

C L I F F O R D
C H A N C E

FUNDAMENTALS OF PRIVATE CAPITAL AND M&A TRANSACTIONS
SINGAPORE | WEDNESDAY, 4 SEPTEMBER 2024

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MERGER CONTROL

YONG BAI AND DAYU MAN

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MERGER CONTROL



YONG BAI
PARTNER

T +86 10 6535 2286
E yong.bai
@cliffordchance.com



DAYU MAN
FOREIGN LEGAL COUNSEL

T +852 2826 3467
E dayu.man
@cliffordchance.com

WHAT DO WE DO?

Merger control,
national security and FSR filings



Antitrust investigations
(anti-competitive agreements
and abuse of dominance)



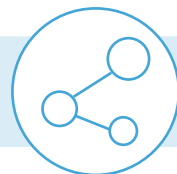
Antitrust compliance
advice



WHAT DO WE COVER IN M&A TRANSACTIONS?

WE WILL COVER

Merger Control



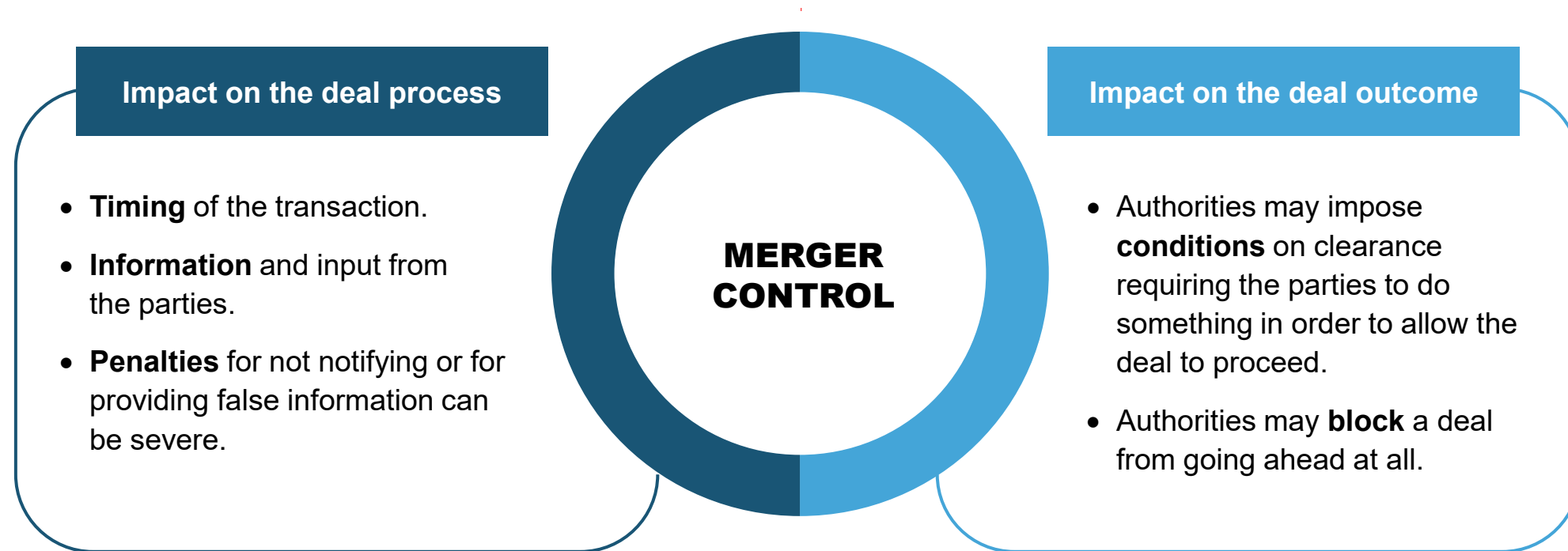
- 'Lifecycle' of a merger control filing process
- Impact on the SPA
- Document production
- FDI / National Security / FSR

LDD

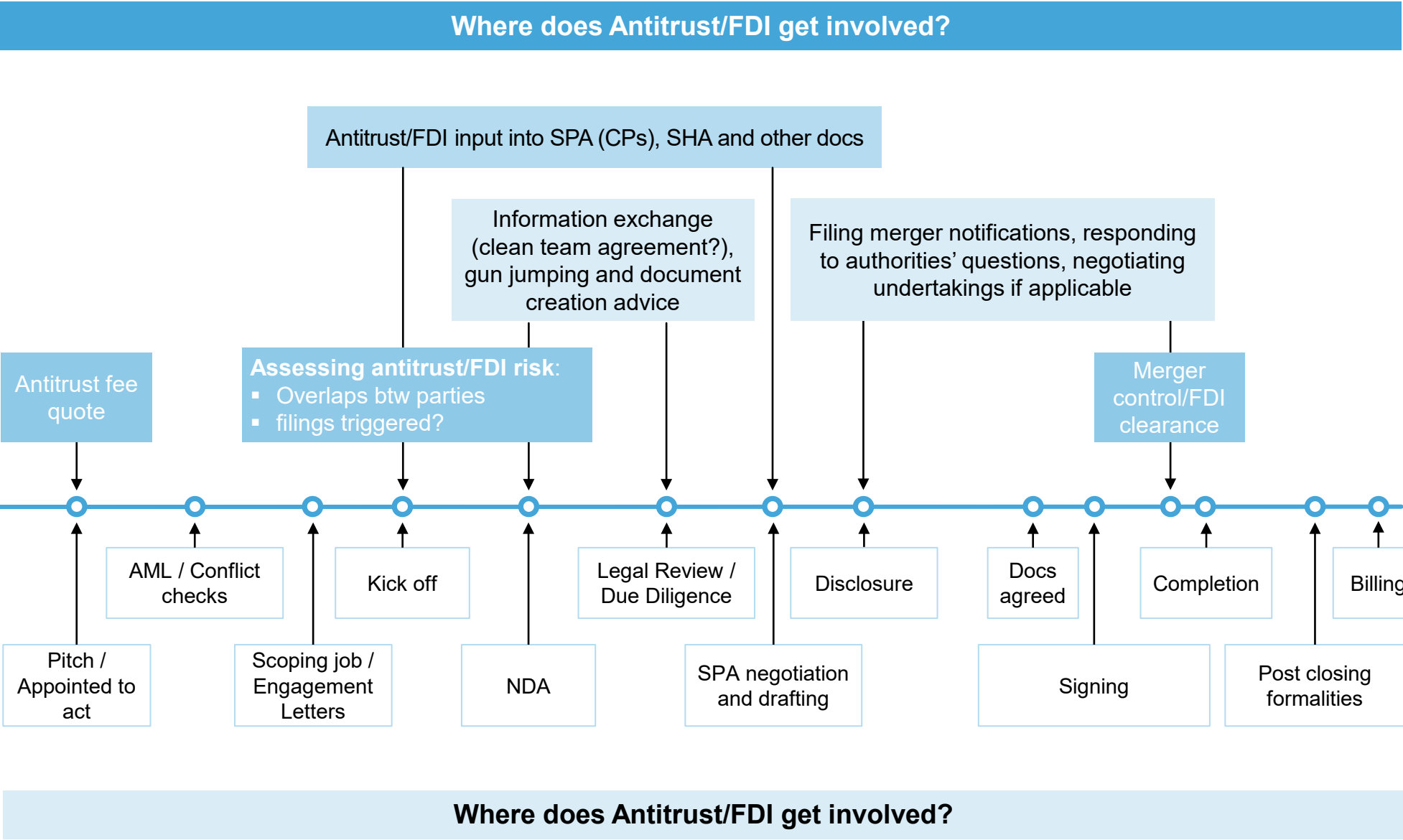


- Anti-competitive agreements
- Abuse of dominance

WHY DO YOU NEED TO CARE?



ANTITRUST WORKSTREAM IN M&A TRANSACTIONS



WHAT SORTS OF DEALS NEED TO BE NOTIFIED?

ACQUISITION OF CONTROL

Key concept is that there must be an acquisition of control of an undertaking, or parts of an undertaking.



- Differs from the concept of 'control' or 'ownership' in contract law.
- Differs from jurisdiction to jurisdiction
 - In many jurisdictions, there must be an acquisition of '**decisive influence**'
 - In some jurisdictions, **minority investments** may be sufficient
 - In others, the value of the transaction may also be relevant.



- Shares.
- Share options / convertible instruments.
- Assets / employees / goodwill.
- Contractual rights, etc.
- Outsourcing arrangements.

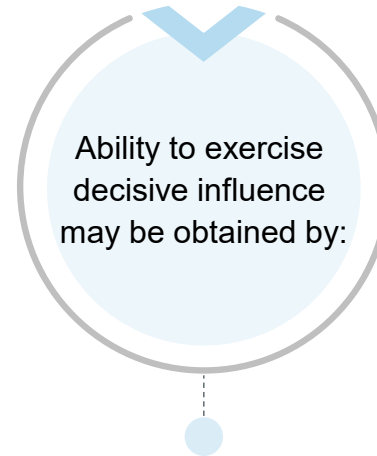
WHAT SORT OF DEALS NEED TO BE NOTIFIED?

‘DECISIVE INFLUENCE’

Means the ability to determine strategic commercial decisions.



- Approval of the business plan.
- Approval of the budget.
- Appointment / dismissal of senior management.
- Approval of investments impacting ordinary course activities.



- Voting rights (of shareholders or directors).
- Shareholders agreements (e.g. resolution thresholds, quorum requirements).
- *De facto* control for listing companies.



- Amendment to the articles of association.
- Mergers and de-mergers.
- Capital increases or decreases.
- Liquidation and/or winding up of a company.

WHAT SORT OF DEALS NEED TO BE NOTIFIED?

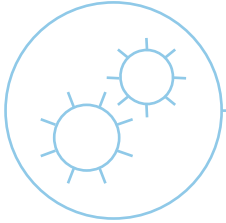
MINORITY SHAREHOLDINGS

In a number of jurisdictions, acquisitions of minority interests can require notification even where no “control” rights are acquired.

Jurisdiction	Shareholding threshold
Austria	25%
Germany	25% or even lower
Brazil	20% (or as low as 5% where there is competitive overlap)
Canada	20-35%
Chile	>10% (in the case of competitors)
Egypt	No threshold (based on rights attached to shares)
India	25%
Israel	25%
Japan	20%
Mexico	35%
Qatar	No threshold (any acquisition of shares may be caught)
Russia	25%, 50% or 75% for Russian joint-stock company; 33.3%, 50% or 66.6% for Russian limited liability company
South Korea	20% (or 15% for a Korean listed company)
Taiwan	33.3%
UK	Material influence may arise as little as 15% interest with no director
United States	No threshold (based on value of shares acquired)

WHAT SORT OF DEALS NEED TO BE NOTIFIED?

SPECIFIC RULES



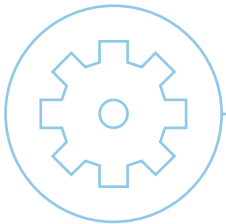
Joint control – test of decisive influence

- Veto rights (e.g., budget, business plan, senior management).
- De facto control (e.g., acting-in-concert agreements).



Parent companies alone can meet the filing thresholds

- Possible filing even if JV not active in the relevant jurisdiction.



Full functionality test

- Must be market facing and operate on a lasting basis – not just supplying a shareholder.
- “Greenfield” JVs caught.
- Creation of a non-full-function JV may still be notifiable (e.g. China, Germany, Austria, Poland and UK), if respective filing thresholds are met.



SPV

- In some jurisdictions the set up of SPVs may trigger filings (e.g. China, Korea) even if this is set up for non-transactional purposes.

WHERE SHOULD WE NOTIFY A DEAL?

THE THRESHOLDS

Multi-jurisdictional assessment – thresholds

- Turnover, market shares, asset value.
- Some jurisdictions have transaction value thresholds.
- Whether the deal gives rise to a competition issue?

China (mandatory)

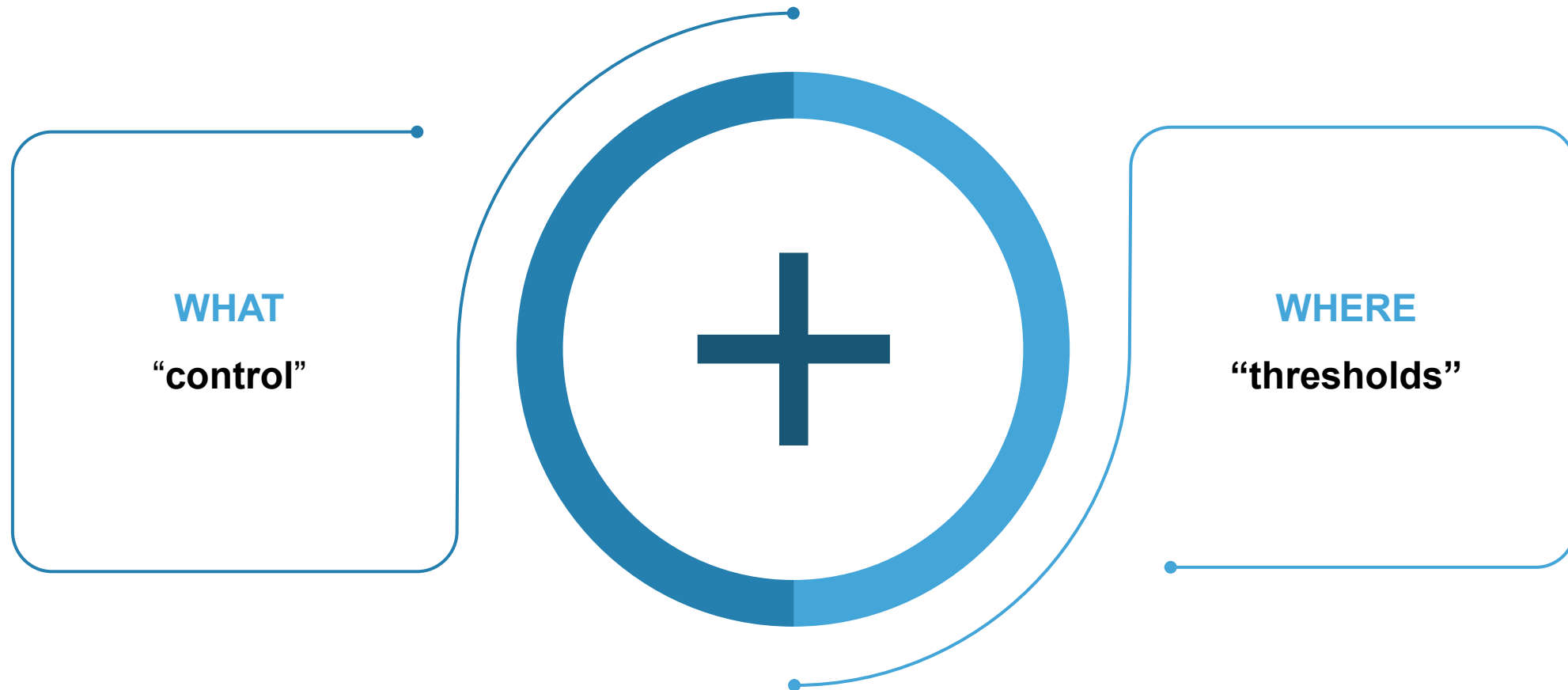
- Each of at least two parties has turnover in China of at least RMB 800 million; AND
- EITHER (a) the parties' combined worldwide turnover exceeds RMB 12 billion; OR (b) the parties' combined turnover in China exceeds RMB 4 billion.

Singapore (voluntary)

Parties must self-assess but the CCCS is unlikely to intervene if:

- Parties have a combined market share of less than 40%; or
- Parties have a combined market share of between 20% and 40%; AND the post-merger combined market share of the three largest firms is less than 70%; or...

RECAP



WHAT IS THE IMPACT ON THE DEAL TIMELINE?

CONDITIONS TO CLOSING

Mandatory or voluntary?

Mandatory: e.g. EU; most EU Member States; China

- Where triggered, a filing must be submitted.
- Failure to do so may result in fines being imposed and / or the deal being unwound.

Voluntary: e.g. UK; Australia; New Zealand; Singapore

- Typically only notify where there may be a substantive issue after self-assessment.
- Authorities often have the power to 'call in' a deal and, where an issue is identified, force a divestment.

Suspensory or non-suspensory

Suspensory:

- A notified transaction cannot legally be closed until approval has been received.
- Pre-approval closing and/or implementation of the transaction may be considered "gun jumping".

Non-suspensory:

- Notifying parties may close the transaction at their own risk before receiving approval.
- Transaction may be unwound if found to be problematic.
- Authority may have powers to prevent completion (i.e. 'hold separate' obligations) pending clearance.

WHAT IS THE IMPACT ON THE SPA?

KEY ISSUES

Conditionality

- CPs must include suspensory filings.
- Normally require clearance in “Phase I”.
- Approach to HoHW and restrictions on other transactions prior to closing.

Support obligations

- Buyer normally has filing obligation, but needs seller’s input.
- Role of continuing shareholders.

Timing – filing date and longstop date

- Pre-notification discussions with competition authorities often required (e.g., EU).
- Signed agreement sometimes required for filing (e.g. US, China).
- Most authorities open to discussing, confidentially, jurisdictional and/or substantive issues.

Gap controls

- No implementation prior to clearance – buyer’s influence over target conduct pre-completion must not extend to ‘ordinary course’ business activities.
- No transfer of economic risk until completion.
- No exchange of commercially sensitive information prior to completion.

WHAT ARE CONSEQUENCES OF PROCEDURAL VIOLATIONS?

Gun-jumping & information exchange

- Failure to file or implementing a transaction prior to clearance.
- EU can impose fines of up to 10% of worldwide group turnover for gun-jumping
 - Altice (2018) was fined EUR 125 million for implementing a deal prior to EC clearance
 - (new record) **Illumina/GRAIL (2023)** – Illumina fined €432 million (10%), GRAIL also fined €1,000 by the EC.
- In China, failure-to-notify penalties have been issued against minority investment deals and joint venture deals with the lowest acquisition % of 3.23%.
- Exchange of commercially sensitive information (CSI) where the parties are actual or potential competitors.
- Clean team agreements.

Provision of misleading information

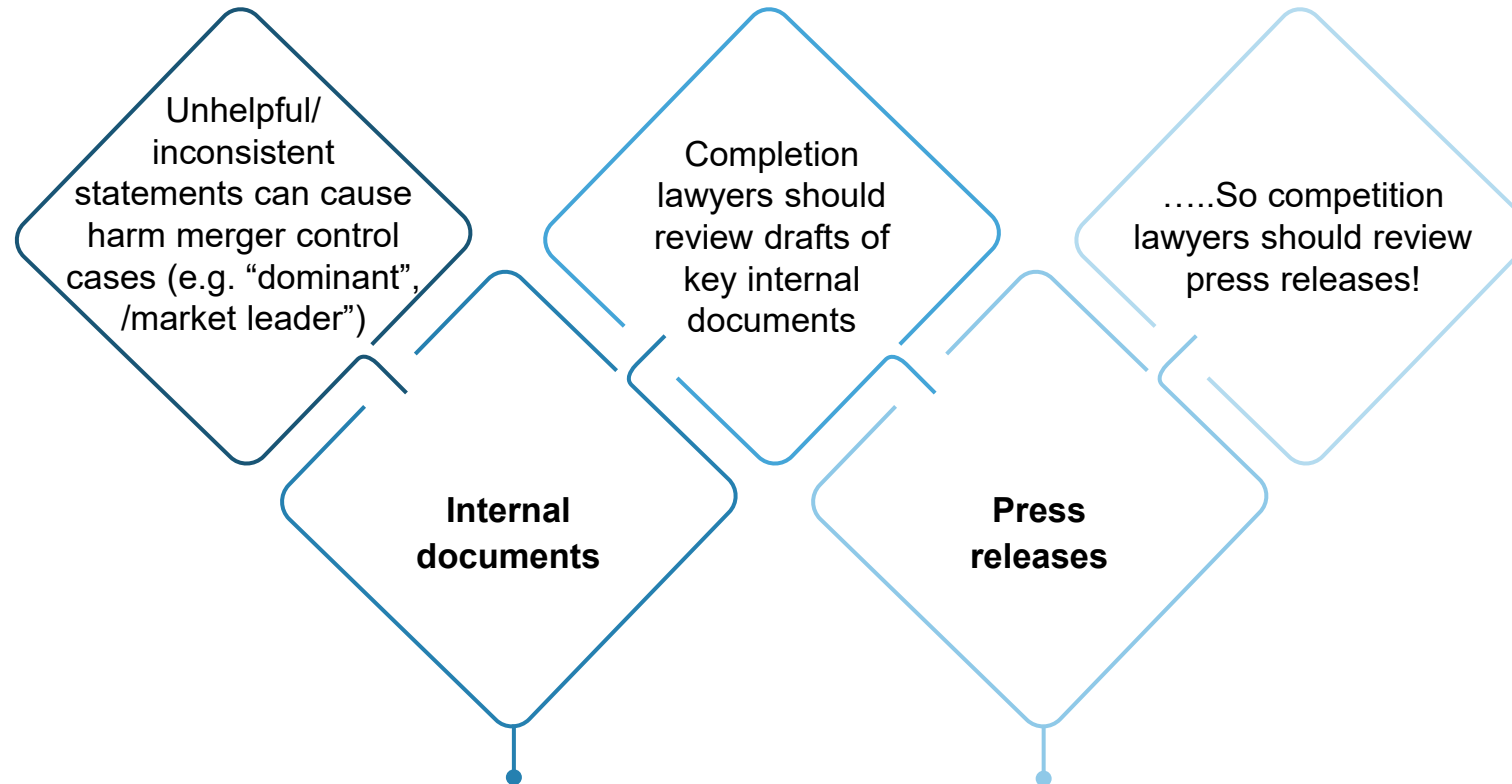
- EU and China can impose fines of up to 1% of worldwide group turnover for the provision of incorrect or misleading information
 - **Facebook** fined EUR 110 million for allegedly providing misleading information in relation to its takeover of **WhatsApp**.

International case study

- **Canon/Toshiba Medical Systems:** Canon jumped the gun by using a warehousing structure to acquire Toshiba Medical Systems in 2016 before notifying the transaction to, and gaining approval from, antitrust authorities:
 - **EU:** EUR 28 million.
 - **China:** USD 43,000 fine
 - **Japan:** FTC raised similar objections but imposed no fine.

DOCUMENTS

BE AWARE!



During the review, **notifying parties must/may provide authorities with internal documents** including any papers, presentations, board papers, etc. that contain competitive analysis of deal.

- EU/UK: wide scope of documents can be requested.

Competition authorities **monitor the press**:

- Vodafone Airtouch’s CEO was quoted in Fortune “*the merged entity will have unrivalled power to sell seamless pan-European services with pan-European rates*”

FOREIGN INVESTMENT / NATIONAL SECURITY

Many other countries are also increasingly concerned about investment in sensitive sectors.

Implications to deals

- Detailed analysis of target's activities often required
- Filings can be required for even for minority investments
- Delays to closings (due to government review)
- Possible that remedies will be required

Implications for failure to file

- Unwinding
- Large fines
- Criminal offences

FDI / national security regimes may be driven by political considerations

CONCLUSION



PLEASE GET IN TOUCH AND CONTINUE THE CONVERSATION

Feedback Survey



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Clifford Chance Pte Ltd, 12 Marina Boulevard, 25th Floor Tower 3,
Marina Bay Financial Centre, Singapore 018982
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