

# COMPETITION LAW & POLICY DEBATE

20  
21

Volume 5 | Issue 4 & Volume 6 | Issue 1 | March 2020

## Editorial

- *Annette Schild* [3]

## Hot Topic: Environment & competition

Sustainable competition policy [4]

- *Maurits Dolmans*

## Synopsis: Abuse of dominance & Mergers

Main developments in abuse of dominance in the EU (November 2018 - October 2019) [24]

- *Lars Kjølbye, Christos Malamataris and John Wileur*

A review of 2019 EU merger control [37]

- *Cormac O'Daly*

## Symposium: International aspects of merger enforcement

Introduction [52]

- *Josep M. Carpi*

EU merger control in a globalised economy [54]

- *Josep M. Carpi*

Current issues in international merger control [70]

- *Dave Anderson and Paul Culliford*

Antitrust enforcement in China: merger review and the role of economic analysis [89]

- *Elizabeth X. Wang, Kun Huang, Jason J. Wu, Sophie N. Yang and Todd Kendall*

The recent experience of Brazil with multijurisdictional mergers [98]

- *Cristiane Albuquerque*

ICN framework for Competition Agency Procedures (ICN CAP) [105]

- *Eddy De Smijter and Filip Kubík*

## Hot Topic: State aid

Contagious financial injections: extended liability for the recovery of illegal State aid [114]

- *Ulrich Soltész and Maximilian Imgenberg*



CLAEYS &  
CASTEELS  
LAW PUBLISHING

# Current issues in international merger control

**Dave Anderson**

*Managing Partner,  
Bryan Cave Leighton Paisner LLP, Brussels*

**Paul Culliford**

*Senior Associate  
Bryan Cave Leighton Paisner LLP, Brussels*

## 1. Introduction

Navigating international merger control has come a long way since the early efforts towards convergence that began in the late 1990s and early 2000s, led by the International Competition Network (“ICN”) and supported by other organisations such as UNCTAD and the OECD. However, while significant progress has been made towards convergence of merger control notification requirements and procedures, which benefits merging parties and their lawyers, there is still a significant way to go.

Today, there are more than 130 countries with merger control regimes. The significant majority of these are mandatory and suspensory, meaning if relevant thresholds are triggered then merging parties are required to seek competition clearance before they can complete their transaction. At the same time, in the modern economy, parties to mergers regularly have customers and operations across multiple countries, meaning that it is often necessary to assess whether the transactions are notifiable in multiple jurisdictions around the world.

In most jurisdictions, these notification and suspension requirements apply irrespective of whether there is actually a substantive competition law concern. Indeed, the vast majority of notified transactions do not raise any substantive issues, but still lead to delays to the transaction timetable and costs to the notifying parties. For example,

of the 362 merger control decisions made by the European Commission in 2019, 78%<sup>1</sup> were notified on the “Short Form” procedure designed to cover “no issues” transactions.

This means that assessing notifiability and then coordinating merger control filings and reviews across multiple jurisdictions is a crucially important aspect of modern competition law practice. This can become particularly challenging when notification requirements and merger control procedures in different jurisdictions are significantly different. While there has been progress towards convergence, there is still procedural divergence across merger control regimes globally. This leads to unnecessary difficulty that continues to make the coordination of multi-jurisdictional merger control unnecessarily difficult, which in turn leads to uncertainty for business and delays to deals, as well as legal risks when notification thresholds are not clear and straightforward.

## 2. Increased crackdown on procedural infringements

A recent global trend underpins the importance of “getting it right” with merger control. In particular, over recent years, there has been a noticeable increase in the number of cases of competition agencies penalising companies for procedural infringements in merger control. Most relevantly, there has been a trend of competition agencies prosecuting parties for either failing to notify a

<sup>1</sup> See European Commission Merger Statistics: <https://ec.europa.eu/competition/mergers/statistics.pdf>

transaction, or implementing that transaction before clearance is received (i.e. gun jumping).

It is worth noting at this point that suspensory merger control regimes generally include two separate, but related, obligations – the first obligation is to notify the transaction to the competition agency, and the second is not to fully or partially complete the acquisition prior to clearance. Although there are two separate obligations, it is possible to breach both provisions with one action. While closing a transaction that has been notified before clearance is received will only breach the standstill obligation, closing a transaction that has not been notified will breach both. In most jurisdictions, there is no obligation to notify a transaction within a certain period after signing, so long as it is notified (and cleared) prior to completion. As such, the breach of both the notification obligation and the standstill obligation only crystallises with the single action of completing the transaction.

This raises the question of whether parties who complete a transaction without notifying at all, breaching both the notification and standstill obligation, are liable to more significant reprimands. This question was recently considered by the European Court of Justice in the *Marine Harvest* case.<sup>2</sup> In that case, Marine Harvest closed a transaction without notifying it, and was fined EUR20 million by the European Commission – EUR10 million for breaching the notification obligation and EUR10 million for closing before clearance. On appeal, Marine Harvest argued that this fine was essentially a double punishment, as they were being fined twice for the same conduct (closing the transaction). The General Court rejected Marine Harvest's appeal. In September 2019, Advocate General Tanchev released his opinion, recommending that the Court allow the appeal on the basis that the infringement of the standstill obligation under EU law essentially subsumes the infringement of the notification obligation.<sup>3</sup> While the authors agree with the Advocate General – to fine a company twice under two separate provisions for the exact same action, when both provisions are fundamentally related, effectively results in double-punishment – the

Court did not agree. In its judgment, released in March 2020, the Court rejected Marine Harvest's appeal, thereby confirming that companies can be separately fined for breaches of each of the notification and the standstill obligation.

Putting aside the technical distinction between a failure to notify and breach of the standstill obligation, there have been a significant number of infringement cases brought by the European Commission in recent years. Indeed, in addition to the fine against Marine Harvest, each of Altice (EUR125 million)<sup>4</sup> and Canon (EUR28 million)<sup>5</sup> have been fined for implementing transactions prior to clearance. In announcing these fines, the Commission has left no doubt that it will continue to pursue such cases in appropriate circumstances, and that companies that jump the gun in mergers undermine the effectiveness of the merger control system.<sup>6</sup>

It is, however, not just the European Commission that is actively pursuing gun jumping cases. The Annex sets out a non-exhaustive list of gun jumping cases that we have identified around the world in 2018 and 2019. As can be seen from this list, there is significant global activity in this area. While five or 10 years ago, one might expect to hear of a few fines globally each year, if that, we have identified over 60 gun jumping fines issued between January 2018 and November 2019. While there are very few fines that reach the magnitude of those imposed by the European Commission, there is no doubt that procedural infringements are high on agencies' lists of priorities.

Each case will of course turn on its own facts, and a number of factors will go into the calculation of a fine – including the gravity of the infringement (e.g. whether it was intentional or negligent), mitigating and aggravating factors, and the duration of the infringement (e.g. how long until the error is realised and rectified). It is also important to remember that, by definition, transactions examined by the European Commission will involve significantly larger parties and greater revenues than those examined

<sup>2</sup> *Marine Harvest ASA v Commission* Case C-10/18P, 4 March 2020.

<sup>3</sup> *Marine Harvest ASA v Commission* Case C-10/18P, Opinion of Advocate General Tanchev, 26 September 2019.

<sup>4</sup> Case COMP/M.7993 – Altice/PT Portugal, 24 April 2018.

<sup>5</sup> Case COMP/M.8179 – Canon/Toshiba Medical Systems, 27 June 2019.

<sup>6</sup> See for example the Commission's press release in relation to the Altice fine: [https://europa.eu/rapid/press-release\\_IP-18-3522\\_en.htm?locale=EN](https://europa.eu/rapid/press-release_IP-18-3522_en.htm?locale=EN).

by Member States and most other jurisdictions globally and, consequently, fines will be larger. However, there does appear to be significant inconsistency in the approach to setting fines across the globe.

While it is hard to disagree with the notion that blatant breaches of competition law and filing obligations should not go unpunished, we consider that it is important for competition agencies to balance, on the one hand, the need to protect the efficacy of the merger control system and, on the other hand, the difficulties and realities faced by parties and their advisors when carrying out a global merger control assessment. While there will no doubt be cases where the parties have intentionally or recklessly avoided material merger control obligations, there may be others where a failure to notify is no more than a genuine mistake, or where the nature of the merger control regime in question was such that the parties had to make a judgement call, based on expert legal advice, and had taken the decision not to notify. When the rules to determine whether a notification is required are unclear, this exacerbates the risks associated with making judgement calls, and puts parties in an unnecessary legal risk situation with regard to competition law compliance.

We are not suggesting that the European Commission or other agencies have been overzealous in their enforcement to date, but we do believe that it is important for there to be some degree of discussion and convergence amongst agencies in relation to how they will approach gun jumping and other procedural infringement cases in future. This is particularly important given the international nature of so many transactions, and the need for parties and their advisors to navigate differing approaches to both what transactions are covered and how thresholds are assessed. Given these issues – examined in detail in the next section – and the regular need for parties to make judgement calls and risk assessments where filing rules are unclear, there is a risk that non-transparent enforcement priorities and policies, particularly in the form of significant fines, will raise costs and compliance risks faced by merging parties, and lead to potential delays in transactions.

### 3. Notification – divergence and uncertainty

As already noted, the vast majority of transactions that require merger notification do not raise substantive competition issues. Accordingly, the question of whether a transaction actually requires notification is to most businesses more important than the substantive competition law position – the parties will usually know that their transaction will be cleared, but they still need to build competition clearance across a number of countries into their overall transaction timetable, and will also need to ensure that the transaction documents reflect these requirements. There are two principal questions that need to be assessed in this respect – first, whether a transaction is actually covered by the merger control regime in question and secondly whether the notification thresholds are satisfied.

#### 3.1 Covered transactions

The first challenge faced by advisors is the question of whether the transaction actually constitutes a relevant merger for the purposes of various jurisdictions' rules. This might seem like an easy question and, indeed, in most cases – particularly straight acquisitions of 100% or a majority shareholding of a business – it is. However, not all transactions are majority acquisitions or straight mergers. For example, it is often necessary to determine whether the establishment of a joint venture or the acquisition of a minority stake in a business amounts to a notifiable transaction. The fact that there are a multitude of different approaches to each of these questions can result in significant time and money being spent on determining whether a transaction might require notification – even before questions of thresholds or substantive issues are considered.

The ICN has carried out valuable work in this arena. This started with a paper in 2007, setting out a number of principles and approaches to how notifiable transactions are defined globally.<sup>7</sup> That paper notes that, as a general principle, merger review is directed at transactions *“in which two or more previously independent economic undertakings are combined in some fashion that involves a lasting change in the structure or ownership of one or more of*

<sup>7</sup> International Competition Network “Defining “Merger” Transactions for Purposes of Merger Review”, 2007.

*the undertakings concerned*.<sup>8</sup> This general principle is reflected in the ICN's Recommended Practices for Merger Notification and Review, which make clear that only transactions that are likely to result in a lasting combination of previously independent undertakings and a lasting change to market structure should be captured.<sup>9</sup> The Recommended Practices also make clear that what constitutes a covered transaction should be clearly defined.<sup>10</sup>

While in the majority of instances it is straightforward to determine whether a transaction is potentially notifiable in any given country, there still remain a number of divergent approaches globally – particularly when it comes to minority acquisitions and joint ventures. This can lead to situations where a transaction may be viewed by some jurisdictions as notifiable, but not by others. The following sections consider some of the areas where divergence and uncertainty remains.

### 3.1.1 Minority acquisitions

While it is generally a given that a majority or total acquisition of a business will be a covered transaction, the question of when a minority acquisition is covered is less clear. In this respect, there are two broad approaches:

- Many jurisdictions, including the EU and the majority of Member States, will only view a minority acquisition as notifiable if the acquirer will gain “control” over the target (whether that control is held solely by the acquirer, or jointly between the acquirer and one or more other parties).
- Other jurisdictions set out “bright line” ownership percentages, over which a notification is triggered. For example, in Germany and Austria acquisitions that result in the acquirer holding of over 25% or 50% the capital or voting rights in a target are covered transactions. Other countries, such as Japan and South Korea, adopt similar approaches.

Both of these approaches present their own challenges, and there are upsides and downsides to both.

If one takes the view that only acquisitions that result in two previously independent businesses becoming part of the same control structure should be captured by merger control, then regimes that require an element of “control” would be the most effective. Without any acquisition of an equity stake granting control, the companies in question will remain independent on the market. However, the use of a fluid and necessarily subjective concept like control inevitably leads to a number of uncertainties and differing approaches globally.

The first issue is what actually amounts to “control” in the relevant legislation. Under the EU Merger Regulation, for example, “control” is defined as the ability of the acquirer to exercise “decisive influence” over the target.<sup>11</sup> The European Commission’s guidance<sup>12</sup> sets out a number of factors to be taken into account in determining decisive influence, but in essence a company will be held to have decisive influence if it is able to either pass or block key strategic business matters on its own. By contrast, in UK law, a merger will exist if there is “material influence”,<sup>13</sup> which the Competition and Markets Authority considers to be a lower standard that will usually be satisfied with 25% of the voting rights in the target.<sup>14</sup> Further, other regimes, such as that of China, simply refer to an acquisition of control without further elaboration, which has led to inconsistency in application and differing approaches to what amounts to a notifiable acquisition.

Regardless of the legislative definition of control, the application of the relevant legal principles will also leave room for differing views and interpretations. This is particularly the case with so-called *de facto* control where an acquirer, although lacking the legal or *de jure* right to control an entity, can in practice control that

8 International Competition Network “Defining “Merger” Transactions for Purposes of Merger Review”, 2007, Page 1.

9 International Competition Network “Recommended Practices for Merger Notification and Review Procedures”, Recommended Practice 1A.

10 International Competition Network “Recommended Practices for Merger Notification and Review Procedures”, Recommended Practice 1A.

11 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“EU Merger Regulation”), Article 3(2).

12 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (“Consolidated Jurisdictional Notice”).

13 Enterprise Act 2002, Section 26.

14 Competition and Markets Authority “Mergers: Guidance on the CMA’s Jurisdiction and Procedure”, January 2014 Paragraph 4.19.



entity. This is an issue that often arises in the case of listed companies, where an entity that holds a significant, albeit minority, stake in the target can be deemed to have control on the basis that the remaining shareholder base is widely spread, and other factors including voting patterns at General Meetings establishing that, in reality, that minority owner is able to pass any resolution on its own and, therefore, has control.

This principle is illustrated by cases where acquisitions of minority shareholdings below 30% have been found to confer sole control.<sup>15</sup> The recent saga of Marine Harvest's acquisition of Morpol also provides a valuable example of how important the "control" assessment is, and the consequences of getting that assessment wrong. In December 2012, Marine Harvest acquired an interest of 48.5% in Morpol. The following year, Marine Harvest submitted a mandatory public offer for the remaining 51.5% of Morpol, which was notified to the European Commission. The Commission found, however, that based on voting patterns from previous General Meetings, the initial acquisition by Marine Harvest of 48.5% conferred *de facto* sole control over Morpol. Consequently, Marine Harvest was fined EUR20 million.<sup>16</sup> Marine Harvest's appeal did not expressly relate to the question of whether control was acquired and, in any event, was rejected by the European Court of Justice in March 2020.<sup>17</sup>

While the *Marine Harvest* case did not ultimately rest on a misunderstanding of whether Marine Harvest acquired "control", it still demonstrates the importance of getting that assessment correct and the costs of not doing so. It also shows that a company can obtain expert legal advice on an area of law that will always involve a degree of subjective assessment, and still face significant fines.

Having considered the uncertainties associated with open definitions of "control", it might seem that "bright line" approaches like those in Germany and Austria are to be favoured. However, while there can be little doubt that the difficulties

in determining whether "control" exists are eliminated with bright line tests, such an approach has the danger of capturing transactions that, in reality, do not lead to an aggregation of market positions. The fact that such acquisitions may need to go through a full merger control procedure (with consequent costs and delays) is likely to outweigh the benefits of easily determining whether there is notifiability. The reality is that, with the use of concepts of control, only transactions that truly allow the acquirer to influence the business of the target in a meaningful way are captured by merger control. While a small minority of cases may lead to difficulties in determining whether control exists, and potential disagreements between parties and competition agencies, this should not be an excuse for merger control to overreach its remit.

### 3.1.2 Joint ventures

The term joint venture is one of the most commonly used terms to describe business arrangements. However, it has no single definition in the business and legal community. At one extreme, joint ventures could be simple collaborations between companies for specific projects, such as a particular research and development project to develop some technology. At the opposite extreme, a joint venture might involve a full combination of elements of each joint venture partners' businesses, and result in essentially a new entity being established on the market.

The challenge for merger control is to define which kinds of joint venture should be classified as a notifiable merger. In this respect, it is probably uncontroversial to say that merger control should only capture those kinds of joint ventures that actually lead to some form of lasting change in a market structure and the integration of elements of the joint venture parties' businesses. That is not to say that joint ventures that amount to something less cannot have an impact on competition. However, it should be borne in mind that not subjecting such agreements to merger control does not mean they are not subject to competition law. Rather, any impact on competition they have can be considered under general provisions prohibiting anticompetitive agreements.

<sup>15</sup> See for example Case COMP/M.7779 – Trafigura/Nystar, 15 December 2015, where an acquisition of a 20% to 30% stake in the target was enough to confer sole control.

<sup>16</sup> Case COMP/M.7184 – Marine Harvest/Morpol (Article 14(2)), 23 July 2014.

<sup>17</sup> *Marine Harvest ASA v Commission* Case C-10/18P, 4 March 2020.

It may be accepted that only joint ventures that involve true integration of the parties' businesses or a change to the market structure should be covered by merger control. However, it is not accepted that there is any one "right" way to determine which joint ventures meet this criteria. A full survey of all approaches taken to joint ventures around the world is not possible in the context of this article. However, it is clear that there is very little consistency globally, and what may amount to a covered joint venture in some countries will not in others. Some general considerations and examples of differing approaches and associated challenges faced are set out below.

## What may amount to a covered joint venture in some countries will not in others

### *Joint ventures – the EU approach*

An examination of the EU's approach to joint ventures is a useful starting point. The EU Merger Regulation (as well as the merger control laws of many EU Member States, and indeed some countries further afield such as Serbia and Singapore) specifically states that the establishment of a joint venture will be a notifiable concentration if:

- the parties establishing that joint venture have "joint control" over the joint venture; and
- the joint venture performs "on a lasting basis all the functions of an autonomous economic entity."<sup>18</sup> This requirement is generally referred to as "full functionality".

Such an approach appears to satisfy the key recommendations of the ICN, as it ensures that only joint ventures that truly lead to a change in market structure – by resulting in the creation of a new and autonomous business on the market –

are captured by merger control. That said, such an approach is not without its challenges. The same issues relating to whether there is "control" as set out above exist, and determining whether an entity has the requisite degree of "full functionality" can be far from straightforward. That said, the Commission's Consolidated Jurisdictional Notice and jurisprudence provide a significant amount of guidance on when a joint venture will have the requisite degree of independence and, in reality, it will only be relatively few borderline cases where there remain doubts as to which side of the line a joint venture falls.

A recent decision of the European Court of Justice has, however, thrown up some uncertainty as to when "full functionality" will actually be a relevant consideration. This confusion relates to the potential distinction between, on the one hand, the acquisition of joint control by two or more undertakings of an *existing* undertaking and, on the other hand, the creation by two or more undertakings of a new full function joint venture. In this respect, two provisions of the EU Merger Regulation are relevant:

- Article 3(1)(b) states that the acquisition *by one or more undertakings* of the whole or parts of another undertaking constitutes a notifiable merger; and
- Article 3(4) states that the creation of a new full function joint venture constitutes a notifiable merger.

With this in mind, the Commission's *Consolidated Jurisdictional Notice* states that:<sup>19</sup>

*"a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking, fulfilling the criteria set out in paragraph 24, from third parties will constitute a concentration according to Article 3(1) without it being necessary to consider the full-functionality criterion."*

On this basis, it may seem fair to assume that any joint acquisition of an existing undertaking from third parties would be potentially notifiable, without having to consider the full functionality criterion. However, the European Court of

<sup>18</sup> EU Merger Regulation, Article 3(4).

<sup>19</sup> Consolidated Jurisdictional Notice, Paragraph 91.

Justice's *Austria Asphalt* decision, along with the Commission's subsequent practice, has cast further uncertainty on when a transaction may or may not be notifiable.<sup>20</sup> At the centre of that case was an asphalt plant, wholly owned by a single undertaking. The plant solely supplied asphalt to its owner and, so, it was not a full function undertaking – it did not have the required degree of independence on the market. *Austria Asphalt* sought to purchase a 50% share in the asphalt plant, which would then continue to supply asphalt to its parents (and not to third parties). The question was whether this constituted a notifiable transaction.

The Court ultimately concluded that such an acquisition would *only* be notifiable if the target would, following the acquisition, have a degree of full functionality. In essence, the Court characterised such a transaction as the creation of a new joint venture under Article 3(4), rather than the acquisition of joint control of an existing undertaking. Accordingly, such a transaction would only be notifiable if, post-transaction, the target would operate as a full function entity. At first blush, this might appear to significantly reduce the regulatory burden faced by joint acquirers, and mean that many joint acquisitions that would otherwise have been notifiable would no longer be notifiable. However, in its practice following the decision, the Commission appears to have taken a rather narrow interpretation of the Court's decision.

The Commission's reading of the decision appears to be that, in the case of a joint acquisition of an existing undertaking,<sup>21</sup> the question of full functionality will *only* be relevant if the initial sole controller remains as a joint controller after the transaction.<sup>22</sup> That is, for the principle set out in *Austria Asphalt* to apply, there must be a continuing "thread" of control before and after the transaction. Of course, the facts of the case involved such a thread of control, and so the *ratio* of the case does indeed only apply to such a situation. However, in our view, there is nothing in the wording of

the Court's judgment that suggests the Court intended the principle to apply only when an existing thread of control remains. Further, we see no reason in principle why it should be limited to such a situation. Regardless of the identity of the initial shareholder, and whether they remain following the transaction, the end result is the same – a jointly controlled undertaking on the market. The purpose of merger control is to examine transactions that impact the overall market structure. It is difficult to envisage how the market structure is potentially impacted if a non-full function entity is transferred by A to B and C, but not if B takes joint control with A of a non-full function entity that was previously controlled by A. In any event, it appears that we are now in a situation where, while the creation of an entirely new full function joint venture will always amount to a notifiable transaction, there may be uncertainties when it comes to the joint acquisition of an existing undertaking. While it seems reasonable to assume that full functionality will always be required when an existing thread of control remains before and after the acquisition, the position will be less clear when the new joint controllers are independent of the initial controller. Parties involved in such transactions, and their advisors, will likely therefore continue to have to notify such transactions until such time as the Court is able to clarify the scope of its judgment in *Austria Asphalt* (which, given *Austria Asphalt* is the first judgment of the Court on this point, is not likely to be in the near future).

### *Joint ventures – other approaches*

While the "full function joint venture" approach is applied by the EU and most of its Member States, along with a few other jurisdictions globally (for example Albania, Serbia and Singapore), multiple other approaches are applied globally too. While different countries might adopt more than one element of these approaches, common elements that can be seen include:

- **Control rights:** As in the EU, some jurisdictions require an element of joint control for a joint venture to amount to a merger. A notable example is China, where the competition agency's guidance states that newly formed joint ventures will amount to mergers if at least two undertakings jointly control the new business.<sup>23</sup>

20 *Austria Asphalt GmbH & Co OG v Bundeskartellamt* Case C-248/16, 7 September 2017.

21 Full functionality will, of course, always be a relevant consideration in relation to the establishment of an entirely new joint venture.

22 See for example MLex Report of 4 December 2017: <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=942039&siteid=190&rdir=1>

23 See MOFCOM Notification Guidance.



- **Ownership percentages:** By contrast, some jurisdictions do not require any form of joint control but rather (as in the case of other acquisitions) state bright-line ownership percentages where notifications may arise. Countries such as South Korea (as noted above) operate such systems.
- **Creation of an entity:** Some jurisdictions require the establishment of a legal entity in order for a joint venture to be notifiable. For example, in South Korea, the establishment of a new joint venture company constitutes a notifiable transaction, while something that does not involve the creation of a legal entity may not.
- **Existing businesses and greenfield joint ventures:** Not all merger control regimes will capture the establishment of a greenfield joint venture, meaning that only joint acquisitions of existing businesses will be captured. For example, in India, only the acquisition of an 'enterprise' constitutes a merger, meaning that greenfield joint ventures are not captured.<sup>24</sup>

This lack of consistency across the globe can lead to significant difficulties for parties involved in joint venture arrangements. On the one hand, an agreement that the parties may consider is no more than a collaboration without any "integration" may unexpectedly trigger merger filing obligations in some countries. On the other hand, an arrangement the parties may consider would benefit from receiving clearance (e.g. to provide certainty and protection from challenge) may not, in fact, be able to receive such clearance, thereby leaving the parties in a position of uncertainty. This is an area where, we consider, there is significantly more room for convergence and that warrants greater discussion in international fora such as the ICN. The global divergence in the treatment of joint ventures has been discussed within the ICN's Merger Working group several times as an area where consensus and best practice work is needed – we believe that this topic deserves the same serious attention at ICN-level today as thresholds convergence received in the early days of the ICN.

### 3.2 Thresholds

Once it has been determined whether the deal in question is, in fact, a covered transaction the parties and their advisors must then determine whether the notification thresholds in relevant countries are satisfied. The importance of ensuring that thresholds can be understood, and notifiability can be assessed quickly and easily, should not be underestimated. Putting aside the importance of merger filings to the timing and commercial reality of the transaction, as we have seen above, the failure to notify a transaction that meets the thresholds in a particular country can open the parties up to significant fines. It is therefore of crucial importance to the business community that notification thresholds are easy to understand and to apply, and do not lead to the expenditure of significant time and money just to determine whether a notification is required.

It is of crucial  
importance to business  
that thresholds are  
easy to understand  
and to apply.

Significant work has been done in this area by the ICN, with the ICN's Recommended Practices for Merger Notification and Review Procedures covering a number of key "best practices" in the design of thresholds – including ensuring that only deals that have an actual nexus to the jurisdiction in question are caught and ensuring that thresholds are based on easy to understand, objectively quantifiable criteria.<sup>25</sup>

The work of the ICN and other international organisations has borne fruit in leading to some convergence and simplification of thresholds. For example, in a survey of ICN members carried out in 2016 ("the 2016 ICN Survey"), 92% of respondents noted that their thresholds required

<sup>24</sup> See, for example, Competition Commission of India FAQs, Number 7: <https://www.cci.gov.in/node/2847>

<sup>25</sup> International Competition Network "Recommended Practices for Merger Notification and Review Procedures", Recommended Practice II.

a substantial “nexus” to their jurisdiction and 72% of respondents confirmed that their thresholds use objectively quantifiable criteria to determine notifiability (e.g. revenue or asset values).<sup>26</sup> However, that same survey indicates that there remain significant differences in the approaches to thresholds globally, and that there is still room for further convergence. For example, more than a quarter of countries still have thresholds that are not based on objectively quantifiable criteria. We have also noted some other key statistics below. The following sections outline various approaches to notification thresholds that are commonly encountered in a multi-jurisdictional merger control assessment, and discuss the potential difficulties encountered with some of them.

#### *Turnover thresholds – (usually) simple*

The most common and, in theory, the most simple form of threshold is based on turnover. That is, a threshold which simply requires the assessment of the merger parties’ revenues in their most recently completed financial years against prescribed threshold numbers. Such thresholds are adopted by many countries globally, including the EU and most of its Member States, as well as significant jurisdictions such as China and Brazil.

Such thresholds, in principle, also satisfy the ICN’s Recommended Practices, as they are clear and understandable, and based on objectively quantifiable criteria. However, just because a threshold is based on “turnover” does not mean it is always simple and compliant with the Recommended Practices. There are multiple examples of turnover thresholds that do not comply with the ICN’s recommendations. Examples include:

- **No local nexus:** Sometimes, while thresholds may be straightforward to assess, they will risk capturing transactions that have little or no local nexus to the country in question. This often occurs where thresholds are based on *combined* revenues in a given country, without a specific requirement that each merger party has local revenues. This can occur in countries such as Serbia, the Ukraine and Austria. Close to 40% of respondents to the 2016 ICN Survey

confirmed that their thresholds can be triggered by the local activities of the buyer alone. The European Commission’s merger thresholds can also capture transactions without any European nexus where there is a joint acquisition or establishment of a joint venture – even if that joint venture is active entirely outside the EU, a notification obligation can be triggered on the basis of the parents’ EU revenue.

- **Unclear calculation rules:** There are also inconsistencies as to how the revenue that is attributable to an acquirer or target may be calculated. For example, the EU Merger Regulation sets out rules as to how “group” revenue is calculated, which are relatively straightforward. However, other jurisdictions do not have such prescriptive rules and it is possible that the makeup of the “group” for the purposes of calculating thresholds could differ from country to country. Similarly, in the vast majority of countries, it is only the *target* (i.e. not the seller) whose revenue is relevant. However, over a quarter of respondents to the 2016 ICN Survey (including significant jurisdictions such as Brazil) indicated that targets or assets of the *seller group* are used in their thresholds.
- **Geographic allocation:** One of the most obvious questions that needs to be answered when assessing thresholds is how revenue is allocated to each country. Again, for the most part this is a relatively straightforward exercise, and most jurisdictions have clear rules. However, there are some differing approaches. For example, while the majority of jurisdictions allocate revenue based on the location of, or place of delivery to, the customer (i.e., the country where the competition for that customer’s business took place), others take a different approach. For example, for the purposes of assessing thresholds in Canada, the relevant revenue is that generated from sales “*in, from or into*” Canada. There can also be difficulties applying the generally accepted principles of allocation that apply in the EU and many other countries globally. In particular, when services are supplied electronically, and also for cross border services (such as air and rail travel, or transport of goods), there can be difficulties, and limited guidance, on how to allocate revenues.

<sup>26</sup> See ICN Merger Working Group “ICN Recommended Practices for Merger Notification and Review Procedures – Member Self-Assessment, Report on 2016 Survey Results”, April 2017.

*Asset values – sometimes simple*

Some thresholds are also in whole or in part based on asset values rather than revenue figures. For example, thresholds in countries including the United States, Canada and South Africa include limbs based on the value of assets on either a worldwide or domestic basis. While it is generally straightforward to calculate total asset values of a company – one need only refer to the company's balance sheet – some challenges can still be presented, such as identifying the value of relevant assets in specific countries. On the whole, however, asset value thresholds do not generally present significant challenges.

*Market share thresholds*

Another relatively common form of threshold is one based on market shares. That is, only transactions where the individual or combined shares of the merger parties are above a specified threshold (often set at around 25% or 30%) require notification. In the abstract this may sound attractive – it ensures that most simple “no issues” transactions do not require notification and delays. However, the reality is far from this simple, and such thresholds pose many challenges to merger parties and cut across the clear recommendations of the ICN in relation to merger thresholds.

It will be rare that market shares will be able to be assessed with complete confidence. In the context of assessing whether a transaction is notifiable, rather than the actual preparation of the notification, this is a significant burden and in many instances the parties will need to take a risk assessment, by building up an argument as to why notification may or may not be required, and then making a judgment call on whether to proceed with or without notification. However, this does not mean that agencies who adopt market share thresholds do not pursue gun jumping cases – the Spanish CNMC, for example, regularly pursues and fines cases of non-notification based upon their market share test.<sup>27</sup> The inherently subjective nature of such market share thresholds is further demonstrated by the fact that the CNMC's fines have, on occasion, been overturned on the basis of market definition. For example, in

2012, the Spanish Appeal Tribunal overturned a fine against Bergé for a failing to inform the CNMC of its acquisition of Marítima Candina.<sup>28</sup> Among other factors, the Tribunal held that the CNMC's market definition was incorrect. These factors can lead to merger parties going to significant effort and expense simply to reach a decision on whether to notify, and those parties then often proceeding with a transaction without complete confidence that the competition agency will never raise questions about why the transaction was not notified.

The first challenge is that of market definition. It is not possible to assess market shares without first knowing what the relevant market definition is. At the same time, it is well accepted that market definition is something of an art and not a science – it is seen as a useful tool in the assessment of mergers, but nothing more. Indeed, in the majority of merger control decisions, competition agencies will not in fact definitively determine what the relevant market in question is. Even if there is some precedent for market definition in a particular area, it is often not definitive. On top of that, there are many areas where there is no precedent, which means the parties are required to assess the relevant market definition from scratch – a task that can involve significant economic analysis and work, and will very rarely lead to an answer that the parties' advisors can say with 100% certainty would also be adopted by the local competition agency.

Even if a robust, or at least defensible, market definition can be determined, this does not mean that assessing market shares within that market will be a straightforward task. The most obvious point is that, in most industries, companies will not have visibility of their competitors' sales values or volumes and, consequently, of their market shares. Indeed, in many industries, having visibility of such factors could in itself suggest anticompetitive sharing of information. So, in the absence of public information about sales volumes or market shares, parties are left with no option but to simply estimate the overall size of a market and, thereby, estimate their market shares. While there will of course be cases where the parties are aware their

<sup>27</sup> See, for example, commentary in OECD “Suspensory Effects of Merger Notifications and Gun Jumping – Summaries of Contributions”, 27 November 2018, Page 30.

<sup>28</sup> See, for example, Global Competition Review Report of 30 October 2012: <https://globalcompetitionreview.com/article/1056245/cnc-suffers-triple-court-loss>

market shares are well over thresholds, this will not always be the case and many cases could be borderline. So, again, the parties are forced to make a decision based solely on estimates, and will rarely have 100% certainty that thresholds are met.

It is evident, then, that assessing notifiability under market share thresholds will almost always lead to judgement calls and estimates. It may be possible to consult with an agency on the application of the market share threshold, but in practice that step adds further time, expense and uncertainty which should not be the case when the parties are simply trying to assess notifiability. While these are all aspects of substantive merger review that we do not doubt should form part of the presentation of arguments before a competition agency, the use of such approaches to assessing notifiability places significant costs and burdens on parties and their advisors, and will in most instances lead to an uncertain outcome where parties have no choice but to make a judgement call and potentially proceed with a transaction in the knowledge that, if a competition agency views the market differently, they could pursue – and fine – the merging parties. All of these factors mean that market share thresholds cut across the clear recommendations of the ICN, and we hope that with further work in such international organisations the few remaining countries globally that adopt such thresholds will move towards more objective thresholds.

### 3.3 Killer acquisitions or killing innovation?

Over recent years, competition agencies have been grappling with the question of how, if at all, merger control should capture what are sometimes referred to as “killer acquisitions”. That is, the perceived situation where a new innovative rival is purchased by an incumbent, therefore removing that competitive threat from the market before it really takes off. Given such new innovative rivals are often still in the start-up phase, they often generate little or no revenue. As such, these acquisitions are often not caught by “traditional” turnover based notification thresholds. Accordingly, some competition agencies perceive there to be a regulatory gap where such transactions may escape merger control scrutiny.

This debate started in earnest with Facebook's acquisition of Whatsapp in 2014. The transaction

is regularly cited as an example of a transaction of interest that did not have a “Community Dimension”, meaning that it did not have to be notified to the European Commission. This was because, while Facebook paid US\$16 billion for Whatsapp, Whatsapp did not generate sufficient revenue to meet the thresholds set out in the EU Merger Regulation. However, the acquisition did meet the notification thresholds in three EU Member States, meaning that, under Article 4 of the EU Merger Regulation, it could be referred to the European Commission for review. The transaction was ultimately cleared unconditionally at Phase One.<sup>29</sup>

In response to concerns about the inability of EU merger control to capture such “killer acquisitions”, the European Commission launched a consultation in late 2016 that, amongst other things, considered whether the current turnover based thresholds were effective in capturing these types of “low revenue, high value” transactions.<sup>30</sup> Although no formal response has been made to the consultation, we understand that the Commission currently has no intention to implement new thresholds, but that they will keep the position under review. Indeed, Commissioner Vestager has already indicated that considering the effectiveness of thresholds and how to approach these types of transactions will be a key issue under consideration in her second term.<sup>31</sup>

While the issue remains under review at Commission level, two EU Member States – Germany and Austria – have already introduced new secondary thresholds based on transaction value with the express aim of capturing these types of transaction. These new thresholds, introduced in 2017, include a limb based on the value of the transaction. However, in order to ensure deals that have no “nexus” to Germany or Austria are not caught, the thresholds also include a requirement that the target is active in Germany or Austria “to a significant extent”. Both of these elements cut across the ICN's clear recommendations that thresholds should be clear and understandable,

29 Case Comp/M.7217 – Facebook/Whatsapp, 3 October 2014.

30 European Commission Consultation on evaluation of procedural and jurisdictional aspects of EU merger control: [https://ec.europa.eu/competition/consultations/2016\\_merger\\_control/index\\_en.html](https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html)

31 See Margrethe Vestager's Answers to the European Parliament Questionnaire to the Commissioner-Designate, September 2019.



and based on objectively quantifiable criteria. In particular:

- At first blush, the “deal value” may seem like a straightforward question, but in reality it is anything but straightforward. An acquisition price is rarely a simple number, but often includes asset swaps, consideration in the form of securities and equity interests, as well as earn outs and other similar elements. How these factors are all taken into account to calculate the overall value of consideration in the transaction is far from simple.
- Similarly, the question of how to determine whether a target is active in Austria or Germany “to a significant extent” necessarily leads to judgement calls and uncertainty. This is further exacerbated by the prevalence of e-commerce and the fact that so many of the alleged “killer acquisitions” that these thresholds are intended to capture are likely to involve targets that have no physical presence in Germany or Austria.

These are all issues that, while they may play an important part in the *substantive* assessment of a transaction, should not have to be considered simply to determine whether a transaction needs to be notified. Indeed, the difficulty of assessing notifiability under these thresholds is evidenced by the fact that the joint guidance issued by the Austrian and German competition agencies runs to over 30 pages of examples and considerations.<sup>32</sup> Further, we understand that a large proportion of the consultations with the agencies in relation to the new thresholds have been on the issues of value and local effects, which demonstrates the uncertainty inherent in including such concepts in notification thresholds.

While the Austrian and German competition agencies have not formally released statistics relating to transactions notified under the new thresholds, it is far from clear that the thresholds have served their purpose of capturing so called “killer acquisitions”. For example, at a conference in May 2019, representatives of both authorities discussed the operation of those thresholds to date.<sup>33</sup> At that point, around 30 cases had been

looked at in Germany, and 20 had been notified in Austria. None of these cases involved the kind of “killer acquisitions” that the thresholds are designed to capture, and all were cleared at Phase One. So, experience to date suggests that, rather than ensuring problematic acquisitions do not fall through the crack, it appears the new thresholds have simply added to the burden and workload of both merger parties and the competition agencies.

It is to be hoped that the Austrian and German experience to date is noted by other agencies that are considering such thresholds. Indeed, some agencies, such as the French<sup>34</sup> and Belgian<sup>35</sup> agencies, have already concluded that their thresholds do not require modification. At the same time, a number of other agencies or Governments globally, such as the Netherlands,<sup>36</sup> have expressly stated that they are considering such thresholds. Similarly, the Japanese Fair Trade Commission has recently recommended (in the form of guidance) that companies voluntarily consult with the agency in the case of transactions with an effect in Japan where the deal value exceeds 40 billion yen. It has, however, so far stopped short of a formal change to the notification thresholds.<sup>37</sup>

While the debate remains ongoing at EU level and in various countries globally, it is important not to lose sight of a number of factors. First, the Facebook/Whatsapp transaction was notified to the European Commission under the Member State referral mechanism. So, it is not correct to say that this transaction was “missed”. Since then, Apple's acquisition of Shazam has also been referred to the Commission from Member States having not initially required an EU level notification.<sup>38</sup> Secondly, a key principle that

May 2019: <https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1094979&siteid=190&dir=1>

34 Autorité de la Concurrence Press Release, 7 June 2018: [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=684&id\\_article=3182&lang=en](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3182&lang=en)

35 Belgian Competition Authority Press Release, 18 May 2017: [https://www.belgiancompetition.be/sites/default/files/content/download/files/20170518\\_press\\_release\\_10\\_bca.pdf](https://www.belgiancompetition.be/sites/default/files/content/download/files/20170518_press_release_10_bca.pdf)

36 See Dutch Government Press Release, 27 May 2019: <https://www.government.nl/latest/news/2019/05/27/dutch-government-change-competition-policy-and-merger-thresholds-for-better-digital-economy>

37 See Japan Fair Trading Commission “Policies Concerning Procedures of Review of Business Combination (Tentative Translation)”, 17 December 2019: <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912174Policy.pdf>

38 Case Comp/M.8788 – Apple/Shazam, 6 September 2018.

32 Bundeskartellamt & Bundeswettbewerbsbehörde “Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)”, July 2018.

33 See MLex Report of “EU Merger Control, KNeCT 365 Brussels”, 23

underpins competition law is that companies should be encouraged to innovate and be the best. The incentive to become the best, and then be able to sell a business, is what drives innovation. Adding deal value thresholds and further hurdles to that process risks reducing those incentives, to the detriment of consumers as a whole.

There are multiple  
divergent approaches  
to thresholds  
across the globe.

It should also be borne in mind that there are alternative approaches to the “killer acquisition” problem other than modifying thresholds. For example, a number of countries (such as Sweden and Hungary) have a mechanism in their competition law that allows the agency to “call in” a transaction that it considers merits review, but is not otherwise notifiable. Experience shows that such powers are used sparingly, and do not lead to material uncertainty for businesses. The French competition agency is also considering such an option.<sup>39</sup> These regimes also often allow parties to voluntarily make a notification prior to implementing their transaction. Such an approach is, in our view, to be favoured over new deal value thresholds. These mechanisms can be effective to avoid imposing unnecessary regulatory burdens on parties and delaying unproblematic transactions, but also allow agencies to look at transactions where there is a genuine concern – particularly where there is no “referral” mechanism like that included in the EU Merger Regulation. At the same time, they also avoid competition agencies using their finite resources to review significant numbers of unproblematic deals.

### 3.4 Conclusion on thresholds

It is clear, then, that there are multiple divergent approaches to thresholds across the globe, which therefore present significant practical hurdles to merger parties and their advisors. While, as noted above, the 2016 ICN Survey showed a move towards convergence in key areas, there is still a lack of compliance across the ICN as a whole, and there is clear room for improvement in ensuring thresholds are based on objectively quantifiable criteria and require a local nexus.

The first hurdle for parties and their advisors is often in determining what information is required to carry out the jurisdictional merger review – most commonly, as an initial step, advisors will request that the parties provide a breakdown of their revenue by jurisdiction. However, given the various approaches to how revenue is calculated globally, as well as the fact that not all thresholds are based simply on revenue, it is often the case that further clarifications and information are required. This presents difficulties to both advisors and merger parties, who are generally also busy on the corporate and other aspects of the transaction, and can lead to significant delays in finalising the merger control analysis. Further, even once all information is obtained, it is not always completely clear whether thresholds are satisfied in all jurisdictions (for example, in those jurisdictions where market share thresholds apply), and merger parties are left with little choice but to undertake a risk assessment on whether they proceed with or without filing.

### 4. Dealing with agencies – timing and information requirements

It is not just in determining notification where inconsistencies and difficulties can be experienced. Merger parties, and their advisors, also experience a number of difficulties when it comes to coordinating merger reviews across multiple jurisdictions. Putting aside potential differences in the approach to *substantive* merger review, there are also two crucial procedural elements where differing approaches across jurisdictions can lead to significant difficulties in coordination and transaction dynamics. These are the overall timing of a review, and the information requirements imposed by agencies.

<sup>39</sup> Autorité de la Concurrence Press Release, 7 June 2018: [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=684&id\\_article=3182&lang=en](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3182&lang=en)

## 4.1 Timing

A significant percentage of transactions will trigger multiple merger filings in multiple countries around the world. Parties and their advisors are therefore left with the task of coordinating those filings across multiple countries. Leaving aside challenges faced with ensuring consistent stories are presented to agencies globally, while also catering for local market factors and potentially different information requirements and languages, a particular challenge arises when it comes to the timelines used by agencies in conducting their reviews – when there are multiple filings required, parties and their advisors need to ensure that all filings take place at the appropriate times to ensure that the overall deal timeline can be satisfied.

The ICN's Recommended Practices<sup>40</sup> set out a number of practices that agencies should observe in relation to merger control reviews. In particular, the ICN recommends that merger reviews should take place in a reasonable time, should provide for expedited reviews for cases that do not raise material competition concerns and that waiting periods should end in a definable period. It is difficult to argue with any of these recommendations, but the reality is that there is a lot of “room to move” within the recommendations. Further, they are of course no more than recommendations, and there is no obligation for agencies to comply with them. For this reason, there is significant divergence in timing across jurisdictions globally.

It is now common practice for many jurisdictions to require (or, at least, encourage) pre-notification discussions prior to filing. Usually this will involve providing a draft filing to the agency, and one or more rounds of questions and re-drafts before the formal filing, and the transaction being “on the clock”. While such an approach is sensible, and ensures that filings are not rejected as incomplete, causing further delays, we have seen instances where agencies appear to essentially view the pre-notification phase as an indefinite extension of the statutory review period. While we absolutely agree that pre-notification should generally take

place, we think the agencies must bear in mind that during this period, the parties and the agency are only in voluntary communication. In most instances, there is no statutory requirement to carry out pre-notification discussions. Given that parties will often be in the process of preparing multiple filings, as well as negotiating the overall transaction, agencies should carefully consider whether information requested during the pre-notification phase is actually required in order to make the notification “complete”, or is rather better left for the market testing phase. They should also consider the time limits imposed to reply to requests for information during this phase, given they are not “on the clock” and are in purely voluntary discussions at that point. Ultimately, legislatures have written statutory time limits into relevant laws on the basis that these are appropriate time limits to review a transaction, so the key for agencies is not to simply extend those time limits indefinitely through the statutory pre-notification period.

For the purposes of this article is not necessary to go into significant detail on the various approaches globally to formal review timelines. However, following the potential uncertainty as to how long the pre-notification phase might take, there can be further difficulties in coordinating filings across countries given the formal review periods. Issues here can include:

- The fact that some countries allow for expedited reviews in simple “no issues” cases, whereas others do not. Generally such reviews require the parties to provide less information to the agency and usually (although there may not be different legal time limits) result in clearance being received more quickly. Such an approach reduces the burden on both parties and agencies, and is therefore recommended by the ICN.<sup>41</sup> For example, in 2019, 78% of all cases decided by the European Commission were reviewed under the Commission's “short form” procedure.<sup>42</sup> This approach has significantly lower information requirements, and while there is no formal difference in the review timeline (and the Commission will always have to respect the

40 International Competition Network “Recommended Practices for Merger Notification and Review Procedures”, Recommended Practice IV.

41 International Competition Network “Recommended Practices for Merger Notification and Review Procedures”, Recommended Practice IV(B).

42 See European Commission Merger Statistics: <https://ec.europa.eu/competition/mergers/statistics.pdf>

statutory 15 working day period that Member States have to request a referral from the Commission before it can make its decision), in our experience the Commission will often issue its decision between working days 15 and 20 of the 25 working day Phase One timeline.

- The structure of the review process differs across jurisdictions. For example, while it is most common for there to be two review phases (a first phase which allows the agency to determine whether there may be issues, and an in depth second phase if issues are identified), this is not universally the case. For example, some jurisdictions (such as Brazil) simply have a maximum time limit in which a decision can be issued.
- The statutory timelines differ across jurisdictions, even if the overall “structure” of the review is similar. For example, Phase One periods can vary significantly – from, for example, 25 working days for the European Commission to 40 working days for the UK’s Competition and Markets Authority. Phase Two reviews can also differ significantly in length and, given the ability of agencies to “stop the clock” at various points, as well as other statutory extension periods, can run for many months.

These factors, when added to the potentially long pre-notification discussions, can make coordinating the timing of filings across multiple countries a very difficult, if not impossible, task. It can, for example, result in clearance being received in some countries while the case remains in pre-notification in others, despite the fact that all those jurisdictions are looking at essentially the same markets. While the ICN’s Recommended Practices go a long way to working towards convergence in review periods and approaches to pre-notification, it is hoped that agencies and governments continue to move towards convergence in their review periods and procedures in the coming years. This would not only benefit merger parties, but also agencies – the increased cooperation between agencies means that agencies would benefit from having more convergence in their review timelines. It is obviously very difficult to cooperate meaningfully on a review when some agencies have already finished, but others have not yet formally started.

## 4.2 Information Requirements

It is also worth mentioning the differing information requirements across agencies, which can both impact the lead time to prepare a draft filing before initiating pre-notification discussions, and also the amount of further work required during the pre-notification and review periods (i.e. in terms of further requests for information).

To a large extent, the standard notification form is similar across many jurisdictions, and requires a narrative description of the parties, the transaction and the relevant markets. This often means that coordinating drafting of filings and ensuring consistency in the “story” presented to different agencies is relatively straightforward. It is, however, to be hoped that this element of the process can be further simplified by jurisdictions that have not to date adopted a simplified procedure for “no issues” transactions doing so – as already noted, this reduces the burden on both merger parties and agencies, and can only be seen as a positive.

Although notification form requirements are broadly similar in most countries (with some notable exceptions, such as the United States where the requirement is largely to provide pre-existing documents), different agencies do tend to have different approaches to how they define a notification as “complete” and the extent of follow up questions. With this in mind, while we recognise that it is important for a competition agency to have a complete file and sufficient evidence to support its decision, we consider that, when agencies request information, they should carefully consider both the extent of their requests and whether the information requested is crucial to them being able to carry out their review. In our experience, there can be times where agencies request significant amounts of information, either in pre-notification or during the formal review period, that is at best tangential to the review and appears to be no more than a “belt and braces” request to cut off any possible challenge, no matter how remote. Given such requests can require significant amounts of work from the parties’ businesses, often with very short deadlines, we consider that there is room for at least some agencies to narrow down the scope of their information requests, and focus on the core markets and areas of potential concern in a transaction.



The crackdown on procedural infringements also plays an important role here. As noted, information requests often require significant amounts of work by already incredibly busy staff members at the parties. While the intentional or reckless provision of false information to competition agencies is of course worthy of sanction, it is also important for agencies to remember that those who are collating the responses are only human, and mistakes can be made – even when they are well counselled. This is particularly the case when staff are involved in a merger procedure for the first time and are required to take time out of their “day job” (which, during such deals can also be coupled with added deal jobs) to respond to such requests. Many companies do not have the resources to dedicate staff full-time to merger procedure information requests and often the information requested is not available at the press of a button, but needs to be created from scratch by the same multi-tasking staff. Should agencies, therefore, consider that any potentially incorrect or misleading information has been supplied, it is to be hoped that they carefully consider how crucial that information was to their decision and also the culpability of the parties providing that information before they pursue any formal cases against them.

## 5. The uncertainty of politics

A more recent area that is worthy of a brief mention in current merger control practice is the impact of the global political climate on merger control. That is, even if the pure competition law issues in a case are clear and straightforward, merging parties and their advisors can face issues when political considerations creep into the merger control process. This could be seen, for example, in the form of politics influencing the decisions of competition agencies, political discussions about law reforms and political interference in the management of competition agencies. It is of course next to impossible to prove political interference in most merger control decisions, regardless of how strongly such interference might be suspected. It should also be emphasised that the significant majority of transactions will be reviewed purely on competition law grounds, and the question of politics will never be raised. There have, however, been a number of important incidents over recent years that demonstrate the potential for politics to play an unwelcome role in global merger reviews:

- The US-China trade war is thought to have had an impact on the Chinese competition law review, and ultimate abandonment, of US chipmaker Qualcomm's proposed acquisition of NXP in 2018. The transaction was cleared by multiple jurisdictions globally, including the European Commission.<sup>43</sup> However, it still remained subject to approval by China's Mofcom, which was required prior to a “drop dead” date for the takeover offer. The Chinese authority simply did not issue a decision by this date. It is widely thought that this was a result of political considerations arising from the US-China trade war.<sup>44</sup> In December 2018, following talks between US President Trump and Chinese President Xi, it was reported that the transaction might be cleared if it were re-filed, but Qualcomm said it would not be revived.<sup>45</sup>
- In 2016, AT&T announced an agreement to acquire Time Warner.<sup>46</sup> While there were no material competitive overlaps between the parties (but some potential vertical relationships), the United States Department of Justice sued to stop the deal.<sup>47</sup> Ultimately, the Courts allowed the transaction to go ahead.<sup>48</sup> Given this was a rare example of the US authorities attempting to stop a vertical transaction, it has been widely speculated that the Trump administration had applied pressure to block the deal,<sup>49</sup> in particular given President Trump's dislike of CNN, owned by Time Warner. At the time of the case, a group of former Department of Justice officials filed an amicus brief with the Court, expressing concern that the White House may have interfered in the matter.<sup>50</sup> More recently, there have been reports that the White House has refused to turn over documents

43 Case COMP/M.8306 – Qualcomm/NXP, 18 January 2018.

44 See, for example, CNN Report: <https://money.cnn.com/2018/07/26/technology/qualcomm-nxp-merger-china/index.html>

45 <https://www.reuters.com/article/us-nxp-semiconductors-m-a-qualcomm/qualcomm-says-china-comment-will-not-revive-nxp-deal-idUSKBN1O20BG>

46 See AT&T Press Release of 22 October 2016: [https://about.att.com/story/att\\_to\\_acquire\\_time\\_warner.html](https://about.att.com/story/att_to_acquire_time_warner.html)

47 See Department of Justice Press Release of 20 November 2017: <https://www.justice.gov/opa/pr/justice-department-challenges-at-directv-s-acquisition-time-warner>

48 *United States v AT&T* Court of Appeal, DC Circuit, 26 February 2019.

49 See for example CNN Report of 4 March 2019: <https://edition.cnn.com/2019/03/04/media/att-time-warner-trump-gary-cohn/index.html>

50 Brief of Former Department of Justice Officials as Amici Curiae in Support of Neither Party in *United States v AT&T*, United States District Court for the District of Columbia, 8 March 2018.

relating to the transaction to House Democrats investigating potential abuses of power.<sup>51</sup>

- In February 2019, the European Commission blocked a proposed merger of the railway equipment businesses of Siemens and Alstom.<sup>52</sup> The decision itself was not influenced by political decisions. Indeed, quite the opposite, the decision to block the transaction was made despite strong political pressure to allow it in order to create a strong “European Champion” to compete against Chinese companies. However, the political fallout from the decision is ongoing, and has led to potential uncertainties as to how European competition law may apply in future. Strong opposition has particularly been felt from the EU’s two largest Member States – France and Germany – who consider that the decision has limited the ability of EU companies to compete against China. There have been suggestions that EU Member States should have the right to veto Commission decisions, and new Commission President Ursula von der Leyen has indicated that competition law will be looked at during her term. While any changes to EU merger control law currently are no more than theoretical possibilities, this is an area where, if changes are made, there could be a very real risk of political considerations creeping in to the reviews of a number of high profile transactions.

There have also been incidents over recent years where national Governments have been accused of appointing, or removing from office, senior competition law officials based on political considerations. For example:

- In 2014, Małgorzata Krasnodębska-Tomkiel, the President of the Polish Office of Competition and Consumer Protection (UOKiK), was removed from office by the Prime Minister of Poland,<sup>53</sup> allegedly due to the Government disagreeing with a decision by the authority in relation to a merger. Krasnodębska-Tomkiel’s successor, Adam Jasser, was similarly removed from office in 2016.<sup>54</sup>

- Israel’s Antitrust Commissioner, David Gilo, resigned in 2015 following disagreements with the Government over his agency’s opposition to a natural gas transaction.<sup>55</sup>
- In January 2019, Greek Prime Minister Alexis Tsipras appointed Vassiliki Thanou, a former Supreme Court Chief Justice, as President of the Hellenic Competition Commission.<sup>56</sup> When new Prime Minister Kyriakos Mitsotakis’s Government took office, they took steps to pass a new law which would help to remove Ms Thanou from office.<sup>57</sup> Ultimately, Ms Thanou and number of other senior officials were removed from office and replaced.

## 6. Conclusion

With the assistance of organisations such as the ICN, OECD and UNCTAD, global merger control has come a long way since its early days. There has been significant convergence of key procedural aspects – such as covered transactions, thresholds and information requirements. However, despite this convergence, there is still a long way to go and merger parties and their advisors are still presented with significant challenges in coordinating differing approaches globally. In a climate where competition agencies are cracking down on infringements of these rules more than ever before, it is increasingly more important to have consistency in rules and their application. It is to be hoped, therefore, that multilateral organisations continue their work towards convergence in order to make the task of navigating international merger control more simple and efficient for merger parties, their advisors and indeed the competition agencies themselves.

51 See for example CNBC Report of 17 April 2019: <https://www.cnbc.com/2019/04/17/white-house-will-not-turn-over-documents-on-att-time-warner-merger.html>

52 Case COMP/M.8677 – Siemens/Alstom, 6 February 2019.

53 See UOKiK Press Release of 10 February 2014: [https://www.uokik.gov.pl/news.php?news\\_id=10860](https://www.uokik.gov.pl/news.php?news_id=10860)

54 See report by PaRR of 22 January 2016: <https://app.parr-global.com/intelligence/view/prime-2164327>

55 See report from The Jerusalem Post of 25 May 2015: <https://www.jpost.com/Business-and-Innovation/Antitrust-Commissioner-David-Gilo-to-resign-in-August-amid-gas-disputes-404017>

56 See report from the Global Competition Review of 21 December 2018: <https://globalcompetitionreview.com/article/1178397/controversial-new-head-will-lead-greek-authority>

57 See report from PaRR of 9 August 2019: <https://app.parr-global.com/intelligence/view/prime-2885206>

**Table 1 - Recent Examples of Gun Jumping (including Failure to Notify) Cases : 2019**

Country	Companies	Infringement	Fines
Australia	Cryosite	Gun jumping	AUD 1.05M (EUR 640,311)
Austria	WIG Wietersdorfer Holding	Failure to notify	EUR 70,000
Austria	Containex Container-Handelsgesellschaft	Failure to notify	EUR 100,000
Austria	Lagardère Travel Retail Austria and Schmitt & Trunk Buch und Presse	Gun jumping	EUR 17,500
China	Jiangsu Dewei Advanced Materials	Failure to notify	CNY 300,000 (EUR 39,611)
China	Yinli Media	Failure to notify	CNY 200,000 (EUR 26,407)
China	Overseas Hong Kong Investment	Failure to notify	CNY 300,000 yuan (EUR 39,611)
China	Tianneng Group	Gun jumping	CNY 300,000 yuan (EUR 39,611)
China	China Action Development	Failure to notify	CNY 300,000 (USD 42,124)
China	China Post Capital Management	Failure to notify	CNY 400,000 (USD 56,165)
China	Suzhou Quanyi Health Pharmacy Chain (Quanyi)	Gun jumping	CNY 300,000 (USD 42,260)
China	Tibet Dejin Enterprise Management	Gun jumping	CNY 300,000 (USD 42,256)
China	Guangxi Liuzhou Iron and Steel Group	Gun jumping	CNY 350,000 (USD 49,277)
China	BAIC Motor, Hyundai Capital Services, and Hyundai Motor Group (China)	Failure to notify	CNY 300,000 (USD 42,364.5)
Denmark	Circle K Denmark	Failure to notify	EUR 800,000
EU	Canon - Toshiba Medical Systems Corporation	Gun jumping	EUR 28M
Indonesia	Matahari Pontianak Indah Mall	Gun jumping	IDR 12.6bn (USD 892,220)
Ireland	Spirit Ford - Motor Company Limited	Gun jumping	EUR 2,000
Kenya	Moringa School Limited	Gun jumping	Ksh. 503,656 (EUR 4,400)
Mexico	Société des Produits Nestlé, Nestlé México, Nestec - Grupo Lala's subsidiary Innovación de Alimentos	Failure to notify	MXN 7.9M (EUR 363,434)
Mexico	BorgWarner and Remy Holdings International	Gun jumping	MXN 2.9M (EUR 133,412)
Mexico	Bankaool and Banco Ve por Más	Gun jumping	MXN 754,900 (EUR 34,728)
Moldova	Valenagro	Gun jumping	MDL 221,058 (EUR 11,165)
Philippines	Wingtech Technology and Nexperia Holding	Gun jumping	PHP 716,150 (EUR 12,411)
Romania	Corsar Online	Failure to notify	RON 1.6m (EUR 0.33m)
Slovenia	United Group	Failure to notify	EUR 3.7M
Slovenia	Agrokor d.d.	Gun jumping	EUR 53.9m
US	Canon - Toshiba Medical Systems Corporation	Gun jumping	USD 2.5m for each company (settled)
Ukraine	TAS Group	Gun jumping	EUR 1.8M
Ukraine	Senalior Investments LTD	Gun jumping	EUR 1.9M
UK	Electro Rent Corporation	Gun jumping	GBP 300,000
UK	PayPal	Gun jumping	GBP 250,000

This represents a non-exhaustive list of failure to notify and gun jumping cases in 2018.  
The information has been gathered from media reports and other public sources.

**Table 1 - Recent Examples of Gun Jumping (including Failure to Notify) Cases : 2018**

Country	Companies	Infringement	Fines
Austria	H.I.G. Capital	Gun jumping	EUR 40,000
Austria	Comparex	Failure to notify	EUR 40,000
Austria	Stahl Lux	Failure to notify	EUR 185,000
Brazil	Supermercados BH	Gun jumping	BRL 1m (USD 268,000)
Brazil	Rede D'Or São Luiz	Gun jumping	BRL 700,000 (USD 187,000)
Brazil	Expresso Guanabara and Nossa Senhora da Penha	Gun jumping	BRL 280,000 (USD 75,000) for each company
China	Linde Gas (HK) and Guangzhou Iron and Steel	Gun jumping	CNY 300,000 (USD 43,536) for each company
China	China Duty Free Group (CDFG)	Failure to notify	CNY 300,000 (USD 43,216)
China	Linde Gas (HK) and Dahua Group	Failure to notify	CNY 300,000 (USD 43,220) for each company
China	Linde Material Handling Hong Kong Limited and Shanghai Huayi Energy Chemical	Failure to notify	CNY 300,000 (USD 43,669) for each company
China	GEM (Wuhan) Urban Mining Resources Industrial Park Development	Failure to notify	CNY 300,000 (USD 43,688)
China	Yunnan Metropolitan Construction Investment (YMCI)	Failure to notify	CNY 300,000 (USD 43,650)
China	Paper Excellence (PEBV)	Failure to notify	CNY 300,000 (USD 43,897)
China	Tianjin Haiguang Advanced Technology Investment - Advanced Micro Devices (AMD)	Failure to notify	CNY 150,000 (USD 21,873)
China	Yunnan Metropolitan Real Estate Development	Failure to notify	CNY 150,000 (USD 21,960)
Denmark	SEAS-NVE Holding A/S and Syd Energi Holding A/S	Failure to notify	DKK 4m (EUR 0.54m) for each company
EU	Altice	Gun jumping	EUR 124.5m
Greece	Dimera Media Investments	Gun jumping	EUR 0.11m
Hungary	ETS Efficient Technical Solutions	Gun jumping	HUF 4.4m (EUR 13,576)
Indonesia	Nippon Indosari Corpindo (ROTI)	Gun jumping	IDR 2.8bn (USD 193,493)
Latvia	UAB Vaizga	Failure to notify	EUR 57,000
Moldova	Alimer-Comert	Failure to notify	MDL 0.5m (EUR 25,404)
Moldova	Energotehcomplet	Failure to notify	MDL 44,137 (EUR 2,229)
Moldova	Ovico-Parfum	Gun jumping	MDL 81,678 (EUR 4,172)
Moldova	Suedzucker Moldova	Gun jumping	MDL 12,265 (EUR 627)
Philippines	Udena - KGLI Investment Cooperatief	Failure to notify	PHP 19.6m (USD 373,797)
Romania	CRH Ciment and Comnord	Gun jumping	RON 3,056,314 (EUR 655,904)
Romania	Westgate Romania	Failure to notify	RON 0.23m (EUR 50,000)
Slovakia	EP Industries	Failure to notify	EUR 18,000

This represents a non-exhaustive list of failure to notify and gun jumping cases in 2018.  
The information has been gathered from media reports and other public sources.