Mega-mergers: key considerations to take to get your deal through

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1.Overview

M&A activity surged last year, with a significant uptick of mega-mergers: over 70 mergers worth more than $10 billion were announced in 2015, with a combined value of more than double that seen in 2014.[2] Most of these deals were cross-border, strategic deals between significant industry players.

Getting very large, global M&A transactions through the regulatory process is an extremely complicated endeavor. Failure to assess properly the antitrust risk and manage the regulatory clearance and remedies process can be very expensive. Ultimately, a disconnect between the parties and the agencies about the scope of the problem or the required remedy can result in a blocked transaction. Last month, the Halliburton/Baker Hughes deal was called off after the US Department of Justice ("DoJ"), which had continually rejected increasingly rich remedies offers, filed a lawsuit to block the transaction. Baker Hughes emerged with a $3.5 billion reverse break fee.

Many factors come into play when mapping out a merger clearance strategy:

- The number of mandatory suspensory jurisdictions has exploded in the last 20 years, and the regulators in many of these regimes have achieved a level of self-confidence and expertise to thoroughly examine proposed transactions;
- The increased cooperation between regulators on a global basis, which can facilitate merger review, but can also create additional complexity, especially in cases in which the antitrust issues raised and/or the remedies required are global in scope;
- The closer substantive scrutiny that mega-mergers attract, partly because of their outsized impact on the domestic economy but also because regulators feel pressure from politicians, customers and the media, who may question whether the regulators have got the review right; and,

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2 There was a 32% increase in global deals compared to 2014, representing a total of $4.7 trillion of announced deals worldwide during 2015 and the strongest annual period to our knowledge with a 42% increase in value from 2014. Source: Thomson Reuters, *Mergers and Acquisitions Review Full Year 2015.*

- Political (non-antitrust) considerations. In several countries, regulators also explicitly address public interest considerations as part their review, and many others implicitly take political considerations into account.

So, what are the parties to a mega-merger to do? To borrow a phrase from the Boy Scouts: be prepared. Long before the ink is dry on the signature pages of the transaction documents, the parties must:

1.Determine where merger control filings are required, and whether there are any voluntary jurisdictions where a merger control filing is advisable (**Section 2: Where and when to file**);

2.Establish early on a strategy both for the antitrust defense of the case on a global basis as well as the remedies strategy, against the backdrop of the closer substantive scrutiny and increased cooperation among regulators (**Section 3: Establishing and implementing an antitrust strategy on a global basis**); and,

3.Prepare solutions for the political and public interest issues that will arise for certain jurisdictions which incorporate a public interest test in their merger control regimes (**Section 4: Non-antitrust considerations political and public interest**).

2.Where and when to file: no jurisdiction left behind?

There are approximately 130 jurisdictions with merger control regimes, the vast majority of which (over 100) have mandatory pre-closing filing regimes. In addition, some jurisdictions have filing deadlines, and breaching those deadlines can result in heavy fines.

The jurisdictional assessment is in many instances very complex and involves parameters well beyond the mere turnover information. Despite the International Competition Network's ("**ICN**") recommendation to have objective merger control thresholds based on turnover, many jurisdictions still rely on market share thresholds or combinations of turnover/asset and market share thresholds, which in some instances vary depending on the deal structure.

As a result, in many cases parties have to carry out their pre-merger filing analysis based on imperfect information. It is not uncommon for the parties to have to postpone the finalization of the filing analysis until after the deal has been announced.

Traditionally, the global "gateway" jurisdictions, such as the European Union ("**EU**"), United States ("**US**") and China have always been given top priority, as a result of their economic importance. Other jurisdictions could be of crucial importance to the deal in question and may involve a less experienced and less efficient review, resulting in obtaining clearance taking longer than expected. Review time may also depend on the varied market structures around the world. As a result, the selection and priority of filings becomes an exercise in triage. This said, there are some rules of thumb that help guide the prioritization:

Global "gateway" jurisdictions: EU, US, China

These are the global jurisdictions that are typically of huge economic importance in the vast majority of mega-mergers. Each of these jurisdictions has the power to hold up the global closing. If filings are triggered, it would be unimaginable for the merging parties to close absent US, EU, and, more recently, China clearance. Indeed, failure to obtain approval in even one of the jurisdictions is sufficient to collapse the entire global merger. GE/Honeywell, a merger that was proposed more than 10 years ago, is one of these rare situations where the merger was cleared by the DoJ but blocked by the European Commission.[3]

[3] http://uk.practicallaw.com/4-101-5292

A key strategic consideration is whether and to what extent the EU, US and China review process should be aligned. In practice this often proves to be very difficult, given that the U.S. system is very different from a procedural standpoint compared to the EU merger review process. The MOFCOM merger review process is closer to the EU, but significant differences remain in terms of the timing.

In practice, very often the U.S. is the first to clear the transaction, while the EU is still in the pre-notification process. This can in some cases increase the risk of divergent outcomes. An extreme example of that scenario is the Oracle/Sun Microsystems case, where the final notification starting the Phase I clock was only filed to the European Commission a few days after the DoJ had cleared the transaction. Despite the DoJ clearance, the Commission had serious doubts about the transaction and only agreed to clear the transaction after a protracted Phase II investigation.

While there are procedural differences remain substantial, the common denominator of all three gateway jurisdictions is that they are aggressive enforcers.

- The European Commission, under the new Commissioner with responsibility for competition, Margrethe Vestager, has shown that it will continue to take a tough stance on mergers. Since Vestager took office in 2014, three mergers abandoned[4] and 34 decisions with remedies. In addition, at the time of writing of this article, there is strong public speculation that the EU Commission will block the Hutchison/O2 acquisition.[5]
- In the US, the Federal Trade Commission ("**FTC**") and the DoJ are aggressive enforcers. Many in the media and the business community believe that enforcement has increased under the Obama administration and, certainly, there are more court challenges and deals that are altered through consent decrees. Attorney General Loretta Lynch told the American Bar Association in April that this is because more transactions are being notified and those transactions are larger, more complex and strategic in nature. Others believe that the Obama administration has made a conscious effort to make merger activity more difficult. While the cause is debatable, there have been several high-profile challenges such as Halliburton/Baker Hughes, GE/Electrolux (which ended when GE exercised its right to terminate while the court proceedings were under way), and Sysco/US Foods (where the parties abandoned the transaction after a judge sided with the FTC and granted a preliminary injunction).
- China's Ministry of Commerce ("**MOFCOM**") has emerged as the third global "gateway" authority alongside EU and the US given its economic importance, the large number of the cases reviewed by MOFCOM, and, most significantly, the fact that MOFCOM does not shy away from pursuing an independent path in terms of theories of harm and imposition of remedies, even in cases where the EU or the US have concluded that there are no substantive concerns.[6] MOFCOM has continued to develop its own theories of harm and remedy measures. For example, conglomerate effects theory is a notion that is generally not recognized in the US and (in recent years) is treated with skepticism in the EU. However, MOFCOM seems to be more receptive to this controversial theory. To date, it has imposed remedies in two cases[7] and prohibited one case[8] based on conglomerate effects, and MOFCOM appears to have

[4] Mondi/Walki Assets (M.7566) and TeliaSonera/Telenor/JV (M.7419) (abandoned after the Commission rejected the parties' commitments) and Halliburton/Baker Hughes (M.7477) (withdrawn after the DoJ filed a lawsuit to block the deal)

[5] *See* https://www.competitionpolicyinternational.com/eu-senior-officials-reject-hutchison-bid-for-telefonicas-o2/

[6] There is at least one case in which MOFCOM concluded that the transaction raised substantive concerns despite the fact that the EU Commission had reached the opposite conclusion. In Panasonic/Sanyo MOFCOM found competition concerns in the Ni-MH battery market for automotive applications, a global product market which had been 'cleared' in the European Commission's review as not giving rise to competition concerns. In contrast, MOFCOM imposed a divestment remedy in relation to Panasonic's motor Ni-MH battery plant in Japan and also required the company to reduce its shareholding in a car battery joint venture. *See* Panasonic/Sanyo (M.5421).

[7] Merck/AZ Electronic Materials (2014) and Walmart/Niuhai (2012).

set out no clear parameters for the application of this theory of harm. MOFCOM has also developed unconventional behavioral remedies, although it has reiterated that it has no particular preference for any single type of remedy. For example, the unique hold-separate remedies, which effectively require parties to remain independent until MOFCOM consents (even after the transaction closes), have been imposed in four cases in China but are not often seen in other parts of the world.

- Many global deals have been delayed due to protracted Chinese merger review. The $35 billion Glencore/Xstrata deal is one such example, receiving conditional approval from MOFCOM in April 2013, more than a year after its initial notification. The parties were forced to push back the date for completion numerous times after having to re-file and undertake several rounds of remedies negotiations with MOFCOM. There are numerous similar examples of global deals delayed due to protracted MOFCOM investigations.

Jurisdictions which have notification deadlines

Another category of jurisdiction which the parties should prioritize is comprised of those that still have filing deadlines.

Notwithstanding that the ICN recommends against filing deadlines where there is a mandatory suspensory regime,[9] there are still more than 30 jurisdictions which impose filing deadlines, and many of them still impose a bar on closing, including Albania, Ecuador, India, Japan, Russia and South Korea.

In some cases, the filing deadlines are extremely tight, and render compliance with the deadlines very challenging, given the significant amount of formal requirements typically associated with the filings in these jurisdictions. For example:

- Ecuador has a filing deadline of only 8 calendar days from the signing of the deal (or announcement of public offer);
- Paraguay has a filing deadline of 10 days from signing; and,
- Serbia has a filing deadline of only 15 calendar days.

Some of the relevant authorities take a very aggressive approach towards the enforcement of mandatory filing deadlines. In February 2016, the Competition Commission of India handed down an order fining General Electric 50 million rupees (€666,000) for missing the filing deadline for its merger with Alstom in 2014. General Electric failed to file with the Indian authority within the 30-calendar day deadline following its announcement of the deal to India's Securities and Exchange Board in May 2014 and did not file a notification until November later that year. It defended its decision arguing that, at the time of the announcement, the parties had not yet reached a final binding agreement and, therefore, no filing requirement was triggered. However, this was rejected by the Competition Commission, which stated that the "timeline for filing commences from the date of public announcement". The fine constitutes the largest domestic penalty imposed on a company for failure to comply with India's merger control regime.[10] This aggressive approach ignores the commercial realities involved in deals like this, where there can be a significant amount of time between the announcement of the intention to enter into a deal, and the negotiation and signing of a legally binding agreement.

Regardless of whether these filing deadlines are desirable according to the ICN, the merging parties still need to meet them, highlighting the need to frontload as much of the merger control work as possible.

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[8] Coca-Cola/Huiyuan (2009).
[9] ICN, *Recommended Practices for Merger Notification and Review Procedures*, page 6.
[10] http://globalcompetitionreview.com/rss/news/article/40938/

Often, India will be the first jurisdiction where the merger is notified, even if it is not key to the transaction, and the India filing will need to be consistent with whatever arguments or statements the parties intend to make in the gateway jurisdictions. The extreme formalities (notarization/apostillization requirements) imposed by the Indian merger control review process further complicate the challenge of meeting the 30-day filing deadline in India.

Other mandatory pre-closing jurisdictions

For other mandatory pre-closing jurisdictions, priority is typically given to jurisdictions which have particular importance for the parties' business operation, i.e., jurisdictions in which either the target or the acquirer have assets or business operations and need to maintain a good relationship with the local antitrust authorities. The relative importance of each of these jurisdictions can vary considerably depending on the deal in question.

In some instances the law is unclear whether the scope of the bar on closing is global or local and it will be very difficult to implement local carve-outs that will be acceptable both to the regulators (from a legal perspective) and the parties (from a commercial perspective).

Voluntary jurisdictions

Typically, voluntary jurisdictions such as Australia, Chile, New Zealand, Singapore, the United Kingdom and Venezuela are not on the list of priority jurisdictions. However, if a transaction has a particularly high profile, or raises significant competition issues, the parties may very well decide to include the jurisdiction in question on their list of priority jurisdictions. Despite being voluntary regimes, the regulators in many of these jurisdictions still have the power to impose far-reaching remedies or even issue orders preventing the parties from closing the transaction. As a result, in certain cases, purely voluntary jurisdictions might also be given priority.

3.Establishing and implementing an antitrust clearance strategy on a global basis

A crucial part of the parties' pre-signing preparation is to determine the likely worst outcome, the odds of this outcome coming to pass, and in what time frame. The buyer has to decide whether the deal will still make sense in light of the antitrust risk. This assessment is crucial to the allocation of antitrust risk in M&A agreements, which are the result of lengthy commercial negotiation processes between the principals and their lawyers.

Even if there is consensus among the parties that the deal is feasible from an antitrust standpoint, the timing for the antitrust clearances plays a crucial factor for many reasons. The parties are typically under pressure to close the transaction, whether because of financing arrangements that may expire, shareholders of the seller that want their pay-out, or simply because they want to prevent their competitors from poaching their customers or employees.

Against this background, in some cases the parties have agreed to establish a "fix-it-first" or "upfront" remedy strategy, consisting in offering remedies upfront to resolve the antitrust issues, without going through a protracted antitrust investigation. However, identifying the remedies that will be sufficient to get the deal through is not an easy exercise.

This strategy has been successfully implemented in Holcim/Lafarge, where the parties submitted a remedy offer to the European Commission at the same time as formal notification of the transaction was made in order to pre-empt any competition concerns.[11]

However, the upfront remedy strategy is not always successful. Indeed, there are many examples of mega-mergers that have been either abandoned or made subject to very far-reaching remedies that virtually undo the merger synergies in the jurisdiction in question.

- **No remedy possible.** In extreme cases, the authorities will conclude that the merger must be blocked, and that there is no possible remedy. For example, in Sysco/US Foods, the FTC's view was that Sysco and US Foods were the only companies that could serve restaurants and other businesses, such as group purchasing organizations and foodservice companies that have locations nationwide. Similarly, in Halliburton/Baker Hughes, the DoJ challenged the merger on the basis that it would reduce the number of oil services suppliers from 3 to 2 in a large number of markets in the US.[12] Hutchison/O2 represents the latest development in the mobile telecoms consolidation saga in Europe and the decision reflects the Commission's even harder stance in "4-to-3" mergers in Europe.[13]
- **No suitable buyer for divested business.** In other cases, the remedies package might be sufficient but the authorities may conclude that there is no suitable divestiture buyer. This was the case with the failed merger between Tokyo Electron and Applied Materials, the world's two largest semiconductor manufacturers, an industry where innovation is key. After an 18-month process, the parties were unable to overcome the DoJ's view that there was no suitable buyer to ensure continued innovation.
- **Remedies eliminate all synergies.** In some cases, the remedy is so extreme that it eliminates all synergies in the jurisdiction in question. In Ball/Rexam, Ball agreed to divest the entire overlap in the European Economic Area ("**EEA**"), consisting of ten "can body" plants and two "can end" plants to a single approved purchaser, in order to obtain clearance from the European Commission. The divestment package encompassed the majority of Ball's metal packaging facilities in the EEA.[14] In this case, the deal would only make sense for the buyer with regard to synergies realized outside the jurisdiction in question. In the proposed acquisition of GE's appliance business by Electrolux, the DoJ rejected at least two remedies offers, and Electrolux chose to litigate rather than expand their remedies proposal.

When establishing the antitrust and remedies strategy for the merger, the parties will have to take two key factors into account in their antitrust risk assessment: (i) the closer substantive scrutiny that mega-mergers will inevitably face from regulators on a global basis; and (ii) the increased cooperation among regulators.

Closer substantive scrutiny

Theoretically, the value of the transaction should not affect the regulators' substantive assessment. In practice, however, mega-mergers attract a lot of interest from regulators, competitors, customers, suppliers as well as the media and other stakeholders. This can complicate merger review in two significant ways.

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[11] Commission Decision M.7252 of 15.12.2014 - Holcim/Lafarge.
[12] http://www.ft.com/cms/s/0/a6389b4e-0fe0-11e6-839f-2922947098f0.html
[13] https://www.competitionpolicyinternational.com/eu-senior-officials-reject-hutchison-bid-for-telefonicas-o2/
[14] Commission Decision M.7567 of 15.01.2016 - Ball/Rexam.

First, authorities will extensively examine the available quantitative and qualitative (internal documents) evidence under the traditional theories of harm. The US and EU authorities and agencies in, for example, Canada and Australia, have developed sophisticated forensic capabilities and will request huge amounts of data and documents from the parties, and, if necessary, from third parties.

Second, more jurisdictions reviewing a transaction allows greater room for more "unconventional" theories of harm. Typically, the more unconventional theories of harm are often based on the scale of the merged entity and the inherent belief that the bigger size and higher earnings of the merged entity will somehow put its competitors at a competitive disadvantage.

Even though many of these theories have been discredited to a large extent in the US and EU by conventional economic theory (big is not necessarily bad), they can still re-appear in the context of mega-mergers. In addition, there is a significant "spillover" risk of these theories being exported to other authorities with a lower evidentiary burden, which can rely on these theories to take sometimes very drastic measures.[15]

Increased cooperation among regulators

Regulators increasingly coordinate with each other, and regularly ask for waivers to exchange not only information, but also documents. This cooperation often starts in the early stages of the investigation, when the competition authorities are likely to proactively request the waivers, which are, in principle, given.

This is further exacerbated by the fact that the EU and the US have very broad authority to obtain documents from parties and rely extensively on internal documents during the merger review process. The US authorities can issue second requests, which call for the production of millions of pages of documents, while the European Commission may decide to make document requests with specific keywords, in the same way as it does in the antitrust enforcement of cartel practices. Accordingly, the parties should assume that any smoking guns uncovered by the US or the European Commission will be shared with regulators in other jurisdictions.

Recent examples of close global cooperation among regulators include:

- **Halliburton/Baker Hughes:** this merger was investigated by the European Commission, the DoJ, and regulators in Brazil and Australia. The merger has been challenged by the DoJ, but would likely also have been challenged by the European Commission had the parties not abandoned the transaction.
- **GE/Alstom**: this deal was investigated by the European Commission and the authorities in Brazil, Canada, China, Israel, South Africa and Switzerland. While the DoJ and European Commission focused on different issues, the remedies were aligned to address both EU and US concerns.
- **GlaxoSmithKline/Novartis oncology**: the case involved close cooperation between the FTC, European Commission, Canada, China, Australia, Brazil, Pakistan, and numerous others. The parties were able to negotiate the same remedy with the FTC and European Commission, which was then relied upon by other regulators.

[15] For example, MOFCOM's prohibition of Coca-Cola's acquisition of Huyian juice company was primarily based on portfolio effects concerns (see: http://www.lexology.com/library/detail.aspx?g=5b6d0580-e4ae-45b1-b379-f3cf35575b9c).

Accordingly, it is mission-critical to establish the substantive defense of the case long before signing, which also means plotting out a remedies strategy on a global basis so that communications with the authorities are consistent between jurisdictions. In particular, the parties must take care to ensure that the substantive arguments in one jurisdiction will not undercut the strategy in another.

4. Non-antitrust considerations: political and public interest[16]

Mega-mergers attract a huge amount of attention from the media, which can result in a large amount of controversy. For example, the combination of competitors in the consumer goods and services sectors often attracts thunderous denouncements by politicians and other stakeholders, such as in the proposed transactions involving cable providers Time Warner Cable and Comcast; wireless telecom rivals AT&T and T-Mobile, and airlines USAir and American Airlines. While many jurisdictions have established tests for assessing the impact of a proposed merger on competition, negative comments from politicians and the media are not helpful to the parties' defense. The parties need to consider whether there will be any political fallout, and, if so, how to address it, by involving lobbyists, public relations professionals, or, if dealing with a foreign country, their own country's diplomats. CEOs may be required to appear before legislatures or the antitrust agencies. Other jurisdictions have cultural requirements, such as Canada, or foreign investment control regimes (e.g. Canada, US, Australia and Russia).

In some less sophisticated jurisdictions, antitrust authorities are required to take into account public interest considerations as part of the merger review. Public interest considerations are also included in the merger control regimes of some EU jurisdictions, but this is very exceptional and limited to specific sectors.[17]

The public interest test in certain emerging jurisdictions is loosely defined, leaving a lot of discretion for authorities, but also a greater margin for negotiation by companies.

In China, the Anti-Monopoly Law explicitly requires MOFCOM to take into account, in addition to competition concerns, "[t]he effect of the concentration on national economic development."[18] There is no detailed guidance on how to interpret this clause, but we understand that in practice it covers industry policy considerations.[19] Industry policy concerns, however, appear to come into play in MOFCOM's merger review process less frequently nowadays. MOFCOM now reviews filings using predominantly the simplified procedure, under which MOFCOM no longer proactively consults with other regulatory agencies, thereby reducing the likelihood of interventions by industry policy issues.

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[16] While we have not considered foreign investment regimes (such as CFIUS in the US and FIRB in Australia) for this article, we note that these rules can also act as a bar to receiving clearance for mega mergers. There are several examples of global deals that have collapsed as a result of the application of foreign investment rules. In November 2010, Canada said that it would not approve a EUR 38.6 billion purchase of Potash Corporation of Saskatchewan by BHP Billiton, a large Australian mining company. The transaction was blocked in order to keep control of an important natural resource. The underlying legal basis is the Investment Canada Act, which requires companies to show a "net benefit" to Canada. Similarly, in March 2009, the Deputy Prime Minister and Treasurer of Australia rejected the takeover proposal by China Minmetals of Oz Minerals Ltd. The transaction was blocked on grounds of national security.

[17] United Kingdom (national security, media plurality, stability of the UK financial system), Ireland[17] (media plurality) and Germany (where public interest concerns which outweigh competitive restrictions might very exceptionally permit the clearance of a merger).

[18] Article 27(5) of the Chinese Anti-Monopoly Law.

[19] This feature is reflected in some of MOFCOM's remedy decisions. For example, in Walmart/Niuhai (2012), MOFCOM required, *inter alia*, (i) unless having obtained its own license to conduct value-added telecommunication services ("**VATS**") business, No 1 Store (operated by the target, Niuhai) shall not offer any platform services to third parties; and (ii) Walmart shall not provide VATS in cooperation with Shanghai Yishiduo via a so-called Variable Interest Entity. These remedies seem to focus on industry policy concerns and foreign investment approval requirements for the telecom sector. Under the relevant telecom regulations, Walmart as a foreign company is prohibited from conducting VATS business without a VATS license. MOFCOM appeared to seek to ensure such foreign investment restriction is followed (by imposing remedy (i)) and is not circumvented by contractual arrangements (by imposing remedy (ii)).

In South Africa[20] the public interest grounds are explicitly limited to: employment, the effect of the merger on a particular industrial sector or region; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; the ability of national industries to compete in international markets.

Countries like Botswana[21], Namibia[22], Kenya[23], Swaziland[24] and Zambia[25] have obviously drawn inspiration from the South African regime. Their public interest test includes, but is not limited to socio-economic and socio-political aspects such as employment, promoting international competitiveness and exports as well as supporting small undertakings, particularly those controlled by historically disadvantaged persons.

In Tanzania[26], mergers are not, as such, subject to a public interest test. However, if the transaction parties consider that the public benefits of the merger outweigh the competition harm, they can apply for an authorization with view to the public benefit of the merger.

In these jurisdictions, the public interest test can lead to results that have very little to do with consumer welfare, and more to do with protecting the local economy. Some of these commitments include:

- Maintaining the same number of employees for certain periods of time;
- The obligation to provide support, including professional trainings, outplacement support and counselling to retrenched employees;
- The obligation to maintain existing supply agreements and manufacturing plants post merger;
- Investing to support farmers, small retailers, local manufacturing, local suppliers, jobs and/or the reduction of harmful alcohol use; and,
- Locally producing raw materials instead of importing them.

5. Conclusion

While there appears to be a consensus among regulators and practitioners that "big is not necessarily bad" when it comes to merger transactions, mega-mergers will attract much more intense scrutiny, both on antitrust and non-antitrust grounds, by regulators that increasingly cooperate with each other, often at a very granular level.

Against this background, it is essential for the parties and their advisors to establish and implement a game plan early on, both for the antitrust and public interest defense of the case. This game plan should involve not only the traditional antitrust defense of the case, but also the elaboration of the suitable remedies, identification of suitable buyers, and early engagement with all key regulators and stakeholders across the globe. This may seem like a tall order, but failure to do so can be a very expensive exercise for the management and shareholders of one or even both parties to the transaction.

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20 Section 12A(3) of Competition Act of 1998.

21 Section 59(2) of Competition Act 17 of 2009. The consideration of public interest grounds is not mandatory in Botswana.

22 Section 47(2) of Competition Act 2 of 2003. In Namibia, trade unions have the right to intervene in merger proceedings.

23 Section 46(2) of Competition Act 12 of 2010.

24 Section 17(2)(h)(I and (iii)) of Competition Commission Regulations Notice of 2010.

25 Section 31 of the Competition and Consumer Protection Act 24 of 2010.

26 Section 13(I)(b) of Competition Act 8 of 2003.