SQUIRE PATTON BOGGS

Competition – Antitrust
Merger Control in International M&A

A large number of countries around the world enforce merger control laws, which require that approval is obtained before closing any deal that exceeds certain thresholds.

These laws also allow authorities to impose conditions on closing – or even block – transactions, if they raise competition concerns.

Filing obligations mostly depend on formal criteria. Therefore, even in the case of an unproblematic deal, an obligation to file can exist and the merger control process can have a significant impact on the transaction timetable. Failure to obtain approval prior to closing can lead to severe fines and legal invalidity of the purchase agreement. The jurisdictional criteria are such that a transaction may trigger filings in jurisdictions that seem entirely unrelated to the transaction at hand.

The following seeks to provide a general overview for business leaders or counsel not regularly involved in global M&A.

Transactions Caught by Merger Control

Acquisitions

Buyer acquires sole control over the **Target** (typically shareholding >50%). **Seller** will not maintain any control over the Target. Acquisitions can be asset or share deals. Exceptionally, there can be situations where a shareholding of <50% leads to sole control (e.g., in companies with very fragmented shareholding) or where a shareholding >50% does not lead to sole control (where a minority shareholder has key veto rights; see JV rules at right).

(True) Mergers

Two **independent companies** combine to create **one final corporate entity**.

Even though many transactions are commonly referred to as mergers, true mergers in the competition law sense are rare.

Joint Ventures

A transaction that leads to an **entity being jointly controlled by more than one party**. The classic example is two independent companies establishing a newly incorporated entity with 50:50 ownership.

But the following also amount to joint ventures (JVs) in most jurisdictions:

- **Buyer** acquires 50% of an existing entity.
- **Buyer** acquires <50% of an existing entity, but has veto rights on senior management appointments, budget and/or business plan (or Buyer acquires >50% and Seller retains veto rights).
- **Buyer** replaces a shareholder in an existing joint venture with veto rights on senior management appointments, budget and/ or business plan.

Typically, only a **JV** selling to third parties is caught ("full-function JV"). One notable exception is Germany.

Minority Acquisition

Buyer acquires a minority interest.

US: Acquisition of a minority interest will be reportable if the jurisdictional thresholds under the Hart-Scott-Rodino Act are satisfied (the "size of the transaction" and "size of person" tests). An exception exists where the acquisitions is made solely for the purposes of investment, and where the acquisition will result in the buyer holding 10% or less of the voting securities of the issuer. Other exceptions are also available under the Act for institutional investors, acquisitions of foreign issuers, intraperson transactions and more.

Outside of US: Only few countries require minority acquisitions to be notified (unless they confer control). Notable exceptions are Germany but also Austria and Ukraine for acquisitions of 25% or more. In Germany, acquisitions below 25% can be relevant if the shareholding provides a material competitive influence over the Target. Under the UK rules, acquiring a shareholding of 15% may confer "material influence," and there is a presumption that acquiring 25%+ does confer "material influence," opening the transaction to potential review by the UK authority (although there is no legal obligation to notify pre-completion).

Where to Notify?
The Usual Suspects

Each country has full autonomy to set its own thresholds, and countries make use of that power very differently. We provide here some examples only. Some low-threshold jurisdictions regularly appear in international transactions even where the business focus lies clearly elsewhere. Some economically important jurisdictions hardly ever come up unless a deal's focus is in that country. In most jurisdictions, notification is mandatory, i.e., a transaction must not close before approval. The UK, as well as Australia and New Zealand, have a voluntary filing system where companies can opt not to file (and close) with the risk that their deal is subsequently "called in."

US: Low thresholds mean that many small and medium deals with target presence in the US require approval. The review is by either the Department of Justice or the Federal Trade Commission. Filing is straightforward, with comparatively little information required up front. Authorities have strong focus on internal company documents.

Be careful: Have all reportable documents, like board presentations, reviewed early in the process.

EU: Captures essentially large deals because of high thresholds. However, the scope extends to review of many JVs between large companies even where the JV itself has little or no business in the EU. If thresholds are met, there is no need for filings at the EU Member State level. If thresholds are not met – but notification is necessary in three EU Member States – parties can ask for EU jurisdiction. Notification requires significant resources upfront to comply with extensive information requests.

Germany: Very low thresholds mean that unless an EU filing is required, most international transactions of a certain size require German approval. German law also casts an unusually wide net: it captures minority acquisitions and all JVs. Moreover, there is a complex, and often overlooked (!) rule on including existing 25% shareholders in the assessment. Notification requires fewer resources upfront than EU Commission filing.

China: The test is a straightforward turnover test (RMB 400 million, approximately US$62.5 million, for each of Buyer and Target). A filing in China will affect the timetable considerably (see overleaf).

Brazil: Seller's group turnover is also taken into account (this is not the case in most other jurisdictions). This means that even if Target is a small entity, a filing may be necessary if the Seller's group turnover is large.

Taiwan/Spain/Portugal: Country-specific market share data is required to assess notification thresholds. Defining the market in most cases involves a subjective element, which creates uncertainties even for transactions with limited sales.

Austria: Threshold structure can lead to notification requirement where Target has very little (or no!) sales in Austria. Austrian law also captures minority acquisitions and includes rules on existing shareholders. Austria has the third highest number of merger filings annually behind the US and Germany – there were over 400 Austrian filings in 2017.

Ukraine: Low threshold combined with seller group turnover being relevant means that many international transactions exceed the thresholds. The filing remains burdensome (even though it has seen significant improvements in recent years).

How Is Turnover Calculated?

Definition of Turnover: There are specific rules on how turnover should be calculated for the purposes of a merger control assessment. Precisely, turnover is the income derived from the sales of all products/services falling within an entity's ordinary activities, less rebates, value-added tax and other taxes directly related to turnover. Intra-group sales are excluded. Different rules apply to financial services and insurances.

Geographical Allocation: Turnover is allocated to the country where the customer is located. In practice, this means that if a product is delivered from a German subsidiary to a customer located in France, this is considered to be French turnover (even though it would appear in the German subsidiary's books).

If the transaction involves the acquisition of shares or assets by one Buyer, the relevant turnover to be taken into account comprises the following:

For the Buyer	The turnover for the entire group (not just the acquiring entity), comprising all parent companies, subsidiaries and sister companies.
	In the case of a private equity Buyer, this includes all portfolio companies controlled by the buyer.
For the Target	**Standard rule**: Only turnover of the Target, not the Seller's group
	Exception: Some countries, notably Brazil and Ukraine, also include Seller group turnover. In Germany and Austria, 25% shareholders in the target – even if unrelated to the transaction – will become relevant in the assessment.
For a Joint Venture	The group turnover of all parties exercising (joint) control is relevant; this means that for the creation of a 50:50 joint venture, the entire group turnover has to be taken into account for each party.
	Joint venture rules typically also apply to acquisitions via a joint purchasing vehicle (but not to transactions by a fully functional JV).

Note: A filing in the US is generally dependent on the value of the acquisition, as opposed to turnover.

What Are the Waiting Periods and When Can I Notify?

The majority of jurisdictions operate a two-phased review, with most unproblematic deals being approved in Phase I. In some jurisdictions, notably the EU, more complicated transactions can also be approved in Phase I on the basis of remedies such as a commitment to divest assets. In most other jurisdictions, remedies form part of a Phase II review.

Alternatively, at the end of Phase II, the authority may deny the deal or start court proceedings (e.g., in the US; in most other jurisdictions, the authority decides unilaterally) to block the deal from closing. The general time periods are set out below. (Specific rules apply to public takeover bids, where in most jurisdictions, transactions can close subject to the Buyer not exercising voting rights.)

Many jurisdictions allow for filings before a definitive agreement is signed. However, the fact of the notification (not the content of the filing) is often public. This means that, at least for publicly listed companies, public disclosure rules in practice force companies to wait until signing of a definitive agreement.

Phase I Review

One month/30 days	**US**, **Germany**, **Spain**, **Austria**, **Ukraine and many others**
One to two months	**EU** Note: need to engage in pre-notification discussions – these are not public and can also be made before signing for listed companies; these can be lengthy, depending of difficulty of the case – *between three weeks and three months*! **Brazil** Approval is granted within 30 days, but 15-day standstill is required after approval.
Four to six months	**China** Chinese merger control rules provide that Phase I decisions shall be adopted within 30 calendar days; in practice, those are adopted only after four to six months as information requests stop the clock.

Phase II Review

A Phase II review will set back the deal timetable considerably and typically involves significant legal costs, management resources and likely lead to the need to offer remedies. Durations are, for instance: three to six months (US second request); four to five months (EU phase II); and three additional months (Germany phase II).

What Are the Possible Substantive Concerns?

Any substantive assessment by regulators involves a prospective analysis as to whether the transaction would impact negatively on competition. The typical concerns are summarized below, but, of course, there are no general rules because each market and each transaction is different.

Reducing the Number of Players

There is no minimum number of competitors required. But, as a rule-of-thumb, authorities will be highly critical of any transaction resulting in a reduction of competitors from three to two. In addition, a four to three merger will be reviewed skeptically.

High Post-merger Market Share

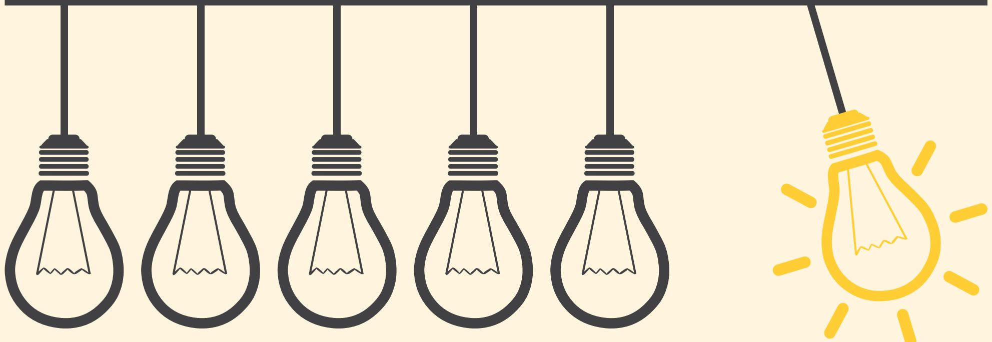
Even with many smaller competitors remaining, a high post-merger market share is an indicator of potential substantive concerns.

Reducing Innovation

A transaction can eliminate an important competitive force when it combines two important innovators. Following a transaction, there is a risk that companies may not continue to invest in R&D. Also, authorities may be concerned that other competitors in the market may lose their incentive to innovate, given the entry of a large innovator in the market.

Foreclosure

A vertical integration can also lead to competition concerns. Different types of foreclosure exist and concerns may arise: (i) a manufacturer acquiring a producer of a key input can lead to concerns that the merged entity will cease supplying competitors with that key input, and (ii) a manufacturer acquiring a key customer can lead to concerns that other producers will not be able to place their products on the market post transaction.



How to Overcome Concerns?

In the Administrative Procedure – Offering Remedies

To overcome substantive concerns, parties can offer or may be required to implement remedies to mitigate negative effects. The "classic" remedy is a divestiture of productions assets or entire business units to a third party, thereby strengthening an existing competitor or introducing a new competitor in the market. In practice, the merging companies will be given a certain period within which they have to enter into an agreement with a third party and a further time limit to close that deal. The authority will monitor the process, including with the assistance of a third party trustee. Divestitures are either a condition on approval (which means that the parties may close the original deal, subject to holding the divestiture business separate while the sale is pending) or the authority will require to fix-it-first, i.e., request that a legally binding agreement is entered into prior to approval.

Even though divestitures will often be an authority's preference, there are situations where other remedies are accepted or, indeed, necessary. For instance, a commitment to grant access to key technology or supply of raw material.

Contractual

The risk of an authority requiring remedies can be addressed/shared in the share purchase agreement.

Seller-friendly

The Buyer undertakes to carry out all actions and obligations necessary (including all divestitures) to satisfy competition requirements for the deal to close ("hell or high water clause"). While there is still the risk that the deal is blocked because no remedy can alleviate the concerns, this is rare. Moreover, penalty clauses can be included for a failure to close the deal.

Buyer-friendly

Inclusion of either (a) a possibility to walk away if divestitures are required or (b) setting a long stop date for Completion, so that a Phase II investigation cannot be completed.

What Effort and Cost Are Involved for the Business?

The effort involved in preparing a merger notification will be determined largely by whether the deal raises any substantive competition concerns. However, some jurisdictions are generally more labor-intensive than others. In the US, a filing is largely based on existing documentation that can be gathered relatively quickly. The European Commission, China and Brazil require the parties to gather a large amount of data and follow lengthy notification forms. Other authorities, such as in Germany, have a similar approach, but require less information and either have no set notification form or a form that is less onerous.

The European Commission and China do not charge the parties a fee for notification, but filing fees are payable in the US and some EU Member States. For example, in the US, the level of fees payable is calculated according to the total value of the securities or assets to be held as a result of the transaction and currently it ranges from US$45,000 to US$280,000.

About Us

More than 1,500 lawyers in 47 offices across 20 countries on five continents provide unrivalled access to expertise.

With over 50 lawyers based in 21 offices around the world, our Competition – Antitrust team has a genuine global reach and works seamlessly between jurisdictions. We have been involved in some of the largest mergers in the Americas, Europe and Asia Pacific. Given our experience, we know how competition enforcement authorities are likely to view particular transactions. We understand what types of arguments will persuade authorities to let business combinations proceed.

We regularly advise both merging parties and third parties on complex in-depth merger control reviews, and we have handled scores of settlements and undertakings with competition authorities when necessary to receive regulatory approval and permit a transaction to proceed.

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