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Competition world

A global survey of recent competition and antitrust law developments with practical relevance

2017 | Third edition

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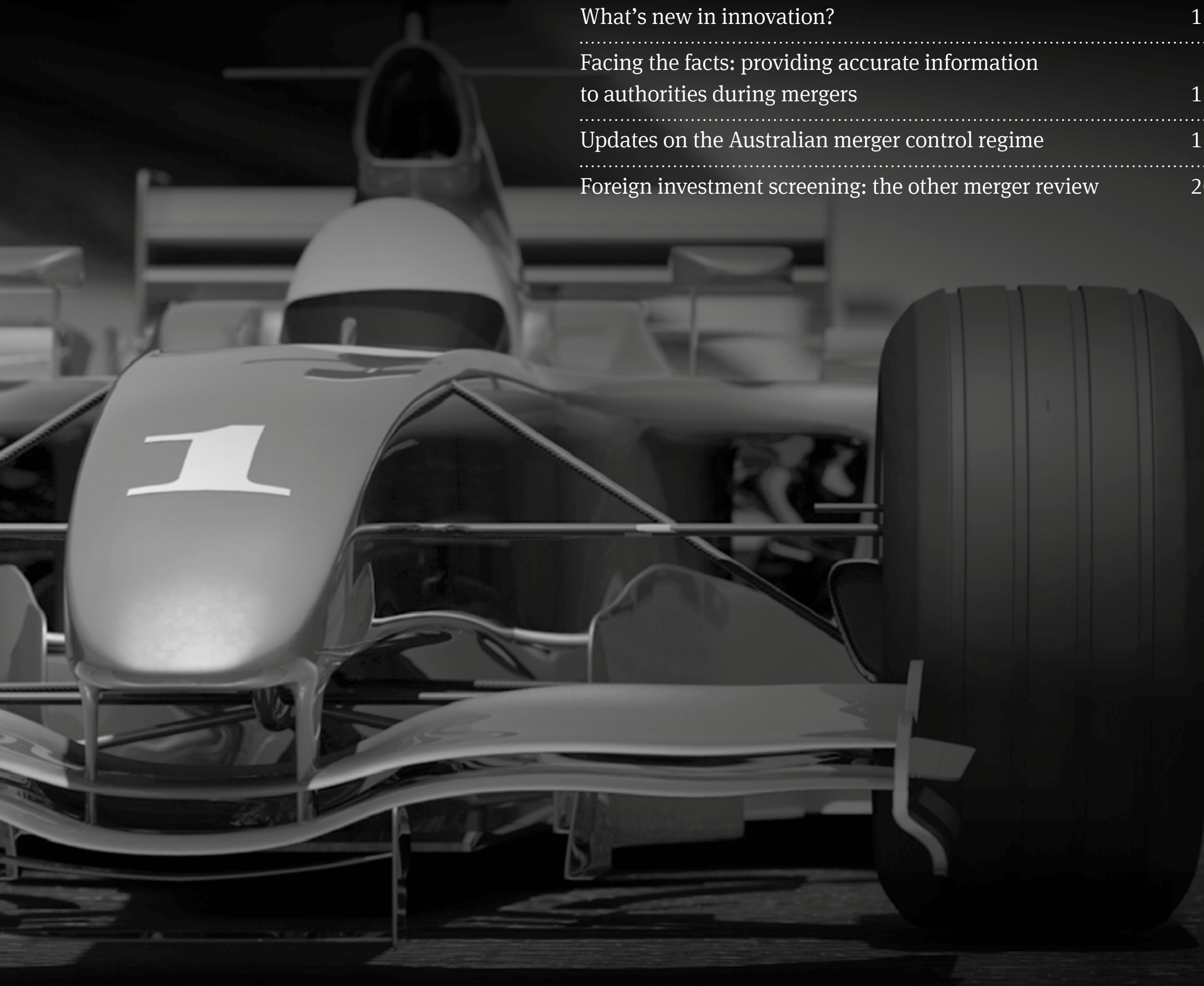

From the editor

Welcome to our third edition of *Competition World* in 2017. This edition covers the topic of merger control. We share insights from our teams around the world on some of the most significant cases and other policy developments in recent months.

We start by offering practical insights on how to get global deals done by identifying "Ten things for in-house counsel to consider". We identify potential pitfalls when conducting multi-jurisdictional assessments; comment on the need to exercise caution in deal documentation when describing the aims of the deal; and explain the key provisions needed to align competition risks between the parties to the deal.

Next, we move to Europe and focus on "gun jumping". We outline the recent case law developments and set out practical suggestions for companies to ensure that they do not fall foul of the rules. We also comment on the French Competition Authority's decision to impose an €80 million fine on Altice and discuss the implications of the decision for pre-closing interactions. We then examine the European Commission's increasingly tough stance on parties which jump the gun.

We also comment on the Commission's recent decision to clear the US$130 billion merger of Dow and DuPont and ask to what extent should an authority concern itself with the possible competitive harm arising where two major innovators merge?

Finally in Europe, we explain that the Commission recently fined Facebook €110 million in relation to a failure to provide accurate information in response to questions asked by the Commission in connection with its acquisition of Whatsapp in 2014. We remind businesses of the importance of providing accurate information that does not mislead the authorities.

Turning to Australia, we outline some of the upcoming reforms to the Australian merger control regime and comment on an interesting case where the Federal Court examined the application of the "public benefits" test.

Finally, we turn to foreign investment review and examine the potential regulatory risks posed by foreign investment review laws around the world.

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Guide to doing global deals: Ten things for in-house counsel to consider

There are over 140 jurisdictions globally that have some form of merger control. For multinational companies this means that transactions are likely to trigger filings in several different jurisdictions. Each jurisdiction varies by regime maturity, filing thresholds and compulsion. Some countries have turnover thresholds, others take into account a company's assets or market share to determine whether notification is required. Successful navigation of these complex rules requires an in-depth understanding of cross-jurisdictional merger control issues; the ability to manage competition risk within the transaction documentation; and consideration of competition law exposure in sharing information with competitors.

01 | Retaining counsel for global transactions

Retaining a single firm with competition expertise in all relevant jurisdictions ensures that a thorough initial analysis is undertaken globally. A single point of contact provides for seamless communication and coordination across jurisdictions, which can minimise costs and in-house counsel time that is associated with managing multiple law firms and filings.

The transaction will also benefit from the certainty created by co-ordination of clearance timelines, and strategies implemented to address jurisdictional nuances which can assist in timely clearance, and ultimately completion of the transaction.

02 | Mandatory notification jurisdictions

Many jurisdictions have a mandatory notification framework, where failure to notify a transaction can result in significant fines for both transaction parties. It is simple to make an erroneous assumption that due to neither party having assets or offices located in a particular country that there will be no requirement to notify. Where revenue is derived from within a jurisdiction, or the parties are of a scale globally that their revenue is significant, assessment of whether thresholds are met is crucial. These filings can be required even if there are no substantive competition concerns.

03 | Non-mandatory jurisdictions

Voluntary notification frameworks such as those in Australia, the United Kingdom and Spain should not be dismissed due to their non-mandatory status. It is not the case that these jurisdictions do not have laws pertaining to mergers or acquisitions – the relevant laws prohibit mergers or acquisitions that are likely to result in a substantial lessening of competition. The voluntary nature of these regimes forms part of the framework which provides parties with certainty that the merger or acquisition will not be in contravention of local competition laws.

Enforcement agencies in these jurisdictions are proactive and will unilaterally initiate investigations into transactions that may raise competition concerns. Parties should consider the recommended notification thresholds closely to establish whether consultation with the enforcement agency is required. Failure to notify transactions with competition concerns under these regimes will have implications for transaction deadlines. Moreover, these enforcement agencies have the power to prevent the completion of the transaction in their jurisdiction, seek sizeable penalties for contraventions of the law or, if a transaction has already been completed, seek orders to unwind the transaction.

04 | Internal documentation

Documents such as presentations, information memorandums, board minutes or briefing documents, that articulate the transaction rationale, strategic decisions or any observations on the current state of competition can assist or derail a clearance process. This is true for documents prepared by the company or for the company by advisors such as investment banks. References that do not support the arguments put to the enforcement agency can seriously affect the likelihood of clearance.

Requests for information by an enforcement agency, whether voluntary or through use of a compulsory information gathering power, are a common feature of merger reviews around the world. Indeed, countries such as Canada and the United States require certain internal documents to be provided at the outset, where in other jurisdictions, information and documents will be requested to substantiate information proffered in the filing. The competition clearance implications of any internal document should be considered at the inception of any anticipated transaction. This will ensure that clearance risk is managed and the production of these materials do not result in enforcement agencies shifting their line of inquiry, which will require the parties to defend the position put forward in the filing.

05 | Deal documentation

Parties should seek input from competition counsel in the early stages of negotiations to ensure that transaction documentation reflects competition law imperatives and assigns risk appropriately between the buyer and seller. Provisions include

- A condition precedent (CP) that completion of the sale is subject to the receipt of competition clearance from all necessary enforcement agencies. CPs can help mitigate the risks of both the buyer and the seller if the deal does not complete due to competition concerns.

- “Hell or high water” provisions, which require the purchaser to fulfil certain obligations to remedy competition concerns, including divestiture. Notwithstanding these contractual obligations, if an enforcement agency’s concerns are so great, remedies may not be accepted even with the inclusion of the clause.

- Cooperation between the parties, which set out who has responsibility for filings and the timing of these. Responsibilities can vary between buyers and sellers in different jurisdictions so it is important that these are clear and coordinated from the outset.

- The sunset date, which is the date by which a deal must be completed, is a common inclusion in deal documents. When considering the jurisdiction threshold question, competition counsel can also provide input into an appropriate and realistic sunset date that provides adequate time for the merger clearance process in different jurisdictions, or suggest a mechanism for automatically extending the date for specified periods if the only outstanding condition precedent relates to competition approval.

06 | Timeline coordination

Regimes have varying timeframes for review, so it is essential to identify from the outset the jurisdictions that will require notification and the outer timeframes for clearance. The time required to prepare what are often quite detailed filings where there is competitive overlap and cross check information across jurisdictions should factor into the overall transaction timetable.

It is also common for enforcement agencies to coordinate their review to align decision dates. This is particularly relevant in the event of remedies to address competition concerns. If divestiture is required across multiple countries (or if a remedy in one country will address concerns in another), enforcement agencies will look to coordinate their approach to ensure consistency in remedies, which can only be achieved if reviews are at a similar stage in the review timetable.

07 | Coordination between global enforcement agencies

As noted above, cooperation and communication between competition agencies is commonplace, with many having memorandums of understanding between them to cooperate and facilitate sharing of information. Where information is provided to an enforcement agency on a confidential basis, the relevant agency will often request a waiver to disclose such information to a fellow agency in another jurisdiction. This brings the prior cross-checking and global coordination of submissions into sharp focus.

A consistent strategy and approach to clearance, including key merger factors such as market definition, is critical. Submitting filings on a consistent basis can minimise any gaps between jurisdictional assessment and result in a smoother global clearance process.

08 | Gun jumping

Information sharing underpins the necessary due diligence process and integration planning for a business once an agreement has been reached. However, if parties move beyond planning the coordination of activities prior to completion they risk “gun jumping”. Merging operations prior to completion is being taken increasingly seriously by antitrust authorities around the world, with individual fines of up to €80 million having been imposed.

Information that should not be disclosed includes

- Detailed pricing.

- Details of customers or suppliers.

- Proposed responses to upcoming tenders, or recent tender information.

- Agreements, financial information or strategy documents.

However, where clean teams and protocols are established, there are work arounds to enable the sharing of information between competitors that would otherwise be problematic. The next section discusses ways in which certain of this information can be shared on a limited basis.

In addition to the sharing of information, the actual integration of businesses cannot occur until the notification has been provided in all jurisdictions and completion takes place. It is not enough to wait until competition clearance has been obtained. Competition agencies can and will investigate companies for antitrust violations arising from any gun jumping activities.

09 | Information sharing protocols and clean teams

Information sharing protocols can minimise the potential for competitively sensitive information to raise competition concerns in the pre-completion phase. Establishing "clean teams" within the businesses allows for the disclosure of otherwise sensitive information subject to strict confidentiality obligations, including disclosure to others within their own business.

The laws of most jurisdictions recognise that competitively or commercially sensitive information may need to be shared to allow for proper consideration of an acquisition. However, the distortion of the competitive process must be considered not only during the pre-completion phase (gun jumping), but after the transaction, if, for some reason, the transaction does not complete. Holding a competitor's competitively sensitive information, including pricing data, strategy documents, and tender proposals can raise competition concerns when that information is used to inform decisions after a failed merger. As such, any protocols should include provisions for the return or certified destruction of the information if the merger is not completed.

10 | Uncovering antitrust violations

Preparing to sell a business or undertaking due diligence requires a thorough review of a company's operations. This process may uncover conduct that could raise competition concerns, such as abuse of dominance practices and cartel arrangements. If this is the case, a thorough internal investigation to determine the extent of any breach should be undertaken, followed by a recommendation on potential risk mitigation measures, including whether an application should be made for immunity. The implications for the seller and the buyer differ, and indeed, the stage of the transaction affects the potential outcomes for each party.

Deals that cross borders have the additional overlay of cross-jurisdictional regulatory assessment. Considering the competition and antitrust implications in the initial phases of a potential acquisition will assist in establishing clear steps through the clearance process. A unified, coordinated and consistent approach globally will ensure that regulatory clearance of a global transaction will proceed as smooth as possible.

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Gun jumping in France: how clean is your team?

In November 2016, the French Competition Authority (FCA) imposed an unprecedented €80 million fine in the telecom sector for merger control "gun jumping" in the takeover of SFR by Altice[1] (the Decision). This widely-commented case has thrown the French M&A and legal world into a frenzy, essentially for two reasons

- Firstly, it concerned a "softer" form of gun jumping: the parties had indeed filed a merger control application, and did wait for the authorisation before closing the transaction. However, according to the FCA, they cooperated too closely between the signing and the closing, among others by exchanging strategic information. Such a high fine for this type of "grey zone" behavior is unsettling, since the rules on how to manage the pre-closing period are not always entirely clear.
- Secondly, although the Decision appears to be based on an exceptional set of facts, it also contains a number of "principle paragraphs", drafted in a general manner, as if the FCA had taken this opportunity to issue informal guidelines in this area. This could have been a good approach, were it not for the choice of words in these paragraphs: a strict interpretation could indeed challenge the whole way in which M&A transactions are conducted in practice, and particularly the management of "clean teams".

Companies and practitioners hope that the FCA will provide further guidance and restore some balance. Eyes are also turned to the European Commission, which has recently opened a probe on Altice's purchase of Portugal Telecom; depending on the facts at stake, the Commission's decision may shed some light on the way forward. However, in the meantime, the question remains of how to deal with the Decision in practice.

Context of the decision: gun jumping in Europe

The term "gun jumping" refers to a breach of merger control regulations, and may cover different types of behavior, the most obvious being what could be called "hard" gun jumping, i.e. implementing a notifiable transaction without making the compulsory filings to the competition authorities. But even when parties have ticked in the merger filing box, they could still be jumping the gun if they decide to implement the transaction prematurely. A clear example is when the closing occurs before the merger control authorisation is obtained, which constitutes a direct breach of the suspensive effect of most merger control procedures.

There are however more subtle forms of gun jumping, such as exchanging strategic information between the signing and the closing, or requesting the buyer's consent before the seller adopts a strategic decision. This is where gun jumping gets difficult to manage: to any M&A operative, asking for the buyer's go-ahead before getting involved in a project that may have significant consequences on future business seems only reasonable and is, as a matter of fact, quite common in practice. In many cases, that kind of cooperation may be necessary to attain the goals of the transaction, or simply to preserve the value of the target and its future activity. In most cases, the success of the transaction depends on the synergies that the buyer will be able to implement, and this is only possible if the integration is prepared beforehand.

From the competition law point of view, this early cooperation may nevertheless constitute an infringement. In theory, as long as the parties have not closed the transaction, they remain competitors, who are not supposed to exchange sensitive information, and even less adopt strategic decisions in a joint manner. Defining what constitutes "sensitive" information in this context may not always be easy though, which is all the more problematic considering the level of applicable sanctions: at EU level, fines can be up to 10 percent of global turnover of all parties

1 See, in particular, paragraphs 303-307.

involved for any form of premature implementation of the transaction.

It is true that, for a long time, these "softer" forms of gun jumping have been seen in Europe as a "low-risk area". Contrary to other jurisdictions like the US, the few existing decisions mostly concerned transactions that had simply not been notified, or had been notified late. This was the case in the Electrabel/Compagnie Nationale du Rhône takeover, which was notified in 2008, whereas the Commission considered that Electrabel had already acquired de facto control over the target back in 2003. The Commission imposed a fine of €20 million for implementing a transaction without notifying it[2].

The European Commission has been recently taking a tougher stance on gun jumping, but very few cases concern the premature implementation of a notified concentration, and even fewer have led to a fine (see separate article in this edition, The EU gets tough on gun jumping). One of the rare illustrations was the fine imposed by the Norwegian Competition Authority on the grocery group Norgesgruppen in early 2014. But this decision seemed an exception when compared to the number of transactions that went on undisturbed.

This age of "insouciance" has abruptly come to an end in France, and that may also soon be the case at the Commission level in the new Altice case.

The exceptional set of facts under review

The Decision concerned not only one but two acquisitions carried out by Altice, within the frame of the concentration trend in the telecom sector: the first target was SFR (one of the main French mobile operators), and, the second, was Omer Telecom (OTL), operating, among others, under the Virgin Mobile brand. The management of this second transaction has been considered as another element of gun jumping, since the FCA found that Altice "replaced" SFR as buyer of OTL.

Concerning the implementation of both transactions, it is interesting to note that the FCA took a pragmatic and "non-formalistic" approach: it did not exclusively focus on the provisions of the share purchase agreement (SPA), but it analyzed in detail the way in which the parties had interpreted and applied those provisions, and how they acted in practice.

Some of the measures adopted by the parties certainly appear to have gone beyond what is acceptable during the pre-closing period. For example

- Altice actively intervened in the definition of SFR's commercial policy, and in particular in its pricing policy, such as in the definition of tariffs for a high-speed offer.
- The parties globally reinforced their commercial relations and, among other things, co-managed an important project concerning very high speed wholesale offers (the "marque blanche" project).
- In the OTL transaction, key managers were prematurely appointed and started acting in their new position before the closing.
- Globally, the parties frequently exchanged sensitive information, among others during regularly organized pre-integration meetings.

Other infringements, on the other hand, seem less obvious and raise questions as to how the parties should have behaved

- Altice blocked investments in IT equipment planned by SFR: on the face of it, this measure may appear reasonable, considering that IT systems would have to be integrated and probably reviewed right after the integration, thus probably rendering any investment useless;.
- Altice intervened in SFR's response to a tender: this was probably going beyond what is admissible, but the response to certain important tenders may have a determining impact on the conduct of business after the integration, and it is not entirely surprising that the buyer wants to have its say on these decisions.

However, representatives of the FCA have insisted on the fact that these infringements cannot be taken as a "checklist". According to them, the key element in this case, which accounts for the very high fine, was the fact that the parties showed an overall and complete unawareness of gun jumping rules, and behaved, in every aspect, as if they already were a single company.

The controversial principles that seem to result from the Decision

Besides the very specific set of facts that caught the FCA's attention, the buzz created by the Decision essentially stems from a few paragraphs, drafted in such general terms that they seem to go beyond the factual situation at stake. The wording of these paragraphs is somehow mysterious and, if interpreted in a strict manner, could render the management of M&A transactions

2 Case No COMP/M.4994 – Electrabel/Compagnie Nationale du Rhone, June 10, 2009.

considerably more complex. This is the case, for example

- For certain paragraphs of the Decision concerning convenants[3]. In the OTL transaction, the parties had agreed on a general prohibition for the target to adopt certain decisions; as well as an exception for a number of decisions, which could be adopted, subject to the buyer's consent. The FCA indicates that this arrangement amounts to a premature acquisition of control over the target.

  A strict interpretation of this paragraph may be taken as a refusal of the traditional distinction, followed among others by US authorities, between decisions taken "in the ordinary course of business", and extraordinary decisions. It is obvious that the target would be penalized by a no-exception prohibition to adopt certain decisions, and that, in certain cases, requesting the consent of the buyer appears to be reasonable, for example concerning non-reversible decisions that may have a determining impact on post-integration business.

- For paragraphs concerning exchanges of information and "clean teams". Among others, paragraph 260 could be interpreted as imposing a general ban on the exchange of any strategic information between the parties, which would in practice block the acquisition process.

Also, and this has probably been the most commented line of the Decision, paragraph 262 seems to ban all employees from "clean teams"; these should then be exclusively formed by external advisers, which is unfeasible in practice.

It seems reasonable to assume that the FCA did not intend these paragraphs to be interpreted in a strict manner, but their wording is nevertheless unsettling, and the publication by the FCA of guidance in this respect would be very welcome by companies and practitioners.

What to do in practice?

The Decision essentially underlines the importance of raising the awareness among the management team, and having an initial strategic reflection about the best way to deal with gun jumping risks at the different stages of the transaction. The simple fact of carrying out this exercise should prevent the "general unawareness" condemned by the FCA.

As to the principles that should frame this strategic reflection, and as long as no further official guidance is available, it seems safe to assume that traditional principles may be followed. In essence, these are

- Timing: adapt the level of information exchanges and common decision-making to the needs of the parties at each stage of the acquisition process.
- Need-to-know basis: limit interactions to what is strictly necessary.
- People: to the extent possible, limit the number of people in contact with sensitive information, and choose people who are as far from operational positions as possible.

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3 See, in particular, paragraphs 303-307.

The EU gets tough on gun jumping

Like many international merger control statutes, the EU Merger Regulation (EUMR) prohibits the closing of a notifiable transaction until the European Commission (the Commission) grants or is deemed to have granted antitrust approval. Until recently, however, the Commission has pursued very few violations of this rule, known as "gun jumping," in particular compared to the U.S. antitrust agencies. The Commission's recent actions, and tough talk by EU Competition Commissioner Vestager, suggest that the relatively relaxed European approach to gun jumping is over.

In her May 2017 speech on "Competition and the rule of law," Commissioner Margrethe Vestager said that if merging parties "jump the gun, we take that very seriously indeed", because "otherwise, the harm to competition could already be done, before we have the chance to intervene."[1] Also in May, the Commission announced gun jumping proceedings against French company Altice, which recently received a gun jumping fine from the French authority in connection with two other transactions. Two months later, the Commission opened another gun jumping case, against Canon. If these cases, involving alleged partial implementation of notified transactions, lead to infringement decisions and fines, they will be the first of their kind in the EU.

This article discusses the types of conduct that may lead to a finding of gun jumping and the Commission's enforcement history in this area. In conclusion, this article offers some practical guidance on avoiding gun jumping issues in future transactions.

What is "gun jumping"?

The expression "gun jumping" is not clearly defined in EU competition law. The EUMR prohibits a company acquiring "control" of another company, or two or more merging companies, from putting their transaction "into effect" before approval, if the transaction meets the EUMR reporting thresholds. The clearest case of gun jumping occurs where the parties implement a notifiable concentration without filing a notification at all. Such an error is surprisingly easy to make under EU law because some of the EUMR thresholds are relatively subjective or difficult to apply, in particular in the case of minority investments in publicly listed companies and joint ventures, where it can be difficult to determine whether a transaction involves an acquisition of control or whether a joint venture is a notifiable "full function" venture.

In addition to clear-cut closing of a notifiable transaction without notification, pre-closing conduct can lead to two different types of gun jumping violation. First, pre-closing conduct that amounts to putting a notifiable transaction "into effect" prematurely may violate the EUMR. Second, if the parties to the transaction are competitors, pre-closing conduct may be caught by Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which prohibits restrictive agreements, decisions and concerted practices. Practices that may be scrutinized from a gun jumping perspective include the exchange of competitively sensitive information during due diligence before or after signing of an acquisition agreement; implementation of pre-closing "ordinary course" covenants between signing and closing; planning for or commencing the integration of the parties' businesses after closing; and coordination of competitive behavior before closing. Pre-merger clearance does not legitimate previous infringements, so that a gun jumping violation may be found even after a notified transaction is approved.

Thus, gun jumping violations may be sanctioned in two different ways: as violations of the EUMR requirement that reportable transactions "shall not be put into effect" before approval or as infringements of the Article 101(1) TFEU prohibition of restrictive agreements, decisions or concerted practices. In either case, violations may be punished with fines of up to ten percent of the merging parties' aggregate turnover, but the applicable procedures and even the amount of any ultimate fine may vary depending on how the infringement is characterized, because the Commission has adopted guidelines on how it sets fines in Article

1 Margrethe Vestager, Competition and the rule of law, May 18, 2017, available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en.

101(1) TFEU cases but not in EUMR infringement cases.

The Commission's gun jumping enforcement history

The Commission's new gun jumping cases suggest that the Commission is focusing more closely on gun jumping issues, particularly in the relatively gray area of partial implementation of notifiable transactions. These cases should also clarify the Commission's approach to calculating fines for EUMR violations. The Commission's imposition of a €110 million fine on Facebook for provision of incorrect or misleading information in the WhatsApp transaction[2] may suggest that any future gun jumping fines will also be considerably higher than in the past.

Enforcement in failure-to-file cases

As mentioned, the most clear-cut case of gun jumping occurs where an acquirer takes action that amounts to an acquisition of "control" in a transaction meeting the EUMR thresholds without making a required notification. Although such cases are relatively rare, the Commission has imposed fines in two such cases in recent years: Marine Harvest/Morpol (*Marine Harvest*; 2014) and Electrabel/Compagnie Nationale du Rhône (*Electrabel*; 2009).[3] Electrabel ended a long drought of such cases; the only prior Commission fines for gun jumping were imposed in 1998 and 1999.[4] In an unusual 2002 case, the Commission apparently found that the parties to a joint venture had implemented a notifiable transaction without notification, but it imposed no fine even though the transaction raised serious competition issues.[5]

Both *Marine Harvest* and *Electrabel* involved minority investments in publicly listed companies, where a large minority stake was considered sufficient to confer control. Marine Harvest was found to have acquired "control" over Morpol for EUMR purposes when it acquired a 48.5 percent stake in 2012, since this minority stake gave Marine Harvest a stable majority at Morpol's shareholders' meetings as a result of the wide dispersion of the remaining shares. Similarly, Electrabel was found to have acquired control of Compagnie Nationale du Rhône in 2003 when it raised a small minority stake to 47.92 percent of voting rights. In both cases, the Commission imposed a fine of €20 million. Although the Commission's fining guidelines under Article 101(1) TFEU did not apply, the Commission indicated that it took into account the duration of the infringement and the amount required to create a deterrent in view of the parties' size, but also mitigating factors such as the fact that both parties brought the issue to the Commission's attention themselves and, in Marine Harvest's case, the prompt start of pre-notification discussions and the fact that Marine Harvest abstained from exercising voting rights and ring-fenced the target.

Marine Harvest and *Electrabel* represented a reminder that acquiring parties must look closely even at minority share acquisitions to determine whether they may involve an acquisition of control under EU law, and if so whether the EUMR thresholds are met. It seems likely that there will be fewer such cases going forward, though in such future cases the Commission may consider imposing even higher fines in view of the clear precedents these cases provide. As noted, the Facebook/WhatsApp case may signal the Commission's intention to increase fines for procedural violations in any event.

Enforcement in partial-implementation cases

The Commission's 2017 cases, by contrast, involve the potential partial implementation of notifiable transactions, a much grayer area of law in the EU. Previously, the Commission has apparently detected and prohibited a pre-approval partial implementation of a notified transaction in only one case, and even in that case no fine was imposed. Interestingly, Computer Associates' acquisition of Platinum, a transaction leading to one of the main US gun jumping cases involving partial implementation, was also notified in Europe, but the Commission approved the transaction without raising any gun jumping issues.[6]

The Commission's only pre-2017 partial implementation case, Bertelsmann/Kirch/Premiere, involved a joint

2 See http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017M8228(03)&from=EN.

3 Case No COMP/M.7184 – Marine Harvest/Morpol, decision of July 23, 2014, available at http://ec.europa.eu/competition/mergers/cases/decisions/m7184_1048_2.pdf, and Case No COMP/M.4994 – Electrabel/Compagnie Nationale du Rhône, decision of June 10, 2009, available at http://ec.europa.eu/competition/mergers/cases/decisions/m4994_20090610_1465_en.pdf.

4 The Commission conducted investigations in two cases (Ineos/Kerling (2007) and Skansca/Scancem (1998), but ultimately found no infringement. See http://ec.europa.eu/competition/international/multilateral/2014_feb_mergers_investigations_en.pdf and Case No IV/M.1157 – Skanska/Scancem, decision of November 11, 1998, available at http://ec.europa.eu/competition/mergers/cases/decisions/m1157_19981111_600_en.pdf.

5 In Case COMP/M.2650 Haniel/Cementbouw/JV, June 26, 2002 (upheld on appeal, Case T–282/02 Cementbouw v Commission, judgment of February 23, 2006 and Case C-202/06P, Cementbouw v Commission, judgment of December 18, 2007), Haniel and Cementbouw failed to notify their acquisition in 1999 of joint control of CFK. The parties notified the transaction after the Commission learned about this acquisition in 2002. The Commission found that the transaction created a dominant position, but it approved the concentration subject to the condition that the parties would terminate their joint control over the joint venture. In practice, this was a prohibition decision disguised as a conditional approval decision. This approach may have been intended to allow the companies to avoid fines for implementation of a non-notified anti-competitive concentration.] In Case No COMP/M.4730 – Yara/Kemira Growhow, decision of September 21, 2007, the Commission stated that Yara's acquisition of a 30.05 percent interest in Kemira-Growhow prior to notification may have constituted gun jumping, but it did not pursue this possibility. See, http://ec.europa.eu/competition/mergers/cases/decisions/m4730_20070921_20212_en.pdf.

6 Case IV/M.1580 CAI/Platinum, June 28, 1999 [1999] O.J. C227/19, available at http://ec.europa.eu/competition/mergers/cases/decisions/m1580_en.pdf.

venture between Bertelsmann, Kirch and Premiere for the launch of the first digital pay-TV channel in Germany. Shortly after execution of the joint venture agreement and prior to notification, Premiere reportedly started marketing Kirch's digital decoder to subscribers and using such decoder for the purpose of providing its digital television services. The Commission warned the parties that this conduct would amount to the partial implementation of the planned concentration contrary to the EUMR and threatened to apply fines of up to ten percent. Following notification, the Commission insisted that, even though "the introduction of a single decoder is not a competition problem," the parties' behavior represented the partial implementation of the notified agreement and ordered them to cease this behavior. Nonetheless, after the parties undertook to stop their gun jumping activities, the Commission did not pursue the matter and imposed no fine.[7]

The Commission's new proceedings against Altice and Canon illustrate a potential hardening of the Commission's approach to partial implementation cases. In May 2017, the Commission announced that it had opened formal proceedings against French company Altice, which notified the Commission of its plans to acquire PT Portugal in February 2015. Although the Commission cleared the transaction on April 20, 2015, the Commission believes that Altice actually implemented the acquisition prior to the adoption of the Commission's clearance decision, and in some instances, prior to its notification, by virtue of provisions in the acquisition agreement that put Altice in a position to exercise decisive influence over PT Portugal. Commissioner Vestager elaborated in her May 2017 speech, that "we found that [under] Altice's agreement to buy PT Portugal … Altice had already been acting as if it owned PT Portugal[,giving] … instructions on how to handle commercial issues, such as contract negotiations. And it also seems to have been given sensitive information. Information that only PT Portugal's owner should have had – and without any safeguards to stop it misusing that information." The Commission has not yet elaborated on the specific contractual provisions in question or the nature of the information disclosed. The Commission has also not yet clarified whether its investigation is limited to a potential violation of the EUMR's suspensory obligation, or also a potential violation of Article 101(1) TFEU.

Interestingly, the Commission's Altice investigation follows close on the heels of a November 2016 decision by the French competition authority imposing an €80 million fine against Altice and SFR Group for gun jumping in two transactions notified in 2014, Altice-SFR and Altice-OTL. The French authority found that Altice intervened in the management of SFR on several occasions and implemented a coordinated strategy for the two groups during the suspensory period, negotiating and preparing for the launch of a new range of very high-speed broadband Internet access offers under the SFR brand. Before the merger was cleared, Altice and SFR also exchanged among senior executives of both groups large quantities of strategic information in preparation for the integration. In the OTL transaction, Altice intervened in OTL's operational management by approving a number of strategic decisions concerning agreements to host OTL's mobile customers with network operators and set up a weekly information-reporting mechanism comparable to that exercised by a controlling shareholder, which provided Altice with access to commercially sensitive information concerning OTL. The authority also noted premature changes in management responsibilities on the part of OTL's Managing Director, involving him in commercial projects through which he received commercially sensitive Altice information.[8] The French Altice case, the first of its kind in France, illustrates that the Commission is not the only European authority taking a harder line on gun jumping.

In July 2017, the Commission opened proceedings against Canon in connection with its acquisition of Toshiba Medical Systems, in which Canon paid the full price for non-voting shares in Toshiba Medical Systems and options for voting shares that were held by an interim buyer. Although Canon only exercised these options after clearance was obtained, the Commission considers that the combination of Canon's ownership of 100 percent of the target's non-voting shares and options to acquire the voting shares allowed Canon to effectively acquire Toshiba Medical Systems before the transaction was even notified. This transaction also triggered gun jumping cases in other jurisdictions, including China and Japan.

The Commission's case against Canon differs from the Chinese and Japanese investigations, because Canon may have relied on a specific EUMR exemption that excludes certain acquisitions by banks or other financial institutions from the definition of a notifiable concentration if the acquirer does not exercise voting rights in the target and resells the shares within one year.[9] While the use of such transactions to "warehouse" a target pending clearance of an acquisition by an ultimate purchaser has raised questions in the past, the Commission has never directly challenged the legality of such structures. Although the Commission has not yet published details of its analysis, the Canon

7 Bertelsmann/Kirch/Premiere (1999/153/EC), May 27, 1998 [1999] O.J. L53/1; [1999] 4 C.M.L.R. 700. See Commission press releases IP/97/953, IP/97/1062 and IP/97/1119.

8 See, http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=630&id_article=2900&lang=en.

9 Article 5(a) EUMR. See, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN.

case should clarify the Commission's treatment of so-called "warehousing" transactions and the circumstances in which the ultimate buyer's pre-payment of all or almost all of the ultimate purchase price, transferring economic risk associated with management of the target, may amount to implementation of a concentration.

Conclusions and practical suggestions

The contrast between the aggressive US prosecution of gun jumping violations and the Commission's apparent lack of interest has been striking, since the legal principles underlying gun jumping cases are similar in the European Union and the United States and in other areas the Commission has been as or more aggressive in finding and fining antitrust infringers. Whatever the reason for the disparity up to now, the Commission seems to have drawn a line in the sand, indicating that it intends to pursue gun jumping cases aggressively going forward.

The Commission's decisions in the Altice and Canon cases will provide clarity in four important areas: the circumstances in which pre-closing exchanges of information and pre-closing integration planning may violate EU law; which legal regime will apply in gun jumping cases (the EUMR alone, or the EUMR and Article 101(1) TFEU); the conditions on which an acquiror's assumption of economic risk without voting control can amount to a premature implementation of a notifiable acquisition; and how the Commission intends to calculate fines in such cases.

Pending the final outcome of these cases, transaction parties should take note of the Commission's newly aggressive focus on gun jumping and take care to avoid potential violations of EU law, particularly in relation to unprotected exchanges of information; premature integration of the parties' businesses; transfer of management control; co-ordination of competitive behavior; and transfer of an excessive amount of the business risk associated with the target's business. More specifically

Confidential information

The parties should not share competitively sensitive information beyond what is required for legitimate purposes such as negotiation, due diligence and integration planning. They should share such information only in accordance with a confidentiality agreement limiting the use of the information to consideration of the transaction and its disclosure to persons who need access and consider where special procedures, for instance limiting exchanges to members of a "clean team" not involved in either party's day-to-day business operations, may be appropriate.

Premature integration

The parties should avoid any changes in the target's business conduct prior to closing, including transfers of personnel or the target's employees holding themselves out as representatives of the buyer and vice versa. The parties should also be careful to avoid giving the appearance of acting as a single company, for instance by changing their business cards or letterhead, the target using the buyer's name when answering to customer phone calls, and the like.

Management control of the target

Before closing, the buyer must not exercise or be in a position to exercise management control over the target's business, for example through "ordinary course" covenants limiting the seller's freedom to manage the target's business during the pre-closing period. While customary limits to unusual operations or material changes to the target's business are acceptable, subjecting the target's routine management decisions to approval by the buyer, or giving the buyer an influence over the target company's conduct, may constitute a gun jumping violation.

Co-ordination of competitive behavior

Before closing, the parties should not under any circumstances co-ordinate their competitive behavior, for instance by co-ordinating their marketing strategies, agreeing on prices or allocating products, territories or customers. Examples of such conduct would include the parties' ceasing to compete against one another for particular contracts or allocating customers, the seller granting the buyer unlimited access to the target's premises and accounting and administrative records, or forming joint committees to monitor the target's business. Similarly, the parties should not conduct joint sales activities or enter into negotiations or commitments on behalf of the other party prior to closing.

Transfer of economic risk

Special care should be exercised in multi-step transactions where the parties believe that certain initial steps are not subject to notification and approval under the EUMR. In particular, in any warehousing transaction relying on Article 5(a) EUMR, it would be prudent to ensure that any transfer or allocation of economic risks does not remove the target's incentive to compete or damage the integrity of the target's business.

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What's new in innovation?

In March 2017, the European Commission (Commission) cleared the US$130 billion merger of Dow and DuPont after receiving substantial commitments from the agrochemical companies.

The Commission had two concerns relating to pesticides markets.

The first was that the merged entity would have a very high market share in a number of markets, with few other competitors remaining.

The second, given separate billing in the Commission press releases, was that innovation in pesticides would be significantly reduced, as the parties' incentives to develop and bring new pesticides to market would be removed.

The emphasis given to this second concern is somewhat novel, and has led to significant criticism of the Commission's approach. To what extent should an authority concern itself with the possible competitive harm arising where two major innovators merge?

Past practice

The Commission's Horizontal Merger Guidelines explain that a merger between an incumbent and a potential competitor can give rise to anti-competitive effects where the "potential competitor significantly constrains the behavior of the firms active in the market." The Guidelines also list "the effect on innovation" as a factor which must be considered in merger control, noting that effective competition may be "significantly impeded by a merger between two important innovators, for instance between two companies with 'pipeline' products related to a specific product market". This is not the first time the Commission has referred to innovation in a merger decision, with (for example) *GE/Alstom*, *Bayer/Aventis* and *Glaxo Wellcome/Smith Kline* all highlighting the potential negative effects of the mergers on innovation in the affected markets. However, this is the first time that the Commission has peered so deeply into the innovation pipeline. In the cases above, and other cases where the Commission has reviewed anti-competitive effects on innovation in any depth, its analysis has generally been limited to the existing product markets affected and the effects of the merger on innovation within or relating to those defined markets.

In the pharmaceutical industry, where R&D is a key competitive dynamic, the Commission has also commonly reviewed pipeline products where they have reached "Phase III" (the most advanced stage of clinical trials/research pre-marketing/commercialisation) and where the product is likely to compete with either an existing product of the other party or comparable pipeline products. This approach, in line with the Guidelines discussed above, recognizes the "lack of precise indications as to the chances of bringing successful products to the markets" makes a proper assessment of merger effects on general R&D "far more difficult" (*Pasteur-Merieux/Merck*). The rationale for this approach is clear. These pipeline products operate as a similar competitive constraint to existing products, and the merger would allow the parties to internalize that constraint, and either scrap one of the pipeline products or raise prices across both.

Developments

In more recent decisions, the Commission has dug deeper, going beyond more late stage pipeline products to analyzing products at much earlier stages of development. For example, in GSK/Novartis the Commission considered products in Phase I and Phase II trials despite the parties suggesting that these earlier stage trials "do not provide a reliable indicator of likely future market situations" given the uncertainty of their success. In response to this, the Commission pointed out that "a concentration may not only affect competition in existing markets, *but also competition in innovation* and new product markets" and that "the effects of a concentration on competition in innovation in this type of situation may not be sufficiently assessed by restricting the assessment to actual or potential competition in existing product markets".

Similar concerns of a "lessening of innovation competition" were made in *Pfizer/Hospira*. However, in both of these cases, the Commission's eye was still firmly on relatively specific markets, with innovation discussed in relation to infliximab and biosimilars in *Pfizer/Hospira* and MEK and B-Raf inhibitors in *GSK/Novartis*.

Prior to *Dow/DuPont* the Commission had started looking more generally at affected R&D markets. In GE/Alstom (2015), the Commission raised concerns about innovation in relation to heavy duty gas turbines. These concerns were not in relation to specific pipeline developments, but concerned the parties' relative market positions. Among other things, Alstom's R&D spend and headcount showed it was a strong innovative force. The Commission required divestment to allow the acquirer, Ansaldo, to "replicate Alstom as an important innovator".

In *Dow/DuPont* itself, the Commission found that the merged entity would have lower incentives and a lower ability to innovate than Dow and DuPont separately, and that the deal would remove incentives to develop new pesticides to bring to market. The concerns arose not in relation to particular pipeline products, but as regards the general overlap of the parties' R&D activities in respect of pesticides, where the companies were two of just five globally integrated R&D players. To remedy its concerns, the Commission required the divestment of much of DuPont's global pesticide R&D organization.

Issues

So to what extent should authorities concern themselves with the possible competitive harm arising where two major innovators merge? The jury remains out.

On the one hand, the economic literature on the effects of mergers on innovation is not clear. It may seem intuitive that the fewer market participants there are, the less any one company feels competitive pressure to innovate. This thinking is supported by some within the Commission with the Commission's Chief Economist Tommaso Valletti having co-authored a paper published in June 2017 which concluded "A merger tends to reduce overall innovation. Consumers are always worse off after a merger [with regards to innovation]". However, the counter argument is that innovation only reaps rewards when the innovator stands a reasonable prospect of recouping its investment – i.e. where there are fewer innovators, innovation may be more likely to reap rewards.

On the other hand, increased concentration in the markets subject to assessment may mean that deeper scrutiny is justified to some degree. In *GE/Alstom*, for example, only Siemens would have been a viable competitor. However, there must come a point at which delving into the pipeline becomes too speculative to be justifiable. There is also a risk that we will see an increasing burden on merging parties to provide documents and information to deal with the Commission's concerns. Firms and their advisers may have to factor the administrative workload into pre-notification periods, as well as the substantive assessment of any deal.

What is notable is the divergence of approach between competition agencies. In Dow/DuPont the US Department of Justice did not consider issues in innovation merited the remedy identified by the European Commission. These differing approaches, as well as the Commission's emphasis on the innovation concern, serve to confirm that the innovation concern was not simply a tag-along to the competition issues in the existing product market.

Given the influence that the European Commission has among authorities in emerging markets worldwide, it is important that the Commission establishes a robust analytical framework which explains what evidence it will take into account when assessing the effects of a deal on innovation.

What's next?

For firms, and advisers, the decision in *Dow/DuPont* will, when published, should shed some light on some of these issues. At the moment, those involved closely in the deal are maintaining their respective party lines. The upcoming decisions in the same sector (*Bayer/Monsanto*, and *ChemChina/Syngenta*) will also help demonstrate the Commission's direction of travel. We expect other competition authorities to be watching closely. For now, firms in industries with intensive R&D programmes ought to be aware of a potentially stricter yet more unpredictable merger control regime in the EU – and the potential for this to influence the approach of other competition authorities globally.

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Facing the facts: providing accurate information to authorities during mergers

There has been a flurry of recent activity by the European Commission (the Commission) in efforts to enforce procedural compliance in EU merger control reviews. In this edition, we have already commented on the risks parties face if they fail to observe the requirement to suspend transactions pending clearance, known as “gun jumping”. In this article, we discuss the importance of ensuring that parties provide accurate information when notifying deals and make sure they do not mislead the Commission.

Fines on Facebook

The Commission recently fined Facebook €110 million for providing misleading information during its assessment of *Facebook/WhatsApp*, a deal valued at US$19 billion. When it notified the deal in 2014, Facebook reportedly informed the Commission that it would not be able to create reliable, automatic matching between Facebook users’ accounts and WhatsApp users’ accounts. This gave the impression that user accounts would not be integrated and the two services would effectively operate independently from one another.

Two years later, WhatsApp made a public announcement updating its terms of service and privacy in which it stated that it had begun sharing information with its parent company, Facebook. This statement led the Commission to send a Statement of Objections to Facebook in December 2016 alleging that the company had provided incorrect information to the Commission both in its original notification of the transaction and in response to a follow-up request for information. The Commission considered that it had been misled by Facebook as to whether or not it was technically possible to match Facebook users’ IDs with WhatsApp users’ IDs given the information it had received.

The rules concerning the provision of information can be found in Article 14(1) of the EU Merger Regulation. This provides for the Commission to be able to impose fines of up to 1 per cent of the aggregated turnover of a company which “intentionally or negligently provides incorrect or misleading information during an investigation or acquisition”. In determining the amount of any fine, the Commission can take into account the gravity and duration of the infringement and any aggravating circumstances.

Facebook accepted that it had breached the rules leading the Commission to consider an appropriate level for the fine. In setting out its analysis, the Commission accepted that even if Facebook had explained that it was technically possible to match user accounts, it would not have reached a different outcome in clearing the deal. Nonetheless, given the nature of the offence, the Commission saw fit to impose a significant fine.

Is the Facebook fine a one-off?

Prior to Facebook/WhatsApp the Commission had not imposed a penalty on a company for providing incorrect or misleading information in respect of a transaction in over ten years. The level of penalty imposed was far smaller in the past. For example, in 2004, Tetra Laval was fined €90,000 due to “gross negligence” in its submissions. Prior to that, in 2002, Deutsche BP was fined €35,000 due to negligent infringement of “considerable gravity with the only attenuating circumstance being that Deutsche BP did not dispute the facts”. In a third case, in 2000, Mitsubishi was fined €50,000 for failure to provide EC with requested information during an investigation in addition to a €900,000 delayed cause penalty.

But the Facebook penalty is by no means an isolated incident. Indeed, the Commission has recently issued Statements of Objection in respect of similar behaviors by GE, and separately by Merck-Sigma-Aldrich. These cases appear to indicate a trend of the Commission being more closely aware of when misleading or incorrect information has been provided – and not being afraid to investigate and to impose punitive sanctions after the event.

The trends at Commission level have already been observed elsewhere. In 2015, the German Federal Cartel Office sought to require Savencia to divest Sobbeke, a business it had acquired in 2011, on the basis that it had provided inaccurate market share information. Forced divestiture was avoided only by Savencia voluntarily selling its shares in another entity it had acquired previously (Andechser Molkerei), with the FCO also imposing a penalty of €90,000.

Other competition agencies also have systems in place to penalise parties which provide incorrect information. For example, the Canadian Competition Bureau may deem the original merger notification incomplete and restart the statutory waiting period upon receipt of the corrected notification, resulting in significant delays if the error is discovered late in the 30-day period. This contrasts with the position in the United Kingdom, where it is a criminal offence to "knowingly or recklessly supply false or misleading information" to the Competition and Markets Authority (the CMA) in connection with merger submissions.

Conclusion

Signals from the Commission suggest that any information parties provide will be carefully scrutinized. To protect against the threat of fines, companies must think carefully about the information they provide and be sensitive to the possibility that the information could be interpreted in different ways. This is not only important so as to avoid fines but also as a means to protecting the companies' reputation which might be tarnished in future dealings with competition agencies.

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Updates on the Australian merger control regime

Reforms are on the horizon for the Australian merger control regime.

Under the current regime, the Australian Competition and Consumer Commission (ACCC) does not have the power to authorise anticompetitive mergers where public benefits outweigh the competitive detriment (the "public benefit" test). That power currently rests with the Australian Competition Tribunal (Tribunal), a division within the Australian Federal Court (Federal Court).

At the time of publication, the Australian Parliament is still in the process of enacting laws that would enable the ACCC to authorise anticompetitive mergers that satisfy the public benefit test, and to scrap the ACCC's formal merger clearance process. The Tribunal will become an appeals body.

While the reforms are making their way through Parliament, the ACCC has recently succeeded in judicial review proceedings against the Tribunal in relation to its application of the public benefit test in authorizing the merger between Tabcorp Holdings Ltd (Tabcorp) and Tatts Group Ltd (Tatts), to form a A$11.3 billion wagering juggernaut. The Federal Court has referred the Tabcorp-Tatts merger back to the Tribunal for reconsideration.

In this article, we look at

- The proposed changes to the merger control regime.
- The Tabcorp-Tatts merger case.

The Australian merger control regime

The current regime

The current regime provides different tests for permitting mergers depending on whether clearance is sought from the ACCC or the Tribunal. Merger parties can currently seek merger clearance in the following ways

- ACCC informal clearance
- ACCC formal clearance, and
- Tribunal authorisation.

Almost all merger filings in Australia are assessed under the informal clearance process, which, as the name suggests, is not prescribed in legislation. Under the ACCC informal clearance process, the ACCC considers whether it would oppose the merger by considering the likely anticompetitive effects of the merger (i.e. a "competition" test). The ACCC can assess mergers on a confidential basis.

Both the ACCC formal clearance and Tribunal authorisation process are formal (and public) processes with prescribed timeframes set in legislation. Since its conception in 2008, the formal merger clearance process has never been used in Australia; while the Tribunal authorisation process has been used only a handful of times.

Currently, the ACCC assess merger filings under the competition test under both the informal and formal process. Under the authorisation process, the Tribunal assess merger filings under the public benefit test. The differences between the competition and public benefit tests are summarized below.

ACCC – Competition test	Tribunal – Public benefits test
• The ACCC may clear an acquisition if it would not have the effect or likely effect of substantially lessening competition (s50 of the Competition and Consumer Act 2010). • The ACCC must consider "merger factors" e.g. level of import, barriers to entry, countervailing market power, availability of substitutes, etc.	• The Tribunal may authorise an acquisition if it would result, or be likely to result, in such a benefit to the public that it should be allowed (s95AT and s95AZH(1) of the Competition and Consumer Act 2010). • The Tribunal must treat the following as benefits to the public: (1) significant increase in real value of exports; and (2) significant substitution of domestic products for imported goods.

The newly proposed merger regime

The Australian Parliament is considering a legislative bill to reform the current merger regime. The bill is expected to become law in late 2017.

Key features of the proposed regime are

- The ACCC will be able to authorise mergers under the public benefits test as well as clearing mergers under the competition test.
- The Tribunal will become an appeals body and can review ACCC decisions in relation to merger authorizations only.
- The formal merger clearance process will be repealed.

Tabcorp-Tatts authorisation

Background

Tatts and Tabcorp are two of the biggest publically listed companies in the Australian wagering and gambling entertainment space. Tatts is a supplier of lotteries, wagering and gaming products and services. Tabcorp's business also incorporates wagering (including the retail network of TAB outlets and Sky Racing) and gaming services. The wagering and gambling related businesses of both Tatts and Tabcorp are heavily regulated by both the Federal Government and state and territory governments. The gambling divisions of Tabcorp and Tatts Group Limited overlap in respect of electronic gambling machines and ancillary services in Queensland.

Initially, the merger parties followed the well-trodden informal merger process and sought approval from the ACCC. However, rather than waiting for the review process to be completed, Tabcorp withdrew its application for informal clearance and lodging an application for authorisation with the Tribunal shortly after the ACCC had published its Statement of Issues identifying various competition concerns.

The Tribunal authorised the merger subject to the condition that Tabcorp divest its gaming business in Queensland i.e. the area where the merging parties' businesses overlapped.

This approach of switching tracks mid-way through the informal merger clearance process was unprecedented and unexpected given the ACCC had not expressed any insurmountable concerns. The ACCC's preliminary view, as published in its Statement of Issues, was that the proposed merger might substantially lessen competition as it would combine two of the biggest operators in the wagering and gaming industry in Australia. In particular, the ACCC was concerned that the increased market power would

- Adversely affect the terms on which pooling arrangements are offered.
- Increase barriers to entry and deter potential bidders in future wagering licence processes.
- Enable the merged entity to restrict the level of rebates offered by a guest totalisator to premium wagering customers.

The Tribunal found that the merger would not substantially lessen competition and that it would generate substantial public benefits through efficiency savings and gains for the merger parties, part of which would be shared with the racing industry. The Tribunal considered the possible detrimental effects of the merger – which the ACCC and other stakeholders argued included reduced competition, increased problem gambling and reduced employment – were either unlikely to arise or didn't outweigh the public benefits of the merger. The Tribunal also noted that the wagering market was competitive and that there was strong substitution between the different wagering channels and products.

During the Tribunal process, it became clear that the Tribunal and the ACCC disagreed on how to value the "public benefit" of a merger; the Tribunal had higher regards to economic and commercial benefits that only flowed to the merger parties (such as cost savings and business efficiencies), while the ACCC considered that those benefits should be given less weight and more emphasis should be placed on public benefits that flow through to consumers and the public at large.

Judicial review by the Federal Court

Following the Tribunal's decision to authorise the Tabcorp-Tatts merger, the ACCC commenced judicial review proceedings in the Federal Court relating to the Tribunal's application of the statutory test and the considerations taken into account. Specifically, the ACCC argued that the Tribunal was wrong on three grounds.

First, the ACCC criticized the Tribunal for stating it could only conclude the merger would be detrimental if there was a "substantial lessening", rather than just a "lessening", of competition. The ACCC succeeded on this ground, with the Federal Court ordering that the decision be set aside and the matter be referred back to the Tribunal for consideration. In reaching this decision the Federal Court confirmed that under the public benefit test, any detriments will need to be balanced against the public benefits and there does not need to be a substantially lessening of competition for there to be detriment.

Second, the ACCC alleged that the Tribunal had failed to compare the future state of competition with and without the merger when it was considering any potential competitive detriment. The Federal Court, however, found in the Tribunal's favour on this ground.

Finally, the ACCC argued that the Tribunal had placed too much weight on the benefits retained by the merger parties, such as cost savings and revenue synergies, and not those benefits which would be shared with consumers more broadly. The Federal Court rejected the ACCC's arguments, finding that the public benefit test (as expressed under the current text in s95AZH(1) of the Competition and Consumer Act 2010) is broad and does not necessarily require a weighting of different public benefits that may benefit one segment of the public (e.g. shareholders) over another (e.g. consumers). The Federal Court did not, however, go as far as to say definitively how much weight should be given to those benefits that only enrich a segment of the public.

Conclusion

This decision is relevant for the ACCC and merger parties as it sets out the limits and the correct application of the public benefit test in Australia, particularly if the ACCC is given the power to authorise mergers under the reforms.

The judicial review challenge by the ACCC sheds light on the way the ACCC may approach the public benefit test. Importantly, the Federal Court's decision does not prevent the ACCC from giving a lower weight to benefits that are retained by merger parties, if it were minded to do so in the future – assuming it is granted the power to authorise mergers.

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Foreign investment screening: the other merger review

As the other articles in this issue make clear, there are a myriad of antitrust issues that merging parties must consider when planning their transactions and evaluating the potential regulatory risks. In cross-border transactions, another important consideration is securing clearance under foreign investment screening laws. In many countries, significant foreign acquisitions of domestic companies require government approval under foreign investment laws, which are generally intended to ensure foreign acquisitions are in the national or public interest or are of net benefit to the country concerned. In addition, foreign investment rules may screen investments for national security purposes.

Foreign investment reviews have made headlines recently in a number of jurisdictions

- On September 21, 2017, the landmark trade deal between Canada and the European Union, the Comprehensive Economic and Trade Agreement (CETA), came into provisional effect after almost a decade of negotiations. As a result, the review threshold under the Investment Canada Act has been amended to provide that investors from the EU that are not state-owned enterprises will benefit from an increased investment review threshold of C$1.5 billion in enterprise value. As a result of most-favoured nations clauses in Canada's other free trade agreements, investors from Chile, Colombia, Honduras, Mexico, Panama, Peru, South Korea, and the United States will also benefit from this increased review threshold. Additional details are available here.
- On September 13, the European Commission (Commission) proposed a regulation creating a new framework for screening foreign direct investments into the European Union. The proposal would address the potential for divergence among existing Member State screening mechanisms and create a new oversight role for the Commission itself. The framework could affect acquisitions in a broad range of industries, including communications, data storage, energy and transport infrastructure, artificial intelligence and robotics. Additional details are available here.
- Also on September 13, 2017, Donald Trump, President of the United States of America, issued an Executive Order blocking the proposed acquisition of an Oregon-based semiconductor firm by an investment fund whose ultimate parent is a Chinese state-owned entity. The Committee on Foreign Investment in the United States (CFIUS) had proposed that the transaction be blocked due to national security concerns. Although President Trump's action is only the fourth time in the last 27 years that a president has blocked a transaction, the last time similar steps were taken was only in December 2016, when President Obama blocked a proposed Chinese acquisition of a semiconductor firm. Additional details are available here.
- On July 1, 2017, a suite of changes came into effect to streamline Australia's foreign investment (FIRB) regime. The new changes to the FIRB regulations are mostly incremental, but will nevertheless assist foreign investors investing in residential land, commercial real estate in central business district areas, student accommodation, aged care and retirement villages, and wind or solar farms. The streamlined fee structure, which is now calculated on consideration payable by the foreign investor, should also reduce the application fee for some of the small to medium-sized investments. Additional details are available here.

Although only a very small proportion of all foreign investments are blocked or otherwise approved subject to terms and conditions or other mitigation measures, it is crucial that due consideration be paid to the potential regulatory risk posed by foreign investment review laws. The reviews can be lengthy and therefore affect overall deal timing, and as such it is important that counsel coordinate to the extent possible with their antitrust colleagues.

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- Energy
- Infrastructure, mining and commodities
- Transport
- Technology and innovation
- Life sciences and healthcare

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- Athens
- Brussels
- Frankfurt
- Hamburg
- Istanbul
- London
- Luxembourg
- Milan
- Monaco
- Moscow
- Munich
- Paris
- Piraeus
- Warsaw

United States
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- Dallas
- Denver
- Houston
- Los Angeles
- Minneapolis
- New York
- St Louis
- San Antonio
- San Francisco
- Washington DC

Canada
- Calgary
- Montréal
- Ottawa
- Québec
- Toronto
- Vancouver

Latin America
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- Caracas
- Mexico City
- Rio de Janeiro
- São Paulo

Asia
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- Beijing
- Hong Kong
- Jakarta[1]
- Port Moresby
- Shanghai
- Singapore
- Tokyo

Australia
- Brisbane
- Melbourne
- Perth
- Sydney

Africa
- Bujumbura[3]
- Cape Town
- Casablanca
- Dar es Salaam
- Durban
- Harare[3]
- Johannesburg
- Kampala[3]
- Nairobi[3]

Middle East
- Abu Dhabi
- Bahrain
- Dubai
- Riyadh[2]

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