ALLEN & OVERY

Global trends in merger control enforcement

February 2016

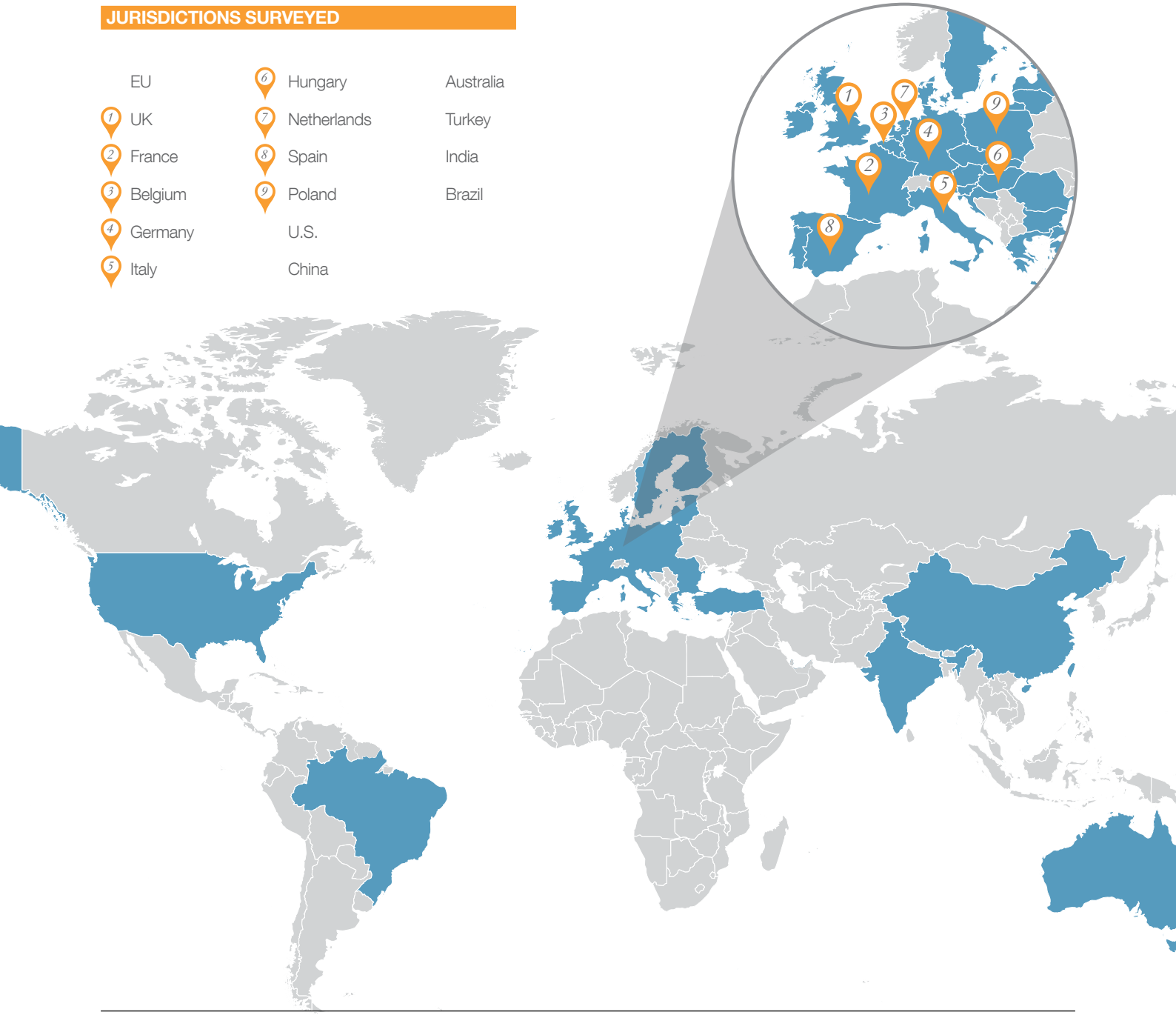
As M&A activity remained at record levels in 2015 we saw executives continuing to gain the confidence to engage in more aggressive and strategic deals. And antitrust authorities have responded. Last year over EUR60 billion of deals (20 transactions in all) were frustrated (ie were prohibited or abandoned) as a result of antitrust concerns. A further 92 cases were subject to interference in the form of remedies. Antitrust intervention, therefore, had a clear and tangible impact on deals in 2015, and we expect this to continue.

Introduction

We have collected and analysed data on merger control activity for 2015 from 16 jurisdictions, focussing on the U.S., EU and China, pulling out key trends as well as practical differences. The results are insightful and, in some cases, surprising. In this report we give you the headlines as well as the story behind them.

JURISDICTIONS SURVEYED

EU	6 Hungary	Australia
1 UK	7 Netherlands	Turkey
2 France	8 Spain	India
3 Belgium	9 Poland	Brazil
4 Germany	U.S.	
5 Italy	China	



Eight key insights

1

Antitrust frustrated over EUR60 billion of deals in 2015

Seven transactions were formally prohibited, but even more (13) were abandoned after the authorities raised antitrust concerns and the parties decided not to proceed.

2

Antitrust authorities interfered with 92 deals in 2015 by requiring (often far-reaching) remedies

In 38 of these cases remedies were agreed in phase 1. The remaining 54 were subject to remedies following an in-depth investigation.

3

(Green) light at the end of the tunnel: not all in-depth investigations result in antitrust intervention

The picture varies considerably from jurisdiction to jurisdiction. In the U.S. only 38% of in-depth probes in 2015 received an unconditional clearance. In the EU it was 13%. Contrast the UK and Germany, where deals facing an in-depth review had the greatest chance (86% and 78%) of a clearance without remedies. And in China only two deals faced antitrust intervention in the whole of 2015.

4

Formal in-depth reviews take five to eight months but can take a year or more when you factor in pre-notification discussions

One U.S. case in 2015 took around 18 months from notification to reach a conclusion. In the EU we saw investigations stretching up to eight months (not including pre-notification). In China one 2015 probe reached eight months from filing, although overall timings have improved significantly following recent steps taken to streamline the Chinese process.

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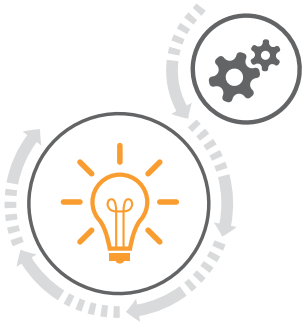
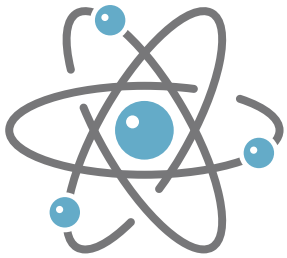


In 2015 authorities showed more willingness to accept creative and innovative solutions

Of in-depth cases resulting in remedies, 37% involved "behavioural" commitments relating to future conduct, either as the whole remedy package (24%) or alongside a requirement to divest (13%). Excluding the U.S., this figure rises to 62%. In the remainder of cases pure divestments were required.

6



Telecoms and life sciences deals accounted for the highest ratio of antitrust intervention in 2015

Telecoms and life sciences mergers accounted for the highest ratio of antitrust intervention compared to the global volume of deals in these sectors. In the jurisdictions surveyed, telecoms deals were the most problematic, accounting for 10% of all transactions frustrated (while accounting for only 2% of global deals). Life sciences mergers attracted the most frequent antitrust interference by way of remedies (21% of all deals interfered with compared to 7% of global deals). This reflects major industry consolidation in these sectors and a willingness to attempt deals which are challenging from an execution perspective due to antitrust concerns.

7

Overall, the vast majority (95%) of deals get cleared at phase 1, without remedies, and generally in less than 30 days

Merging parties can take comfort that the outlook looks positive for most cases in which merger filings are required.

8

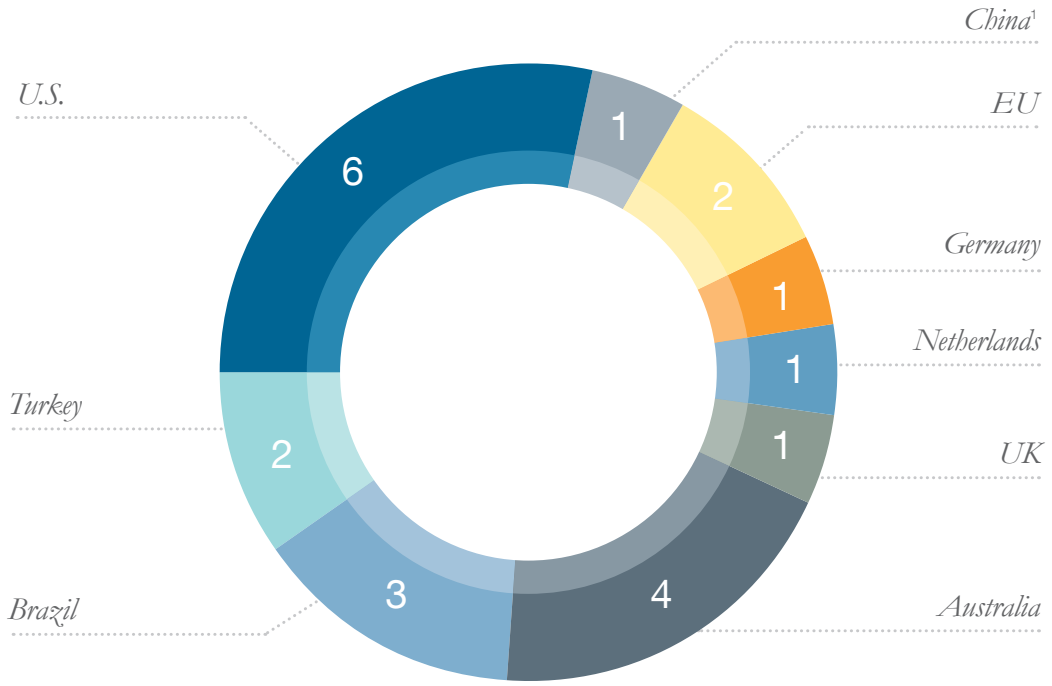
Authorities are clamping down on parties who fail to file

Last year antitrust authorities in over 14 jurisdictions across the globe took action against firms suspected of failing to file their deals, imposing EUR4.2 million in fines.

Antitrust frustrated over EUR60 billion of deals

DEALS FRUSTRATED (PROHIBITED OR ABANDONED)

(by number)



As M&A activity remained at record levels in 2015, we have seen executives continuing to gain the confidence to engage in more aggressive and strategic deals. And antitrust authorities have responded. Last year over EUR60 billion of deals (20 transactions in all) were frustrated (ie were prohibited or abandoned) as a result of antitrust concerns. A further 92 cases were subject to interference in the form of remedies. Antitrust intervention therefore had a clear and tangible impact on deals in 2015.

The value of deals frustrated represents around 2% of total global M&A in 2015,[2] but this potentially represents only the tip of the iceberg. It only covers deals which did not go ahead due to antitrust concerns in the 16 jurisdictions surveyed, and only where the deal value was made public. The actual figure could in fact be a great deal higher.

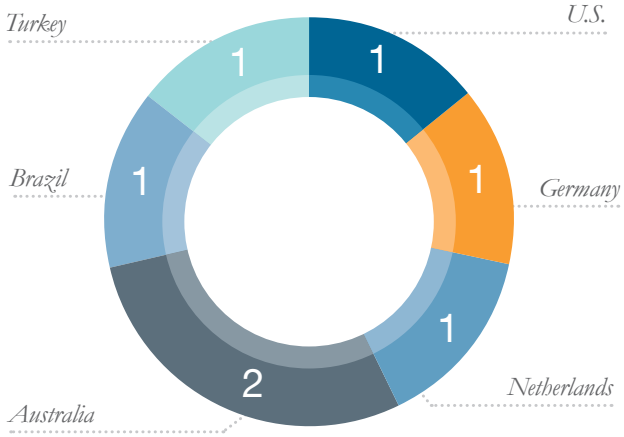
Two types of frustrated deals can be distinguished. First, cases where the authorities formally prohibited a transaction, of which there were seven in 2015. Second, situations where the parties decided to abandon the deal after learning of the antitrust authority's concerns. Often in these cases the parties had offered remedies but these were rejected by the authority as being insufficient to address the antitrust issues. The parties therefore decided to abandon the deal, either to avoid a formal prohibition or to escape the imposition of remedies on such a scale that it would seriously undermine the rationale for the transaction. In 2015 there were 13 of these cases.

The U.S. is clearly the frontrunner in terms of the number and value of deals frustrated. Some 99% of the EUR60 billion total comes from deals prohibited or abandoned following scrutiny by U.S. antitrust authorities. One deal in particular, Comcast's attempted acquisition of Time Warner Cable, contributes EUR41 billion (USD45 billion) of the total. This is primarily due to the proportion of big ticket M&A originating in the U.S. (U.S. antitrust agencies reported that 142 deals of over USD1 billion were assessed under U.S. merger rules in FY2013, increasing to 225 deals in FY2014) often raising significant antitrust issues on U.S. soil. It is bolstered by the fact that the U.S. antitrust authorities have shown increased confidence in challenging deals.

In the EU a huge amount of attention this year was focussed on the abandoned merger between Danish mobile operators Telenor and TeliaSonera, the first "quasi-prohibition" by new Competition Commissioner Margrethe Vestager who, after the parties announced they would not go ahead with the deal, was happy to publicly state that the deal had been "on the road to prohibition". The parties had offered remedies, but the Commission was not convinced. This has been followed more recently by Mondi abandoning its proposed

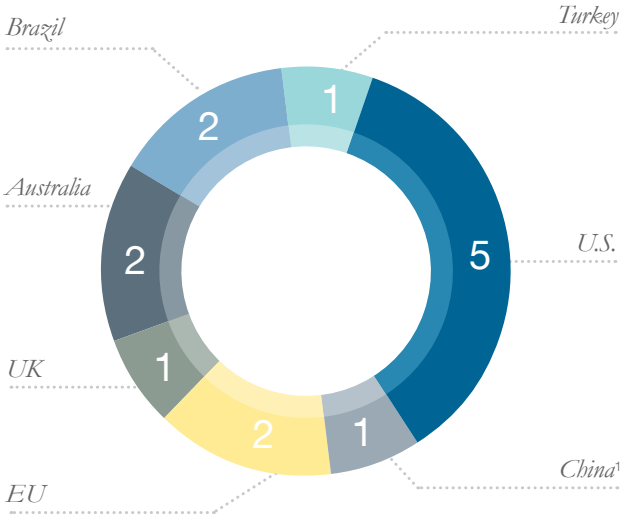
DEALS PROHIBITED

(by number)



DEALS ABANDONED

(by number, allocated to jurisdiction where antitrust concerns led to parties' decision to abandon)



acquisition of Walki assets. Again, the parties offered remedies but these were not enough to alleviate the Commission's concerns.

But the data shows that it is not just in the U.S. and EU that antitrust can frustrate deals. The Tokyo Electron/Applied Materials transaction was abandoned due to antitrust concerns raised by China's Ministry of Commerce (**MOFCOM**) as well as the U.S. Department of Justice (**DOJ**). And deals have been blocked or abandoned in other jurisdictions across the globe, from individual EU Member States (Germany, the Netherlands and the UK) to Brazil, Turkey and Australia.

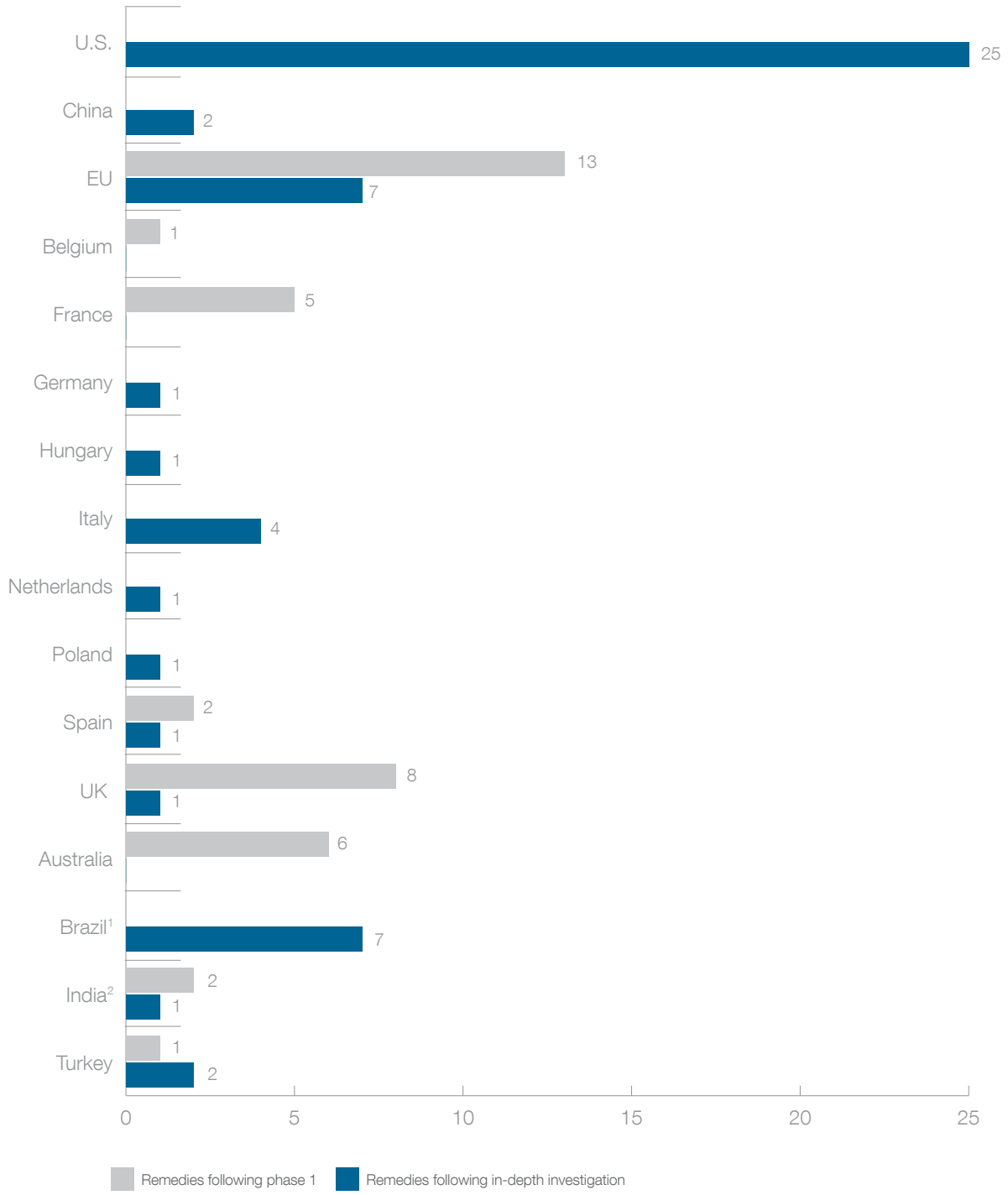
It is also important to mention break fees (payable by the target company) and "reverse" break fees (payable by the bidder) which are negotiated to address execution risk, thereby placing antitrust risk with the relevant party. We are increasingly seeing purchasers in prohibited or abandoned deals facing reverse break fees running into hundreds of millions of euros. Take, for example, Sysco's planned acquisition of rival US Foods. The deal was prohibited by the U.S. court in June 2015 due to concerns that it would create a dominant company that could raise prices and reduce service levels. Sysco had to pay reverse break fees of over EUR270 million (USD300 million) after the deal was terminated. Separate Allen & Overy research into private M&A in 2015 shows that 14% of conditional deals now include a reverse break fee (which on average amounts to 5% of deal value).[3] This means that there can be a real tangible cost to the purchaser if antitrust intervention prevents completion.

Overall this means that merger control risk is often a key driver of the deal dynamic. It must be considered upfront in the deal planning process, with potential antitrust risks being identified early so that they can form part of the consideration of whether to pursue a transaction. For purchasers, any risks that do arise can be mitigated by negotiating appropriate conditions in the deal documents. According to our research, deals conditional on antitrust or regulatory approvals are becoming increasingly common (61% of all conditional private M&A transactions surveyed included such a condition in 2015, up from 55% in 2014, rising to 90% in the U.S.).[4] This is a clear indication that antitrust risks are being taken seriously by merging parties, and is a trend which we are expecting to continue.

1. Represents Tokyo Electron/Applied Materials, which is also included in the U.S. figure.
2. Source: Thomson Reuters "Mergers and Acquisitions Review", Full Year 2015, which reports value of 2015 worldwide completed M&A as USD3,160,761 million.
3. "Global trends in private M&A", research based on 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.
4. See above.

Antitrust authorities interfered with 92 deals by requiring (often far-reaching) remedies

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



Antitrust intervention in deal activity strikes further than just those cases that are frustrated by being blocked or abandoned. It can also interfere with the outcome of a transaction: authorities may be willing to clear a deal, but only on the basis of remedies designed to address the antitrust concerns. Often this interference is significant.

In 2015 a total of 92 deals were cleared subject to remedies. In 38 of these transactions remedies were agreed during phase 1. The remaining 54 cases were subject to an in-depth investigation, with the remedies package being imposed at the end of that process.

In the EU, 20 deals resulted in remedies (13 after phase 1 and a further seven after an in-depth investigation). This compares to 17 in 2014 (12 phase 1 and 5 in-depth). This is not a dramatic year-on-year difference. However, what is interesting is the comparison between the number of in-depth remedies cases in Commissioner Vestager's first year in office (starting in November 2014) and that of her predecessor, Joaquin Almunia, in 2010. In the initial 12 months under Vestager, seven deals were subject to remedies in following an in-depth investigation compared with two under Almunia. This marks a significant increase. While it may be an early sign that Vestager is taking a more interventionist stance than Almunia, it could also be a product of there having been more cases notified, naturally leading to a higher number of remedies cases, combined with an increased appetite on the part of executives to try their hand at more risky deals. Next year's report should be able to shed light on this.

In the U.S., 25 cases ended in remedies in 2015. The figure was the same in 2014. In fact, the rate of intervention by U.S. agencies remains steady year-on-year, with 2% to 3% of all deals being challenged. Where we are seeing a change, however, is in the number of court battles over problematic mergers, with the agencies increasingly litigating cases rather than settling them. In 2013, of nine complaints against mergers filed by the Federal Trade Commission (**FTC**) and the DOJ only two were litigated in court, with the remaining seven being settled. In 2014 six complaints were settled (the other two being abandoned). In 2015, however, the balance has clearly shifted towards litigation. Of eight complaints we have already seen three cases litigated, and only one settled. Four complaints are still pending (including Staples' acquisition of Office Depot), and it looks likely that we will see even more litigation before these are concluded. We expect this trend to continue in 2016.

In Brazil there were seven remedies cases in 2015, compared to nine in 2014.

There were two remedies cases in China in 2015. This compares to four in 2014. Overall, cases involving remedies are relatively rare – there have been only 26 in total since the Antimonopoly Law came into force in 2008, a stark contrast to the position in the EU and U.S.

It is difficult, however, to pinpoint a single reason for this, and it will be interesting to see if this pattern continues in the coming years.

One key trend that has emerged in the past 12 months has been the increased co-operation between antitrust authorities on multinational deals. The European Commission, for example, now regularly states in its press releases where it has coordinated with other agencies on a particular transaction. We are seeing this general co-operation being extended to remedies. In a number of recent deals, certain authorities have chosen not to require remedies in a particular case on the basis that undertakings agreed in other jurisdictions are sufficient to address any issues. The Novartis/GSK three-limbed transaction is a prime example of this. The Australian Competition and Consumer Commission (**ACCC**), despite having antitrust concerns, cleared the deal unconditionally on the back of remedies required in the EU: *"...where undertakings provided to the European Commission have resolved competition concerns in Australia, the ACCC has taken a pragmatic approach and not sought standalone undertakings in Australia."* We are expecting to see more of this type of co-ordination in the coming years.

If one considers that, particularly in phase 1 cases, remedies must generally be offered up by the merging parties, this gives parties an element of control over the remedies they may be prepared to offer to antitrust authorities. Parties can instigate the discussion, and can take a strategic decision over what to offer (and when). Often such remedies packages are the result of agreements between the parties to a deal. These agreements are often combined with a reverse break fee payable by the bidder if the deal is blocked.

Pre-notification discussions can be particularly useful to "sound out" an authority's appetite to accept remedies, at which point the parties can begin their own analysis of what they may be prepared to give up in order to get the deal cleared. In Holcim/Lafarge, for example, the parties discussed divestments with the European Commission at the pre-notification stage and, at the very end of 2014, received phase 1 clearance with a substantial remedies package, which would not usually have been possible to agree without an in-depth investigation.

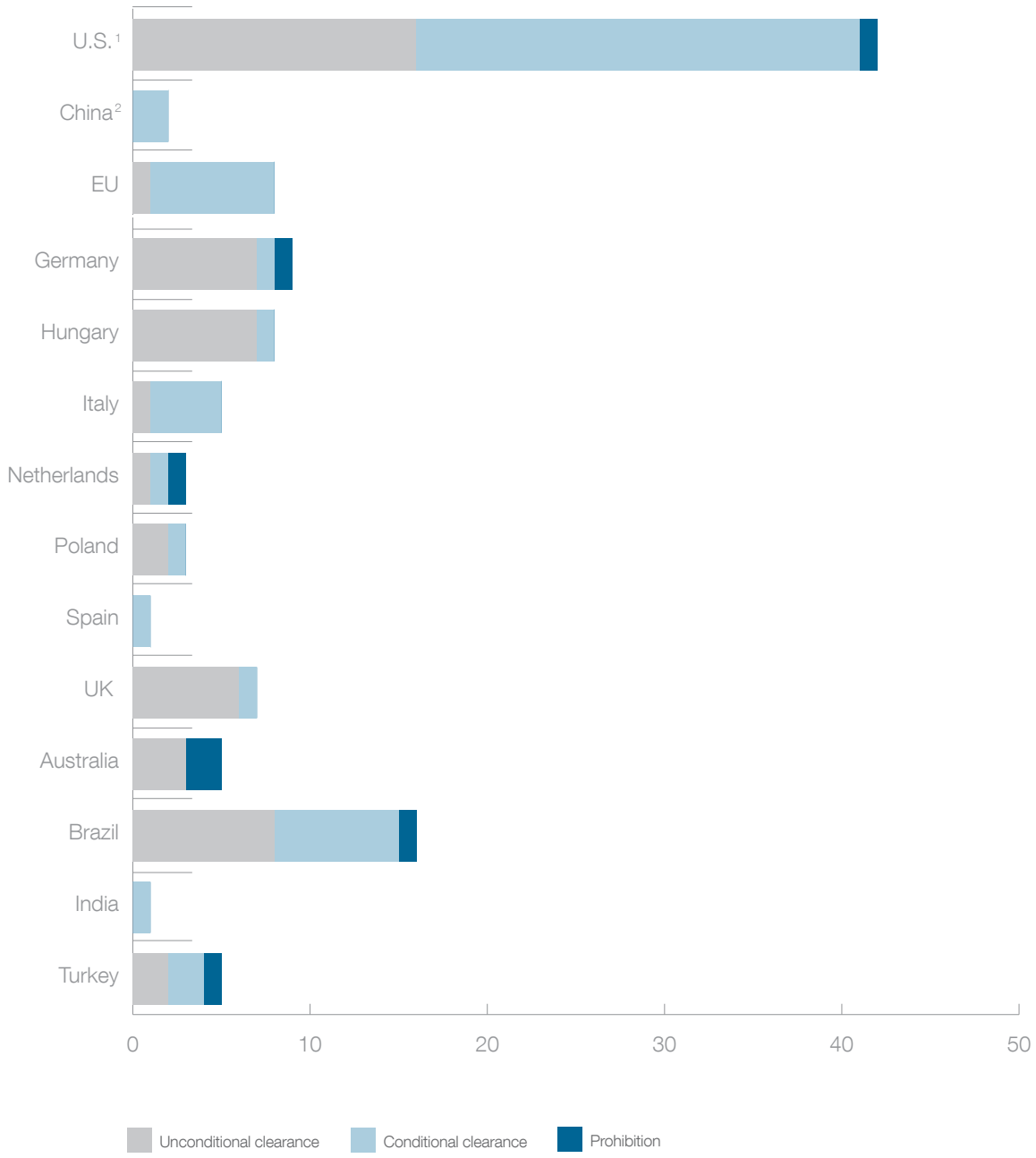
Finally, merging parties may decide to take a proactive approach to potential antitrust concerns by pre-emptively agreeing to divest certain businesses. Anheuser-Busch InBev's planned acquisition of SABMiller is a good example. It was announced in late 2015 that SABMiller had agreed to sell its stake in the MillerCoors joint venture to the joint venture partner in a USD12 billion deal agreed at the same time as the main offer. AB InBev is also exploring the sales of a number of European brands.

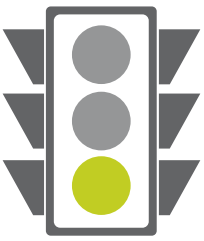
In terms of the nature of the remedies accepted by antitrust authorities there have also been some interesting developments. We will look at these in more detail later in the report.

1. Data provided by TozziniFreire Advogados.
2. Data provided by Khaitan & Co.

(Green) light at the end of the tunnel: not all in-depth investigations result in intervention

IN-DEPTH INVESTIGATIONS BY OUTCOME





Merging parties entering into an in-depth investigation may think their chances of leaving the merger control process with their assets intact are slipping away. And this may be more likely than not in certain jurisdictions. In the U.S., 62% of "Second Requests" (U.S. in-depth investigations) resulted in remedies or prohibition. In the EU, 88% of in-depth probes in 2015 (seven out of eight) resulted in remedies. In Italy the figure is 80% (four out of five). And in India the one in-depth investigation in 2015 resulted in remedies.

But the story is not the same across the board. In Germany and Hungary 78% and 88% of in-depth transactions were cleared unconditionally. In the UK the figure is also high at 86%, perhaps a surprising statistic given the voluntary nature of the UK regime – many "no-issues" cases are not notified meaning we might expect to see more deals subject to remedies or being blocked. But the large proportion of unconditional clearances may be attributed to the fact that, in the UK, an in-depth case is decided by an independent panel which operates as a fresh pair of eyes to reconsider the issues. This peculiar feature of the UK merger rules survived recent reforms to the regime which included the creation of a single agency, the Competition and Markets Agency (**CMA**), combining the previous two-authority system.

In China the picture is less clear, as there is no visibility over the total number of in-depth investigations. By "in-depth" here we mean a phase 3 review (phase 2 probes are not akin to the in-depth investigations of other jurisdictions – rather than being a formal statement that there are antitrust concerns, they are generally viewed as an extension of phase 1 and routinely used by MOFCOM to "finish off" its review of a deal which it has not completed in phase 1). What we do know is that in 2015 only two phase 3 reviews ended in remedies and none resulted in prohibition. Given that we expect there to have been some phase 3 cases cleared unconditionally during 2015, the proportion of cases resulting in intervention is likely to be lower than both the EU and the U.S.

There is no single reason why we are seeing such a disparity between the EU/U.S. and the other jurisdictions. Most likely, in our view, is that it is a result of the fact that the European Commission and U.S. antitrust authorities generally assess the largest deals taking place in some of the most mature markets, which necessarily results in an increased probability of antitrust issues.

Despite the position in the EU and U.S., the outlook is overall relatively positive for merging parties facing an in-depth investigation. Clearly it will depend on the complexity of the case and the issues, but an in-depth inquiry certainly does not mean a bad result for the deal.

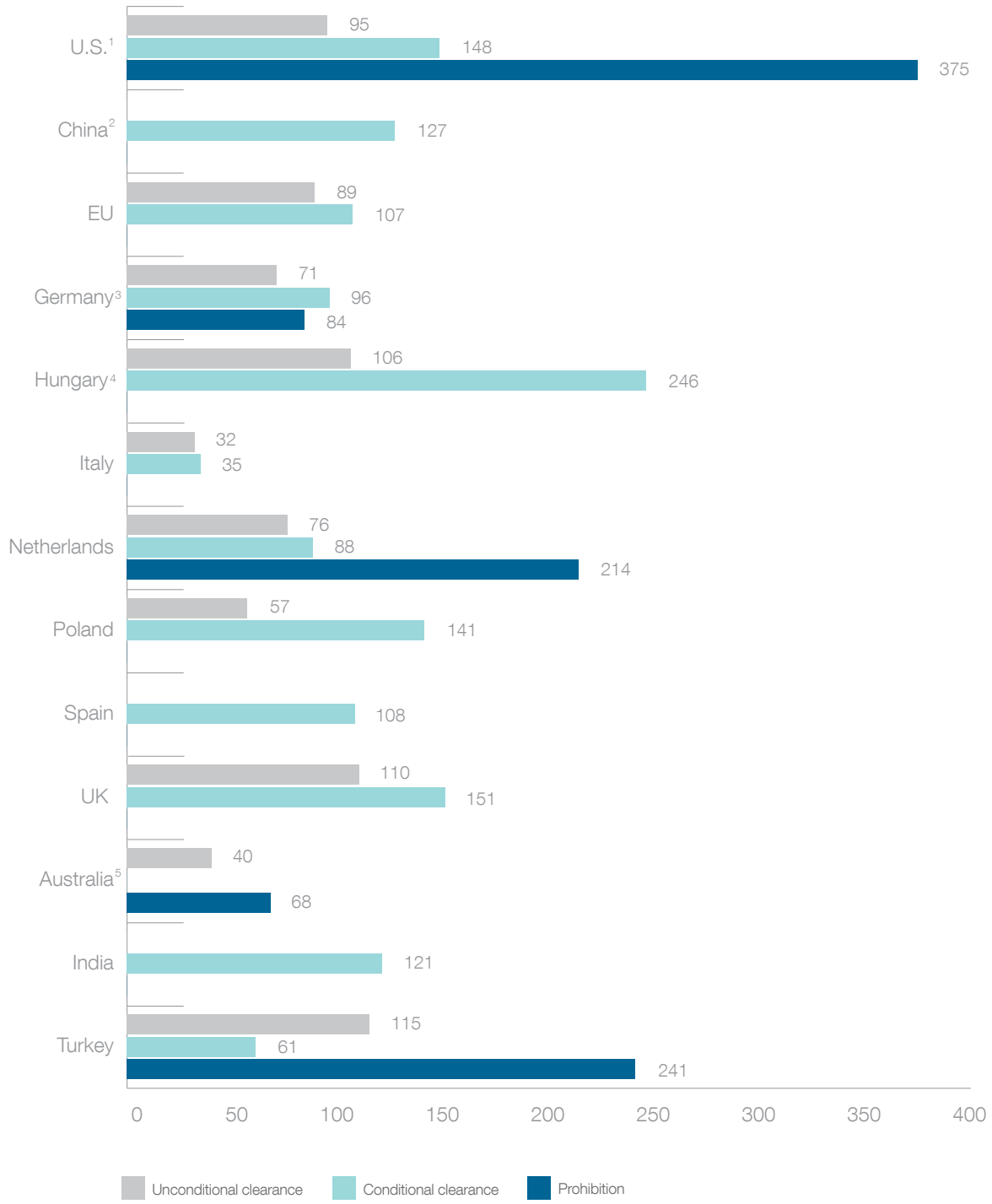
From a practical perspective, and despite this positive outlook, the administrative burden of an in-depth investigation can be huge for merging parties. Many antitrust authorities are, in complex cases, requiring increasing amounts of information to be provided as part of the filing itself, and in subsequent information requests. As part of this we are seeing some authorities requesting the submission of enormous numbers of internal documents in the hope that these materials will inform their analysis of the likely effect of the deal on competition. In the EU for example, our experience in complex cases is of the European Commission requiring the submission of tens of thousands of documents. Allowing for sufficient resources to handle such requests is therefore vital for parties to a deal which faces an in-depth review.

1. Number of unconditional clearances based on best estimates.
2. There is no visibility over the total number of in-depth (phase 3) investigations and so a figure for unconditional clearances cannot be provided.

Formal in-depth reviews take 5-8 months but can take a year or more with pre-notification

AVERAGE LENGTH OF IN-DEPTH INVESTIGATION PERIOD

(working days)



Where authorities identify antitrust concerns that the parties have been unable to address in the initial (phase 1) investigation, they are likely to launch an in-depth investigation to consider the issues more closely.

This will have a clear impact on timing. In the majority of jurisdictions surveyed an in-depth investigation will last between 75 and 150 working days which, on top of phase 1, gives a total review period of around five to eight months. And this is even before adding on the often lengthy pre-notification discussions with an authority that can run to several months before the clock starts to tick. Within this range, unconditional clearances are generally at the shorter end, with conditional (ie involving remedies) and prohibition decisions usually towards the upper limit.

This is not to say that an in-depth review has to take this long. Some jurisdictions have relatively short in-depth investigation periods. In Australia the ACCC, for example, took on average 40 working days (less than two months) beyond phase 1 to reach an unconditional clearance in 2015, and only 68 days on average (just over three months) for a prohibition decision. The Italian Antitrust Authority followed a similar pattern.

But it is China that yields the most surprising results, especially given the general perception that deals notified to MOFCOM take an extremely long time to reach the end of the merger control process. See the box below for more details.

At the other end of the spectrum, some jurisdictions can have much longer in-depth investigation periods, particularly where deals are ultimately blocked. In 2015, in-depth investigations ending in prohibitions in the Netherlands and Turkey lasted over ten and 11 months respectively. In the U.S., the preliminary injunction prohibiting the Sysco/US Foods merger was not granted until around 18 months after the deal was notified.

From a practical perspective, even where a relatively short in-depth investigation can be expected, this will likely have a major impact on the deal timetable. This is especially the case given that most merger control regimes are suspensory, meaning completion cannot take place before clearance has been obtained. Even regimes that are voluntary, such as the UK, may contain rules preventing closing once an in-depth investigation is underway.

Parties can and routinely do manage this in three ways:

- First, they can take advantage of pre-notification discussions with the authorities to assess areas of likely antitrust concern and even discuss potential remedies. Parties engaging in extensive pre-notification talks may even be able to avoid an in-depth probe altogether. Earlier we looked at the Holcim/Lafarge cement transaction that was cleared at phase 1 with remedies following extensive pre-notification discussions. This was the case even though the previous Commissioner (just after the deal was announced) stated that he thought an in-depth analysis would be needed.
- Second, and going one step further, parties may even consider selling off an obviously problematic business before the merger control process has started. We mentioned earlier the Anheuser-Busch InBev/SABMiller deal where pre-emptive divestment arrangements have been agreed.
- Finally, where in-depth investigations in several jurisdictions look likely, parties can take steps (such as deciding tactically when to formally file with the authorities) to try to align the timings of those probes as much as possible, with a view to receiving clearances at a similar time. Given that we are increasingly seeing antitrust authorities co-ordinating with each other in relation to multinational deals, this is likely to be a strategy that is also welcomed by many agencies.

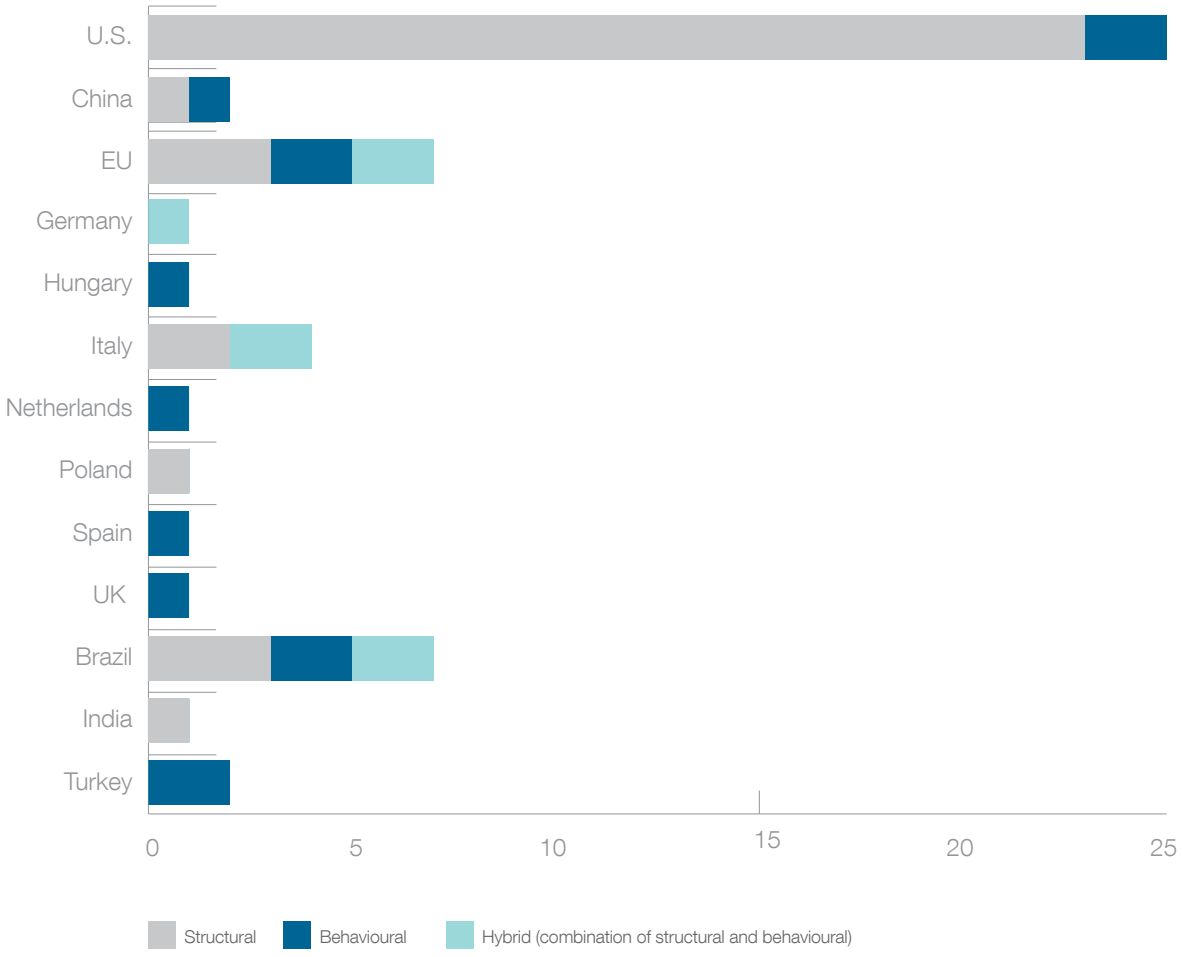
Is China still the outlier in terms of timing?

- Not necessarily – the outlook in China is much more positive.
- The introduction in 2014 of the simplified procedure has had a big overall impact on investigation periods. As we will see later, most simplified cases are cleared quickly, in an average of around 17 working days. In the one phase 3 case under the simplified procedure in 2015 MOFCOM took around 115 working days (approximately five months) from initiation of the merger process to reach a clearance decision – at the lower end of the overall range identified.
- In-depth cases that are not reviewed under the simplified procedure do take longer. But having said that, even the two in-depth investigations which resulted in remedies in 2015 were decided in around six and (just under) eight months respectively from the date of filing – not the extremely lengthy probes that merging parties often fear.
- This is not quite the whole story: first, MOFCOM is typically always the last antitrust authority to conclude its review, meaning that in multinational deals Chinese clearance will necessarily take longer than approvals in other jurisdictions (see, for example, the Shell/BG merger which received unconditional clearance after approvals were announced in the EU, Brazil and Australia).
- Second, parties filing in China must also factor in MOFCOM's "pre-acceptance" period between filing and MOFCOM declaring the filing complete (which for the two remedies deals in 2015 took on average around 34 working days, or one-and-a-half months). But MOFCOM has taken recent steps to streamline this process by making internal changes to its case teams (meaning that the same case team will review the initial filing and conduct the review itself) and we expect to see shorter pre-acceptance periods in 2016 and beyond.

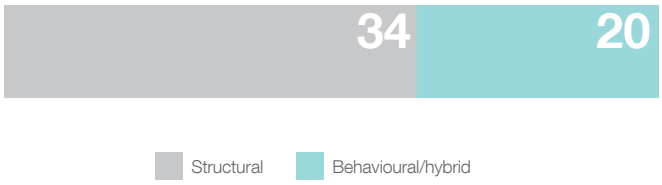
1. Based on best estimates.
2. Data on unconditional phase 3 clearances (apart from those under the simplified procedure) is not available and therefore no average investigation period can be provided. The figure provided for conditional clearances is converted from calendar days into working days using an approximation.
3. Figure for prohibition based on best estimates.
4. Includes phase 1 period as it is not possible to determine when an in-depth investigation starts.
5. Based on best estimates of public holidays.

Authorities showed more willingness to accept creative and innovative solutions

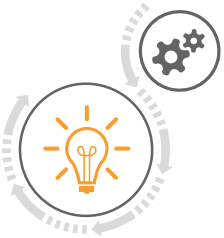
IN-DEPTH REMEDIES CASES BY TYPE OF REMEDY



TOTAL IN-DEPTH REMEDIES CASES BY TYPE OF REMEDY



TOTAL IN-DEPTH REMEDIES CASES BY TYPE OF REMEDY
(excluding U.S.)



Where antitrust authorities interfere in a deal and require remedies to address antitrust issues, they have traditionally preferred these to take the form of structural divestments. Selling off parts of the acquiring or target businesses gives the authority certainty that antitrust concerns can be addressed in a clear-cut manner, without the need for potentially burdensome ongoing monitoring.

However, more recently we have been seeing a shift away from this approach. Antitrust authorities are becoming much more willing to accept behavioural remedies (ie commitments relating to the future conduct of the merging parties), or remedies that combine both structural divestments and behavioural commitments (so-called "hybrid" cases). In 2015, 37% of cases resulting in remedies following an in-depth investigation involved either standalone behavioural or hybrid remedies. If we exclude the U.S. from the mix, this figure increases to 62%. This is a significant change, and a trend that has been building over the past few years and is expected to continue to do so going forward.

China has been a frontrunner in this trend – more information is set out in the box below.

Moving west, in the EU four[1] out of seven conditional decisions following an in-depth probe involved behavioural remedies, including commitments such as the licensing of a brand or asset, or granting access to a network. This is despite Commissioner Vestager's claims that *"the more structural [the remedy] the better"*. And EU Member States are following suit: every one of the 2015 in-depth conditional clearances in Germany, Hungary, the Netherlands, Spain and the UK involved behavioural remedies in some form. This picture is mirrored in Turkey.

The U.S. is the clear exception to the trend, with 92% of remedies imposed following a Second Request in 2015 being structural. This could be a sign of the attitude of the U.S. antitrust agencies to ongoing behavioural commitments. Or it could be a result of the nature of the deals that have been reviewed in the U.S. in 2015 – 40% of remedies cases are pharmaceuticals mergers, usually involving concerns in relation to large numbers of individual product lines which are more naturally addressed by selling off one of the overlapping products than requiring on-going commitments. We look more at the split of cases by sector later in the report.

It is also worth mentioning at this stage that, out of the 23 structural remedies imposed in the U.S. in 2015, 21 (91%) involved an "upfront buyer", ie where the authority requires the merging parties to identify a purchaser for the divestment business, of which the authority approves, before the conditional clearance is granted. These are typically required where the authority has concerns over the number and viability of potential purchasers for the business being divested. While the use of upfront buyers by authorities used to be employed only exceptionally, we are seeing them used more frequently. In 2015, in addition to the U.S., the European Commission (in two of five in-depth cases involving structural remedies) the UK CMA (in four remedies cases at phase 1) and the French Competition Authority (in one of two cases involving divestments at phase 1) all made use of upfront buyers. This increase is perhaps one of the reasons why we are seeing merging parties seeking to avoid the imposition of formal remedies by making pre-emptive divestment arrangements.

Returning to the structural versus behavioural remedies point, it is not just in conditional clearances following in-depth investigations that we are seeing this trend. At phase 1, 39% of conditional cases involved behavioural or hybrid remedies. Commitments have ranged from price caps (in one UK case, which is unusual and due to the peculiarities of the industry) and maintaining services to compliance with open access conditions and non-discrimination. These data are as, if not more, surprising than the situation with in-depth probes: phase 1 is generally not seen as a forum for agreeing ongoing commitments with an authority given the usually tight timeline of getting a remedies package agreed within the phase 1 deadline.

Putting the U.S. to one side, one reason for this general shift towards behavioural remedies may be that authorities are getting more comfortable with accepting behavioural commitments that are effectively structural remedies "in disguise". The UK CMA's conditional phase 1 clearance of Müller's acquisition of Dairy Crest's dairy operations is a good example. Müller committed to offer an option to a rival dairy to process certain volumes of milk in Dairy's Crest's dairy each year, a commitment which the CMA has been clear in describing as "quasi structural".

Having said this, many of the behavioural remedies that we have seen this year are "purely" behavioural, and not merely disguised divestments. It appears that authorities are just in general becoming more willing to think creatively about addressing antitrust concerns. This is good news for merging parties. Parties considering offering innovative solutions should, however, do this as early as possible in the merger control process. This will give the authority time to test the proposals with the market and get comfortable that they address the antitrust concerns identified.

China remains the most prolific user of non-structural/behavioural remedies

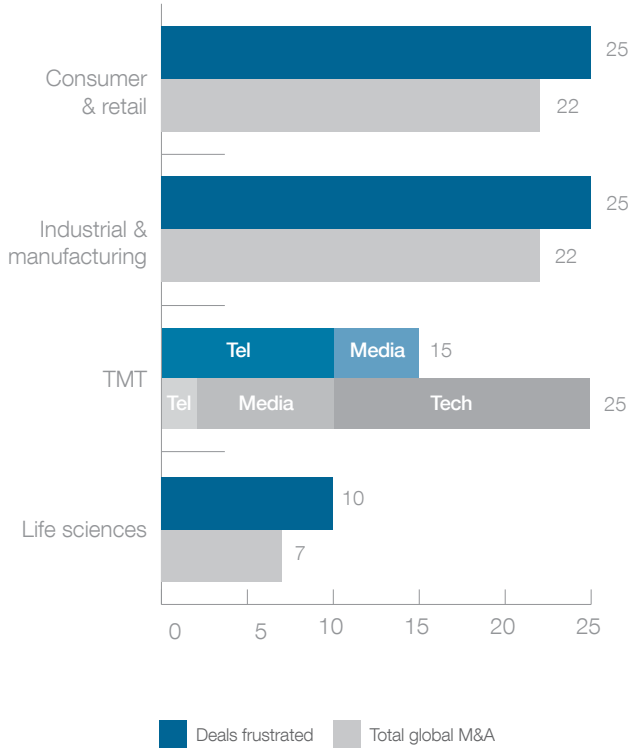
- MOFCOM has traditionally favoured behavioural commitments over divestments.
- Even in multinational deals where other antitrust agencies have required divestments it has shown its willingness to accept complex packages of behavioural commitments.
- In its 2015 conditional clearance of Nokia's acquisition of Alcatel-Lucent, MOFCOM accepted a suite of commitments over Nokia's practices and policies in relation to mobile phone standard essential patents.
- The other conditional clearance in 2015 is in fact a surprising break from the norm as it comprised a purely structural remedy (NXP was required to divest its RF power transistor business to a Chinese state-owned enterprise in order to obtain clearance for its acquisition of Freescale).
- Despite this anomaly, we expect MOFCOM to continue with its preference of behavioural remedies in the coming year.

1. Liberty Global/De Vijver Media, PRSfM/STIM/GEMA JV, DEMB/Mondelez JV, Orange/Jazztel

Telecoms and life sciences deals accounted for the highest ratio of antitrust intervention

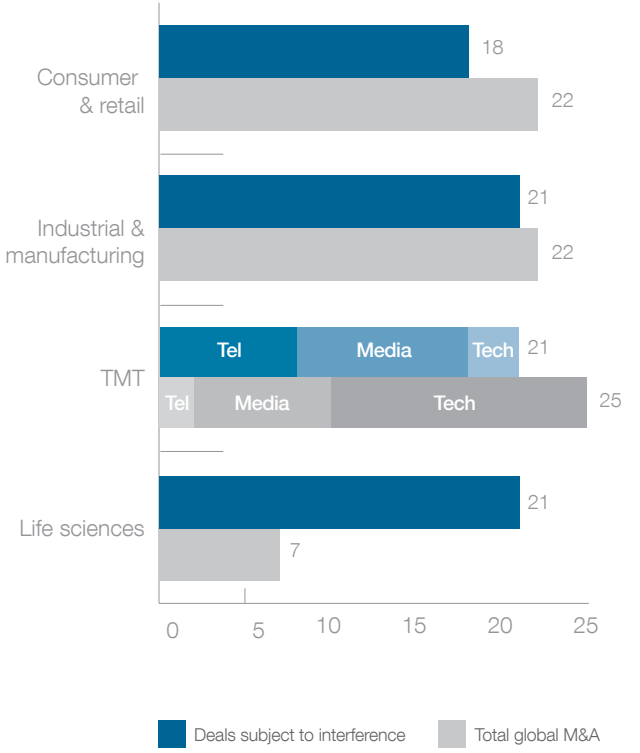
TOTAL DEALS FRUSTRATED (PROHIBITED OR ABANDONED) BY SECTOR (VS TOTAL GLOBAL M&A)

(% volume)



TOTAL DEALS SUBJECT TO INTERFERENCE (REMEDIES) BY SECTOR (VS TOTAL GLOBAL M&A)

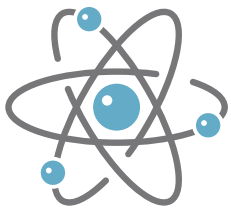
(% volume)



According to Thomson Reuters data[1], the split by four key sectors of completed global M&A activity (by volume) in 2015 was as follows: consumer/retail 22%, industrial/manufacturing 22%, TMT 25% (split into technology (15%), media (8%) and telecommunications (2%)) and life sciences 7%. We have compared this data with the sector split for deals subject to antitrust intervention in 2015.

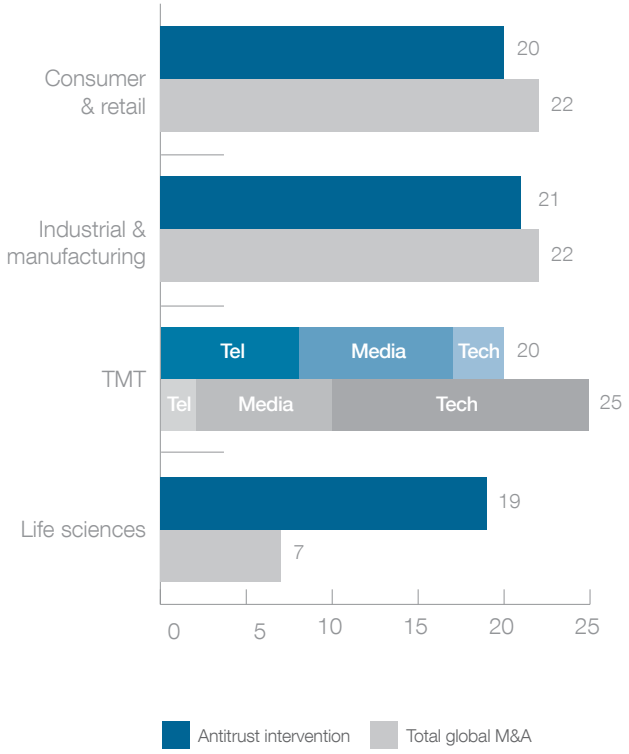
The proportion of deals frustrated (ie prohibited or abandoned) in each sector closely follows the split of overall M&A activity: consumer/retail 25%, industrial/manufacturing 25%, TMT 15% and life sciences 10%. However, looking at the split within TMT gives a rather different story. Media and technology deals together accounted for 23% of all global M&A in 2015 but only 5% of deals frustrated by antitrust. Telecommunications deals on the other hand made up only 2% of all global M&A, but 10% of deals frustrated in 2015: a five-fold difference. This shows that last year a higher ratio of telecoms mergers were frustrated as a result of antitrust concerns. This is understandable and a result of a large amount of recent industry consolidation, which is set to continue into 2016.

For deals subject to interference by antitrust authorities we see another interesting story. Life sciences mergers accounted for 21% of such cases. This is compared to 7% of all 2015 M&A activity. Life sciences deals have therefore clearly attracted a higher ratio of antitrust interference and are more likely to result in remedies. As with the telecoms sector this is primarily a result of major industry consolidation. We saw earlier in the report that 40% of remedies cases in the U.S. in 2015 were life sciences deals.



TOTAL ANTITRUST INTERVENTION BY SECTOR (VS TOTAL GLOBAL M&A)

(% volume)



Looking finally at the sector split for all antitrust intervention in 2015, the above two stories can be observed from the data, with the life sciences trend being more noticeable simply due to the greater number of cases involving antitrust interference when compared to those frustrated (92 versus 20).

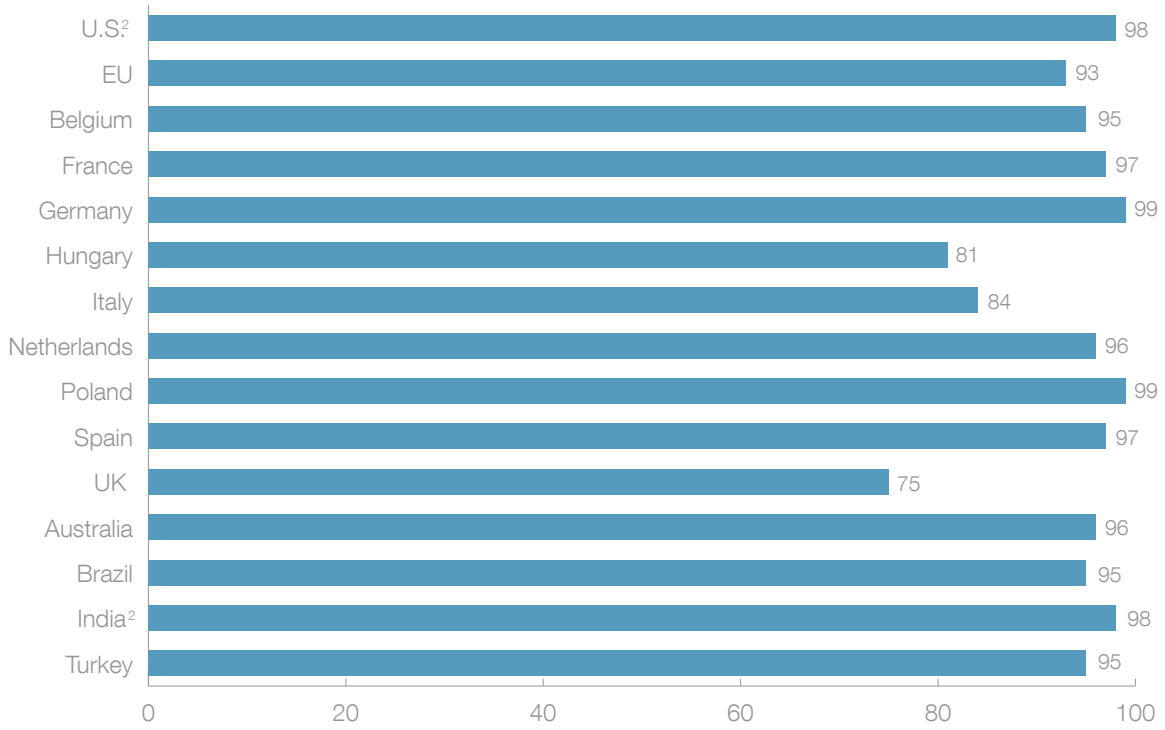
There are a number of big ticket telecoms and pharmaceuticals deals already in the pipeline in 2016 (some already undergoing the merger control review process), building on the industry consolidation of recent years and again reflecting a willingness to attempt deals which are challenging from an execution perspective due to antitrust concerns. Early signs are that antitrust will play a large part in these transactions. We will be able to comment in the next edition of this report whether, like 2015, we see mergers in these sectors accounting for a high level of antitrust intervention.

1. Thomson Reuters sector splits have been re-named to correspond with our categorisations.

The vast majority (95%) of deals get cleared at phase 1, without remedies, and generally in less than 30 days

TOTAL DECISIONS THAT RECEIVED UNCONDITIONAL CLEARANCE IN PHASE 1[1]

(%)



This is great news for merging parties. Looking more closely at the data, in nearly all jurisdictions surveyed over 80% of total deals are cleared unconditionally at phase 1, with many in fact exceeding 90%.

The UK is a clear outlier at 75%. But this can be explained by the voluntary nature of the UK merger regime where, as noted previously, many unproblematic cases simply do not get notified. It necessarily follows that a higher proportion of cases reviewed by the CMA raise antitrust issues. For more information on China, see the box.

In terms of the timing for these phase 1 clearances, it is also good news for merging parties. Some authorities clear deals in a very short period, eg Germany (average of 13 working days) and Spain (average of 16 working days). Only a small number of jurisdictions on average take longer than 30 working days. Again we see the UK as an outlier, with an average of 33 working days, but it is important to note that this still falls short of the 40 working-day phase 1 deadline, showing that the CMA is making a concerted effort to decide cases quickly. Based on 2015, the CMA is on track to clear 70% of "no-issues" cases within 35 working days, a commitment made in its Draft Annual Plan for 2016/17.

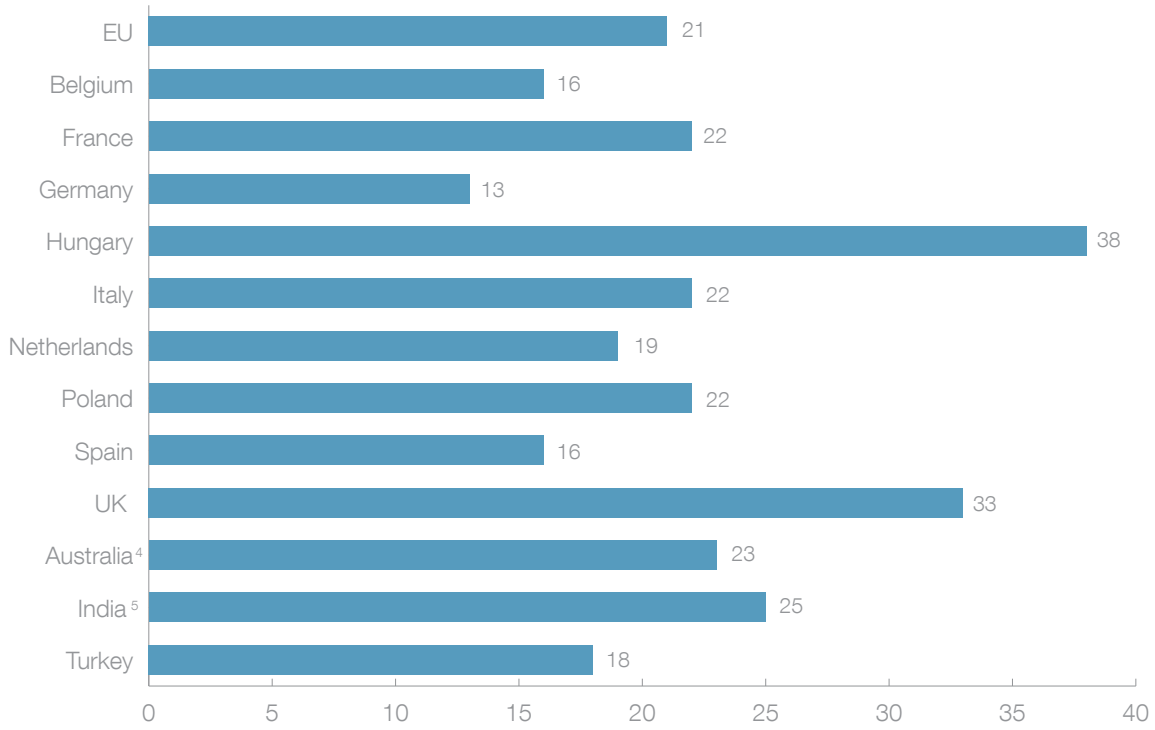
In the U.S., the initial waiting period is 30 calendar days, but parties withdrawing and re-filing notifications is not uncommon, meaning that this period is often longer. Having said this, the majority of deals (around 60%) are granted "early termination", meaning that clearance is received before the end of the initial waiting period.

The existence of simplified procedures is helping to get deals cleared quickly. Seven of the 16 jurisdictions surveyed have such a procedure, which will generally apply where a transaction meets certain conditions (intended to capture no-issues cases) and usually involves a less detailed filing form and a streamlined investigation period. In the EU, 70% of cases in 2015 were reviewed under the simplified procedure, in Belgium it was 80% and in Australia around 88%. The introduction of a simplified procedure in China has been a real success – more information is set out in the box.

Overall, merging parties can take comfort in the fact that, where there are no substantive issues, by far the most common outcome of a merger review is an unconditional clearance at phase 1 in less than 30 working days. And this is not a result reserved only for deals in non-complex markets that have only a national dimension. As made clear by EU Competition Commissioner Vestager, commenting on the European Commission's unconditional clearance of Intel's acquisition of Altera: *"...multibillion euro deals in complex industries can be cleared unconditionally after an initial investigation. Our decision demonstrates that relevant deals can be swiftly approved if they raise no competition concern."*

AVERAGE PHASE 1 INVESTIGATION PERIOD[3]

(working days)



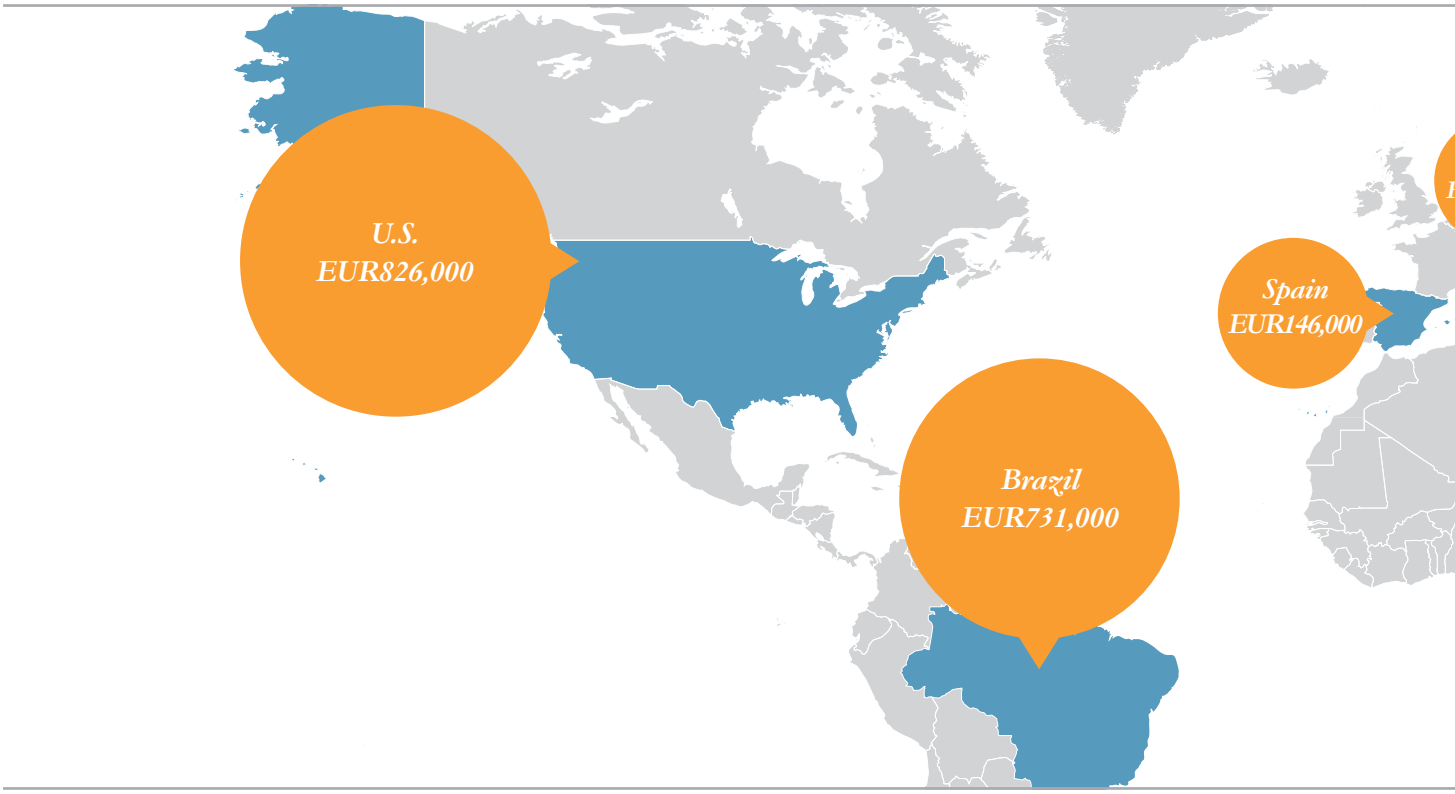
China: MOFCOM is taking real strides to streamline the merger process

- The introduction of the simplified procedure has been a major success.
- 75% of cases (237 in total) fell within its scope in 2015. All were cleared unconditionally.
- In terms of timing, 78% of simplified cases were cleared within around 17 working days and practically all the remainder (bar one case) were cleared in an average of around 36 working days.
- Together with efforts by MOFCOM described earlier to restructure case teams to reduce the length of the pre-acceptance period, we expect to see average total review periods dropping further.

1. No figure has been provided for China as it is not possible to compare in a like-for-like manner.
2. Based on best estimates.
3. No absolute figure is provided for the U.S. as this information is not public. No figure is provided for China as it is not possible to compare in a like-for-like manner. Average durations for Italy and Poland have been converted from calendar days into working days using an approximation – these figures may include public holidays.
4. Based on best estimates for duration of simplified cases.
5. Based on best estimates. Requests for information may "stop the clock" and result in longer review periods.

Authorities are clamping down on parties who fail to file

ENFORCEMENT ACTION AGAINST PARTIES WHO FAIL TO FILE



Most jurisdictions across the globe have "mandatory" merger control regimes, meaning that if the parties meet the filing thresholds they must file or face fines and other sanctions. In the past year we have seen a real increase in the appetite of antitrust authorities to enforce the merger rules and to hand out infringement decisions and fines for failures to file.

In 2015, six of the jurisdictions surveyed took enforcement action against parties they suspected of failing to file. Total fines imposed in these cases have reached EUR2.2 million.

But this is only part of the story. We have seen antitrust authorities all around the world taking a similar stance. Enforcement action has also been taken in 2015 in Austria, Croatia, Denmark, Latvia, Lithuania, Mexico, Norway and Taiwan, resulting in a further EUR2 million in fines (giving a grand total of EUR4.2 million).

The U.S. authorities are among the strictest enforcers, and hand out some of the largest fines. Interestingly, in two of the three infringements in 2015, the parties had relied on an exemption from the filing requirement. However, the FTC looked closely at the parties' conduct and, adopting arguably narrow readings of the exemptions in question, concluded that they did not apply and a filing should have been made in each case. These examples serve to show the real depth of inquiry that the authorities are willing to undertake to ensure compliance with merger control rules.

In China, MOFCOM has ramped up enforcement of the merger rules and has been vocal about its efforts – see the box for further details.

Even in voluntary regimes, such as the UK, there may be consequences of parties deciding not to file a transaction which raises antitrust issues. The CMA has reinforced its team (the "Mergers Intelligence Committee") which monitors the market for deals that have not been notified but at which the CMA wants to take a closer look. Since the regime reforms in April 2014 around 30 transactions which were not notified have been "called in" and fully examined by the CMA (some even resulting in remedies, eg GTCR/Gorkana where the CMA accepted divestments to remedy concerns in the supply of media contact databases).

We expect this trend of increased enforcement to continue in 2016. When analysing filing requirements for a particular deal, parties should therefore take into account recent enforcement action to get a full picture of the risk. In jurisdictions where exemptions from filing are available, they should not assume that such exemptions apply without a full analysis in light of the specific transaction.

China: a strict enforcer of the merger control rules

- In 2015 alone, MOFCOM reportedly imposed penalties in nine cases (only five of which have been made public).
- This marks a serious increase when it is considered that only six penalties were imposed in the whole of the previous six years.
- We expect to continue to see this phase of active enforcement and possibly, to provide sufficient deterrence, to see fine amounts increasing to levels higher than the typical cost of a merger filing.

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