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Merger Control 2023

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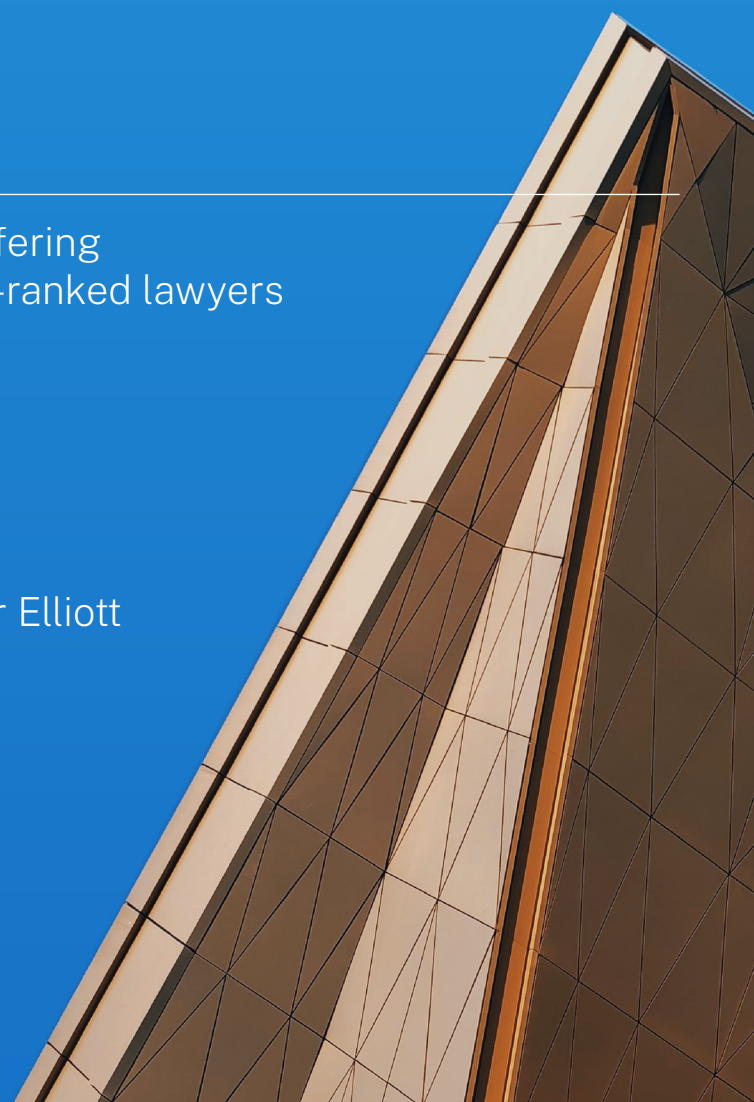

Introduction

Jean-François Bellis and Porter Elliott
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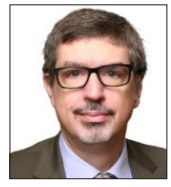
Contributed by: Jean-François Bellis and Porter Elliott, **Van Bael & Bellis**

Van Bael & Bellis is widely acknowledged as having one of the leading practices in EU and UK competition law, including merger control. From its main office in Brussels and its newest office in London, the competition team at Van Bael & Bellis has assisted clients at both the EU and national levels, notably appearing before the European Commission, the UK Competition and Markets Authority (CMA) and the EU and UK courts, where the firm has acted as counsel in many landmark cases. Within the field of merger control, Van Bael & Bellis has a dedicated team of EU and UK specialists who regularly represent merging parties as well as complainants in cases involving key issues of jurisdiction, procedure and substantive law. The firm has succeeded in obtaining clearance for numerous complex transactions before the European Commission and the CMA. The team also routinely helps clients to obtain merger clearance from member state authorities for transactions that do not meet EU thresholds. The firm is frequently called on to co-ordinate merger control filing efforts across the world.

Contributing Editors

Jean-François Bellis is the co-founder and current chairman of Van Bael & Bellis. He has extensive experience assisting clients in a broad range of antitrust issues, including cartels, dominant market positions, mergers and state aid. Jean-François has written extensively on competition law and has spoken on this subject at numerous international conferences. He is also a professor of EU competition law at the Institute of European Studies of the University of Brussels.



Porter Elliott is the co-head of competition law at Van Bael & Bellis and a leading expert on EU merger control law. For over 25 years, he has successfully guided dozens of complex and high-profile transactions through the regulatory process, both in Europe and elsewhere. He has also represented third parties in successfully challenging and preventing the approval of proposed mergers. Porter regularly teaches, writes and speaks on issues of competition and merger control law and has conducted training for merger control authorities.

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Fewer Deals, Greater Challenges?

After a strong 2021, global M&A activity declined in 2022 and shrank to its lowest level in more than a decade in the first quarter of 2023, due to rising interest rates, high inflation and concerns about a looming recession.

This has naturally led to a decrease in the number of transactions subject to merger control approval. In the EU alone, the number of transactions notified to the European Commission (the "Commission") declined around 8% from 2021 (a year that saw the second highest number of EU merger filings ever) to 2022. Although 2023 is not yet at the halfway point, at the current pace, there will be fewer EU merger notifications this year than in any year since 2003.

Notably, the significant decline in the number of notifications has not corresponded to a decline in the number of Commission challenges. There were as many Phase II investigations in 2022 as in any year since 2018, including the first two prohibition decisions since 2019. The number of Phase I approvals requiring remedies in 2022 was also broadly consistent with recent years, despite significantly fewer notifications. The average duration of reviews, even in Phase I cases, remained significant in 2022, albeit slightly less than in 2020–2021 (a trend that will hopefully continue).

The theme of tougher (or at least, equally tough) enforcement is by no means limited to Europe. For example, merging parties are seeing a substantial increase in the willingness of US regulators to sue to block transactions or push the parties to abandon their deal before being sued, with the Department of Justice's Antitrust Division demonstrating a strong aversion to accepting remedies in order to approve deals raising competition concerns (the Federal Trade Commission, while certainly no less formidable a regulator, has been more willing to enter into consent decrees).

Many other competition authorities around the world also continue to flex their enforcement muscles, among them the UK's Competition and Market Authority (CMA), which continues to carve out a place post-Brexit as one of the main merger control regulators to be reckoned with, despite the UK having a so-called "voluntary" notification regime. Look no further than the CMA's prohibition in April 2023 of Microsoft's planned acquisition of Activision, a deal that the European Commission conditionally approved a few weeks later.

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Clearly, the challenges that both in-house and external counsel face on how to obtain merger control approvals as quickly and efficiently as possible remain acute. This makes having a clear guide such as this one all the more essential. Indeed, the Chambers Merger Control 2023 guide provides answers to all the most pressing questions companies and their lawyers face with every notifiable transaction.

Filing location

For starters, where does the deal need to be filed? This is a crucial question, as there are potentially serious consequences for failing to make a required merger control filing, including the imposition of heavy fines. Unfortunately, it can be tricky to determine where filings are required in a given case. Although an ever-increasing number of countries have some form of merger control law, there remains very little standardisation, with each merger control regime continuing to have its own test to determine which transactions amount to a notifiable event. Some jurisdictions catch only changes in control, while others also cover certain acquisitions of non-controlling minority stakes. Moreover, every jurisdiction has its own set of filing thresholds based on various factors such as the parties' turnover, asset value, market share and the size of the transaction.

Given this, determining where to file requires a careful country-by-country analysis.

An emerging challenge faced by merging parties is the possibility of having to make separate, potentially very onerous filings under the EU Foreign Subsidies Regulation (FSR), distinct from any merger control filing that may also be required. The FSR requires, inter alia, notification to and prior approval by the Commission of certain transactions where one party is established in the EU and the other (typically the acquirer, but also possibly a merging party or joint venture partner) benefits from "financial contributions" meeting certain monetary thresholds.

An increasing number of countries also have foreign direct investment (FDI) legislation that may also require additional filings and approvals. Although neither FDI nor subsidies fall within what one traditionally has in mind when speaking of "merger control", they represent additional (and potentially significant) hurdles merging companies will have to face. As such, the 2023 edition of the Chambers Merger Control guide adds a new question covering FDI/subsidies review for each jurisdiction.

Substantive reviews

Once it has been determined where merger control filings need to be made, the next question is what the regulatory reviews will entail and what needs to be done in order to obtain approval in each jurisdiction. Again, each merger control regime has its own test for determining whether a given transaction will be approved, and while the approach may be broadly similar across jurisdictions, there are nuances in each that are important to understand.

For example, is the legal test for assessing mergers based on maintaining effective competition, avoiding the creation or strengthening of a dominant position, or some other standard? Are vertical mergers (which are starting to garner more attention in the USA, in particular) subject to the same level of scrutiny as horizontal mergers? How are efficiencies considered by the regulator in its assessment? Is the agency's analysis based purely on competition law principles or are there other (eg, public interest) considerations at play? What kinds of arguments are most likely to be persuasive to each authority,

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and how does one ensure a consistent approach across jurisdictions at a time when international co-operation between regulators is more common than ever?

Timing

Of course, another key issue will be how the regulatory process affects timing. After all, there is no such thing as a deal that is not time-sensitive. In every transaction, there is a sense of urgency and a desire to close as soon as possible, ideally the day before yesterday.

This urgency needs to be reconciled with the fact that, with some notable exceptions, most merger control jurisdictions require closing to be suspended until regulatory approval has been granted. Taking into account the time needed to prepare the filing(s), which in challenging cases can easily be hundreds of pages long (excluding annexes) in certain jurisdictions, the time spent in "pre-notification consultations" with the relevant authorities before formal filing occurs (an increasingly common practice), and the time it takes for the review process(es) to play out, closing can easily be delayed for a couple of months in simple cases to well over a year in more challenging ones.

Reasonable timelines need to be set for the parties, and expectations must be carefully managed. Once again, every jurisdiction has its own procedural rules and deadlines, so co-ordinating the reviews across the world can be a significant challenge. This is even more so where remedies are required in order to obtain approval in one or more jurisdictions.

Conclusion

For the above reasons – and many more – navigating a global merger control filing and approval process is a complex business, and it is only getting more complex every year. The Chambers Merger Control 2023 guide aims to cut through some of that complexity by providing the reader with a practical guide, in a user-friendly format, that covers many of the world's leading merger control jurisdictions.

The sections in this guide cover the key rules relevant for a merger control filing assessment, including:

- what kinds of transactions have to be notified;
- what the filing thresholds are;
- the procedure and timeline for notification and approval;
- the substantive considerations for the authorities; and
- what kind of enforcement record the authorities have.

However, the chapters also go beyond the letter of the law and provide useful information on how these rules are applied in practice. For instance, the sections on applicable fines for failure to file not only cover whether such penalties exist and what their legal maximum is, but, more importantly, whether these penalties are applied in practice and what penalties have been imposed recently.

Although by no means a substitute for seeking advice from experienced merger control counsel, this guide provides clear and practical answers to most of the fundamental questions faced by any company involved in a transaction that requires merger control filings. The reader will find this guide to be a very useful tool for navigating their way through the increasingly complex labyrinth of global merger control.

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As with any work of this nature, compiling this guide has been a team effort. With this in mind, we would like to thank all the authors for their contributions, as well as the Chambers team for their diligence and professionalism.

CHAMBERS GLOBAL PRACTICE GUIDES

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