Merger Control and Practice in the BRIC Countries vs. the EU and the US: Review Thresholds

Written by Nicolas Harlé, Philippe Ombregt and Karel Cool

With more than 90% of global GDP growth coming from the rapidly developing economies,[2] companies from around the world are targeting these markets for future expansion. The BRIC (Brazil-Russia-India-China) cluster has been a major magnet as it represents about 25% of global GDP and over 60% of global growth.

Acquisitions have frequently been chosen to enter or consolidate industries in the new high growth regions. In a first article,[3] we provided the facts about M&A activity in the BRIC countries and compared this to M&A transactions in Europe and the US. We saw that between 2001 and 2011 M&A transactions in the BRIC cluster increased more than twenty-fold and stood at about half the number of M&A transaction of either the EU or the US by 2011. In 2001, this was less than 5%. We also saw how the different merger control regimes in the BRIC countries led to vastly different numbers of review filings. For example, Brazil had in 2010 more than five times the number of reviews than China, and Russia had seven times as many reviews as Brazil in the same year.

In this article, we discuss the key reason for this difference: the turnover (sales) and asset threshold levels that antitrust authorities have defined and which trigger a review process. We keep the legal language to the strict minimum and focus on the key managerial implication of the filing requirements: when does a particular merger or acquisition risk an antitrust review?[4] The article highlights the necessity for decision-makers and M&A specialist to monitor the differences in regulation as they vary significantly from one region to another, with regular evolutions in the BRIC countries.

Review thresholds: market share versus revenues and assets

Anti-trust authorities seek to regulate or prevent mergers that have a negative impact on competition and innovation and harm the interest of consumers. Large firms were historically more likely to have their M&A transactions reviewed than smaller firms, as there was a presumption of monopoly or oligopoly effects. While one would expect thresholds to be cast in terms of market share, authorities in the BRIC countries and in the EU and the US have moved to define thresholds in terms of revenues or assets of the transacting parties.[5] The calculation of market share is often subject to dispute as most markets may be delineated in different ways. A threshold expressed in turnover and asset levels therefore removes the source of the size ambiguity measure. Russia has thresholds defined in revenues, assets and market share to be sure to catch all mergers that in their eyes are to be reviewed.

The language in which thresholds are defined is often quite technical and we simplify this here as much as we can. A number of specific terms are used however. The *buyer* is defined as the corporate entity that acquires (or merges with) the target entity. The *buyer's group* is the corporate group to which the buyer belongs. Similarly, the *seller's group* is the corporate group to which the target belongs. Finally, the *target*is defined as the entity of the seller's group that is acquired by (or merged with) the buyer.

Table 1: Merger control turnover thresholds (USD)

Note: Values are expressed in millions (M) or billions (B) of USD; na = not applicable. Currency value of July 26 2012. The terms "party" or "combined parties" refers to the buyer, target, buyer group or seller group depending on the country, as explained in the text below.

The big picture

All of the BRIC countries as well as the US and the EU have a mandatory pre-merger notification regime. Russia also has a mandatory post-merger notification regime for some transactions.[14]

To decide whether a transaction will be reviewed, each country imposes a turnover test. India, the US and Russia also apply an asset test. Tables 1 and 2 provide an overview of the turnover and asset thresholds. As the antitrust laws have tests concerning *worldwide* turnover (or assets) of the *combined* parties, combined turnover (or assets) in the *target* country, and turnover (or assets) of a *single* party in the target country, Tables 1 and 2 give information on the three dimensions. The laws very often use a combination of the tests to select the mergers that will be scrutinized.

We focus on the thresholds that apply to all corporations. The values should be seen as "red flags," warnings that a merger control is likely to be triggered. Details, special cases and further references are provided in the endnotes. To provide a background for the regimes in the BRIC countries, we first provide an overview of the key EU and US provisions regarding merger thresholds.

Table 2: Merger control asset thresholds (USD)

Note: Values are expressed in USD; na = not applicable. The terms "party" or "combined parties" refers to the buyer, target, buyer group or seller group depending on the country, as explained in the text below.

Merger thresholds in the EU and the US

The EU

Merger control in the EU is handled by the Competition Directorate General of the European Commission as well as by the competition authorities in the member states. The Europe-wide laws are designed to review very large acquisitions that have an impact on the EU as a whole or on several EU countries simultaneously. Specifically, When the buyer group and the target had together a worldwide turnover exceeding USD 6.1 B (€ 5 B) in the year preceding the transaction, and each realized more than USD 307 M (€ 250 M) turnover in the EU, then the merger needs to be notified with the EU authorities. When the transaction concerns a full merger between a buyer group and a seller group, then the entire revenues of both groups are taken into account.

Compared to the US and the BRIC countries, these thresholds are high. The EU Competition authorities may nevertheless demand a review of smaller mergers if these have a concentrated impact on a small number of member states. The following thresholds are defined for the case of a company (buyer group) acquiring a target entity: when the combined worldwide turnover of the buyer group and the target is USD 3.1 B (€ 2.25 B) or more, and the combined turnover of the buyer group and target is more than € 100 M in at least three member states, and the turnover of one party is more than € 25 M in each of the three countries, the M&A transaction will need to be reviewed.

In addition to the community wide thresholds, each member state has its own merger control laws. These apply when the above thresholds are not met but the buyer group and target realize more than two-thirds of their turnover in one country. The member states then decide how to take the review forward. There remain significant differences among the states with regard to merger control. In the case of Belgium, for example, concentrations must be notified if the parties have an aggregate Belgian turnover exceeding € 100 M and if at least two of the parties each have a Belgian turnover of € 40 M or more. In the case of Germany, if all the companies in the merger jointly realize a worldwide turnover of more than € 500 M with one company achieving a turnover in Germany of more than € 25

M and another company a turnover of more than € 5 M in Germany, the merger needs to be notified with the Bundeskartellamt.[18] In contrast, M&A transactions in France that do not meet the EU thresholds will require a review by the French authorities if the combined worldwide turnover of the buyer and seller group is more than € 150 M and the turnover realized by the buyer (group) and seller (group) exceeds € 50 M.

The US

Merger control in the US is executed by the Federal Trade Commission (FTC) and the Department of Justice (DOJ). Individual states can conduct merger control reviews independently from the Federal authorities, but the cost of the investigation tends to limit their reviews to local concentrations.[19] Different from the EU is the consideration of asset levels in addition to revenues and the explicit consideration of securities thresholds (share of voting rights) by the buyer that give rise to control over the target.

The thresholds to determine whether a merger should be notified with the FTC relate to three "tests": commerce in the US, the size of the transaction, and the size of the person. When there is an insufficient connection to the US economy (engagement in or affecting US commerce), notification will not be required. Notification will be required if the buyer group obtains voting securities and/or assets of the target with a value of more than USD 272.8 M. When the buyer group ('acquiring person') obtains voting securities and/or assets of the target ('acquired person') with a value of more than USD 68.2 M but less then USD 272.8 M ("size of transaction"), parties will have to file when the size-of-transaction and the size-of-person tests are both met. That is when one party has net sales or total assets of USD 136.4 M[20] or more and the other party has annual net sales or total assets of USD 13.6 M or more ("size of person"). The net sales and assets relate to both domestic and foreign activities of the buyer (group) and target (group).

When there is an insufficient connection to the US economy, notification will not be required. For example, acquisitions of foreign assets by US and non-US companies ("foreign to foreign") do not need to be notified when the foreign assets that would be held as a result of the acquisition generated sales in or into the US below USD 68.2 M during the target's most recent fiscal year. Even if the USD 68.2 M threshold is reached, a notification does not need to be done if all parties to the transaction are foreign, if their aggregate sales in or into the US are less than USD 150 M and if their aggregate US assets are less than USD 150 M, and the assets that will be held as a result of the transaction are valued at USD 272.8 M or less. A parallel stipulation is defined when the transaction relates to the acquisition of more than 50% of the voting stock of the target.

Brazil

The law that went in effect in May 2012 stipulates a very clear threshold: a filing is required when two conditions are met: if the buyer's or seller's group has sales in Brazil in the calendar year prior to the M&A transaction of about USD 196 M (400 M Reais) or more, *and* if any party to the transaction had sales in Brazil in the previous calendar year of USD 15 M (30 M Reais) or more.[21] Mergers outside the Brazilian borders are reviewed only if the merging corporations have operations in Brazil that exceed the review threshold.

Though the test is very simple, it is also very stringent: the *combined* turnover thresholds of USD 211 M is very low. Without surprise, the number of mergers that are reviewed in Brazil are the second highest in the BRIC cluster, more than double the 2010 reviews EU-wide, and more than half the 2010 reviews conducted in the US. Penalties for failure to notify or for late notification may range from around 63,000 Reais to 6.3 M Reais.[22] In practice, most fines imposed are between 100,000 Reais and 300,000 Reais, depending on a series of aggravating or mitigating circumstances.[23]

Russia

While Brazil limits its oversight to mergers that have an impact on the Brazilian market, Russia cast its oversight net very widely. Further, the thresholds were defined rather vaguely, giving extensive powers to the Federal Antimonopoly Service (FAS) to determine whether a merger (or joint venture) needs to be reviewed. The amendments that came into effect in January 2012 provide some clarity to the scope of the filing requirements.

The general rule is that *each* merger that has a *combined* value of the *global assets* of the buyer's and seller's group of more than USD 214 M (RUR 7 B) *or* a combined *global turnover* of more than USD 306 M (RUR 10 B), *and* a value of the global assets of the seller's group of more than USD 8 M (RUR 250 M), needs to be filed with the Russian authorities. Depending on the interpretation of the law, foreign-to-foreign transactions that had no connection to the Russian economy were subject to review, and parties needed to decide whether to file or not. Filing was certainly required when the target was a Russian company or concerned a Russian subsidiary. Not surprisingly, this extremely low threshold led to a number of reviews in Russia that was about four times as high as in the US in 2010.

The new rules that came into effect in January 2012 stipulate that if the target has no Russian subsidiary, an acquisition will require filing only if at least 50% of the voting rights of the target are obtained and if the target achieved sales in Russia in the prior calendar year of more than USD 31 M (RUR 1 B).[24] This provides much needed clarification, but still imposes review requirements on many mergers. Further, domestic mergers still need to abide by the general rules. There are also a number of other rules that trigger further reviews. For example, if either the buyer or the seller group is included in the FAS Register of dominant entities because they have a Russian market share of over 35%, their M&A activity will be reviewed irrespective of their asset and turnover values.

Failure to comply with the filing requirements may result in both administrative fines and civil liability. The FAS may bring a civil action in court with the risk that companies may be liquidated or split-up. However, such liquidation or reorganization is possible only in judicial proceedings initiated by the antimonopoly authorities.[25]

India

Merger reviews in India are triggered if asset *or* turnover threshold levels are exceeded by either the buyer and target combined, *or* by the buyer group and seller group combined. These relate to Indian *or* worldwide activity, thus triggering again many reviews. However, the Competition Commission of India (CCI) limits its scope of review to mergers with an impact on the Indian economy only, reducing the number of foreign-to-foreign transactions. Also, the threshold levels are quite high compared to the other BRIC countries.

Specifically, if the buyer and target have *combined Indian assets* exceeding USD 270 M (rupees 15B) or a*combined Indian turnover* exceeding USD 812 M (rupees 45 B), a filing must be made. These thresholds levels are high compared to other BRIC countries, the EU and the US. However, a filing may be necessary if the size of the buyer and target in India is smaller depending on the global sales of the firms. When buyer and target have combined *worldwide* assets of USD 750 M or a combined *worldwide* turnover of USD 2.3 B, the merger will need to be reviewed if the combined assets in India exceed USD 135 M (rupees 7.5 B) or the combined turnover in India exceeds USD 406 M (rupees 22.5 B). Large, global companies are thus subjected to a stronger test than strictly Indian incorporated companies.

Though some firms of a same group may not be directly involved in a merger, the CCI considers that their group affiliation may harm competition following a merger (e.g. firms operate in different segments of the same market but jointly control the market). The CCI therefore requires mergers to be reviewed also if the buyer group and seller group have in India combined assets exceeding USD 1.1 B (rupees 60 B) or a combined turnover exceeding USD 3.2 B (rupees 180 B). Parallel to the above rule, when the groups have combined worldwide assets of USD 3 B or a combined worldwide turnover of USD 7.5 B, the merger will need to be reviewed if the combined assets in India exceed USD 135 M (rupees 7.5 B) or the combined turnover in India exceeds USD 406 M (rupees 22.5B). Global groups are thus also subjected to a stronger test than strictly Indian incorporated groups.

Though the criteria seem complex and appear to be treating Indian vs. non-Indian companies and groups differently, they are very clearly spelled out. They also indicate very well when foreign-to-foreign transactions are affected: when the combined Indian operations exceed asset or turnover thresholds.

Under the Competition Act, failure to notify the CCI may trigger a penalty equal to one per cent of the turnover or assets of the combined entity, whichever is the highest. The CCI may also order that the merger or acquisition shall not take effect if it finds that it has an adverse effect on competition in India.[26]

China

The Anti-Monopoly Law (AML) that came into effect in August 2008 gives the Ministry of Commerce (MOFCOM) clear guidelines for when to demand a merger review. Similar to Brazil and the EU, China only applies a turnover test. However, the turnover test is the most stringent of the three regions

Specifically, a merger will need to be filed for review when either of two turnover levels is reached. When the combined *worldwide* turnover of the buyer *group* and the seller *group* exceeds USD 1.6 B (RMB 10 B) in the previous accounting year *and* the Chinese turnover of *each* of the buyer group and seller group exceeds USD 63 M (RMB 400 M), the conditions for a review are met.[27] Alternatively, when the combined *Chinese* turnover of the buyer and seller groups exceeds USD 313 M (RMB 2 B) and Chinese turnover of at least two companies in the groups exceeds USD 63 M (RMB 400 M), a review will also be required.

MOFCOM has been given broad powers and may still decide to investigate a merger even when the thresholds are not met when it considers there is evidence that concentration "may result in the elimination or restriction of competition in China."[28]

Failure to notify a merger may trigger various penalties. MOFCOM may order the parties to cease the implementation of the merger, dispose of shares or assets, transfer businesses or adopt other measures to restore the market to its pre-merger situation. MOFCOM may also impose a fine of up to USD 80,000 (RMB 500,000).

Conclusion

The antitrust authorities of the EU, the US and the BRIC countries all declare they want to prevent mergers and acquisitions (as well as joint ventures) that significantly impede or lessen competition. Yet, the very different notification thresholds indicate that the presumption of a wrongful M&A is very different across the countries. Clearly, "effective" competition has a very different definition in each country or region, or antitrust regulation is used for additional purposes, or both.

Small M&A transactions

The thresholds indicate what transactions need to be reviewed but also which will sail through without interference of government antitrust authorities. The thresholds tables show this is very different across the countries we compare. Russia's USD 8 M threshold is the lowest ceiling of the BRIC countries, the EU and the US. It is even possible for firms that fall below this ceiling to require a review depending on the sector (e.g. considerations of the national interest). The US and Brazil have a very similar ceiling: USD 13.6 M and USD 15 M respectively. The EU does not look at transactions if these have a turnover lower than USD 30 M (€ 25 M), but the individual member states have lower levels and that may be very relevant for local transactions. China has defined a high ceiling: USD 63 M. Interestingly, India only considers the combined turnover and not the turnover of the individual parties, allowing for quite an open M&A market.[29]

Large M&A transactions

The other side of the merger control challenge is: which transactions will for sure need to be notified? Europe has significantly higher thresholds than the US. Whether a merger concerns the EU as a whole or only a small number of member states, EU thresholds are at least twice as high as in the US. The fact that the US also considers assets and applies the same values to the asset and revenue thresholds guarantees that the FTC and the DOJ will have a review right on a higher number of mergers than the EU authorities. Without surprise, the 2010 reviews in the US (1166) were four times as high as in the EU (274). The low thresholds in the US would trigger even more notifications were it not for the very clear "foreign-to-foreign" exemption rules (provided above).

The Brazilian revenue thresholds resemble the US thresholds, but are somewhat higher. The absence of worldwide revenue thresholds and asset threshold will alleviate the notification requirement in Brazil. As in the US, however, the review right of the antitrust authorities (CADE) remains significant. The fact that the turnover of the buyer or seller *group* is taken for the threshold implies that many transactions will still require notification. Firms that count on acquiring a significant presence in Brazil will almost certainly have to deal with CADE. It remains to be seen whether Brazil will maintain its penchant for "national champions" and review Brazilian and foreign mergers in a different way.[30]

The Russian thresholds are by far the most stringent. With a global revenue threshold that is a tenth to a twentieth of EU levels, and asset threshold levels of the target entity of USD 8 M, a very large number of mergers that take place inside and outside of Russia need to be notified. In 2010, the number was 4774, 20 times as high as in the EU (274). This is expected to go down somewhat with the recent exemptions (explained above), but will remain a legal hurdle for a large number of companies.

M&A transactions in China should, from a threshold perspective, be less scrutinized than in Russia; the thresholds for sales in China of the buyer and seller group are quite high compared to the other BRIC countries, the US and the EU. But, as the Chinese economy continues to grow at very high rates, these levels will become problematic for an increasing number of companies considering M&A transactions in China. Perhaps the biggest concern for companies making M&A transactions *anywhere* is the very low threshold for worldwide turnover: USD 1.6 B. This ensures that the Chinese authorities will be able to impose conditions on most significant M&A transactions around the world. The recent ruling on the Google-Motorola merger where MOFCOM imposed conditions while the US and the EU cleared the merger without conditions may be a sign of what is to come.[31]

Finally, the Indian merger thresholds are, comparatively speaking, quite high when M&A transactions are among corporations that are operating in India only. This should encourage the development of national champions. However, when these belong to groups that, in addition, are also only operating in India, the thresholds are set at half the level for stand-alone firms. Clearly, groups are under closer scrutiny than independent companies. Firms that are operating outside India are treated more severely than those strictly operating in India as reviews are triggered at threshold levels that are half these of local, stand-alone companies. As non-Indian groups are by definition more likely to have significant sales outside India, the threshold levels have a built-in bias against M&A activity of non-Indian corporations.

The fact that an M&A transaction needs to be notified and reviewed does not mean that the M&A will not go through. A good knowledge of the process of getting the deal through the regulatory process will help firms to faster achieve the strategic objectives that drove the merger or acquisition. In the next article on "Merger Control and Practice in the BRIC countries vs. the EU and the US: The Process," we will discuss the key steps to take to navigate through the merger control regulatory maze.

[1] Respectively Partner and Managing Director, The Boston Consulting Group, Paris; Research Associate, INSEAD; BP Chaired Professor of European Competitiveness, Professor of Strategy, INSEAD. We would like to thank Joao Deca and Alex Kalenik, both INSEAD MBA 2012 and Yaroslav Kulick from Art De Lex Law Firm, Moscow for their research help.

[2] Source: BCG analysis of the BRIC countries plus Indonesia, Pakistan, Thailand, Philippines, Kazakhstan, Malaysia, Vietnam, Ukraine, Turkey, Mexico, Peru, Colombia, Egypt, South Africa, Iran, Nigeria, Algeria, Morocco, and Saudi Arabia.

[3] https://blog.insead.edu/2012/06/merger-control-and-practice-in-the-bric-...

[4] For in-depth reviews of the merger control laws in the countries we consider here, see e.g. http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2012

[5] OECD Policy Roundtables, Cross-Border Merger Control: Challenges for developing and emerging economies, 13 February 2012

[6] And the book value of the total global assets of the target company and its group of persons exceeds RUR 250M (approx. USD 8.1M)

[7] The combined parties thresholds only. Combined parties = combined enterprises (entities directly involved in a transaction)

[8] Including turnover of at least 22.5B (approx. USD 406M) in India for the post acquisition group

[9] And each of at least two parties exceed RMB 400M (approx. USD 63M) of Chinese sales

[10] Idem

[11] This is equals €100 M times 3, the requirement that €100 M needs to be realized in at least 3 countries.

[12] This is equals €25 M times 3, the requirement that €25 M needs to be realized by one party in at least 3 countries.

[13] There are no explicit worldwide thresholds. However, when a transaction has a value greater than $68.2 M (and less than $272.8 M), then the size of person test kicks in. If global sales (or assets) of one person are $136.4 M or over, and the global sales (or assets) of the other party are $13.6 M or over, notification is required.

[14] Federal Law No 135-FZ of July 26, 2006 on Protection of Competition (LPC) entered into force on October 26, 2006

[15] And the book value of the total global assets of the target company and its group of persons exceeds RUR 250M (approx. USD 8.1M)

[16] Including assets of at least 7.5B (approx. USD 135M) in India for the post acquisition group.

[17] This thresholds is only relevant when the size of the transaction is $68.2 M or larger.

[18] If one company belongs to a group of companies, the Bundeskartellamt will take the turnover of the entire group into consideration. http://www.bundeskartellamt.de/wEnglisch/Fusionskontrolle_e/fusionskontr...

[19] Mats A. Bergman, Malcolm B. Coate, Maria Jakobsson, and Shawn W. Ulrick, "Merger Control in the European Union and the United States: Just the Facts." European Competition Journal, April 2011, pp. 89-125.

[20] Notification thresholds are adjusted annually to reflect changes in the Gross National Product. In addition, certain types of transactions are exempt from filing requirements, such as acquisitions of certain real property or assets located outside the U.S. that generated sales in or into the U.S. falling below certain dollar thresholds.

[21] The threshold of 20% market share obtained because of the merger has been abolished.

[22] CADE's Resolution 44/07

[23] Getting the Deal Through: http://www.gettingthedealthrough.com/books/20/jurisdictions/6/brazil/

[24] BRIC Merger Control, The New Regulatory Frontier, Alasdair Balfour & Tobias Caspary, 27 April 2012, http://www.mondaq.com/unitedstates/x/174998/Dodd-Frank+Wall+Street+Refor...

[25] International Comparative Legal Guide, Merger Control, Russian Chapter, http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2012/...

[26] International Comparative Legal Guide, Merger Control, Russian Chapter, http://www.iclg.co.uk/practice-areas/merger-control/merger-control-2012/...

[27] When only a part of a company is acquired, then the turnover of that "target" needs to be taken into account, not the turnover of the seller group.

[28] A Guide to China's Anti-Monopoly Law, Herbert Smith's Publications, November 2011

[29] Note that some countries have additional thresholds that require a notification for very small acquisitions *if* these concern *incremental* transactions following a previous transaction (e.g. the "incremental size of transaction" thresholds in the US).

[30] E. Roche, A. Balfour, T. Caspary, F. Frank, Bric Merger Control – The New Regulatory Frontier. International In-house Counsel Journal, Spring 2012, No. 19; p 2.

[31] Xiao Yong and Li Zhaohui, Chinese Agency Conditionally Approves Google's Acquisition Of Motorola Mobility, Vinson and Elkins, 18 July 2012