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Strategies for Managing Multi-Jurisdictional Merger Filings

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A Practice Note discussing strategies for US counsel to manage multi-jurisdictional antitrust merger filings. This Note discusses what factors US parties and their counsel should consider when conducting a preliminary antitrust risk assessment. It considers how to determine where to file, procedural and substantive aspects of managing merger control for multi-jurisdictional (cross-border) filings, timing considerations, how to avoid gun-jumping, and how to draft agreement provisions relating to antitrust filings and approvals. It also discusses other key considerations in global transactions, including foreign direct investment (FDI) approvals, sector-specific regulations, and foreign subsidies regulations.

Transactions continue to be increasingly global, and many transactions require antitrust merger filings in multiple jurisdictions outside the US. Critical and early considerations arise when managing these transactions. US parties and their counsel must conduct a premerger antitrust risk assessment, analyzing where the transaction is reportable and might be vulnerable to regulatory investigation or enforcement actions. Counsel must analyze and be prepared to defend even non-reportable transactions, as enforcement agencies have begun scrutinizing deals below jurisdictional thresholds.

When conducting multi-jurisdictional antitrust merger analyses, counsel should retain local counsel in jurisdictions where filings are required, pay close attention to the timing of filings, and maintain a consistent approach to advocacy across jurisdictions. Counsel should also structure transactions and draft agreement provisions to account for antitrust risk. Transacting parties must ensure they are not viewed by antitrust enforcers as engaging in gun-jumping by consummating a merger, in fact or in form, before closing.

This Note discusses key strategies for US counsel managing antitrust merger filings in a transaction with multi-jurisdictional implications.

General Steps in Multi-Jurisdictional Transactions

When handling multi-jurisdictional transactions, counsel should conduct a global premerger antitrust risk assessment (see Antitrust Risk Assessment), and determine whether filings are required in:

- The US (see US Premerger Reportability and Filing Submission).
- Any non-US jurisdictions (see Non-US Premerger Reportability and Filing Submission).
  - Counsel must evaluate:
- Timing considerations, if filings are required, such as:
  - non-US filing deadlines;
  - the length of the applicable review period; and
  - whether the jurisdiction imposes a suspensory obligation (meaning the parties cannot close until they have obtained clearance from the antitrust authority) (see Timing Considerations).
- The activity level of each local antitrust authority.
- Any history of gun-jumping fines in each jurisdiction.
- The parties' prior merger control filings in any jurisdiction.

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- Any applicable foreign direct investment (FDI) or foreign subsidy regulation (FSR) filings and sector-specific regulations.
- How to draft risk-shifting provisions in the parties' transaction documents that allocate antitrust risk and relate to filing requirements across jurisdictions.
- How to minimize the risk of divergent outcomes by ensuring that the positions taken across jurisdictions are consistent.

For a checklist of key considerations, see International merger notification checklist.

Antitrust Risk Assessment

A global premerger antitrust risk assessment is generally the first step to navigating the merger clearance process. Antitrust risk for deals is primarily evaluated by assessing both:

- The jurisdictions in which notifications are required (procedural requirements) (see Procedural Considerations).
- The potential market effects in those jurisdictions where notification is required (substantive assessment) (see Substantive Jurisdiction-Specific Considerations).

(See Practice Note, International merger control.)

In assessing antitrust risk, counsel must consider whether a transaction will harm competition through the creation or enhancement of market power, for example through the substantial lessening of competition in the case of the US and the UK or by posing a significant impediment to effective competition in the EU (and in those EU member states who follow the EU approach).

When assessing potential market effects, counsel should consider:

- Product and geographic market definitions.
- Market concentration.
- The relative strength of the transacting parties and other competitors.
- The potential for market effects from the entry or expansion of new or nascent competitors.
- The transaction's procompetitive benefits.
- (See Practice Note, Merger control in corporate transactions: planning, timing, and implementation: Substantive assessment.)
- For a model PowerPoint presentation that counsel can use to explain the preliminary antitrust risk analysis in a proposed transaction to the client, members of a deal team, or other attorneys, see Preliminary Antitrust Merger Analysis: Presentation Materials.

Counsel should also consider whether the transaction impacts any non-horizontal relationships, meaning those between entities operating or consuming at different levels of the chain of commerce from the transacting parties (see Practice Note, Vertical Mergers).

In the US, the scope and variables of antitrust risk assessment have broadened. In October 2024, the Federal Trade Commission (FTC) announced that it had finalized changes to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) premerger notification rules. These changes were proposed in June 2023 and follow a lengthy comment period (see Mayer Brown, Final FTC Rule Enacts Fundamental Changes to HSR; Will Complicate Merger Filings (Oct. 11, 2024) and see Legal Update, FTC Announces Major Proposal to Change HSR Form and Process; 88 Fed. Reg. 42,178 (June 29, 2023)).

The FTC's final rule changes, expected to go into effect in mid-January 2025, do not affect the types of transactions that must be reported using the statutory size-of-person and size-of-transaction tests (see US Premerger Reportability and Filing Submission). However, the changes substantially affect the information that must be submitted with an HSR filing and accelerate the timing for advocating for and articulating the justification for transactions. The changes require a significantly more detailed preliminary assessment for all reportable transactions, not just those involving competitors.

US Premerger Reportability and Filing Submission

The HSR Act requires parties to certain transactions to file a premerger notification and report form with both the Department of Justice (DOJ) and the FTC and observe a statutory waiting period before closing. These transactions include:

- Acquisitions of assets (excluding cash).
- Acquisitions of voting securities.

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- Acquisitions of a controlling interest in a non-corporate entity, such as a limited liability company or partnership.
- The formation of a corporate or non-corporate entity, including a joint venture.
- Mergers of corporations and non-corporate entities.
- Acquisitions of exclusive licenses to certain intellectual property.

These transactions are reportable only if they meet all the following threshold tests and no exemption applies:

- The commerce test.
- The size-of-person test, if applicable (15 U.S.C. § 18a(a)(2)(B)(ii)(II)).
- The size-of-transaction test (15 U.S.C. § 18a(2)(A)).

For more on the reportability requirements under the HSR Act, including how to determine whether the size-of-person and size-of-transaction tests are met, see Practice Note, Determining Hart-Scott-Rodino Applicability. The size-of-person and size-of-transaction thresholds are revised annually (see Annual HSR Threshold Adjustments Chart).

For more on the available exemptions under the HSR Act, see Practice Note, HSR Act: Exemptions and HSR Exemptions Toolkit.

HSR Filing Fee and Submission

The merging parties must submit an HSR filing and pay a filing fee for reportable transactions. The fee depends on the total value of the assets, voting securities, or non-corporate interests that the acquiring ultimate parent entity (UPE) will hold after the transaction and is adjusted annually (see Annual Antitrust HSR Filing Fee Adjustments Chart and see Practice Note, What's Market: HSR Act Filing Fee Allocation).

The HSR form currently requires the parties to disclose basic business information, such as their revenue and subsidiaries, as well as any competitive overlaps with the target (see Standard Document, Hart-Scott-Rodino Form). It also requires the parties to submit documents that meet certain criteria and relate to competition, efficiencies, and synergies and were provided to the parties' officers or directors (or the equivalent), known as Item 4(c) or 4(d) documents (see Practice Note, HSR Form: Item 4(c) and 4(d) Documents). Items 4(c) and 4(d) refer to the section of the HSR form and related instructions that require those documents.

In contrast, in the EU, parties must submit copies of all documents prepared by or for a member of a company's board or shareholders meetings that analyze the competitive conditions of the concentration as part of the filing.

The final rules change the HSR filing requirements and are expected to increase the burden on parties to submit documentation concerning the transaction and relevant industry(ies).

US Transaction Review

The DOJ and FTC share authority to review mergers, though only one of the agencies reviews a transaction. The HSR Act allows either the DOJ or the FTC time to review the transaction and determine whether it has anticompetitive effects. If so, the reviewing agency can negotiate remedies or sue to block a transaction that it determines raises unmitigated anticompetitive concerns. If the FTC sues to challenge a transaction, it can bring an administrative action or sue in federal court, while the DOJ can only sue in federal court (see FTC Merger Review Process Flowchart and DOJ Merger Review Process Flowchart).

Over time, the agencies have developed expertise in certain industries and often review transactions accordingly. For example, the DOJ has expertise in the banking, airlines, and telecommunications industries, and the FTC in the hospitals, chemical manufacturing, and retail industries. When the FTC and DOJ both wish to review the same transaction (known as a clearance contest), the dispute is escalated to the agencies' leaders to make a decision.

For more on the agency clearance process, see Practice Note, Predicting the Investigating Agency for Merger Review.

HSR Waiting Period

Once all parties have submitted complete HSR filings, the initial waiting period begins (see FTC, Premerger Notification and the Merger Review Process and Practice Note, Hart-Scott-Rodino Act: Overview: Waiting Period). The waiting period is generally 30 days but is 15 days for cash tender offers and bankruptcies. If an antitrust agency's

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initial investigation shows that the transaction does not raise substantive antitrust concerns warranting further action, it may grant early termination of the waiting period if requested by either party. However, as of February 4, 2021, the agencies "temporarily suspended" discretionary early termination (see FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021)). As a result, parties must wait at least 30 days (or the full initial waiting period) to close a reportable transaction. The FTC stated it will lift its suspension on early termination of filings after the final rules go into effect (see FTC, Press Release, FTC Finalizes Changes to Premerger Notification Form (Oct. 10, 2024)).

During the initial waiting period, the buyer can withdraw the HSR filing once and refile it within two business days (known as a pull and refile) without incurring additional costs, but only if the terms of the transaction have not materially changed. The "pull and refile" restarts the initial 30-day waiting period (see FTC, Getting in Sync with HSR Timing Considerations (Aug. 31, 2017)). The refile needs to include certain additional information since the first filing, including any new Item 4(c) and 4(d) documents. For more on the pull and refile process, see Standard Document, HSR Form: Notice of Withdrawal and Intent to Refile. The final HSR rules, which are not yet in effect, specify the information that the acquiring party must submit if it chooses to pull and refile its HSR form in 16 C.F.R. § 803.12(c).

Second Requests

At the end of the initial HSR waiting period, the agency reviewing the transaction can either allow the waiting period to expire or issue a Request for Additional Information and Documentary Material (Second Request) to each party, asking for more information (see Practice Note, Second Requests in Merger Investigations and FTC, Premerger Notification and the Merger Review Process). Where a Second Request is issued, the reviewing agency negotiates with the transacting parties to tailor the scope of the investigation (see FTC, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave). The agency issues document requests and interrogatories and interviews or deposes key employees to determine whether the transaction will have anticompetitive effects. Complying with a Second Request usually takes two to six months.

For more information on the Second Request process, see the Second Request Toolkit.

Non-US Premerger Reportability and Filing Submission

In a global transaction, counsel must determine whether filings are required outside the US in any of the 130 plus jurisdictions with merger control regimes (see Quick Compare Chart, Merger Control and OECD Competition Trends 2021, Volume II, Global Merger Control (2021)). Filing regimes are either:

- **Mandatory.** Most jurisdictions impose a mandatory filing requirement if notification thresholds are met and can impose significant fines for gun-jumping (see Box, Avoiding Gun-Jumping). In many of these mandatory jurisdictions, filing obligations are also suspensory, meaning that the parties may not complete a transaction before obtaining clearance.
- **Voluntary.** A minority of jurisdictions have voluntary notification regimes, meaning that the parties may complete the transaction without filing. New Zealand, Singapore, and the United Kingdom each have a voluntary filing regime (see Voluntary Filing Regimes). The Australian merger control regime is currently voluntary but is expected to become mandatory effective January 1, 2026.

(See Practice Note, International merger control: Is the merger regime mandatory or voluntary?.)

Counsel should first determine if non-US filings are required and then consider whether those filings are mandatory and suspensory. Notification thresholds are most often based on the parties' revenues or sales to customers in the relevant jurisdictions, with the target's local revenues being a significant factor. To determine if filings are required, counsel should obtain each merging party's sales and asset values in those jurisdictions in the preceding financial year.

Common tests for determining whether the notification threshold is met in a certain jurisdiction include:

- A turnover test, which evaluates the parties' national turnover (such as in Bulgaria and Hungary) or worldwide and national turnover (such as in France, Germany, and the Netherlands) (see Box, Determining Sales and Turnover).
- A market share test, which evaluates the parties' market share in the jurisdiction (such as in Spain and Portugal).

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- A turnover and asset test (such as in Mexico, India, and South Africa).
- A transaction value-based test (usually in combination with a turnover test), such as in Germany and Austria.

(See Practice Note, International merger control: What triggers a notification? and Quick Compare Chart, Merger Control.)

Less commonly, certain jurisdictions apply:

- **A single-trigger test.** In a single-trigger jurisdiction, notification can be triggered even where the target has no sales in that jurisdiction (such as in Serbia, Montenegro, Turkey, Ukraine, and Vietnam). For example, in China, even if the parties' turnover does not meet the notification threshold, if there is evidence that the transaction may exclude or restrict competition, the State Administration for Market Regulation (SAMR) may still require notification.
- **A local nexus test.** Some jurisdictions expressly recognize that notification is triggered if the target has a local nexus there in the form of material turnover or assets. In other jurisdictions, a local nexus test has developed in practice.

For a chart setting out the jurisdictional thresholds and information on filing requirements, including whether the jurisdiction is mandatory or voluntary, see Quick Compare Chart, Merger Control. Counsel should closely assess the risks of not filing in jurisdictions where the companies have sales or assets below the relevant notification thresholds but could still attract regulatory scrutiny, especially in voluntary notification jurisdictions (so-called "call-in" risk) (see Voluntary Filing Regimes).

The parties should consider consulting local counsel in jurisdictions in which a preliminary analysis shows notification is potentially or likely required (see Practice Note, International merger control). Often, counsel can obtain initial advice from local counsel without disclosing the names or identifying details of the merging parties (that is, no-names advice) to evaluate whether:

- Filing thresholds are met.
- Exemptions apply.
- The antitrust enforcement authority is particularly active and if it has a history of gun-jumping enforcement, such as imposing fines or unwinding mergers, or both, where the parties failed to file a notification of a reportable transaction (see also Quick Compare Chart, Merger Control).

In the EU, there has been considerable debate about the jurisdiction of the European Commission (EC) to accept merger referrals from national competition authorities where national jurisdictional thresholds are not met but the transaction might be perceived as posing a risk affecting trade between the EU member states and threatens to significantly affect competition within the EU (see Practice Note, EU Merger Regulation: jurisdiction and process).

On September 3, 2024, the Court of Justice overruled the decision of the General Court and the decision by the EC to accept merger referrals from national competition authorities and to review the proposed Illumina/Grail transaction under Article 22 of the EU Merger Regulation even though national thresholds were not met (see Mayer Brown, Below The Thresholds But on The Radar: What's Next After the ECJ's Illumina/Grail judgment? (Sept. 4, 2024)). Counsel should carefully and regularly monitor this area.

US counsel and the parties should consider retaining local counsel if needed, especially where the merging parties' counsel is not qualified in the relevant jurisdiction.

Voluntary Filing Regimes

In voluntary jurisdictions, counsel should carefully consider whether to file based on the risk of a regulatory authority taking an interest in the transaction (even if filing is not mandatory). For example, filing may be advisable in a voluntary jurisdiction based on:

- The scope and profile of the transacting parties' activities.
- Overlaps between the transacting parties' activities.
- Potential vertical restraints.

Counsel may also determine that filing in a voluntary jurisdiction is advisable when considering the risk of penalties, unexpected investigations, unwinding a deal, or even criminal sanctions.

Antitrust authorities in voluntary jurisdictions may monitor transaction activity for potential anticompetitive effects. Some voluntary jurisdictions have highly active merger control authorities, such as the UK, Australia, and New Zealand (see Practice

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Note, International merger control: Is the merger regime mandatory or voluntary?). These authorities may raise questions about and choose to investigate non-notified transactions over which they have jurisdiction. In the UK, the Competition & Markets Authority (CMA) has broad discretion when applying the so-called share of supply test. This test applies in situations where the CMA can base its jurisdiction not on turnover, but instead on the transaction creating or enhancing a 25% share of the supply of particular goods or services in the UK, or a substantial part of it (see Practice Note, UK merger control: share purchases: The share of supply test).

In the past, the CMA has investigated transactions with (arguably) only a limited UK nexus, for example, where the parties had overlapping pipeline products (see Practice Note, International merger control). Although the UK is a voluntary jurisdiction in theory, if the CMA chooses to review a transaction, it may:

- Impose compulsory hold separate orders in a transaction that has closed.
- In a proposed transaction, intervene with interim orders where it determines there is a risk to competition by integration (see Practice Note, UK merger control: share purchases: Interim measures).

Counsel should consult each jurisdiction's issued merger guidelines for insight into how a particular regulatory body might view a certain transaction and stay abreast of proposed changes. In some cases, the parties may wish to proactively provide information on a non-notified transaction to solicit the regulatory body's view of the transaction, such as a briefing paper to the CMA's mergers intelligence unit (see Practice Note, International merger control).

Filing Fees

Most mandatory and voluntary regimes impose filing fees. Notably, China, the EU, Japan, Norway, and South Korea do not impose these fees. In the US, the typical range of fees, for example, is from $30,000 up to $2.335 million (see Annual Antitrust HSR Filing Fee Adjustments Chart). In the UK, most mergers which the CMA investigates require a fee to be paid. Fee amounts vary from £40,000 to £160,000 and are based on the value of the UK turnover of the business being acquired.

Filing Deadlines

Some jurisdictions impose a filing deadline that is based on a triggering event, such as entering into the transaction agreement. For example, parties must file in Albania and Greece within 30 days, and in Bosnia, Serbia, and Montenegro within 15 days, of the triggering event. However, most jurisdictions, including Canada and the EU, simply require that the filing be submitted (and the transaction approved) before completion of the transaction. For more information on timing considerations for multi-jurisdictional filings, see Timing Considerations.

Length of the Review Period

Understanding the length of the relevant jurisdiction's prenotification contact period (that is, the period before the parties make any formal filing but are in communication with the agencies) and substantive review period is essential, particularly for suspensory jurisdictions in which parties may not close a transaction before obtaining clearance. Parties could be subject to civil penalties for gun-jumping (see Gun-Jumping).

The length of the review period varies by jurisdiction and often involves a preliminary review potentially followed by a more in-depth investigation. For example, in the EU, the EC must within 25 working days complete its Phase I review process and decide whether to clear the merger or proceed to Phase II (see Practice Note, EU Merger Regulation: jurisdiction and process). For information on the Phase I and Phase II merger review periods in the US, see Practice Note, Merger Review Timeline (US).

In the UK, the CMA has up to 40 working days to reach a decision on whether to clear the merger or refer it to Phase II.

In China, SAMR takes about four to eight weeks to review the filing documents before it officially accepts them. SAMR then completes the Phase I review process within 30 calendar days, the first ten days of which are the public notice period for simple cases. In China:

- Most cases reviewed under the simplified procedure are usually approved during Phase I (30 calendar days).
- Most cases reviewed under the normal (not simplified) procedure that do not have competition issues are usually approved in Phase II (90 calendar days) and Phase III (60 calendar days).

China takes approximately 7 to 12 months or longer to conditionally approve remedy cases.

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Other Filings to Consider

Counsel should evaluate whether there are any additional filings outside of competition merger control to submit in connection with the transaction.

FDI Filings

Mandatory and suspensory FDI filings are required in many circumstances. Even where mandatory filings are not required, the authorities in many jurisdictions have wide powers to "call-in" transactions that might raise national security concerns. It is typically possible to submit voluntary notifications in such jurisdictions, if a mandatory filing is not required. FDI filings generally allow authorities to review transactions based on national security considerations and are separate from merger control rules and administered by separate agencies. In the US, the Committee on Foreign Investment in the United States (CFIUS) has authority to review transactions involving a foreign entity (see Practice Note, CFIUS Review of Acquisitions and Investments). Certain jurisdictions require filings even from local buyers such as in the UK, where the Investment Security Unit within the Government's Cabinet Office is responsible for the national security regime (see Practice Note, Regulation of Foreign Investment in United Kingdom).

Over 100 jurisdictions have FDI regimes, with varying forms of FDI screening rules, and jurisdictions around the world are increasingly adopting these regulations (see Article, Foreign Direct Investment: National Screening Regimes Proliferate). Many jurisdictions globally have taken an increasingly aggressive posture towards FDI. Several authorities have recently:

- Either:
  - strengthened existing FDI screening rules (such as in the US as well as in the EU, where a new legislative proposal has been introduced to reform the FDI Screening Regulation); or
  - established new FDI or national security regimes (such as the National Security and Investment rules in the UK).
- Expanded their position on what constitutes a sensitive sector and what level of investment triggers a mandatory filing.

(See Quick Compare Chart, Regulation of Foreign Direct Investment (FDI) and OECD, ECD Foreign Direct Investment Regulatory Restrictiveness Index.)

Given the powers wielded by FDI regulators to review and potentially unwind transactions even post-closing, precautionary filings are often advisable even where they are not mandatory. Counsel should perform an analysis of potential FDI filings during due diligence, and parties must consider their impact on deal timing and closing.

FSR Filings

In January 2023, the FSR came into effect in Europe, empowering the EC to investigate financial contributions granted by non-EU governments to companies active in the EU and to redress distortive effects of these subsidies in the context of M&A transactions (and other market situations, such as public tenders).

The FSR requires transacting parties to notify the EC about a transaction if:

- It has a nexus to the EU.
- At least one of the transacting parties, the target, or the joint venture is established in the EU and generates aggregate revenue in the EU of at least EUR 500 million.
- The parties to the transaction were granted aggregate financial contributions of more than EUR 50 million from non-EU countries in the three years preceding the conclusion of the agreement, the announcement of a public bid, or the acquisition of a controlling interest, where the parties to the transaction include:
  - the acquirer or acquirers and the acquired entity;
  - the merging parties; or
  - in the case of a joint venture, the entities creating the joint venture and the joint venture.

(See Legal Update, Foreign Subsidies Regulation enters into force and Practice Note, The EU Foreign Subsidies Regulation.)

It remains to be seen how the FSR regime will be implemented in the M&A context in practice, with Q&As and precedents beginning to emerge, although formal guidance might not come until as late as January 2026 (Article 46(1) FSR). In relation to public procurement and other market activities, the EC has so far focused on Chinese subsidies. However, the EC has emphasized that it is nationality blind in its approach to where foreign subsidies come from,

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and that its focus is on any potentially distortive effect on competition in the EU (see Legal Update, Foreign Subsidies Regulation: European Commission publishes guidance on assessing distortion and application of balancing test).

In September 2024, the EC concluded its first in-depth review of an M&A transaction, imposing commitments on the transacting parties which involved subsidies from the UAE (EC Press Release, Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation (Sept. 23, 2024)). The FSR's impact is therefore already notable in a number of M&A deals. Indeed, as of February 2024, the EC engaged in pre-notification talks with the transacting parties in 53 cases covering a large set of sectors (see EC Competition, FSR Brief (Feb. 1, 2024)).

Under the FSR, parties can be fined up to 10% of the preceding financial year's turnover if the business:

- Fails to file a notification.
- Implements a notified merger or acquisition before the applicable review periods have expired.
- Tries to improperly avoid the notification requirements.

As a result, counsel should assess the potential application of the FSR on transactions from an early stage, and create awareness among relevant business contacts of this new regime which introduces, in addition to possible merger control and FDI clearance requirements, an extra layer of regulatory compliance and deal conditionality for some larger transactions. In particular, counsel should consider how the significant evidentiary requirements might best be met, especially in relation to relevant foreign financial contributions, and the impact of this on deal timing. The EC has aligned its published timeframes for FSR and merger reviews so that in theory the two notifications can run in parallel, noting however that the procedures remain different. For example, on the face of the FSR, remedies cannot be offered at Phase 1. However, parties and their advisors should still reach out to the EC as soon as possible to ensure that both FSR and merger control interventions are coordinated in terms of timing, data requests, and analysis as much as possible.

For more information, see Foreign Subsidies Regulation Toolkit.

Sector-Specific Considerations

Some jurisdictions impose sector-specific rules and approvals for, or take specific interest in, transactions in industries that are considered of special economic or political importance, including:

- Finance.
- Media.
- Telecommunications.
- Energy.
- Natural resources.
- Utilities and defense.
- Semiconductor and key technology manufacturing.

(See Quick Compare Chart, Regulation of Foreign Direct Investment (FDI).)

Many jurisdictions are taking a particular interest in assessing activity within digital markets or so-called digital platforms. The largest technology players may need to disclose transactions that fall below existing merger control thresholds in the digital sector under:

- The EU's Digital Markets Act (see Practice Note, Digital Markets Act (EU): overview).
- The UK's Digital Markets, Competition and Consumers Act (see Legal Update, Digital Markets, Competition and Consumers Act 2024 published (digital markets and competition aspects)).

China's SAMR recently implemented new regulations specific to its analysis of market power within the digital platform market. Under the 2023 Regulations on Review of Concentrations of Undertakings, SAMR considers the parties' "ability to possess and process data" as a relevant factor in analyzing market concentration (see Practice Note, Antitrust Investigations in China: Overview: SAMR Implementing Rules and see Susan Ning, Ruohan Zhang, and Weimin Wu, China: The Latest Steps Towards a More Robust Enforcement Framework for Anti-Monopoly (Dec. 8, 2023)).

For more information on determining which jurisdictions have sector-specific FDI and merger control rules, see Quick Compare Charts, Regulation of Foreign Direct Investment (FDI) and Merger Control.

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Drafting Transaction Agreements

Muti-jurisdictional transaction agreements should reflect the increased antitrust risk of filing in multiple jurisdictions. Before drafting the agreement, the parties should determine the transaction's antitrust risk and related timelines, and factor these into the transaction's closing conditions and drop-dead date. The drop-dead date is the date by which the parties can terminate the agreement if certain closing conditions, such as a requirement to obtain clearance from antitrust authorities, have not been met.

When drafting these provisions, counsel should consider the following key questions:

- Which jurisdictions have authority to investigate the deal?
- What are the timelines for investigations in any of those jurisdictions?
- What is the likelihood of an in-depth investigation, or legal action, in any of those jurisdictions?
- If an investigation is launched, what is the likelihood of conditional clearance or prohibition?

These questions can help parties determine how to allocate the responsibility and risk of antitrust approval in the transaction agreement, known as risk-shifting provisions. These provisions address timing, the efforts the parties must take to obtain antitrust approval (known as antitrust efforts provisions), interests in competitors, and post-signing acquisition limitations, and may include reverse break-up (or reverse termination) fees and ticking fees (see Practice Note, Antitrust Risk-Shifting Provisions: Overview).

Timing Provisions

Some transaction agreements set the drop-dead date (also known as the longstop date) at the time investigations are likely to conclude. Other agreements allow time for litigation before the drop-dead date. Transacting parties filing in multiple jurisdictions should determine the drop-dead date, including any extensions, by considering:

- The timing of investigations.
- The likelihood of an in-depth investigation or litigation in any jurisdiction with authority to block the deal.
- The requirement to obtain clearance in multiple jurisdictions.

Transaction agreements often include either automatic or optional extensions to the drop-dead date if closing conditions requiring antitrust approval are not met by the original date (see, for example, Standard Clause, Purchase Agreement: Drop-Dead Date Extension for Antitrust Approval). The extension of the drop-dead date can be any length the parties decide but is typically three to six months to allow the investigation or litigation to conclude. Parties can also allow for an extension only if the deal is challenged, but not for an extended investigation.

Antitrust Efforts Provisions

Antitrust efforts provisions specify requirements for the parties to complete the transaction. Typical provisions require parties to use reasonable efforts, reasonable best efforts, or commercially reasonable efforts to obtain required antitrust clearance (see Practice Note, Antitrust Risk-Shifting Provisions: Overview). In some instances, the parties agree to a hell or high water (HOHW) clause where a buyer agrees to take any and all action to obtain antitrust approval. Risk-shifting provisions also can include:

- Requirements to communicate about early termination of a waiting period.
- Obligations to pull and refile an HSR or other antitrust filing.
- Allocation of filing fees and costs.
- Whether the parties must make divestitures or are obliged to accept particular conditions of approval.
- Whether parties must litigate in the event of an antitrust or other legal challenge.

Filing in multiple jurisdictions may complicate drafting and negotiating a risk-shifting provision as different jurisdictions may require different remedies and conditions and have varying standards for enforceability. The parties should therefore determine the conditions they are willing to accept and record those decisions in the transaction agreement.

Parties should also consider how courts in different jurisdictions may interpret efforts clauses. Some jurisdictions may interpret an efforts provision as conceding a proposed remedy. Additionally, parties should consider including a choice-of-law provision that governs where the agreement is enforced. This

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can limit the risk of jurisdictions interpreting the efforts clause under a source of law that was not intended.

Interest-in-Competitors Provision

The seller may ask a buyer to include an interest-in-competitors provision, which generally is a representation that the buyer, its controlled entities, and its associates do not have an interest of 5% or more in any of the target's competitors. Parties that anticipate filing in different jurisdictions should consider how that provision impacts the definition of the target's competitors and how different jurisdictions define control.

For more on interest-in-competitors provisions, see Practice Note, Antitrust Risk-Shifting Provisions: Overview: Interest in Competitors Provision. For a sample interest-in-competitors provision, see Standard Clause, Purchase Agreement: Interest in Competitors Provision.

No Post-Signing Acquisitions

The agreement may contain a provision stating that the buyer, including its associates and subsidiaries, or, in some cases the seller and its associates and subsidiaries, will not enter into any post-signing agreements or make any acquisitions that may:

- Increase the risk that the original transaction does not pass antitrust scrutiny and as a result does not close.
- Extend the antitrust agencies' investigation or review of the original transaction.

This prevents the companies from entering agreements that may hurt the chances of the deal being approved within a certain time period. If a deal requires approval in multiple jurisdictions, this provision could prevent the buyer from engaging in a variety of deals, underscoring the importance that counsel understand the scope of global transactions as early as possible.

Transaction agreements sometimes also contain provisions limiting or prohibiting transactions after signing for which merger filings are required in multiple jurisdictions. Parties should ensure these prohibitions are carefully negotiated. The sequencing of transactions is relevant for counterfactual analysis.

For more on post-signing limitations provisions, see Practice Note, Antitrust Risk-Shifting Provisions: Overview: Post-Signing Limitations Provision. For a standard provision prohibiting the buyer from entering post-signing agreements or acquisitions that can be used in a purchase or merger agreement, see Standard Clause, Purchase Agreement: Post-Signing Limitations Provision.

Reverse Break-Up Fees

A reverse break-up fee (or reverse termination fee) is a fee paid by the buyer to the target if the deal is unable to close due to the buyer's breach or because of some other failure, including failure to obtain antitrust clearance. The reverse break-up fee allows the target to reduce the risk of a deal not closing, especially if the deal is likely to be investigated by antitrust authorities. This also allows the parties to shift risk without creating obligations on the buyer to take certain actions, which antitrust authorities might view as a roadmap of the actions that the parties are willing to take to complete the transaction.

Multi-jurisdictional filings may increase the likelihood of a deal being investigated and ultimately challenged in one or more jurisdictions, and therefore should be considered when setting the reverse break-up fee. The potential for carve-outs and divestitures in certain jurisdictions may affect the determination of the reverse break-up fee. On the other hand, if a deal is likely to attract antitrust scrutiny, parties may be unwilling to agree to a high reverse break-up fee.

For more information on reverse break-up fees, see Practice Notes, Antitrust Risk-Shifting Provisions: Overview: Reverse Break-Up Fees and Reverse Break-Up Fees and Specific Performance.

Ticking Fees

A ticking fee requires a buyer to pay the target additional money if the transaction is delayed or terminated after a specific date or for a specific reason, such as for failure to receive antitrust clearance. Filing in multiple jurisdictions can increase the likelihood that a transaction is either blocked or cleared subject to conditions. This increased risk may be reflected in the ticking fee.

For more information on ticking fees, see Practice Notes, What's Market: Antitrust-Related Ticking Fees and Antitrust Risk-Shifting Provisions: Overview: Ticking Fees.

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Strategies for Managing Multi-Jurisdictional Filings

Counsel should consider how to manage the process of submitting multiple pre-closing filings and obtaining clearance. Working with experienced local counsel, parties should consider the unique considerations for each jurisdiction, including:

- The procedural aspects of submitting filings (see Procedural Considerations).
- The timing of submitting filings, which affects the deal timetable (see Timing Considerations).
- The substantive aspects of submitting filings (see Substantive Jurisdiction-Specific Considerations).

Procedural Considerations

As early as possible in the process, counsel for both merging parties should:

- Agree on a definitive list of jurisdictions (both mandatory and voluntary) in which filings will be made.
- Determine which party will take the lead in ensuring notifications are submitted.
- Consider the filing requirements in each jurisdiction.
- Carefully monitor the workstreams for each jurisdiction and consider timing issues.

Determining Which Party Takes the Lead

Parties should consider who will function as the "bridge" counsel for the transaction and coordinate among the parties and local counsel to ensure all appropriate notifications are submitted. In most jurisdictions, the merging parties are required to submit a substantial amount of information and internal documentation with a notification. Therefore, appointing one law firm as a conduit for information between the transacting parties and local counsel advising on jurisdiction-specific filing requirements offers strategic and organizational benefits and helps to minimize the burden on the parties.

Bridge counsel generally develop the core deal advocacy to be incorporated into white papers, briefing documents, and other pre-notification submissions consistent with the parties' commercial strategy, including:

- Descriptions of the parties' activities.
- The definition of a relevant antitrust market.
- Market share determinations.
- Any horizontal or vertical relationships impacted by the transaction.

Bridge counsel also closely review filings to ensure they are consistent across jurisdictions. Parties should consider how best to allocate responsibility for preparing filings in particular geographic regions, potentially based on a firm's expertise with the merger control regime in a particular jurisdiction.

For more on drafting white papers in mergers, see Practice Note, Drafting and Submitting White Papers.

Filing Requirements

In each jurisdiction where filings are required, counsel should:

- Maintain a complete set of that jurisdiction's filing instructions and requirements, including the required categories of documents that must be attached to notifications and responses.
- Identify authorized signatories of the parties and ensure those individuals are given sufficient time to review and provide feedback on filings before any deadline in the agreement or statutory deadline for submission. Counsel should also consider additional required formalities, such as apostilled or notarized signatures.

Whenever possible, counsel should coordinate requests for information across jurisdictions to streamline information gathering and limit direct points of contact at the client.

Timing Considerations

Timing is extremely important when filing in multiple jurisdictions, and counsel must consider timing implications in the overall deal timetable. Counsel should also assess the impact of any negotiated voluntary agreements between the parties and a governmental authority, known as a timing agreement (see Practice Note, Second Requests in Merger Investigations: Timing Agreements).

Counsel should maintain a comprehensive list of:

- The filing deadlines in each jurisdiction.
- The expected length of the review period in each jurisdiction where filings are being submitted.

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Counsel should factor into the deal timetable in each jurisdiction the impact of a potential investigation. A preliminary or Phase I investigation may be relatively straightforward and brief, while a potential in-depth or Phase II investigation can be complex and lengthy, occasionally extending for several months.

In some jurisdictions, follow-up submissions may be required, for example, responses to requests for information and separate exemption applications in relation to non-compete clauses. Counsel should consider the potential impact of these submissions on timing.

When to Submit Filings

If a deal requires antitrust clearance in multiple jurisdictions, the transacting parties should determine when to file in each jurisdiction. Since most jurisdictions impose a suspensory obligation on parties not to implement the transaction during the review period, counsel should think strategically about how to sequence filings to minimize the risk of disparate outcomes or unnecessary delays (see Other Filings to Consider).

For example, counsel could consider one of the following approaches for submitting multiple filings:

- **Filing in each jurisdiction as soon as possible.** This approach allows each jurisdiction ample time to review the transaction before the drop-dead date.
- **Sequencing the filings.** Parties can sequence filings by submitting in some jurisdictions immediately while waiting to file in others. For example, parties may file first in those jurisdictions likely to clear the transaction or, alternatively, in those jurisdictions likely to take an aggressive approach. Successfully obtaining clearance in one key jurisdiction might help to relieve possible concerns in other jurisdictions. The sequencing approach can help control which jurisdiction investigates the deal first. If the US or the EU investigates a deal first and the investigation progressed significantly at the time of filing in smaller jurisdictions, authorities in smaller jurisdictions have the option to dovetail their investigations. Additionally, counsel can often leverage the information contained in an EU filing to promote consistency across other filing jurisdictions. Moreover, where remedies are agreed to with a key competition authority, which could address concerns in another voluntary jurisdiction, the competition authority in the latter jurisdiction may decide not to investigate the transaction.
- **Aligning the filings.** Parties may file concurrently in all applicable jurisdictions to allow the review process to proceed simultaneously. Alternatively, parties can time the filings to align remedy negotiations across jurisdictions. Depending on the type of transaction, this could allow the parties to negotiate one remedy that meets the requirements of multiple jurisdictions, decreasing the likelihood of having to offer multiple disparate remedies. However, aligning the filings in this way can be difficult because it can increase the demands on counsel to provide information requested by relevant authorities.

Fencing Provisions

In deciding where to file, parties should consider whether they can lawfully close the transaction with an outstanding antitrust investigation in each jurisdiction. If the parties are not able to "close over" a jurisdiction's investigation, they should be careful to leave enough time for a full review before a drop-dead date.

To speed up the process to closing, parties can consider using fencing provisions or carve-outs, which allow them to close a transaction requiring multiple antitrust approvals in jurisdictions other than where there are outstanding non-material antitrust approvals (see Standard Document, Purchase Agreement: Antitrust Approval Fencing (Carve-Out) Provision).

However, the parties should be aware that fencing or carve-out provisions are not permissible in all jurisdictions (see Practice Note, International merger control).

For a model fencing provision that may be used in a purchase or merger agreement to close a transaction outside of a jurisdiction with a non-material outstanding antitrust approval, with explanatory notes and drafting and negotiating tips, see Standard Document, Purchase Agreement: Antitrust Approval Fencing (Carve-Out) Provision.

Substantive Jurisdiction-Specific Considerations

Once counsel and the parties decide where to file, it is critical to develop a comprehensive plan for navigating the complexities of each filing regime.

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Counsel can avoid unexpected outcomes and delays by carefully balancing parallel processes and closely analyzing the likelihood of a reviewing jurisdiction taking an adverse position on a transaction.

Competition Analysis

To determine the likelihood of an investigation, counsel should have a thorough understanding of each jurisdiction's substantive tests for assessing the potential competitive effects of a transaction. Counsel should look to the regulatory body's published decisions to assess its:

- View of the relevant product or geographic market.
- Threshold for establishing the substantive legal test, for example a dominant market position.

(See Practice Note, International merger control: What is the relevant substantive test?.)

In some jurisdictions, features such as the effects of the merger on labor markets, data protection, or ESG considerations may be more or less relevant than in other jurisdictions. These features may be considered either as part of the competition assessment or on a standalone basis. (See, for example, Practice Note, How Antitrust Agencies Analyze M&A: Guideline 10: Mergers Involving Buyers, Including Labor Markets.)

Merger Remedies

To effectively and efficiently navigate multiple merger reviews, counsel should perform an early assessment of the scope and nature of acceptable remedies for each jurisdiction involved. To do this, counsel should review each jurisdiction's past and present positions regarding potential remedies for competitive concerns.

In general, many competition authorities have exhibited a preference for structural (rather than behavioral) remedies, such as divestitures. Structural remedies are generally considered less burdensome to implement and monitor and are considered definitive, whereas behavioral remedies require adjustment over time as market circumstances change (see Practice Note, Merger Remedies). In some regimes, there is a pronounced distinction between the nature of remedies acceptable in Phase I and Phase II investigations. In the EU, for example, remedies proposed in Phase I investigations must remove any "serious doubts" about the anticompetitive effects of the transaction, whereas Phase II remedies are designed around specific competitive concerns (see Practice Note, International merger control: What are the deadlines for filing and how long will the process take?). However, it's worth noting the recent call to reconsider the approach to merger remedies in Europe in the Draghi report, especially in the case of so-called European champions (see Legal Update, Report on future of European competitiveness: recommendations on new approach to competition policy).

The success of the parties' timing strategy for submission of filings depends on the likelihood of the different jurisdictions accepting the same remedy (see When to Submit Filings). Some jurisdictions are more likely than others to accept behavioral remedies. One example is the EC in the Microsoft/Activision merger (see EC Press Release, Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions (May 15, 2023) and see What's Market, In the Matter of Microsoft Corp. and Activision Blizzard, Inc. (ongoing litigation)).

Additionally, divestitures can often be difficult to carry out across jurisdictions. Some jurisdictions may require divestiture of different assets, such as in the 2018 Bayer AG/Monsanto merger and the 2017 Dow/DuPont merger (see EC Press Release, Mergers: Commission clears Bayer's acquisition of Monsanto, subject to conditions (Mar. 21, 2018) and EC Press Release, Mergers: Commission clears merger between Dow and DuPont, subject to conditions (Mar. 27, 2017)). Jurisdictions may also disagree on the appropriate buyer for any divestiture where the identity of the buyer is key to the remedy, such as in the Zimmer Holdings/Biomet, Inc. merger (see FTC Press Release, FTC Requires Medical Device Company Zimmer Holdings, Inc. to Divest Assets as a Condition of Acquiring Biomet, Inc. (June 24, 2015)).

Strategies for Managing Multi-Jurisdictional Investigations

When managing investigations in multiple jurisdictions, parties should minimize the risk of divergent outcomes or negative impacts on the deal or the closing timeline by:

- Ensuring a consistent strategy for advocacy.
- Maximizing agency cooperation, including through use of waivers and bilateral cooperation agreements.

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Consistent Strategy for Advocacy

Counsel should ensure that positions taken in one jurisdiction do not undermine or harm positions taken in another jurisdiction, including those taken with agency officials in submissions, statements, or representations.

Bridge counsel can help ensure effective and consistent advocacy across jurisdictions by:

- Functioning as the central conduit of information.
- Coordinating core competition and FDI submissions across all notifications and review processes.

(See Procedural Considerations.)

Bridge counsel should also frequently communicate and collaborate with local counsel and engage in early-stage planning of coordinated advocacy across jurisdictions. Doing so can result in a more efficient process of engaging in multiple complex merger reviews and may even speed up review.

Agency Cooperation

Counsel should consider how agencies across jurisdictions communicate with each other regarding their views on a particular transaction, often on a regional basis. Increasingly, when a transaction is global in nature and impacts multiple jurisdictions, agencies either formally or informally confer with one another regarding key competition issues, including:

- Possible cross-border effects.
- Whether the transaction qualifies for notification or investigation in another jurisdiction.
- The impact on transnational markets.
- The suitability of potential remedies to address competitive concerns.

(See Practice Note, Confidentiality in Merger Investigations: Disclosures to Other Agencies.)

Use of Waivers

Counsel should consider the benefits of allowing the reviewing agencies to coordinate their review through reciprocal confidentiality waivers with the parties. Coordination may allow for streamlined processes and remedies. While the US agencies have said that they cannot and do not require companies to sign waivers (see FTC, International Waivers of Confidentiality in FTC Antitrust Investigations), they have warned against using waivers as bargaining chips during the review process.

For example, in 2020, in its review of the Elanco Animal Health, Inc. and Bayer Animal Health GmbH merger, the FTC collaborated with competition authorities in Australia, Canada, the EU, New Zealand, and the UK to analyze the proposed transaction and potential remedies and conditioned clearance of the transaction on a series of divestitures (see FTC Press Release, FTC Requires Global Suppliers of Animal Health Products Elanco Animal Health, Inc. and Bayer Animal Health GmbH to Divest Assets in Three Product Markets, as a Condition of Merger (July 15, 2020)).

Bilateral Cooperation Agreements

To facilitate cooperation among agencies, authorities increasingly rely on bilateral cooperation agreements and multilateral forums to discuss competition policy (see Practice Note, International merger control).

Multilateral forums such as the International Competition Network (ICN), European Competition Network (ECN), Common Market for Eastern and Southern Africa (COMESA), OECD Global Forum on Competition, and the United Nations Conference on Trade and Development (UNCTAD) continue to play a major role in facilitating bilateral agency actions (see Practice Note, EU Merger Regulation: jurisdiction and process: International co-operation). Counsel should pay close attention to the recommendations and guidance issued by such entities, and which enforcement regimes adopt them.

Avoiding Gun-Jumping

Before obtaining clearance from antitrust authorities in a jurisdiction that requires mandatory pre-closing approval, transacting parties must avoid gun-jumping. Transacting parties cannot either formally close their transaction or engage in conduct before closing that amounts to the transfer of beneficial ownership of the assets to be acquired. Gun-jumping therefore includes other illegal preclosing coordination, such as

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improper information sharing, or acting in a coordinated way. Instead, the merging parties must continue to act independently until closing. Gun-jumping also includes a wholesale failure to file where a filing was required.

Gun-jumping risks include:

- Significant fines of up to 10% of the parties' global group revenue in the preceding financial year.
- A requirement that the parties unwind (or undo) their transaction.
- Legal and business strategy costs and complexity and significant time expenditures.

However, businesses can find it hard to "wait" for competition clearance, including due to commercial pressures and the lack of certainty in the competition clearance procedure. To manage this, counsel must properly advise business teams in advance about the time they need to build into transaction planning and review, and how to conduct themselves and their businesses while going through this process. Businesses need to take great care, as even requesting and receiving commercially sensitive information might in some circumstances be interpreted as a buyer exercising control over a target which, if done without proper merger clearance, could breach notification requirements and trigger gun-jumping allegations.

Counsel should consider whether the parties' pre-closing covenants facilitate a real or perceived change of control over the target, such as if they go beyond what is necessary to preserve the value of the business being acquired. If so, there is a risk that antitrust authorities will investigate, or even bring an enforcement action, based on gun-jumping concerns.

Gun-Jumping Enforcement in the US

In the US, transacting parties must avoid excessive, pre-closing control of the target's activities. Potential gun-jumping violations include:

- Prematurely integrating operations.
- Exchanging competitively sensitive information.

(See Practice Note, Gun-Jumping Antitrust Enforcement.)

Gun-jumping violations can lead to DOJ or FTC enforcement actions against the transacting parties (see Legal Update, Tips to Avoid Gun-jumping in a Merger and see Box, Avoiding Gun-Jumping).

The FTC and DOJ have found acceptable, however, pre-closing terms that preserve the buyer's anticipated investment in the target. For example, the agencies have generally accepted restrictions on:

- Declaring or paying dividends or distributions of the target's stock.
- Making or agreeing to make large new capital expenditures.
- Mortgaging or encumbering the target's material assets.

(See Scott Perlman, Mayer Brown, Compliance With Gun-Jumping Rules Keeps M&A Deals On Track (Oct. 18, 2022).)

Interim restrictions present concerns where they prevent the target from operating in the normal course of business, such as where the buyer seeks to control the target's output or receive its profits and losses before closing.

In addition, where a merging party fails to file an HSR-reportable transaction, the FTC or DOJ may bring an enforcement action post-closing. In exercising its discretion to bring an enforcement action, the agency considers whether:

- The UPE had at least one previous failure-to-file violation.
- The parties submitted a corrective filing (see Submitting Corrective HSR Filings Checklist).

Civil penalties can total up to $51,744 per day, starting from the day the parties made

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the acquisition in violation of the HSR Act and ending on the day the waiting period expires once a corrective filing is made (15 U.S.C. § 18a(g)(1); 89 Fed. Reg. 1445) (see Practice Note, HSR Act Violations: Failure to Make an HSR Filing).

Gun-Jumping Enforcement in Europe

In Europe, guidance on the authorities' approach to gun-jumping can be found in caselaw and enforcement actions that leave no doubt that this is an ongoing area of risk for parties to a transaction (see Practice Note, Gun-jumping under the EU Merger Regulation). For example, in its review of the Illumina/Grail merger, the EC emphasized that the standstill obligation is "a cornerstone of the European merger control system, that enables the Commission to carry-out its role before structural changes modify the competitive landscape." (EC, Press Release, Mergers: Commission fines Illumina and GRAIL for implementing their acquisition without prior merger control approval (July 12, 2023)).

The EC fined Illumina and Grail EUR 432 million and EUR 1,000 respectively, for implementing their proposed merger before receiving its approval. In addition, and for the first time in an EC merger enforcement action, the parties were required to unwind their deal. Although the decision and fines have since been annulled, they still serve as a powerful reminder to firms not to close a transaction before obtaining the necessary merger clearances.

In addition, a few months after the EC imposed a fine against Illumina and Grail for gun-jumping, the European Court of Justice confirmed that the EC acted lawfully when it fined Altice for gun-jumping in its earlier acquisition of PT Portugal from Brazilian telecommunications operator Oi (see Altice Group Lux Sàrl v. European Commission, Judgment of the Court (Nov. 9, 2023)).

Gun-Jumping Enforcement in China

In China, a transaction that has been filed to the SAMR may not be implemented before approval is obtained, or it is gun-jumping resulting in legal liability for the unsanctioned concentration.

In China, gun-jumping takes various forms in practice, including doing the following before SAMR approval is obtained:

- Implementing some steps of the transaction structure. For example, Canon was fined ¥300,000 (approximately $41,460) in 2017 in China for implementing the first step of its transaction before filing its acquisition of Toshiba Medical Systems to the Chinese anti-monopoly enforcement agency (see Legal Update, FTC Settles with Canon and Toshiba over Alleged Violation of HSR Rule 801.90).
- Implementing the substantive acquisition of control over a target company or joint venture.
- Exchanging competitively sensitive information.

Enforcement in Voluntary Filing Regimes

Even in voluntary regimes, parties risk incurring penalties if they continue with a transaction the authorities have required them to "hold separate."

For example, in the UK, the CMA can impose Initial Enforcement Orders (IEO), an Interim Order, or Interim Undertakings pending a decision. Where the parties have decided not to notify a transaction which has completed, but the CMA has called it in for review, the CMA will generally impose an IEO very quickly, requiring the target to continue to operate separately, and at arm's length, from the buyer. The parties then might wish to consider whether to ask the CMA to derogate from its standard hold separate conditions.

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These orders are much less common when parties notify the CMA of their transaction and do not close before clearance, but should not be ruled out where, for example, the CMA is concerned that:

- An anticipated merger may close during the CMA's Phase II investigation.
- Completion of the merger in Phase II could prejudice the reference or its ability to remedy any substantial lessening of competition (SLC) resulting from the merger.

(CMA, Interim Measures in Merger Investigations (Dec. 2021).)

Failure to comply with Interim Measures without reasonable excuse may result in the CMA imposing a penalty, on both the business and in some cases on relevant individuals. The amount of these penalties is set to rise significantly under the new Digital Markets Competition and Consumer Act (see Practice Note, Digital Markets, Competition and Consumers Act 2024 published (digital markets and competition aspects)).

Practical Tips for Counsel

To avoid gun-jumping liability, counsel should ensure that before obtaining approval, transacting parties remain independent and that they do not do the following:

- Transfer businesses, assets, or employees.
- Participate in the other party's daily business activities.
- Exchange competitively sensitive commercial information or engage in business coordination.
- Take actual integration measures.
- Jointly work or communicate with customers or suppliers.

For more on avoiding gun-jumping, see Avoiding Gun-Jumping in Corporate Transactions Checklist.

Determining Sales and Turnover

In determining sales and turnover for international merger control, sales should generally be allocated by "destination" meaning the location of the customer. The geographic allocation of sales and turnover should reflect the location where competition among alternative suppliers actually takes place. This is usually where the "characteristic action" under the contract occurs, meaning where the product is delivered or the service is provided, although there are exceptions to this (for example, for internet sales, certain telecommunications services, and banking services).

When determining turnover, include the following:

- Turnover data for **all** members of the group.
- If the group includes a joint venture, the reported sales and turnover for the joint venture should be allocated in proportion to the number of controlling shareholders.

When determining turnover, **do not include**:

- "Internal" turnover, meaning the value of sales of goods and provision of services between members of the same group.
- Taxes related to sales and turnover, such as sales rebates and VAT.

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