

# Global Antitrust Filings in M&A Transactions

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# Today's Speakers

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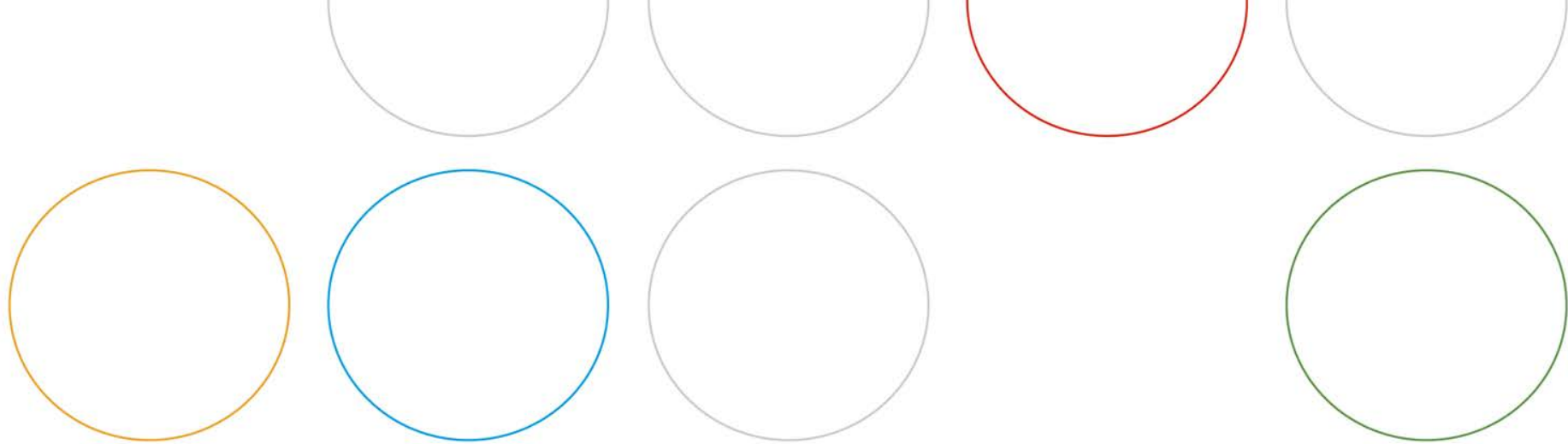
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# Global Merger Control Issues

Understanding and Managing the Worldwide  
Antitrust Clearance Process

Steve Harris

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# Antitrust Merger Control Now Truly Global

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- The US was the first country to establish mandatory antitrust merger reviews for certain transactions, with the 1976 Hart-Scott-Rodino (HSR) Act
- The EU, Canada, and a few other jurisdictions followed suit soon thereafter
- Post-2000 boom: now, over 100 countries have antitrust merger review laws

# The Basics

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- Merger control laws try to stop deals likely to harm competition before they close (“incipiency” law)
- Only deals that meet certain criteria (“thresholds”) are subject to such reviews
- Likely positions of agencies in established jurisdictions reasonably predictable
- In other jurisdictions, agencies’ views are hard to predict, and can be affected by protectionism, politics, lack of experience, etc.
- It doesn’t matter if there is a real competition issue caused by the deal – you will likely still have to file in some jurisdictions

## Mandatory or Voluntary?

- Most countries: mandatory filing for deals meeting thresholds (e.g., U.S., EU, China, Brazil, Japan, Korea).
- A few countries: voluntary (e.g., UK, Australia)

## Suspensory or Non-suspensory?

- In suspensory jurisdictions, it is illegal to close the deal before “clearance” is obtained
- Most countries are suspensory

## Active or Passive Clearance?

- Active: Approval requires affirmative act of agency
- Passive: Approval requires only the passage of time without notice from agency that deal is challenged or blocked



# Where do we have to file?

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## Filing Thresholds

- Vary a lot
- Most based on one or more of the following tests
  - Revenues (sales) of buyer and/or seller (in Jurisdiction X or Worldwide)
  - Market shares in that jurisdiction

# What happens if we don't file?

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- **Mandatory jurisdictions may impose:**
  - Large fines
  - Orders requiring the deal to be undone (“unscrambling the egg”)
  - Closer scrutiny of the deal and more intrusive remedies
  - Closer scrutiny of subsequent deals, or fines when later deal brings earlier failure to file to light
  - (worst case): prohibit company from doing business in that jurisdiction/ revoke business license (e.g., China)
- **Voluntary jurisdictions:**
  - No fines or other penalties, but:
  - Not filing does not guarantee that deal will not be reviewed if the agency chooses to do so – if so, must cooperate with review or risk fines

# When do we have to file?

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- Notification Deadlines
- These vary significantly by jurisdiction
  - Most: Within X days of signing the merger agreement (or a “definitive agreement” – LOI, MOU or Heads of Agreement MAY be enough to trigger)
  - Some: Any time before closing
  - A few: Any time – even after closing (sounds good, but risk having to unwind deal)

# What's required for filing?

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- Most jurisdictions have a form that requires disclosure of certain information, typically:
  - Lines of business
  - Sales (in country and worldwide, sometimes by product market)
  - Competitive impact of deal (or lack thereof)
  - Major competitors
  - Major customers
- Some jurisdictions (e.g., EU) effectively require pre-filing discussions with agency to “negotiate” the filing
- Some jurisdictions require certain documents to be filed with the form
  - e.g., “In U.S., “Item 4(c) and 4(d) documents””: documents reflecting internal decision making and analysis of deal or, under certain circumstances, similar contemplated deals

# Are the filings confidential?

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- Yes and no
- In some jurisdictions, they are and the agencies strictly protect designated business secrets if they don't contest the designation
- In some jurisdictions, information can be obtained, either in accordance with the law or despite it, with little or no effective remedy for improper disclosure

# Who can block our deal?

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## Agency or Court

- Most Jurisdictions (“Agency Model”) (e.g., EU, China, India, Japan): Agency can block without Court involvement through a “self-executing” decision. In most jurisdictions, parties may appeal agency decision to either a:
  - Special Competition Court (“Competition Appeals Tribunal”); or
  - Court of General Jurisdiction
- Some Jurisdictions (“Judicial Model”) (e.g., US): Only a court can render a decision that prohibits parties from closing. So agency must sue in court to block the deal
  - Agency first does review
  - If agency decides to block deal (often after rejecting parties’ proposed remedies) it must file suit in:
    - Special Competition Court (“Competition Appeals Tribunal”); or
    - Regular Court (in U.S., a federal district court)

# How long does the review take?

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## Clearance Timetables Vary

- Most jurisdictions have 2 phases:
  - Phase 1 (typically, approx. 30 days): for agency quick review to see if it sees any potentially serious issues
  - Phase 2 (typically, approx. 90 days, but can be much longer and can be extended)
    - Requires producing lots of documents and, possibly interviews of employees
    - Presentations by counsel and experts
    - Expensive

# Stopping (or not starting) the clock

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## Clearance Timetables Cannot Be Predicted Precisely in Many Jurisdictions because:

- Some jurisdictions delay starting the clock, often to gain time for review, until the agency “deems the filing complete”
- Some jurisdictions can and do stop the clock during the review for certain statutorily permitted reasons (e.g. a failure to comply with document request in a timely manner)
- Some jurisdictions can and stop the clock for any reason or no reason



# What happens during the review?

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- Internal analysis of deal by agency lawyers and economists
- Discussions with interested entities
  - Customers
  - Competitors
  - Suppliers
  - Others (deal partners and potential partners)
- Discussions with the parties to the deal
  - Frequent communications by phone or email with antitrust counsel
  - Infrequent in-person meetings with business people, counsel and (sometimes) outside economists
- Requests for and review of documents from parties and non-parties

# Is the approval all-or-nothing?

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- Can be unconditional clearance if agency sees no problem
- Can be outright prohibition, if agency sees deal as serious threat to competition and can find no possible remedy short of blocking deal
- But: can be a “conditional” approval, or “approval with remedies”

# What kinds of remedies can be imposed?

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## Types of Remedies:

- Structural (e.g., forced divestiture of subsidiary or part or all of a line of business)
- Behavioral, e.g.:
  - “Hold separate” requirements (parts of business have to continue to act as separate, competing entities)
  - Obligations regarding price, continuing supply to buyers, refraining from competing in certain markets (product or geographic), certain kinds of cooperation with competitors or with buyer of divested assets

# How are the remedies decided?

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- Ultimately, by agency or court
- Can be negotiated during review
- Can even be proposed by parties at beginning, or during, review in some jurisdictions (“fix it first”) (e.g., offer to divest an overlapping business)

# How do we know if the deal is approved?

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- What constitutes approval? (Active or Passive “Clearance”?)
  - Active: Approval requires affirmative act of agency
  - Passive: Approval requires only the passage of time without notice from agency that deal is challenged or blocked
- Written decisions required in some jurisdictions; in some, no written decision required or typically provided
- In some jurisdictions, written decision required only in case of outright rejection or “conditional approval” (approval with remedies imposed)

# What do we need to do to give our deal the best chance of easy, quick, cheap approval?

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## Even before negotiations begin:

- Start thinking about possible antitrust risks as soon as the deal is under consideration
- Put “communications protocols” in place
- Limit distribution of information about the deal to a small “need to know” group from beginning to end

# What do we need to do to give our deal the best chance of easy, quick, cheap approval?

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## Include antitrust considerations in the LOI and SPA/Merger Agreement

- Identify all “must-clear” jurisdictions
- Allocate antitrust risks
  - Conditions precedent?
  - “Hell or high water” clause?
  - Break-up fee?
  - Indemnification?
  - Agreement to propose remedies to agencies?
  - Side letter?

# Business Judgment re Filings

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Consider risks and benefits of choosing not to file in jurisdictions where thresholds are technically met, but:

- Nexus between the deal and jurisdiction is very weak
- Enforcement is unlikely
- Consequences of penalty for non-filing is acceptable business risk



# Coordinating Multijurisdictional Filings

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## Filing and review timetable

- When must filings be made where?
- What's the likely timetable for approvals?
- Include worst case delay scenario
- Clarity re: coordinating counsel & cooperating counsel
- Themes should be consistent – agencies talk with each other!

# Include Possible Antitrust Delays in Business Planning

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Take into account the effect of delays in antitrust review, on:

- Value of deal
- Financing
- Personnel
- Costs
- Other actual or potential deals

# Avoid Risky Information Sharing

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- Competitively Sensitive Information (CSI)
  - Non-Public Prices
  - Costs
  - Business/marketing/sales plans
- Distribute CSI ONLY to personnel that do NOT use that information for competitive purposes day-to-day (“Clean Team”)

# Possible Penalties for Improper Information Sharing

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- Enforcers can punish improper information sharing as cartel conduct
  - E.g., in the U.S., DOJ can treat this as a violation of Section 1 of the Sherman Act (felony), with up to 10 year prison sentences for executives and up to \$100 million fine for the company per count
- Risks are heightened if deal doesn't close
  - Enforcers, customers or competitors may suspect:
    - Negotiations were a sham pretext to exchange information and facilitate collusion
    - Even if negotiations were not a sham, companies can't "unlearn" what they learned about their competitor and may appear to be using the competitor's CSI to make market decisions that harm consumers or competitors

# Avoid Gun-Jumping

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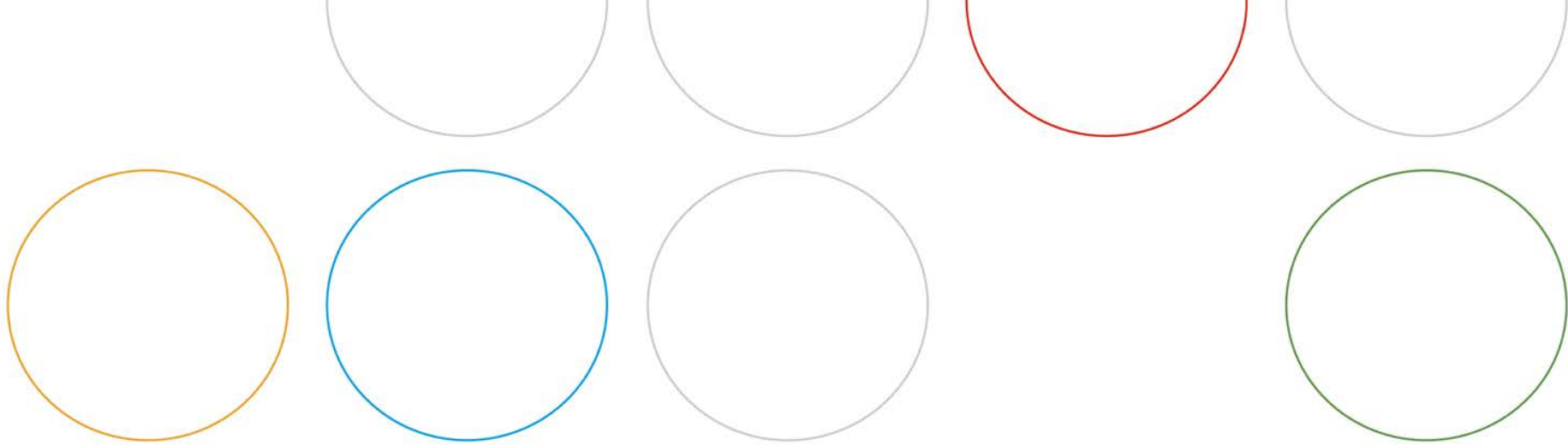
- Gun-Jumping: Law prohibits pre-closing exercise of *de facto* control over company (or *de facto* joint control by companies to be merged)—applies even if the deal raises no competition issues
- Use Pre-Closing Protocols to:
  - Limit distribution of certain categories of CSI until after closing
  - Delay the sharing of certain other categories of CSI until such sharing is *necessary* to integrate the businesses efficiently and effectively post-closing
  - Avoid any actual integration of business decision-making and competitive activities until post-closing

# Possible Penalties for Gun-Jumping

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- Large fines
- Some countries (e.g., U.S.): criminal fines and prison sentences for individuals involved
- Injunctive relief prohibiting closing the deal
- This can be treated the same as the agencies would treat illegal cartel activity by two competitors that have never considered a merger or acquisition between them, regardless of the fact that the deal has received antitrust approval

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# Transactional Antitrust in the U.S.

Richard Falek

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# The Basics

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- Clayton Act (enacted in 1914) prevents acquiring of stocks or assets that may tend to lessen competition or create a monopoly.
- HSR Act (enacted in 1976) requires a filing prior to consummation of transactions above certain thresholds.
- 95% of HSR filings result in no further action – so arguably way overboard, and results in unnecessary cost and delay.
- HSR filing requires provision of various information to DOJ/FTC regarding parties, transaction, relevant industries, and production of certain documents regarding the deal.
- Government has the right to review deal regardless of dollar amount, but HSR gives it a pre-consummation look at "larger" transactions.
- Even if no HSR filing, transaction can still be challenged post consummation as recently demonstrated in U.S. v. Bazaarvoice, Inc.

# HSR Overview

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- Current thresholds (thresholds adjust each year with GNP): Transaction valued at \$303.4 million, typically need to file.
  - Transaction valued between \$75.9 million and \$303.4 million, typically need to file if:
    - One party has prior year sales/assets of \$151.7 million; and
    - Another party has sales/assets of \$15.2 million.
  - Transaction below \$75.9 million typically do not need to file.
- Actual application of all HSR rules to particular transaction often complex, with numerous exceptions and "quirks" – e.g., aggregation, post-closing conversion of shares.
- Set forth in Code of Federal Regulations. 16 C.F.R. Sections 801-3.

# HSR Overview

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- Crucial to reach out early to navigate HSR because failure to comply is punishable by up to \$16,000 per day.
- Reach out for all transactions, even those that seem well below thresholds because of numerous quirks including "aggregation rules".
- Antitrust input on draft agreement:
  - Industry research to shape antitrust risk allocation in agreement and also to give a better sense of likely timing of HSR review.
  - Will edit agreement to reflect client's antitrust approach and to avoid providing unnecessary or potentially provocative information to reviewing agency (agreement will be filed with HSR).

# HSR Logistics

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- Government has 30 days (15 days in bankruptcy or cash tender offers) from time all parties file HSR to decide whether to issue Second Request.
- Parties can request early termination – latest statistics show early termination granted 75% of time.
- If Second Request is issued, transaction delayed until 30 days after "substantial compliance."
- Substantial compliance involves production of documents, data, and deposition of parties, customers, suppliers, and others.
- Government can then seek to enjoin transaction in court or let it proceed.

# Second Request

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- The U.S. government may extend the HSR process with what is commonly known as a “Second Request”
- A Second Request will be extremely cost prohibitive and will likely delay the transaction by months or more
- The various approaches already covered maximize the chances that your transaction falls within the 95%
  - e.g. elimination of buzz words language; focus on language that highlights the strength of the companies while not denigrating remaining competitors

# Negotiating Remedies

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- Most Second Requests end in consent decrees.
- Consent decrees typically involve divestitures or other permanent concessions (e.g., irrevocable license).
- DOJ/FTC driven by political concerns.
- Can argue antitrust merits or can try "Jack Sprat" approach:
  - Jack Sprat could eat no fat.
  - His wife could eat no lean
  - And so between them both, you see,
  - They licked the plate clean.
- For example, it may make business sense to divest underperforming assets which may make sense from a business perspective and, at the same time, give the agencies their "press release."



# Merger Control in the E.U.

Peter Crowther

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# Do we need to file in the E.U.?

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- Main principle: one-stop shop if a filing in Brussels is required
  - European Commission has exclusive jurisdiction over "**concentrations**" with a "**Community dimension**"
  - subject to various exceptions
- If not, individual filing rules for each of the 28 Member States
- Concentration: **Change of control** on a **lasting basis** results from:
  - the merger of two previously independent undertakings;
  - Acquisition of direct or indirect control of the whole or parts of one or more undertakings;
  - The creation of certain kinds of joint ventures.
- Control is the possibility of exercising decisive influence and may be legal or *de facto*
- A shareholding of less than 25% may be sufficient
- Includes sole and joint control



# What is a “Community dimension”?

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## First set of thresholds:

- the **combined** worldwide turnover of the parties exceeds €5,000 million; and
- at least **two** of the parties each have turnovers in the EU exceeding €250 million;

## Second set of thresholds:

- the combined worldwide turnover of the parties is more than €2,500 m;
- at least **two** of the parties **each** have turnovers in the EU of more than €100 m;
- in **each** of at least **three** EU Member States the **combined** turnover of all the parties exceeds €100 m; and
- in **each** of the **same three** EU Member States the turnover of **each** of at least **two** parties concerned exceeds €25 m.

Exception: The ECMR will not apply (in either case) if more than two-thirds of the EU-wide turnover of each undertaking concerned is achieved in the same single Member State.

## 10 February 2014: Commission approves Russian joint venture

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- Joint venture by Rudus East and Lujabetoni, both of Finland
- The joint venture will produce and supply ready-mixed concrete in the St Petersburg area in Russia.
- The Commission concluded that the proposed acquisition would not raise competition concerns, in particular because the joint venture has no actual or foreseen activities within the territory of the European Economic Area (EEA).

# Reallocating Jurisdiction: Pre-Notification

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- Article 4(4) ECMR: Referral from the Commission to the National Competition Authority (NCA)
- Article 4(5) ECMR: Referral from the NCAs to the Commission
- Impacts on notification procedures and timing, but may ultimately result in a smoother notification process and a quicker clearance of the transaction

# Reallocating Jurisdiction: Post-Notification

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- Article 9 ECMR: Member States can ask for (part of) a transaction notified to the European Commission to be referred down to the NCA where there is an impact on competition in a distinct market in that NCA
- Member States have 15 Working Days to make an Article 9 request
- Effect of request is to extend the timetable by 10 Working Days
- Article 22 ECMR: NCAs may ask the Commission to take a case that has been notified to the NCA.
- Member States must make an Article 22 request within 15 Working Days of notification to the NCAs

# Notification procedure

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- Notification prior to implementation
- Extensive pre-notification process
- Clearances usually within 25 Working Days (Phase I)
- Phase II proceedings usually take 6-7 months
- Stop the clock provisions

# Phase II proceedings

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- Launched when the Commission has “serious doubts” about a transaction
- Statement of Objections / Reply
- Oral Hearing
- State of play meetings
- About half of Phase II Decisions involve commitments

# Assessment of transactions

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- Overwhelming majority of transactions are cleared in Phase I
- Substantive test is whether the transaction would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position
- Substantial use of economic evidence and the European Courts provide a check against the Commission's decision-making
- Supplementary Notices dealing with many aspects of notification and assessment

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# Questions?

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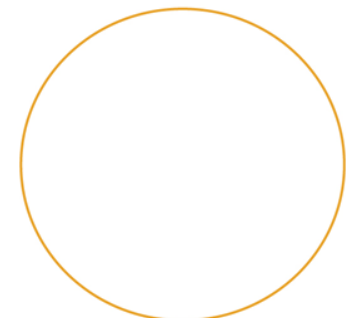
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# Biographies



## Peter Crowther

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Peter Crowther has significant experience with EU merger control, national and international cartels, state aid, trade/sanctions, free movement, and other general EU and competition law. Mr. Crowther also has a long track record of advising broadcasting and telecommunications companies on regulatory matters.

A significant part of Mr. Crowther's practice involves defending companies in a wide range of national and international enforcement proceedings, often simultaneously across a range of jurisdictions. He also devises and implements compliance programs covering areas such as competition, trade/sanctions, bribery, and corruption.

Mr. Crowther is a former law lecturer and former holder of a Jean Monnet Professorship in European Law. He has been recognized in Chambers and Legal 500 since 2006 and was named one of The Lawyer's "Hot 100" for 2011.

Mr. Crowther earned a Ph.D. in EU Competition Law in Telecommunications from Copenhagen Business School in 1997. He received his Masters in Law and Economics from the University of Oxford in 1993 and received a B.A. from Keele University in 1992.

# Biographies



## Richard Falek

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Richard Falek's practice focuses on antitrust and trade regulation issues, particularly mergers and acquisitions requiring Hart-Scott-Rodino Act filings, as well as state and foreign filings and approvals.

He has been lead counsel in nearly 100 domestic and multi-national transactions covering myriad industries. These transactions have ranged from those right at the HSR threshold to tens of billions of dollars. Mr. Falek takes a holistic approach, overseeing all aspects of a transaction, beginning with the analysis of potential antitrust issues before the transaction is structured, through the negotiation of asset purchase or similar agreements, and then through the completion of the HSR process and any other regulatory approvals. Mr. Falek's sole goal is to get the transaction closed with as minimal impact and distractions caused by the regulatory process as possible. He has extensive experience with the Department of Justice, the Federal Trade Commission, and state and foreign regulators.

Mr. Falek has also been involved in varied antitrust litigation, both civil and criminal. He also frequently counsels clients on antitrust and trade regulations issues including matters involving the Sherman Act, the Clayton Act, the Robinson-Patman Act, and state and foreign antitrust laws.

Mr. Falek received a B.A., summa cum laude, in Philosophy and Sociology from the State University of New York - Albany in 1993 where he was Phi Beta Kappa and his J.D. from the University of Pennsylvania in 1996.

# Biographies



## Steve Harris

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Steve Harris concentrates his practice in antitrust/competition law, including litigation, cartel defense, merger control filings, and administrative proceedings before U.S. and international courts and agencies. He has particular experience working with clients in China, Korea, Japan, and Taiwan.

Mr. Harris is an active member of the ABA – Section of Antitrust Law; he currently serves as a member of the International Task Force, and was formerly the Section’s International Officer and member of the governing Council. Currently, he is Chair of the Competition Law Committee of the Inter-Pacific Bar Association; a member of the Antitrust & Competition Section of the International Bar Association; a Life Fellow of the American Bar Foundation; a non-governmental advisor to the International Competition Network (Unilateral Conduct Working Group) appointed by the U.S. Federal Trade Commission; a member of the Advisory Board of the Antitrust & Trade Reg. Report (Bloomberg BNA); a member of the Competition Committee of the United States Council for International Business; and a member of the Antitrust Council and International Competition Policy Working Group of the U.S. Chamber of Commerce.

Mr. Harris received his A.B., magna cum laude, from Cornell University in 1977. He received his J.D. from Columbia Law School in 1982, where he was certified with honors by the Parker Program in Foreign and Comparative Law, and was a Harlan Fiske Stone Scholar.