DIFFERING LEVELS OF TRANSPARENCY across merger control jurisdictions globally can prejudice the ability of merging parties, practitioners, and other industry participants to prepare for merger control investigations and provide information and advocacy during such investigations. Transparency plays an important role in both merger control and other antitrust enforcement, by making enforcement policies known, ensuring procedural fairness, and improving the predictability of enforcement actions for particular types of transactions and conduct. But agency investigations typically are non-public, due to legal requirements to protect trade secret and other sensitive business information, and to enable enforcement staff to develop evidence and make enforcement decisions without public disclosure that may interfere with the investigative process.

Since 2010, at least the International Chamber of Commerce, the OECD Competition Committee, the American Bar Association, and the International Competition Network have examined these issues.1 The discussion below focuses on merger enforcement and compares the relative transparency of the U.S., EU, and Chinese competition authorities. We do so by analyzing the amount of information available at each stage of the proceedings to the parties and third parties, the amount of the agency’s substantive reasoning that is made available to the parties and to third parties, and the amount of information requested from and made available to other industry participants. We then offer some observations on how the key differences among these jurisdictions may impact the parties to enforcement actions, as well as other industry participants and the public in general.

What Do We Mean by Transparency?

Transparency is a fundamental attribute of a sound merger control regime that provides greater certainty for merger parties and others about transactions that are subject to review by antitrust authorities.

In this article, transparency in merger enforcement is defined as including three important components:

■ the amount of information issued publicly by antitrust agencies to describe general jurisdictional standards, enforcement priorities, analytical methods/standards used for substantive analysis of transactions, and administrative standards and procedures for pre-merger notification, preparing the notification, settlements, and remedies;

■ the level of information about a particular investigation that antitrust agencies share about the evidence that the agency has gathered with respect to the matter, and the agency’s enforcement intentions and positions on the matter going forward; and

■ the amount of information issued publicly by antitrust agencies upon termination of an investigation to describe the rationale for the agency’s decision (including the acceptance/rejection of any remedies).

The discussion below applies these definitions to the antitrust enforcement agencies in the EU, U.S., and China, and shows significant differences among these jurisdictions in the level of transparency for merger enforcement.

Transparency in EU Merger Enforcement

In the European Union, merger control is governed by the European Union Merger Regulation 139/2004 (EUMR). The EUMR lays down the conditions under which the European Commission (Commission) will have jurisdiction over concentrations (widely defined in the EUMR to cover mergers, acquisitions of control, and full-function joint ventures). Where the concentration has an “EU dimension” (i.e., where certain turnover thresholds are met), the Commission will have jurisdiction to investigate the merger. Those transactions without an EU dimension may fall to be investigated by the National Competition Authorities (NCAs) in accordance with their domestic merger control rules. As an exception to
this rule, there are procedures under which the parties can engage in pre-notification discussions with the authorities in order to re-allocate jurisdiction between the Commission and the NCAs (for example, if it would be more advantageous for the transaction to be reviewed at the Member State level if the only competition issues of any significance are limited to one Member State), and procedures also exist for the post-notification re-allocation of jurisdiction between the Commission and NCAs (for example, a Member State can request that a concentration notified to the Commission be referred to it, if the deal threatens to affect significantly competition in a market in that Member State which is a distinct market, or if the intervention is to protect legitimate interests of public security). This article considers only the Commission’s investigations under the EUMR.

All concentrations with an EU dimension must be notified to, and approved by, the Commission prior to their implementation. Notifications have to be made in a specific form published by the Commission by the parties acquiring control.

Once the notification is filed, the Commission’s review is, potentially, a two-stage process. During the first phase of the investigation (Phase I) the Commission has up to 25 working days in which to make its initial assessment of the proposed transaction (although this period can be extended to 35 working days if the parties offer remedies during Phase I). The Commission must then decide whether to clear the concentration (with or without remedies), or open an in-depth (Phase I) investigation. When the Commission opens a Phase II investigation, it has a basic period of 90 working days in which to complete its investigation. This period can, however, be extended if remedies are offered, or if the parties request an extension. At the end of the Phase II investigation period the Commission will either clear the concentration (with or without remedies) or prohibit the concentration.

Commission merger decisions (whether clearances or prohibitions) can be appealed to the EU courts. Such an appeal may be brought by the parties to the transaction, or by any other person for whom the decision is of direct and individual concern.

Transparency is a fundamental principle governing the actions of the Commission, particularly due to its role as a supra-national institution. This is baked into the statutes governing the Commission as a whole and its merger control function. These tenets of transparency are also echoed in the EUMR, particularly in the requirements governing publication of information on notified transactions (as discussed below).

**Transparency of Jurisdictional Standards, Pre-Notification and Notification Procedures.** The Commission has issued comprehensive guidelines on the assessment of mergers, and the Consolidated Jurisdiction Notice which sets out how the jurisdictional thresholds will be applied. The Commission does not have a dedicated team set up to respond to informal queries but guidance can be obtained from previous Commission and General Court decisions where the Commission’s approach to analyzing jurisdictions in trickier cases is outlined, and through pre-notification discussions with the Commission staff. Parties can also apply for formal guidance from the Commission.

In the EU, the process for entering into pre-notification discussions follows a set procedure of submitting the Case Team Allocation Request, receiving requests for information, and entering into a dialogue with the case team. The Commission’s Best Practice Guidelines includes a section that details the purpose and usual procedure for pre-notification discussions, in which parties are directed to provide a background memorandum on the transaction to begin discussions, followed by a draft of the notification (the Form CO). Although the discussions, rightly, remain confidential, and the Commission does not officially publish information on when pre-notification discussions with the parties began, the Commission does occasionally reach out to third parties during pre-notification with questionnaires and/or invitations to participate in phone calls and meetings with Commission staff to assist in the review. When this occurs, some market participants, at least, will have knowledge that the Commission’s assessment has started. Particularly in these circumstances, it remains unclear why the Commission is unwilling to otherwise confirm that pre-notification discussions are underway.

The Commission uses a two-stage approach to publicizing the formal notification, which is required under Article 4(3) EUMR. Within about two to three days of receipt of the filing, the Commission’s practice is to publish on its website bare details of the transaction. At this stage, the published information will be limited to non-confidential information only, including the names of the parties, the relevant economic activity code, the date of the filing, and the provisional deadline for the Commission’s decision on the matter. Usually about one week after the Commission has received the filing, a more detailed (but still relatively brief) non-confidential statement about the transaction is published in the EU’s Official Journal (which is also accessible from the Commission’s website). The statement adopts a standard format, and the parts of it relating to the parties and the transaction are provided by the parties themselves. The statement will identify the parties and their main business activities, and will provide a very brief outline of the nature of the transaction. It will also invite interested third parties to submit their views on the transaction to the Commission within 10 days of the date of publication. This process allows for a significant degree of transparency concerning each case that is undergoing a Commission investigation, and also ensures that potentially interested third parties have adequate information to make submissions about the transaction.

The Commission’s Horizontal Merger Guidelines outline in significant detail the Commission’s approach for analyzing market shares, concentration thresholds, competitive
impact, buyer power, and efficiencies. This gives the parties to the transaction significant detail about the Commission’s analysis and insight into enforcement priorities. The Commission has also published best practice guidelines for the submission of economic evidence and data collection in competition cases, including merger cases, which contain recommendations regarding the content and presentation of economic analysis, and how best to respond to Commission requests for quantitative data. This provides additional guidance for parties concerning the Commission’s approach to analyzing data, and also gives details of data requests that parties can expect to receive during a Commission investigation.

The Commission has published notices on acceptable remedies, and best practice guidelines for the submission and negotiation of remedies. The Commission has also published an ex-post study of 96 remedies included in merger decisions adopted from 1996–2000, which provides further detail on the types of remedies that are acceptable in specific scenarios. These materials provide important guidance regarding the Commission’s analytical approach and procedure for submitting remedies, including model documents that have to be completed for the formal submission of remedies.

**Transparency of Information Shared During Investigation.** As part of the Commission’s statutory commitment to transparency, it does share information with third parties, including Member States, more extensively than other authorities. The Commission will send copies of the notification, as well as any other important documents made available during the investigation, to all the Member States. (It needs a waiver from the parties to share information with authorities outside the EEA.) Nonetheless, the Commission remains alive to confidentiality concerns. Any documents containing confidential information must be marked as such and the Commission goes through a rigorous procedure with the merging parties of identifying and redacting confidential information before non-confidential versions of key submissions can be shared with any third parties.

The Commission also proactively contacts key industry players to gather their feedback regarding the merger shortly after notification, and dialogue and engagement with third parties and key stakeholders is a very important part of the Commission’s merger review. Importantly, the merging parties also have knowledge of third parties the Commission may contact, as the Commission relies on the contact details submitted by the merging parties. Other third parties that are interested in the transaction may also approach the Commission with their views.

The Commission’s process is therefore relatively accessible to interested parties. As the investigation progresses, further key details of the Commission’s substantive concerns (such as an outline of the theories of harm that the Commission is exploring) may also be made public and will be made known to third parties. This in turn increases accountability of the Commission and maximizes the role of third parties. The Commission also updates the case timeline on its website regularly so that third parties are aware of the status of the case, including when remedies discussions are ongoing, thereby facilitating third party engagement and understanding of a Commission investigation. The Commission will also conduct a market test of any remedies that are proposed by the merging parties, by asking third-party market participants for their views on the proposed remedies.

**Transparency of Decisions and Agency Reasoning.** The European Commission’s website lists all notified transactions and reports the Commission’s disposition of each of these transactions. Even transactions that are cleared unconditionally after simplified review are the subject of a Commission statement that identifies the parties, the nature of the transaction (joint venture, acquisition of stock, etc.), and the relevant product and geographic markets. Other Phase I unconditional clearance decisions will also identify the degree of overlap of the participating firms, and other salient facts that led the Commission to conclude that no challenge was necessary.

The Commission publishes the fact of its decision to refer a merger to Phase II on its website, but not the full text of that decision (known as a 6(1)(c) decision), only the notifying parties receive a copy. However, the Commission’s public announcement provides a brief description of the Commission’s substantive concerns and reasons for the Commission’s decision to refer the case to Phase II, and the merging parties are provided with key documents relied upon in the decision to refer.

The process of a Phase II investigation also involves further questionnaires being sent to third parties. Again, the merging parties also know the majority of third parties that will be proactively contacted, as the Commission will rely on the contact details originally provided by the parties, as well as any third parties that proactively contacted the Commission during Phase I.

If, during the Phase II investigation, the Commission proceeds to issue a Statement of Objections, the notifying parties will get access to the Commission’s file. This involves the notifying parties receiving redacted copies of all the submissions and responses from third parties, as well as often receiving access to the data used by the Commission to make any economic calculations. The Statement of Objections is a document often issued during a Phase II investigation in which the Commission lays out its substantive concerns arising during the whole investigation and allows the merging parties to understand what will be required to allow the Commission to clear the deal. Third parties that have applied for and been designated by the Commission as interested third parties in the merger investigation will also receive redacted copies of key submissions from the merging parties, including a redacted copy of any Statement of Objections.

The Commission publishes details of all the decisions that it takes throughout the full merger investigation process with the notable exception of the 6(1)(c) decision to open a Phase II review. This includes providing publicly available infor-
In the United States, at the federal level, mergers are reviewed by both the Federal Trade Commission and the Antitrust Division of the Department of Justice. In terms of the statutory framework, mergers are principally governed as to substantive legal standards by Section 7 of the Clayton Act, and as to premerger notification requirements by Section 7A of the Clayton Act (the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act)), and associated Rules issued by the FTC under the HSR Act, which together form the premerger notification regime. The HSR Act requires that the parties to transactions meeting the thresholds file HSR notification forms with the FTC and the DOJ and observe a statutory waiting period prior to closing the transaction. Filings under the HSR Act are required to be made with both agencies, which (if not cleared summarily) go through a procedure of “clearance” to allocate responsibility for review, investigation, and possible enforcement of particular transactions to one of the agencies based on the expertise or interest of the agency. In addition, several specialist agencies address competition issues as part of their own reviews, including the Federal Communications Commission, and parties to transactions may have to deal with these agencies in parallel to the FTC/DOJ. State Attorneys General also have relevant authority to investigate and often require similar advance notices.

**Transparency in U.S. Merger Enforcement**

In the United States, information on the content of the Statement of Objections, as well as publishing a full public, non-confidential version of the Commission’s final decision in all merger cases. These decisions are typically lengthy and detailed and contain significant references to the merging parties’ views as well as anonymized feedback received from third parties. This provides a high level of transparency and allows scrutiny of the Commission’s reasoning in each merger case. The publication of all Commission final decisions also increases certainty for future merging parties as it allows practitioners to fully review all precedent cases in a particular market and understand the Commission’s substantive decision regarding market definition and competitive assessment. Indeed, transparency in decision-making is considered to be particularly important since it is linked to the rights of defense enshrined in EU law which have been litigated at the Court of Justice of the European Union, and the Court has ordered the Commission to disclose more information in its decisions, particularly relating to economic reasoning. Frequently, the Commission decisions are also cited on issues of market definition in other jurisdictions.

It is notable however, that when it comes to appeals of Commission decisions, the appellants need to show there is a “manifest error” in the Commission’s decision. This means that, when facing court challenge, the Commission does not have to reveal all of its reasoning behind the decision but only defend itself on the points of “manifest error” raised by the appellants.

**The [European] Commission publishes details of all the decisions that it takes throughout the full merger investigation process with the notable exception of the 6(1)(c) decision to open a Phase II review.**

This includes providing publicly available information on the content of the Statement of Objections, as well as publishing a full public, non-confidential version of the Commission’s final decision in all merger cases.

The initial HSR waiting period is 30 days in most circumstances. A party may request early termination of this period, and these requests are often granted if the agency does not intend to investigate the transaction further. The reviewing agency may decide to further investigate the transaction beyond the initial waiting period by issuing a formal Request for Additional Information and Documentary Material (Second Request). After the issuance of a Second Request, the HSR waiting period is suspended until 30 days (or 10 days for cash tender offers) following substantial compliance with the Second Request. Upon substantial compliance, the agency may close the investigation, allow the investigation to close subject to a settlement setting out specific remedies, or challenge the transaction by seeking a preliminary injunction in a U.S. district court to block the transaction (with each of the FTC and DOJ following a slightly different procedural path to obtain an injunction). Notably, unlike the Commission in the EU, neither the FTC nor the DOJ has the power to block a transaction without getting an injunction issued by the court.

These procedural features of the U.S. premerger review process, including both the statutory regime and the requirement for a favorable court ruling to block a transaction, has an impact on the level of transparency in the U.S. merger control regime.

**Transparency of Jurisdictional Standards, Pre-Notification and Notification Procedures.** In the United States, information about the jurisdictional thresholds that determine whether the parties must notify a transaction, the process of notifying a transaction, and further detail on how the FTC and DOJ conduct the substantive assessment, are primarily available from the FTC Premerger Notification Rules, formal interpretations issued by the FTC, informal Interpretations issued by staff of the FTC Premerger Notification Office (PNO), and substantive enforcement guidelines issued by the DOJ and FTC.
The FTC PNO offers a wealth of resources, including several published guides to the HSR Act and its associated Rules, including on the jurisdictional thresholds and reportability requirements. The FTC PNO also issues substantial guidance on how to complete the HSR notification form and what information should be included in a filing. Of particular use to practitioners and parties considering if a notification is required are the FTC’s formal interpretations, and the FTC PNO’s informal interpretations. Formal interpretations are statements by the FTC, usually published following court judgments and typically endorsed by the Assistant Attorney General in charge of the DOJ, pronouncing on the correct interpretation and treatment of certain situations under the HSR Rules. Informal interpretations are published in a database formed from the responses that the PNO gives to the thousands of emails it receives from practitioners and parties to transactions seeking guidance on the interpretation of HSR Rules. Many PNO responses and the original letter or email containing the fact-specific enquiry are available on the searchable database on the FTC website. (Other non-published responses may be obtained through Freedom of Information Act requests.) Although the FTC cautions that the informal interpretations only provide guidance from previous staff interpretations on the applicability of the HSR rules to specific fact patterns and should not be relied upon, they are nevertheless a good example of transparency within the U.S. agencies and provide additional certainty that the Rules will be applied consistently across transactions.

Further, the DOJ and FTC have issued joint Horizontal Merger Guidelines, providing details on the approach that the agencies take to analyzing transactions, including the evidence that the agencies consider when determining if a transaction will have adverse competitive effects, the approach that is taken to market definition and how unilateral and coordinated effects are analyzed, among other issues. The agencies have also issued Vertical Merger Guidelines, including proposed new guidelines. The published commentary also provides additional detail on the approach that the agencies will take to analyzing transactions, providing additional transparency on the process and the legal principles that are applied. The agencies also publish a number of model documents, giving greater visibility of what parties to transactions can expect at various stages.

Outside of engagement with the PNO and available resources, however, the procedure for entering into pre-notification discussions with the FTC or DOJ is more of a black box, as there is no guidance issued regarding engaging in pre-notification discussions. This does not provide much certainty to the merging parties in terms of the potential benefits of such discussions or how they would be conducted. Although in practice merging parties will often make a presentation to the FTC/DOJ once they have made the decision to file with the U.S. authorities, when or why the authorities would expect such a presentation is not made clear. Such lack of transparency in the pre-notification process means that consistency in treatment between transactions—beyond the interpretation of the Rules—is not guaranteed.

The FTC and the DOJ have also issued guidelines on negotiating merger remedies, which aims to answer questions that frequently arise and detail procedural information regarding divestitures and the timing for engaging in remedies negotiations. The FTC has also published a Remedies Study, reviewing merger remedies imposed from 2006–2012, with the aim of providing insight into the FTC’s remedies processes. The FTC is also going to update its Statement for Negotiating Merger Remedies in light of what has been learned from the report. Nonetheless, the agencies do not provide updates on the current progress of remedies negotiations during ongoing cases or precise implications on timing, and precise details of how remedies market testing is conducted are very limited. There is similarly limited visibility as to which stakeholders, if any, will be contacted.

Transparency of Information Shared During Investigation. The basic rule regarding confidentiality in the HSR Act is set forth in Section 7A(h) (15 U.S.C. §18a(h)), which provides that any information filed with the DOJ or FTC under the HSR Act shall be exempt from disclosure under the Freedom of Information Act and “no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.” The FTC and DOJ have consistently taken the position that the statute therefore prohibits disclosure of even the fact of a filing because it is information filed with the DOJ or FTC pursuant to the HSR Act. Indeed, even the HSR form states that the “information and documentary material filed in or with this Form is confidential.” This means there is a ban on disclosing the details about the parties or the transaction.

Although this contrasts with the approach in the EU, this is a statutory prohibition over which the agencies have no discretion. Therefore, by extension, disclosure of any HSR notification and other confidential materials to other independent federal agencies or other non-U.S. competition authorities is precluded unless the parties sign a waiver. In practice, signing a waiver is commonplace and uncontroversial, particularly where it facilitates coordination between international competition authorities. However, when it comes to contacting third parties during the course of an investigation to elicit market and other information to aid the investigation, the DOJ and FTC are precluded from divulging confidential information but may disclose the transaction that they are investigating. Nonetheless, the fact that the HSR Act mandates that the fact of filing is kept confidential means that the role of third parties is more limited, as third parties are not easily able to make proactive submissions to the agencies and have to wait until the FTC or DOJ contacts them before being able to express their views on a transaction. Further, there is no published guidance on when the agencies will contact third parties, the nature of the questions that may be posed, or which third parties will be contacted.
Transparency of Decisions and Agency Reasoning.

There is little or no disclosure when the FTC or DOJ terminates an investigation (either following the initial 30-day waiting period, or following a Second Request). Generally, any such disclosure will only stretch to a short press release that the agency has cleared the transaction, even after a significant in-depth Second Request. Further, even the decision-making process at U.S. agencies is not transparent: the FTC does not publish a list of the votes taken by the Commission in a given year or how each Commissioner voted. The DOJ and FTC issue selective closing statements for a small number of in-depth investigations that do not result in a settlement or court action to explain the agency’s decision to close the investigation.25

In addition to selected closing statements, the FTC and DOJ release information publicly on merger investigations in three other circumstances.

The first is under the statutory exception to the HSR Act non-disclosure rule for the fact of filing: Section 7A(B)(2). This notice requirement has been interpreted to apply to the early termination of the initial waiting period and the early termination of the waiting period after a Second Request. The FTC fulfills this notice requirement by publishing on its website and in the Federal Register the names of the acquiring parties, acquired parties, and acquired entities, and the date on which early termination of the waiting period has been granted.

Second, where cases are settled by consent of the parties (i.e., where the case requires a negotiated remedy to be approved by the agency but before any administrative or judicial complaint is filed), details of the consent resolution are published. At the FTC, settlements take the form of an order, agreed to by the parties and issued by a vote of the Commissioners. The order is first accepted as a proposed order and released to the public for comment along with a draft Complaint and an Analysis to Aid Public Comment. There is then a 30-day public comment period, after which the Commissioners vote on whether to issue the Final Order, renegotiate, or commence litigation. After the Final Order is issued, it is enforceable by the FTC through a lawsuit. All of the documents relating to the FTC settlements are available on the FTC website and give significant insight into the parties and markets concerned, market definition, entry conditions in the market and competitive effects of the acquisition.

At the DOJ, settlements are governed by the Antitrust Procedures and Penalties Act (the Tunney Act) and take the form of a proposed Final Judgment, which describes in detail the remedies agreed by the parties and DOJ, and which is filed with a federal district court. Along with the proposed Final Judgment, the DOJ files a Complaint, a Competitive Impact Statement and, typically, a stipulated Hold Separate or Asset Preservation Order. The Competitive Impact Statement describes the competitive harm expected from the proposed transaction and how the proposed Final Judgment remedies that harm. Following a 60-day public comment period, the DOJ may file responses to public comments, after which the court issues a ruling (in rare cases following a court hearing), as to whether the Final Judgment is in the public interest and, if so, the Final Judgment becomes an enforceable court order. All documents relating to DOJ settlements are also available on the DOJ website and provide significant public transparency into the parties and markets concerned, market definition, entry conditions in the market and competitive effects of the acquisition.28

Third, and most commonly, significant information related to the DOJ or FTC’s investigation is published during any litigation where the DOJ or FTC is suing to enjoin the transaction. In lawsuits filed by private parties challenging a merger transaction, the parties’ premerger notification forms and other relevant documents submitted to the reviewing agency during the premerger review process may be requested directly from the filing parties in the ordinary course of discovery (subject to the ordinary rules of privilege and confidentiality under the Federal Rules of Civil Procedure, including Protective Orders).29

As noted above the DOJ and FTC publish selected closing statements explaining the agency’s decision to close a merger investigation without a settlement or enforcement action. FTC action to issue a closing statement in these circumstances requires a vote of the commissioners, and commissioners who disagree with the decision to close the investigation may issue separate statements explaining their position.30

There is therefore a notable lack of transparency regarding the reasoning given by the agencies for permitting a transaction following the termination of an investigation. Typically, there are several reasons cited to justify the reluctance of agencies to make any further disclosure.

(1) As the agencies are required to sue to block transactions, it is these investigations that have the most useful precedent value as they are the most complex or controversial and therefore it is justifiable only to disclose details of cases which involve court-sanctioned consent orders or litigation.

(2) Confidentiality can be crucial for reaching consensus with the parties, and also ensures that there is no excessive, or poorly implemented, disclosure which could harm both the parties involved and the agencies.

(3) Further disclosure of the agencies’ reasoning could make it more difficult to win court cases in the future because the agencies would have to explain why one deal was approved but another (potentially on similar facts) was blocked. The frequently cited example of such concerns is the Office Depot/OfficeMax case of 2013, and the subsequent Staples/Office Depot case in 2016. In Office Depot/OfficeMax, the FTC issued a three-page closing statement explaining the rationale for approving the deal, including reasoning around customers having multiple potential suppliers for office supplies so the merging par-
ties were not each other’s closest competitors. When the FTC challenged the Staples/Office Depot case in court three years later, the merging parties used the 2013 closing statement to attack the FTC and said that the same factors, including multiple suppliers like Amazon, continued to apply. Although the FTC was able to fight off the attack and the court granted a preliminary injunction, many still argue that such burdens should not be borne by the authorities in court.

(4) The cost and burden is not warranted to issue published statements for routine merger investigations that are closed without a settlement or enforcement action, given the relatively large number of such investigations (e.g., for fiscal year 2018, HSR filings were made for 2,111 transactions and the reviewing agency issued a Second Request for 45 of these transactions).

Despite the cost and burden to the DOJ and FTC, there may be benefits to merger parties, industry members, and the public that warrant more frequent and detailed published statements explaining closed merger investigations. The guidance in these statements: (1) may enable merger parties to structure transactions and propose remedies that avoid protracted court challenges, (2) help industry members to better focus their engagement with the merger review process for future transactions, and (3) provide greater insight about agency decision-making to members of the public (including legislators, state enforcers, practicing/academic economists, and other interested parties).

Transparency in Chinese Merger Enforcement

The Antimonopoly Law of the People’s Republic of China (AML) is the legal basis for Chinese merger control. In 2018 the State Administration for Market Regulation (SAMR) was officially inaugurated as the new regulatory authority consolidating the antimonopoly responsibilities of the National Development and Reform Commission, the Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce.

A concentration triggers a filing requirement to SAMR if certain turnover thresholds are met. After receipt of the notification, SAMR makes supplemental information requests to the merger parties. The clock for review will not start to run until SAMR declares the materials and information submitted by the merger parties to be complete and formally accepts the case. SAMR then has 30 calendar days for an initial assessment of the merger. If SAMR cannot clear the merger (either unconditionally or conditionally with remedies) within this initial investigation period, it can initiate a more in-depth review, which may take up to 90 calendar days. The in-depth investigation can be extended for a further 60 calendar days in exceptional circumstances or with the parties’ consent. However, some conditional clearance decisions show that SAMR can in practice take a longer time than the maximum statutory review period of 180 days to finish the review. Following the in-depth investigation, SAMR will either clear the transaction (unconditionally or subject to agreed remedies) or prohibit the transaction.

Following SAMR’s decision to prohibit a transaction, parties to the transaction or interested parties can appeal the decision. Appellants must first apply to SAMR for an “administrative reconsideration,” after which, if the appellants object to the reconsideration decision, appellants may lodge an administrative lawsuit.

Transparency of Jurisdictional Standards, Pre-Notification and Notification Procedures. In 2018, SAMR published a set of Guiding Opinions on its merger review process, including the Guiding Opinion on the Notification of the Concentration of Undertakings, which includes some welcome transparency on the jurisdictional thresholds for notification in China. In other respects, guidance by the Chinese authorities around jurisdiction remains opaque, notably around the meaning of “control” and the investigation of transactions falling below the jurisdictional thresholds.

It is possible for parties to apply for pre-notification guidance from SAMR, particularly where clarification is required on a particular substantive or procedural aspect of the filing. However, there is very little information in the public domain regarding the process for obtaining pre-notification guidance. Moreover, the fact that parties are seeking pre-notification guidance is not made public, and typically not confirmed by the authority even if the transaction is already public knowledge, thus limiting the role that third parties can play at this stage of the process. Pre-notification is therefore much more of a black box, both from the parties’ and third parties’ perspectives.

The AML (Article 27) outlines the factors that SAMR will consider when analyzing a transaction (including, for example, market shares of the relevant undertakings, impact of the concentration on market entry and technical progress, and impact on the national economy). This provides additional detail to merging parties regarding the enforcement considerations of SAMR.

There is also some recent additional transparency around the process for submitting remedies proposals during an investigation. SAMR published the Trial Provisions on Imposing Restrictive Conditions on Concentration of Undertakings (Trial Provisions). The Trial Provisions outline a basic structure and aspects that should be followed or covered by remedies. These guidelines also provide important details to both merging parties and practitioners regarding SAMR’s approach and the expected procedure for submitting remedies. Nonetheless, there is much less transparency during the process of submitting and negotiating remedies in China: SAMR does not publish any timing updates or details of the remedy negotiations occurring in any particular cases. SAMR will market test satisfactory remedy proposals by sharing a non-confidential version with third parties. However, the exact timing and progress of remedies negotiations in ongoing cases remains quite opaque for third parties, merging parties, and practitioners.
Transparency of Information Shared During Investigation. The amount of information shared with third parties during a merger investigation is limited. Third parties in China do not have a statutory right to access merger control files but they can (and do) proactively challenge mergers at any stage of the process of review.

If the merger is subject to the simplified procedure, SAMR will release a Public Notice Form introducing the case on its website, which will remain on the website for a period of 10 days, during which time any third party can submit written comments, including regarding whether or not the case should be a simple case, providing relevant evidence. Outside the simplified procedure, SAMR may seek opinions from third parties with respect to the proposed acquisition, although no confidential information is disclosed to third parties without the prior approval of the notifying parties. There is no formal equivalent announcement for such cases, and under either procedure it is not possible for the merging parties to learn the identity of third parties with which SAMR is consulting.

SAMR has enhanced its cooperation with antitrust authorities in other jurisdictions. Due to the restriction on information sharing from the Guiding Opinion, the parties must sign a waiver before SAMR will discuss any confidential information relating to a transaction with other antitrust authorities, as is standard practice in other jurisdictions. SAMR does cooperate and actively communicate with its international counterparts on an investigation, and not only does it consult with the Commission, other Asian antitrust authorities, and the agencies in the U.S. on key aspects of merger control, but also agencies in other jurisdictions such as Turkey where there are points of common interest (e.g., remedies).

Transparency of Decisions and Agency Reasoning. In China, until recently, SAMR and its predecessor MOFCOM only published an extremely limited set of decisions, namely prohibitions and conditional clearances (which are required by the AML). However, there has been a gradual increase in transparency.

First, recent decisions provide more detailed comments that address both issues of procedure (recounting the procedure, as well as the consultation process leading to the identification of competitive concerns and adequate remedies), and of substance (relevant market definition, competitive assessment, market entry). This trend demonstrates an effort to communicate more on SAMR’s internal processes, as well as to anchor decisions in clear competition concerns using recognized substantive assessment tools, and resulting from a consultation with relevant parties.

Second, SAMR has been increasing transparency and communication of unconditional clearances. In November 2012, MOFCOM announced that it would be publishing a quarterly update on transactions that it has conditionally cleared, which commenced in January 2013. In May 2019, SAMR switched to publishing lists of mergers cleared unconditionally on a monthly basis and SAMR then switched in June 2019 to publishing weekly updates on conditional clearances. SAMR has continued to publish weekly updates ever since. The list only provides basic information about each transaction, namely the parties’ names, the type of transaction, and the clearance date. Nevertheless, it is a positive step and reveals SAMR’s resolve to communicate more extensively with stakeholders. It also validates some previously unconfirmed interpretations of the law and its implementation.

However, it remains the case that SAMR does not publish full text decisions of unconditional clearances, nor does it publish any details of non-simplified case timelines. Moreover, decisions (or reasoning) to refer a transaction for an in-depth investigation are not publicly announced.

Increased Transparency in Merger Control Reviews: Who Wins? It is clear from the above discussion that the levels of all three components of transparency differ across the three jurisdictions. When it comes to transparency about reportability of a transaction and the approach that the competition authority will take, the U.S. agencies come out as some of the most transparent, particularly due to the extensive publications and established process of answering informal questions by the FTC PNO. However, when looking at transparency of information shared during investigations and transparency of authority decisions, the European Commission appears as the gold standard, particularly due to the reasoned decisions that are published even if a transaction is cleared after the initial Phase 1 investigation. Even in China SAMR publishes minimal factual statements transactions cleared at the first phase. This is notably different than the practice in the United States, where no decision is published, except for limited information that is published when early termination of the HSR waiting period is granted, and more detailed and substantive information that is published pursuant to statutory requirements for merger investigations that are resolved through a consent order or consent decree. In merger cases that the U.S. agencies litigate in court (or that FTC enforcement staff litigate in FTC administrative proceedings), a full litigation file is available for public review, subject to any materials that are kept under seal to protect trade secret and confidential information.

Several practical arguments against increasing transparency are often raised. Most frequently, the concern that is expressed is that the financial and human resource burden on the agencies will increase significantly if agencies are required to publish fully reasoned decisions. By way of comparison of their relative caseload in the EU as of December 2019, 382 cases were notified to the Commission, with 9 cases referred to Phase 2, resulting in 9 Phase 2 decisions, including 3 prohibitions;

In China, in 2019, 432 filings were reviewed, with 427
unconditional clearances and 5 conditional clearances; and
- In the U.S. in (fiscal year) 2018, 2,111 transactions were notified, for which 45 Second Requests were issued, the DOJ challenged 17 cases (filing 9 complaints in U.S. District Court, and in 8 cases filing settlement papers simultaneously), and the FTC challenged 22 cases (with only 5 leading to administrative or federal court litigation).

There are also concerns that publishing more decisions would make it more difficult to win future litigation, or put an additional burden on authorities to justify why one case was subject to in-depth investigation when another was cleared unconditionally.

Nonetheless, increasing transparency in merger control reviews brings multiple benefits:

- **Improving pre-decision process and results:** For merging parties, it allows them to foresee how the authority will review their transaction, both procedurally and substantively, based on past precedent. This increases predictability and efficiency in transaction planning, as well as the knowledge of when and which third parties the authorities will contact and when third-party views will be taken into account in the process. It also creates an incentive for the authority to refine its fact-gathering and deliberating process before a decision is reached, because decision-makers will know that their conclusions will be open to scrutiny.

- **Increased third-party involvement:** For third parties, it allows them to see which transactions are being investigated, and when, therefore, it may make sense to send proactive comments. Transparency as to which issues the authority is looking at encourages the third parties to target the information they provide appropriately and make a more meaningful contribution, and it allows third parties to both protect their own interests and give the authorities better insight into the market.

- **Fostering agency accountability:** An explanation as to how particular decisions have been reached enables a meaningful performance check. If the authority is aware that its decisions will be scrutinized, this creates an incentive to ensure they are robust. Transparency also allows third parties and the merging parties the opportunity to challenge the conclusions of the authority and therefore discover any mistakes that may have been made and potentially change procedure and reasoning in future cases.

- **Enhancing knowledge of and confidence in the authorities and the law:** Finally, making more information available about the merger review process also clarifies policy and increases public confidence in the authority and the law. It can also help shape future enforcement policy.

With this in mind, one might expect that all agencies would aim for the maximum level of transparency possible. Indeed, these principles are enshrined in the ICN’s Recommended Practices for Merger Notification and Review Procedures. 36

**How Can We Move Transparency in Merger Control Forward?**

Enforcement agencies may consider options within their control (i.e., without changes in controlling statutes and treaties), to increase three components of transparency.

In the United States, the lack of published guidance where a case ends in a terminated investigation (either after the initial 30-day waiting period or a Second Request), and does not proceed to a court-sanctioned consent order or litigation, is one of the most notable absences of transparency outlined above. Although the U.S. agencies deal with a larger number of notified transactions than either the European Commission or SAMR, they could adopt an approach similar to that of SAMR and limit publicity to very minimal factual statements for transactions cleared at or before the initial 30-day waiting period and publish more detailed factual statements for transactions cleared after the initial 30-day waiting period and publish more detailed factual statements for transactions cleared at or before the initial 30-day waiting period.

As regards the level of information shared during an investigation, in both the United States and China there is limited visibility over which third parties are contacted, and no access to submissions or responses to questionnaires that they submit to the authorities. This lack of access to file materials in the United States at the initial stages of the investigation (before litigation commences, if any), and in China, means that the ability of parties to the transaction to adequately rebut third party submissions can be reduced.

It is notable that reform around transparency in multiple jurisdictions has been investigated in the past, and, in particular, there have been numerous calls in the academic community for increased transparency in the decisions made by the U.S. agencies.38 SAMR’s ongoing publication of further guidance and changes to improve transparency in Chinese merger control is a step in the right direction. For the United States, it is hoped that the current DOJ administration will step beyond the current proposed reforms, which only involve releasing statistics about the duration of reviews, and publishing more guidance for merging parties.39

**Conclusion**

An increase in all three components of transparency brings significant benefits to competition law procedures. Competition authorities are seeking to promote competition; merging parties need certainty and procedural fairness; third parties are keen to express their views on pending merger reviews, and to know how future cases in the industry will be...
dealt with; and practitioners want to be able to advise clients effectively with a significant degree of certainty around past cases and authority procedures.

Transparency brings such benefits. It can also pose difficulties, including the potential for increased workload and scrutiny for authorities. Nonetheless, the benefits of increasing all three components of transparency appears to outweigh such burdens, particularly in an era when antitrust is gaining more political traction and media attention.

The differing levels of transparency that merging parties, third parties, and practitioners experience in the EU, United States, and China, particularly when it comes to the publication of decisions and details of an authority’s reasoning, demonstrates that, the arguments against increasing transparency are not universally agreed. This reform should come about in the form of the publication of (at least) basic details of authorities’ decisions not to challenge transactions, as well as the continued publication of additional information of those cases subjected to additional scrutiny (in cases of remedies or litigation), and increasing the merging parties’ access to the file during in-depth investigations.


2 Consolidated Version of the Treaty on the Functioning of the European Union art. 296, 2012 O.J. (C 326) 47, 175 [hereinafter TFEU] requires that the Commission state the reasons for which its acts are based, and Article 297 TFEU requires that regulations, directives, and decisions of the Commission be published.


8 EUR, COMM’N, MERGER REMEDIES STUDY (2005).

9 See, e.g., Case C-265/17 P, Comm’n v. United Parcel Service, ECLI: EU:T:2019:23 (Jan. 16, 2019), art.14 T-194/13, United Parcel Service v. Comm’n, ECLI:EU:T:2017:144 (Mar. 7, 2017) (holding that the Commission had to disclose the methodology and further details of its econometric analysis model that had been previously withheld in the decision provided to the merging parties. The Court particularly stated: “The methodological basis underpinning those models must be as objective as possible in order not to prejudice the outcome of that analysis one way or another. Accordingly, those factors contribute to the impartiality and quality of the Commission’s decisions, which, ultimately, is the basis of the trust that the public and businesses place in the legitimacy of the EU’s merger control procedure.”).


13 Fed. Trade Comm’n Informal Interpretations of HSR Act Rules (last visited Jan. 19, 2020), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations. The PNO has also recently begun to post newly issued informal interpretations in which the PNO has changed its position from previously issued interpretations.


20 See, e.g., U.S. Dep’t of Justice ANTITRUST DIVISION MANUAL ch. III.D.1.g.iii (5th ed.), https://www.justice.gov/atr/file/761141/download.


24 FTCWatch, U.S. Among The World’s Most Secretive Antitrust Jurisdictions (Feb. 21, 2019).

25 For the DOJ, see https://www.justice.gov/atr/public/guidelines/2018888.pdf (DOJ guidelines for issuing closing statements on antitrust investigations, including merger review); https://www.justice.gov/atr/closing-statements (links to access DOJ closing statements, including 13 for merger investigations dated 2010 of later). The FTC website does not include a similar link to access all closing statements, which require a majority vote

26 See 16 C.F.R. § 803.11(c) (providing for early termination).


30 See supra note 25.


