

ALLEN & OVERY



Global trends in merger control enforcement

February 2017

Building on the trends of previous years, companies continued to show a willingness to engage in strategic deals to bring about further consolidation across different industries. In response, in 2016 antitrust authorities intervened in significantly more transactions than in 2015. Last year, more than 31 transactions were frustrated (i.e. prohibited or abandoned) due to antitrust concerns, with a total value of over EUR 69 billion. In addition, at least 159 deals were subject to interference in the form of remedies. Authorities further imposed record fines on companies that failed to comply with merger control rules. The impact of antitrust intervention on M&A deals therefore continued to increase in 2016, and we do not expect this trend to end anytime soon.

Scope of the report

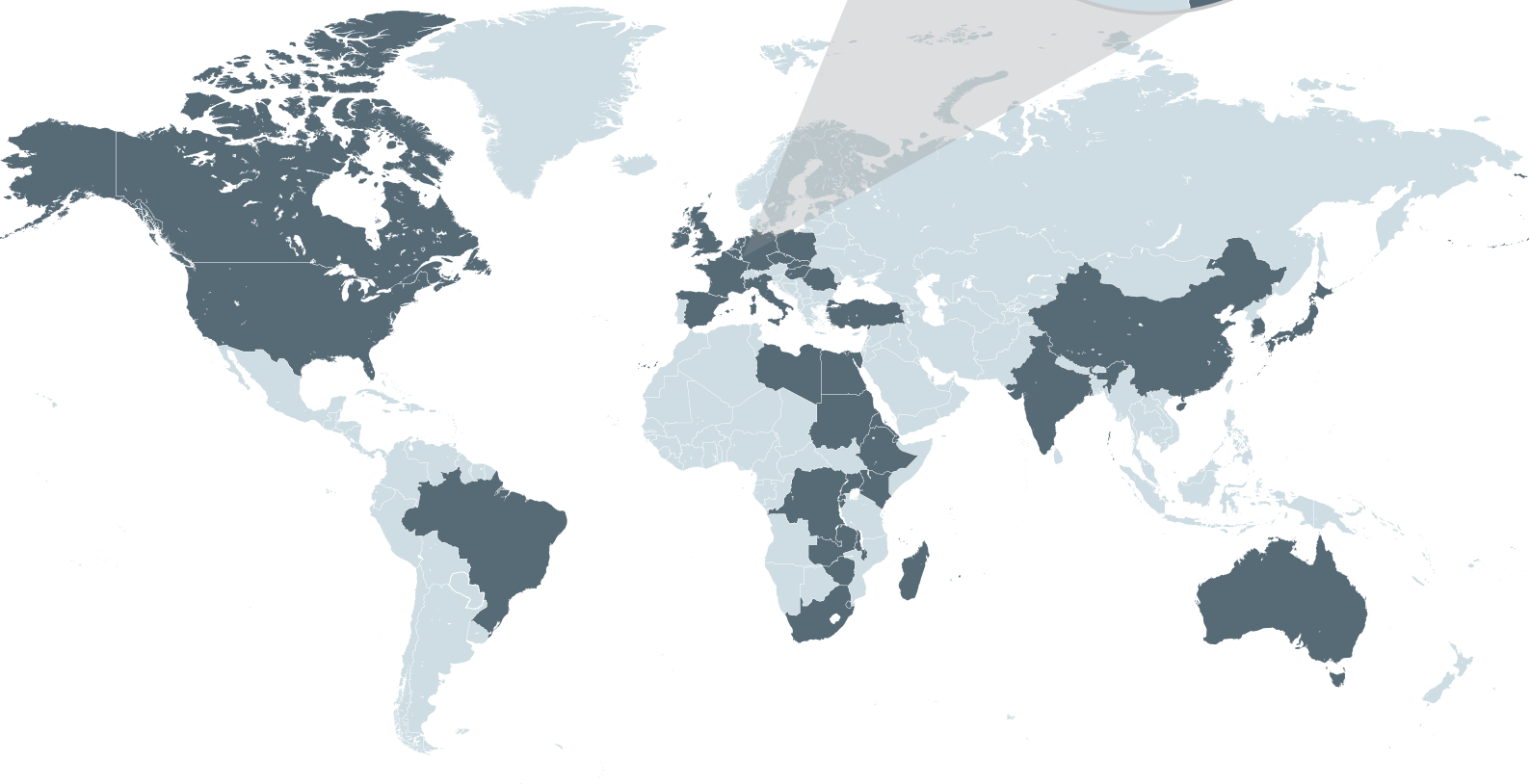
We have collected and analysed data on merger control activity for 2016 from 26 jurisdictions (ten more than in last year's report), focussing in particular on the U.S., EU and China.

JURISDICTIONS SURVEYED

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

EU

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



Introduction

Despite the turbulent political landscape of 2016, we continued to see a steady and resolute application of established merger control rules across the globe. Last year, antitrust authorities intervened in more cases than in 2015, resulting in a higher number of deals frustrated (prohibited or abandoned) because of antitrust concerns, a higher number of deals that were subject to remedies and a much higher number of fines imposed by a wide range of authorities for companies failing to comply with the merger control rules. This reflects the willingness of authorities to step up their enforcement efforts, without fundamentally changing the principles and processes that stem from the solid legal framework underlying most merger control regimes.

During 2016 a number of studies have shown increased levels of concentration across a variety of sectors, with higher profits for a small group of companies and fewer instances of market entries. These findings, combined with political concerns about economic inequalities, have also raised questions about the effectiveness of antitrust laws, including merger control.¹ This has not yet translated into policy changes and it remains to be seen to what extent it will. Many of the trends increasingly identified in academic literature are rooted in wider economic and technological developments rather than regulatory failures.

What we have seen already is an increase in activism and risk aversion by authorities in relation to remedial action in merger control. Moreover there is an increased political momentum to reconsider public interest considerations within merger control. However, we expect a serious policy debate to reconcile these legitimate political considerations with a sound economic analysis to avoid kneejerk reactions which may lead to a regression to regulatory system choices that had been relegated to history. The simplified and flawed rhetoric of “big is bad” – which surfaced particularly in the U.S. presidential campaign (in some instances on a bipartisan basis) – has not translated into misguided policy choices.

The principle of independent decision-making (and judicial oversight) in antitrust enforcement is well established in the majority of jurisdictions with developed merger control regimes. It will be interesting to observe any policy shift within the U.S. agencies. The new acting U.S. Federal Trade Commission (**FTC**) Chairman, Maureen Ohlhausen, stated she will focus on promotion of competition, economic liberty and shrinking “regulatory burden”. In the context of merger control she has been reported to be looking into the burden of second requests.²

The European Commission (**Commission**) is also exploring further simplifications of its merger control process for non-problematic cases, but at the same time is considering a possible extension of its jurisdiction to capture deals that may escape review, particularly in the tech and pharma sectors, and has shown an increased focus on document reviews.

In this report we present the results of our analysis of last year’s application of merger control rules by the antitrust authorities in 26 jurisdictions. We give you the key insights of merger control trends in 2016 as well as the story behind them.

We can already predict that 2017 will be an interesting year.

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 1_See for example the Economist editorial “Too much of a good thing”, 26 March 2016.

2_As reported by MLex on 24 January 2017, Leah Nylen, “FTC’s Ohlhausen says she’ll push to streamline ‘second requests’”.



Antitrust frustrated at least 31 deals with a value of over EUR 69 billion in 2016



Antitrust authorities interfered with 159 deals in 2016 by requiring remedies



Continued willingness of authorities to accept behavioural remedies, with a noticeable increase at phase 1



A rising tide of upfront buyer and fix-it-first remedies, led by the U.S., EU and UK



Telecoms, Transport and Life Sciences deals continued to account for the highest ratio of antitrust intervention



97% of all reviewed deals received unconditional clearance at phase 1



Unconditional clearance was generally obtained within one month, with in-depth reviews on average taking 5-8 months



Fines for failure to file and gun jumping rose sharply to over EUR 105 million in total

Antitrust frustrated over 31 deals in 2016 with a total value of over EUR 69 billion

During 2016 antitrust authorities were faced with “bigger, more complex and more challenging transactions”, with the number of deals being notified “growing and growing and growing”.³ Many of these deals are strategic, and involve considerable industry consolidation. The figures clearly show that the authorities have responded to this challenge. More than 31 deals with a total value of over EUR 69 billion were frustrated in 2016 as a result of antitrust concerns. Of these, eight were formally prohibited, and 23 were abandoned after the parties learned of the authority’s antitrust concerns (either to avoid a prohibition or escape potentially far-reaching remedies).

This is a significant increase compared to 2015, when a total of 20 deals were frustrated with a value of over EUR 60 billion. Even when only considering the same 16 jurisdictions that were also surveyed last year, the number went up by 30% and the value of frustrated deals by 7%. As for 2015, the value of deals frustrated represents around 2% of total global M&A.⁴ But the value figure only covers deals which did not go ahead in the 26 jurisdictions surveyed and only where the deal value was made public. So in reality the actual figure may be much higher.

In 2015 99% of the value of frustrated deals related to deals prohibited or abandoned due to antitrust concerns in the U.S. Last year the picture was much more mixed, with antitrust concerns frustrating deals across the globe. In 2016 only 23% of the value of deals purely related to the U.S., although including the Halliburton/Baker Hughes transaction – abandoned due to antitrust concerns in various jurisdictions, including the U.S, EU, Brazil and Australia – would push the percentage of deals related to U.S. concerns to 63%.

Two other particularly high profile deals abandoned due to antitrust concerns in the U.S. were Staples/Office Depot, abandoned after a judge granted the preliminary injunction to block the deal, and Lam Research/KLA-Tencor, abandoned after the U.S. Department of Justice (**DOJ**) advised that it would not continue with the consent decree that the parties had been negotiating. These cases fit in the trend of deals increasingly being challenged by the U.S. antitrust agencies. According to the DOJ, it has successfully challenged or secured the abandonment of 40 mergers under the Obama administration, compared to only 16 mergers during the eight years of the previous administration.

In the EU, last year marked the first formal prohibition under Commissioner Vestager: Hutchison/Telefonica UK (O2). The parties had offered remedies to address the identified concerns, but the Commission was not persuaded they were sufficient. The prohibition came after the abandoned merger between Danish mobile operators Telenor and TeliaSonera in 2015 which was, according to Vestager, “on the road to prohibition”. Some have therefore hinted at a more interventionist stance against telecoms mergers, particularly in respect of those deals that reduce the number of competing providers from four to three. But the latter part of 2016 has shown that this may not necessarily be the case, with the Commission clearing the joint venture between VimpelCom and Hutchison relating to their Italian subsidiaries, having accepted commitments from the parties which effectively create a new fourth mobile player in the Italian market.

We saw deals being prohibited in four other jurisdictions. The Korea Fair Trade Commission (**KFTC**) blocked the acquisition of CJ HelloVision by SK Telecom, the UK



2015

Deals prohibited: 7
Deals abandoned: 13



2016

Deals prohibited: 8
Deals abandoned: 23

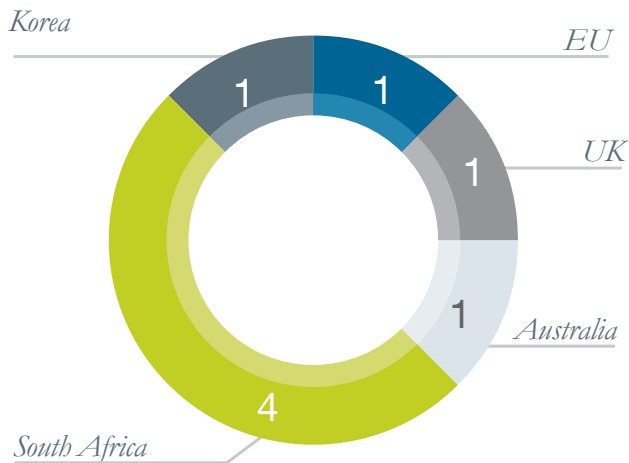


2016

(only including 16 jurisdictions also covered in 2015)
Deals prohibited: 3
Deals abandoned: 23

DEALS PROHIBITED

(by number)

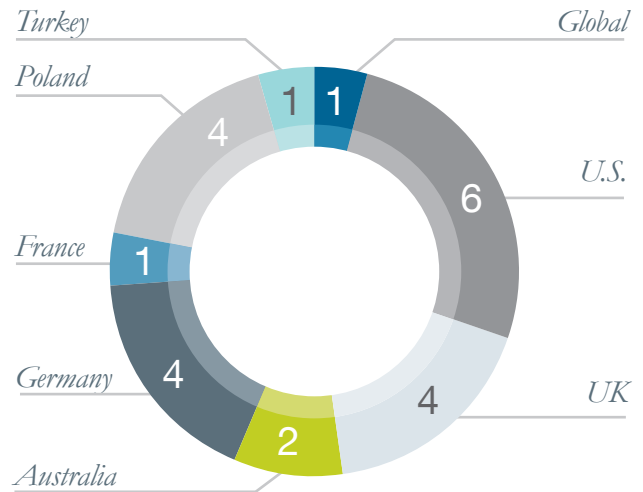


Competition and Markets Authority (**CMA**) unwound the completed acquisition of Trayport by ICE by requiring a full divestment (the first time this has happened in a vertical merger), and in South Africa four deals were prohibited. Australia saw an unusual case where the deal was technically cleared after a phase 1 review, but in reality was tantamount to a prohibition: the parties had already completed the transaction (the Australian merger regime is voluntary and so allows for this) but the divestments required by the Australian Competition and Consumer Commission (**ACCC**) largely reversed the deal. While not strictly amounting to a prohibition, the ACCC has also interfered in at least two auction processes by expressing preliminary antitrust concerns against one or more bidders (the sale of Glencore Rail NSW and Pillar). In both instances the seller decided not to sell its business to one of the bidders considered problematic by the ACCC, which may have been clearly impacted by the authority's intervention.

In the UK the number of deals abandoned due to antitrust concerns increased from one in 2015 to four last year. One of these deals (Safetykleen/Puresolve) collapsed before the CMA had even started an in-depth investigation. Other jurisdictions in which several deals were abandoned due to concerns are Germany (four), Poland (four) and Australia (two).

DEALS ABANDONED

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



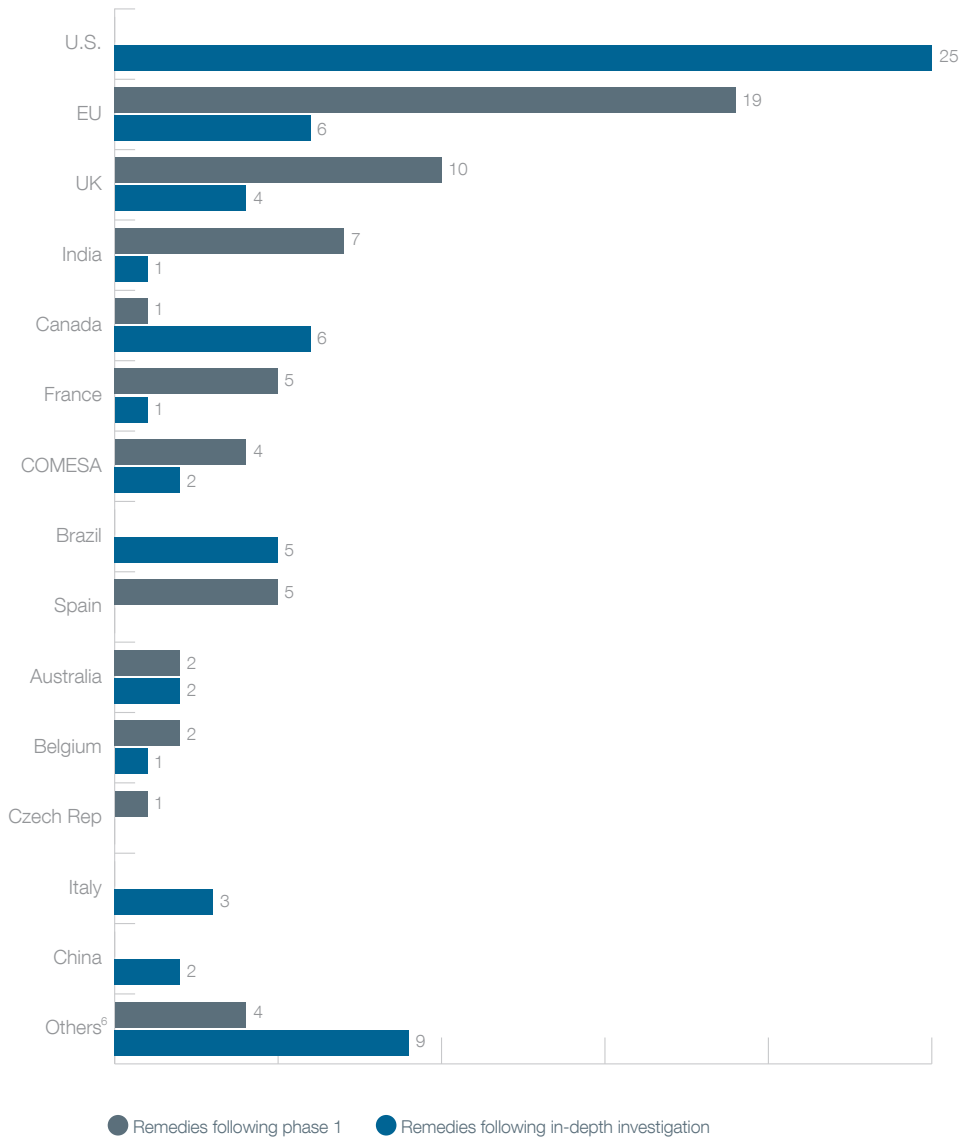
The increased number of deals being frustrated by antitrust authorities highlights the importance of merger control planning for the overall execution risk. Purchasers can mitigate this risk by negotiating appropriate antitrust conditions. According to our research on trends in private M&A, deals conditional on antitrust or regulatory approvals are becoming increasingly common – in 2016 76% of high-value conditional deals were subject to antitrust or regulatory approval. But we are also continuing to see a trend of purchasers increasingly facing reverse break fees (payable by the purchaser to the seller), such as the USD 3.5 billion fee agreed between Halliburton and Baker Hughes or the USD 2 billion fee announced by Bayer in relation to its USD 66 billion merger with Monsanto. Our research shows that reverse break fees are now used in circa 20% of all conditional deals (up from 14% in 2015), with the average fee having risen to 6.5% of the deal value (up from 5%). We expect this trend to continue in 2017.

3_ Stated by then Acting Assistant Attorney General for Antitrust at the DOJ, Renata Hesse, at the IBA's Annual Conference in September 2016.

4_ Source: Thomson Reuters "Mergers and Acquisitions Review", Full Year 2016, which reports value of worldwide completed M&A as USD 3,235,364 million.

Antitrust authorities interfered with 159 deals in 2016 by requiring remedies: significantly up on last year's tally

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



In 2016 we saw even more interference by antitrust authorities in the form of (often far-reaching) remedies. A total of 159 deals were only cleared after the parties and authorities had agreed on conditions designed to address antitrust concerns. In 60 of these transactions remedies were agreed in phase 1, with a slightly higher number of deals (67) being subject to remedies following an in-depth investigation. The remaining 32 deals relate to remedies imposed in South Africa,

where no split between phase 1 and in-depth investigations could be made.

When only considering the same 16 jurisdictions that were also surveyed last year, we see an overall increase in the number of remedy cases of 14%. This increase is caused by a higher number of conditional phase 1 clearances (up from 38 to 51, an increase of a third). The number of cases in which remedies were imposed following an in-depth investigation has remained the same at 54.



2015

Total deals subject to remedies: 92



2016

Total deals subject to remedies: 159



2016

(only including 16 jurisdictions also covered in 2015)

Total deals subject to remedies: 105

After seeing little year-on-year change from 2014 to 2015 in the number of conditional clearances by the Commission, 2016 shows a clear increase. In total, 25 deals resulted in remedies compared to 20 in 2015, with 19 deals being conditionally cleared after phase 1 and a further six after an in-depth investigation. The increase can only partly be explained by the 11% rise in the number of deals reviewed by the Commission. The figures may therefore suggest a more interventionist approach by the Commission, although it could also be the result of a larger number of more risky deals having been attempted in 2016.

In the U.S. we saw 25 cases resulting in remedies in 2016, the same number as in 2014 and 2015. But we have seen a continuation of the trend of agencies choosing to litigate problematic cases rather than settling them with remedies. In last year's edition of the report we observed that there had been a clear shift towards litigation between 2013 and 2015, with more and more complaints being litigated rather than settled. In 2016 all of the complaints filed by the FTC or the DOJ have either been litigated or abandoned (often both) and none of them have ended in a consent decree.

We only saw two conditional clearances in China last year. There were only two remedies cases also in 2015, and four in 2014. This confirms that remedies continue to be relatively rare in China. We are aware of only 28 deals that were subject to remedies imposed by China's Ministry of Commerce (**MOFCOM**) since the Antimonopoly Law came into force in 2008.

Apart from the EU, jurisdictions showing a real increase in the number of remedy cases include India (eight, up from three) and the UK (14, up from nine). But we have also seen numbers decline, for example in Turkey (no remedy cases in 2016 compared to three in 2015), Australia (from six to four) and Brazil (from seven to five). It is interesting to see that for the Common Market for Eastern and Southern Africa (**COMESA**), despite being a very new regime, the authority is certainly not afraid to interfere with deals,

imposing remedies in six cases. With 32 conditional clearances, South Africa had the largest number of deals that were made subject to remedies. But this high number is mainly due to the authority's policy of regularly imposing employment-related remedies on merging parties.

Last year has also shown that parties can sometimes have a difficult time in trying to convince authorities that remedies will address the competition concerns. Remedies must, under most merger regimes, be offered by the merging parties to the authorities. Officials from U.S. agencies in particular have been quite vocal this year about what they expect from parties in terms of remedies offered, stating that the DOJ and FTC "have become justifiably more sceptical about...the likelihood that remedies solve the competition concerns" and warning parties against viewing remedy discussions as a financial negotiation.⁷ Just offering large numbers of divestments may also not be enough. In Halliburton/Baker Hughes the parties offered wide-ranging divestments but these were rejected by the DOJ on the basis that they did not fully address the antitrust concerns. And what works for one authority may not work for another, as shown by the Staples/Office Depot transaction for which remedies were accepted by the Commission but rejected by the FTC.

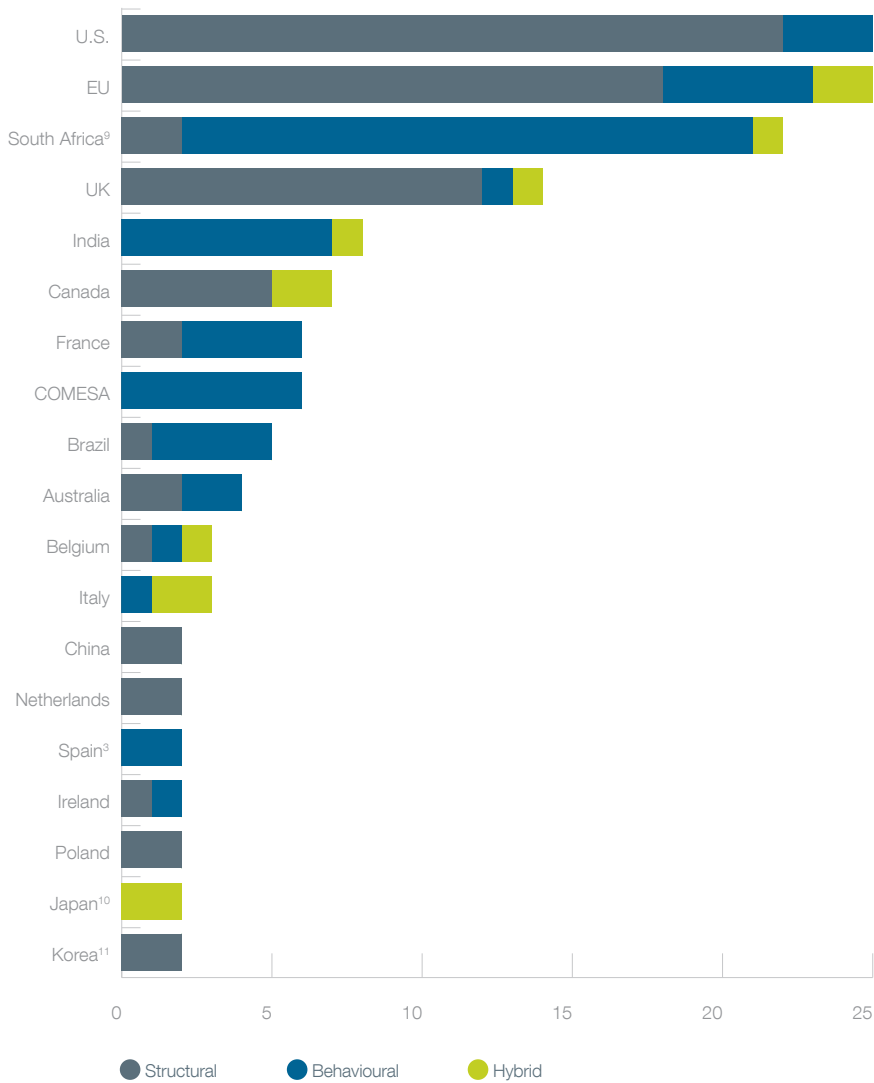
Finally it is worth remembering that in some jurisdictions the authority has the power to "call in" transactions even if the jurisdictional thresholds are not met. The impact of this was demonstrated last year in Canada where the Competition Bureau called in the Iron Mountain/Recall transaction even though there was no obligation on the parties to notify. The authority ultimately imposed structural remedies after an initial review. Interestingly, this deal was also scrutinised in the U.S. and the UK, with divestments ordered by the U.S. authorities and the CMA after an in-depth investigation. This scrutiny may well have alerted the Bureau to the deal. Parties to international deals with multiple filings should be alive to this possibility.

⁶ Excluding South Africa for which no split between phase 1 and in-depth investigations could be made. The number of phase 1 conditional clearances for Japan and Korea is not known.

⁷ Renata Hesse, then Acting Assistant Attorney General for Antitrust at the DOJ, and Deborah Feinstein, Director of FTC's Bureau of Competition, speaking at the Global Antitrust Enforcement Symposium, Georgetown Law, September 2016.

Continued willingness to accept behavioural remedies, with a noticeable increase at phase 1

CONDITIONAL CLEARANCES SPLIT BY TYPE OF REMEDY⁸



Our figures show that divestments remain the most common type of remedy. Structural remedies have traditionally been preferred by antitrust authorities because they provide certainty that concerns are addressed in a clear-cut manner, without the need for ongoing monitoring. However, purely structural remedies actually only represented around half of all remedies in 2016. We see a continued willingness of antitrust authorities to accept behavioural remedies (ie commitments relating to future conduct of the parties), either standalone or in combination with a divestment (so-called “hybrid” remedies).

In total we saw behavioural remedies being imposed in 70 remedy cases (48%), including 12 hybrid cases (8%). When only considering the same 16 jurisdictions that were also surveyed last year, the percentage of remedy cases in which behavioural remedies were imposed remained relatively stable at 36%.

It is at phase 1 where we noticed a steady increase in the number of behavioural remedies being accepted, rising from 39% (15 cases) in 2015 to 46% (22 cases) in 2016.

Considering all jurisdictions surveyed this year, 51% (29 cases) of phase 1 conditional clearances included behavioural remedies. This is surprising as phase 1 is generally not seen by authorities as an appropriate forum for agreeing ongoing commitments given the usually tight timeframe for getting a remedies package agreed within the phase 1 deadline. But behavioural or hybrid remedies were accepted in phase 1 in the EU, UK, France and Belgium. In fact all of the phase 1 remedies cases in the Czech Republic, Ireland, Spain, COMESA, India and Singapore in 2016 were behavioural.

In contrast to the trend for phase 1 conditional clearances for deals subject to in-depth investigations, the use of behavioural or hybrid remedies has dropped from 37% (20 cases) to 28% (15 cases) (comparing the same 16 jurisdictions). Excluding the U.S. the percentage increases to 41%, compared to 62% in 2015, thus pointing to a significant decrease in the relative use of behavioural remedies following in-depth investigations outside the U.S. The UK is one of the countries where there has been a notable decrease, from 33% (three out of nine remedy cases) to 14% (two out of 14 cases). The impact of the U.S. figures is so significant because of its wide use of structural remedies. Of all remedies accepted in the U.S. in 2016, 88% were structural. As suggested in last year's report this may in part be down to the number of Life Sciences mergers being reviewed (36% of all remedies cases in 2016, 40% in 2015), where divestments are usually the most appropriate type of remedy. However, it also appears

that the U.S. agencies are simply less keen on accepting behavioural commitments.

The use of behavioural remedies in the EU has significantly increased at phase 1 (from two to five remedy cases), but the overall proportion of behavioural remedies at both phase 1 and phase 2 has not materially changed (28%). In certain sectors the Commission appears to be more sceptical of behavioural remedies. In telecoms cases for example, structural divestments seem to be the preferred route (in order to create a new rival in the market). Behavioural commitments were offered by the parties in Hutchison/ Telefonica UK (O2) but were rejected, with Commissioner Vestager noting clearly that a structural remedy would have been required to avoid a prohibition. In Hutchison/Wind/ JV the parties did succeed in obtaining conditional clearance after an in-depth review by offering structural divestments (see further information on this deal below).

In China the two conditional clearances in 2016 were both subject to structural remedies, a clear break from its traditional practice. MOFCOM has historically favoured non-structural remedies, and has even accepted complex packages of behavioural commitments for multinational deals that were subject to divestment requirements in other jurisdictions. In 2015 there were only two conditional clearances in China, one behavioural and one structural. The fact that last year both remedy cases concerned divestments may indicate that MOFCOM has now moved away from its traditional preference for behavioural remedies.

Types of behavioural remedies accepted in 2016

We saw widely diverging types of behavioural remedies being accepted last year, varying from price restrictions and non-exclusivity, non-discrimination and access obligations to transparency conditions, compliance rules, mandatory personnel training on customer service and requirements aimed to protect the personal data of consumers. In India all phase 1 behavioural remedies involved an amendment of non-compete obligations. For Brazil three out of four

behavioural remedy cases related to joint ventures, with commitments relating to corporate governance, the duration of the joint venture, transparency obligations and restrictions to avoid the exchange of commercially sensitive information between joint venture parents. In South Africa, behavioural remedies mainly concerned restrictions imposed to protect employees against job losses.

8_Excluding jurisdictions with only one or no remedy cases.

9_Excluding remedy cases for which the decision was not yet published.

10_Excluding any phase 1 conditional clearances.

11_Excluding any phase 1 conditional clearances.

A rising tide of upfront buyer and fix-it-first remedies, led by the U.S., EU and UK

In September 2016 we reported on the rising tide of “upfront buyer” and “fix-it-first” scenarios in EU and UK structural remedy cases. Such scenarios relate to the situation where the notifying parties negotiate and conclude the agreements giving effect to a divestment remedy before the authority conditionally clears the main transaction (fix-it-first) or after obtaining conditional clearance but before being allowed to complete the main transaction (upfront buyer). In both cases the implementation of the divestment remedy (including the identity of the remedy-taker) needs to be approved by the authority before the parties can proceed with the main transaction. This is in contrast to a ‘standard’ divestment remedy, where the notifying parties commit that they will negotiate and complete the sale of the divestment business within a specified time period following the authority’s conditional clearance of the main transaction. Such a traditional divestment remedy permits the parties to complete the main transaction immediately upon receipt of clearance. However, to ensure that the remedy will indeed be implemented after the completion of the main transaction, a traditional structural remedy typically prescribes that an independent divestment trustee may sell the divestment business after a certain period at no minimum price.

Fix-it-first and upfront buyer remedies can be attractive for antitrust authorities as they minimise the risks of harm to competition prior to implementation of the remedy, and – more importantly – of a failed remedy. This approach is particularly suitable for situations where an appropriate buyer for a divestment business may be difficult to find. Requiring a fix-it-first or upfront buyer remedy then creates a higher level of certainty that the agreed remedy will in fact be implemented. From the perspective of the merging parties it may also be beneficial to propose a fix-it-first or upfront buyer remedy. In particular this may mitigate the potentially costly risk of having to divest part of the merged business at a severely discounted price in a fire sale conducted by a divestment trustee.

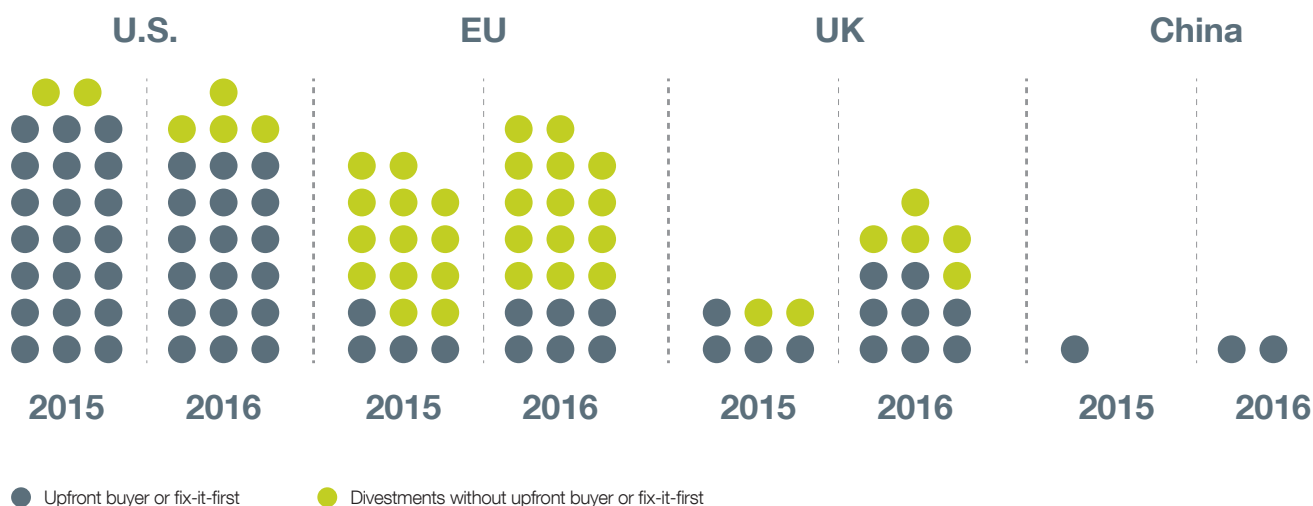
The use of upfront buyer and especially fix-it-first remedies can have significant timing implications, as there may only be a short time frame for concluding an agreement with a divestment remedy-taker and obtaining approval for that divestment from the authority. Therefore notifying parties

may want to start discussions with potential buyers for the part of the business that is expected to give rise to antitrust concerns early on in the process, perhaps even during pre-notification discussions. In some situations it may even make sense to consider entering into a break-up bid, where it is agreed in advance that immediately following the acquisition of a target business (or at least very shortly thereafter), part of that business will be sold on to a second acquirer. However, the benefit of proactively addressing potential antitrust concerns, either through a fix-it-first solution or a break-up bid, depends on whether the parties are able to predict correctly the scope of the divestment remedy that is likely required to address the authority’s concerns. It is possible that such an approach actually reduces or even eliminates any prospect of avoiding any remedies altogether.

The data on 2016 reveals that the U.S. authorities continued their frequent use of upfront buyers in 2016. An upfront buyer was required in 18 out of 22 structural remedies cases. This is slightly down compared to 2015, both in absolute numbers (from 21 to 18) and in relative terms (from 91% to 82%). As for 2015 most upfront buyer remedies were imposed in respect of deals in the Life Sciences sector (eight cases). In one of these cases (the FTC’s conditional clearance of Teva’s acquisition of Allergan) the remedies package involved Teva divesting the rights and assets to over 75 generic drugs to 11 different buyers, marking the largest ever drug divestment order in a pharmaceuticals case.

In the EU and the UK, where we reported increased use of these types of remedies in 2015, we saw them being used even more frequently in 2016. The Commission required an upfront buyer or fix-it-first remedy in two phase 1 cases involving structural remedies out of a total of 15.

This compares to two in 12 in 2015. But for in-depth cases there is a significant uptick, with four out of five structural remedies cases involving an upfront buyer or fix-it-first – a 100% increase on 2015 where the tally was only two in five cases. And 2016 has been particularly interesting as it marked the first fix-it-first solution used in a telecoms merger – Hutchison/Wind/JV. In this deal the parties offered a package of commitments that involved the creation of a new Italian mobile network operator to address the

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


Commission's concerns that the transaction would reduce the number of Italian mobile network operators from four to three.

In the UK the CMA tends to employ upfront buyer or fix-it-first solutions most often at phase 1. In 2015 this was used in four out of six cases (67%), and in 2016 seven out of ten (70%). One particular case of note is Tullett Prebon's acquisition of ICAP's global voice broking business, which involved a very unusual divestment package comprising only the ICAP oil broking employees and no other tangible assets. As the remedy was so novel the CMA had concerns over its viability and the possibility of finding a suitable purchaser. We also saw (unusually for the CMA) the use of an upfront buyer in a phase 2 case in 2016, namely in Ladbrokes/Coral. In this case, an upfront buyer was required for the divestment of 350 to 400 local betting shops.

It is interesting that in China an upfront buyer was required in all three of the structural remedy cases of the last two years. However, all three deals also required an upfront buyer in the U.S. It is therefore not clear whether these cases point to upfront buyer remedies being embraced in China or rather to MOFCOM aligning its remedies with those accepted elsewhere.

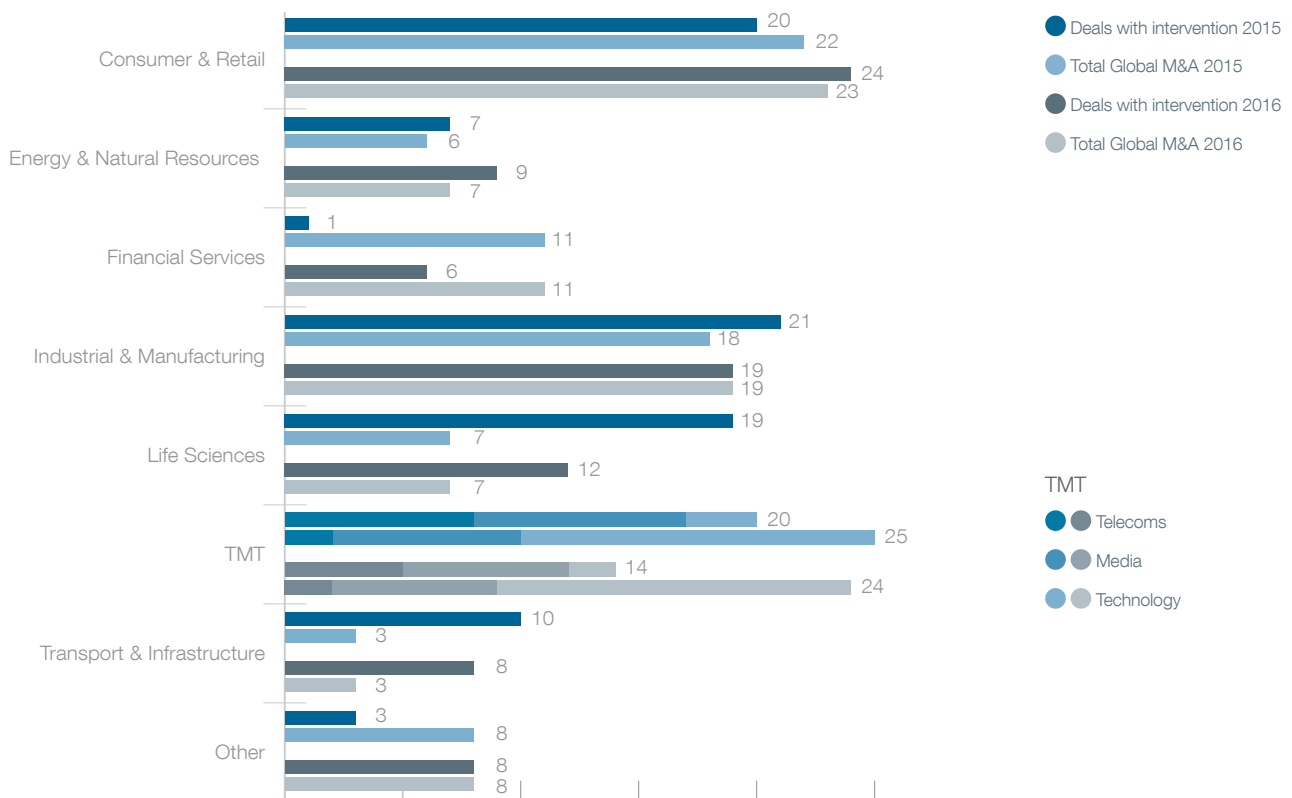
Whereas fix-it-first and upfront buyer remedies are now regularly used in the U.S., EU and the UK, they are still rarely used elsewhere. Out of 17 jurisdictions surveyed where structural remedies were imposed last year, fix-it-first or upfront buyer remedies were used in only five. Looking at the future it may well be that authorities in other jurisdictions will be inspired to adopt this approach more frequently.

12...See the article "Rising tide of 'Fix-it-first' and 'Up-front Buyer' remedies in EU and UK merger cases", available at www.allenoverly.com

Telecoms, Transport and Life Sciences accounted for the highest ratio of antitrust intervention

TOTAL ANTITRUST INTERVENTION

(by sector)



According to Thomson Reuters data, global M&A activity (completed deals, by volume) in 2016 was split as follows: Consumer & Retail (23%), Industrial & Manufacturing (19%), Telecoms, Media and Technology (TMT) (24%), Financial Services (11%), Energy & Natural Resources (7%), Life Sciences (7%), and Transport & Infrastructure (3%). Within the TMT sector, Technology accounted for 15%, Media for 7% and Telecoms for 2%. This split in overall M&A activity is similar to what we saw for 2015. We compared the data with the sector split for deals subject to antitrust intervention in 2016. In last year's report we concluded that telecoms and life sciences deals accounted for the highest ratio of antitrust intervention in 2015. The Transport & Infrastructure sector also accounted for

a relatively large share of antitrust intervention in 2015. A similar picture can be seen for 2016, although the results are not as pronounced as in 2015. Looking at all deals that were subject to antitrust intervention in 2016, the Consumer & Retail sector accounted for the highest number of deals (43), followed by Industrial & Manufacturing (35), TMT (25) and Life Sciences (21). The Telecoms, Transport and Life Sciences sectors were subject to a higher share of antitrust intervention than their share of overall M&A deals would suggest. Telecoms deals represented 5% of total deals subject to antitrust intervention, while only making up 2% of all global M&A. For Transport & Infrastructure 8% of deals in 2016 were subject to intervention, while making up

only 3% of overall M&A activity. And Life Sciences accounted for 12% of antitrust intervention but 7% of global M&A deals. For 2015 we saw greater differences between the share of intervention and the share of M&A activity for these three sectors. Still, it is clear that antitrust intervention continued to have a particular focus on these sectors. Conversely, for the Financial Services and Technology sectors the level of intervention is considerably lower than the overall M&A activity in these sectors. Interestingly the Commission is considering whether it should amend its jurisdictional thresholds to capture all relevant transactions, in particular also in the tech sector.

In last year's report we noted that there were a number of big ticket telecoms and pharmaceuticals deals in the pipeline, building on a trend of industry consolidation. We also identified a willingness to attempt deals that were particularly challenging from an antitrust perspective. With deals such as Hutchison/Telefonica UK (O2), Hutchison/Wind/JV, Liberty Global/BASE Belgium and Vodafone/Liberty Global/Dutch JV, we certainly saw this trend continuing in the telecoms sector. For Life Sciences there was a noticeable drop in overall M&A in 2016, but we still saw several large deals being subject to intervention in various jurisdictions, such as Abbott Laboratories/St. Jude Medical, Teva Pharmaceuticals/Allergan Generics, Mylan/Meda, and the two deals between Boehringer Ingelheim and Sanofi.

It is worth noting that another trend gained real momentum this year which cuts across many sectors: the focus of antitrust authorities on innovation. We are seeing authorities across the globe considering carefully the potential harm to R&D or innovative pipeline products resulting from a merger. In some deals authorities may seek to address such concerns by asking the parties to divest R&D facilities as part of the remedy package (as was done by the Commission in Plastic Omnium/Faurecia and in last year's GE/Alstom transaction). But in 2016 several deals that were frustrated due to antitrust concerns across the various sectors collapsed at least in part due to concerns over the impact on innovation, including Lam Research/KLA-Tencor, Halliburton/Baker Hughes and Hutchison/Telefonica UK (O2).

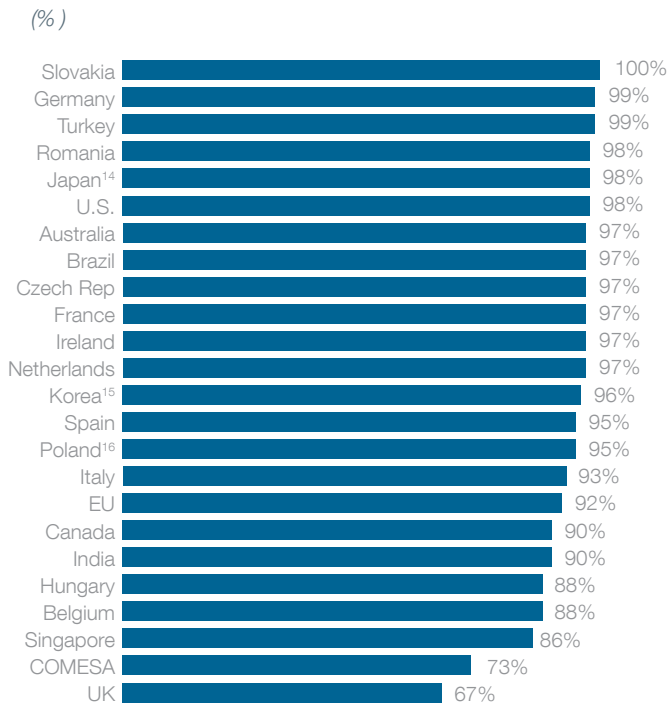
Looking ahead to next year a major focus of antitrust authorities (particularly in the U.S. and EU) will be on agriculture mergers, with antitrust reviews underway in four major deals (Dow/DuPont, Bayer/Monsanto, ChemChina/Syngenta and Agrium/Potash) which will see six major rivals in the seed and crop protection industry in the U.S. reduced to four. In line with the trend mentioned above we expect the potential impact on innovation to be a key element of the merger reviews. Interestingly Bayer and Monsanto have already tried to deal with these potential concerns head-on by stating when they announced the transaction that they had a "deep commitment to innovation" and would set aside an annual R&D budget of USD 2.75 billion.

In addition to antitrust scrutiny these deals are attracting much political interest, mostly opposing the transactions.

In the future we may also see greater scrutiny of deals in the digital economy sector. In October 2016 the Commission consulted on whether changes should be made to the EU merger control rules to capture significant transactions that would otherwise fall below the current (turnover-based) jurisdictional thresholds. The Commission is particularly focused on transactions in the digital economy, where it finds that players may have considerable market potential, but generate minimal turnover. The Commission is therefore considering whether it should adopt additional notification requirements based on alternative criteria, such as transaction value.

97% of all reviewed deals received unconditional clearance at phase 1

PERCENTAGE OF CASES RECEIVING UNCONDITIONAL CLEARANCE IN PHASE 1



In 2016, 97% of deals were cleared at phase 1 without requiring remedies. This is consistent with last year's figures. In 19 of the jurisdictions surveyed, 90% or more of the notified transactions were cleared unconditionally in the first phase.

The UK is a clear outlier. Only 67% of the mergers reviewed in the UK received unconditional phase 1 clearance. This is down from 75% in 2015. This relatively low level can be explained by the voluntary nature of the UK merger regime, as a result of which many unproblematic transactions do not get notified and are not reviewed by the CMA. Whereas a voluntary regime also applies in Australia, 97% of the deals reviewed by the ACCC were unconditionally cleared in phase 1 last year. The much higher percentage in Australia is mainly due to the possibility of filing a simple courtesy notice with the ACCC instead of a complete notification form, the general practice of sending a short notice in relation to transactions that will come to the authority's attention anyway through the Foreign Investment Review

Board, and the lack of merger review thresholds in Australia that would otherwise limit the ACCC's jurisdiction.

The other outlier is COMESA. Out of 22 cases decided in 2016 four were subject to remedies in phase 1 and two were referred to phase 2. However, given the limited number of cases under review, the relatively low percentage of cases cleared unconditionally in phase 1 may not be representative of the decisional practice of the authority going forward.

For in-depth investigations in all jurisdictions surveyed except China, Korea and South Africa, the proportion of deals being cleared unconditionally in 2016 was 44%. When only considering the same jurisdictions that were covered in last year's report the percentage drops further to 41%, compared to 48% in 2015 (excluding China). However, as in 2015, the picture remains extremely varied across jurisdictions. In a third of the jurisdictions surveyed with phase 2 decisions adopted in 2016 (six out of 18), all decisions involved remedies. In Hungary and Slovakia all phase 2 investigations resulted in an unconditional clearance. In four countries (the Netherlands, Australia, Brazil and Japan) the number of conditional and unconditional clearances is equally split.

The relatively low percentages of unconditional clearances after an in-depth review in the EU (13%), the UK (29%) and the U.S. (29%), show that the authorities in these jurisdictions last year have mostly focused their in-depth investigations on transactions that were firmly considered to result in antitrust concerns. For the UK this percentage has dropped significantly from 86% last year, revealing more frequent intervention by the CMA.

In China over 99% of all cases were cleared unconditionally. Only two out of 353 cases were subject to remedies and there were no prohibitions. Similar to last year and in contrast to the dominant perception, this shows that MOFCOM is actually not as interventionist as some of the other antitrust authorities in key jurisdictions.

OUTCOMES OF IN-DEPTH INVESTIGATIONS¹⁷

In numbers	Unconditional	Conditional	Prohibition	Total
EU	1	6	1	8
Belgium	0	1	0	1
France	0	1	0	1
Germany	4	1	0	5
Hungary	7	0	0	7
Ireland	0	1	0	1
Italy	0	3	0	3
Netherlands	1	1	0	2
Poland	5	2	0	7
Slovakia	1	0	0	1
UK	2	4	1	7
U.S.	10	25	0	35
Australia	3	2	1	6
Brazil	5	5	0	10
Canada	11	6	0	17
India	0	1	0	1
Japan	2	2	0	4
COMESA	0	2	0	2
TOTAL	52	63	3	118

Increased use of simplified procedures

Overall, we saw a further increase in the use of simplified merger control procedures. Over half of the jurisdictions surveyed (14 out of 26) provide for a simplified procedure: EU, Belgium, Czech Republic, France, Ireland, Romania, Slovakia, Spain, Australia, Brazil, Canada, China, Korea and Singapore. The country with the highest percentage of cases

benefitting from a simplified procedure is Ireland (99%), followed by Brazil (90%) and Australia (89%). In Canada, France and Spain, the simplified procedure is applied in only 45-50% of all cases. In China 78% of notified cases were reviewed under the simplified procedure, slightly up from 75% in 2015.

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 14_Based on the authority's case statistics for FY2015/2016.

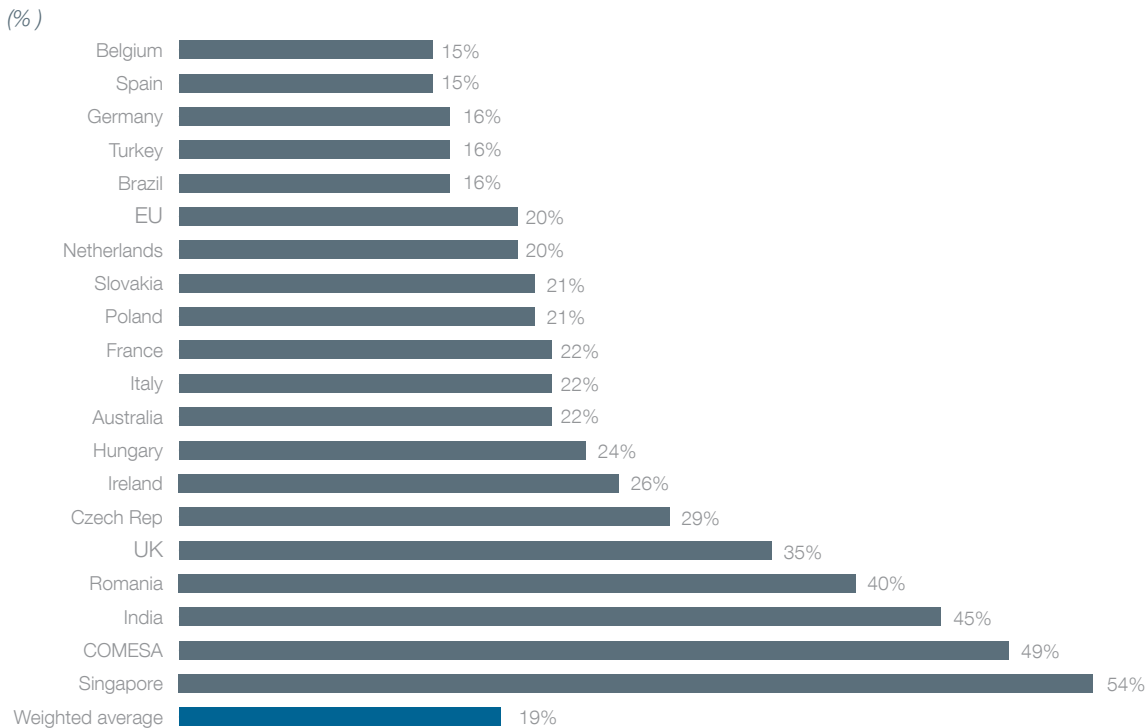
15_Based on the data for the first half of 2016.

16_Based on data for the period from 1 January 2016 to 31 August 2016.

17_Excluding China, Korea and South Africa for which no split could be made.

Unconditional clearance was generally obtained within one month, with in-depth reviews on average taking five to eight months

AVERAGE DURATION OF REVIEW RESULTING IN UNCONDITIONAL PHASE 1 CLEARANCE (WORKING DAYS)¹⁸



For the large majority of cases, namely those that are cleared unconditionally in phase 1, the period between notification and obtaining clearance on average lasts just under one month. In all except five jurisdictions surveyed, unconditional phase 1 clearances were received in less than 30 days on average. But there are wide differences between the various jurisdictions. Some authorities typically clear unproblematic cases in well under a month, for example in Belgium, Spain, Germany, Turkey and Brazil. In Canada, non-complex matters are even cleared on average in circa seven working days. At the other end of the spectrum, we see the authorities in the UK, Romania, India, COMESA and Singapore on average taking between 1.5 and 2.5 months to clear merger in phase 1 without imposing remedies. Parties filing in these jurisdictions should be mindful of the potential impact this has on their timetables, even for cases that are not expected to give rise to any substantive issues.

For the UK the average review period of 35 working days was well within the 40 working day statutory deadline. One case last year was even cleared in a record ten working days. However, with only 52% of the unconditional clearances being given in 35 working days or less, it seems that the CMA is behind on the commitment stated in its Annual Plan for 2016/2017 to clear 70% of “no issues” cases in 35 working days.

In China, cases benefitting from the simplified procedure are practically all cleared within phase 1 (97%) and on average in 16 working days. This is a slight improvement compared to 2015, demonstrating the continued commitment of MOFCOM to reduce its investigation periods. One notable exception to the swift handling of simplified cases was the Zhong Ke/Hitachi metals deal which, although it started as a simplified procedure case, took 199 working days (over nine months) to receive

¹⁸ Excluding jurisdictions for which no data was available and no reasonable estimate could be made.

AVERAGE DURATION OF IN-DEPTH INVESTIGATION PERIOD, BY OUTCOME (EXCLUDING PHASE 1) (IN MONTHS)
Phase 1 Cases
0.9 | Unconditional
2.6 | Conditional
In-depth review cases (including Phase 1)
5.6 | Unconditional 10.2 | Prohibition
8.2 | Conditional

unconditional clearance. This was due to significant opposition by complainants, who argued for a more narrow market definition than that applied by the notifying parties. This led to the case being pulled after going into phase 3 and being refiled under the normal procedure. MOFCOM subsequently cleared the deal in phase 1.

The opening of an in-depth investigation clearly has an impact on the deal timetable, particularly where the merger regime is suspensory. On average, in-depth investigations in the jurisdictions surveyed lasted circa 119 working days, with the average for most jurisdictions lying between 85 and 150 working days. Similarly to 2015, the total review period of cases subject to an in-depth investigation generally took between five and eight months. When you take into account the often lengthy pre-notification discussions for cases that are expected to go into a second phase, the investigation periods can extend further to a year or more.

In 2016 we saw more instances of deals taking much longer to conclude than the typical timeframe. Examples include the reviews of Primary Healthcare / Healthscope Queensland (Australia, 16 months), Brocacef/Mediq (the Netherlands, 14.5 months), Penta Investments/Petit Press (Slovakia, 14 months), Showa Shell Sekiyu / Idemitsu Kosan and Tonen General Sekiyu / JX Holdings (Japan, 12 months), and Parkland/Pioneer Petroleum (Canada, 11 months). In China there was at least one instance of parties refiled a case with MOFCOM to give the authority more time to conduct its review – Dell’s acquisition of EMC. The deal was pulled just before the 180 day statutory deadline was exceeded and cleared shortly after refiled. In the U.S. we saw the average duration of investigations resulting in remedies increase by 29 working days to circa

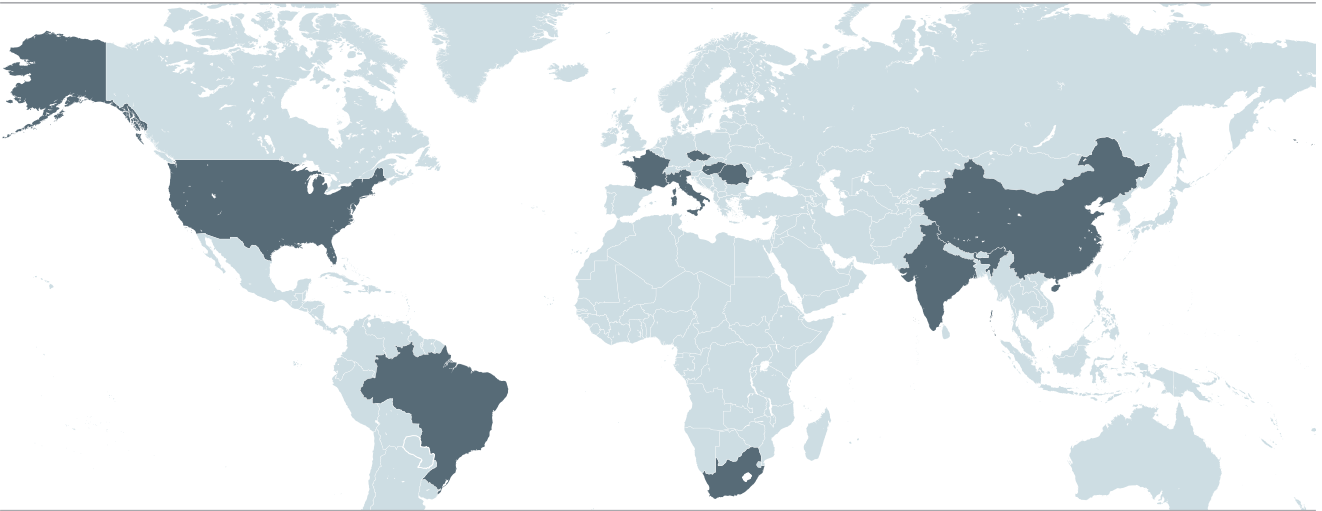
nine months last year, whereas the review of cases that were abandoned due to antitrust concerns took on average 14 months before being withdrawn.

A particular trend that we are seeing in the EU is the suspension of the in-depth review period by asking the notifying parties for additional information (so called “stop the clock”). This was done in four out of twelve in-depth reviews initiated or concluded by the Commission in 2016 (Hutchison/Telefonica UK (O2), Wabtec/Faiveley, Halliburton/Baker Hughes (twice) and Dow/DuPont (twice – still under review). The use of this mechanism not only extends the Commission’s review period but it may hold up the timetables across the board to the extent that other jurisdictions are waiting to see the outcome of the EU probe before making their final decision. However, this may not necessarily be a bad thing if it allows the parties to ultimately provide the authorities with enough information to convince them to clear the deal unconditionally. Therefore the use of the power to stop the clock may have sometimes been used with the consent or even at the request of the notifying parties.

Managing the overall merger review timetable becomes more challenging the more filings are required and the more in-depth investigations are initiated. We are now frequently seeing mergers being notified in ten or more jurisdictions. Dow/DuPont reportedly notified their deal to 25 antitrust authorities and the ChemChina-Syngenta deal was filed in at least 22 jurisdictions. When faced with such a patchwork of global filings and potential antitrust issues it is particularly important for the parties to be well organised, in control of the overall filing process, and prepared for procedural and substantive differences between authorities.

Record-breaking fines for failure to file and gun jumping

JURISDICTIONS WHERE FINES WERE IMPOSED IN 2016



2016		
JURISDICTION	NUMBER	VALUE OF FINES (EURk)
France	1	80,000
U.S.	3	10,991
Brazil	8	10,396
India	8	1,624
South Africa	4	840
Czech Republic	3	433
China	4	194
Romania	1	170
Hungary	4	48
Italy	2	10
TOTAL	38	104,706

Last year we reported a real increase in the appetite of antitrust authorities to enforce the merger rules. That was based on 13 fines imposed in six surveyed jurisdictions amounting to EUR 2.2 million in total. We saw an enormous further increase in fines relating to merger control in 2016, with the total fine amount reaching EUR 105 million. Of this amount, EUR 18 million relates to fines imposed for failures to file. The remaining EUR 87 million relates to fines imposed on parties who notified their transaction but who did not await merger clearance before implementing it in violation of a standstill obligation (so-called “gun jumping”). The record-breaking EUR 80 million fine imposed on

telecoms company Altice in France represents the largest part of this amount – see the box for further details.

In addition to the jurisdictions surveyed for this report, enforcement action for failure to file has also been taken in Taiwan, Indonesia and Austria, resulting in a further EUR 0.7 million in fines. The fact that fines for breaches of merger control rules have been imposed in at least 13 different jurisdictions shows that the trend of aggressive enforcement is shared around the world. Interestingly, none of the instances of failure to file or gun jumping were fined in more than one jurisdiction. In the future we may well start to see parties involved in multi-jurisdictional transactions being fined by various authorities in parallel.

The U.S. authorities remain strong enforcers of merger control rules. In July 2016 the DOJ imposed a record USD 11 million fine on ValueAct for failing to report its purchase of shares in Halliburton and Baker Hughes. The DOJ argued that as an activist investor ValueAct could not rely on the “investment-only” exemption under the Hart-Scott-Rodino (**HSR**) Act. This follows two fines imposed in 2015 on companies that wrongly believed they could rely on such an exemption from HSR reporting. As the maximum penalty amount for failure to file was increased by 250% in August 2016 it will be interesting to see whether the U.S. fine level will increase even further next year.

The Brazilian authority (Administrative Council for Economic Defense, **CADE**) has acted on its promise to step up its enforcement efforts to prevent failures to file and gun jumping behaviour. It imposed eight fines in 2016 (compared to two last year) and increased the total fine amount by a factor of 14. The largest fine in Brazil was imposed on Technicolor (EUR 6.7 million) for completing the acquisition of the connected devices business of Cisco Systems before obtaining CADE's clearance. The parties had argued that the deal had to be closed urgently and had put in place an agreement carving out the Brazilian assets from full completion. Nonetheless the authority considered it to be a very serious gun jumping violation and set the fine at ten times the amount of the previous largest gun jumping fine.

In India notifying parties are obliged to file their transaction within 30 days of its announcement. The Indian authority confirmed its strict stance on the enforcement of this rule by imposing a EUR 667,000 fine on General Electric for failing to notify its acquisition of Alstom within this timeframe. While the authority reduced the fine because GE always intended to notify the transaction, it still represented the largest fine imposed for failure to comply with the Indian merger rules.

South Africa is another jurisdiction where we saw more aggressive enforcement of merger control rules. One of the four fines imposed last year was the record EUR 656,000 fine imposed on Life Healthcare, a fine that was ten times as high as the previous largest fine imposed in South Africa for failure to file.

In 2016 authorities have also shown their willingness to impose heavy fines for other infringements relating to merger control. We saw seven fines being imposed for providing incorrect or incomplete information in the context of merger investigations (amounting to a total of EUR 1.2 million). Another three fines totalling EUR 15.4 million were imposed for breach of merger commitments, including a EUR 15 million fine imposed on Altice in France.

We expect authorities to continue the trend of strict enforcement of merger control rules in 2017, although we would be surprised to see the total fine amount remain at this extraordinarily high level. Failure to file investigations are currently ongoing in a number of jurisdictions, including Spain, China and Brazil. In addition, in December 2016, the Commission sent a Statement of Objections to Facebook for allegedly providing incorrect or misleading information in the context of the merger review of its acquisition of WhatsApp in 2014.

The record fines imposed last year and the various ongoing investigations confirm the need for parties to carefully consider where a transaction needs to be filed, to notify the transaction in time, to respect the standstill obligation and to provide complete and accurate information to the authorities assessing the transaction.

France: record-breaking EUR 80 million gun jumping fine imposed on Altice

In November 2016 the French competition authority imposed a record fine on telecoms company Altice for gun jumping behaviour in respect to two acquisitions that were notified and cleared in 2014. The authority found that Altice had implemented these transactions before obtaining clearance by exercising decisive influence over the targets and by exchanging commercially sensitive information.

The tension between compliance with merger control standstill obligations and the – legitimate – desire for parties to prepare for integration as early and as effectively as possible to maximise the benefits of merger synergies is an increasingly common theme in strategic M&A transactions. The Altice decision highlights the importance for parties to put in place adequate safeguards for the period between signing and closing and to stay clear of any attempt to influence the commercial behaviour of a target company before obtaining merger clearance.

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