

Antitrust Merger Clearance

Getting Your Deal Through - Strategies for Increasing Deal Certainty

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GIBSON DUNN

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Status of U.S. Antitrust Agencies

- Antitrust Division, U.S. Department of Justice
 - Makan Delrahim, nominated as Assistant Attorney General for the Antitrust Division
 - Acting AAG, Brent Snyder, the Deputy Assistant Attorney General for Criminal Enforcement
- Federal Trade Commission
 - Two sitting Commissioners
 - Acting Chairman Maureen Ohlhausen (Republican)
 - Commissioner Terrell McSweeney (Democrat)
 - President has not yet selected a permanent FTC chair or nominated commissioners for three vacancies



Assessing Antitrust Deal Risk

- Practical to reliably predict antitrust agencies' views about a transaction
- Antitrust agencies have used largely consistent standards for the last 20 years
- Agencies challenge 3-to-2s, 2-to-1s, and some 4-to-3s, which produce firms with high market shares (*e.g.*, 40%+), with likelihood of price increases
 - Complaining customers and entry barriers increase antitrust risk
- Agencies have predictable strategies for merger reviews in many sectors, such as pharmaceuticals, energy, retail, and health care

Strategy 1: Up-Front Assessment/Planning

- Collect documents and data that antitrust agencies always request
- Conduct up-front analysis that tracks agencies' analytical paradigms
- For transactions likely to receive regulatory scrutiny:
 - Calculate “shares” of potential “markets”
 - Gather key facts about competitors
 - For “concentrated” markets, collect information that demonstrates that “shares” are not representative of real world market conditions
 - Collect information needed to demonstrate transaction's efficiencies
- Bottom line: *Early investment in information collection and analyses can produce reliable antitrust risk assessments and reduce the likelihood of lengthy investigations*



Strategy 2: Prepare Advocacy Presentations

- When there are antitrust risks, prepare and make robust presentations that address the key issues
 - Agencies value early engagement
 - Element of surprise is almost always overrated and often counterproductive
- *Take advantage of antitrust agencies' desire to avoid devoting substantial resources to investigations that do not produce an enforcement action*
- For transactions that require multiple filings, have a global strategy that accounts for the exchange of information among competition agencies
 - Arguments should be analytically consistent, while accounting for individual jurisdiction dynamics



Strategy 3: Document/Customer Management

- Use antitrust compliance training to reduce the risk of creating damaging documents
 - “Hot” documents produced early in the process can significantly increase deal risk and lengthen investigations
- Have a proactive customer outreach strategy ready to put in place immediately upon the announcement of the deal
 - Complaining customers dramatically increase the odds of lengthy antitrust investigations
 - Conversely, neutral or supportive customers can cause agencies to shut down “close call” investigations

Strategy 4: Time/Clock Management

- Avoid second requests/Phase II investigations through strategies that give agencies extra time in early phases of investigations
- In U.S., when antitrust considerations warrant and business considerations permit, consider:
 - Engaging with the DOJ/FTC *before submitting HSR filings*
 - Pulling and re-filing the HSR to give provide an additional 30 days before second request decision
- In EC and other jurisdictions, use pre-filing period to engage in proactive advocacy
- Use a global time management strategy for transactions that require multiple filings
 - *E.g.*, stagger the pre-notification filings when warranted

Strategy 5: Account for New Realities of DOJ/FTC Second Request Investigation/Litigation Strategies

- If you receive a DOJ/FTC second request, consider responding and certifying compliance rapidly
- Negotiate "timing agreement" that gives the parties the flexibility to "put the agencies on the clock"
 - Virtually no examples of prolonged investigations benefitting the parties
- Prepare for and defend investigation depositions as if they are trial depositions
 - Agencies take depositions to "lock in" witnesses/obtain transcripts for cross examination at trial
- For transactions with substantial U.S. antitrust risk, prepare for possibility of litigation from the outset
 - Don't let the agencies get ahead of the parties



Strategy 6: Proactive Assessment of Remedies

- Account for agencies' demanding standards for evaluating and approving remedies
 - Agencies are very concerned that remedies will fail – *i.e.*, not preserve pre-merger market structure and competition
- Offer "robust" remedy that fully addresses the agencies' competitive concerns
 - Agencies react negatively to "low-ball" offers
- When warranted, consider offering a remedy early in the investigative process, rather than risk producing damaging information and a prolonged investigation
- Poorly planned remedy strategies can significantly increase the time required to complete the review process



Overview of EU regime for merger control

- Both the EU itself and 27 countries within the EU have merger control regimes
- EU has “one-stop-shop” merger system – review by European Commission (EC) deprives Member States of jurisdiction to review deals for competition concerns
 - “One-stop-shop” also applies to Norway, Lichtenstein and Iceland
- Referral system allows deals to be reallocated either back to Member State(s) or upwards to the EC in certain situations
- Mandatory notification system – qualifying deals cannot be completed without EC’s prior approval
 - Failure to notify/implementation without clearance punishable by a fine of up to 10% of aggregate turnover of parties

Criteria for falling within EC jurisdiction

- Thresholds for whether a merger qualifies for EC review are based on mechanistic “turnover” criteria:
 - combined worldwide turnover exceeds EUR 5000 million; and
 - EU-wide turnover of each of at least two of the parties exceeds EUR 250 million; unless
 - each of the parties achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.
- Additional threshold to give EC jurisdiction over deals involving parties with lower turnover who achieve a certain level of turnover in three Member States:
 - combined worldwide turnover exceeds EUR 2.5 billion; and
 - in each of at least three Member States, combined turnover exceeds EUR 100 million; and
 - in those three Member States, aggregate turnover of each of at least two parties exceeds EUR 25 million; unless
 - each of the parties achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

Overview of the EC merger review process

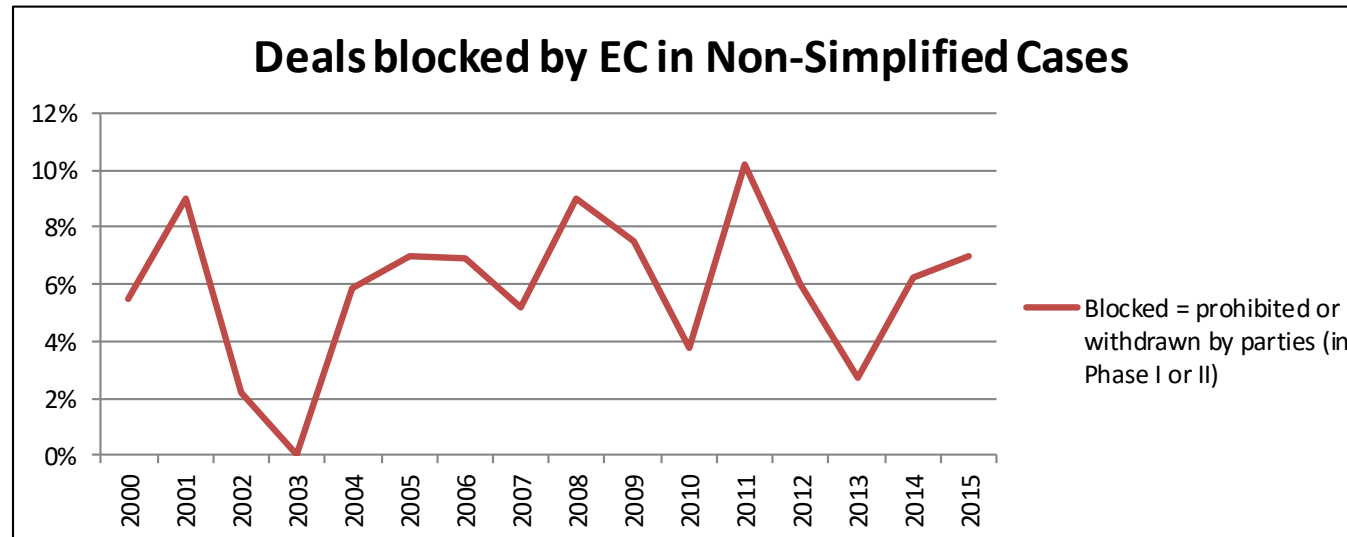
- Two-phase review process – both phases carried out within the EC
 - Same case team with additional members and involvement of Chief Economist team and Hearing Officer
 - Phase II concerns set out in formal SO with possibility for oral hearing
- Strict deadlines
 - 25 working days for Phase I
 - Phase I deadline extended to 35 working days if parties offer remedies
 - 90 working days for Phase II
 - Phase II deadline extended to 105 working days if remedies offered
 - Possible further extension of up to 20 working days

Overview of the EC merger review process (cont.)

- Process can be lengthy
 - “Pre-notification” discussions as a matter of course
 - EC requires detailed information on all “plausible” “affected markets”
 - Notification (Form CO) requires considerable detail
 - But “simplified procedure” available (at EC’s discretion) for some transactions
- Judicial oversight of EC’s merger decisions is not a full-merits review
 - EU courts give deference to EC’s view/interpretation of facts – wide “margin of appreciation” in relation to assessments of economic nature
 - Internal peer review panels and chief economist set up to provide degree of discipline on process

EU merger control in practice – statistics (I)*

- EC is far less likely to prohibit deals than is often feared
- Since 1990, EC has cleared over 5,500 deals and blocked only 25
- Blockage rate of reviewed deals that do not qualify for simplified procedure is low



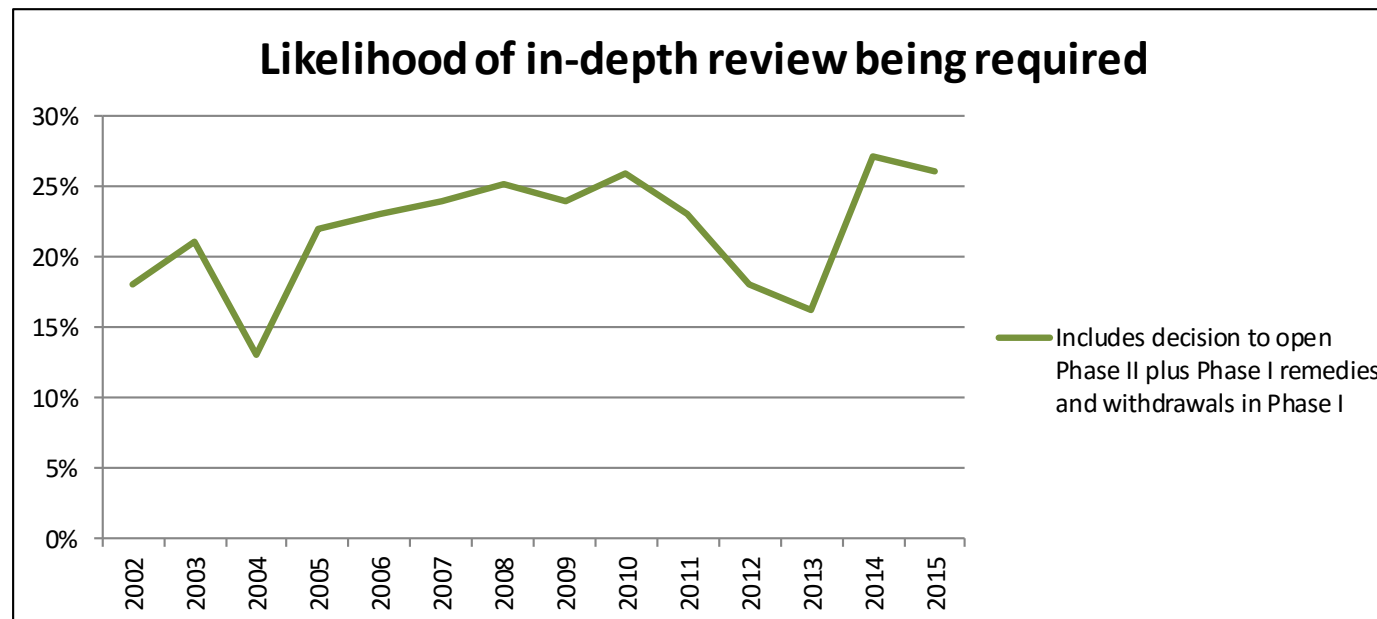
*Source data: EU yearly statistics on (i) notifications and (ii) number of decisions per decision-type; percentages are approximate because year of notification may not be the same as year of decision. I updated all the tables in the presentation.

Recent prohibition decisions

- *Hutchison 3G/Telefonica UK* (May 2016): Proposed combination of “O2” and “Three” mobile networks in UK would have created new number 1 player
 - Three-to-two merger would lead to higher prices and less choice
 - Would hamper development of mobile network infrastructure (merged entity would have been part of both network sharing arrangements)
 - Would reduce number of operators willing to host virtual mobile network operators
- *Deutsche Börse/LSE* (March 2017): Two largest European stock exchange operators
 - Would have led to *de facto* monopoly in clearing fixed income instruments
 - Downstream impact on markets for settlement, custody and collateral management

EU merger control in practice – statistics (II)*

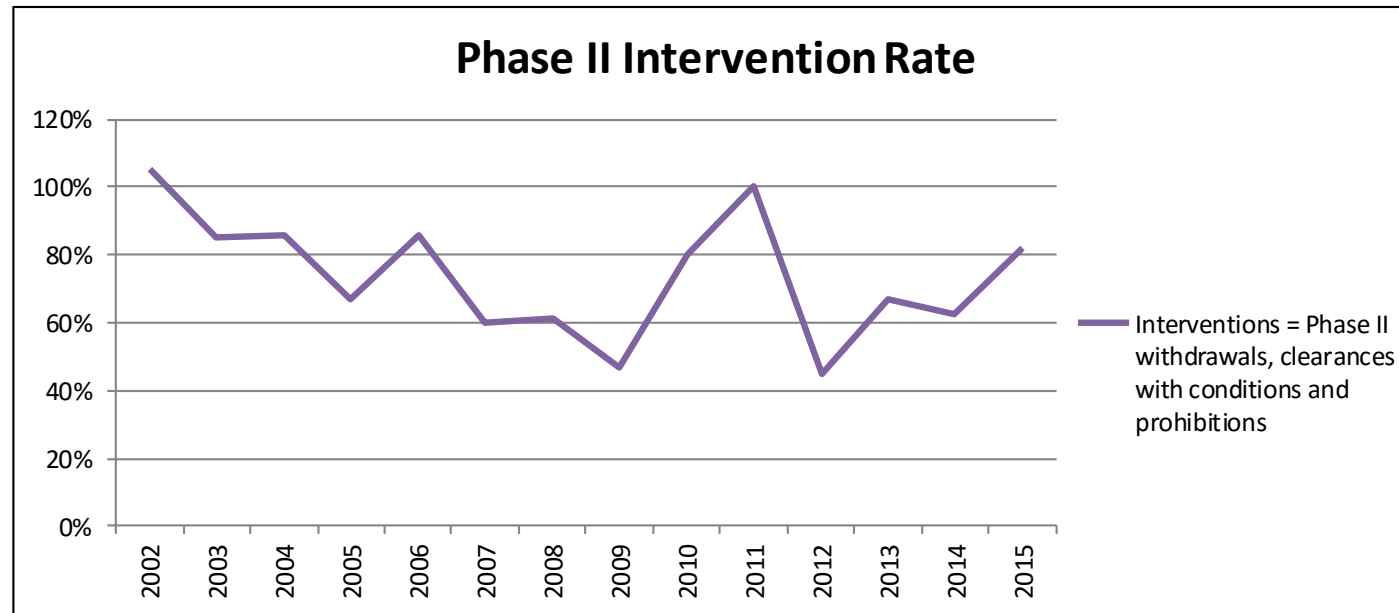
- Although not a big deal “blocker,” EC is cautious in merger review
- Significant percentage of deals that do not qualify for simplified procedure require either in-depth review or clear remedies in Phase I to avoid Phase II



*Source data: EU yearly statistics on (i) notifications and (ii) number of decisions per decision-type; percentages are approximate because year of notification may not be the same as year of decision.

EU merger control in practice – statistics (III)*

- Deals that go into Phase II are highly likely to require remedies to avoid prohibition



*Source data: EU yearly statistics on (i) notifications and (ii) number of decisions per decision-type; percentages are approximate because year of notification may not be the same as year of decision.



EU merger control in practice – characteristics

- EC more cautious on vertical and conglomerate mergers than US
- Some deals inevitably come in for close scrutiny; “red flag” deals where:
 - Parties have combined market shares over 35%;
 - Parties are close competitors;
 - Active complainants or national authorities are opposed to the deal; and
 - The deal is high-profile
- EC will carefully review deals in network/regulated industries and innovation
 - Telecoms, financial services, life sciences, energy
 - EC has rejected recent referral requests from MS to examine telecoms deals – citing EC expertise and experience
- No indication that extra-scrutiny placed on US or “foreign” mergers



EU merger control in practice – developments

- EC more concerned about innovation than US
 - Traditional focus on market-to-pipeline and pipeline-to-pipeline overlaps, with a time horizon of approximately two-to-three years
 - Now EC assessment covering earlier states in pipeline as well; *e.g.*, not only Stage III in pharmaceutical clinical trials but also Stage I and/or II



Getting your deal through the EU faster

- If your deal meets the EU thresholds, start work on the filing as soon as possible
 - Many companies prioritize the US, although EU clearance often takes much longer
- EU process is data- and information-heavy even for non-problematic deals
- Notification form must be completed before formal filing is permitted – can run to hundreds (sometimes thousands) of pages
- Require provision of detailed market information on every plausible affected market
- Is possible to debate market definition and narrow down scope of information provided if deals looks like Phase I clearance
 - If prima facie problematic, EC less likely to agree scope reduction
- Expect multiple RFIs from EC and prepare to respond in-depth

Getting your deal through the EU faster

- Internal documents becoming increasingly important, so take compliance steps
- Great weight given to customer view
- Proactive customer outreach strategy equally important in EU
- Unlike US, competitor views are also important – consider proactively addressing likely competitor concerns in submissions
- Need to explain rationale of deal
- In vast majority of cases, collaborative approach is much more effective than confrontational with EC
- EC process puts time pressure on case team, and working “with” the staff can make significant difference to process
- Litigation rarely an option in deal for parties and not a credible threat given “discretion” to EC
- Avoid Phase II if at all possible
- Consider staying in pre-notification longer to give EC extra time to get comfortable in early phases of investigations
- For “red flag” deals, think about remedies early

Case Study: Merger of Marriott and Starwood

- Largest M&A transaction in the history of the hotel industry, creating the world's largest hotel company
- The companies operate or franchise more than 5,700 properties and 1.1 million rooms, across 30 brands, in more than 110 countries worldwide
- Merger agreement signed on November 16, 2015; transaction closed on September 23, 2016





Challenges

- Competitive overlaps in thousands of local markets around the world
- Pre-merger filings required in 15 jurisdictions on 5 continents representing over 40 countries
- High-profile, consumer-facing deal
- Limited recent history of antitrust merger reviews in the hotel industry
- Publicly available sources of competitive data are incomplete and/or unreliable for many parts of the world
- Aggressive timeline: Obtain merger approvals on a global basis for a complex deal with thousands of competitive overlaps in less than a year



Getting the Deal Done: Secured Unconditional Clearance on a Global Basis within 10 months

- India – Jan. 15, 2016
- Canada – Feb. 19, 2016
- US – Feb. 29, 2016
- Taiwan – March 14, 2016
- Colombia – March 15, 2016
- S. Africa – March 16, 2016
- Pakistan – April 1, 2016
- Turkey – April 20, 2016
- Japan – April 22, 2016
- Chile – May 9, 2016
- S. Korea – June 7, 2016
- EU – June 27, 2016
- Saudi Arabia – June 27, 2016
- Mexico – July 1, 2016
- China – Sept. 20, 2016



Keys to Getting the Deal Done

- Cohesive global team
 - Leadership team with global perspective to manage filings
 - Understand local issues in context of global mission
- From the outset, develop themes and facts that will work on a global basis
 - Top-down analytical approach: Start globally, then address local issues within a cohesive global approach
 - Analytical approach must be consistent across jurisdictions
 - Understand that regulators will talk to one another
- Develop and follow global regulatory timeline

Keys to Getting the Deal Done (cont.)

- Push the process forward
 - Be proactive, forthcoming, and nimble
 - Be responsive and be an advocate
- Examples:
 - 75-day engagement with FTC during initial waiting period
 - Day 1: Produce market data, key strategic and deal documents, and meeting between FTC Staff and senior executive
 - Respond quickly to information requests and provide numerous additional presentations throughout the waiting period
 - Five-month engagement with European Commission leading to Phase I clearance



Gibson Dunn Transactions

- **St. Jude Medical/Abbott Laboratories.** Global antitrust counsel to St. Jude in its \$25 billion merger with Abbott Laboratories, which closed in eight months, following the negotiation of divestiture agreements with the FTC, the European Commission, MOFCOM, and the KFTC.
- **LinkedIn/Microsoft.** Global antitrust counsel to LinkedIn Corporation in obtaining clearance for its acquisition by Microsoft Corporation. Gibson Dunn obtained antitrust clearance for the \$26 billion transaction in the United States and the European Commission in less than six months.
- **Marriott/Starwood.** Global antitrust counsel for Marriott International in its \$13.6 billion acquisition of Starwood Hotels & Resorts. Gibson Dunn obtained unconditional clearance in 15 jurisdictions, including in the United States, the European Commission, and China, in ten months.
- **Luminant/NextEra.** U.S. antitrust counsel to Luminant in its \$1.6 billion acquisition of generating assets from NextEra. Gibson Dunn obtained unconditional clearance in five months.



Gibson Dunn Transactions (cont.)

- **Southern Company/Kinder Morgan.** U.S. antitrust and regulatory counsel to Southern Company in its \$2 billion joint venture with Kinder Morgan. Gibson Dunn obtained unconditional clearance in two months.
- **Southern Company/AGL Resources.** U.S. antitrust and regulatory counsel to Southern Company in its \$12 billion acquisition of AGL Resources, an electric and gas utility company. Gibson Dunn obtained unconditional clearance in three months.
- **Intel/Altera.** Global antitrust counsel for Intel Corporation in its \$16.7 billion acquisition of Altera Corporation. Gibson Dunn obtained unconditional clearance in four months.
- **Norbord/Ainsworth.** Global antitrust counsel to Norbord in its \$650 million acquisition of Ainsworth. Gibson Dunn obtained unconditional clearance in five months, following a DOJ second request investigation.



Gibson Dunn Transactions (cont.)

- **Gala Coral Group/Ladbrokes.** European antitrust counsel to Gala Coral Group Limited in its \$3.4 billion merger with Ladbrokes to create Ladbrokes Coral, the largest betting and gaming company in the UK. Gibson Dunn was able to obtain clearance with a small number of divestitures.
- **Schlumberger/Cameron.** Global antitrust counsel to Schlumberger in its \$14.8 billion acquisition of Cameron International. Gibson Dunn obtained unconditional clearance in seven months.
- **Tenet Healthcare/United Surgical Partners International.** U.S. antitrust counsel to Tenet Healthcare for the creation of a joint venture with the owners of United Surgical Partners International. The joint venture created the world's largest chain of ambulatory surgery centers. Gibson Dunn secured clearance for the transaction in sixty days.
- **Tenet Healthcare/Emanuel Medical Center.** U.S. antitrust counsel to Tenet Healthcare in its acquisition of Emanuel Medical Center. Gibson Dunn obtained unconditional clearance for the transaction in six months, following an FTC second request investigation.

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Upcoming Gibson Dunn Webcasts

- April 18, 2017, 11:00 am – 12:30 pm EDT
 - The New French Anti-Corruption Law (“Sapin II”) within the Global Compliance Landscape
- May 2*, 2017, 12:30 pm – 1:30 pm EDT (*pending confirmation)
 - Hot Topics in Securities and Governance
- May 10, 2017, 12:00 pm – 1:00 pm EDT
 - Labor & Employment Developments in the Trump Administration

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- **March 30, 2017**
 - Congressional Investigations: Where is the 115th Congress Heading?
- **March 16, 2017**
 - Identifying and Combatting Fraud and Other Misconduct in Transactions and Litigation
- **February 8, 2017**
 - Tectonic Shifts in the Landscape of Economic Sanctions: Will the Pace of Change in 2016 Continue?
- **January 25, 2017**
 - 13th Annual Webcast: Challenges in Compliance and Corporate Governance

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