A Gibson Dunn Mergers & Acquisitions Presentation

Getting The Deal Done: Antitrust Merger Clearance Strategies in a Global Setting

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MCLE Certification Information

- Most participants should anticipate receiving their certificate of attendance in 3 to 4 weeks following the webcast.
- Virginia Bar members should anticipate receiving their certificate of attendance in 6 weeks following the webcast.
- Questions regarding MCLE information should be directed to Jeanine McKeown (National Training Administrator) at 213-229-7140 or jmckeown@gibsondunn.com.

Agenda

- United States
- Europe
- China

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United States

DOJ/FTC Enforcement Decisions Are Predictable: Allow for Reliable Upfront Antitrust Risk Assessment

- DOJ/FTC challenge alleged 3-to-2s and 2-to-1s
  - *GE/Electrolux* (DOJ)
  - *National Cinemedia/Screenvision* (DOJ)
  - *Sysco/US Foods* (FTC)
  - *Verisk Analytics, Inc./EagleView Technology* (FTC)
- DOJ challenges high-profile telecom/media transactions when supported by the FCC
  - *TWC/Charter*
  - *AT&T/T-Mobile*
  - *Comcast/TWC*
- FTC uses predictable/established matrices for hospital/pharma deals
- Agencies have lost or backed down when attempting to break new ground
  - FTC lost the *Steris* "potential competition" case
  - DOJ abandoned the "national market" component of *USAir/American* challenge

Why DOJ and the FTC Are Winning

- Early assessment/prioritization of cases likely to produce enforcement actions
- Rapid incorporation of litigation strategy into the investigation plan
  - Broad second requests
  - Demands for substantial time to investigate
  - Use of investigation depositions for trial prep
  - Early retention of testifying economists
- Enhanced litigation capabilities
  - Political appointees with strong litigation credentials
  - Enhanced litigation skills of career lawyers
- “Strategic” assessment of whether the parties are willing to litigate
- Aggressive trial strategy
  - Cross-examine parties’ executives in affirmative case with party documents
  - De-emphasize customer witnesses who are hard to control

Formulate Strategy: Identify "Type" of Merger

- Three categories of mergers for antitrust purposes:
    - Type 1: Can be cleared in the initial HSR 30-day waiting period
    - Type 2: Can be cleared, but agency will require detailed information from parties and potentially third parties
    - Type 3: DOJ/FTC will be strongly inclined to challenge in court

- Type of merger should drive parties' antitrust strategy

Type 1: Make Sure Agencies Clear the Deal in 30 Days

- Proactively identify “horizontal” product/service overlaps

- Collect information to respond to DOJ/FTC “voluntary request letters”
  - Parties’ business/strategic plans for the last two years
  - Third-party industry studies (e.g., Gartner reports)
  - List of parties’ largest customers with contact information

- Prepare short letter explaining that parties face substantial competition in each overlap product/service

- Prepare businesspersons from buyer and seller to meet with DOJ/FTC (if needed)

Type 2: Avoiding a Second Request

- *Pre-HSR* substantive analysis, document collection, and advocacy
  - Early analysis of “real world” performance of the overlap markets
  - Pull materials required to comply with DOJ/FTC voluntary requests
  - Prepare focused advocacy presentation that is “ready to go” as soon as the agency calls
  - Prepare short presentation by an economist to use if needed
- Proactive outreach to customers upon deal announcement to explain benefits of the deal
- When possible, meet with the case team *before filing HSR* to give staff more time
- “Pull and re-file” HSR filings when warranted to give the agencies another 30 days
- Contact DOJ/FTC political leadership to advocate that second request is justified
  - **Leadership wants enforcement actions, not second request investigations that go nowhere**
- Do not use pre-litigation divestiture provisions in merger agreements unless necessary
  - Divestiture provisions signal to the agencies that they can force an asset sale
- **<u>Bottom line</u>:**
  - **Pre-HSR antitrust analysis and advocacy preparation can save millions**
  - **Use strategies to give agencies additional time to decide whether to issue a second request**

Types 2 and 3: Handling a Second Request – Fast

- If a second request is likely, consider collecting documents and data *before* the parties file HSR and/or during the initial 30-day waiting period
  - Enables parties to certify substantial compliance faster
- Don't waste time haggling with the Staff over the "search group"
  - Proactively decide whose files to search and stick with it
  - If the parties are reasonable, agencies will not challenge HSR compliance
- Proactively prepare to produce relevant data
  - Data productions, not documents, are the most common roadblocks to certifying substance compliance with second requests
- Consider modifying the agencies' one-sided standard "timing agreement"
  - Generally, give agencies no more than 60 days to review second request production
  - Agencies do <u>not</u> have the right to investigate deals for many months
  - <u>**Lengthy investigations benefit the agencies, but rarely benefit the parties**</u>

Type 3: Preventing/Winning Litigation

- From start, highlight evidence that would make a litigation challenge difficult
  - Often too late by the time of Front Office meetings
- Highlight competitor evidence that will impede DOJ/FTC's case
  - Cases often won or lost based on third-party evidence
- Seek customer support for the transaction
  - Government purchasers can be particularly damaging to DOJ/FTC cases
- Prepare for DOJ/FTC investigation depositions as if they are trial depositions
- Firmly convey willingness to litigate (if business considerations permit)
  - Staff/Front Office will pick up on parties' reluctance to go to court and use it as leverage
  - Posturing or bravado by the parties never works
- Parties' trial team should be integrated into the team that advocates to DOJ/FTC
- Use "direct effects" evidence to rebut DOJ/FTC structural case
- Adopt proactive strategy to present competitor evidence at trial

Use Sectoral Regulators to Reduce Antitrust Risk

- Proactively seek support of sectoral regulators (e.g., DOD, FCC, HHS)
- Sectoral regulators often emphasize issues other than competition
  - Often too late by the time of DOJ/FTC Front Office meetings
- DOJ/FTC often lobby sectoral regulators to support merger challenges
  - Parties must anticipate agencies' arguments and get to the regulators first
- If the sectoral regulator supports the transaction it can make it difficult (if not impossible) for DOJ/FTC to litigate
  - E.g., DOJ would face substantial litigation obstacles to challenging a telecom deal if the FCC supported the transaction

Remedies: Stay Ahead of the Curve

- Agencies have “raised the bar” for what type of remedies are acceptable
  - Increasingly unwilling to put the remedy risk on “agencies’ books”
- Both DOJ and FTC almost always require a “buyer up front”
  - Generally will not permit parties to close until they approve the buyer and key deal terms
  - Can result in substantial delays in closing transaction
- When remedies are likely, parties should proactively plan for divestitures
  - Analyze potential buyers and divestiture packages before HSR filing
  - Generating interest from multiple bidders can reduce risk that buyers will “hold up” the parties for a low sales price and additional assets

Gibson Dunn - Track Record of Rapidly Obtaining Clearance for Complex Transactions

- Marriott's $13 billion acquisition of Starwood (FTC clearance in 75 days)
- Southern Company's $8 billion acquisition of AGL Resources (FTC clearance in 60 days)
- Intel's $16 billion acquisition of Altera (FTC clearance without a second request)
- Norbord's $650 million acquisition of Ainsworth (unconditional DOJ clearance after second request)
- Tenet Healthcare's $2 billion acquisition of USPI (FTC clearance in 60 days)
- Tenet Healthcare's acquisition of EMC (unconditional FTC clearance after second request)
- Ameristar's $2.8 billion sale to Pinnacle Entertainment (FTC clearance after limited divestiture)
- Fortune 500 company's $1.7 billion acquisition of competitor (unconditional DOJ clearance after second request)

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Europe

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 (I)

- Thresholds for whether a merger qualifies for EC review are based on mechanistic "turnover" criteria:
  - combined worldwide turnover exceeds EUR 5000 million; <u>and</u>
  - EU-wide turnover of each of at least two of the parties exceeds EUR 250 million; <u>unless</u>
  - each of the parties achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

Criteria for coming within EC jurisdiction (II)

- 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; <u>and</u>
  - in each of at least three Member States, combined turnover exceeds EUR 100 million; <u>and</u>
  - in those three Member States, aggregate turnover of each of at least two parties exceeds EUR 25 million; <u>unless</u>
  - 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

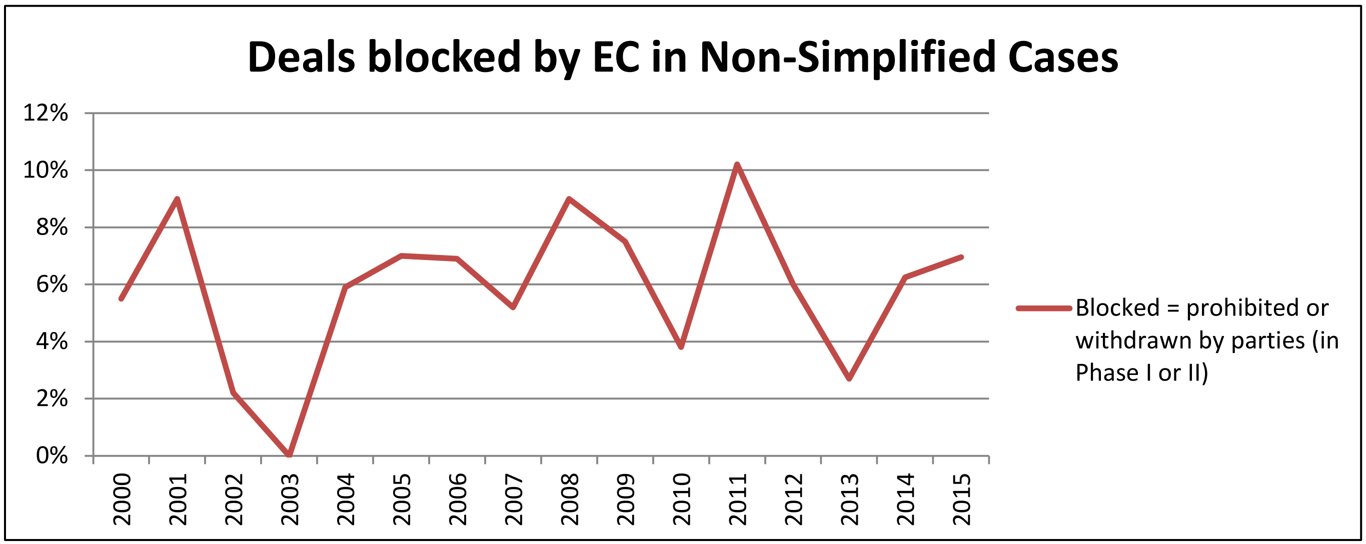
- Two-phase review process – both phases carried out <u>within</u> the EC
  - same case team with additional members and involvement of Chief Economist team and Hearing Officer
  - Phase II concerns set out in formal SO with possibility for oral hearing
- Strict deadlines
  - 25 working days for Phase 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 less than 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.

The last three prohibitions all took place in 2012/2013

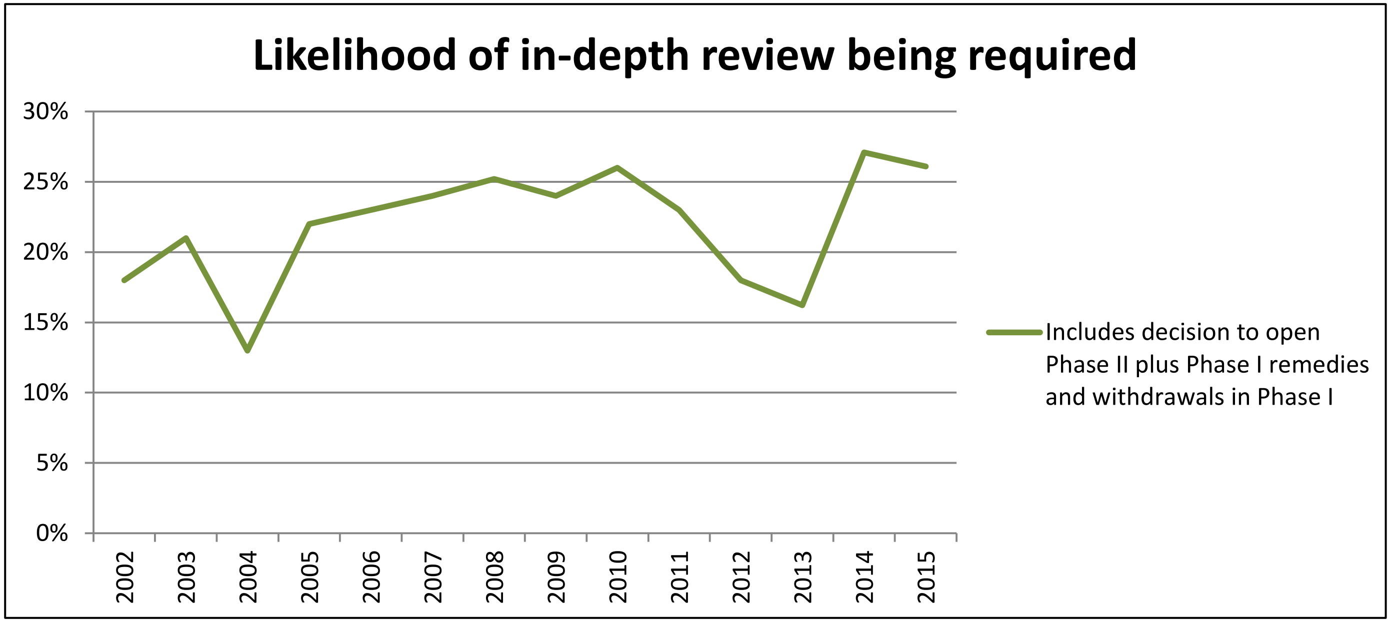
- *Deutsche Börse/NYSE Euronext*: over 90% of global trade in European financial derivatives
    - new entry difficult – market dynamics would reinforce monopolistic position
    - efficiencies not enough to outweigh harm
    - proposed remedies did not include sale of significant overlapping derivatives products
- *UPS/TNT*: three-to-two in express deliveries to another European country
    - fourth player did not exercise significant competitive constraint
    - efficiencies not sufficient and would not be passed on to all segments
    - sufficient remedies not offered in time

The last three prohibitions all took place in 2012/2013 (cont.)

- *Ryanair/Aer Lingus III*: over 80% market share on routes
  - monopoly on some routes, removal of closest competitor on others
  - no prospect of new entry post-merger
  - slot divestitures insufficient-limited ability/incentive of purchasers to compete

EU merger control in practice – statistics (II)*

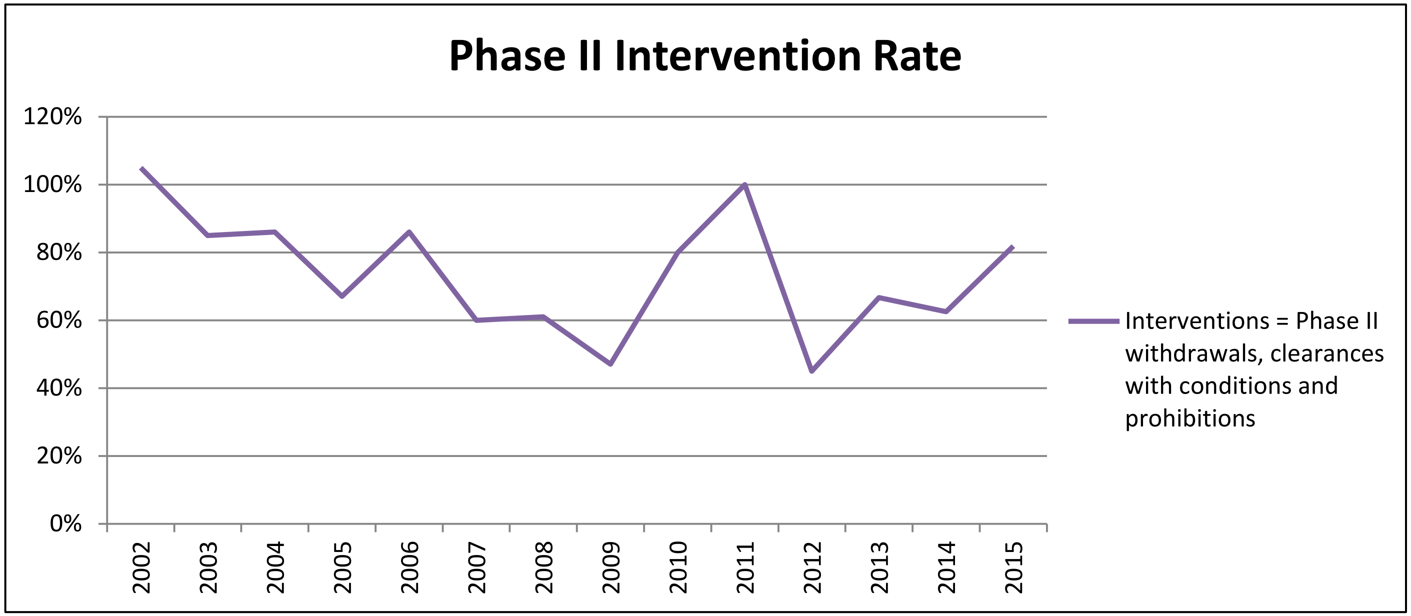
- Although not a big deal "blocker", EC is cautious in merger review
- Significant percentage of deals that do not qualify for simplified procedure require either in-depth review or clear remedies in Phase I to avoid Phase II



*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
  - the deal is high profile; and
  - the market/sector is important (telecoms, financial services, life sciences, energy).

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
  - senior point-person to co-ordinate information gathering
- More is often better
- Proactive outreach to customers where possible
- In vast majority of cases collaborative approach is much more effective than confrontational
- For “red flag” deals think about remedies early
  - can be hard to avoid a full Phase II investigation unless very clear and comprehensive remedies are offered

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China

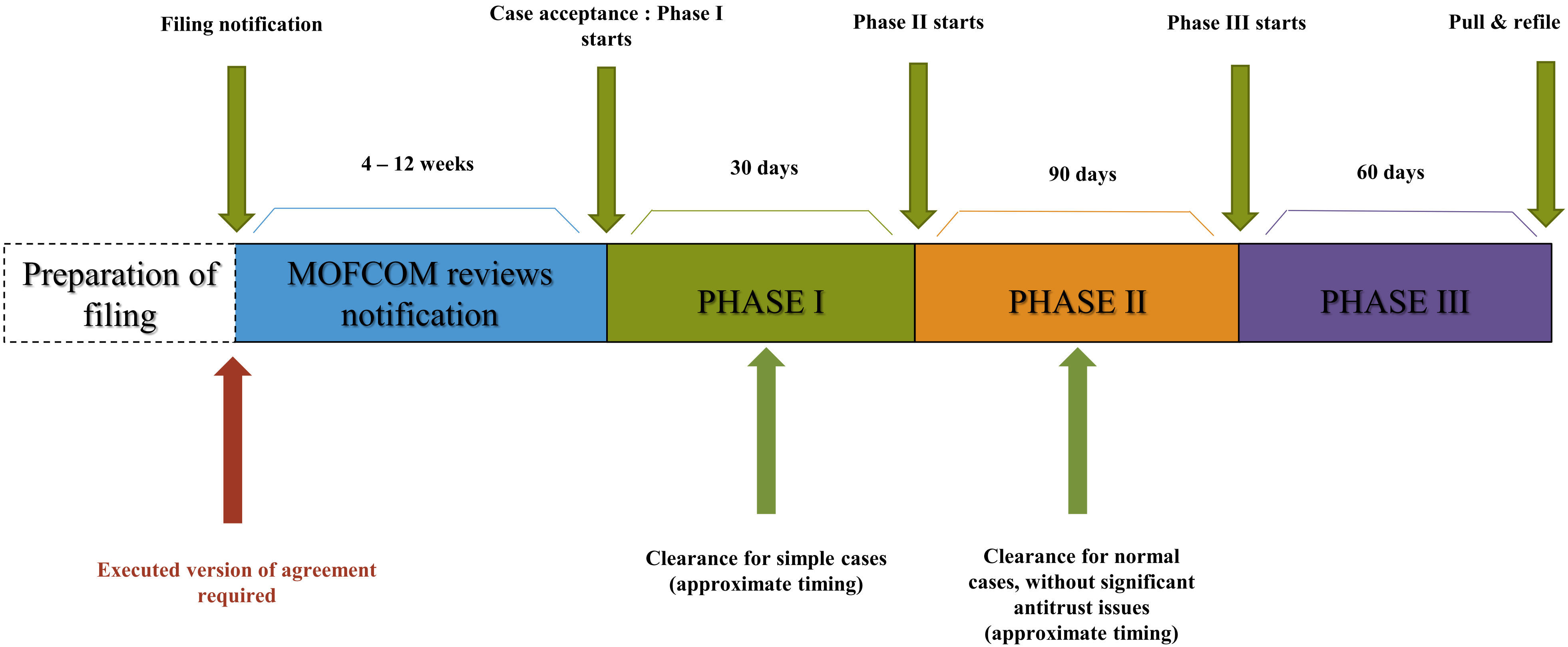
Do we have to file in China?

- Thresholds:
  - each of Buyer and Target have China revenues > USD 61 million
  - Buyer and Target have combined revenues of
    - USD 1.5 billion worldwide OR
    - USD 300 million in China
- MOFCOM can investigate sub-threshold transactions
- Beware of revenues booked in Hong Kong
- Issues with JVs

MOFCOM’s Track Record

- End of 2015 Statistics
  - 1,276 transactions cleared
  - 26 conditional approvals
  - 2 prohibitions
    - Coca-Cola / Huiyuan
    - P3 shipping alliance
- Simplified filings accounted for 75% of unconditional approvals
- Over 50 investigations for non-filing; penalties in 15 cases

MOFCOM Merger Review Timeline



Can we carve out China?

- Pre-closing clearance required
  - MOFCOM does not accept carve-outs
- Penalties for closing without clearance
  - fines
  - delays
  - political capital

Remedies

- Divestitures
  - not always in line with EU/US
- « hold separate »
- FRAND Commitments
- Obligations to continue to deal with Chinese customers

How can we speed up the process?

- Anticipate and preempt potential industrial policy issues
  - engage with stakeholders (trade association, customers, etc.)
- Anticipate MOFCOM's follow-up questions
- Timing of China filing:
  - China review generally longer than other jurisdictions so generally better to file first in China
  - exception when parties contemplate global remedies

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