

## 5 Global Merger Control Developments You Need To Know

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The first half of 2018 saw continued gun-jumping scrutiny worldwide, consolidation of China's three competition authorities, and greater activity in South America. The U.S. Department of Justice scrutinized multiple large vertical transactions, and unsuccessfully challenged the AT&T-Time Warner combination. Finally, as national security concerns have become a more prominent factor in merger control globally, the European Parliament moved to adopt a standardized approach for scrutinizing foreign investments.

### 1. Gun-jumping enforcement continued to increase globally with fines by EU, Austrian and Chilean authorities and a new Irish investigation.

Worldwide gun-jumping enforcement continued to accelerate in the first half of 2018. The European Commission imposed the largest gun-jumping fine ever of €124.5 million against Altice. Austria's Cartel Court imposed two separate fines of €185,000 and €40,000 for closing notifiable transactions before obtaining clearance. Chile's antitrust enforcer recommended its first gun-jumping fine — approximately \$3.8 million — against two meat-packing companies, despite the parties' argument that they had carved the Chilean business out of the closing. The Irish competition authority also launched a gun-jumping investigation in February 2018 of a transaction that occurred in 2015.

The EC's Altice fine is particularly instructive. The EC conditionally cleared Altice's acquisition of PT Portugal in April 2015. More than two years later, in May 2017, the EC issued a statement of objections alleging that Altice actually implemented the acquisition by taking control of PT Portugal before deal clearance. In April 2018, the EC concluded that Altice did breach gun-jumping prohibitions and imposed the large €124.5 million fine. The EC found that control had transferred based on Altice (1) having veto rights in the purchase agreement over decisions concerning PT Portugal's ordinary-course business decisions, (2) actually exercising decisive influence over aspects of PT Portugal's business such as instructing PT Portugal on a marketing campaign, and (3) seeking and receiving detailed commercially sensitive information about PT Portugal outside any confidentiality agreement. Altice plans to appeal the decision and contends that its actions were "in accordance with well-established M&A market practice."



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Gun-jumping enforcement is active and evolving. The enforcement actions above can be contrasted with the European Court of Justice's

May 2018 decision overturning the Danish competition authority's gun-jumping determination in EY Denmark's acquisition of KPMG Denmark. The ECJ found that KPMG Denmark did not gun-jump by giving notice to terminate its cooperation agreement with KPMG's international network (effective ten months after the date of the notice) because this action did not breach the EU standstill obligation or contribute to a change of control of KPMG Denmark.



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## **2. China consolidated its antitrust enforcers into a single agency.**

China's three antitrust agencies consolidated into one agency this year. The new State Administration for Market Regulation (SAMR) will handle the responsibilities of the three previous antitrust agencies — the Chinese Ministry of Commerce (merger review), the National Development and Reform Commission (pricing conduct) and the State Administration for Industry and Commerce (nonprice conduct). The SAMR commenced operations in April 2018, led by Zhang Mao. Zhang most recently oversaw the SAIC, which pursued investigations ranging from tire company rebate programs to alleged bribery by global pharmaceutical companies. Integration is scheduled to be complete in September 2018. Because of transitions to new case handlers, required sign-offs from new leadership, and physical office moves, Chinese merger clearances may involve delays as the new agency completes its transition.



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There is some expectation that the consolidation may strengthen Chinese competition law enforcement. Possible developments include (1) more common sharing of merger control filing materials and information with the antitrust conduct enforcers, (2) new confidentiality rules for merger control materials, and (3) greater enforcement activity based on more substantial combined resources and coordination.

## **3. South American merger enforcement grew as Argentina adopted a pre-merger clearance regime and Chile blocked its first merger.**

South American competition authorities, including in Argentina and Chile, gained new merger control tools and increased enforcement.

Argentina is the latest South American country to adopt a pre-merger clearance regime. A new law sets up an independent National Competition Authority to operate as a self-governed leg of the executive branch. Transactions involving combined party revenues in Argentina above approximately \$83.3 million will require pre-closing filings and approval. Filings will be made public, and third parties may file objections. Deals will be analyzed based on harm "to general economic interests," which could include objectives beyond consumer welfare, such as producer welfare and national economic growth. The agency will have an initial 45-day period to review a transaction once submitted, and another four months to issue a decision if it identifies potential competition issues (this period may be suspended while the parties prepare responses to the agency's information requests). The pre-merger clearance regime is expected to take effect June 2019, one year after the establishment of the new competition authority.

In addition, Chile's new competition authority, in its first year of operation with a new pre-merger clearance regime, unconditionally approved more than 30 transactions, subjected five transactions to conditions, and blocked one deal — a combination of two of the top three Chilean baked goods suppliers, Ideal and Nutrabien. In that investigation, the agency claimed that the companies would have had a 75-80 percent share in a market for sponge cakes, biscuits and alfajores. After two commissioned market surveys, reports by multiple economists, customer and competitor submissions, consultation with the EC's former chief competition economist, and a 128-page report by the Chilean merger division chief, the Chilean authority blocked the deal. To address the agency's concerns, the parties offered to launch new products, regulate the price and quality of certain products, and restrict advertising investments for two years, but the agency rejected the offer, reasoning that these behavioral remedies were only temporary, might deter entry and required substantial compliance monitoring.

#### **4. United States enforcers scrutinized vertical mergers in media and health care, but with an important setback.**

The U.S. Department of Justice began 2018 with pending investigations or challenges of three large vertical transactions: AT&T-Time Warner, CVS-Aetna and Cigna-Express Scripts.

In AT&T-Time Warner, the DOJ initiated litigation in November 2017 that continued with a trial in the first half of 2018. While this was the first time in 40 years that the DOJ took a vertical merger case to trial, DOJ Assistant Attorney General Makan Delrahim stated that the challenge did not signal hostility to vertical combinations in general. The DOJ's principal theory of harm was that the transaction would allow AT&T to profitably increase the price of Time Warner television program content to AT&T's television distribution rivals. After a full trial, the district court rejected the DOJ's claims in June 2018. The court disagreed with the contentions that Time Warner provides "must have" content that would enable AT&T to extract higher prices from rival distributors and that AT&T would have an incentive to withhold Time Warner's content from other distributors. The AT&T outcome may improve the U.S. merger clearance outlook for vertical transactions.

#### **5. The European Union moved toward a unified framework for evaluating foreign investments in targeted industries.**

A committee of the European Parliament voted in May 2018 in favor of a bill to create a unified framework among EU member states to evaluate transactions that involve foreign investments in the EU, paving the way for full Parliament votes and talks with the European Council and EC. The bill proposes to (1) enable — and possibly require — the EC and member states to conduct a standardized national security screening on foreign investments in certain sectors such as automobiles, biomedicine, finance, data analysis, energy and other critical technologies, (2) require member states to immediately inform the EC and other member states about foreign investments that they are screening, and (3) allow the EC to issue nonbinding opinions on these foreign acquisitions.

Transaction parties are already incorporating deal mechanisms to account for possible additional scrutiny in Europe, including (1) foreign investment clearance as a closing condition or basis for a breakup fee, (2) commitment to structural and behavioral commitments fixes in order to obtain foreign investment clearance and (3) additional time for obtaining global regulatory approvals.

## **Conclusion**

Taken together, these developments reflect a global trend toward alignment of enforcement on the national level — such as in China — and on the regional level — as seen in the European Union and South America.

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