

ANTI-TRUST IS AN INCREASING OBSTACLE IN GLOBAL M&A

26 May 2016 | Global

Legal Briefings - By **Stephen Wilkinson, Roddy Martin, ...**, **Andrew Rich** and **Frédéric Bouvet**

Anti-trust regulations are a growing risk for dealmakers in cross-border transactions.

Almost three-quarters (71%) of respondents in Herbert Smith Freehills' new cross-border M&A report *Beyond Borders*, picked out anti-trust regulation as an issue that had caused a deal to fail. The survey also suggests that anti-trust regulation will go on representing a major challenge for potential buyers. Anti-trust concerns are particularly front of mind for companies considering making acquisitions in North America, where close to half (44%) see such regulation as a potential hurdle. A third of acquirers (33%) considering transactions in the Middle East are also nervous about anti-trust issues.

Stephen Wilkinson, global head of M&A at Herbert Smith Freehills in London, says the rise of anti-trust is a global phenomenon made more complicated by the increasing reach of anti-trust regulators. "Compared to ten and even five years ago, there are many more regulatory regimes on a national level - in countries in Africa and South America - which in theory have jurisdiction not only over transactions that involve companies incorporated in those regions, but also over foreign-to-foreign transactions," he warns. "The thresholds for intervention can often be met on cross-border deals."

Mark Jephcott, head of competition, Asia, at Herbert Smith Freehills in Hong Kong sees the same happening in the Asia Pacific region. "Obtaining the necessary merger control clearances can have significant implications for the timing and structure of an M&A transaction," he says. "The proliferation of anti-trust regimes in recent years, particularly in the APAC region, has introduced additional complexity and means that companies can no longer focus only on the EU and US as the key jurisdictions where anti-trust clearance may be required."

This may mean deals can take longer than expected. In China, for example, MOFCOM - the anti-trust regulator - has demonstrated on a number of occasions its ability and willingness to undertake detailed reviews of mergers and to adopt an independent line to other major merger control jurisdictions, including as regards the imposition of a substantial remedies package.

Examples include its conditional clearances of the Seagate/Samsung and Microsoft/Nokia deals in 2011 and 2014 respectively, and most recently in the Nokia/Alcatel-Lucent deal in October 2015. Timing considerations have also been of particular concern, especially where a transaction raises substantive anti-trust issues (such as the Glencore/Xstrata transaction in 2013). In such cases a period of more than a year may be required to negotiate and finalise remedies with MOFCOM.

Visit the [Beyond Borders website](#) for more articles like this.

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021