International Comparative Legal Guides

Merger Control 2021

A practical cross-border insight into merger control issues

17th Edition

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The principal merger authorities in the United States are the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ). The agencies share jurisdiction; and for transactions subject to premerger reporting obligations, the notification must be submitted to both agencies, and both agencies may conduct a preliminary review. Under an interagency clearance agreement, only one of the agencies will open a formal investigation into any particular merger.

In addition to the antitrust agencies, various sectoral regulators have jurisdiction over mergers in their particular industries. Depending on the authority granted under the governing legislation, the sectoral regulator may have exclusive, primary, or concurrent jurisdiction. Where its jurisdiction is exclusive or primary, the sectoral regulator often receives comments from the FTC or DOJ.

1.2 What is the merger legislation?

The primary substantive merger provision is Section 7 of the Clayton Act, codified at 15 U.S.C. § 18, which prohibits the acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly". Mergers may also be reached under the substantive provisions of: Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits contracts, combinations, or conspiracies in restraint of trade; Section 2 of the Sherman Act, 15 U.S.C. § 2, which prohibits monopolisation, attempt to monopolise, and conspiracy to monopolise; and Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair methods of competition.

The primary procedural provision governing merger review is Section 7A of the Clayton Act, codified at 15 U.S.C. § 18a and more commonly known as the Hart-Scott-Rodino Antitrust Improvements Act (HSR or Hart-Scott-Rodino) amendments to the Clayton Act. HSR imposes premerger notification obligations on parties to non-exempt transactions when certain thresholds are exceeded (see question 3.1 below). For transactions that fall below HSR thresholds or that are otherwise exempt from HSR, the agencies may conduct investigations using their general investigative powers derived from other statutes.

1.3 Is there any other relevant legislation for foreign mergers?

The United States does not have competition laws specifically applicable to foreign mergers. Various sectoral laws and national security laws do address foreign mergers that are within the scope of their jurisdictional provisions. Transactions where foreign persons will purchase or invest in a U.S. business, and which have a potential impact on national security, may require separate notification and approval by The Committee on Foreign Investment in the United States (CFIUS).

1.4 Is there any other relevant legislation for mergers in particular sectors?

The federal legislation granting authority for oversight of traditional regulated industries – for example, banking, communications, transportation, and certain utilities – often includes provisions for merger reviews by the sectoral regulator. Similarly, state-level legislation often provides for merger reviews by a public utility commission, an insurance commission, or another regulator with authority over a specialised sector. Such reviews are often conducted under a standard that does not focus solely on competitive effects and that takes into account "public interest" considerations or other factors.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

As discussed in question 1.4, certain industries are subject to additional regulation by sectoral authorities. In relation to the banking sector, certain transactions, or portions of transactions, that are subject to review by the Federal Reserve Board or the Board of Governors of the Federal Reserve System are exempted from the requirement to make filings under the HSR Act. Copies of the materials submitted to those authorities must be provided to the FTC and DOJ.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

For purposes of the substantive reach of the United States antitrust laws, a "merger" potentially includes any acquisition of

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assets or stock or share capital of another person. For purposes of the procedural reach of premerger notification obligations under Hart-Scott-Rodino, a "merger" potentially includes any acquisition of assets, voting securities, or non-corporate interests (such as partnership interests or limited liability company membership interests) of another person. Notwithstanding the broad reach, numerous classes of assets and voting securities are exempted by legislation or regulation (see question 2.7 below).

A transaction does not need to confer "control" to be cognisable under United States law. That is, "acquisition of control" of the target is not an element of United States merger control. An acquisition of a less-than-controlling interest may be reached substantively if it results in an adverse competitive effect due to altered incentives and procedurally under HSR if it exceeds reporting thresholds and is not otherwise exempt.

Nonetheless, the concept of "control" is carefully defined in the Hart-Scott-Rodino regulations because it is relevant to the operation of many provisions, including determining the identity of the acquired or acquiring "person", the scope of the holdings of the "person", and the set of transactions that must be aggregated for the purposes of assessing a particular merger. In assessing "control", different tests apply depending on whether an entity is incorporated. In particular, "control" means:

(1) either (i) holding 50 per cent or more of the outstanding voting securities of an issuer, or (ii) in the case of an unincorporated entity, having the right to 50 per cent or more of the profits of the entity, or having the right in the event of dissolution to 50 per cent or more of the assets of the entity; or
(2) having the contractual power presently to designate 50 per cent or more of the directors of a for-profit or not-for-profit corporation.

Special rules apply to trusts. Detailed rules and interpretations inform the measurement of the percentages invoked in the definition.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes. Any acquisition of a minority interest in an entity may be subject to FTC or DOJ review. An acquisition of even a small, non-controlling stake in an issuer of voting securities may require HSR notification. An acquisition of non-corporate interests, however, will not be HSR-reportable unless the acquiring person will control the entity in question.

2.3 Are joint ventures subject to merger control?

Yes, where the joint venture involves the acquisition of assets or voting securities or non-corporate interests. For example, formation of a new joint venture entity to which one or more persons will contribute assets, and in which those persons will receive equity interests in return, may require HSR notification. Acquisition of a joint venture entity, or of a party's stake in an existing joint venture, may also be reportable. Formation of a joint venture that is purely contractual, however, is not subject to merger control, though it is within the reach of substantive antitrust law.

2.4 What are the jurisdictional thresholds for application of merger control?

For the purposes of the substantive reach of Section 7 of the Clayton Act and other United States antitrust laws, the sole jurisdictional test is geographic – the parties must be "in commerce or in any activity affecting commerce [of the U.S.]". Even transactions that are too small to trigger premerger notification (see the next paragraph) remain subject to challenge and prohibition if they result in an adverse competitive effect in violation of law.

The procedural reach of premerger notification obligations under Hart-Scott-Rodino is narrower, applying only to transactions that satisfy three jurisdictional tests:

- *The Commerce Test.* One of the persons must be in commerce or in any activity affecting commerce. "Commerce" for this purpose means "interstate United States commerce", but the term is broadly construed, and it would be extraordinary in an otherwise-reportable transaction for this test to be deemed not met.
- *The Size-of-Transaction Test.* As a result of the acquisition, the acquiring person would hold an aggregate amount of voting securities, non-corporate interests, and/or assets of the acquired person exceeding $94 million (as of February 27, 2020, using the amount determined and published annually by the FTC by multiplying the baseline figure of $50 million times the percentage change in gross national product since 2003 – note that thresholds can therefore increase or decrease). The terms "as a result of" and "aggregate amount" mean that creeping acquisitions, multi-step acquisitions, and acquisitions involving multiple affiliates of the same parents will sometimes be caught, even if the value of a particular step or a particular merger agreement is below the threshold (see question 2.8 below). The measurement of the size of transaction is subject to detailed regulations that require varying approaches depending on, among other things, whether voting securities, non-corporate interests, or assets are being acquired.
- *The Size-of-Person Test.* If the size of the transaction exceeds $94 million, but not $376 million, at least one "person" involved in the transaction must have annual net sales or total assets of at least $188 million and the other must have annual net sales or total assets of at least $18.8 million (again using the 2020 values of figures adjusted annually). The test varies slightly when the acquired person is the smaller person and is not engaged in manufacturing. The size of each "person" takes into account the sales and assets of the "ultimate parent entity" or "UPE" of the entity directly involved in the transaction as well as all entities the UPE directly or indirectly "controls". The UPE is identified by successively applying the aforementioned "control" tests to the entity directly involved in the transaction, to any entity that "controls" it, and so on until one reaches either a natural person or an entity not "controlled" by any other entity. The measurement of the size of a "person" is subject to detailed regulations.

In order for a transaction to be subject to an HSR filing obligation, all three jurisdictional tests must be met, unless the size of transaction is large enough that the size-of-person test does not apply. In addition, even if all applicable jurisdictional tests are met, the transaction may qualify for an exemption under any of numerous provisions in the statute and regulations (see question 2.7 below).

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, it does.

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2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

"Foreign-to-foreign" transactions are most likely to require HSR notification where the target holds substantial assets in the United States or makes substantial sales in or into the United States. The HSR regulations include exemptions for certain "acquisitions of foreign assets" and certain "acquisitions of voting securities of a foreign issuer". Each exemption applies more broadly when the transaction is "foreign-to-foreign", but even then the exemptions are limited.

An acquisition of foreign assets is exempt unless those assets, plus any other foreign assets acquired from the same person in a separate transaction near enough in time, generated sales "in or into the U.S." in the most recent fiscal year greater than the HSR size-of-transaction threshold (currently $94 million). If both the acquiring and acquired persons are "foreign persons" and the size of transaction does not exceed the level (currently $376 million) where the size-of-person test ceases to apply, the transaction may still be exempt even if the sales "in or into the U.S." generated by the foreign assets exceed the size-of-transaction threshold. This further requires, however, that neither the aggregate sales in or into the U.S. nor the aggregate total U.S. assets (certain categories excepted) of the acquiring and acquired persons exceed a certain threshold (currently $206.8 million).

An acquisition of voting securities of a foreign issuer is exempt, even if it results in "control" of the issuer, if neither the aggregate fair market value of the issuer's U.S. assets (certain categories excepted) nor the issuer's sales in or into the United States in its most recent fiscal year exceed the size-of-transaction threshold (currently $94 million). Additionally, an acquisition of a foreign issuer's voting securities by a foreign person always is exempt unless it results in "control" of the issuer. Further, even an acquisition of a foreign issuer's voting securities by a foreign person resulting in "control" is exempt if the transaction size does not exceed the level (currently $376 million) where the size-of-person test ceases to apply and neither the aggregate sales in or into the United States nor the aggregate total U.S. assets (certain categories excepted) of the acquiring and acquired persons exceed a certain threshold (currently $206.8 million).

Identifying sales "into the U.S." for purposes of these exemptions is often a highly fact-intensive exercise, taking into account a number of factors beyond where a party's customers are located.

In some circumstances, an acquisition of voting securities or non-corporate interests in a U.S. entity may be exempt on the grounds that the entity's assets include exempt foreign assets and the aggregate fair market value of its non-exempt assets does not exceed the amount of the HSR size-of-transaction threshold (currently $94 million).

For HSR purposes, a "foreign person" is one whose ultimate parent entity is not incorporated in the U.S., is not organised under U.S. laws, and does not have its principal offices in the U.S., or in the case of a natural person, is neither a U.S. citizen nor resident. A "foreign issuer" is one that is not incorporated in the United States, is not organised under U.S. laws, and does not have its principal offices in the U.S.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Even where the jurisdictional thresholds identified in question 2.4 above are exceeded, a transaction may qualify under any of the numerous provisions in the HSR statute and regulations for exemption from premerger notification obligations. Most of the exemptions are very technical and subject to detailed definitions and limitations. In rough terms, though, in addition to the "foreign asset exemption" and "foreign voting securities exemption" described in question 2.6 above, the key exemptions are as follows:

- Acquisition of cash.
- Acquisition of goods or realty in the ordinary course of business.
- Certain acquisitions of portfolios of financial instruments in the ordinary course of business.
- Acquisition of certain real property assets not in the ordinary course of business, including certain new facilities, unproductive land, office and residential buildings, hotels, certain recreational land, certain agricultural land, retail rental properties, and warehouses.
- Acquisition of bonds, mortgages, or similar instruments.
- Transfers to or from a federal agency, state, or political subdivision.
- Certain acquisitions by or from foreign governments within their own jurisdiction.
- Acquisitions solely for the purpose of investment, defined to mean an interest of no more than 10 per cent in an issuer and interpreted to mean essentially held passively.
- Certain enumerated classes of acquisitions subject to approval or supervision by sectoral regulators.
- Acquisitions in connection with stock splits and *pro rata* dividends.
- Acquisitions of convertible voting securities (note that the act of conversion may be reportable).
- Certain acquisitions by institutional investors (such as banks and broker-dealers) of 15 per cent or less of an issuer in the ordinary course of business, solely for the purpose of investment.
- Certain acquisitions by creditors upon foreclosure or default or in a *bona fide* workout.
- Acquisitions by gift or intestate succession.

The applicability of these exemptions depends on detailed criteria that may be subject to varying, and evolving, interpretations.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Except in very limited circumstances, a person acquiring voting securities must aggregate newly-acquired shares with any earlier-acquired shares, valuing the latter at their current market price or fair market value rather than historical cost. The same holds for acquisitions of non-corporate interests such as partnership interests or LLC membership interests.

A staged series of asset acquisitions by an acquiring person from the same acquired person may also have to be aggregated, particularly where the acquiring person signs the governing letter of intent (LOI) or agreement in principle less than 180 days after either signing a LOI or agreement in principle to acquire other assets from the same acquired person, or completing such an asset acquisition.

Acquisition of an issuer's voting securities in stages may necessitate multiple HSR filings. The HSR Rules contain a series of reporting thresholds for voting securities acquisitions. Clearance at a given threshold applies only to that threshold; it does not permit the acquiring person to cross a higher threshold

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without again completing the notification process. For example, notification at the lowest threshold (currently $94 million) for an acquisition of less than 50 per cent of an issuer's outstanding voting securities will not enable the acquiring person to acquire a 50 per cent or greater stake without making another filing, if the second filing is otherwise required.

The mere passage of time between successive acquisitions of an issuer's voting securities may also necessitate an additional filing. Completion of the HSR notification process gives the acquiring person five years from expiration or termination of the waiting period to acquire additional shares of the same issuer without another filing, so long as the acquiring person does not cross a higher threshold. After five years, however, acquisition of additional voting shares will necessitate another filing even if a higher threshold will not be exceeded, assuming notification is otherwise required.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

If the jurisdictional thresholds are met and an exemption is not available, notification is compulsory. There is no deadline for notification, subject to the qualification that the transaction cannot lawfully be closed until the notification has been filed and a statutory waiting period has been observed.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Many transactions that satisfy the basic HSR jurisdictional thresholds qualify for an exemption under which notification is not required. If the requirements for any particular exemption are satisfied, a transaction need not be reported even if the jurisdictional thresholds are met (see questions 2.6 and 2.7 above).

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Improper failure to file currently can result in civil penalties of as much as $43,280 per violation per day; this amount is adjusted annually for inflation. Fines imposed for such violations have exceeded $10 million, particularly where an acquiring person has failed to make the required HSR filings on multiple occasions. Further, the government has the authority to seek injunctive relief unwinding a transaction completed in violation of the HSR Act.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

In an asset acquisition, it is lawful for an acquiring person to complete an acquisition of exempt foreign assets while delaying its reportable acquisition of non-exempt U.S. assets from the same acquired person pending expiration or termination of the HSR Act waiting period, provided that the foreign assets in the aggregate are exempt.

If an acquisition of voting securities or non-corporate interests is reportable, however, then it is not permissible to carve out completion of the transaction in the United States while completing it elsewhere.

3.5 At what stage in the transaction timetable can the notification be filed?

In a consensual transaction, the parties may file notification any time after: (a) they have executed a written agreement or LOI, the formality of which is not specified under the rules (the document may be primitive and non-binding); and (b) they are prepared to certify that they have the good faith intention to proceed with the transaction.

In a tender offer or other acquisition of voting securities from third parties, the acquiring person may file notification and initiate the review process any time after: (a) it provides notice of its intentions to the issuer of the voting securities to be acquired, together with certain details specified in the applicable regulation; (b) it is prepared to certify that it has the good faith intention to proceed with the acquisition; and (c) in the case of a tender offer, it has publicly announced its intention to make the offer.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Normally the initial waiting period under the HSR Act is 30 calendar days after all acquiring and acquired persons have filed the required notifications. The initial waiting period is only 15 days for all-cash tender offers and certain bankruptcy-related transactions. The waiting period cannot end on a Saturday, Sunday, or federal holiday; rather, it continues through the next business day. The waiting period may be terminated before it expires if the parties request early termination and the transaction raises no antitrust concern that cannot be resolved expeditiously. An acquiring person can voluntarily restart the initial waiting period once after filing without paying an additional filing fee by voluntarily withdrawing its notification and re-filing it, with limited updates, within two business days. This step may be taken to facilitate discussions with the reviewing agency aimed at resolving concerns without a lengthier investigation. The parties may not complete the proposed transaction until the waiting period has expired or been terminated.

The reviewing agency can extend the waiting period before allowing it to expire by issuing a formal request for additional information and documentary material (known as a "second request"). Responding to a second request typically entails a burdensome and costly process spanning weeks if not months during which the parties make extensive submissions of documents and data and furnish narrative responses to questions. The parties must certify substantial compliance with the second requests served on them in order to start a second waiting period of either 30 or 10 days within which the government must decide whether to challenge the transaction or let it proceed. The government may challenge a certification of substantial compliance if it believes that a party has failed to respond appropriately, and this may delay the start of the second waiting period. The government's time to decide whether to challenge a transaction often is extended through a so-called "timing agreement", by which the parties agree not to close the transaction without first giving the government a specified amount of advance notice that they intend to do so.

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3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

It is unlawful to complete a HSR-reportable transaction until the applicable waiting period has expired or been terminated. It is likewise unlawful for the buyer to exercise control over the target before the transaction can properly be closed. Violating these prohibitions may result in significant civil penalties and may lead to the transaction being unwound.

3.8 Where notification is required, is there a prescribed format?

Notification requires completion of a prescribed form containing enumerated "items" plus submission of certain categories of documents as attachments. The form calls for: basic information about the parties and the transaction; a breakdown of the filer's most recent year's revenues by industry code; information on the filer's subsidiaries and equity holders; and, where the parties' businesses overlap in one or more industry codes, information about the geographic scope of the filer's business and (for the acquiring person only) prior acquisitions in the overlap code within the past five years whose size exceeded specified thresholds. Required attachments include: the parties' fully-executed agreement or LOI, plus any ancillary non-compete agreements and other agreements between the parties that are needed to understand the transaction; the filer's most recent annual report and audited financials; and, most importantly, documents prepared by or for officers or directors that analyse the proposed transaction with respect to either certain competition-related issues or attainable cost synergies or efficiencies.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

The HSR regulations do not provide for a short form of notification; nor do they provide, apart from the right to request early termination of the waiting period in any filing, for an accelerated procedure for particular types of mergers other than all-cash tender offers and certain bankruptcy-related transactions (see question 3.6 above). As a practical matter, this is not an impediment – the U.S. process does not contemplate pre-filing consultation, and the basic content of the form is largely limited to preexisting documents and accounting data. The form does not call for the parties to define markets, express contentions as to competitive effect, or provide substantive analysis. As a result, notifications can commonly be made within two weeks, and roughly 95 per cent of filed transactions receive clearance within 30 days after filing.

For transactions that present extreme time sensitivity, or that present serious competitive complexity and are likely to undergo detailed review, there are numerous ways parties can affect the clearance timetable. Common mechanisms include providing early informal notification to agency staff (sometimes before public announcement), deferring notification beyond a typical filing date to allow agency staff to conduct preliminary analysis without time pressure, withdrawing a filed notification and re-filing it to double the "initial waiting period" available to agency staff, and voluntarily providing competitive information going beyond the bare-bones HSR notification requirements. The choice of expediting mechanisms is highly judgmental, reflecting the insights and experience of counsel.

3.10 Who is responsible for making the notification?

Acquiring and acquired persons are each responsible for filing a notification form containing their respective information.

3.11 Are there any fees in relation to merger control?

The acquiring person is responsible for paying the HSR filing fee, which currently ranges from $45,000 to $280,000, depending on the size of transaction. Merging parties sometimes contractually choose to allocate the fee among them.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The HSR Rules contain special timing provisions for public tender offers. The acquiring person files first after formally notifying the issuer of its intention to do so. The issuer then has 15 days to file as acquired person (10 days in an all-cash tender offer).

3.13 Will the notification be published?

No. Under the HSR statute the notification is non-public, and the agencies are required to treat its content confidentially, subject to limited provisions for disclosure in an administrative or judicial proceeding or to the U.S. Congress.

Further, if the parties do not request early termination and the government allows the initial waiting period to expire uneventfully, the government will not disclose even that a notification has been filed. If, however, the parties request and are granted early termination, the FTC will issue a short public notice on the next business day that identifies the acquiring and acquired persons and acquired entities and states when early termination was granted.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

For purposes of merger assessment, the United States uses a "substantially to lessen competition" test. That is, the primary substantive merger provision is Section 7 of the Clayton Act, codified at 15 U.S.C. § 18, which prohibits the acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly". The details by which the test is applied in practice are the subject of: extensive case law; government horizontal merger guidelines (most recently the 2010 edition available at: https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf); a detailed government commentary, available at: https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmerger-guidelinesmarch2006.pdf, illustrating enforcement principles based on a prior edition of the merger guidelines; updated government guidelines pertaining to vertical mergers released in June, 2020 (available at: https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf); and much learned commentary.

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4.2 To what extent are efficiency considerations taken into account?

Efficiency considerations are crucial to United States merger analysis, which they influence in two ways. First, they enter into the framing of general substantive standards. For example, United States policy is more permissive than many jurisdictions with respect to vertical mergers, reflecting a view that vertical mergers tend on balance to be efficiency-enhancing. See Section 6 of the Vertical Merger Guidelines: "Vertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers." (Available at: https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.) Similarly, efficiency considerations underlie the structural tests reflected in the safe harbour provisions of the horizontal merger guidelines.

Second, efficiency considerations are expressly recognised as a potential element relevant to evaluation of specific mergers. Under the government's merger guidelines, the agencies will not challenge an otherwise-suspect merger "if cognisable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive" – that is, if the efficiencies "likely would be sufficient to reverse the merger's potential to harm". For efficiencies to be cognisable under the guidelines, they must be merger-specific, verifiable, and derived from sources other than anticompetitive reductions in output or service.

4.3 Are non-competition issues taken into account in assessing the merger?

In general, the substantive test in the United States is currently limited to competition considerations. Non-competition issues, such as effects on labour rates and industrial policy, are not ordinarily taken into account.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

During the review of any merger that undergoes meaningful investigation, the FTC and DOJ routinely initiate contact with customers, suppliers, competitors, and other interested third parties. Complaints are also welcomed from third parties, particularly customers and suppliers of the merging parties.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

Under the HSR statute, the FTC and DOJ have authority to issue a request for information in the form of documents and interrogatory responses from the merging parties. In addition, the agencies have authority under other statutes to issue subpoenas for testimony from employees of the merging parties and to issue subpoenas and civil investigative demands to compel the production of documents, interrogatory responses, and testimony from third parties. The government may impose civil penalties or seek injunctive relief unwinding a merger for violations of the HSR Act (see questions 3.3 and 3.7). In addition, a party's failure to follow an agency directive or court order might lead to sanctions for civil contempt.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

In principle, commercially sensitive information produced during the merger review process is protected against public disclosure, with three exceptions: (a) it may be disclosed in an administrative or judicial proceeding; (b) it may be disclosed to the U.S. Congress upon request; and (c) notice of a grant of early termination of the HSR waiting period is published in the Federal Register, on the FTC website, and on an FTC Twitter feed, even as to otherwise-non-public transactions (see question 3.13 above). More generally, the HSR statute provides that documents and other information filed by the merging parties shall not be made public and shall be exempt from disclosure requirements of the Freedom of Information Act, except as noted in the prior sentence. Other statutes and regulations provide comparable protections for commercially sensitive information produced by third parties.

Notwithstanding the formal protections, commercially sensitive information does sometimes become known as a result of agency communications with the merging parties and with third parties such as customers, suppliers, and competitors.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The Hart-Scott-Rodino process in the United States is a clearance process, not an approval process. For transactions within the HSR statute's jurisdictional scope, the law requires parties to notify the enforcement agencies and to defer closing until after completing a waiting period, so as to enable the agencies to investigate and challenge problematic transactions; but it does not confer a regulatory approval or disapproval power upon the agencies. For the large majority of transactions, the review process ends one of two ways: (a) the statutory waiting period expires without formal agency action, enabling the parties to proceed by operation of law; or (b) the FTC and DOJ grant early termination of the statutory waiting period, enabling the parties to proceed as of the time of the grant. For the relatively small percentage of transactions that result in agency intervention, most are resolved through consent settlements that include remedial steps to address the agency's competitive concerns. Transactions that result in agency intervention, but that cannot be resolved consensually, typically end either with abandonment of the transaction or with federal or administrative (in the case of the FTC) court litigation between the government and the parties. If the HSR waiting period in a reportable transaction has been terminated or permitted to expire without intervention, the agencies do nevertheless have continuing authority to investigate and challenge the transaction (even post-closing), but it is highly unusual for the agencies to do so. The agencies also have authority to investigate and challenge transactions that do not require HSR notification; this is a somewhat more common occurrence.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Where the review process causes the FTC or DOJ to conclude that the transaction would have an adverse competitive effect, the most likely outcome is negotiation of a divestiture or other remedy to resolve the problem. It is not always possible, however,

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for the agency and the parties to negotiate a resolution that would be mutually acceptable; typically, this failure occurs where the scope of the competitive problem, or the scope of the remedial steps needed to cure the problem, is too large relative to the value of the underlying transaction. Both agencies have published guidelines on the type of remedies that they view as acceptable.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The standards applicable to the remedies process in the United States are independent of the nationality of the parties. While the adverse competitive effects that lead to intervention must relate to United States commerce, such effects can be caused by foreign-to-foreign mergers. In those instances, remedies have been imposed.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Merging parties may seek to initiate the negotiation of remedies with the government at any stage in the review process. As a practical matter, however, the FTC and DOJ are unlikely to conduct negotiations until after they first have conducted an investigation that is sufficient to enable them to conclude: (a) that the transaction presents adverse competitive effects that violate the law, thereby warranting intervention; and (b) that they understand the transaction and its effects well enough to craft an effective remedy.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The FTC and DOJ have standard approaches to divestiture obligations, which approaches are reflected in provisions commonly found in consent settlements and which are described in guidance documents. The agencies do not have formal regulations or notices that specify standard terms and conditions. However, they have issued guidelines that discuss the types of conditions they view as preferable.

5.6 Can the parties complete the merger before the remedies have been complied with?

In most instances the parties are permitted to close the merger upon entry of a stipulation (or agreement) to be bound by the terms of a consent settlement that provides for executory remedies, which must be completed in a time frame specified in the consent settlement. If the agencies have questions about the viability of a proposed remedy, they will typically require proof of viability (such as identification of the buyer for divested assets and a detailed divestiture agreement) before agreeing to the consent settlement, but completion of the actual remedy does not ordinarily need to precede closing of the problematic merger.

5.7 How are any negotiated remedies enforced?

The FTC and DOJ have standard procedures for monitoring and enforcing compliance with negotiated remedies, and both have policies of strict enforcement. Parties to settlements are routinely subject to rigorous reporting and inspection provisions. It is common for either agency to appoint a trustee to monitor compliance and ensure that the agreed-upon remedy is effective. Each agency also may appoint a divestiture or selling trustee where an agreed-upon divestiture has not been completed within a specified time frame. In appropriate cases, a divestiture or selling trustee may be authorised to invoke a so-called "crown jewel" provision and compel divestiture of a different asset package from what a party has agreed to divest, though in practice it is unusual for such measures to be enforced.

At the FTC, the Compliance Division enforces merger remedies. At the DOJ, the Office of Decree Enforcement and Compliance enforces merger remedies. Failure to comply with a remedial agreement may result in civil penalties as well as injunctive and other equitable relief and violations of a consent order issued by a federal court can result in civil or criminal contempt penalties.

5.8 Will a clearance decision cover ancillary restrictions?

The merger review process in the United States generally will not cover ancillary agreements. While ancillary restrictions within the merger agreement filed as part of the negotiation will be before the agency, there can be no assurance that such restrictions will be meaningfully examined.

5.9 Can a decision on merger clearance be appealed?

Because the FTC and DOJ must apply to a federal district court if they wish to obtain a preliminary injunction barring the merging parties from closing the transaction, an adverse agency decision necessarily must be presented to another tribunal. The decision of the federal district court may be appealed to a federal court of appeals. The FTC separately has authority to use administrative proceedings in merger cases, and the parties may appeal an adverse administrative decision to a federal court of appeals.

If the FTC or DOJ clears a merger, adversely affected third parties do not have a right of appeal under the HSR statute. Third parties with standing do, however, have separate rights to bring a private action against the merger under the Clayton Act.

5.10 What is the time limit for any appeal?

The time limit for appeal varies, depending on the procedural posture of the decision or action being appealed. In general, though, the time limit is tight.

5.11 Is there a time limit for enforcement of merger control legislation?

No. Although the Clayton Act provides that actions to challenge violations must be brought within four years, an unlawful merger is generally viewed to constitute a continuing violation that can be challenged at any time.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The United States routinely consults with other jurisdictions with

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respect to mergers under common review. Because of confidentiality provisions in the HSR statute (see question 4.6 above), the FTC and DOJ will not share protected information with the counterpart agency unless the parties have executed appropriate waivers. Even if confidential information received from the parties may not be shared, however, the FTC and DOJ often can conduct meaningful consultations with other jurisdictions by sharing theories and publicly available information.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

Most enforcement matters are resolved through consent decrees that impose remedies on the merging parties. To the limited extent that the FTC or the DOJ and the parties are unable to reach a consent settlement and the agency initiates an enforcement action, the results are mixed. This information is presented in the agencies' joint Hart-Scott-Rodino Annual Reports, which may be accessed at: https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

Several proposals that would modify merger control standards or procedures in the U.S. are pending before the U.S. Congress. In addition, the House Antitrust Subcommittee recently released a report that called for significant changes to the antitrust laws, including merger standards, particularly as they relate to technology firms. The report is available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. The likelihood of legislative changes will depend on the outcome of the current Presidential and Senate elections. Currently, proposed changes to the HSR Rules have been announced related to the scope of the definition of "person", the creation of a new *de minimis* exemption for the acquisition of shares in an issuer of not more than 10 per cent, and to clarify how to determine if an entity is a foreign person or issuer for purposes of determining reportability under the HSR Act.

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of October 20, 2020.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

Policymakers in the U.S. currently are debating whether antitrust enforcement requires refinement given concerns about increased corporate concentration. Some commentators have highlighted both digital platform markets and merger enforcement as areas where antitrust enforcement may be improved, specifically through more aggressive enforcement by the FTC and DOJ. See question 6.3 above. However, the question of whether the U.S. antitrust laws are fit to address anticompetitive behaviour in high-tech markets has long been a subject of debate, with some in the past suggesting that the dynamic features of these markets make a high level of antitrust oversight unnecessary. It is possible that there will be new antitrust law restrictions placed on digital transactions, largely depending on the result of the current elections.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

The House Antitrust Subcommittee Report (see question 6.3), and legislative proposals for certain Senators, would alter review standards for digital mergers. The likelihood of adoption of any of these proposals will depend on the results of the current elections.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

While merger enforcement in digital markets can raise difficult questions, such as issues involving potential competition, the FTC and DOJ remain committed to policing mergers that they believe will harm innovation. It can be difficult for the agencies to explain successfully the risk to competition posed by digital transactions, particularly those between traditional providers and new digital providers. For example, the DOJ lost its challenge to the merger of Sabre and Fairlogix after the reviewing court rejected the DOJ's proposed market definition.

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