
Merger Control and Practice in the BRIC Countries vs. the EU and the US: The Timing



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Mergers or acquisitions are often the preferred way to enter rapidly growing geographies such as the BRIC countries. Also, domestic companies in these geographies frequently use M&A's to challenge foreign entrants or to become a player with global ambitions.

Without surprise, the number of M&A's in the BRIC countries exploded during the last decade. We documented in a first article "Merger control and practice in the BRIC countries vs. the EU and the US: The facts", that the number of M&A's in the BRIC countries increased more than twenty-fold between 2001 and 2011, from 346 to 7654. This is equivalent to about half the number of M&A's in the EU or the US in 2011; it stood at roughly a twentieth in 2001.

BRIC governments have responded to the massive increase by overhauling their M&A approval processes. In our second article "Merger control and practice in the BRIC countries vs. the EU and the US: The thresholds," we

review the differences in one key measure, the thresholds that antitrust authorities use to decide when a proposed merger or acquisition needs a review, with the possible outcome of a rejection or remedies. All governments state they want to protect the interest of consumers. However, as we document, the very different size yardsticks they use to determine which firms are allowed to merge without government review or intervention indicates that the term “consumer protection” has a very different meaning in the geographies. It may also reveal that governments pursue with their merger control policies other goals such as the promotion of national champions, which we found evidence of.

The newly enacted merger control policies also have substantial differences in the review process and the timelines that need to be respected or expected to get the deal through. An M&A transaction can get mired in red tape and reviews, impairing the strategic value that was pursued. Managers responsible for the strategy of their company need to be aware of the critical differences in the review processes and the necessary actions to be successful.

In this article, we first give “the big picture” on similarities and differences among the countries we consider here. We then briefly review how the review process works in the EU and the US. Thereafter, we highlight the differences with each of the BRIC countries. As with the thresholds, there are similarities among the countries, but the differences are substantial enough to derail a strategic move if the process is not well managed. We give references to the legal literature where more detail can be found on the many technicalities.

The big picture

With the exception of Brazil, the countries we consider here all have a formal “Phase I” and “Phase II” process. The first phase of the review is concerned with fact finding about the proposed M&A transaction. The legally defined length of this phase tends to be about 30 days, but can extend to 3 months as in Russia or be ambiguous as in China where Phase I virtually automatically transitions into Phase II, de facto becoming similar to the process in Brazil.

At the end of Phase I, the authorities decide whether a more detailed review is in order (Phase II) or whether remedies (e.g. sale of part of either company) may avoid further delay. Once Phase II starts, it leads to either

outright approval, approval with remedies, or rejection. With the exception of the US where actions are decided in court, this decision is in the hands of the regulatory authorities. The phase II process can be less than 30 days as in the US, but can extend to a year and a half, as for example in Brazil.

The review process in the EU and the US

The antitrust authorities of the EU and the US face every year a huge caseload and have put in place very transparent processes to review the M&A transactions. Figure 1 gives a simplified, high-level timeline of the European process.

The EU

Though the Phase I period is limited to 25 working days, the Commission expects the parties to interact with them before officially notifying them of the proposed merger (and starting Phase I). This can be limited to four-to-six weeks in straightforward cases but also extend to several months in the case of transactions raising substantial competition concerns.[2] Once Phase I is officially started, it may be extended by 10 days if the firms involved offer commitments that will make the deal acceptable to the Commission.[3]

If at the end of Phase I the Commission believes the transaction raises serious doubts that competition will be adversely impacted, an in-depth Phase II review will be started. The standard period is 90 days, which can be extended by a one-off 20 day period when requested by the parties or the Commission.[4] In all, the basic 115 working day full review period (about 6 months) can be extended to about 7 months (135 working days) – but the pre-notification activity should not be forgotten to get a global perspective on the review process.

For cases that do not raise obvious competition concerns but that meet the review thresholds anyway, the Commission has a “simplified procedure.” This fast-track review promises a review and final decision within the 25-day window.[5]

The USA

The review process in the US is shown in Figure 2. The Phase I process is triggered by a mandatory notification[6] if the merger thresholds are met. Parties have to wait for the decision of Phase I before starting the post-merger integration process. This Phase I decision is given within 30 days

from notification.[7] In case the authorities raise no formal objection, the parties may proceed with the merger after the 30-day waiting period.

If antitrust issues remain unresolved at the end of Phase I, a “Request for Additional Information and Documentary Material” will be made, setting Phase II in motion. Once parties provide the required information, the authorities (Department of Justice or the Federal Trade Commission) have another 30 days to render their decision. In case issues remain, the agencies will seek a preliminary injunction to delay or block the transaction. [8]

In all, most merger reviews that extend to Phase II take about 3-5 months after the Phase II request. Adding the initial waiting period brings the review process to about 4-6 months. This is faster than in the EU, but the US does not have a formal fast-track review process. Though the antitrust agencies have not taken a public position on accelerating requests for early termination as a result of economic circumstances, they have been sensitive to the need to complete promptly investigations of mergers involving distressed firms. Also, the agencies generally grant requests for early termination swiftly for transactions clearly raising no competitive concerns.[9]

The review process in the BRIC countries

Brazil

Though merger control policy was very recently overhauled, the Brazilian review process remains quite different from the ones in the EU and US. It is visualized in Figure 3. A first key difference is the absence of a formal Phase I / Phase II distinction. The second key difference is the substantial time that authorities can take to review the case. The antitrust body, CADE, has up to 240 calendar days from the filing date to issue a decision. This period may be extended by another 60 days at the request of the merging parties, or by 90 days at the initiative of CADE. If after this review period no decision has been made, the transaction is considered approved.[10] Alternatively, remedies are sought, or the transaction is prohibited.[11]

As the legal deadlines can be suspended at many stages, the time it takes to clear a case can vary substantially. Simple mergers can be cleared in 45-60 days, but complex cases may extend to 12-18 months. Similar to the US, there is neither a fast-track procedure to process straightforward cases.

Under the current law, all cases, even the less complex ones, are decided by CADE's panel.[12] Even though there is no formal, established review period for simpler cases, CADE can — at its discretion — fast-track decisions. In all, merging companies need to expect to be engaged with CADE for a very long time, especially now that CADE has indicated it wants to actively enforce the new merger law that came into effect in May 2012.

Russia

The timeline for clearing an M&A transaction in Russia is shown in Figure 4. Similar to in the EU and the US, the Federal Antimonopoly Service (FAS) needs to decide whether to pursue an extensive review within 30 calendar days from the filing date. However, if the filing is considered incomplete, FAS can extend Phase I by another two months. Filing requirements are also known to be ambiguous and far-reaching, forcing companies to extensively engage with FAS before filing. A two-month preparation period is not unusual [13][14] Note that transactions are not automatically considered cleared at the end of Phase I review if the FAS has not taken a decision.[15]

The total review is legally confined to a nine-month period. In the event of a possible impact on competition, the FAS may delay clearance until the parties complete certain actions. There may also be a requirement for a post-completion filing, among others,[16] if the aggregate assets or the aggregate turnover on a worldwide basis of all companies within the acquirer's group and the target's group exceeds 400 million Rubles (US \$ 12M) and the aggregate value of assets of the target and the companies of its group exceeds 60 million Rubles (US \$ 2M).

The caseload of the FAS however is much higher than in the other countries we compare and the FAS is therefore not known to hold up transactions with long reviews.[17] In all, the review timeline is fairly well defined and bound in time but the ambiguous data requirements creates uncertainty in the filing process. Given the very low thresholds in Russia, many firms have to deal with this challenge. There are no legal means to speed up clearance and there are no specific legal rules for a fast-track procedure in Russia.

India

The Competition Commission of India (CCI) has very clear thresholds to decide whether a merger needs to be reviewed and also works with very clear timelines (see Figure 5). Companies need to file a notification within 30

calendar days after the boards of companies have agreed to merge, but the CCI also needs to conclude in 30 days from filing (Phase I) whether they intend to pursue a further investigation.[18]

If the CCI has “prima facie” competition concerns and launches a review, it has up to 180 calendar days to reach its conclusion to approve, seek remedies or reject the transaction. There is however a significant uncertainty in each stage: if the CCI requests supplemental information, the clocks are stopped and the review period is effectively extended.[19] The new law neither has specific rules for a fast-track procedure.

As the new merger control laws went into effect only in May 2011, there is little evidence to yet paint a clear picture of the delays that need to be expected.[20] However, the first 24 transactions notified to the CCI were cleared on average in two to six weeks, which is prompt by international standards. In all, the experience with the Indian review process is building up and it shows capability for fast reviews. It has however the possibility to build stops into the review process, which could push total review time for more complex cases beyond the standard 7 months.[21]

China

The Chinese regulator MOFCOM officially works with tight deadlines: it will render a decision within 30 calendar days from the date of receipt of the filing whether to pursue a Phase II investigation. Also, it will render a final decision within 90 days from the start date of Phase II, which can be extended by another 60 days.[22] The total of 180 days puts it on par with India, the EU and the US.[23]

The practice of the review work by MOFCOM however shows that once a transaction is reviewed because the thresholds are reached, a pre-Phase I period of data requests starts that can take several months. Further, the large majority of cases automatically move into Phase II, making the distinction between the two stages ambiguous. In all, firms that are reviewed by MOFCOM have to expect a lengthy data-gathering phase without a resolution after Phase I. There are cases where parties were confronted with several rounds of data requests before their filing was accepted as complete.[24] Quite significantly, this review practice is extended to a vast number of corporate agreements or “concentrations”

(e.g. acquisitions of shares, joint ventures). At the same time, at a press conference on 27 December 2011 where MOFCOM reviewed its merger control work in 2011, it explained the long review periods by the high volume of filings and promised to take measures to improve efficiency and shorten the review period.**[25]**

Conclusion

The US appears to offer the fastest M&A clearing process, but the risk of getting substantially delayed in court adds ambiguity to complex merger cases. The EU review process has the advantage of offering an explicit fast-track process, but if an M&A is not eligible for this, the review is likely to take longer than in the US. There is also the possibility that some mergers that clear the EU hurdles may need to be reviewed at the member state level where thresholds and processes can differ significantly.

In the BRIC countries, the review deadlines and requirements have become more transparent in the past decade. Brazil's CADE has recently approved some transactions very fast. However, the review of complex mergers will most likely be dragged out as the law allows very long review times. Russia is struggling with a huge caseload and many transactions are quickly approved but the many exceptions and extensive data requests require extensive preparation. On the face of it, India's process is very similar to the one in Europe, but there is little experience with the implementation of the process. Finally, China's review is, seemingly, very clear but the implementation shows that the Chinese authorities aggressively pursue reviews and that once an M&A transaction is notified, a fast decision should not be expected.

Managers should no longer expect a "rubber-stamping" of M&A's in the BRIC countries. While the review in each of the countries has its specificities, managers should explicitly take the merger control review process into account when planning their strategic moves – or risk seeing their strategy derailed. In the next article, "Merger control and practice in the BRIC countries vs. the EU and the US: Best Practice", we will discuss some of the key findings from the field on what steps to take to clear complex mergers in the BRIC countries.

- [1] Respectively Research Associate, INSEAD; BP Chaired Professor of European Competitiveness, Professor of Strategy, INSEAD; Partner and Managing Director, The Boston Consulting Group, Paris.
- [2] <http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2012/european-union>
- [3] This will be the case when parties give commitments within 20 working days after notification or when a member state requests a referral of the transaction.
- [4] This request has to be made no later than 15 days into Phase II.
- [5] Note that there is no filing fee for the EU Commission.
- [6] See <http://www.ftc.gov/bc/hsr/index.shtm> for the premerger notification program, based upon the Hart-Scott-Rodino Act.
- [7] <http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2012/usa>
- [8] The filing fee in the US depends on the transaction value. If the value is less than US\$ 131.9m, the filing fee is US\$ 45.000. If less than US\$ 659.5m, the fee is US\$125.000, and if more than US\$ 659.5m, the filing fee is 280.000. Note that a proposal is pending to significantly increase the filing in the US.
- [9] <http://www.gettingthedealthrough.com/books/20/jurisdictions/23/united-states/>
- [10] DavisPolk Client Memorandum, New Merger Control Regime Now in Force in Brazil, June 14 2012, and Fiona Schaeffer and Michael Culhane Harper, A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact On Cross-Border Transactions. theantitrustsource.com, August 2012
- [11] The filing fee is BRL 45,000 (about USD 22,000)
- [12] Baker & McKenzie, "New Brazilian Merger Control: forwards or backwards?" April 2012
- [13] American Bar Association, "Russia, China and India: Designing Compliance Programs for Developing Antitrust Enforcement Regimes", 2011.

http://www.americanbar.org/content/dam/aba/publications/YourABA/201107_09_russchini

[14] The filing fee is RUB 20.000 (about USD 620)

[15] Clifford Chance, “Merger Control: getting the Deal Cleared in Russia,” May 2011.

[16] See Clifford Chance, “Merger Control: Getting the Deal Cleared in Russia,” May 2011, for a detailed overview of other exceptions.

[17] Emily Roche, Rio Tinto & Alasdair Balfour and Dr. Tobias Caspary, Fried Frank, BRIC Merger Control – The New Regulatory Frontier, International In-house Counsel Journal, Vol. 5, No. 19, Spring 2012, 1

[18] T. Reeves and D. Harrison, “India’s New Merger Control regime: When do you need to File?”, Antitrust, Fall 2011. The filing fee is INR 1.000.000 (US\$ 18,000); INR 50.000 (US\$ 900) for the simplified notification.

[19] Freshfield Bruckhaus Deringer, “New merger control regime for India,” 1 June 2012

[20] Palavi Shroff, “India: Merger Control, Global Competition Review,” The Asia-Pacific Antitrust Review, 2012.

[21] Emily Roche, Rio Tinto & Alasdair Balfour and Dr. Tobias Caspary, Fried Frank, BRIC Merger Control – The New Regulatory Frontier, International In-house Counsel Journal, Vol. 5, No. 19, Spring 2012, 1

[22] DLA Piper, “Practical Guide to Merger Control in China”,
<http://www.dlapiper.com/practical-guide-to-merger-control-in-china-12-06-2010/>

[23] Clifford Chance, “A Practical Guide to Chinese Merger Control,” April 2012. There is no filing fee in China.

[24] M. Dietrich et al, “The hidden fourth phase of anti-monopoly reviews”, China Law and Practice, July-August 2012.
<http://www.chinalawandpractice.com/Article/3073231/The-hidden-fourth-phase-of-anti-monopoly-reviews.html>

[25] <http://www.chinalawinsight.com/tags/merger-control-statistics/>

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