ALLEN & OVERY

Global trends in merger control enforcement

February 2019

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In 2018, against a background of political uncertainty we saw the M&A cycle reach its peak. Antitrust authorities maintained their appetite to intervene. More than 29 transactions with a value of over EUR46.3 billion were prohibited or abandoned due to antitrust concerns. At least 139 deals were subject to remedies. And fines for breaches of procedural rules continued to break records. Despite M&A volumes falling as we head into 2019, antitrust (as well as other regulatory) risk remains high on the agenda for dealmakers.

Scope of the report

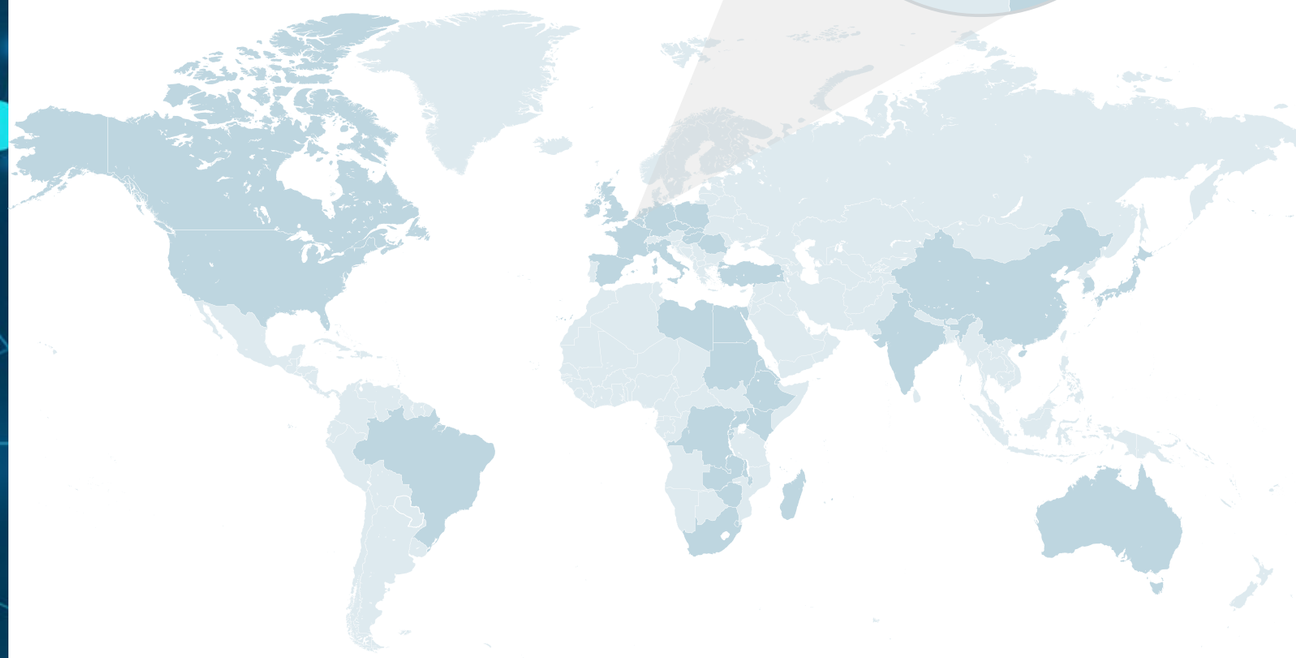
We have collected and analysed data on merger control activity for 2018 from 26 jurisdictions, focusing in particular on the U.S., EU and China.

JURISDICTIONS SURVEYED

U.S.
Brazil
China
India
South Africa
Australia
Canada
COMESA
Japan
Singapore
South Korea
Turkey

EU

1. Belgium
2. Czech Republic
3. France
4. Germany
5. Hungary
6. Ireland
7. Italy
8. Netherlands
9. Poland
10. Romania
11. Slovakia
12. Spain
13. UK



Introduction

In 2018 we saw a record number of merger notifications as global M&A activity soared during the first half of the year. And intervention by antitrust authorities overall remained high. Although we continue to see strong activity, from mid-2018 M&A volumes fell,[1] with a landscape of political turmoil teamed with uncertainties around obtaining antitrust and other regulatory approvals creating challenges which must be addressed on strategic, transformative deals.

Alongside this, 2018 yielded more academic evidence linking a rise in concentration levels in certain industries with inequality and market power. Antitrust authorities continued to face questions as to whether under-enforcement, particularly in merger control, is a contributing factor. A related debate concerned whether common ownership (ie investors having shareholdings in a number of players in the same industry) is leading to less vigorous competition and, if so, how antitrust authorities should deal with it.

With research into each of these areas on-going, and antitrust authorities themselves committing to consider the issues closely, we expect to see these debates continue to be a key focus in policy arenas throughout 2019.

Geo-political considerations were also front of mind in 2018. In the EU in particular there were two sets of considerations. On one hand, merger rules were criticised by leading politicians as restricting the emergence of 'European Champions' to compete with other growing entities on the global stage, particularly those based in China. The recent prohibition of Siemens/Alstom by the European Commission attracted the fury of top politicians in France and Germany. On the other hand, we saw many jurisdictions taking steps to strengthen their oversight of inbound foreign investment – well established rules were bolstered, and new regulatory regimes started to emerge, especially in Europe. Further developments are likely in the coming months.

We have witnessed a real focus on digital markets in the past 12 months. Specialist groups were formed in a number of jurisdictions, including the EU and UK, to look at whether the traditional antitrust enforcement toolkit (including the merger control rules) is fit for purpose in a digital age. One particular area of interest was 'killer acquisitions' – where large firms buy up smaller players who have the potential to become rivals – with authorities considering carefully whether these should be better policed and, if so, how.

Last year we also saw changes in administration in several key jurisdictions. In the U.S., four new commissioners were appointed to the Federal Trade Commission (**FTC**) following another round of Trump-led nominations. It is possible that these, combined with previous changes at the Department of Justice (**DOJ**), have contributed to a decrease in enforcement levels. In China, a new antitrust agency (the State Administration for Market Regulation (**SAMR**)) was established, consolidating the merger control as well as antitrust enforcement teams of the three former agencies. So far, we have not witnessed any tangible impact on Chinese merger control policy as a result – it is something to watch in 2019. This year will also mark the final year of Margrethe Vestager's term as Competition Commissioner at the European Commission. It will be interesting to see if she seeks to cement her legacy by making any key policy changes before the end of her term.

Finally, and looking forward, all eyes will be on the UK and the impact of Brexit on M&A markets and antitrust enforcement and policy. Whatever the outcome of the political negotiations, it is likely that merging parties will face uncertainty and increased administrative burden as they engage in M&A in a post-Brexit world.

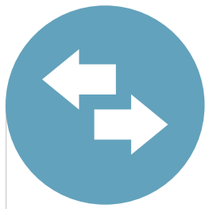
2018 highlights

Are geo-political issues impacting merger control enforcement?

A greater role for political considerations in merger control?

Over 29 deals with a value of at least EUR46.3bn were prohibited or abandoned as a result of antitrust intervention

Fewer remedies cases, but authorities focused on getting the 'right' package



Merger control approvals were a key driver in execution risk allocation

Antitrust intervention targeted Industrial & Manufacturing, Energy and Transport sectors

Authorities focused on the intention of the parties in internal documents

Clearance for the masses: the vast majority of deals obtained unconditional phase 1 clearance

Efforts to streamline review periods yielded (some) results

Strict enforcement of procedural rules continued

[1] Source: Thomson Reuters "Mergers and Acquisitions Review", Full Year 2018, and First Nine Months 2018.

Are geo-political issues impacting merger control enforcement?

We saw the potential impact of geo-political considerations on merger control enforcement in several ways in 2018. In some cases antitrust authorities were criticised for allegedly taking such considerations into account. And in others, particularly in the EU, they were criticised for not doing so. Governments across the globe sought to strengthen their scrutiny of foreign investments, adding to the regulatory challenges faced by merging parties to international transactions.

In July 2018, Qualcomm abandoned its acquisition of NXP. The parties had obtained eight out of nine merger control approvals, agreeing to remedies in both the EU and South Korea to address antitrust concerns. But they were unable to secure clearance in China before the long-stop date set out in the deal documentation. Many argued that the trade war between the U.S. and China played an important part. The Chinese agency denies this, and its position is that the remedies offered by the parties didn't meet its concerns.

In the EU, the European Commission is coming under increasing pressure from the leading politicians in some Member States to apply merger control rules in a way which supports the creation of 'EU champions'. They want such companies to be able to compete on a global stage with growing international firms, particularly those originating from China.[2] The Siemens/Alstom deal was the focal point in this debate throughout 2018 and into 2019. It has generated a political furore the likes of which we have not seen for many years. Politicians in both France and Germany made repeated requests for the Commission to approve the transaction in order to create one of the world's largest rail companies capable of competing with China's state-owned equivalent. However in February 2019 the Commission blocked the deal, sparking intense criticism from many (mainly political) quarters and receiving support from others. We have not witnessed this intensity of political pressure since President Chirac reportedly called Commissioner Monti to support the clearance of Schneider/Legrand, a merger which the Commission then blocked in 2001 (although it was later overturned by the Court of First Instance).

In response to the prohibition, French Minister of Economy and Finance Bruno Le Maire stated that EU antitrust rules should be reformed to allow Member State representatives to intervene in the process, echoing similar remarks made by Manfred Weber, one of the lead candidates to succeed Commission President Juncker in November 2019.

Commissioner Vestager's stance in protecting independent decision-making by the Commission has been firm. She stood by her decision and her reply was that EU merger policy *does* lead to large European companies – she points to AB InBev, as well as noting that both Siemens and Alstom (separately) are "global champions" – but that European champions cannot be built by undermining competition. The current Commission President Jean-Claude Juncker supports this approach.

Overall we saw the regulatory landscape for parties to international transactions get increasingly complex and burdensome. In the past year many governments have taken clear steps to increase their regulatory oversight of foreign investments. Such scrutiny is not new – the U.S., Australia and Canada, for example, have well established foreign investment regimes – but in 2018 we saw several governments (eg the U.S., Australia, Germany and UK) reconsidering their powers and as a result strengthening their existing toolkits. New regimes also emerged, with proposals for an EU-wide framework for screening in the final stages of approval and the UK considering a new far-reaching regime to scrutinise deals which may raise national security issues. And enforcement rose. In the U.S., we saw CFIUS block Broadcom's acquisition of Qualcomm in March 2018. In August the German government issued its first ever order prohibiting a foreign investor from acquiring a German business – Chinese investor Yantai Taihai's purchase of a German mechanical engineering firm.[3]

The result of all of this is that parties to international deals face an increasingly challenging and unpredictable regulatory environment. They must consider carefully the potential impact of geo-political considerations when setting merger control strategy and allocating execution risk, and ensure that they look holistically at regulatory approval requirements, taking into account both antitrust and foreign investment regimes.

[2] On 18 December 2018, for example, ministers from 18 Member States issued a joint statement calling for updated merger rules which better take into account international markets and competition.
[3] To read more about trends and developments in foreign investment scrutiny, see our report: "National interest screening: a growing challenge for international transactions?", available at allenovery.com.

A greater role for political considerations in merger control?

In 2018, the debate continued as to the extent to which political and public interest considerations should play a role in merger control policy and enforcement. We saw an increasing body of research show rising concentration levels in key industries across a number of mature jurisdictions. Some have linked this increased concentration to inequality, market power and a lessening of competition. And many are questioning whether under-enforcement by antitrust authorities, particularly in the field of merger control, is to a greater or lesser extent to blame.

Antitrust authority reactions to this debate have been mixed. While the U.S. agencies have generally been sceptical, other authorities are starting to consider the issue more closely. Commissioner Vestager has said, for example, that the European Commission is looking at whether certain European industries have become more concentrated in the past two decades.[4] It is also, alongside a number of other authorities, considering how to address any potential under-enforcement. Digital and pharmaceutical mergers are the main area of focus, as claims of under-enforcement have been most acute in these sectors. Germany and Austria have already introduced thresholds based on deal value into their merger control rules, to try to capture transactions where the target is a start-up with little or no turnover. A similar change is being considered in the EU and South Korea. France is debating whether to introduce a post-closing review to ensure that potentially problematic deals do not fall through the net. Meanwhile, the Australian Competition and Consumer Commission (**ACCC**) recommended in December that large technology platforms should be forced to notify acquisitions with activities in Australia: a bold suggestion in the context of a voluntary merger regime.

In the past 12 months we have also seen other commentators attribute a lessening of competition in certain industries to high levels of common ownership. The theory goes that even if a market is not concentrated, key industry players may share common (often minority) investors, who may find it more lucrative if their investment companies do not compete vigorously with each other.

Again, the U.S. agencies have been unconvinced by these arguments. But Commissioner Vestager noted that the European Commission is studying whether common shareholdings do exist in the EU and, if so, whether this can have an effect on competition.[5] The European Parliament is reportedly also thinking about commissioning a study. In addition, the Commission has started to consider common ownership as part of its merger analysis, with Dow/DuPont and Bayer/Monsanto being the prime examples. The Commission looked in particular at the effects of common investors in the agrochemical industry on market shares and concentration measures. We expect to see more of this type of analysis going forward.

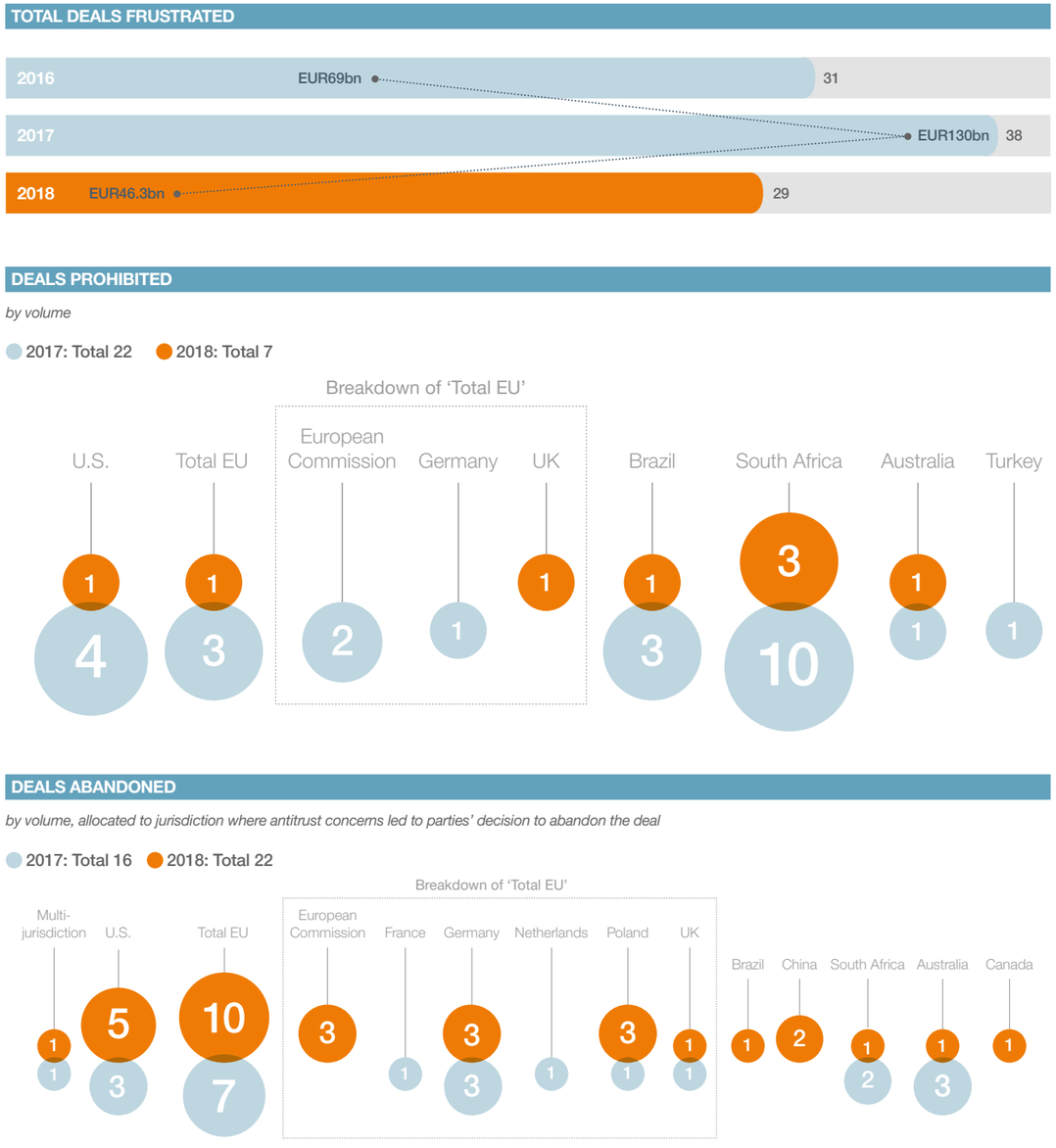
Beyond this, the debate on common ownership also clearly has implications for the acquisition of minority stakes which have previously been considered purely 'passive'. The merger control rules in the UK, Germany and Brazil, for example, already enable the authorities to review a large number of minority shareholdings. At EU level, the European Commission has considered whether to expand its rules to enable it to do the same, but as yet has taken no action. In the U.S., legislation (the Clayton Act) exists but there are calls for it to be interpreted more expansively. And in India proposals are on the table to require notification of acquisitions of more than 5% in sectors where the acquirer already has an investment.

With the debates on these issues showing no signs of abating, we expect to see authorities continue to grapple with the best way to answer their critics. Changes to merger control rules appear likely – watch this space.

"Some have linked ...increased concentration to inequality, market power and a lessening of competition" and "...other commentators attribute a lessening of competition in certain industries to high levels of common ownership."

[4] "Competition in changing times": speech by Margrethe Vestager, 16 February 2018.
[5] See footnote 4.

Over 29 deals with a value of at least EUR46.3bn were prohibited or abandoned as a result of antitrust intervention



In 2018 over 29 deals with a value of least EUR46.3bn were frustrated by antitrust intervention in the jurisdictions surveyed. Seven were formally prohibited by antitrust authorities, and the remaining 22 were abandoned after the merging parties learned of the authorities' antitrust concerns. Compared to total global M&A by value, this represents around 2%.[6]

These figures are lower than the equivalent for 2017, where we saw 38 deals frustrated with a value of over EUR130bn. However, they are much more consistent with levels of prohibited/abandoned deals in 2015 and 2016. After a bumper year of enforcement in 2017, it appears that the landscape may now be beginning to stabilise.

Interestingly, while the number of formal prohibitions fell from 22 to seven in 2018, abandoned transactions rose by 38% to 22. This shift may indicate that, last year, parties were less willing to fight for clearance in the face of antitrust concerns. We also saw timing issues play a part, with parties to deals in Australia, China and the EU pulling out because the merger review was taking longer than anticipated, and long-stop dates were approaching or being met.

Looking more closely at the value of deals frustrated in 2018, the vast majority (89%) of the total was made up of Qualcomm's abandoned attempt to purchase NXP, which we discussed earlier. In fact, only one other frustrated transaction (out of those where deal value was known) exceeded EUR1bn. But this is not to say that antitrust authorities were unwilling to intervene in big ticket M&A in 2018 – many of these large deals were subject to far-reaching remedies.

In the U.S., overall enforcement levels were down despite the total number of transactions remaining stable. Only one deal was formally prohibited in 2018 following the issuance of a preliminary injunction (Wilhemsen Maritime Services/ Drew Marine). Five deals were abandoned at various stages of the review process. In one case, the parties cancelled the transaction due to the time and expense of responding to the FTC's second request.[7] They plan to restructure the deal and re-notify on that basis. A noticeable absence from the data on frustrated deals is AT&T/Time Warner, after the DOJ's landmark challenge was unsuccessful at trial. We discuss this case in more detail later in the report.

Turning to the EU, three deals were abandoned last year. Blackstone/Celanese (which also received objections in South Korea) and Aperam/VDM were withdrawn during the in-depth review period. Norsk Hydro decided to pull out of its acquisition of Rio Tinto's smelter in Iceland much earlier in the process – during phase 1 – following initial feedback from the European Commission. While no deals were blocked in 2018, the Commission has hit the ground running in 2019 with a double prohibition in early February (Siemens/Alstom, as mentioned earlier, and the Wieland/Aurubis copper merger). Next year's report looks set to be very interesting.

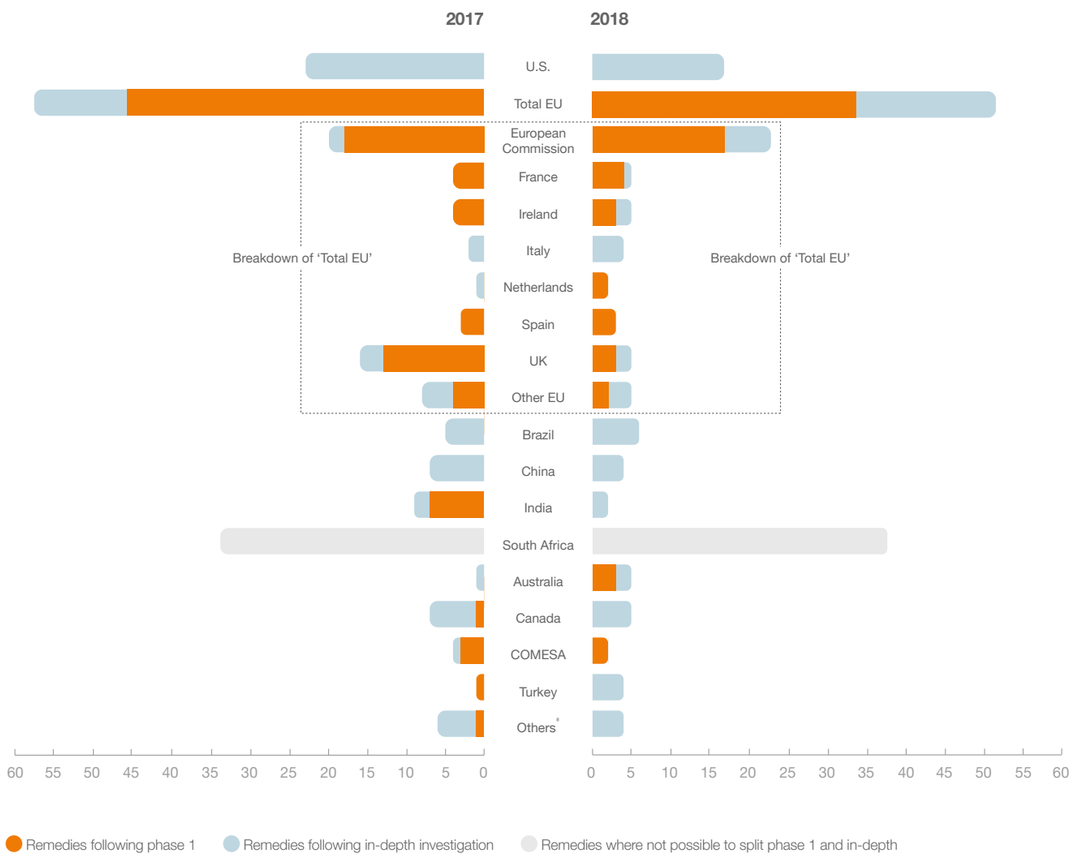
Elsewhere, we saw Brazil's Administrative Council for Economic Defence (**CADE**) block Ultragaz' acquisition of Liquigás. This takes CADE's tally to four prohibitions since its new head took office in June 2017. In South Africa three deals were prohibited, down from ten in 2017, but still showing the authority's willingness to intervene. And in the UK the Competition and Markets Authority (**CMA**) notched up a rare prohibition. It 'called in' Vanilla Group's acquisition of Washstation for review five months after the deal completed, on the back of a complaint. After an in-depth review the CMA concluded that Vanilla should divest the Washstation business, effectively 'unscrambling' the whole deal. The case highlights that even in a voluntary merger regime there are risks in not notifying potentially problematic mergers before completion. Post-Brexit, we can expect to see the UK feature more heavily in this section of the report, as the CMA gains the ability to review complex international transactions in parallel with the European Commission.

[6] "Source: Refinitiv, full year 2018, which reports values of global completed M&A as USD3,560,056m.
[7] Churchill Downs/Lady Luck Casino.

Fewer remedies cases, but authorities focused on getting the 'right' package

CASES RESULTING IN REMEDIES FOLLOWING PHASE 1 AND IN-DEPTH INVESTIGATIONS

by volume



[8] The number of phase 1 conditional clearances for Japan and South Korea is not known.

TOTAL REMEDIES CASES

The level of interference by antitrust authorities in the form of remedies fell slightly in 2018. We saw 139 conditional clearances, down from 155 in 2017, but overall still high. Thirty-nine of these remedies were agreed at phase 1, 62 after an in-depth review, and the remaining 38 related to remedies imposed in South Africa.[9]

In the U.S., the number of remedies cases dropped last year from 23 to 17. This is an interesting development – in previous years we have reported this figure as staying very steady year-on-year. It ties in with an overall trend of decreased enforcement by U.S. antitrust agencies, which in part may be explained by the change to a Republican administration.

We saw a similar drop in China. There were only four remedies cases in 2018, down from a record seven in 2017. It is not, however, out of line when viewed from a long-term perspective. Since the Chinese merger rules came into force ten years ago there have been around 40 remedies cases. As in previous years, all of these decisions related to global, foreign-to-foreign transactions, and the remedies packages were extensive. In fact SAMR was one of only two antitrust authorities to require remedies in Essilor/Luxottica out of the 19 that reviewed the deal.

In the UK, the CMA cleared only three cases with remedies at phase 1, a big drop when compared to 13 in 2017.

Combined with an uptick in referrals to an in-depth investigation, this might suggest a more interventionist approach. We will keep an eye on this in the coming 12 months.

The EU, on the other hand, went against the grain. In 2018, we saw a significant increase in remedies at phase 2 – up threefold to six. In 2017 the European Commission blocked two transactions where the parties were not willing to offer the remedies required to get clearance. Part of the uplift in remedies cases last year could well be due to parties being willing to offer the 'right' concessions. At phase 1, the number of conditional clearances remained steady at 17 (compared to 19 and 18 for 2016/2017). We observed a trend for commitments in several of these cases to appear to go significantly beyond the Commission's areas of concern, perhaps highlighting the lengths parties need to go to in order to wrap up a complex deal in phase 1.[10]

Other notable jurisdictions include Singapore, where following a high-profile investigation the authority imposed remedies on Uber and Grab in relation to their tie-up, at the same time imposing fines on both for entering into an anti-competitive transaction. And in South Africa, as in previous years we saw the largest number of remedies cases for a single jurisdiction, mainly due to the authority's policy of regularly requiring employment-related commitments.

[9] Where data cannot be split between phase 1 and in-depth cases.
[10] See, for example, Knauf/Armstrong and Quaker/Global Houghton.

Despite the overall decrease in conditional clearances, remedies were a key focus of antitrust authorities during 2018. Many have committed to reviewing their practices in order to assess whether they are getting the 'right' result. The CMA, for example, has been carrying out retrospective reviews to check whether remedies have been successful, and in the U.S. the DOJ's work to identify and bring to an end out-dated and perpetual consent decrees intensified during 2018.

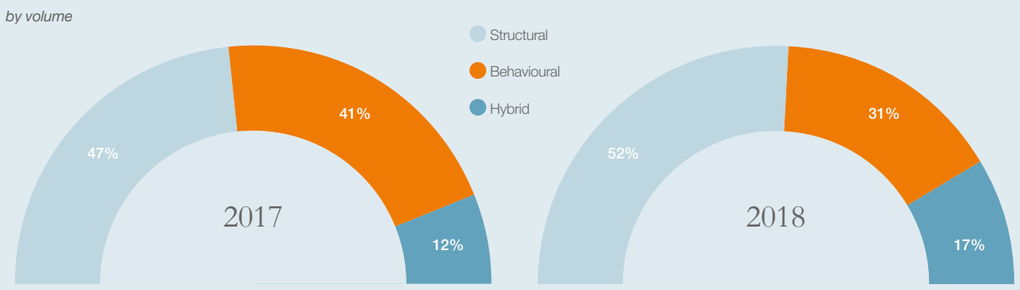
Ensuring that the overall remedies package works across jurisdictions has also been an important theme.

Here, Bayer/Monsanto is a key example. We saw global coordination by authorities with some, such as the ACCC, clearing the deal on the basis of divestments agreed elsewhere. Others (for example in India) relied on the global remedy package supplemented by some jurisdiction-specific concessions. In an EU first, the European Commission altered its remedies after they were announced in order to align them with those offered in the U.S. Overall, the deal yielded the largest ever divestment package – worth over EUR6bn.

Behavioural remedies criticised, but still being used in nearly half of conditional cases

CONDITIONAL CLEARANCES BY TYPE OF REMEDY

by volume



Throughout 2018 we have seen behavioural remedies (ie commitments by parties relating to future conduct) being increasingly characterised as a sign of regulatory failure with authorities pledging to focus instead on structural divestments. However, our data does not support that this is the case in practice, especially outside the EU and U.S. – 48% of all remedies cases in 2018 involved a behavioural element, either on its own or together with divestments (so-called 'hybrid' remedies). While slightly down from 53% in 2017, it still represents a significant proportion.

Last year, behavioural remedies were accepted in 18 of the 26 jurisdictions surveyed. In fact, in China, COMESA, Ireland, Singapore, Spain and Turkey, *all* conditional clearances included behavioural commitments.

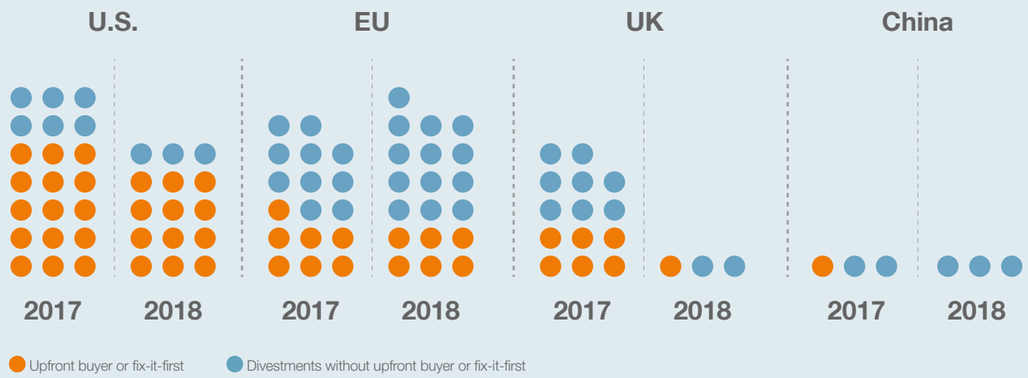
The most common types of behavioural remedy accepted in 2018 were the grant of access, trading on non-discriminatory terms and confidentiality/firewall commitments. In South Africa, many behavioural commitments were aimed at protecting employees against job losses.

It will be interesting to see how this trend develops and whether we do see a significant reduction in the willingness of authorities to accept behavioural remedies. The authorities' increasing focus on the impact of a deal on innovation, and a clear preference (in particular by the European Commission[11]) to fix innovation concerns with divestments, could contribute to a shift back in favour of structural remedies.

[11] See for example, Bayer/Monsanto and Takeda/Shire.

Upfront buyer and fix-it-first remedies becoming less frequently used?

USE OF UPFRONT BUYER AND FIX-IT-FIRST REMEDIES COMPARED TO THE TOTAL NUMBER OF DIVESTMENT REMEDY CASES



These are situations where the merging parties negotiate and conclude agreements giving effect to a divestment before the authority conditionally clears the main transaction (fix-it-first) or after obtaining conditional clearance but before being allowed to complete the main deal (upfront buyer). In previous years we have reported an uptick in the use of upfront buyer and fix-it-first remedies in divestment cases, particularly in the EU, U.S., UK and China. But in 2018 we saw them used less frequently.

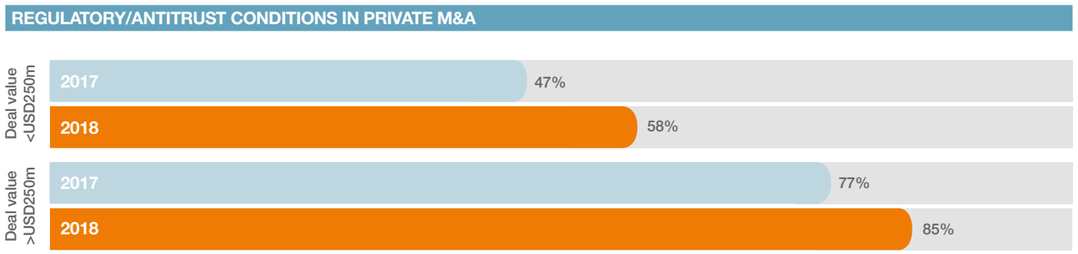
The European Commission accepted them in 32% of divestment cases (6 in 19), down from 35% (7 in 17) in 2017.

In the UK it was 33% (1 in 3), a significant reduction from 42% (6 in 14) the year before. And in China there were no upfront buyer cases in 2018. The U.S. was the exception, with the agencies using them in 80% of cases (12 in 15) in 2018, up 9% from 2017.

We also saw instances of merging parties selling off businesses well in advance of a deal, ie even before the merger control process has started. Shire, for example, offloaded its oncology business ahead of its acquisition by Takeda, which may have helped the parties to secure EU clearance at phase 1.

"Despite the overall decrease in conditional clearances, remedies were a key focus of antitrust authorities ...Many have committed to reviewing their practices in order to assess whether they are getting the 'right' result ...Ensuring that the overall remedies package works across jurisdictions has also been an important theme."

Merger control approvals were a key driver in execution risk allocation



As global M&A activity boomed in 2018, particularly in the first half of the year, we also saw execution risk rising. According to our research on trends in private M&A, 85% of deals with a value >USD250 million were subject to antitrust or other regulatory conditions.[12] This is up 8% from 2017. For lower value (<USD250m) deals, the increase was 11% to 58%.

It is likely that rising intervention by antitrust authorities as well as tighter scrutiny of foreign investments have played a part in this increase. But it may also be a sign that companies have been willing to engage in more strategic (and therefore riskier) deals. We saw a number of these transactions during 2018, involving consolidation in mature markets and requiring antitrust (and foreign investment approvals) across the globe.

Sellers, despite having to accept this increase in conditionality, did however manage to offset the allocation of execution risk by pushing for more financial and behavioural protections.

On the financial side, we saw reverse break fees continuing to become the norm in large cross-border transactions. When Qualcomm terminated its acquisition of NXP, for example, it was required to pay NXP USD2bn in termination fees. Our research shows that in 2018, 13% of conditional private M&A deals included a break fee, with the average fee being around 6% of deal value. In public M&A, we tend to see reverse break fees around 1-3% of deal value where the bidder agrees to take the regulatory risk.

Interestingly, we also saw some sellers ask for 'ticking fees' to be added to the price. These are payments by the buyer in the event that the deal timetable is pushed out after regulatory review periods took longer than expected. Other sellers sought a price increase in return for extending the long-stop date. We examine the length of investigation periods and steps taken by antitrust authorities to try to reduce these in more detail later in the report.

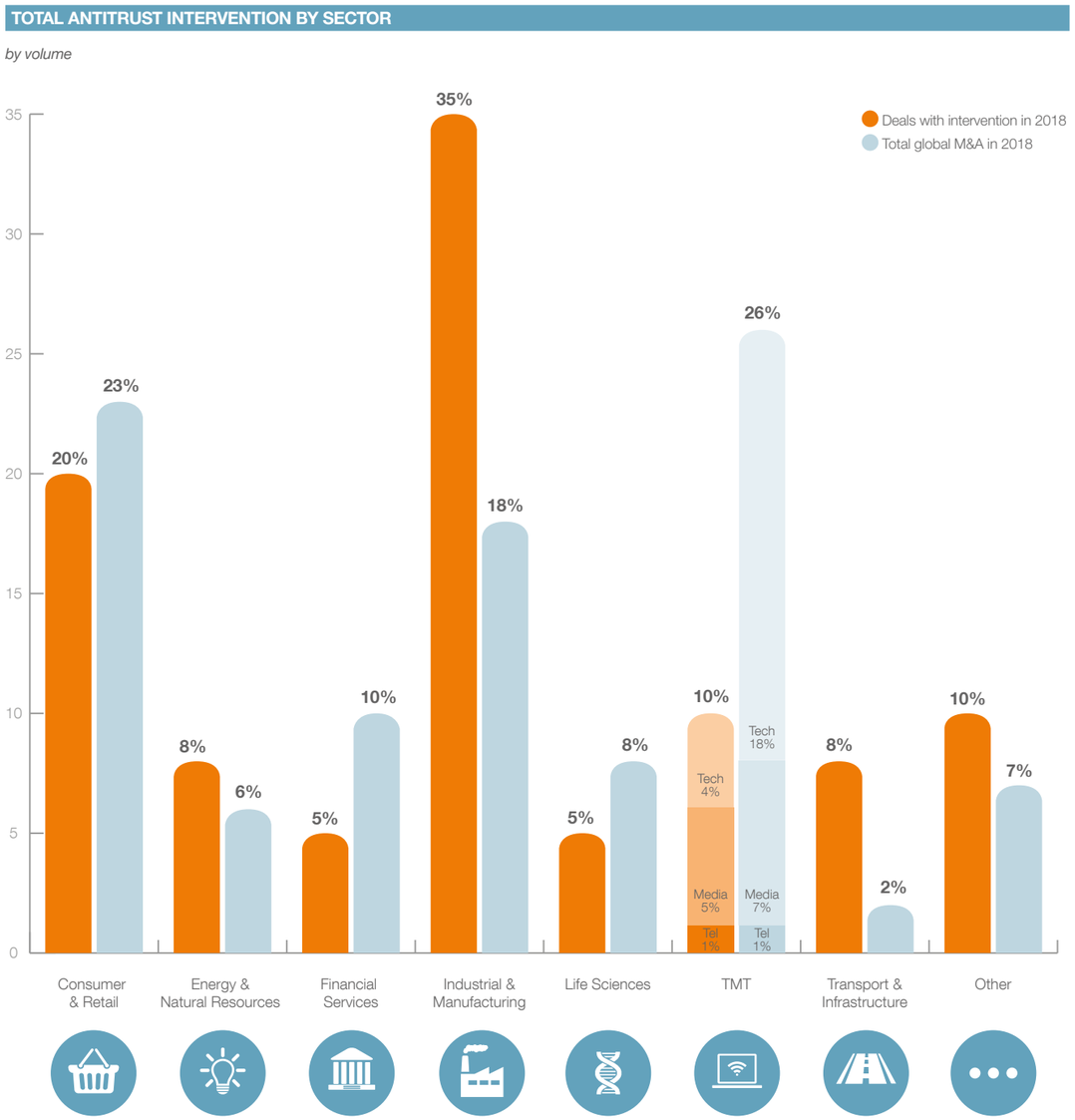
In terms of behavioural protections, 26% of deals that were subject to antitrust/regulatory conditions included a 'hell or high water' commitment for the purchaser to take all actions necessary to get the deal cleared. This was up from 24% in 2017. Private equity sellers continued to insist on these obligations.

And 13% of deals contained conditions requiring parties to agree to divestments to get clearance. These often specified a threshold limit for the divestments. In Linde/Praxair the divestments required to get EU clearance exceeded the limit in the deal documentation. This added an additional layer of complexity, with the companies then needing to reach agreement before being able to proceed. It shows the importance of setting any threshold at an appropriate level.

[12] "Global trends in private M&A", research based on over 1,000 private M&A deals on which A&O has acted. Please contact your usual A&O contact if you would like to learn more about the results.

Deals are increasingly being made subject to antitrust or other regulatory conditions, with the allocation of execution risk a key negotiating issue for dealmakers.

Antitrust intervention targeted industrial & manufacturing, energy and transport sectors



When compared to global M&A for 2018,[13] antitrust intervention focused on three main sectors: Industrial & Manufacturing, Transport & Infrastructure and Energy & Natural Resources. In each of these sectors, the share of intervention by antitrust authorities was greater than their proportion of overall M&A deals would suggest.

Industrial & Manufacturing deals represented 35% of total deals subject to antitrust intervention, while making up only 18% of global M&A volumes. Remedies imposed by antitrust authorities across the globe in relation to both Bayer's acquisition of Monsanto (agrochemicals) and Linde's merger with Praxair (industrial gases) were a key contributor. In fact, in each of the EU and U.S. almost half of remedies cases fell in this sector. Overall, Industrial & Manufacturing mergers made up eight of the 22 transactions abandoned in 2018.

For Transport & Infrastructure the figure was 8% of antitrust intervention in 2018, compared to 2% of global M&A. Two of the seven prohibited deals were in this sector: a rail haulage deal in Australia and an airline deal in South Africa. Plus there were a number of remedies cases across jurisdictions, including the high-profile intervention by the Singapore Competition & Consumer Commission in Uber's acquisition of Grab, which as noted earlier resulted in remedies and financial penalties on both merging parties.

In previous years, antitrust intervention in the Energy & Natural Resources sector was broadly in line with its proportion of overall M&A activity. But in 2018 we saw that change, with Energy deals accounting for 8% of antitrust intervention but only 6% of global M&A. Key cases include the prohibition of Ultragaz/Liquigás in Brazil and Reinplus VanWoerden Bunker/Nord-und Westdeutsche Bunker, an abandoned bunkering deal in Germany. Both remedies cases in COMESA for 2018 were in the Energy sector, as were five of the conditional clearances in South Africa.

Across all sectors, and carrying on a trend from 2017, we saw antitrust authorities look closely at the potential impact of a deal on innovation. The EU continued to set the pace, with innovation concerns identified in, for example, Bayer/Monsanto and Takeda/Shire leading, in each case, to divestments. In China, too, innovation was a key theme in SAMR investigations. We expect to see these authorities, and others, continue to focus their attention on innovation in the coming year.

In focus: the digital/TMT sector

While not yielding a high proportion of antitrust intervention in 2018 (only 10% compared to 26% of global M&A), the digital sector has been a key focal point for antitrust authorities in a number of respects.

First, as mentioned earlier, claims of under-enforcement of merger rules are particularly acute in this area. Debates continued as to whether changes are required to enable antitrust authorities to review the acquisitions of start-ups with limited turnover which would fall below current merger control thresholds. In particular focus were so-called 'killer acquisitions', most notably in the technology (and also pharmaceuticals sectors), where large players buy up smaller companies who have the potential to become rivals. We discuss the steps authorities have taken or are considering earlier in the report.

Second, we followed the trial in what has been heralded as the 'merger control case of the decade': the U.S. DOJ's challenge of AT&T/Time Warner. If successful, it would have taken the overall value of deals frustrated by antitrust from EUR46.3bn to nearly EUR120bn. The DOJ, however, lost its suit. The parties have since closed the deal, but the DOJ is appealing – the outcome of this is one to look out for in 2019.

Third, we saw a new chapter emerge in the story of mobile telecoms mergers. In the EU, T-Mobile NL/Tele2 NL marked the first 4:3 mobile deal to be cleared unconditionally (all others have resulted in intervention). The European Commission emphasised, however, that the decision was based on the particular facts, indicating that it may not be possible to read too much into the Commission's approach. It will be interesting to see the outcome of its review in Vodafone/Liberty Global, which is expected later in 2019, as well as, across the Atlantic, the DOJ's investigation into T-Mobile/Sprint.

Finally, there is an open question over the extent to which mergers resulting in the aggregation of data can adversely affect competition. Authorities are looking into the issue, and cases are starting to be reviewed. In the EU, the European Commission unconditionally cleared Apple's acquisition of Shazam in September 2018, but made clear that it intends in the future to *"carefully review transactions which lead to the acquisition of important sets of data".*

All of this means that we may well see intervention levels increase in the TMT sector in 2019 – we will watch with interest.

[13] Source: Refinitiv, Full Year 2018.

Authorities focused on the intention of the parties in internal documents

Antitrust authorities are increasingly focusing their attention on the internal documents of the parties. This includes studies, reports and presentations (aimed, for example, at the board of directors or shareholders). It may also encompass emails or other electronic messages sent or received by officers or staff. The authorities' aim is to try to glean the strategic intentions of the merging parties and their view of the deal's potential impact on competition, as opposed to the 'curated' view set out in the merger notification. Internal documents could also be an important source of evidence in relation to concerns over mergers designed to remove nascent forms of competition from the market (ie 'killer acquisitions', mentioned earlier).

In recent years the volumes of internal material requested by authorities across the globe has rocketed. Parties are in some cases required to submit tens or even hundreds of thousands of documents during the course of the merger review. This modus operandi is well established in the U.S., but is being applied elsewhere. In its in-depth investigation into Bayer/Monsanto, for example, the European Commission announced that it reviewed 2.7 million internal documents.

Resource constraints mean that it is often neither efficient nor feasible for documents of these volumes to be reviewed by authority staff alone. In the U.S. the agencies have a well-established practice of using e-discovery tools to help filter material and pinpoint the documents which are most relevant to the analysis. We are seeing other authorities starting to tread the same path. In the EU, for example, e-discovery and artificial intelligence is being used selectively, but increasingly, by the European Commission.

"...large internal document requests will complicate, and potentially elongate, both pre-notification discussions ...and the formal review period."

2.7m
internal documents reviewed by European Commission in Bayer/Monsanto

In the past year in particular we have also seen authorities providing more detailed guidance to merging parties on how, when and what internal documents are likely to be requested, and how the parties should go about gathering and submitting them. The UK CMA, for example, has recently published guidelines, which include its approach to search methodology, IT issues such as metadata and the removal of duplicate documents, and the identification of legally privileged materials. The European Commission is expected to imminently publish its own guidelines, after Commissioner Vestager announced in 2018 that it was in the process of crystallising its practice and procedure.[14]

Merging parties, too, must factor in sufficient time and resource to deal with internal document requests by the authorities. We are increasingly seeing companies themselves employing e-discovery tools and AI in order to collect and carry out their own review of the materials to be submitted. Overall, parties must bear in mind the likelihood that large internal document requests will complicate, and potentially elongate, both pre-notification discussions with the authority, and the formal review period.

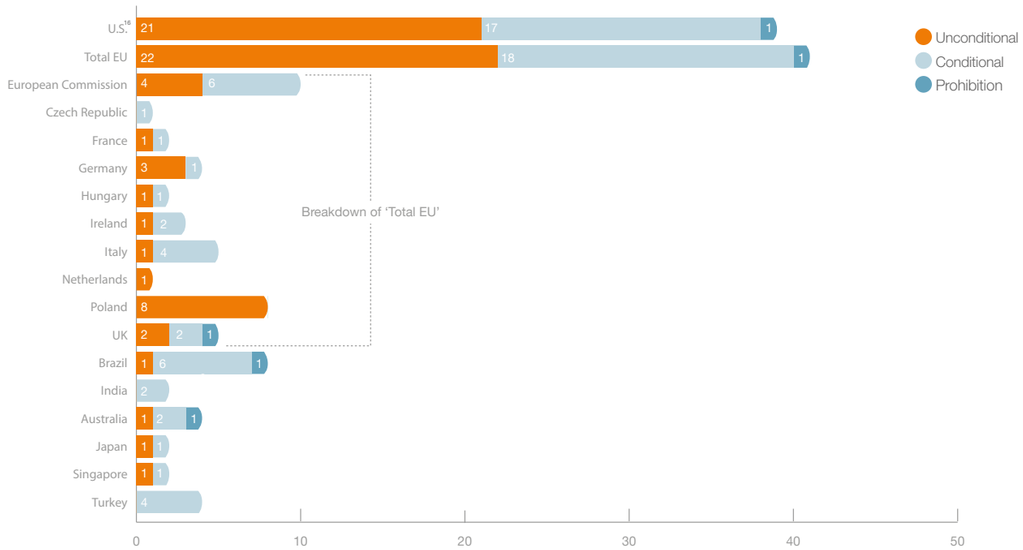
Finally, from a substantive point of view, parties should be aware that the content of their internal documents can have a real impact on the outcome of a case. In Dow/DuPont, for example, the European Commission relied heavily on internal documents to prove that the transaction would reduce the merged entity's incentives to innovate. As a result the parties had to commit to sell off DuPont's entire global R&D business.

[14] "Fairness and competition": speech by Margrethe Vestager, 25 January 2018.

Going forward into 2019 we expect antitrust authorities to continue to refine their practice and procedure in relation to internal documents.

Clearance for the masses: the vast majority of deals obtained unconditional phase 1 clearance

OUTCOMES OF IN-DEPTH INVESTIGATIONS[15]



2018 was a record year for merger notifications as global M&A activity remained high. The vast majority of these deals (96%) were cleared in phase 1, without remedies. In 21 of the jurisdictions surveyed, more than 90% of notified transactions were cleared unconditionally without an in-depth investigation. This is consistent with the landscape for 2015 to 2017.

The UK, as in previous years, is an outlier, with a lower proportion of deals (84%) receiving unconditional phase 1 clearance. This can be explained by the voluntary nature of the UK merger regime, meaning that enforcement is selected and targeted. We saw a similar story in Singapore (80%), which also has a voluntary regime.

Turning to in-depth investigations,[17] 44% of deals were cleared unconditionally in 2018. This is broadly in line with previous years. But as we have reported in earlier editions of this report, the picture varies dramatically from jurisdiction to jurisdiction, as a result of both the number and nature of the cases under review in any particular year.

In the EU, we saw a significant increase in the number of in-depth cases decided in 2018: ten compared to four in 2017. Of these, 40% (four cases) resulted in an unconditional clearance – a much higher proportion than 2016 (13%) and 2017 (0%). Teamed with the lack of prohibitions in 2018, this could suggest that the Commission is taking a less interventionist approach. But in our view this is not necessarily the case. Last year the Commission required remedies in six phase 2 deals (three times the 2017 tally), and three cases were abandoned by the parties as a result of the Commission's antitrust concerns. Plus two deals have already been blocked in 2019. Overall intervention levels remain high.

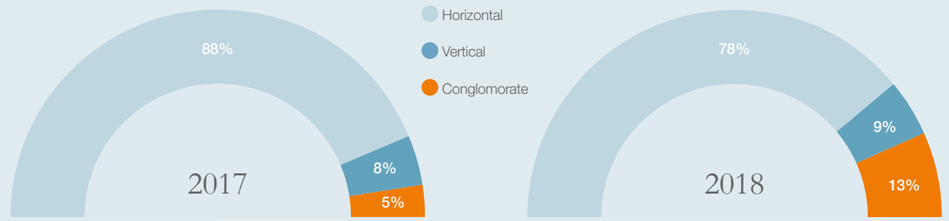
In China the number of filings reached a record high in 2018. 99% of all cases were cleared unconditionally which is in line with previous years. Only four of 448 cases were subject to remedies, and there were no prohibitions. The establishment of the SAMR has not seemingly had any effect on intervention levels. It will be interesting to see if we describe a similar picture in next year's report, after the new authority has had more time to bed down.

[15] Excluding Canada, China and South Korea, where data on number of unconditional in-depth clearances is not available, and South Africa for which no split could be made.
[16] Figure for unconditional in-depth clearances based on best estimates.
[17] See footnote 15.

Rising intervention in non-horizontal mergers

TOTAL ANTITRUST INTERVENTION BY NATURE OF CONCERN

by volume



In 2017, we reported that 12% of deals subject to antitrust intervention raised concerns that were 'non-horizontal', ie vertical (parties active at different levels of the supply chain) or conglomerate (entities in different but related markets). In 2018 we saw this figure increase significantly to 22%.

This increase can in part be attributed to a handful of global transactions, such as Qualcomm/NXP and Bayer/Monsanto, where a number of authorities identified non-horizontal concerns which were ultimately addressed with remedies. But this is not the whole story, and in certain jurisdictions such as Brazil and South Africa we saw an increased appetite for the authorities to intervene in vertical or conglomerate deals.

In the U.S., as mentioned earlier, the DOJ lost its landmark challenge to AT&T's acquisition of Time Warner, a vertical deal.

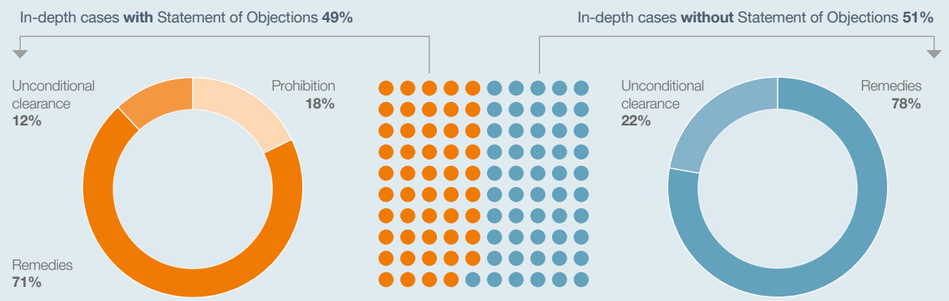
But the agencies did succeed in obtaining consent decrees in three other non-horizontal cases. The DOJ is in the process of drafting updated vertical merger guidelines based on its recent experiences, and we expect that these will be shaped by the result of its appeal of the court's findings in AT&T/Time Warner.

In line with previous years the European Commission only intervened in three non-horizontal cases in 2018. Remedies were agreed at phase 1 in Mars/AniCura and BMW/Daimler (both vertical deals) and at phase 2, granting clearance to Qualcomm/NXP subject to conditions to satisfy conglomerate concerns.

And finally, in China, in every one of the four remedies cases SAMR had non-horizontal concerns, usually sitting alongside more traditional horizontal issues.

Spotlight on the EU: a Statement of Objections nearly always means intervention

IN-DEPTH CASES WITH/WITHOUT STATEMENT OF OBJECTIONS (2014-2018)



During an in-depth review, the European Commission will send a Statement of Objections (**SO**) to the merging parties if its more detailed analysis of the deal confirms the competition concerns it identified at phase 1. Since 2014, the European Commission has issued an SO in 49% of in-depth cases (17 SOs in total).

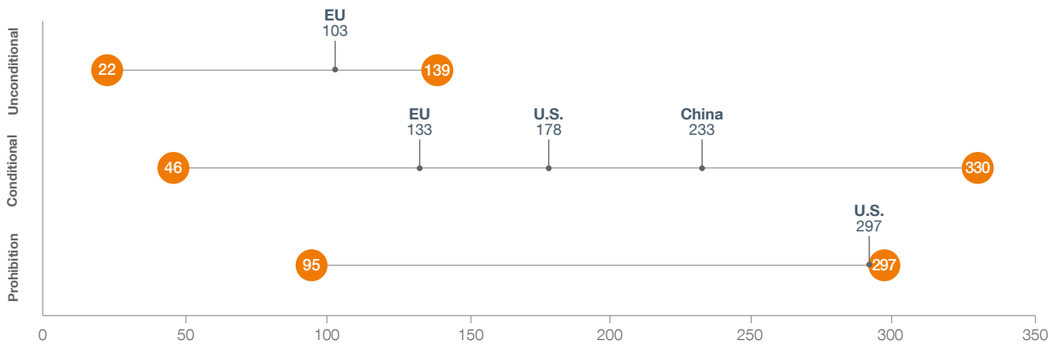
Our analysis shows that the most likely outcome following an SO was a conditional clearance. This was the case in 71% of reviews (or 12 of 17). 18% of SO cases ended in a prohibition (the Commission will **always** issue an SO where it intends to prohibit a transaction). Perhaps surprisingly, there are examples of cases where an SO was issued but which ended in an unconditional clearance, showing that additional evidence or particularly persuasive arguments by the parties can cause the Commission to change its provisional view. But this has only happened in two cases (or 12%) since 2014, one of which we saw in 2018 – T-Mobile NL's acquisition of Tele2 NL.

As you would expect, we found that in cases where the Commission did not issue an SO, getting an unconditional clearance was more likely than where an SO was sent. But interestingly this amounted to less cases than you might expect – only 22%, or four of 18. Again, a clearance with remedies was the most common outcome (78% of decisions).

Efforts to streamline review periods yielded (some) results

DURATION OF IN-DEPTH INVESTIGATIONS[18]

As a range from jurisdiction with the shortest average to jurisdiction with the longest (working days)



In recent years a number of antitrust authorities have acknowledged that merger control review periods have become too long. Many have committed to taking tangible steps to reduce those timelines.

We saw earlier that the vast majority of deals get unconditional clearance at phase 1. In 2018, across all jurisdictions it took an average of around 19 working days to get this clearance.[19] This period tends to stay relatively steady year on year. Looking at individual jurisdictions, we saw phase 1 unconditional review periods get shorter in half of those surveyed, showing that efforts to improve timings are paying off. There were some exceptions, however, most notably COMESA where the average period increased from 50 to 75 working days (although we could not pinpoint a specific reason for this rise).

For in-depth cases, the picture remains extremely varied across jurisdictions. Timing to get an unconditional clearance ranged from 22 working days (Italy) to 139 working days (Brazil), from the start of the in-depth review. The spread for conditional clearances was similarly broad – from 46 working days (again, Italy) all the way to over 330 (15 months) for the Japan Fair Trade Commission to issue its decision in Fukuoka Financial Group's acquisition of The Eighteenth Bank. As in 2017, prohibitions generally took over 100 working days.

In the EU, we saw the trend continue for the European Commission to use its 'stop the clock' powers at phase 2, suspending the review period while it waits for the parties to submit additional information. Of the ten in-depth decisions reached in 2018, the Commission stopped the clock in six. Both Bayer/Monsanto and Qualcomm/NXP were subject to two suspensions each, totalling 32 working days and a record 96 working days, respectively. The result is that in-depth review periods in the EU often stretch well beyond the 125 working day maximum provided for under the EU merger rules: the average review period for conditional clearances in 2018 was 133 working days from the start of the in-depth investigation, a year-on-year increase of four days. This pattern may also be a reason why we have witnessed an increasing number of merging parties withdrawing and re-filing their notifications at phase 1 – see the box for more details.

Turning to the U.S., and in-depth investigation periods have improved during 2018. The average duration of investigations resulting in remedies was down from 216 in 2017 to 199 working days last year, taken from notification to decision. For prohibitions too, the average was down from 488 days (from notification to decision) to 318 in 2018. In helpful news for merging parties, the DOJ announced in September that it would take concrete steps to further shorten the review

[18] From the start of the in-depth review. Excludes South Africa, for which no split could be made.
[19] Excluding Canada, China, Japan, South Africa, South Korea and the U.S. where comparable data is not available.

Weighted average across all jurisdictions surveyed (working days)

	Phase 1		In-depth investigation (including phase 1)		
	Unconditional	Conditional	Unconditional	Conditional	Prohibition
2017	21	80	145	208	289
2018	19	56	152	200	209

periods in in-depth cases to less than six months. To achieve this it will require internal documents from fewer custodians, take fewer depositions, and commit to shorter time periods in timing agreements. This will not be a one-way street however. In return, parties will be expected to engage earlier and make fuller submissions at the outset.

Like last year, China gave us a mixed picture. 99% of cases benefiting from the simplified procedure in 2018 were cleared in an average of 12 working days (falling again for the third year in a row). The transition from MOFCOM to SAMR has not, as some feared, had an impact on these cases. However the duration of cases resulting in remedies has continued to increase. Last year none of the conditional clearances were completed within the 180 calendar day (around six months) maximum provided under the Chinese merger rules and review periods ranged from 12 to 15.5 months. Parties in all cases had to withdraw filings at the end of phase 3 and then re-file in order to get clearance – see below. SAMR has said it is stepping up efforts to speed up investigation periods, for example by giving parties an opportunity to have pre-notification consultations. But it remains to be seen whether this will improve the situation for remedies cases.

Finally, in the UK we saw an unprecedented case of merging parties (Sainsbury and Asda) challenging deadlines set by the CMA for being too **short**. They argued that they were not given enough time to respond to a series of working papers issued shortly before their oral hearing. The CAT agreed and, in an unusual postscript to its judgment, called for revisions to statutory deadlines to be urgently considered to provide more flexibility, particularly when, post-Brexit, the CMA will be reviewing more international mergers.

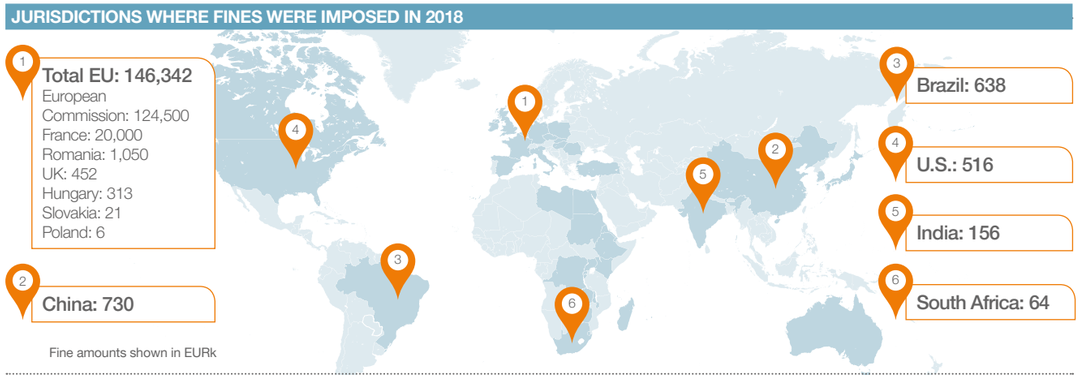
Pull and re-file – a mechanism for success?

The process of pulling and then re-filing notifications at phase 1 is well established in the U.S. But in 2018 we also saw it being employed much more often in the EU, particularly in cases which ultimately resulted in a phase 1 conditional clearance.[20] Withdrawing the notification takes the parties (and the Commission) outside the confines of the statutory timeline and enables them to consider how to address any concerns before re-filing for another phase 1 review. Certainly in the EU, it appears to have been a successful way of wrapping up the review in phase 1 without the need for a protracted in-depth probe.

But this is not necessarily the case elsewhere. As noted above, in China we saw SAMR, in all remedies cases, ask parties to pull and re-file their deals (sometimes repeatedly) during the phase 3 stage of the review. At best, this significantly extended the overall timetable to get conditional clearance. At worst, as in Qualcomm/NXP, it resulted in pushing the merger process right up against the long-stop date, which led to the deal being ultimately abandoned.

[20] See, for example, Knauf/Armstrong and Quaker/Global Houghton.

Strict enforcement of procedural rules continued



Antitrust authorities continued their trend of strict enforcement of procedural merger control rules in 2018. A total of EUR148.4m fines were imposed in 46 cases in the jurisdictions surveyed. This is slightly down on 2017 in terms of value (from EUR164.4m) but a large uptick in terms of volume by over 30%.

Once again the European Commission led the charge, imposing a record EUR124.5m fine on Altice for both failing to file its acquisition of PT Portugal and for gun-jumping (ie breaching the 'standstill' obligation by implementing the deal before merger clearance has been granted). This fine made up the majority of total global penalties last year. We also saw the EU's top court hand down a ruling in another gun-jumping case involving Ernst & Young and KPMG Denmark. See the box for further details on both of these. Finally, the Commission progressed its on-going investigation into alleged gun-jumping by Canon, issuing a supplementary Statement of Objections in November.

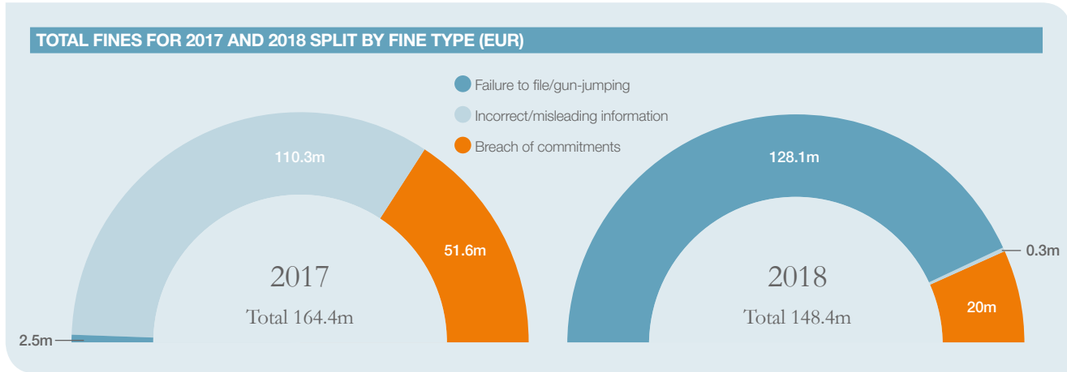
In the U.S., the DOJ ended 2018 with a USD610,000 fine on an individual investor for failing to notify the acquisition of additional voting securities which pushed his stake over the relevant filing threshold. There are reportedly other cases under investigation.

China clocked up another record year in terms of failure to file fines – 15 in 2018, up from nine the previous year, with the total amount exceeding EUR700,000 – more than double the 2017 tally.

In the UK, the CMA flexed its muscles in 2018 by taking its first enforcement action for gun-jumping. Given the voluntary nature of the UK merger control regime, there is no 'standstill' obligation as such. However, the CMA has the power to impose initial enforcement orders which have the same effect, ie to halt further integration between merging parties or even, in the case of an anticipated transaction, to prevent closing. It imposed penalties of GBP100,000 and GBP300,000 in two separate cases for breaches of initial enforcement orders, both relating to completed transactions.[21] Importantly, the decisions show that even in the context of a voluntary merger control regime there is a risk of fines for jumping the gun.

Authorities in other jurisdictions, too, are showing their willingness to enforce in this area. Brazil's CADE reached three failure to file infringement decisions and one related to gun-jumping, with fines totalling over EUR630,000. The penalty in one of the Romanian Competition Council's three failure to file cases stretched above EUR655,000. In India, the authority imposed 11 fines for failure to file/gun-jumping, although total amounts were small. Finally, our analysis shows that outside the 26 jurisdictions surveyed, appetite for enforcement also remains high. Total fines for gun-jumping and failure to file infringements exceeded EUR4.4m. The upshot: merging parties must take filing requirements and standstill obligations seriously.

[21] Electro Rent's acquisition of Microlease (the CMA's decision was upheld by the Competition Appeal Tribunal in February 2019), and Ausurus Group's purchase of CuFe Investments.



2018 fines for procedural breaches were not just limited to gun-jumping/failure to file. We also saw penalties imposed for breach of commitments entered into in remedies cases. France was the key example, where Fnac Darty received a EUR20m fine for failing to divest three out of the six stores it committed to sell off when the parties merged in 2016.

Finally, nearly EUR350,000 fines were imposed in the jurisdictions surveyed last year for provision of incorrect or misleading information. This is significantly less than 2017's total of EUR110.3m (most of which was attributable to the European Commission's fine in Facebook/Whatsapp). But merging parties should not view this as a sign that authorities are being more lax in this area. The Commission in particular has two investigations on-going involving GE and Merck/Sigma Aldrich. More is expected on this in next year's report.

EU: gun-jumping following Altice and Ernst & Young

The Commission's decision in Altice and the ruling of the European Court of Justice (**ECJ**) in Ernst & Young have given some clearer guidance on what actions may amount to gun-jumping in the EU.

In Altice, the Commission identified three types of problematic behaviour:

- Rights granted in the transaction agreement gave Altice the possibility of vetoing decisions and directing conduct that went further than required to preserve the value of the target – in particular, financial thresholds above which Altice approval was required were set at such a low level that they captured ordinary course business.
- In practice, Altice exercised control even beyond that provided for in the deal documentation, including being involved in marketing campaigns, commercial arrangements and sale of investments.
- The parties systematically exchanged commercially sensitive information without any safeguards – there were no non-disclosure agreements or clean teams in place.

In Ernst & Young, the ECJ ruled that actions which are merely preparatory and do not contribute to a change in control (here, the decision by KPMG Denmark to terminate its cooperation agreement with KPMG International) do not amount to gun-jumping, but may still fall foul of the prohibition on anti-competitive agreements.

While each case was fact-specific, merging parties must bear the general principles in mind, ensuring that the acquirer's involvement in the target's business prior to merger clearances/completion is appropriately limited in both the deal documentation and in practice, and that any exchange of commercially sensitive information is necessary and ring-fenced.

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We have an unrivalled and multiple award winning track record of securing merger control clearances for clients from antitrust authorities around the world. We were named Competition Team of the Year 2018 at the British Legal Awards for our work on 21st Century Fox/Sky and we also won Competition Team of the Year 2017 at the Legal Business Awards for our work on the WIND/3 Italia JV between VEON and CK Hutchison. Our other experience includes acting for notifying parties or interveners in some of the most high-profile and complex merger control cases in recent years, for example, 21st Century Fox/The Walt Disney Company, Asahi/AB InBev, Cargill/ADM, FedEX/TNT, Imperial Tobacco/Reynolds American, Tullet Prebon/ICAP, Saudi Aramco/Lanxess, and Worldpay/Vantiv.

Our involvement in these case demonstrates our ability to secure exceptional results for clients against difficult odds. We have particular expertise in identifying innovative remedies which are likely to satisfy regulators' concerns in the most challenging cases. We also have unrivalled experience in successfully guiding high-profile transactions through national public interest reviews and sector-specific regulatory approval procedures, and managing the interplay between national interest screening regimes and merger control proceedings.

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