2006, the European Commission required remedies in the T-Mobile/tele.ring merger (Case M.3916), a so-called '5-to-4 merger', as a result of the anticipated non-coordinated effects in an oligopolistic market for mobile telecommunications services, despite the fact that the merged entity would not become the market leader post-merger. This was treated as a 'gap' case that could be covered by merger control rules after the 2004 legislative amendment. The importance of 'gap' cases is particularly problematic in the telecommunications sector, which is prone to oligopoly in infrastructure-based markets. In this sector, the Commission has made findings of non-coordinated effects (which has accordingly required remedies from the merging parties) in a number of cases such as *Hutchison 3G Austria/Orange Austria*, *Hutchison 3G UK/Telefonica Ireland, Telefonica Deutschland/E-Plus* (2014) and *Hutchison 3G Italy/Wind,* all of which were ultimately resolved by sweeping remedies.[50]

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48 EU:T:2015:148.

49 See also Case COMP/M.6314 *Telefonica UK/Vodafone UK/Everything Everywhere Joint Venture*, where a joint venture concerned a specific secure 'mobile wallet' payment system for the UK, which was to be established jointly by three out of four UK mobile network operators (which received unconditional clearance, but only after a lengthy Phase II review).

50 Case M.6497, Case M.6992, Case M.7018, Case M.7758 respectively.

Online platforms

The European Commission has also had the opportunity recently to develop policy towards online platforms in a series of individual merger decisions, involving *Facebook/WhatsApp*, *Google/Double Click*, *Microsoft/Skype* and *Microsoft/LinkedIn*.[51]

In *Facebook/WhatsApp*,[52] the merger broadly raised horizontal overlap issues at least on an EEA-wide basis (if not worldwide) in relation to consumer communications services applications for smartphones, online advertising and social networking services. In that case, the European Commission concluded that the merging parties were not direct (or 'close') competitors across their various product lines. Short innovation cycles, the ease with which apps could be developed and the use by customers of multiple apps simultaneously (with the possibility of switching between them) meant that network effects posed no significant competition concerns in the circumstances.

In *Google/DoubleClick*,[53] the Commission concluded that the merger was unlikely to have any negative impact on consumers in the relevant markets for ad intermediation and ad serving solutions. It would have been unlikely that, as a result of the merger, Google's AdSense would be able to increase its traffic in such a way as to 'tip' the market in its favour in a way that would foreclose rivals in the ad intermediation service and lead to increased prices.

In *Microsoft/Skype*,[54] the acquisition of Skype by Microsoft was seen to affect two distinct EEA-wide (and possibly global) markets, for: 1. consumer communications services; and 2. enterprise communications services; both of which could be further segmented into instant messaging, voice calls and video calls. The Commission concluded that the assessment of market power in the online world emphasises that market shares, even if extremely high, might be no more than 'ephemeral', given the short innovation cycles that characterise the sector. Opportunity for consumers to switch providers was critical in the circumstances, there being no need to question whether customers would *actually* switch providers.

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51 For a more detailed discussion, refer to Peter Alexiadis, '*Forging a European Competition Policy Response to Online Platforms*' (2017) 18 Business Law International 91.

52 Commission decision of 3 October 2014 in Case Comp/M.7217, *Facebook/WhatsApp*, C(2014) 7239 final.

53 Commission decision of 11 March 2008 in Case Comp/M.4731, *Google/DoubleClick*, C(2009) 927 final.

54 Commission decision of 7 October 2011 in Case COMP/M.6281 *Microsoft/Skype*, C(2011) 7279 final.

In *Microsoft/LinkedIn*,[55] the acquisition by Microsoft of the LinkedIn social networking service was approved by the Commission, subject to conditions, based on a review of product markets for: (i) professional social network services; (ii) customer relationship management software solutions; and (iii) online advertising services.

The decision confirms the Commission's tendency to define markets in the internet space narrowly, and to emphasise the importance of privacy policy as a competition differentiator. It also demonstrates an overarching concern that interoperability should not be capable of being compromised because of the parties' incentives to act as a 'gatekeeper', while acknowledging that certain online platforms might lend themselves to 'tipping' and hence create a 'winner takes all' scenario.

Efficiencies

In theory, efficiencies can outweigh the negative effects of a merger where they can lead to the reduction of the marginal costs that will offer the ability to maintain or even lower prices for consumers, leading to consumer benefits and an overall benefit to the market. However, the practical likelihood that efficiency arguments will succeed in any given merger review forms something of a patchwork across different regimes (and even, in some instances, within regimes).

By way of example, at EU level, in order to apply the efficiencies doctrine, the notifying parties must satisfy three conditions. First, the efficiencies must be 'merger-specific'. This means that efficiencies could not be achieved without the proposed merger. Second, efficiencies must benefit the consumer, and therefore the offset of costs should have direct positive effects on consumers. Third, the efficiencies must be verifiable. This means that the suggested data should be relatable to the merger and not be too remote from its existence.

As one can imagine, the satisfaction of these conditions will not be something that can be easily achieved by the notifying parties, other than in exceptional circumstances. For example, in its *UPS/TNT* decision, the European Commission applied these three conditions with respect to the efficiencies submitted by the notifying parties,[56] but nevertheless concluded that only some of the efficiencies listed by the parties were unlikely to be achievable without the transaction.

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55 Commission decision of 6 December 2016 in Case Comp/M.8124 *Microsoft/LinkedIn*, C(2016) 8404 final.

56 Case No COMP/M.6570, *UPS/TNT Express*.

Conversely, efficiency defences are generally thought to achieve more traction in some other jurisdictions, most notably the US and UK.[57] Australia and Brazil are among the other major international jurisdictions that allow for an efficiencies defence, although at the time of writing it is not common for otherwise problematic deals to be authorised on the basis of the efficiencies created.[58]

Implementation

Towards the back end of the merger review process, a series of antitrust-related issues arise as regards the parties' focus upon the implementation of their notified transaction. These issues go well beyond the usual considerations of M&A lawyers surrounding the closing of the transaction. The most important of these issues relate to the remedies to be proposed to address competition concerns, risks of so-called 'gun-jumping' arising from the integration plans of the parties post-clearance (which might result in significant fines being imposed on the notifying parties), the possible application of the so-called 'ancillary restraints' doctrine as a means of justifying certain restrictions on either the buyer or the seller, and the possibility of appeals from the decisions of competition authorities.

Remedies

Insofar as a merger generates significant competition concerns, it is usually open to the parties to address those competition concerns by offering the reviewing competition authority commitments or undertakings ('remedies').[60] The usual rule of thumb is that the commitments or undertakings offered by the notifying parties must present the competition authority with a comprehensive solution that eliminates its competition concerns. While the remedies should not go beyond what is appropriate to address the theories of harm identified by the competition authority (ie, they should be 'proportionate'), they should be capable of being implemented effectively (depending on the legal traditions prevailing in the particular jurisdiction). In doing so, the remedy package should have an overall positive effect on consumers and should be positive in terms of its impact on technical and economic progress.

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57 See, for example, UK Case ME/3638/08, *Global Radio UK & G Cap Medical plc.* (2008).

58 See further "The Role of Efficiency Claims in Antitrust Proceedings", (2012) OECD Policy Roundtable.

60 Refer to Chapter 20 and reports cited therein in A Lindsay and A Berridge, *The EU Merger Regulation: Substantive Issues*, 5th edn (Thomson Reuters 2017).

The remedies that might ultimately be accepted by the competition authority can be either structural or behavioural in nature, and can take one of three broad forms (or a combination of all three) depending on the theories of harm raised by the merger, namely: divestitures of stand-alone business units designed to remove the concerns raised by increasing industry concentration; other looser forms of structural remedy (such as the grants of access to infrastructure or wholesale inputs, intellectual property licensing arrangements, or amendments to long-term supply contracts); and, in exceptional circumstances, commitments relating to the future behaviour of the merged entity, at least where the parties can ensure that there is a system in place which ensures that their commitments will be respected.

The growing practice among competition authorities is to subject the remedies proposed by the notifying parties to a 'market test' among other competitors and customers, with the European Commission having a well-established procedure to allow third parties to comment on the efficacy of the proposed remedies and in which ways they can be improved. Additional time is also afforded in the merger review timetable to facilitate the process of submitting, reviewing and receiving comments on the details of the remedies.

The process of acceptance of remedies in the EU has a very specific procedural characteristic, insofar as explicitly different legal standards apply according to whether or not the merger is being reviewed in either Phase I (25 working days) or Phase II (90 working days). Remedies accepted in Phase I must remove any 'serious doubts' harboured by the Commission as to whether the transaction will result in an SIEC situation, whereas Phase II remedies are designed to eliminate an acknowledged SIEC situation. This structure is based on the understanding that the notifying parties might be willing to make a trade-off between early clearance and more onerous commitments, on the one hand, and significantly later clearance but more proportionate remedies (once all the competition arguments have been fully considered), on the other. In some regimes, such as the UK, there is a comparable distinction (whether in law or in practice) between the nature of remedies acceptable at Phase I and Phase II; in others, there is no discernible difference. In others, such as the US and Brazil, there is arguably less variation in the standard of proof between the different phases of review.[61]

The EU has arguably the most detailed regime in the world governing the substance and procedure that determines how remedies are crafted and implemented, including a Notice on Remedies, Model Divestiture

61 See 'Remedies in Merger Cases', (2011) and (2013) OECD Policy Roundtables; and 'Merger Control in Brazil: Frequently Asked Questions', (2017) IBRAC.

Commitments, a Model Trustee Mandate and Best Practice Guidelines.[62] According to those instruments, there is a clear preference for structural divestments over behavioural remedies. Similarly, a divested business should, by preference, be a standalone business, while 'mix and match' assets from two or more parties are usually avoided because of the additional risks posed to the viability of the divested business post-merger. There are clear preferences that the potential buyer of the divested business should be independent and unconnected with the merging parties, should have the financial resources and technical knowledge to operate that business and should have the necessary incentives to compete vigorously on the affected market. To this end, competition authorities are concerned to varying degrees about ensuring that the competitiveness of the divested business is not undermined prior to its transfer, which requires that the divested business be kept separate from the divesting party's existing business and often also requires that the divesting parties provide transitional support for the purchaser of the divested business. In this regard, the role of an independent monitoring trustee (and later, a divestiture trustee) is of critical importance.

It is often the case that the crafting of an appropriate remedy might require the use of a range of different approaches, given the uncertainties that may exist as to implementation. Thus, remedies in the EU have often been accepted under alternative formulations, especially where the range of alternatives increases the range of purchasers likely to respond and increases the seller's bargaining power.

In some of these situations, the parties may be convinced that the offer of 'crown jewel' remedies as one of the alternative remedy packages might be the only means of ensuring that a divestiture package is accepted by a purchaser, even if it results in a disproportionate remedy to address the competition concerns identified – one that might even strip the commercial heart out of the deal itself.

In particularly complex transactions where there is speculation as to whether the envisaged remedies will work in practice, recourse will be made to an 'up-front buyer' solution or to a 'fix it first' remedy package. Under the former, the merging parties undertake not to complete the transaction until they have entered into a binding agreement covering the divested business with a purchaser approved by the European Commission. The latter expression refers to an offer of an identifiable buyer (similar to the

62 See, in particular, Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1.

up-front buyer scenario) during the course of the merger review procedure, rather than at the end of the procedure, although the implications of both approaches are virtually identical.

Finally, the efficacy of a remedy package in the EU will in certain situations depend upon whether a given Member State is able to declare that it is implementing certain regulatory measures. Beyond the EU, cooperation with other competition authorities such as the Department of Justice (DoJ) or the Federal Trade Commission (FTC) in the United States means that similar remedies or complementary remedies are able to be brokered with the merging parties around the world. Indeed, the EU and US 'Best Practices' for the coordination of merger reviews emphasises that the merging parties should work with both sets of regulators so as to minimise the risks of inconsistent remedies being implemented or interpreted inconsistently.[63]

'Gun-jumping' concerns

The majority of merger control regimes that require the pre-closing notification of notifiable transactions also prohibit the parties from closing the transaction until: (i) clearance has been expressly granted by the competition authority; or (ii) the expiration of the statutory time limits for the competition authority to oppose the transaction (presumed clearance). Infringement of this suspension (or 'standstill') obligation renders the transaction void and can also lead to the imposition of administrative or criminal fines. Some jurisdictions do provide the parties with the possibility to request a derogation from the standstill obligation, including the EU and a number of its Member States, at least where it can be demonstrated that there are critical reasons why the parties must proceed to closing on a more advanced time schedule.

Given the length and number of merger reviews around the world, it is becoming increasingly challenging for many merging parties to limit their pre-merger integration planning activities to the sorts of actions that are compatible with the suspensory nature of most merger reviews. The possibility that certain merging parties 'jump the gun' (ie, breach the suspension obligation) has thus been the subject of increasing scrutiny around the world, both as a standalone offence and because of the risks

63 See Commission Press Release of 30 October 2002 (IP/02/1591) and FTC Press Release of the same date.

that such early implementation infringes antitrust-based prohibitions on coordination between competitors (ie, concerted practices).[64]

Gun-jumping can take place in various forms and in different phases during the M&A process before the competent competition authorities issue their respective clearances, including situations where:

1. The buyer takes effective control of the acquired party by issuing instructions as regards business operations or business plans, or by requiring the acquired party to perform or abstain from performing certain activities. This generally does *not* include the imposition of an obligation on the seller to continue business operations to the best of its abilities or to not make certain investments above certain thresholds that might jeopardise the value of the business.
2. The parties engage in physical acts of implementation of the transaction (eg, decommissioning production facilities, merging IT systems, merging accounts or financial reporting, engaging in joint procurement or tendering before clearance).
3. The parties engage in improper exchanges of commercially sensitive information (regarding customers, specific sales data and contractual obligations), including during the M&A due diligence process.
4. The parties implement coordinated business strategies, and present a common commercial face to the marketplace (eg, by bidding jointly for contracts, or by allocating contracts between themselves, for which they would otherwise have competed).

Where a competent competition authority identifies an infringement of the suspension obligation, it may impose administrative or criminal fines on the parties.[65] Some jurisdictions also expressly provide for the possibility to impose fines on the individuals (ie, directors, managers or business people) responsible for the gun-jumping infringement.[66] While the level of penalties varies as between jurisdictions, gun-jumping in the EU can often lead to fines of up to ten per cent of the parties' worldwide turnover. Moreover, insofar as competition authorities are distracted from focusing on the merits of the competition review of the transaction, and are instead considering opening separate proceedings to investigate gun-jumping allegations, this will inevitably delay merger clearance of the main transaction.

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64 This would include anti-competitive behaviour where the parties: 1. coordinate their individual commercial behaviour; 2. adopt a common strategy in the market; or 3. exchange commercially sensitive information, with the object or effect of restricting competition.

65 Eg, Austria, Canada, Denmark, Greece, Ireland, Israel, Japan, Kenya and Uzbekistan.

66 Eg, Australia, Bosnia Herzegovina, Colombia, France, Greece, Israel and Kenya.

While the US has historically been the front-runner in imposing fines for gun-jumping, other jurisdictions, including the EU, China, Brazil, South Africa and Australia, are displaying an increasing willingness to police gun-jumping practices, as reflected in official policy statements,[67] an increased level of imposed fines and an increasing number of cases subject to investigation and/or the introduction of 'name and shame' policies in which infringements are published.[68] There is also increasing vigilance in smaller jurisdictions that feel that their notification thresholds might not have been respected in the past (eg, Ukraine).

A recent judgment of the Court of Justice of the European Union has clarified the extent to which the gun-jumping offence should affect the usual integration strategies foreseen by merging parties in advance of the implementation of their merger. According to the Court, preliminary steps taken by the notifying parties to close the transaction can *only* be considered to amount to 'gun-jumping' at EU level if they amount or are equivalent to a change in control.[69]

The ancillary restraints doctrine

Not all forms of cooperation or exchanges of information between parties to a transaction will necessarily give rise to gun-jumping concerns. Thus, certain types of behaviour might be permissible in many jurisdictions because they can benefit from the 'ancillary restraints' doctrine, according to which agreements or restrictions that are directly related to and necessary for the implementation of the transaction are deemed to be legal.[70] Ancillary restraints may include obligations entered into by merging parties simultaneously, or in close connection with their transaction, which restrict the parties' commercial freedom of action. The restraints might be considered to be potentially anti-competitive if they were to be considered independently of the transaction, but are in fact crucial in the circumstances to achieve the economic objectives of the transaction.

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67 See, eg, statements by European Union Commissioner for Competition Margrethe Vestager on 18 May 2017: 'If they jump the gun, we take that very seriously indeed.… I don't see these cases as a distraction from our work reviewing mergers.… We need to be strict in those – hopefully rare – cases where we find that companies aren't taking their obligations seriously enough.'

68 See, eg, *United States v Duke Energy Corp* (2017): settlement penalty of US$600,000; EU – *Eletrabel/CNR* (2009): fine of €20m; EU – *Marine Harvest/Morpol* (2014): fine of €20m; EU – *Altice/PT Portugal* (2017): fine of €125m; EU – *Canon/Toshiba Medical Systems* (2017): fine still pending; Australia – *ACCC v Cyrosite Limited* (2018).

69 Judgment of the Court of 31 May 2018, C-633/16, *Ernst & Young*, ECLI:EU:C:2018:371.

70 See, eg, European Commission, Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03).

In order to benefit from this exemption, the ancillary restraints must typically be:

1. Closely linked to the transaction itself: they cannot simply be entered into in the same context or at the same time, but must be economically related to the main transaction and intended to allow a smooth transition to the post-merger company structure after the transaction is completed.
2. Objectively necessary, meaning that, in the absence of the restraint, the transaction could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty. Necessary restraints are thus typically aimed at protecting the value of the business being transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity.
3. Of such reasonable duration (in terms of subject-matter and geographic scope), as not to exceed what is reasonably required for the implementation of the transaction. If equally effective alternatives are available to attain the otherwise legitimate aim being pursued, the alternative that is objectively the least restrictive of competition must be selected.

Based on these criteria, certain contractual relations are unlikely to be regarded as restrictive of competition, as they may be objectively and commercially required. For example, activities such as the following are unlikely to raise concerns: (i) the grant of an exclusive licence or the appointment of an exclusive distributor, which may be necessary to penetrate a new area; (ii) an exclusive copyright licence to exhibit film or other media content, which may be necessary to protect licensees investment; (iii) the seller's agreement not to compete with the business that it is selling for a limited period of time; and (iv) covenants in franchise agreements geared at protecting the intellectual property of the franchisor.

While ancillary restraints may inure to the benefit of the buyer or the seller, the need for the buyer to benefit from certain types protection is typically regarded as more compelling than the corresponding need to protect the seller (as the buyer needs to be assured it will be able to acquire the full value of the acquired business). As a general rule, restrictions that benefit the seller are often considered to be either not directly related to the transaction, or unnecessary for the implementation of the concentration at all. In any event,

the scope and/or duration of restrictions placed on buyers typically needs to be more limited.[71]

While some jurisdictions require that the competent competition authority expressly approve the ancillary restraints in question (eg, Israel, Italy, Ukraine), it is more usual for the parties to be required to identify and support the legitimacy of ancillary restraints in their notification form (eg, Albania, Argentina, Brazil, Canada, Colombia, EU,[72] India, Macedonia, New Zealand, Pakistan, Russia,[73] Serbia, Singapore, South Africa, Switzerland, Taiwan, Turkey).

Given that, in most jurisdictions, the parties are expected to conduct a self-assessment of the legitimacy of ancillary restraints under the applicable competition rules, this should be performed with great care to avoid gun-jumping risks or other antitrust concerns if the restraint in question might be found not to be objectively necessary and/or directly related to the implementation of the transaction. The process of self-assessment should involve external counsel to ensure that the analysis is sufficiently thorough and robust (while ensuring also that legal privilege covers communications between counsel and the client), ideally as of the earliest possible stage of the merger negotiations.

Appeals

Given the degree of discretion that competition authorities have in their review of complex economic data, it is not unusual that there are few appeals lodged against prohibition decisions of competition authorities. Moreover, given the administrative law traditions of many jurisdictions' appellate courts (ie, a standard of 'judicial review', as opposed to a full re-investigation of the underlying facts), the chances of success on appeal are heavily against the appellants. This is exacerbated by the fact that the momentum in pursuing the vetoed merger has, to all intents and purposes, evaporated by the time

71 For example, non-compete obligations imposed on a seller would, under EU competition rules, only be justified for a period of up to three years (when the transaction includes the transfer of customer loyalty in the form of both goodwill and know-how) or up to two years (when only goodwill is included). Non-compete obligations of around five years are more commonplace in the United States.

72 In the EU, the Commission has a residual responsibility, at the request of the undertakings concerned, expressly to assess the ancillary character of restrictions if a case presents 'novel and unresolved questions giving rise to genuine uncertainty', that is, a question that is 'not covered by the relevant Commission Notice in force or a published Commission Decision'. Otherwise, the Commission is not obliged to assess and to address individual ancillary restraints in the context of a merger control review. This is also the case in the majority of EU Member States.

73 Insofar as the restrictions themselves are not subject to a separate notification requirement under Russian competition rules.

the appeal process has been completed and the fact that courts are reluctant to order the payment of meaningful damages claims to compensate for the losses incurred in a deal not being realised (let alone the large break-up fees usually associated with mergers not obtaining antitrust clearance). The United States is a major exception to this rule, of course, as the merger review regime in that jurisdiction is geared around the competent competition authority (be it the DoJ or the FTC) being able to defend its position before the appeal courts.

In the EU, while it is not unusual for the merging parties to challenge a prohibition decision adopted by the European Commission under the EU Merger Regulation (albeit with limited chances of success),[74] it is becoming increasingly popular for third parties to challenge European Commission merger clearance decisions before the European courts.[75] This is often because of concerns that the notified merger would harm competitors, suppliers or consumers, or because the remedies are considered to be ineffective. This trend appears to have had the indirect effect of extending the scope of merger review procedures and the details of the fact-finding exercise used to support decisions, adding costs and delay to the merger review process in the EU.

Conclusions

This article has sought to make sense of the many antitrust-related aspects of merger review that govern global deals. The process of merger review has become increasingly complex over the past decade, reflected not only in the number of jurisdictions now embracing merger control rules, but also in the increasing forensic scrutiny being adopted by competition authorities to review more complex deals, and the inexorable expansion of merger review timetables (including lengthy pre-notification discussions and an increasing number of 'stop-the-clock' possibilities).

As international cooperation between the competition authorities of jurisdictions such as the EU, the US, Canada, China and Brazil has increased, the difficulties of dealing with different theories of harm in different markets across the world, and forging appropriate remedies that satisfy those

74 Notable exceptions to that general proposition can be found in the appeals brought in Case T-310/00, *MCI v Commission*; Case C-440/07P, *Commission v Schneider Electric SA* (2009); Case T-342/99, *Airtours plc v Commission* (2002); Case T-194/13, *United Parcel Service (UPS) v Commission* (2013).

75 For example, see Case T-307/15, *1&1 Telecom GmbH v European* Commission (2015); Case T-394/15, *KPN BV v European Commission* (2017); Case T-464/04, *Independent Music Publishers and Labels Association (Impala) v Commission* (2006).

competition authorities, has added a further layer of complexity and delay to an already difficult process.

With pressure being brought on competition authorities around the world to extend their powers of review to mergers in high-tech sectors with high share valuations, and to situations involving the acquisition of minority shareholdings, the need for comprehensive merger review planning by deal-makers for mergers of a global dimension has become unavoidable. That planning will only be made more complex in the foreseeable future, as non-economic, or overtly political, criteria assume ever-growing importance as part of the fabric of merger review.