

IBRAC

INSTITUTO BRASILEIRO DE ESTUDOS
DE CONCORRÊNCIA, CONSUMO E
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24.º SEMINÁRIO INTERNACIONAL DE DEFESA DA CONCORRÊNCIA

24th INTERNATIONAL SEMINAR ON COMPETITION POLICY

Campos do Jordão, São Paulo - Brasil

24 a 26 de outubro de 2018

Painel 8: Big 4 - Os Desafios de Operações Globais nas Principais Jurisdições Concorrenciais

Big 4 - The Challenges of Global Mergers Across the Main Jurisdictions in Competition Enforcement

Proponentes/Proponents

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Palestrantes/Speakers

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Charles Rick Rule | *Paul Weiss*

John Boyce | *Slaughter and May*

Paulo Burnier da Silveira | *CADE Commissioner*

CESCON BARRIEU

Big 4: Os Desafios de Operações Globais nas Principais Jurisdições Concorrenciais

Joyce Honda | Thales Lemos

INTRODUÇÃO

- **Objetivo do trabalho:**

- Abordar os desafios enfrentados por agentes econômicos e autoridades antitruste face a operações de dimensão global e sujeitas a múltiplas aprovações
- Foco em quatro autoridades concorrenciais: FTC/DOJ, *European Commission*, SAMR e CADE

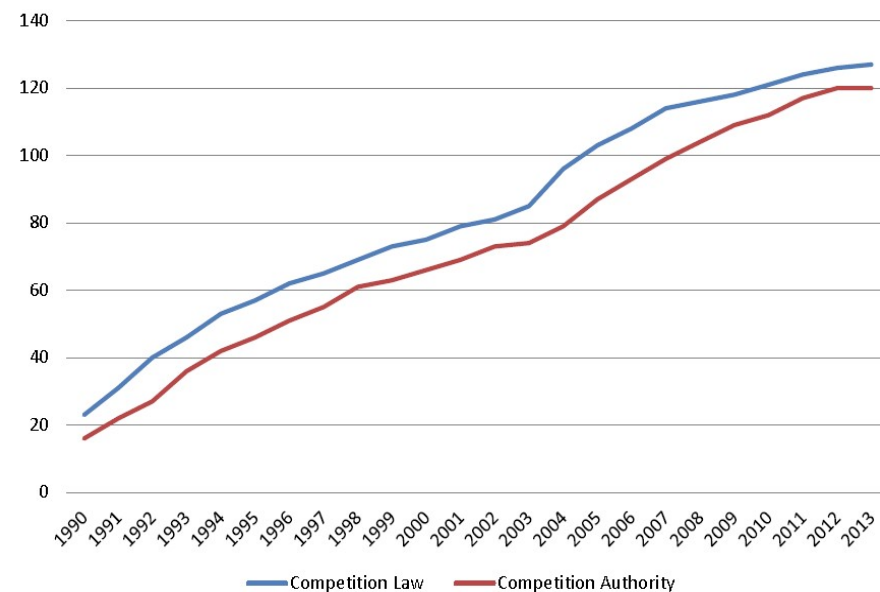
- **Motivação:**

- A superação de fronteiras pela atividade econômica e a proliferação de regimes antitruste desafiam o *enforcement* consistente e efetivo, além de representarem dificuldades adicionais para investimentos
- Recentes concentrações globais como *Dow/DuPont*, *Bayer/Monsanto* e *AT&T/Time Warner* reforçam a pertinência da discussão
- Autoridades mais experientes e ativas podem assumir posição de liderança buscando melhoria e harmonização dos procedimentos

CRESCIMENTO DO *ENFORCEMENT* ANTITRUSTE

- Relatório OCDE (2014):
 - 1970: 9 jurisdições e 6 autoridades
 - 1990: 23 jurisdições e 16 autoridades
 - **2013: 127 jurisdições e 120 autoridades**
- Possível motivo para expansão:
 - reconhecimento dos benefícios da política de concorrência para a economia e para os consumidores
- Expectativa de que novas autoridades se tornem mais atuantes, principalmente na América Latina e na Ásia

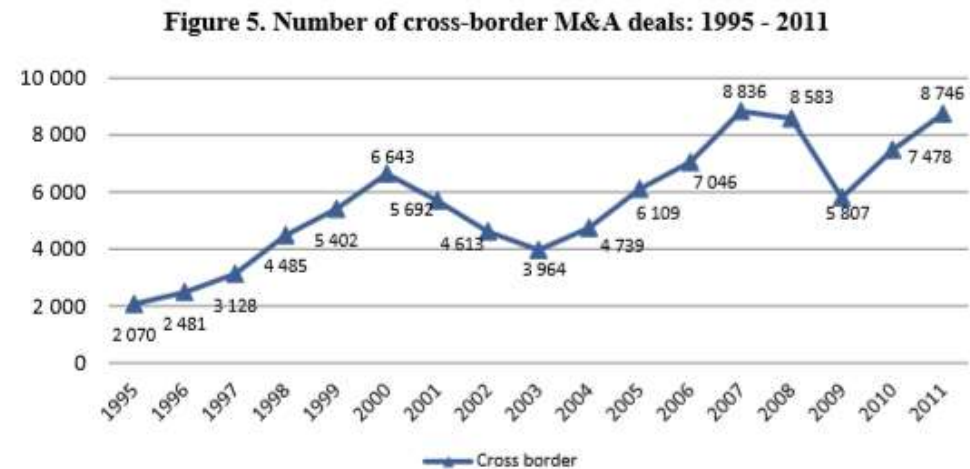
Figure 9. Number of jurisdictions with Competition Law and Competition Authority



CRESCIMENTO DO *ENFORCEMENT* ANTITRUSTE

- Globalização dos mercados motivada pela inovação tecnológica e liberalização do comércio exterior (FINGLETON, 2011)
- **Relatório OCDE (2014):**

Porcentagem de fusões e aquisições notificadas em diferentes jurisdições por multinacionais			
Período	2 ou menos notificações	3 a 5 notificações	6 ou mais notificações
1991-1995	100%	0%	0%
1996-2000	81%	15%	4%
2001-2005	63%	19%	18%
2006-2010	66%	21%	13%



Source: Dealogic Global M&A Database, OECD calculations

CRESCIMENTO DO *ENFORCEMENT* ANTITRUSTE

“With the competition law autoestrada growing ever more crowded, and the need for competition authorities to pursue investigations and remedial actions as efficiently as possible, the international competition enforcement community ought to consider methods to alleviate the congestion” (CALVANI; STEWART-TEITELBAUM, 2007)

- Propostas de harmonização da legislação concorrencial: cooperação bilateral, acordos regionais, maior envolvimento da OMC, OCDE e ICN, adoção de decisões estrangeiras, etc.
- Um dos principais pontos de atenção: discussão da estrutura dos **remédios**, critérios para escolha de compradores, viabilidade dos negócios desinvestidos, duração do período de desinvestimento, uso dos mesmos *trustees*, etc.
- O *enforcement* antitruste tem se mantido majoritariamente doméstico, gerando riscos de: (i) falsos negativos prejudicarem consumidores em escala global; (ii) redução de investimentos.

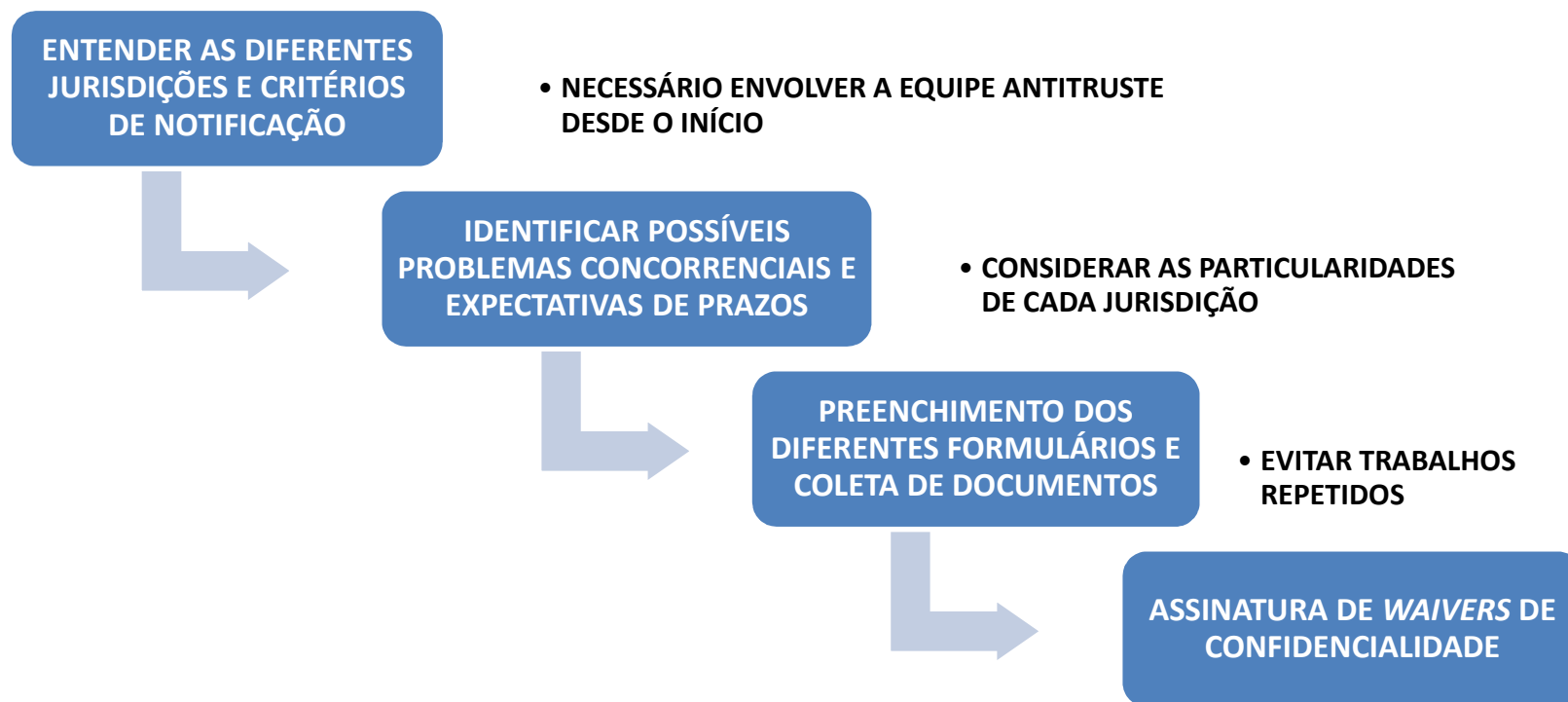
DESAFIOS EM OPERAÇÕES GLOBAIS



- Estudo da PwC (2003):

- Uma típica operação multijurisdicional custa, em média, **3,3 milhões de euros** e leva por volta de **sete meses**: praticamente não há economias de escala para cada submissão adicional

DESAFIOS EM OPERAÇÕES GLOBAIS



DESAFIOS EM OPERAÇÕES GLOBAIS

Qual o estado
da arte nas
Big 4?



Recent Developments in China Merger Control Review

October 25, 2018

Index

- Ten-year of merger enforcement in China
- Increasingly used theory of harm – conglomerate effect
- Popular remedy type
- Remedy modifications
- Third party intervention
- Complex picture of review timeline
- Enforcement on failure to notify
- Expanded international cooperation
- Agency integration
- Recent case studies

Ten Year of Merger Enforcement in China



- The three Chinese competition agencies, NDRC and SAIC in addition to MOFCOM, are currently merging into one. MOFCOM had the sole jurisdiction for merger control enforcement.
- More than 2,000 filings, two prohibitions (Coca-Cola/Huiyuan Juice and P3 Shipping Alliance) and 38 conditional approvals.
- MOFCOM/SAMR consults with other stakeholders and considers non-antitrust issues as part of its substantive review.
- Usually longer review periods than many other agencies (“Chinese bottleneck”) due to extensive “pre-notification” phase and the stakeholder consultation process, but introduced the simple case procedure in 2014
- Behavioural remedies very popular with MOFCOM (require more supervision)
- Scope of remedies required by MOFCOM can be greater than required in EU/U.S.

Increasingly Used Theory of Harm – Conglomerate Effects

- Conglomerate effect has become an increasingly used theory of harm in SAMR review of cases, particularly those without any horizontal or vertical concerns.
- The investigation of conglomerate effects could significantly prolong the review process and often result in behavioral remedies. A typical remedy in such cases is a commitment of “no bundling/tying.”
- Chinese stakeholders use possible conglomerate effects (often unsubstantiated) to achieve non-merger specific purposes and SAMR is willing to use it to get the Parties and the Chinese stakeholders to the middle ground.
- In the last ten years, conglomerate theory of harm was raised seven times in a total of 40 intervention decisions (~17%). In recent cases, possible conglomerate effects have been routinely heavily examined.

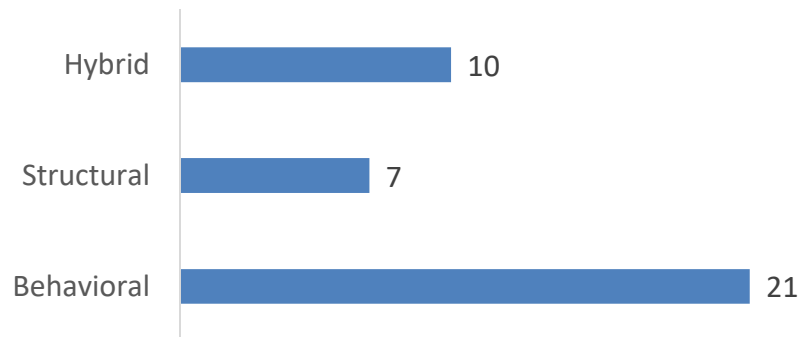


MONSANTO

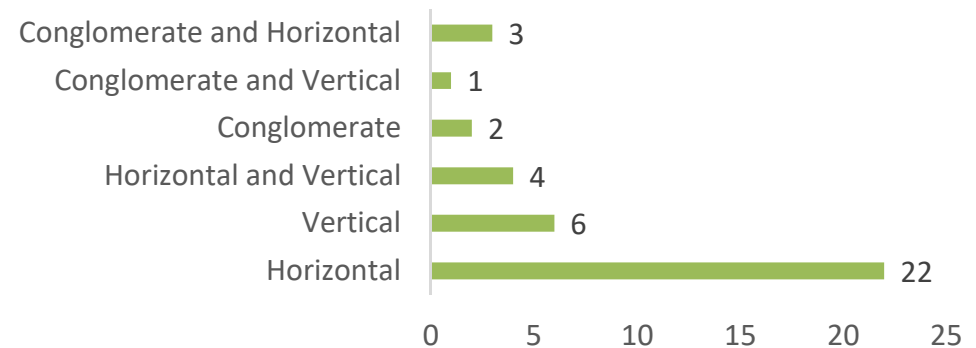


Popular Type of Remedy – Behavioral

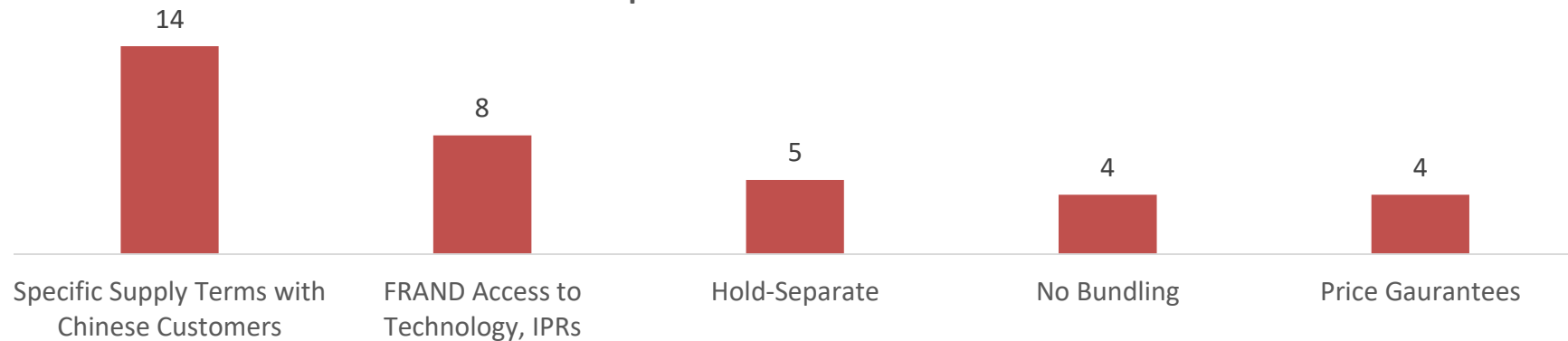
Types of Remedies



Theories of Harm



Examples of Behavioral Remedies



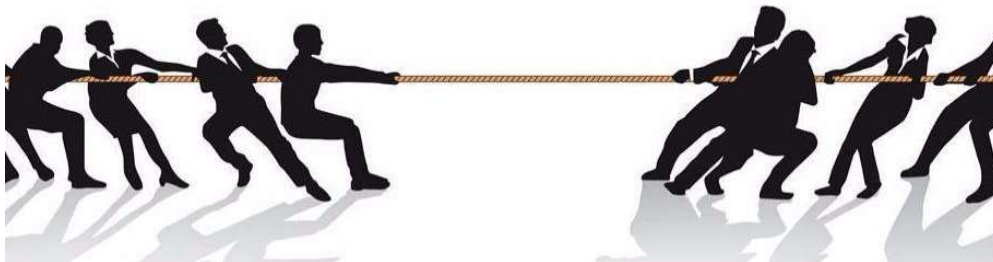
Remedy Modifications

Case	Time of approval	Duration of Behavioral Remedies	Remedies Lifted or Modified	Time of Application	Time of Decision
GE/Shenhua/JV	Nov. 10, 2011	Indefinite	Lifted due decreased shares and new market entrants	Nov. 2017	Aug. 22, 2018
Media Tek/Msatr Cayman	Aug. 26, 2013	3 years (termination upon review)	Lifted due to decreased shares and other material market changes	Sep. 2016	Feb. 9, 2018
Henkel HK/Tiande	Feb. 9, 2012	Indefinite	Lifted as Henkel transferred JV shares to Tiande	Jul. 2017	Feb. 1, 2018
Wal-Mart/ Yihaodian	Aug. 13, 2012	Indefinite	Lifted after foreign investment policies in e-commerce sector loosened in Jun. 2015	Jul. 2015	May 30, 2016
Western Digital/ Hitachi	Mar. 2, 2012	2 years (termination upon review)	Modified after six rounds of implementation plans submissions	Mar. 2014	Oct. 19, 2015
Seagate/ Samsung	Dec. 12, 2011	1 year (termination upon review)	Modified after meetings with parties, stakeholder consultation, and economic analysis	May 2013	Oct. 10, 2015
Google/ Motorola Mobility	May 19, 2012	5 years (early termination possible upon application)	Lifted one of the behavioral remedies after the sale of Motorola Mobility business to Lenovo	Dec. 1, 2014	Jan. 6, 2015

- It Remain difficult to petition SAMR to remove or modify behavioral remedies.
- The relevant rules on remedies modification allow SAMR substantial discretion.
- No time limit on review of remedy modification applications.
- In five out of six cases so far, MOFCOM took 7 to 29 months to reach a decision after a full competitive re-assessment.

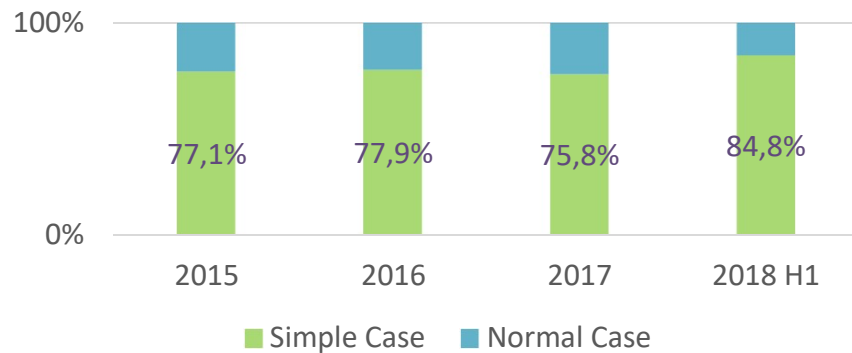
Third Party Intervention

- Local stakeholders' intervention could significantly complicate the review
 - SAMR is more deferential to local stakeholders than other authorities, today than before;
 - The process is opaque, unpredictable, and lengthy
 - Non-merger-specific or non-competition matters may lead to remedies
- How to manage the risk?
 - Identify highly influential local stakeholders and potential risks as early as possible
 - Pool internal and external resources to build up multiple communication channels with stakeholders
 - Craft messages and strategy to communicate with SAMR and stakeholders
 - Consider side negotiation with complaining stakeholders, if appropriate

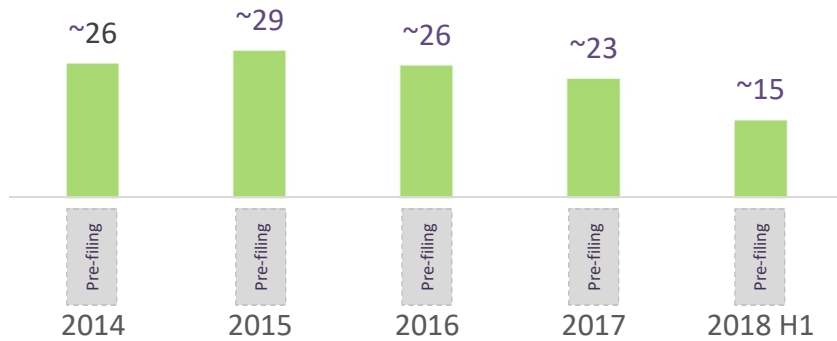


Complex Picture of Review Timeline

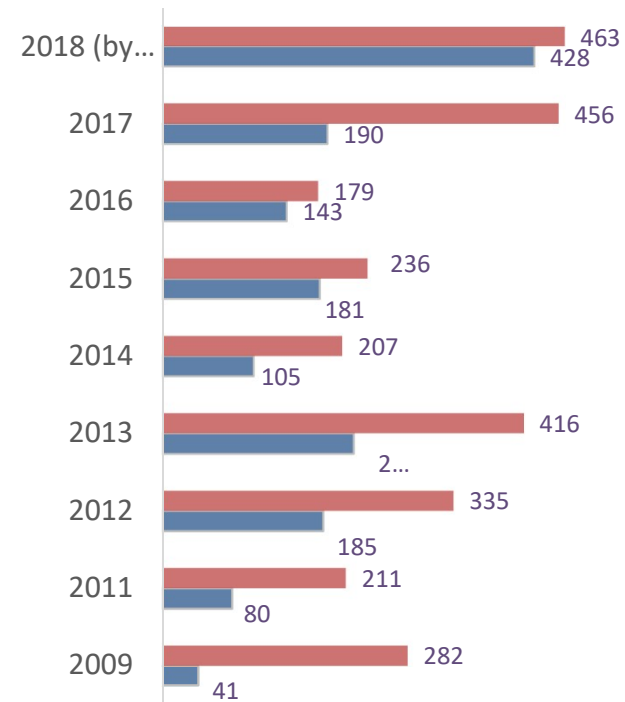
% of Simple Cases



Simple Case - Avg. Length of Review (Days)



Conditional - Max and Min (Days*)



* Days from filing to decision

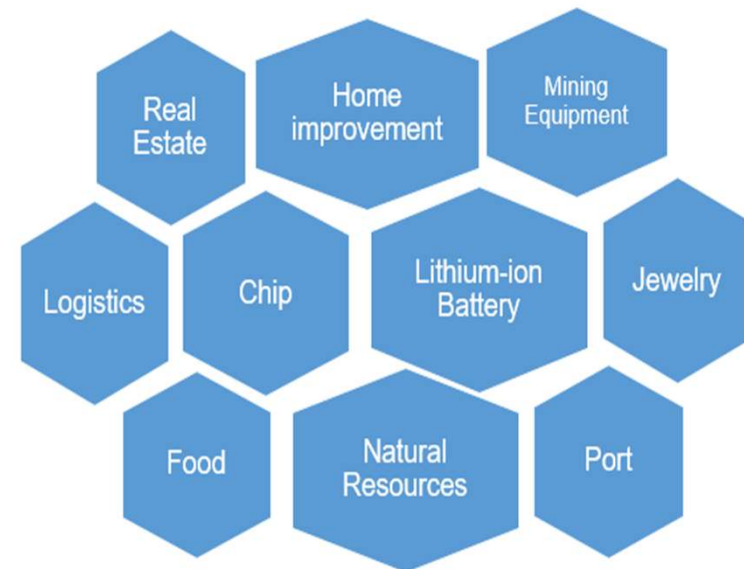
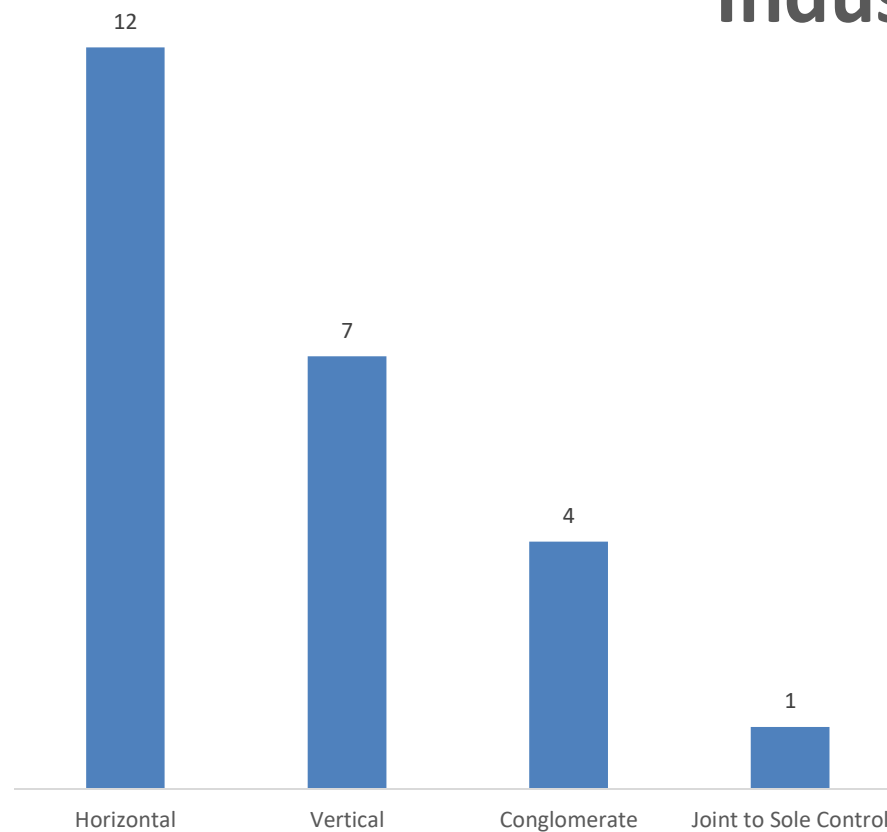
Complex Picture of Review Timeline (Cont'd)

China not always the last jurisdiction to clear

Case Name	EU	US	China
Linde/Praxair	08/20/2018	10/22/2018	09/30/2018
Bayer/Monsanto	03/21/2018	05/29/2018	03/13/2018
Becton, Dickinson and Co./C.R. Bard	10/18/2017	01/26/2018	12/27/2017
Dow/DuPont	03/27/2017	06/15/2017	04/29/2017
NXP/ Freescale	09/17/2015	11/ 25/2015	11/25/2015
Thermo Fisher / Life Technologies	11/26/2013	01/ 31/2014	01/14/2014
UTC / Goodrich	07/26/2012	07/26/2012	06/15/2012
Western Digital / Hitachi	11/23/2011	03/05/2012	03/02/2012
Novartis/Alcon	08/09/2010	08/16/2010	08/13/2010
Panasonic/Sanyo	09/29/2009	11/24/2009	10/30/2009
Pfizer/Wyeth	07/17/2009	10/14/2009	09/29/2009

Complex Picture of Review Timeline (Cont'd)

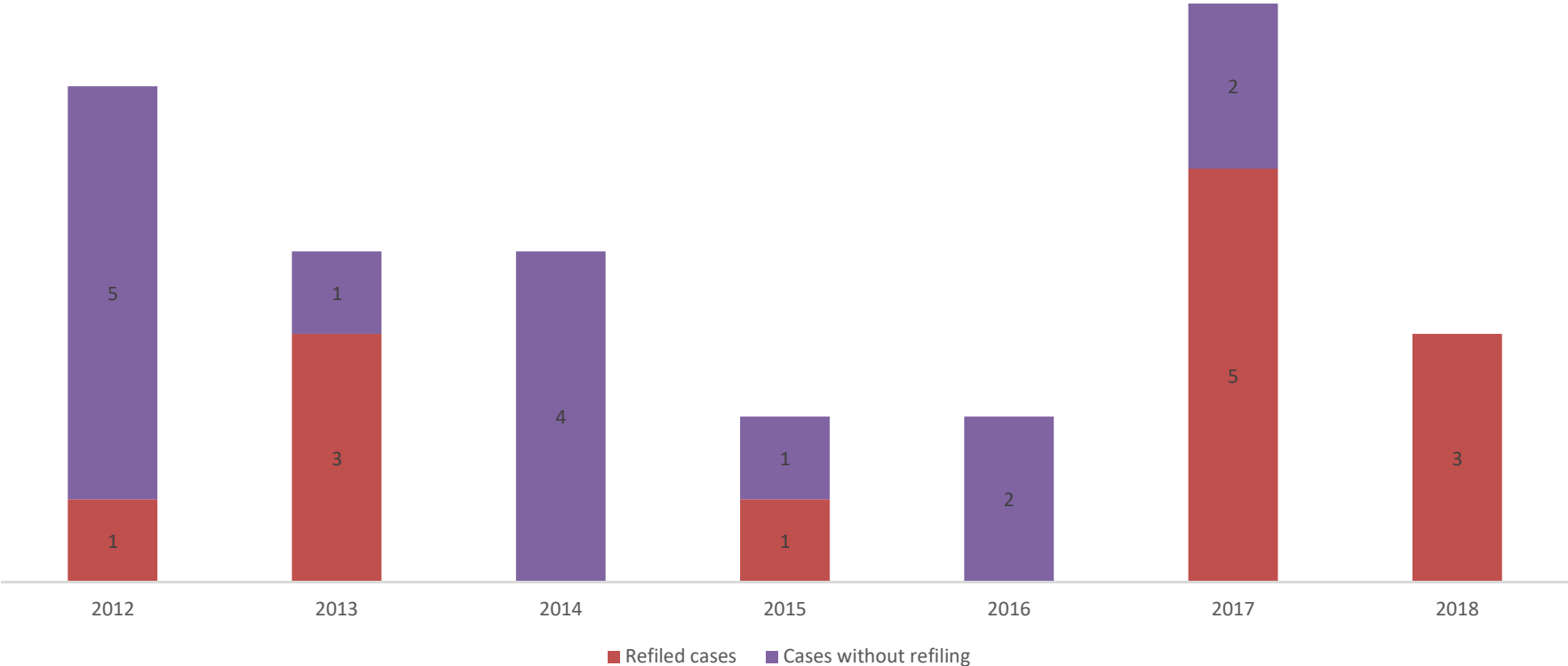
Simple Cases (over 30 days) – Type and Industry*



* Based on 18 cases in 2016-2018 H1. Some cases fall within more than one type.

Complex Picture of Review Timeline (Cont'd)

No. of Pull and Refile Cases in Conditional Clearances



Complex Picture of Review Timeline (Cont'd)

Uncertainty arising from the recent US-China trade tension
Qualcomm/NXP as an example

Deal announced on
10/27/2016

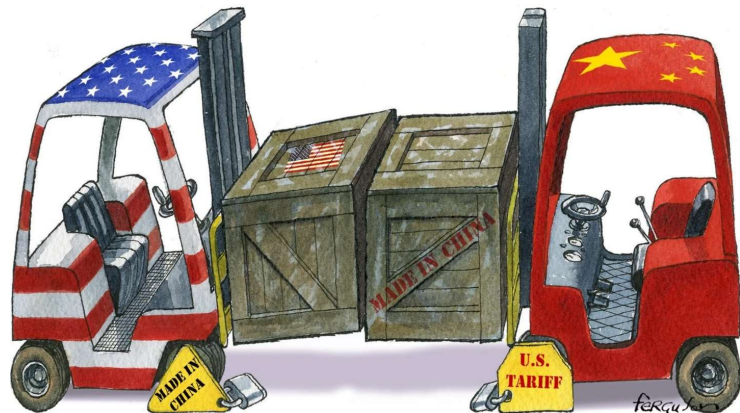
Initial China filing in 02/2017

1st Re-filing reportedly
to be in 10/2017

*Delay reported in late
03/2018 (trade tension)*

2nd Re-filing reportedly to be in
04/2017

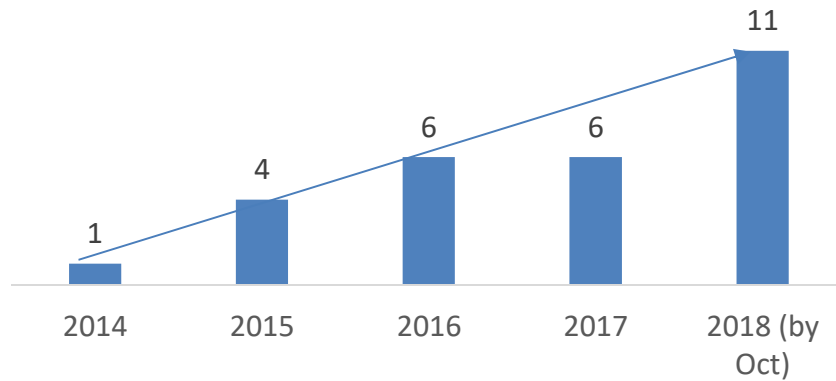
*Talk with China said to be once resumed in
late 05/2018*



Terminated on 07/26/2018

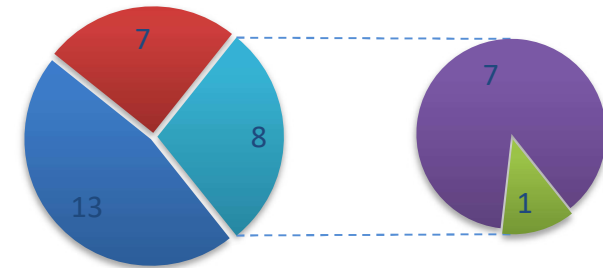
Increasing Enforcement on Failure to Notify

No. of Cases

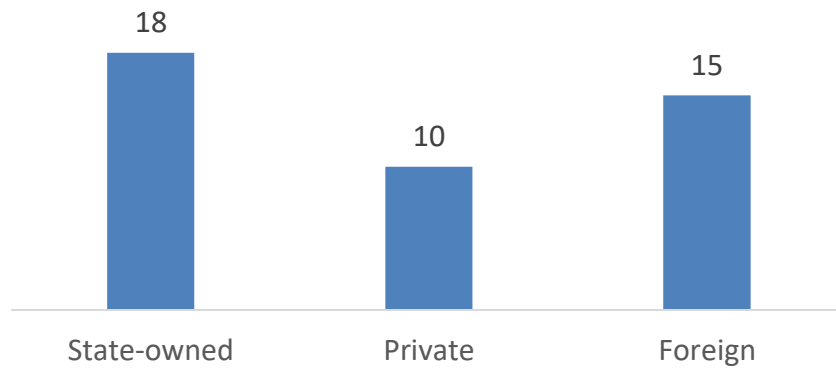


Type of Cases

- JV
- Other Share Purchase
- Minority Share Purchase



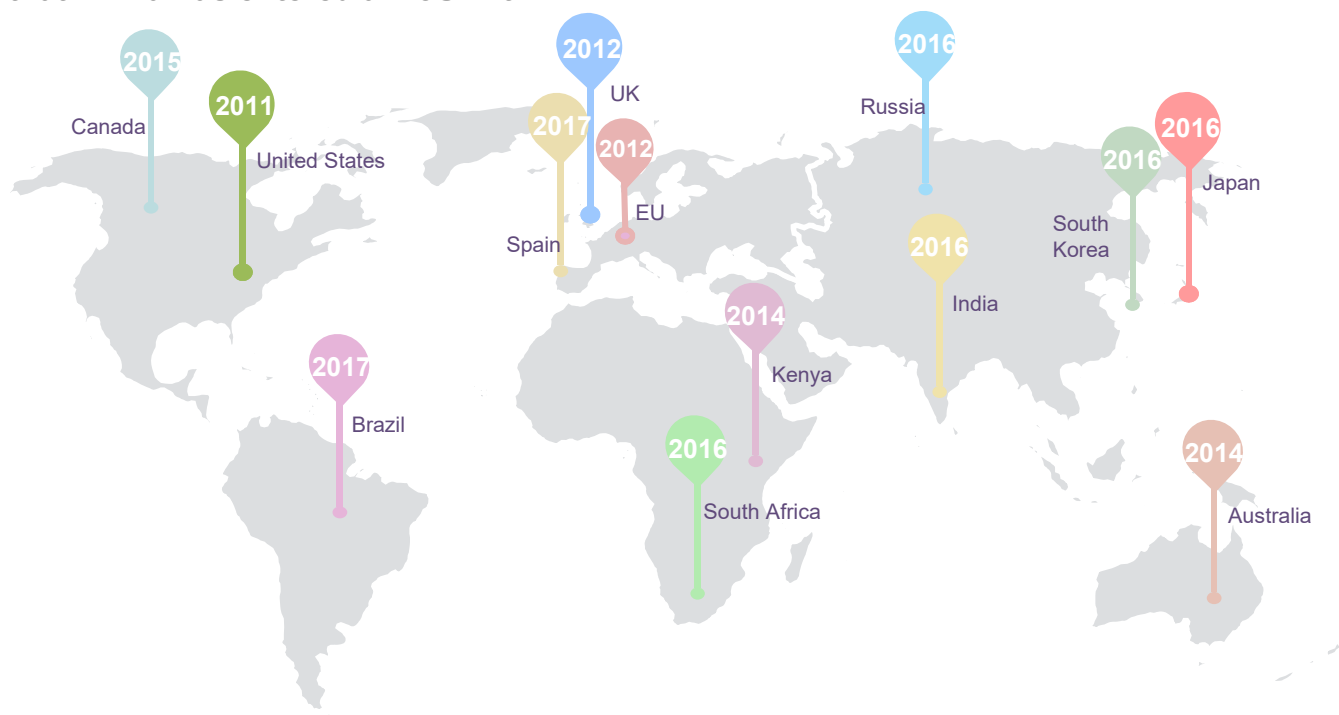
Type of Fined Companies



Enforcement of non-compliance with merger notification is among SAMR's priorities.
 - Mr. Xu Lefu, speech at a competition forum in Sep. 2018

Expanded International Cooperation

Jurisdictions that China has entered a MoU with



Cooperation in More Cases*

- E.g., cooperated with other enforcers in >11 cases this year, including Broadcom/Brocade and Dow/DuPont, representing ~5% of the overall cases concluded.

Cooperation with More Enforcers

- EU
- US
- (Increasingly) new economics, such as, South Africa and Russia

Broadened Discussion*

- Coordination on procedure
- Complicated issues
- Market definition
- Competitive analysis
- Data verification
- Remedies

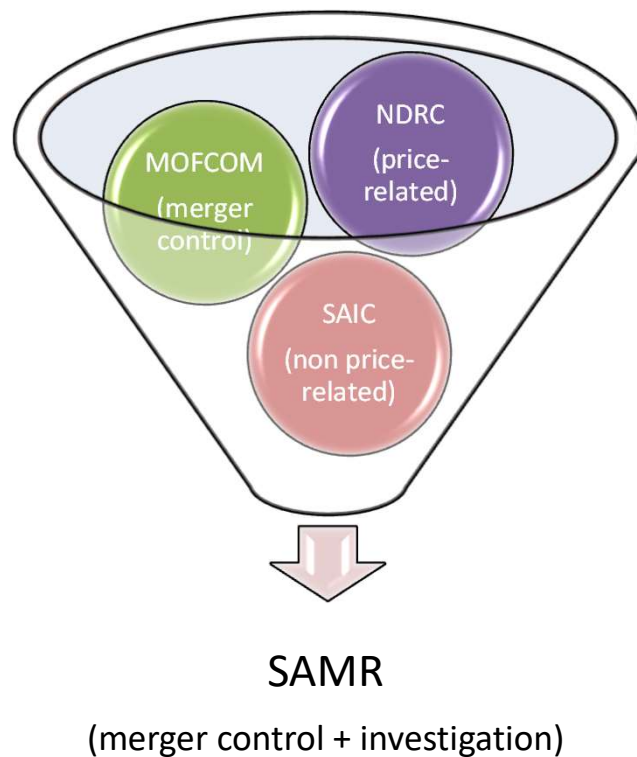
Multiple Mechanism

- Communication with international organization, incl. ABA, OECD, UNCTAD, and APEC
- High-level dialogue with US and EU, such as, EU-China Competition Week

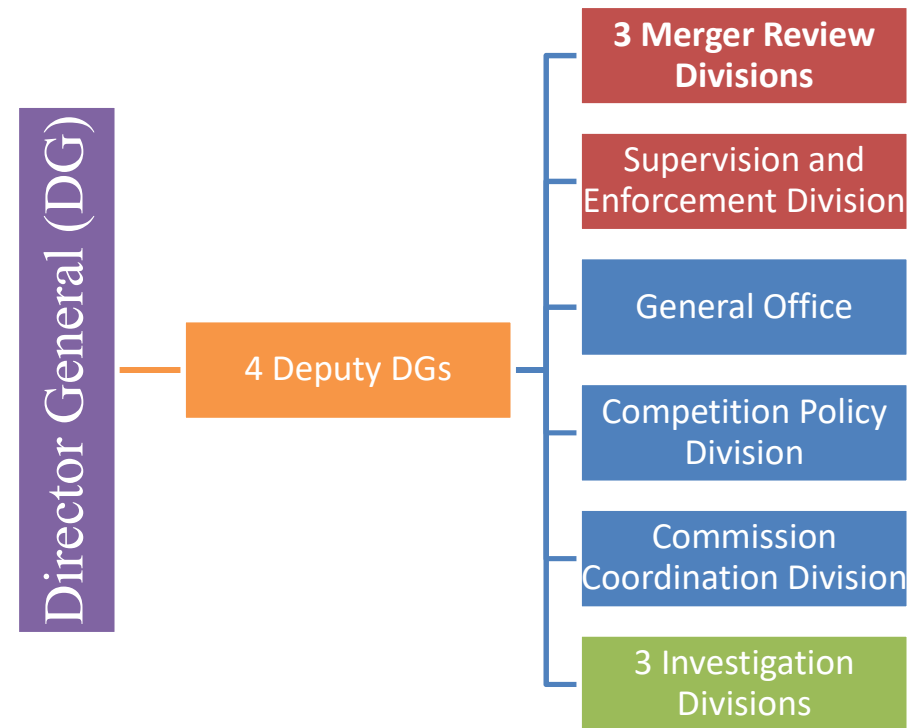
Source: MOFCOM official's speech in 2017 China competition policy forum held in Aug. 30-31 2017

Agency Integration

Integration of Three Agencies into a Single One



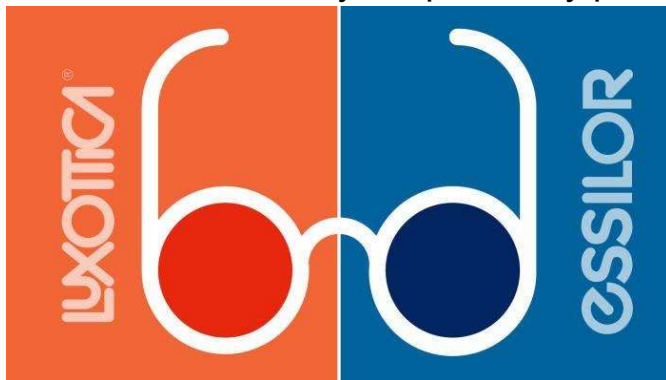
Structure of the New Anti-Monopoly Bureau under SAMR



Case Study – Conglomerate Effect

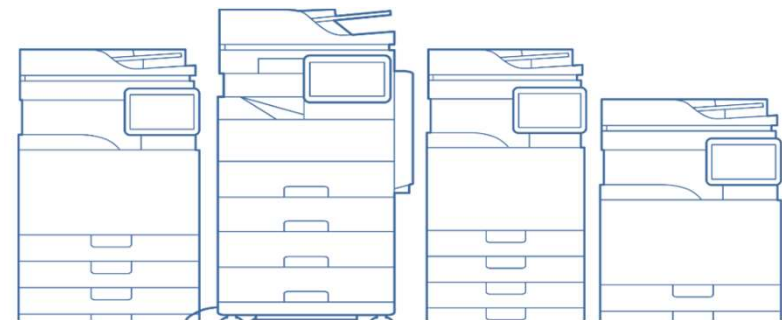
Essilor/Luxottica (2018)

- Optical industry
- Limited overlaps - Essilor focuses on lenses, while Luxottica focuses on frames and sunglasses
- Mainly conglomerate concerns raised by a stakeholder
- Remedies were only imposed in a few jurisdictions
- China behavioral remedies
 - no tying, supply on FRAND terms, no exclusivity, no predatory pricing, etc.



HP/Samsung (2017)

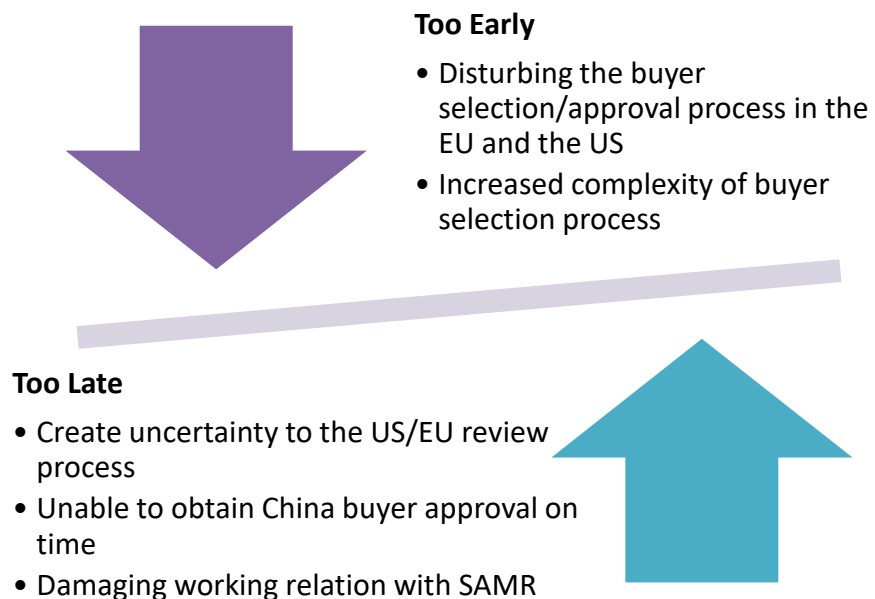
- Printer industry
- Limited overlaps - Samsung is strong in A3, whereas HP is strong in A4
- Conglomerate concerns (re printers and consumables)
- Remedies were only imposed in China
- China behavioral remedies
 - no tying, supply on FRAND terms, assurance on interoperability, ban on future acquisitions, etc.



Case Study – International Coordination

Abbott/St. Jude Medical (2016)

- Medical device industry
- Horizontal concern
- Clearance achieved within 6m after filing (one of the quickest conditional approvals)
- Global divestiture remedy – fix-it-first (one of the three fix-it-first cases so far)
- Coordination with EU and US on remedy negotiation and timing (see below)



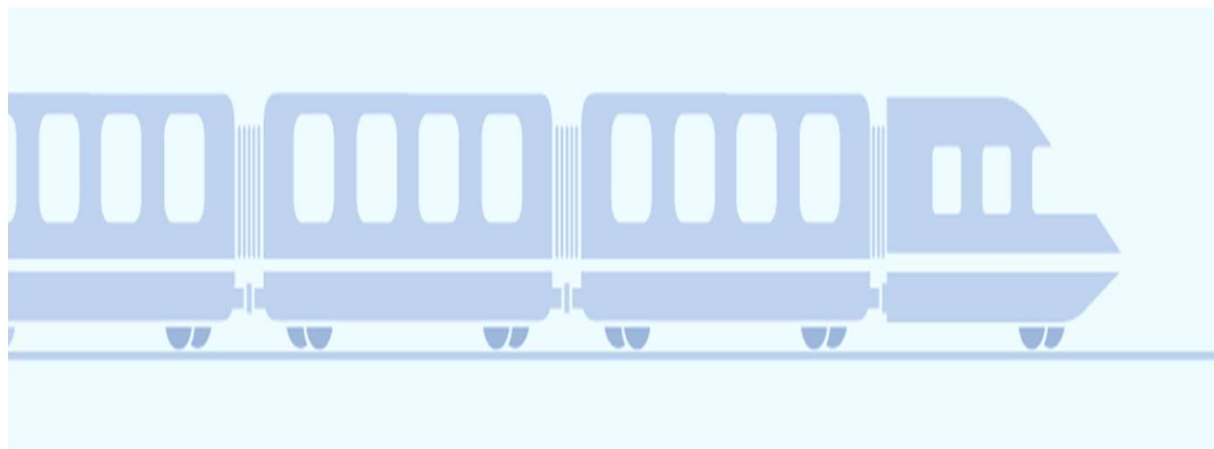
General Suggestions

- File early in China
- Inform SAMR of buyer at the most appropriate time (earlier than other ROW)
- Take China process into consideration when discussing the U.S. deadline for divestiture closing

Case Study – Managing All Decision Makers

Siemens/Alstom (2018)

- Mobility industry
- Only take ~4 months after filing to obtain unconditional clearance in China
- Limited overlaps, but involving a sensitive industry where large SOEs are dominant



Other Examples:



DEVELOPMENTS IN U.S. MERGER ENFORCEMENT

Charles F. (Rick) Rule

Paul, Weiss, Rifkind, Wharton & Garrison LLP

BACKGROUND

CURRENT U.S. ENFORCERS

Trump
Administration

Department of Justice



Asst. Attorney General
Antitrust Division
Makan Delrahim



Deputy Asst. AG
Mergers
Barry Nigro



Principal Deputy Asst. AG
Antitrust Division
Andrew Finch



Deputy Asst. AG
International
Roger Alford



Acting Deputy Asst. AG
Criminal
Richard A. Powers



Deputy Asst. AG
Litigation
Vacant



Deputy Asst. AG
Economics
Vacant

Trump Administration | Federal Trade Commission



Chairman
Joseph Simons (R)



Commissioner
Noah Phillips (R)



Commissioner
Christine Wilson (R)



Commissioner
Rebecca Kelly Slaughter (D)



Commissioner
Rohit Chopra (D)



Director
Bureau of Competition
Bruce Hoffman



Director
Bureau of Economics
Bruce Kobayashi



Director
Bureau of Consumer Protection
Andrew Smith

BACKGROUND

U.S. LAW & MERGER CONTROL PROCESS

Paul|Weiss

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Substantive Law: §7 of the Clayton Act (as amended in 1950)

- Condemns acquisitions of stock or assets, the effect of which “may be substantially to lessen competition, or tend to create a monopoly”
- U.S. court decisions (Supreme Court and Courts of Appeal, most importantly) have fleshed out meaning
 - For example, concept of relevant markets and importance of market shares/concentration derive from case law (much before 1970)
 - Also, favorable presumptions for government based on concentration created by courts
 - Supreme Court enshrined principle that U.S. antitrust is a “consumer welfare prescription”
- DOJ/FTC articulate their enforcement policy toward M&A in Merger Guidelines
 - First published by DOJ in 1968; completely rewritten in 1982 and amended several times since
 - Horizontal merger guidelines last amended in 2010; FTC joined in the 1990s
 - Non-horizontal merger guidelines haven’t been updates since 1984 (FTC never joined)
 - Technically not binding on courts, but today courts routinely follow the guidelines
- DOJ and FTC have concurrent jurisdiction to enforce section 7
 - Use an informal, half-century old clearance process so that only one agency is reviewing a given merger
 - State attorneys general, as well as private parties suffering “antitrust injury”, can bring court actions under section 7
- Importantly, under U.S. antitrust law, M&A does not require DOJ/FTC approval; rather, law provides a tool for agencies to try to stop (or undo) mergers
 - Mergers are allowed unless the FTC/DOJ (or other proper plaintiff) proves in a court that the merger violates section 7

U.S. law does not require DOJ/FTC approval for mergers, but they have the power to investigate and challenge mergers

Suspensive Process: Hart-Scott-Rodino Act (§7A of the Clayton Act)

- In 1976, U.S. first major jurisdiction to enact a suspensive regime of merger notification
 - Gives DOJ/FTC notice, time, and tools to investigate significant M&A before deal can close
 - Transactions subject to law cannot close until waiting periods expire or are terminated early by FTC
 - Did not change substantive law; DOJ/FTC still must go to court to block a merger (or threaten to extract remedies to “fix” any issues)
- Statute and FTC-administered regulations determine whether a transaction is subject to HSR
 - Generally the size of parties and size of transaction determine whether a filing is required
 - Thresholds increase every year to reflect inflation; currently the “size of transaction” threshold is \$84.4 million”
 - The FTC’s “Pre-merger Notification Office” administers the thresholds and regulations
- If a transaction is reportable, both parties must make a relatively simple report and wait 30-days before closing
 - Except for certain deal-related documents (so called “4c and 4d documents”), the report provides little valuable substantive information
 - If any issue, investigating agency will ask parties to provide additional information voluntarily
 - Can “pull and refile” (i.e., restart the 30-day clock) once to avoid the second-request process (below)

The U.S. merger review process begins with a simple filing that starts an initial waiting period

Suspensive Process: Hart-Scott-Rodino Act (§7A of the Clayton Act)

If concerns remain at the end of the initial waiting period, the investigating agency can extend the waiting period by issuing a “second request” to parties

- 2nd request is a very extensive request for documents, data, and substantive response – often millions of documents and terra bytes of data
 - Typically parties negotiate to narrow scope; still very burdensome
 - Also, agencies have power to require individual officers and employees to testify under oath
- Statute provides that 2d request extends waiting period until 30 days after both parties “substantially comply” with the 2nd request
 - But, currently, timing agreements between parties and DOJ/FTC supersede the statutory waiting period (and practically give DOJ/FTC more time)
- When waiting period expires (or is terminated early), the parties can close unless DOJ/FTC go to court and obtain an injunction
 - DOJ/FTC use threat of court action (and resulting delay and risk of being blocked) to extract remedies
 - Generally, any remedies are embodied in a consent order or judgment (as opposed to voluntary undertakings)

The Second Request process involves extensive discovery, document productions, and interviews—timing is flexible, but typically takes months

Unique Aspects and Customs in U.S. Merger Control Process

- Compared to other major jurisdictions, U.S. process is less structured, more flexible, and more varied
 - E.g., no set “phases” prescribing timing
 - No equivalent of a Form CO requiring parties to identify and address issues
- DOJ/FTC have powers beyond those provided by HSR Act to obtain information
 - Can send parties compulsory process (“CIDs”), e.g., to require depositions (i.e., testimony under oath)
 - Can also send third-parties CIDs to compel document and data production and even to compel depositions
 - The information obtained from third-parties is not made available to the parties (unless and until DOJ/FTC file a complaint in court)
- Typically, timing agreements between parties that receive a 2nd request and the investigating staff supersede statutory waiting period
 - Process has evolved over more than 25 years and varies depending on agency and even investigating staff
 - Agencies use leverage to get more than the 30-days, post-substantial compliance (in some cases up to 120 or more days)
 - Agreements also address various other issues (e.g., number of depositions, meetings with supervisors and Front Office, parties’ rights in litigation)

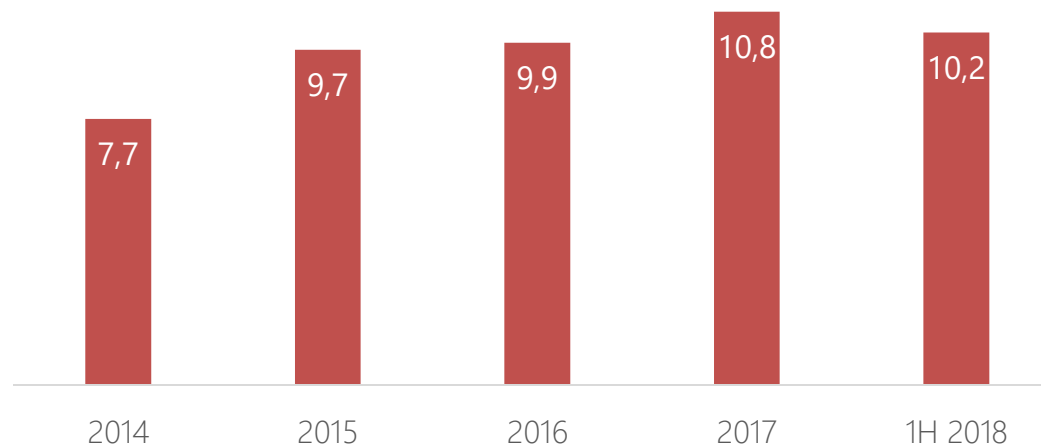
There is a great deal of flexibility in the U.S. enforcement process, which differs from other regimes—close coordination with other enforcers is critical

Major Antitrust Investigation Duration

Recently, Makan Delrahim has announced that DOJ will make effort to limit and shorten the process

- Delrahim made the announcement in a September 25 speech at Georgetown Law
- DOJ will aim to resolve most merger investigations within six months of the parties' HSR filing, assuming "expeditious cooperation" from the parties
- Cigna/ESI deal arguably a beneficiary of that announcement (six months from filing to closing)

Average Major U.S. Merger Investigation Duration (mos.)

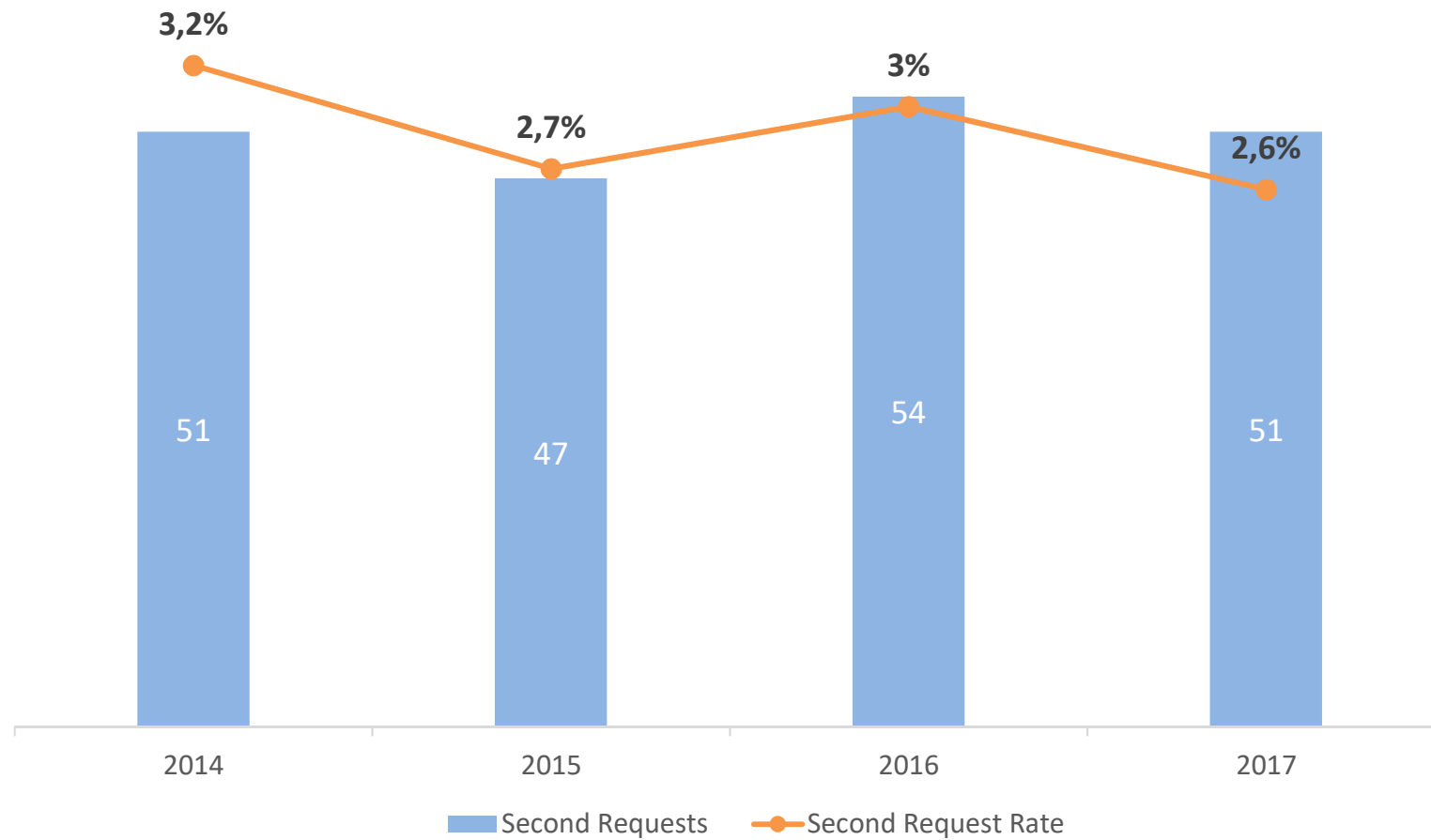


International Cooperation & the Multilateral Framework on Procedures

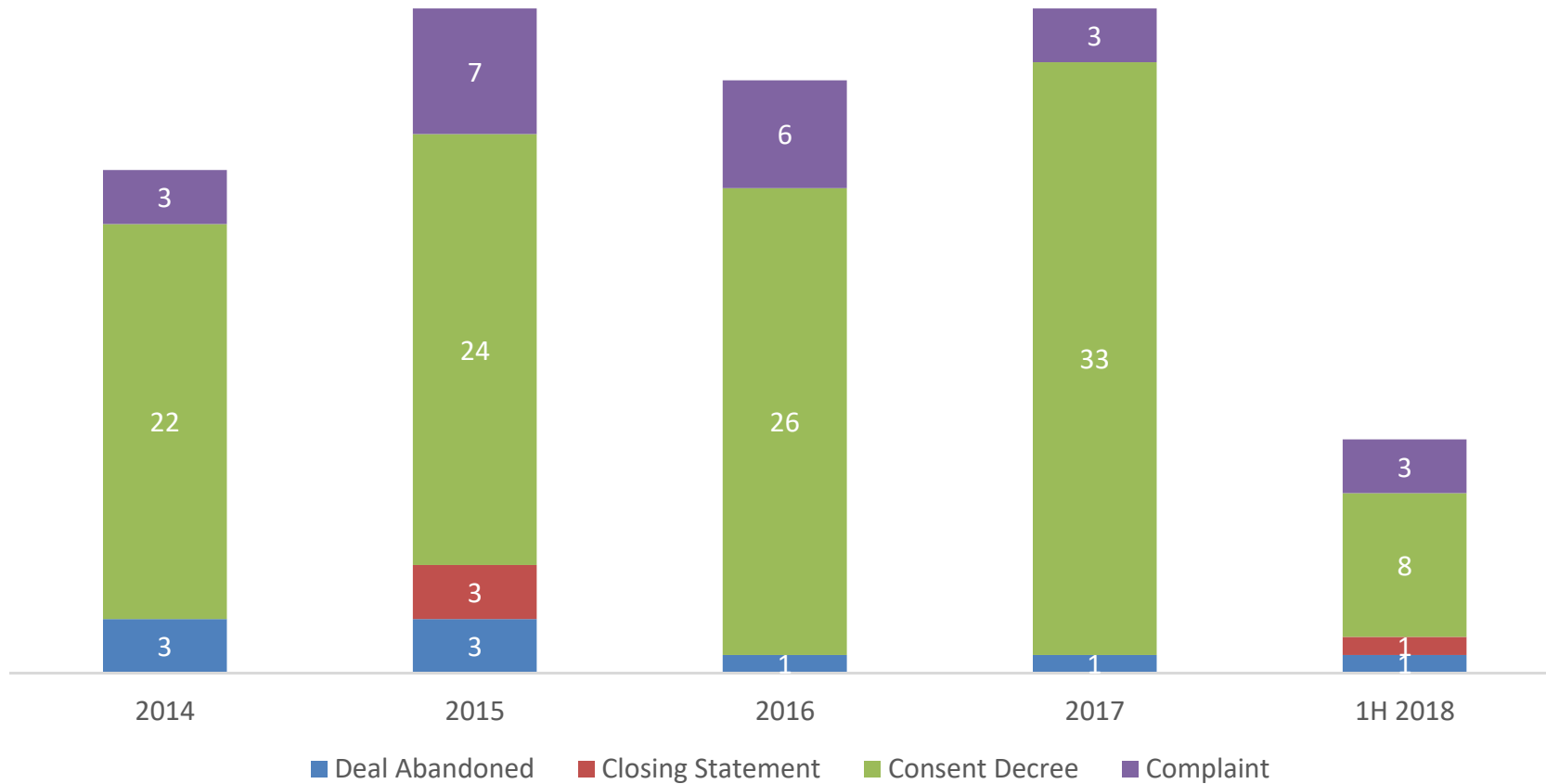
- In the past, there have sometimes been difficulties in coordinating merger remedies across borders
 - GE/Honeywell
 - Boeing/McDonnell Douglas
- Today, jurisdictions are generally "on the same page" substantively
 - But some friction on issues like timing and remedies remains
 - Recently, in significant multi-jurisdictional deals, there have been conflicts on remedies
- To resolve potential procedural and substantive conflicts, regulators coordinated through international bodies such as ICN
- DOJ is now pushing for the global antitrust enforcement community to finalize a joint Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP)
 - Delrahim announced the MFP initiative in June 2018
 - MFP aims to identify universal procedural norms and to allow for better cooperation between agencies
 - Specifically, the goal of MFP is to promote fairness and due process commitments regarding:
 - Non-discrimination
 - Transparency
 - Timely resolution
 - Confidentiality
 - Conflicts of interest
 - Proper notice
 - Opportunity to defend
 - Access to counsel
 - Judicial review

RECENT U.S. MERGER ENFORCEMENT

Second Requests & Rate



Significant U.S. Merger Investigation Outcomes



RECENT HORIZONTAL MERGER ENFORCEMENT

RECENT LITIGATED MERGER CHALLENGES

Under the “Obama formula”, agencies focused on sophisticated markets with fewer players, particularly where a “maverick” firm plays a special competitive role



AT&T/T-MOBILE (2011)

DOJ filed suit to challenge AT&T’s proposed \$85 billion acquisition of Time Warner. The judge concluded that DOJ had failed to prove that the combination would result in higher prices for consumers or harm competition.



US AIRWAYS/AMERICAN AIRLINES (2013)

DOJ challenged the merger of two of the largest U.S. airlines. DOJ cited the extent of consolidation in the industry and US Airways’ role as a maverick competitor because of its unique pricing structure. The companies were ultimately required to divest slots to low-cost carriers.



STAPLES/OFFICE DEPOT (2016)

FTC challenged the proposed merger of two office products retailers. FTC alleged the deal would increase market concentration to presumptively anticompetitive levels in the market for “sale and distribution of consumable office supplies to large business-to-business customers.” FTC won its motion for preliminary injunction and the deal was abandoned.



CIGNA/ANTHEM & AETNA/HUMANA (2016-17)

DOJ successfully challenged two major U.S. health insurance mergers. In Aetna/Humana, DOJ primarily relied on competitive overlaps. In Cigna/Anthem, DOJ pointed to Cigna’s innovation in customer-facing wellness programs to argue that it was a maverick competitor. DOJ was affirmed on appeal, resulting in an important CADC opinion on efficiencies.

Recent Horizontal Merger Challenges



CVS/AETNA

DOJ approved CVS Health's acquisition of insurer Aetna, but required the divestiture of Aetna's Medicare Part D prescription drug business for individuals.



DOW/DUPONT

DuPont and Dow Chemical won U.S. antitrust approval to merge on the condition that the companies sell certain crop protection products and other assets.



MONSANTO/BAYER

After a prolonged investigation (and after EU approval), DOJ finally approved merger subject to significant divestiture to BASF to create a new (replacement) GMO seed/trait platform. Divestiture package included seed treatment assets to address "vertical problem". Very long and detailed consent judgment with significant hold separate.



WALGREENS/RITE AID

Merger of two of three largest retail pharmacy chains abandoned, apparently due to 1-1 deadlock of remaining Commissioners over accepting divestitures. Instead, Walgreens is buying 1,932 stores and three distributions centers from Rite Aid for nearly \$4.4 billion in cash.



J.M. SMUCKER/CONAGRA

FTC challenged the proposed \$285 million acquisition, claiming it would eliminate head-to-head competition in the market for the sale of canola and vegetable oils to retailers, citing several of the parties' internal documents. The parties abandoned the deal in March 2018.



DISNEY/FOX

DOJ approved the \$71 billion bid for 21st Century Fox, on the condition that Disney divest all of Fox's 22 regional sports networks. Successful effort by Disney to gain regulatory advantage over Comcast.

RECENT VERTICAL MERGER ENFORCEMENT

AT&T/Time Warner Merger Litigation

DECISION TO CHALLENGE

AT&T/TW suit was the first litigated vertical merger challenge in 40 years; prior to filing the complaint, DOJ/FTC accepted consent orders with behavioral remedies to fix “problematic” vertical mergers:

- DOJ justified the challenge (versus a consent decree) largely on the grounds that AT&T only offered behavioral remedies and DOJ felt only structural remedies would do.
- DOJ believed it had evidence that AT&T/DirecTV would raise the fees for TW’s live programming and use that programming to stymie the growth of virtual MVPDs.
- Without the benefit of a *Philadelphia National Bank* presumption, DOJ relied heavily on Shapiro’s bargaining model.
- However, DOJ did acknowledge efficiencies (at least elimination of double marginalization).

TRIAL COURT DECISION

Judge Leon’s decision in *U.S. v. AT&T/TW* rejected DOJ’s arguments across the board:

- Recognized vertical mergers are inherently less of a threat to competition, but even accepting DOJ’s framework, DOJ failed to prove any anticompetitive effect.
- Found the inputs in Shapiro’s model (e.g., switching) didn’t reflect real world evidence.
- Essentially found that DOJ failed to prove that AT&T would either raise fees for TW content or restrict distribution of that content to harm “virtual MVPDs.”
- Explicitly recognized efficiencies and indicated the merger had great potential for efficiencies (beyond EDM); however, court determined it was unnecessary to evaluate claimed efficiencies because DOJ failed to show any threat to competition.

APPEAL

DOJ appealed the trial court’s decision to the U.S. Court of Appeals for the DC Circuit:

- DOJ claims Judge Leon erred by ignoring the economics of bargaining and the principle that corporate subsidiaries act to maximize the parent’s profits.
- DOJ argued that Judge Leon’s determination that the merger wouldn’t give Time Warner increased bargaining leverage “implausible and internally inconsistent.”
- DOJ argued that the court erred in rejecting evidence that a combined AT&T/Time Warner would maximize firm-wide profits by increasing programming costs for rival distributors.

Recent Pharmacy/Insurer Mergers



CIGNA/EXPRESS SCRIPTS

In September, DOJ unconditionally approved Cigna's acquisition of Express Scripts, a pharmacy benefits manager (PBM). In his closing statement approving the transaction, Delrahim said the deal was unlikely to lessen competition in the sale of PBM services because Cigna's PBM business nationwide is small. He also pointed to the existence of at least two other large PBM companies and several smaller ones.



CVS/AETNA

In October, DOJ approved CVS Health's acquisition of insurer Aetna, but required the divestiture of Aetna's Medicare Part D prescription drug business for individuals. As in Cigna/Express Scripts, DOJ concluded that the deal was unlikely to cause CVS to increase costs for Aetna's insurance rivals "due to competition from other PBMs and retail pharmacies."

Both cases suggest that the DOJ's decision to challenge AT&T/Time Warner does not herald a general concern with vertical mergers

EMERGING TRENDS IN HORIZONTAL MERGER INVESTIGATIONS, LITIGATION & REMEDIES

Investigations & Litigation



EFFICIENCIES

Yet to be found as a defense to an otherwise anticompetitive horizontal merger.

Appellate decision in *Cigna/Anthem* endorses DOJ view of high burden on defendants.

Must be merger-specific true efficiencies (not simply a wealth transfer) and cognizable (demonstrated to occur in amounts that are reasonably certain).



BARGAINING MODEL

Increasing trend toward economic analysis of “direct” competitive effects (i.e., price increases), with GUPPIs and merger simulation models.

Require care because, to be successful for parties, often requires showing of substantial efficiencies.

Notwithstanding the models, agencies continue to rely on market share/concentration (HHI) threshold presumption (*Philadelphia National Bank*).



MONOPSONY & LABOR

In recent testimony before the Senate Judiciary Subcommittee on Antitrust, FTC Chairman Joe Simons said that the FTC will consider potential monopsony effects in merger cases before the Commission, focusing specifically on potential impacts on labor.

The FTC’s ongoing tech hearings include a specific focus on monopsony and the effects on labor. This is part of a larger reconsideration of the “consumer welfare” standard.

Remedies

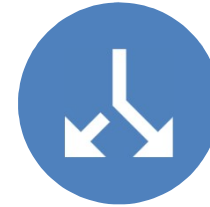


AGENCIES MORE SKEPTICAL OF BEHAVIORAL REMEDIES

Assistant AG Delrahim has repeatedly expressed skepticism of behavioral remedies for merger cases in public statements and speeches:

[W]here a reasonable probability of anticompetitive effects exists, the role of the enforcer is to eliminate the risk and let the markets dictate prices—not to design elaborate remedies that purport to reduce that risk while usurping regulatory powers. Structural remedies to an illegal merger, such as divestitures, substantially eliminate the risk of harm and preserve natural incentives for businesses to compete.

DOJ thus insisted on structural remedies in several cases, including AT&T/Time Warner and Bayer/Monsanto.



AGENCIES MORE SKEPTICAL OF DIVESTITURES

Several high profile divestitures have failed in recent years, such as Hertz/Dollar Thrifty Automotive Group Inc.

FTC Best Practices reflect skepticism.

DOJ and FTC rejected proffered fixes in several major deals and instead sued to block.

DOJ's skepticism most apparent in vertical case, AT&T/Time Warner.

In CVS/Aetna, DOJ requested divestiture of Aetna's entire PDP business, even in areas without overlap problems.

Divestiture issues also loomed large in Bayer/Monsanto, as a key concern for DOJ was whether the proposed \$9 billion divestiture would preserve competition in the market.

CFIUS and Transactions that Implicate U.S. National Security

- Foreign investment in U.S. businesses can trigger additional U.S. regulatory requirements
- Parties may need to clear the transaction through the Committee on Foreign Investment in the United States (CFIUS)
- CFIUS interprets “national security” broadly, so it has jurisdiction over a wide range of transactions
- CFIUS can block a transaction if it:
 - Finds credible evidence that the foreign interest exercising control might threaten national security, and
 - Concludes that it cannot adequately protect national security through other means
- There are three formal stages to a CFIUS case:
 1. Initial review phase (30 days)
 2. At CFIUS’s option, a formal investigation phase (45 days)
 3. At CFIUS’s option (but very rare), referral to President for decision (15 days)
- But the reality is more complicated
 - It normally takes at least 4 weeks (after deal signing) to prepare a CFIUS notice
 - The parties normally file first with CFIUS in draft, and it can easily take several weeks to obtain and incorporate CFIUS comments
 - Once the parties make the formal filing, the statutory time clock does not start until CFIUS formally accepts the filing as complete (easily another 1-2 weeks)
 - If CFIUS does not have time to complete its review in 75 days, or if there is not time to complete negotiation of a mitigation agreement, the parties will commonly pull and re-file (starting the statutory time clock all over again)
 - So, for most cases, a good estimate of the time required after deal signing is 4-6 months
- The Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), passed in 2018, will cause fundamental changes in the foreign investment review process overseen by CFIUS
 - These changes include the broadest expansion in CFIUS jurisdiction since this interagency committee was reconstituted in 1988
 - FIRRMA expands the range of transactions subject to CFIUS jurisdiction (“covered transactions”) to capture certain transactions that do not involve an acquisition of control over a U.S. business by a foreign person
 - Recently released regulations implement changes and introduce mandatory filings for acquisitions of non-passive interests in critical technology and certain industry sectors

Some Hot Topics in Merger Control from a European Perspective

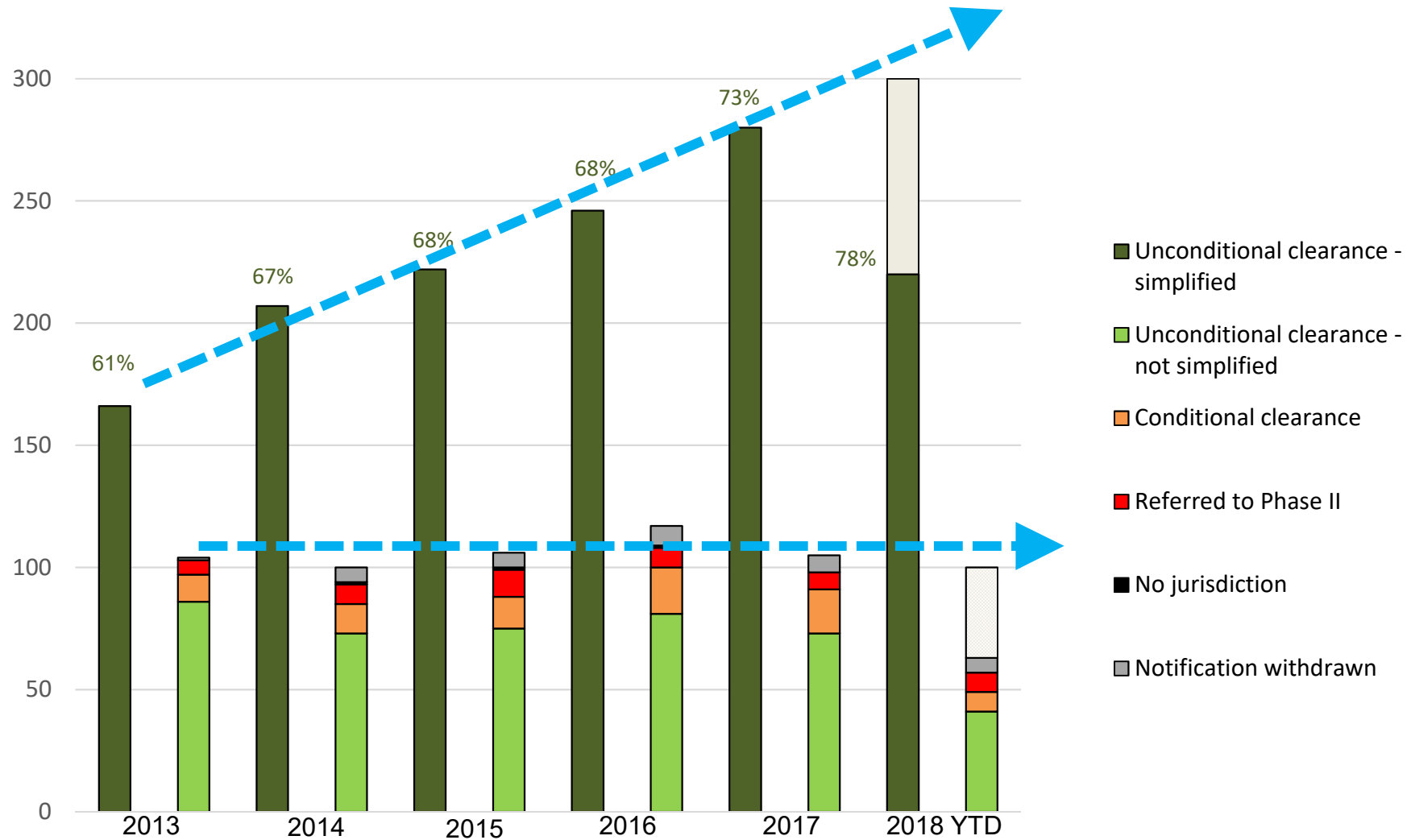
John Boyce, Slaughter and May, Brussels

Headlines from Europe

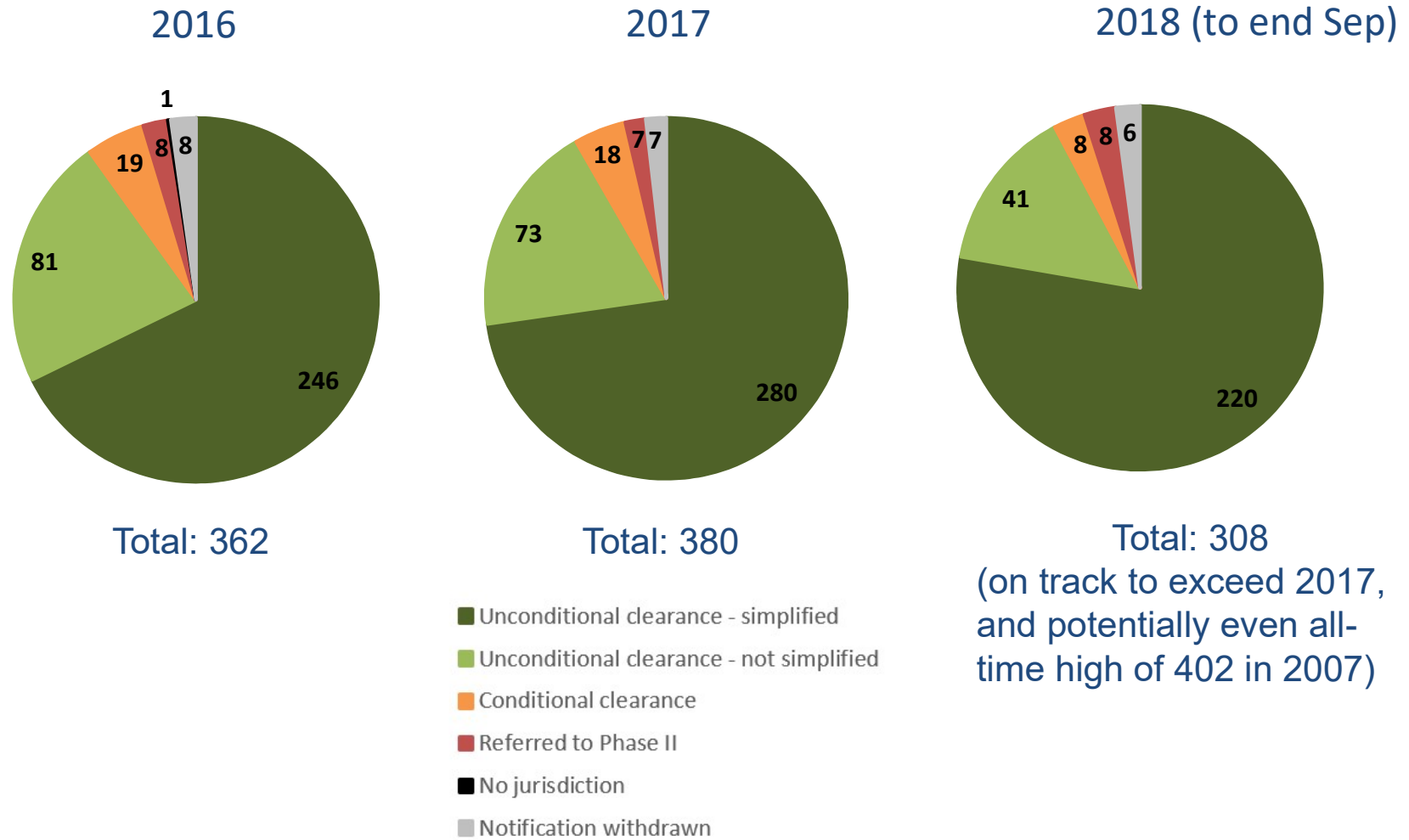
1. Some Statistics and Context: Most EU cases are cleared quickly, but:
 - Pre-notification is getting longer for non-simplified cases
 - The difficult cases seem to be getting ever more demanding
2. Gun-jumping risks
3. Risks of providing misleading information
4. Other changes ahead in Europe:
 - 30 March 2019: Brexit:
 - Issues for pending cases (including remedies)
 - CMA as a new global antitrust authority?
 - 23-26 May 2019: European elections (=> new Commissioners later in year)

1. Some Statistics and Context

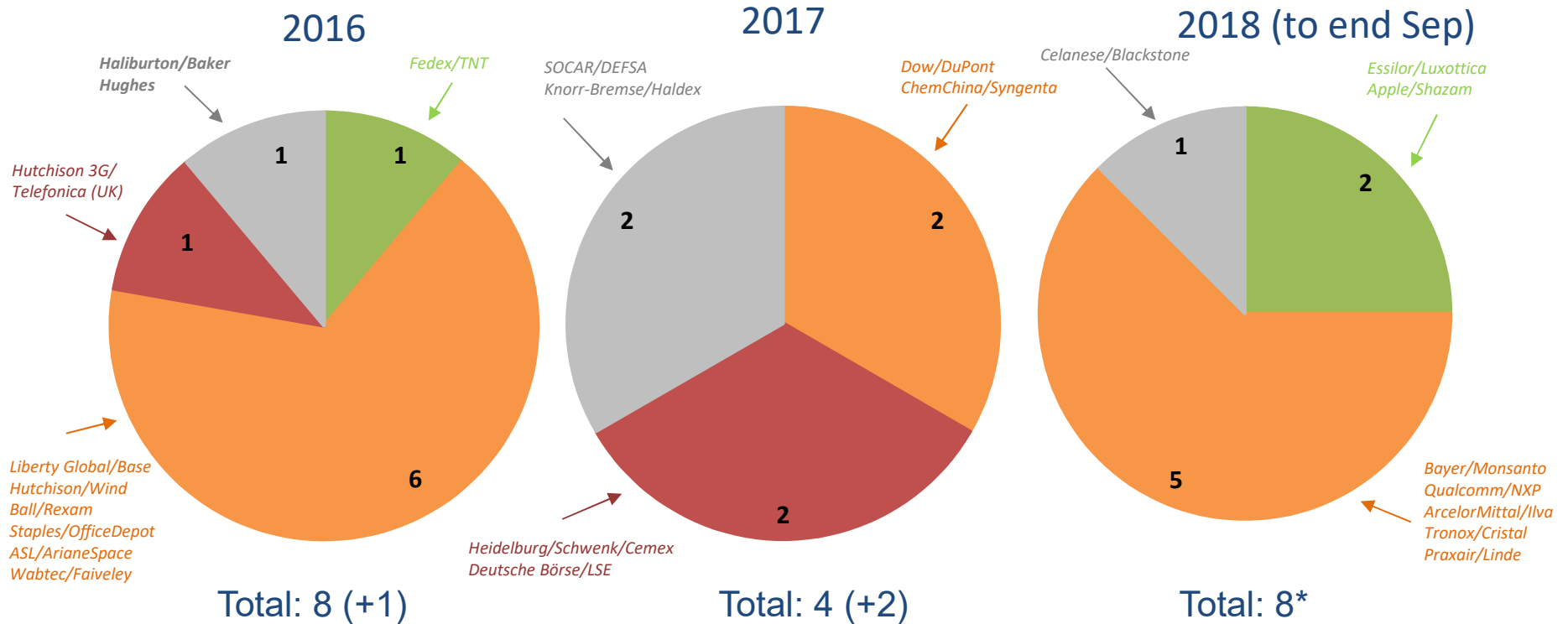
1.1 Trends in Phase I reviews



1.2 Phase I Outcomes



1.3 Phase II Outcomes




* Currently a further six cases pending (two due to be completed before year end):

- T-Mobile/Tele2
- BASF/Solvay (polyamide)
- KME/MKM
- Wieland/Aurabis
- Thales/Gemalto
- Siemens/Alstom

1.4 Pressures and challenges in the digital age

<ul style="list-style-type: none"> • Increasing access to, & volumes of, data (RFIs & document requests) 	<ul style="list-style-type: none"> • internal documents (“smoking guns” & “silver bullets”) • reviewing custodians’ emails • economic analysis
<ul style="list-style-type: none"> • Increasing globalisation & regulatory scrutiny 	<ul style="list-style-type: none"> • multi-jurisdictional scrutiny (including foreign investment rules) • Impact on timing • coordination of reviews & remedies
<ul style="list-style-type: none"> • Increasing time & cost pressures 	<ul style="list-style-type: none"> • commercial pressures to get the deal done (break fees, HoHW, activist investors) • practical obstacles to using pre-notification process constructively • post-notification RFIs with tight deadlines
<ul style="list-style-type: none"> • Increasing role & influence of third parties 	<ul style="list-style-type: none"> • third party RFIs • complainants (& threats of appeals) • press scrutiny
<ul style="list-style-type: none"> • New conceptual approaches and changes in emphasis 	<ul style="list-style-type: none"> • how to deal with Big Tech/Big Data (including concept of “fairness”) • new focus on R&D pipelines & innovation competition • increasing interest in common ownership (& directorships)



<p>Data rich, time poor?</p>	<ul style="list-style-type: none"> • Project management (in-house & external counsel, economists, etc.) • Planning & coordination of information & data gathering, as well as filings & remedies • Efficient use of pre-notification where appropriate
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1.5 A tweet from the top



Margrethe Vestager ✓

@vestager

Follow



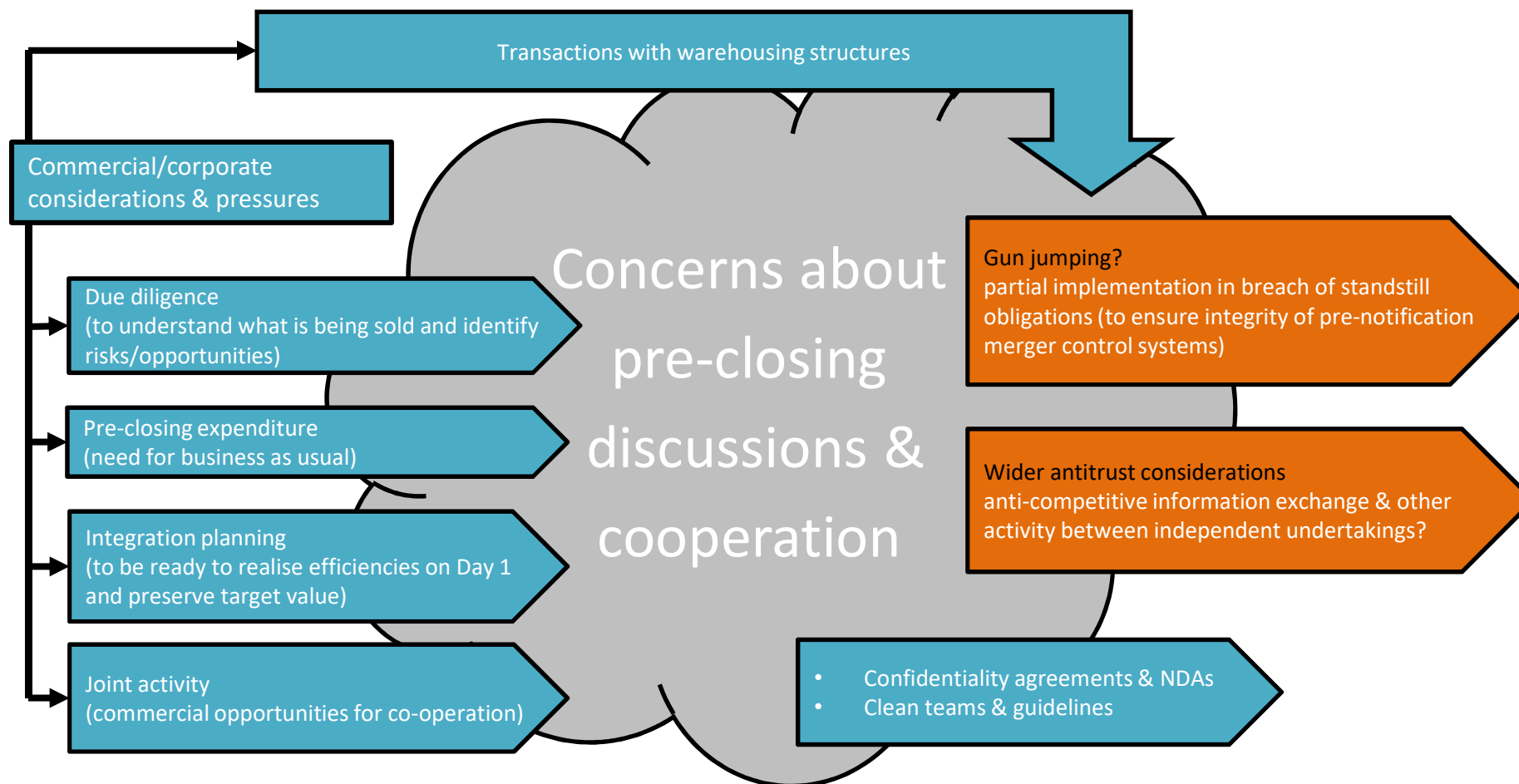
3 x Statements of Objections in 3 separate cases: Not giving full/accurate information or putting a merger into effect before cleared.
Don't

2:32 am - 6 Jul 2017

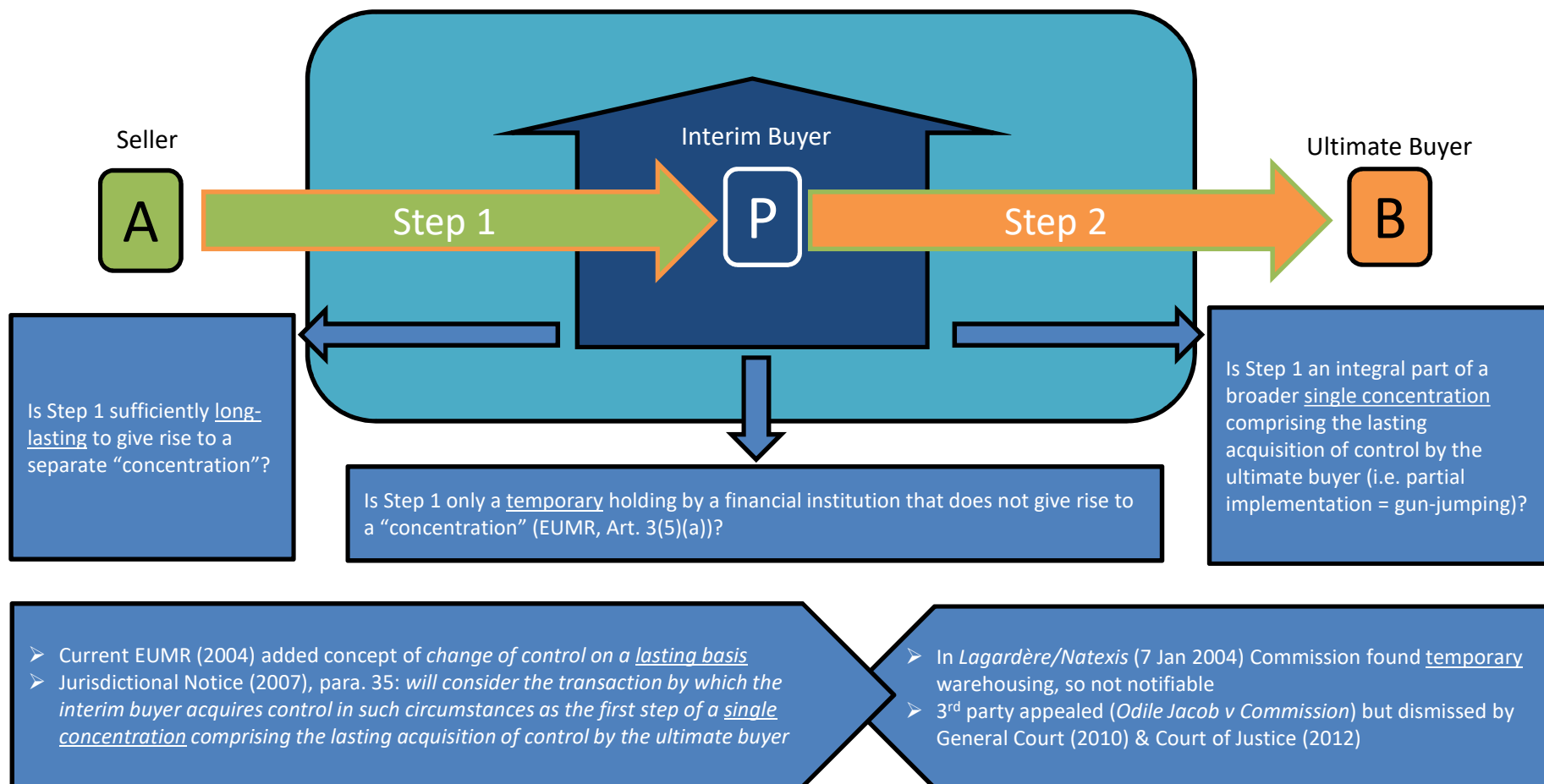
2. Gun-jumping

SLAUGHTER AND MAY

2.1 Don't jump the gun!



2.2 Warehousing arrangements



2.3 Fines for gun jumping

A. Under original EUMR (maximum fine was only €50,000)

Case	Fines	Failure
<i>Samsung/AST Research</i> (1998)	€33,000	Samsung totally failed to notify public bid prior to implementation + implemented prior to clearance
<i>A.P. Møller</i> (1999)	€219,000	A.P.Møller totally failed to notify three concentrations + implemented all three prior to clearances

B. Under current EUMR (up to 10% of worldwide turnover)

Case	Fines	Failure
<i>Electrabel/CNR</i> (2009)	€20m	Electrabel totally failed to notify acquisition prior to implementation + implemented prior to clearance
<i>Marine Harvest/Morpol</i> (2014)	€20m	Marine Harvest totally failed to notify acquisition prior to implementation + implemented prior to clearance
<i>Altice/PT Portugal</i> (April 2018) (on appeal to General Court)*	€124.5m	Altice able to exercise decisive influence (including veto rights over ordinary business) and did so prior to clearance and in some cases prior to notification (deal announced Dec 2014, notified in Feb 2015, and cleared with conditions at Phase I) (NB in 2016 Altice fined €80m by French NCA for cooperation and information sharing between signing and clearance of deals with SFR and OTL)

C. In the pipeline

Case	Status	Alleged failure
<i>Canon/Toshiba Medical Systems</i> (NB Canon fined by MOFCOM (c. €40,000) and criticised by JFTC)	SO sent to Canon in July 2017	Concerns that warehousing structure amounted to partial implementation (deal structure involving special-purpose vehicle company implemented in Mar 2016; notified Aug 2016 and cleared without conditions at Phase I)

* In May 2018, EU's Court of Justice issued ruling on referral (from Denmark) in *E&Y/KPMG* (Case C-633/16), finding that KPMG Denmark's termination of its membership of KPMG International was not early implementation of proposed merger with E&Y as it did not contribute to change of control of KPMG Denmark (even if it were ancillary or preparatory to the merger)

3. Misleading Information

3.1 Don't mislead! (must give full/accurate information!)

SECTION 11

Declaration

The notification must conclude with the following declaration which is to be signed by or on behalf of all the notifying parties:

‘The notifying party or parties declare that, to the best of their knowledge and belief, the information given in this notification is true, correct, and complete, that true and complete copies of documents required by Form CO have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

They are aware of the provisions of Article 14(1)(a) of the Merger Regulation.’

3.2 Fines for incomplete information

A. Under original EUMR (maximum fine was only €50,000)

Case	Fines	Failure
<i>Sanofi/Synthélabo</i> (1999)	€50k each	Did not disclose overlap in morphine
<i>KLM/Martinair</i> (1999)	€40k	Did not disclose some route overlaps
<i>Deutsche Post/Trans-o-flex</i> (1999)	€50k each	Did not disclose previous share acquisition of possible indirect control
<i>Mitsubishi Heavy Industries</i> (2000)	€50k + €900k periodic pens.	Incomplete response to RFI (by decision) - third party to Ahlström/Kvaerner merger
<i>BP/Erdölchemie</i> (2002)	€35k	Did not disclose co-operation agreements and activities in ACN technology licensing
<i>TetraLaval/Sidel</i> (2004)	€90k (2x€45k)	Did not disclose technology developments

B. Under current EUMR (up to 1% of worldwide turnover)

Case	Fines	Failure
<i>Facebook/WhatsApp</i> (May 2017)	€110m	Did not disclose ability to establish automated matching between Facebook & WhatsApp users' accounts

C. In the pipeline (SOs sent July 2017)

Case	Alleged failure
<i>Merck/Sigma-Aldrich</i>	Failure to provide information on innovative project for lab chemicals (deal cleared Jun 2015 subject to remedies for lab chemicals; after complaints, Merck licensed additional technology to Honeywell, purchaser of divestment business)
<i>GE/LM Wind</i>	Failure to provide info on R&D and a specific wind turbine project in initial Jan 2017 notification, but GE pulled & refiled with information in Feb 2017 (deal cleared unconditionally in March 2017, after parallel <i>Siemens/Gamesa</i> case)

Headlines from Europe

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 - 30 March 2019: Brexit:
 - Issues for pending cases (including remedies)
 - CMA as a new global antitrust authority?
 - 23-26 May 2019: European elections (=> new Commissioners later in year)

Os desafios de operações globais nas principais jurisdições concorrenciais

Campos do Jordão, 25 de outubro 2018



Paulo Burnier da Silveira
Conselheiro do CADE

Sumário

I. Experiência brasileira

- a. Balanço (2013-2017)

II. Cooperação internacional

- a. Procedimento
- b. Mérito

III. Ilustrações

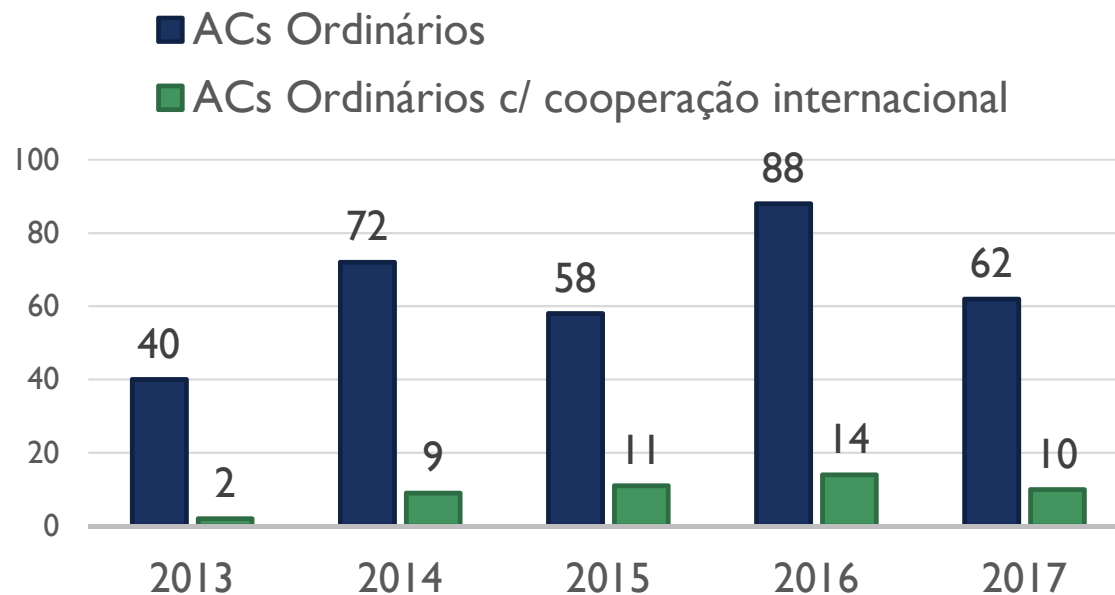
- a. AC Bayer/Monsanto (2018)
- b. AC Technicolor/Cisco (2016)

IV. Considerações finais

Disclaimer: as opiniões são pessoais e não refletem necessariamente a posição do CADE

Experiência brasileira

Atos de Concentração Ordinários submetidos à Cooperação Internacional

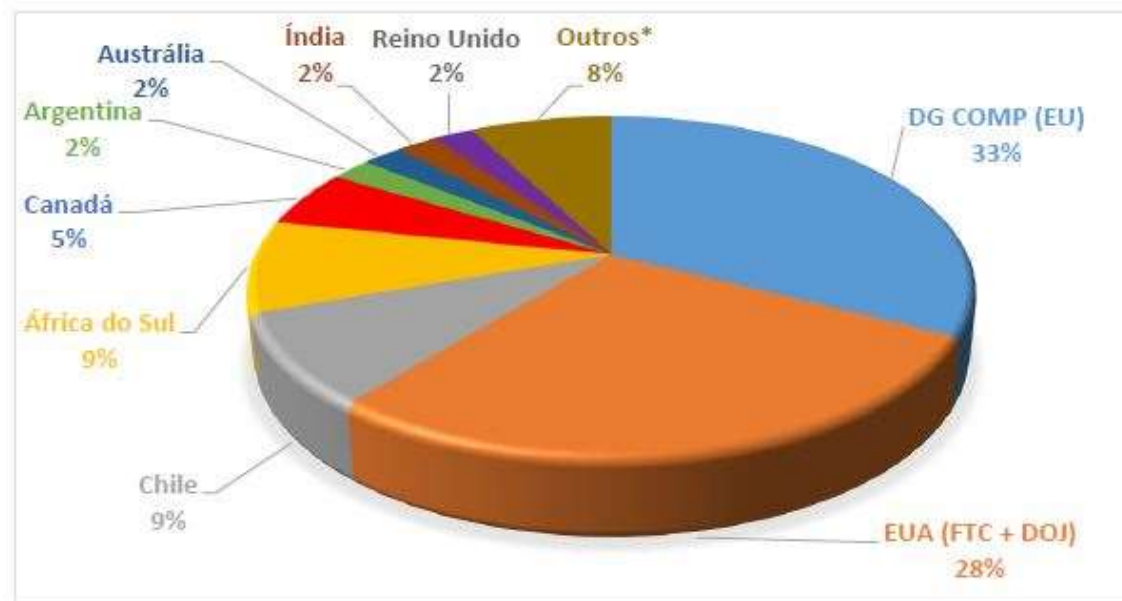


Média:
9,2 casos por
ano
14% ACs
Ordinários

Fonte: Isabela Maiolino (2018)

Experiência brasileira

Quadro de Países da Cooperação Internacional do CADE (2013-2017)



Fonte: Isabela Maiolino (2018)

Procedimento

- **Aspectos preliminares**
 - ✓ Potencial problema concorrencial
 - ✓ Dimensão transnacional
- **Ativação da cooperação**
 - ✓ Contato via Assessoria Internacional
 - ✓ Existência de *waiver of confidentiality*
- **Cronograma**
 - ✓ Previsão e atualizações



Cooperação internacional

Mérito

■ Mérito

- ✓ Definição do mercado relevante
- ✓ Poder de mercado
- ✓ Problemas concorrenciais



■ Remédios

- ✓ Estruturais/comportamentais
- ✓ Implementação: monitoramento, desinvestimento, *trustee*



AC Bayer/Monsanto (2018)

- **Ato de concentração global**
 - ✓ 29 jurisdições
 - ✓ Análise tradicional
 - ✓ Questões de Inovação e de Biodiversidade
- **Cooperação Internacional**
 - ✓ Coordenação
 - ✓ Procedimento e mérito
 - ✓ Consistência dos remédios



AC Technicolor/Cisco (2016)

- **Notificação**
 - ✓ Brasil, Canadá, EUA, Colômbia, Holanda e Ucrânia
- **Implementação antes de autorização**
 - ✓ Brasil e Colômbia
- **Gun jumping: R\$ 30 milhões via Acordo**
 - ✓ R\$ 30 milhões via Acordo

Considerações finais

■ **Consolidação**

- ✓ 15% aprox. dos ACs ordinários
- ✓ Modelo de *waiver of confidentiality*
- ✓ Setores público e privado

■ **Perspectivas futuras**

- ✓ Diversidade de jurisdições
- ✓ Cooperação internacional reforçada

CADE (2017):

*Médias com base nos 12 ACs c/
coop.:*

- 10 jurisdições notificadas
- € 320 mil em taxas de
notificação
- 96 dias de análise no Brasil



International
Competition
Network

OBRIGADO

