Fordham Competition Law Institute

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CLE Course Materials & Speaker Biographies

Fordham Law School
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SPEAKERS

John Blood
General Counsel and Company Secretary, Anheuser-Busch

As AB InBev’s General Counsel & Company Secretary, John Blood is responsible for the company’s legal affairs and ensuring that the world’s leading brewer grows its business the right way and is committed to ethical and transparent operations. John joined AB InBev in 2009 as Vice President of Legal and he focused on commercial matters, mergers & acquisitions, and compliance. Before becoming General Counsel, John was Zone VP of Legal & Corporate Affairs in North America for AB InBev where he led the legal and corporate affairs agenda for the United States and Canada.

John is a graduate of Amherst College and the University of Michigan law school.

Andrea Coscelli
Chief Executive of Competition and Markets

Andrea Coscelli has been the Chief Executive of the Competition & Markets Authority (CMA) since July 2016. He joined the CMA in November 2013 as the executive board member heading the Directorate responsible for UK merger control, the markets regime and the CMA’s work in regulated sectors. He joined the CMA from Ofcom (UK Communications Regulator) where he was a Director of Economic Analysis. He previously worked at Charles Rivers Associates (CRA) in London where he was a Vice President (Partner) in the Competition Practice. He co-founded the Association of Competition Economics (ACE) in 2003. He holds a PhD in Economics from Stanford University.

John Davies
Partner, Freshfields Bruckhaus Deringer LLP

John Davies is a partner at Freshfields and former co-head of the firm's global competition group. He divides his time between the Brussels and London offices. He served as managing partner of the firm’s Brussels office for over 10 years. Before joining Freshfields, John worked as a case officer in the European Commission’s Directorate-General for Competition. John has advised on many major global transactions involving significant antitrust intervention and on major behavioural investigations. He was awarded Competition Lawyer of the Year in the 2016 GCR Global Awards and is a Non-Governmental Advisor to the International Competition Network. John is the Chairman of UKLegalFuture, a group of practising and academic lawyers who provide insight into the UK’s future legal relationship with Europe following Brexit.

Joao Paulo de Resende
Commissioner, CADE

I hold a PhD in Economics from the Federal University of Rio de Janeiro and a MsC in Economics from the Federal University of Minas Gerais (both in Brazil).

I have worked in the public sector first as an economic adviser to the minister of energy, than as a senior economic adviser to the minister of planning (on matters of regulation and privatization of infrastructure) and currently I am a commissioner at the Brazilian Competition Authority. I lecture courses on economic regulation and competition policy at the National School for Public Servants – ENAP.

Deborah Feinstein
Partner, Arnold & Porter Kaye Scholer LLP

Debbie Feinstein heads the firm’s Global Antitrust group, and brings a wealth of experience to her practice in advising clients on a range of antitrust challenges before US antitrust authorities. She recently re-joined the firm from the US Federal Trade Commission (FTC), where she was Director of the Bureau of Competition. In that capacity, she was responsible for supervising the investigation and enforcement of the US antitrust laws against anticompetitive mergers and conduct. During her tenure from 2013 to 2017, the FTC had substantial litigation success and a number of major merger wins, including challenges to Sysco Corp.‘s acquisition of rival US Foods Inc., and Staples Inc.’s merger with Office Depot Inc. She had previously served at the FTC from 1989 to 1991 as Assistant to the Director of the Bureau of Competition and Attorney Advisor.

Throughout her career, Ms. Feinstein has focused on merger and acquisition reviews by antitrust enforcement agencies in the United States and globally, as well as civil investigations and litigation. Her industry experience is broad, and includes retail, food, consumer products, healthcare, chemicals, and automotive parts, among others. She was an associate at Arnold & Porter from 1987 to 1989 and from 1991 to 1995. Later, as a partner, she led the firm’s US Antitrust group from 2010 to 2013.

She received her AB from University of California Berkeley and her JD from Harvard Law School.

D. Bruce Hoffman
Director, Bureau of Competition, U.S. Federal Trade Commission

Bruce Hoffman is Director of the Bureau of Competition at the US Federal Trade Commission. Bruce came to the FTC from Shearman & Sterling, where he was global co-head of the firm’s antitrust practice. Previously, Bruce served as chair of Hunton & Williams’ antitrust practice, and prior to that, as Deputy Director and Associate Director of the FTC’s Bureau of Competition. Bruce has a law degree from the University of Florida, and a bachelor’s degree from Penn State.
James Keyte  
**Director of Global Development, The Brattle Group (moderator)**

James Keyte is the Director of Global Development at The Brattle Group. In this capacity, Mr. Keyte plays a lead role in growing Brattle’s antitrust practice and defining a new level of quality for economic consulting.

His extensive practical experience, along with his deep antitrust expertise, gives Brattle a competitive advantage in producing top quality expert work product across all competition subject areas. Mr. Keyte is directly engaged in marketing, training, and quality review across all of Brattle’s competition and antitrust engagements both in the U.S. and globally.

Mr. Keyte previously spent more than twenty years as a partner at Skadden, where he handled a wide variety of antitrust litigation, transactions, and advisory matters across numerous industries. He led high-profile antitrust cases involving alleged price-fixing, monopolization, mergers, intellectual property licensing, and sports-related matters, including class actions. He was also involved in a number of high-profile mergers, several of which involved litigation challenges by the DOJ and FTC.

Mr. Keyte is the Director of the Fordham Competition Law Institute (FCLI), which he will continue to lead, and has published more than 50 articles related to antitrust across a wide range of topics, including on the subject of expert testimony. He is an adjunct professor at Fordham Law School, a former editor of Antitrust Law Journal, and currently serves as editor of Antitrust Magazine. He holds a J.D. from Loyola Law School (Law Review) and a B.A. from Harvard University (cum laude).

William Kovacic  
**Global Competition Professor of Law and Policy and Director of the Competition Law Center, The George Washington University**

Before joining the George Washington University Law School in 1999, William E. Kovacic was the George Mason University Foundation Professor at the George Mason University School of Law. From January 2006 to October 2011, he was a member of the Federal Trade Commission and chaired the agency from March 2008 to March 2009. He was the FTC’s General Counsel from June 2001 to December 2004. In 2011 he received the FTC’s Miles W. Kirkpatrick Award for Lifetime Achievement.

Since August 2013, Professor Kovacic has served as a Non-Executive Director with the United Kingdom’s Competition and Markets Authority. From January 2009 to September 2011, he was Vice-Chair for Outreach for the International Competition Network. He has advised many countries and international organizations on antitrust, consumer protection, government contracts, and the design of regulatory institutions.

At GW, Professor Kovacic has taught antitrust, contracts, and government contracts. He is co-editor (with Ariel Ezrachi) of the *Journal of Antitrust Enforcement*. His is the Arthur of numerous publications.

Professor Kovacic received his BA from Princeton University and his JD from Columbia Law School.

Gail Levine  
**Head of U.S. Regulatory Affairs, Uber**

Gail Levine is Uber’s Director of U.S. Competition Law. She oversees antitrust litigation, deals, competition advocacy and counseling nationwide. Gail joined Uber in 2016 as the Head of U.S. regulatory affairs, overseeing advocacy nationwide on a wide range of regulatory issues. Before joining Uber, Gail was Vice President and Associate General Counsel at Verizon Communications Inc., where she shaped the company’s patent policy program, led the patent prosecution team, directed the company’s Federal Trade Commission initiatives, and handled antitrust matters.

Before joining Verizon, Gail was an attorney advisor to the chairman of the Federal Trade Commission, advising on antitrust and intellectual property issues. Before joining the Chairman’s office, Gail was the FTC’s Deputy Assistant General Counsel. She was a significant contributor to the FTC’s report on intellectual property and innovation, and she co-authored many other FTC reports on antitrust and high-tech issues. Before joining the FTC, Ms. Levine was a trial lawyer in the Civil Division of the U.S. Department of Justice. Gail serves on the advisory board of Harvard Law School’s Access to Justice Lab. She also serves on the Business Steering Committee of George Washington University’s Antitrust Writing Awards. Gail has served on the Council of the Antitrust Section of the American Bar Association, the ABA Presidential Transition Task Force, and the ABA Presidential Task Force on Pleading Standards.

Ms. Levine clerked for Judge Royce Lamberth of the U.S. District Court for the District of Columbia and Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. She graduated magna cum laude from Harvard Law School, where she was an editor of the Harvard Law Review.

Carles Esteva Mosso  
**Deputy Director-General EU Commission**

Carles Esteva Mosso is Deputy Director General for mergers at the Competition Directorate General of the European Commission.

Previously, he was in charge of the Directorate for Policy and Strategy. His responsibilities included the development of policy, strategy and legislative instruments in the fields of antitrust, mergers and state aids as well as the coordination of the European Competition Network and the international
Andreas Mundt
President, Bundeskartellamt

Andreas Mundt has been President of the Bundeskartellamt (German Competition Authority) since December 2009. He is a member of the Bureau of the OECD Competition Committee since 2010. In September 2013 he was elected as the Steering Group Chair of the International Competition Network and was re-elected for a second term in May 2015. After qualifying as a lawyer following studies at the University of Bonn and the University of Lausanne, Switzerland, Andreas Mundt entered the Federal Ministry of Economics where he worked from 1991 to 1993. He then joined the staff of the Free Democratic Party in the German Parliament from 1993 to 2000, where he was in charge of the portfolio of labour and social law.

In 2000 Andreas Mundt joined the Bundeskartellamt as rapporteur, with responsibility for banking and card payment systems issues. He was Head of the International Section of the Bundeskartellamt from 2001 to 2005 and Director of General Policy from 2005 to 2009.

Maureen Ohlhausen
Commissioner, U.S. Federal Trade Commission

Maureen K. Ohlhausen was sworn in as a Commissioner of the Federal Trade Commission on April 4, 2012. She served as Acting FTC Chairman from January 2017 until April 2018.

Prior to joining the Commission, Ohlhausen was a partner at Wilkinson Barker Knauer, LLP, where she focused on FTC issues, including privacy, data protection, and cybersecurity.

Ohlhausen previously served at the Commission for 11 years, most recently as Director of the Office of Policy Planning from 2004 to 2008, where she led the FTC’s Internet Access Task Force. She was also Deputy Director of that office. From 1998 to 2001, Ohlhausen was an attorney advisor for former FTC Commissioner Orson Swindle, advising him on competition and consumer protection matters. She started at the FTC General Counsel’s Office in 1997.

Before coming to the FTC, Ohlhausen spent five years at the U.S. Court of Appeals for the D.C. Circuit, serving as a law clerk for Judge David B. Sentelle and as a staff attorney. Ohlhausen also clerked for Judge Robert Yock of the U.S. Court of Federal Claims from 1991 to 1992.

Ohlhausen graduated with distinction from Antonin Scalia Law School, George Mason University in 1991 and graduated with honors from the University of Virginia in 1984.

Ohlhausen was on the adjunct faculty at the Antonin Scalia Law School, George Mason University, where she taught privacy law and unfair trade practices. She served as a Senior Editor of the Antitrust Law Journal and a member of the American Bar Association Task Force on Competition and Public Policy. She has authored a variety of articles on competition law, privacy, and technology matters.

Sharis Pozen
Vice President, Global Competition Law and Policy, General Electric Company

Sharis Pozen is Vice President, Competition Law and Policy, leading GE’s global competition team. Ms. Pozen also serves as GE’s “Select Ambassador,” the executive point of contact and coordinator of GE’s Select Preferred Provider Program. She joined GE from Skadden Arps, Slate, Meagher & Flom, LLP, where she was a leader of their antitrust competition practice, focusing on global merger clearance, conduct investigations and criminal antitrust matters. Prior to joining Skadden in 2012 she served as the acting Assistant Attorney General of the Antitrust Division in the US Department of Justice and, before that, as Chief of Staff to the head of the Division.

Prior to her DOJ experience, Ms. Pozen was a partner at a major global law firm, where she served as director of the firm’s Washington, DC Antitrust Group. Her practice focused on antitrust issues and trade regulation across a broad spectrum of industries. She began her professional career at the Federal Trade Commission where she held several positions, including attorney adviser to two
Commissioners, assistant to the director of the Bureau of Competition and staff attorney.

Ms. Pozen was named a “Distinguished Alumni” of Washington University School of Law in 2017, and has been profiled as a leading antitrust attorney in the past three issues (2009, 2013 and 2016) of Global Competition Review’s “Women in Antitrust” report. She was also selected for inclusion in Chambers USA, the Best Lawyers in America 2014 and 2015, and The International Who’s Who of Competition Lawyers and Economists 2014.

Howard Shelanski  
Partner, Davis Polk & Wardwell LLP, Professor of Law, Georgetown University

Howard Shelanski is a partner in Davis Polk’s Litigation Department in Washington DC. He is one of the nation’s leading authorities on antitrust and regulation, with high-level experience at the Federal Trade Commission, the Federal Communications Commission, and in the Executive branch of government. He is also a Professor of Law at Georgetown University.

Mr. Shelanski served as Administrator of the White House Office of Information and Regulatory Affairs from 2013 to 2017. Previously, he was Director of the FTC’s Bureau of Economics, where he supervised economic analysis and advised the Commission on economic policy matters. From 2009 to 2011, he served as the Bureau’s Deputy Director.

Before joining the FTC and the Georgetown Faculty, Mr. Shelanski was a Professor of Law at the University of California, Berkeley, where he co-directed the Berkeley Center for Law and Technology from 2000 to 2008.

He was Chief Economist of the Federal Communications Commission from 1999 to 2000, and a Senior Economist for the President’s Council of Economic Advisers at the White House from 1998 to 1999.

Mr. Shelanski served as a law clerk to Justice Antonin Scalia of the U.S. Supreme Court, Judge Louis H. Pollak of the U.S. District Court for the Eastern District of Pennsylvania and Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia Circuit.

He received his B.A. in History from Haverford College, his J.D. from UC Berkeley School of Law, and his Ph.D. in Economics from UC Berkeley.
Fordham Competition Law Institute Annual Conference 2018

Andrea Coscelli
Chief Executive
Competition and Markets Authority
A dual approach

Regulatory oversight + Competition enforcement = Fostering dynamic competition and dealing with fast-moving markets
Introduction

**Our focus**
- Enabling new, innovative business models
- Ensuring consumers get a good deal

**Best achieved by**
- Targeted, timely enforcement
- Smart, realistic regulation

**Agnostic**
- In our interventions
- Call for deregulation or greater regulation as appropriate
Let’s explore…

The benefits of a combined approach of competition enforcement and regulation

How to distinguish good from bad in new contexts and markets?

The CMA’s aim to use all tools and skills available to us to make markets work better for consumers

The importance of international cooperation
The benefits of a combined approach

Competition and regulation work well together in some industries – aviation and telecommunications

Close relationships with sector regulators that hold competition powers ‘concurrent’ – reciprocal assistance
Regulators haven’t just taken a static approach to historic problems

Regulators can accommodate new technologies

For example, network sharing agreements between mobile operators and the imposition of caps for mobile operators with a strong market position during certain spectrum auctions.

Financial Conduct Authority created a “regulatory sandbox”

- Market-test innovative products, services, business models and delivery mechanisms without bumping up against existing regulation
- Reducing time to market for new products
- Improving access to finance
- Ensuring built-in safeguards
Where markets develop in unsatisfactory ways...

The CMA has stepped in

- Heat networks
- Secondary ticketing
- Taxis and private hire vehicles
Regulation can inadvertently cause problems.

Different perspectives on level playing fields:

- Bookshops
- Independent coffee shops
- Amazon
- Starbucks
- Independent hotels
- Airbnb
We use all the tools and skills available to us to make markets work better for consumers

Our priority setting – making sure markets can be trusted

- Particularly important in digital markets
- Vulnerable consumers programme

Using our tools flexibly

- Merger cases may be the source of antitrust investigations e.g. cleanrooms laundry services
- Digital Comparison Tools market study led to consumer protection investigation and antitrust investigation into wide MFNs
- Digital markets are high priority
  - Government green paper
  - Commitments and interim measures used as appropriate
It’s not easy to predict the future

Examine and learn from past cases

Facebook / Instagram
Office of Fair Trading 2012

Just Eat / Hungryhouse
CMA 2017
Consumer protection in digital markets

- Hotel online booking
- Online gambling
- Online dating
- Cloud storage
The hotel online booking sector

Problems with wide MFNs

Action by German, French, Swedish and Italian authorities

Consolidation in Priceline / Kayak and Expedia / Orbitz

Consumer protection enforcement in the UK
Advocacy and engagement

Expert adviser to government

Support innovation and productivity

Challenge restrictions or distortions to competition
International co-operation

- Maintain and deepen already close relationships
- UK’s exit from EU means increased parallel international work
- Wish to remain key member of international community
- European Commission remains a key partner
Conclusion
A. Introduction

The objective of this paper is to compare merger control enforcement across a number of major jurisdictions around the world.

The jurisdictions selected for this purpose are the EU, the US, China, the UK, France and Germany. While China’s merger regime is less developed than the other selected jurisdictions, it has been selected because of its increasing importance in global merger control. The comparison is largely based on publicly available statistics. This paper is confined to a statistical review and does not seek to compare the substantive content of decisions (eg the theory of harm or the type of remedies).¹

This paper seeks to examine the statistical evidence for common questions or assumptions about merger control, for instance:

- Are the jurisdictional thresholds and volume of notifications proportionate to the size of the economy?
- Is there any material difference between jurisdictions as to the likelihood of mergers being referred for a second-phase investigation?
- Is there any material difference between jurisdictions as to the likelihood of mergers being prohibited or requiring remedies?
- Where mergers have been referred to a second phase, is there any statistical evidence that certain jurisdictions more than others suffer from “confirmation bias”, ie that the authority has effectively “made up its mind” at the referral stage?²

¹ For a more comprehensive, in-depth comparison of EU and US merger control, see MA Bergman, MB Coate, M Jakobsson and SW Ulrick, “Merger Control in the European Union and The United States: Just the Facts” (2011) 7(1) European Competition Journal 89.

² Lecturer in international merger control at Cambridge University, a panel member of the UK Competition & Markets Authority and a consultant with international law firm Linklaters. The views expressed in this paper are the author’s own. The author would like to thank Antonia Sherman and Christine Ryu at Linklaters, New York, Xi Liao at Linklaters, Beijing, Dorothee de Crocais at Linklaters, Düsseldorf and Daniel Vasbeck at Linklaters, Paris for their assistance with national statistics for the US, China, Germany and France respectively. Any errors are the author’s own.
Given the extent to which statistics in any individual year can be distorted by the different factual circumstances of individual decisions taken in that year, this paper seeks to draw its data from a longer period. Furthermore, annual statistics may have different year ends and treat pending cases (i.e., those opened but not concluded at the end of the year) differently; by drawing the statistics from a longer period, such variances should be largely smoothed out. The period selected is 2007–13, which provides seven years of data, except for China, Germany and France, which, for different reasons, have had to be based on shorter periods. This paper does not, however, attempt to review the evolution of enforcement policy within each jurisdiction but, rather, focuses on comparing enforcement between jurisdictions. While a longer period would provide a larger statistical sample and a better overview over time, it would present greater challenges in comparing jurisdictions which have seen significant changes during the period. Seven years is also sufficiently short to provide an indication of recent merger review practice.

While precisely what the equivalent statistics measure in each jurisdiction may vary, the comparative analysis undertaken in this paper seeks to either take such differences explicitly into account or undertake the analysis in such a way that the differences are minimised. There are, in particular, important procedural differences between jurisdictions that have a significant influence on the statistics. Indeed, it is a key objective of this paper to draw out and explain the significance of those differences.

An overview of the statistics that have been used for this paper is set out in Annex 1. The source of the statistics, together with a description of any adaptations or assumptions that have been necessary for comparative purposes, is set out in Annex 2.

**B. NUMBER OF NOTIFICATIONS**

Table I shows the number of notifications between 2007 and 2013, together with each jurisdiction’s current gross domestic product (GDP), the deal volume in that jurisdiction, the number of notifications as a percentage of GDP and deal volume, respectively, and the relevant jurisdictional threshold (as explained further below) as a percentage of GDP.

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2 In China, the Anti-Monopoly Law (AML) did not come into force until August 2008. Comprehensive data in Germany are not yet available for 2013. In France, the French Competition Authority has been in charge of merger control only since 2 March 2009. Prior to this, the French Minister of the Economy handled merger review, and there are fewer data available for that period.

3 The data would also permit a comparison of enforcement between the two US agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), but likewise that is not the focus of this paper. Nevertheless, some observations are made where appropriate.
There is substantial variation in the number of notifications between jurisdictions. While the US and Germany dealt with around 1,500 notifications per year between 2007 and 2013, the UK, China and France dealt with around 85, 175 and 170 per year, respectively (although, as a young jurisdiction, the Chinese numbers are increasing substantially year on year, with 224 received in 2013). The EU numbers are somewhat higher, at just over 300 per year, but it should be borne in mind that the EU system is designed only to capture the largest transactions, with Member States’ national systems reviewing many thousands more.

This variation could be driven by a number of factors: whether the system is mandatory or voluntary, the level of the thresholds, the size of the relevant economy and the extent of merger and acquisition (M&A) activity, and the culture of compliance. Whatever the drivers, the number of notifications has serious consequences for resourcing within the authority as well as for the extent of burdens placed on business.

The UK’s voluntary system naturally explains why the level of notifications in the UK is relatively low, with less than 100 notifications every year.

The ultimate objective in setting thresholds must be to minimise the number of merger notifications that raise no competition concerns and to ensure that the thresholds capture mergers which do raise competition concerns. While market share thresholds would be more precise tools with which to meet such an objective, their subjectivity and uncertainty make them inappropriate tools for jurisdictional purposes. Turnover value is therefore the preferred measure for certainty purposes, but is geared to target parties or a transaction above a certain economic size (and ideally with sufficient local nexus) rather than targeting problematic mergers.4

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Figures for current GDP provide a rough proxy of economic activity, and one would expect—in theory—the number of notifications to broadly reflect the level of economic activity. That said, many merger control regimes also capture global mergers that may or may not also reflect local economic activity. There is, of course, no absolute level of notifications that can be regarded as proportionate. And, as explained above, the EU figures will naturally be lower as a percentage of GDP, since so many more notifications are made at Member State rather than EU level. For example, simply adding the number of German notifications to the EU total would result in a number of notifications that would exceed that of the US.

The percentage measure used is an abbreviated one to avoid numerous decimal places, i.e. number of notifications (or thresholds converted to US$) as a percentage of GDP expressed in billions of US$. As we are interested in the relative rather than absolute values, the precise percentage is of little importance.

We can immediately see that, expressed as a percentage of GDP, the number of notifications in both the EU and China is low compared to the other jurisdictions in the table and (leaving aside notifications at Member State level) in fact quite similar, at 12.4 and 9.4 per cent, respectively. In contrast, the number of notifications compared to its GDP is very high in Germany (254 per cent), where the number of notifications is roughly the same as in the US despite the economy being less than a quarter of the latter’s size. That said, it should be borne in mind that a notification under the German merger control regime is much less burdensome than in many other jurisdictions, including those in this study. The UK, France and the US fall somewhere between the two extremes, albeit much closer to the EU/China norm than Germany (with figures of 23.7, 30.6 and 59.6 per cent, respectively). While the EU and the US have similar GDP figures, the number of notifications is much higher in the US. Of course, the volume of EU Merger Regulation (EUMR) notifications to the European Commission tells only part of the story, since there is also a huge volume of notifications at the domestic level in each Member State. As mentioned above, simply adding the number of German notifications to the EU total would result in an EU percentage of GDP figure that would exceed that of the US. Although Germany’s GDP is higher than that of the UK or France, the difference is not so great as to justify the much larger number of notifications.


5 The German legislator introduced a second domestic turnover threshold in March 2009, which led to a significant decrease in notifications (from 1675 in 2008 to 998 in 2009), although the number of notifications remains high compared to the other jurisdictions.
Table I also conducts a similar exercise with regard to the volume of deals in each jurisdiction in 2013, based on the headquarters location of the target according to league tables prepared by Thomson Reuters. Of course, headquarters location does not necessarily reflect the geographic scope of the target’s sales, so can only be a very crude measure for these purposes. The results are, however, broadly similar to those based on GDP. The EU and China have the lowest number of notifications expressed as a percentage of deal volume, while Germany has by far the highest. The main difference is that the UK figure as a percentage of deal volume is lower in relative terms, closer to the EU and China. One explanation may be that the higher volume of deals in the UK in proportion to its GDP than in other countries is a result of London’s importance as a global financial centre. The high number of notifications in Germany based on this measure is even more pronounced: Germany has a similar level of notifications to the US, despite having less than one-sixth of the volume of deals (in 2013).

The discrepancies between GDP (and, indeed, deal volume) and number of notifications suggests that this is the result of the level at which the thresholds are set. Table I therefore also compares thresholds as a percentage of respective GDP figures. Naturally, all thresholds differ in their operation and measures, as well as in their value. For the purposes of this analysis, we have chosen the lowest threshold that any one of the parties must meet to trigger jurisdiction. Although the selection of this threshold seems somewhat arbitrary, it has some logical merit, since it is typically the jurisdiction-limiting threshold which defines the extent of the local nexus to that jurisdiction. Nonetheless, given the differences between the thresholds, this analysis does not purport to be a scientific exercise, but provides only a broad indication of proportionality.

The result of this analysis shows that the German thresholds are (unsurprisingly) the lowest as a percentage of GDP, at 0.19 per cent, followed by

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6 See Annex 2 for further details.
7 Again, the EU figures ignore the huge number of notifications that take place at Member State level.
8 Thus, for the EU, I selected the €250 million Community-wide sales threshold that at least two parties must meet rather than the aggregate worldwide threshold of €5 billion (and also the primary rather than secondary thresholds). For the US, the operation of HSR thresholds is complex and the selection of the $75.9 million threshold that the transaction asset value must meet is admittedly arbitrary, but seems reasonable as it is often this threshold which frequently excludes smaller deals from US jurisdiction. For China, I selected the 400 million RMB PRC turnover threshold that at least two parties must meet. For the UK, the relevant threshold is the £70 million turnover in the UK threshold for the entity over which control is acquired. For Germany, the relevant threshold is the lower €5 billion turnover in Germany threshold that the second party must meet if one other party to the transaction has met the €25 billion threshold. For France, the relevant threshold is the €30 million turnover in France threshold that at least two parties must meet (but not the lower thresholds set at €15m/€5m, which are specific to the retail sector and/or to the French overseas territories).
9 For a discussion of EU and US thresholds see generally Bergman et al, supra n 1.
the US and China, which are all below 1 per cent. The highest is the UK, at 4.7 per cent, with France and the EU at similar levels of 2.5 and 2.0 per cent, respectively. Perhaps the most striking figure is that for China, which has a relatively low threshold as a percentage of GDP (0.7 per cent)—a not dissimilar percentage to that of the US (0.45 per cent), but resulting in a far lower number of notifications, both in absolute terms and as a percentage of GDP. Comparing China to the EU, both of which have thresholds that operate in a similar way, China’s threshold is significantly lower than that of the EU in absolute terms ($64 million compared to $340 million). Although that is to be expected, since the EU thresholds are designed to capture only the biggest deals, with a large number of notifications also taking place at Member State level, notifications are a broadly similar percentage of their respective GDP (China 9.4 per cent, EU 12.4 per cent). Possible explanations are a higher level of non-compliance in China, a different distribution of economic activity (eg more economic activity generated by individuals and smaller firms less likely to be caught by the AML thresholds) or a lower level of M&A activity.

Of course, it is not only the financial thresholds that determine jurisdiction. While financial thresholds target the economic size of the transaction and/or the parties to it, jurisdiction also depends on the type of transaction that is covered. Germany, for instance, has a much broader definition of concentration, capturing acquisitions of shareholdings of 25 per cent or more and acquisitions of a “competitively significant influence” (even below 25 per cent), which may be a further contributory factor to the higher number of notifications in Germany (both absolutely and as a percentage of GDP or deal volume). The European Commission is currently considering proposals to extend jurisdiction under the EUMR to acquisitions of non-controlling minority stakes. The Commission currently favours a so-called “targeted transparency system”, which requires parties to submit an information notice rather than a full notification. The Commission estimates that roughly only 20–30 minority shareholding cases per year will meet the criteria of the targeted transparency system as well as the turnover thresholds of the Merger Regulation. This author believes that this is likely to be a significant underestimation, and

10 The UK also captures acquisitions of “material influence”, while practice indicates that China’s definitions of “control” and “decisive influence” are considerably broader than under the EUMR, even though it uses similar language. It should also be borne in mind that the US agencies (and, in theory, MOFCOM) have jurisdiction to review non-notifiable transactions that fall below the thresholds. Although this is currently only theoretical in China, challenges in the US of non-HSR-reportable transactions have increased in recent years, as more than a dozen transactions have been challenged by the Obama administration. The DOJ and FTC challenged five non-HSR-reportable transactions in 2013 alone.


fears that the proposed new system would lead to a significant increase in the number of deals captured by the EUMR.

C. REJECTIONS OF JURISDICTION

Statistics on notifications and decisions rejecting jurisdiction are set out in Table II.

In the US, Germany and the UK, a significant number of decisions are taken each year rejecting jurisdiction. This is around 3 per cent of decisions in the US, 5.6 per cent of decisions in Germany and as many as 17 per cent of decisions in the UK. This is in sharp contrast to the less than 1 per cent in France and not a single rejection decision in the EU (under Article 6(1)(a) EUMR) during the period.

The position in China is not known, but few, if any, decisions rejecting jurisdiction are believed to have been adopted. According to the MOFCOM statistics that have been released, the number of notifications received by MOFCOM is regularly higher than the number of notifications accepted by MOFCOM (eg 224 received compared to 212 accepted in 2013), but this is more likely to be due to notifications received but not yet accepted by the calendar year end than to rejections.

In Germany, uncertainty around the concept of what constitutes a “significant competitive link” may contribute towards the high number of rejected notifications. The European Commission would do well to bear this in mind when formulating its proposals to extend EU Merger Regulation jurisdiction to minority shareholdings.

At first sight, the UK figures are perhaps the most surprising. While the share of supply test adds considerable uncertainty, one would expect to see few deals notified on a “fail-safe” basis where jurisdiction is uncertain, given the voluntary nature of the notification system. One likely explanation is that many transactions are not in fact notified, but are “called in” by the authority.
following market intelligence or complaints.\(^{13}\) Once inquiries are made and the authority establishes that it has no jurisdiction after all, the UK authority regards the statutory rules as requiring it to reach a formal decision that it has no jurisdiction to refer the case—with no ability to deal with a case informally, eg by way of comfort letter.\(^{14}\)

In the EU, the extensive pre-notification consultation process means that deals which do not qualify are weeded out before notification takes place. This may also be true in France, where rejection decisions are rare and such cases may be dealt with informally by comfort letter. In China, since the clock only starts running once the notification is accepted, it is likely that deals that do not qualify are dealt with (if at all) prior to acceptance of the notification, by MOFCOM requesting the parties to withdraw the notification.

Whatever the reasons, decisions rejecting jurisdiction generally entail a significant waste of resources both for the notifying parties and for the agency concerned. It is interesting that, after a handful of cases since 1990, climbing to nine in each of 1992 and 1995, out-of-scope decisions under the EU Mergers Regulation dropped to just one a year between 1999 and 2002, and to zero thereafter. This pattern is likely due to greater clarity around jurisdictional questions (the first jurisdiction notices were published in 1998 and the current Consolidated Jurisdiction Notice in 2007) and increasing use of pre-notification consultation during the period. While the burdens attached to an extensive pre-notification process (where ultimately it is decided that there is no jurisdiction) should not be underestimated, the outcome is likely better than the unnecessary burden and inconvenience attached to a rejected notification. The above statistics also underline the importance of clear and detailed agency guidance on jurisdictional issues.

\section*{D. Rates of Phase 2 Referral}

Most merger control systems around the world have a short first phase (lasting around one month), which acts as a “first screen”, after which the transaction is either cleared (with or without conditions) or referred for a longer, in-depth investigation. This is true of all the jurisdictions covered in this paper. In the

\(^{13}\) See “Mergers: Guidance on the CMA’s Jurisdiction and Procedure”, paras 6.5–6.19, available at \url{https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270256/CMA2_Mergers_Guidance.pdf}, which discusses at length the CMA’s procedures in relation to cases that come to its attention, eg through its own market intelligence unit or complaints, and which are not pre-notified.

\(^{14}\) See Mergers Guidance, \textit{ibid}, para 6.19: “Once the CMA has given notice to the parties that the statutory timetable has commenced, it is required by section 34ZA(1) of the Act to proceed to make its decision as to whether its duty to refer applies. Where the CMA has sent an enquiry letter under section 109 of the Act on its own initiative it would normally expect, therefore, to proceed to a decision on whether that duty applies.”
US, the first and second phases are not categorised as such, but in practice the issuing of a Second Request has a very similar effect as the opening of a Phase 2 investigation in other jurisdictions.

This second-phase investigation entails significant burdens for the notifying parties as a result of the more detailed investigation and substantial delay to completion of the transaction. For this reason, it is a significant form of regulatory intervention even if the deal is ultimately cleared unconditionally at the end of the investigation. Regulatory enforcement by way of remedies or prohibition is discussed in the next section.

One measure that is useful for comparative purposes is the percentage of notifications that result in a second-phase investigation (or Second Request in the US). Where notifications are “out of scope”, the authority does not have jurisdiction in the first place, and therefore does not have the ability to open a second-phase investigation. As a result, a true measure of the Phase 2 referral rate should be based on the total number of notifications minus those that are out of scope. In most jurisdictions, where a relatively low percentage of cases are held to be out of scope, this makes no material difference; in the UK, however, the large number of out-of-scope decisions (17 per cent) pushes up the referral rate from 10.3 per cent to 12.5 per cent (see Table III).

Except for the UK and China, Phase 2 referral rates vary within a relatively narrow range, from 1.0 per cent in France to 3.4 per cent in the US, with Germany at the lower end of the range (1.6 per cent) and the EU at the higher end (2.7 per cent). The very low rate of just 1.0 per cent in France reflects the very low absolute number (nine) of Phase 2 referrals since 2010.

Indeed, the relatively similar rates of Phase 2 referral between the EU and the US (a difference of just 0.7 per cent) is an important indication of consistency, given the significance of these two major jurisdictions in international merger control. The lower rate in the EU may be explained by the availability of remedies at the end of Phase 1, which enables the parties to avoid a Phase

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15 As discussed below, a large proportion of transactions enter Phase 2 in China because of lack of resources and other factors, and not because the transaction raises any competition concerns. The author nevertheless treats these in the same way as any other Phase 2 referrals, since the resulting burden on the parties, especially in terms of delay to the transaction, is the same regardless of the reasons for opening Phase 2.

16 Indeed, this is the approach adopted by the US agencies in their annual HSR Report. See http://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

17 Although the rate of issuance of Second Requests appears to be similar between the FTC and the DOJ, the FTC is granted clearance in around double the number of cases of the DOJ. As a result, the likelihood of receiving a Second Request following clearance to the DOJ is nearly double that following clearance to the FTC. See RP Harty and J Solomon, “Observations on the 2013 Fiscal Year in Merger Enforcement” (2014) XIV(3) The Threshold, Newsletter of the ABA Mergers & Acquisitions Committee 46; PB Hewitt and DL Gillis, “Does It Matter Which Agency—FTC or DOJ—Reviews a Merger? Recent Statistical Evidence” (2012) XIII(1) The Threshold, Newsletter of the ABA Mergers & Acquisitions Committee 51.
2 investigation. Although the negotiation of remedies prior to issuance of the Second Request is possible in theory in the US, it is very uncommon. Indeed, one might argue that one would expect a much lower referral rate in the EU (i.e., a greater disparity with the US), given the availability of Phase 1 remedies—as will be shown below, Phase 1 remedies outnumber Phase 2 remedies in the EU by almost four to one. One would also expect a lower US referral rate, given that the volume of notifications as a percentage of GDP is higher than in the EU, thus indicating a broader reach. While Germany has one of the lowest rates of Phase 2 referral (lower than the EU) even though remedies are also unavailable in Phase 1, this is likely explained by its broad jurisdictional reach, with the highest level of notifications as a percentage of GDP.

The very low rate for France may also be explained by the availability of Phase 1 remedies in France and, in particular, the willingness of the authority to accept behavioural remedies at Phase 1. In addition, the lower threshold that applies to concentrations in the retail sector captures many small transactions which do not raise competition concerns, and which may contribute to a higher rate of phase 1 clearances.

The clear outliers are the UK and China, for very different reasons. The UK’s relatively high Phase 2 referral rate of 12.5 per cent is explained by the voluntary nature of its merger control system. In a voluntary system, simple cases with no material competition concern tend not to be notified, leaving those that are notified as more likely to raise concerns and thus be subject to a second-phase investigation. In order to provide a more like-for-like comparison with the EU, it is possible to adjust the EU figures to cater for the fact that one system is voluntary and the other mandatory by deducting simplified procedure

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### Table III: Rates of Phase 2 Referrals

<table>
<thead>
<tr>
<th>2007–13</th>
<th>EU</th>
<th>US</th>
<th>China</th>
<th>UK</th>
<th>Germany</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td>FTC</td>
<td>n/a</td>
<td>n/a</td>
<td>10,014</td>
<td>866</td>
<td>601</td>
<td>839</td>
</tr>
<tr>
<td>DoJ</td>
<td>n/a</td>
<td>n/a</td>
<td>338</td>
<td>n/a</td>
<td>104</td>
<td>514</td>
</tr>
<tr>
<td>Combined</td>
<td>n/a</td>
<td>n/a</td>
<td>9,676</td>
<td>[866]</td>
<td>497</td>
<td>8,723</td>
</tr>
<tr>
<td>Out of scope</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Notifications less out of scope</td>
<td>2,132</td>
<td>n/a</td>
<td>n/a</td>
<td>9,676</td>
<td>[866]</td>
<td>497</td>
</tr>
<tr>
<td>Phase 2 referrals</td>
<td>38</td>
<td>156</td>
<td>172</td>
<td>328</td>
<td>n/a</td>
<td>62</td>
</tr>
<tr>
<td>as % of notifications</td>
<td>2.7</td>
<td>1.6</td>
<td>1.7</td>
<td>3.3</td>
<td>[67]</td>
<td>10.3</td>
</tr>
<tr>
<td>as % of notifications less out of scope</td>
<td>2.7</td>
<td>1.6</td>
<td>1.8</td>
<td>3.4</td>
<td>[67]</td>
<td>12.5</td>
</tr>
</tbody>
</table>

Note: see Annex 2 for more details.

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18 See also Bergman et al, supra n 1.
19 See supra n 8.
cases from the EU data, as these provide a rough indication of cases unlikely to be notified in a voluntary system. Thus, if one deducts from the total number of notifications the 1,242 cases cleared by the European Commission under the simplified procedure between 2007 and 2013, this might be a rough indication of the number of notifications the EU could expect under a voluntary regime like the UK. In this case, the EU referral rate increases to 6.4 per cent, but this is still only around half the UK rate of 12.5 per cent, indicating that the UK regime is perhaps more interventionist after all.

The Phase 2 referral rate in China is strikingly high. Although official statistics are not available, it is estimated to be around two-thirds of all cases, reaching close to 80 per cent in 2012 and 2013. This is down to a combination of reasons. First, unlike the EU and many other jurisdictions, there is no legal test (e.g. “serious doubts”) that must be satisfied in order to open a further investigation. Secondly, MOFCOM suffers from an acute lack of resources (with only around 30 people in the entire Anti-Monopoly Bureau, of whom around just 10 handle notifications). Thirdly, unlike many other jurisdictions, it has no ability to “stop the clock” if parties fail to provide requested information on time. (Furthermore, time limits are based on calendar days rather than business days, exacerbating the squeeze during periods of national holiday.) Fourthly, the requirement for MOFCOM to consult with other government departments frequently results in significant delays. MOFCOM has been aware of the burdens this has placed on notifying parties (not least Chinese companies), and in 2014 introduced a simplified procedure for more straightforward cases. This has already resulted in a larger number of Phase 1 clearances, and is expected significantly to reduce the proportion of cases entering Phase 2 in 2014 and subsequent years. That said, until the above issues are addressed, the Phase 2 referral rate in China is likely to remain substantially above that in other jurisdictions, since cases that do not qualify for the simple procedure but which do not raise serious competition concerns may still be expected to enter Phase 2 in China.

Although it is not the only reason, as discussed above, the acute lack of resources within MOFCOM’s Anti-Monopoly Bureau clearly plays an important role in accounting for the very high number of Phase 2 cases in China: case teams frequently run out of time in Phase 1, giving them little choice but to

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20 The purpose of this exercise is not, however, to examine what the EU would be like if it literally adopted a voluntary system. In a voluntary system, no doubt some Simplified Procedure cases would still be notified and some cases not qualifying for the Simplified Procedure would not be notified, and it is far from clear that the two would cancel each other out.

21 As indicated above in n 13, Phase 2 in China is treated in this paper in the same way as other jurisdictions even if the reasons for entering Phase 2 are not competition related (as discussed further below), since the impact on the transaction is the same regardless of the reasons.

refer the case to Phase 2 in order to avoid a deemed statutory approval at the end of Phase 1. In contrast, in other jurisdictions, it has sometimes been said that a lack of resources to handle the more detailed Phase 2 investigations may deter case teams and their leaders from referring marginal cases to Phase 2.

A review of competition staff number statistics published by Global Competition Review (GCR) in 201423 is described briefly in Annex 3. This reveals that there is little correlation between staff utilisation (calculated by dividing the average number of notifications per year over the period by the current number of staff, providing a figure for the number of notifications handled per staff number) and rates of referral.24

E. RATES OF ENFORCEMENT

This paper considers rates of Phase 2 referral and enforcement separately. It defines enforcement as interference with the merger proposal itself. This can be prohibition or remedies as a condition of merger clearance. Remedies include remedies that are accepted at any stage of the merger control process, ie at the end of Phase 1 or Phase 2. It also includes withdrawal of the notification following the opening of Phase 2 proceedings. It is impossible to discern the reasons for withdrawal, and these may be commercial entirely unrelated to the merger control process. This paper assumes, however, that withdrawal after (but not before) the opening of Phase 2 is a result of the merger control process. For instance, it may often be the case that continuing the process would have led to either prohibition or remedies that would be unacceptable to the parties. Although the author does not assert that this assumption is true in all cases, applying a consistent definition across jurisdictions enables a comparison to be made.25

The measure used to compare enforcement activity between jurisdictions is the number of cases resulting in enforcement as a percentage of the total number of notifications or decisions (once again, minus those judged out of scope). See Table IV.

24 The author acknowledges that this can only be a very crude indication: for instance, it assumes a constant number of staff over the period, uses average rather than actual annual volume of notifications over the period, and makes no allowance for staff allocation between mergers and other competition work.
25 This is also consistent with the approach often adopted by the European Commission in analysing its own record; see, eg the speech by Thomas Deinehofer at the CRA Annual Brussels Conference on 11 December 2013, where he included “withdrawn” cases along with “prohibited” and “remedies” in calculating a rate for “intervention” in Phase 2 cases. Hewitt and Gillis, supra n 17, 53, similarly include “abandonment (or restructuring) by the parties after the agency (or agency staff) conveys antitrust concerns” within their definition of merger challenges by the US agencies.
Total enforcement rates range from just 0.9 per cent in Germany to 14.3 per cent in the UK. That these two jurisdictions appear at opposite ends of the spectrum should come as no surprise, as they are also at opposite ends of the procedural spectrum. While Germany has low mandatory thresholds, capturing a very large number of deals that present no competition concerns and where enforcement would not be expected, the UK’s voluntary system means that a higher proportion of deals that are investigated are likely to involve serious competition concerns requiring remedy or prohibition.

Perhaps the most interesting disparity in enforcement is between the EU (5.9 per cent) and the US (2.7 per cent). One explanation for the difference is the availability of remedies in Phase 1 in the EU, while remedies are very rarely accepted before the issuance of a Second Request in the US. Although the possibility of avoiding the burdens and delay of a detailed second-phase investigation by offering remedies at the end of Phase 1 is rightly seen as a procedural advantage in the EU, especially where the remedies required are not significant, it may also lead to overenforcement. In some cases, parties may be willing to offer remedies to avoid a Phase 2 investigation which they may have successfully avoided had they fought the case through to the end of a more detailed investigation. Alternatively, in marginal cases, there may be a willingness on the part of the Commission case team to accept remedies where they may not ultimately have referred the case to Phase 2. In other words,

<table>
<thead>
<tr>
<th>Table IV: Rates of Enforcement</th>
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<tbody>
<tr>
<td><strong>Table IV: Rates of Enforcement</strong></td>
</tr>
<tr>
<td>2007–13</td>
</tr>
<tr>
<td>FTC</td>
</tr>
<tr>
<td>Notifications less out of scope</td>
</tr>
<tr>
<td>Enforcement, of which:</td>
</tr>
<tr>
<td>Phase 1 remedy</td>
</tr>
<tr>
<td>Phase 2 remedy</td>
</tr>
<tr>
<td>Prohibition</td>
</tr>
<tr>
<td>Withdrawal (Phase 2)</td>
</tr>
<tr>
<td>Total Phase 2 enforcement</td>
</tr>
<tr>
<td>as % of notifications less out of scope</td>
</tr>
<tr>
<td>Prohibitions as % of notifications less out of scope</td>
</tr>
</tbody>
</table>

Note: see Annex 2 for more details.
the availability of a Phase 1 remedy process, which can wrap the process up quickly, may tip the balance more towards remedies in marginal cases.

Whether or not it is an indication of overenforcement in the EU, it is undoubtedly the case that the EU enforcement rate is influenced very substantially by the large number of cases where remedies have been accepted in Phase 1 (outnumbering Phase 2 remedies by four to one). It is also fair to say that, in a general sense, based on this study, enforcement rates tend to be higher in jurisdictions where Phase 1 remedies are available (EU, UK and France). While there have been concerns in the past (especially around the time of GE/Honeywell26 in 2001) that the EU merger control regime is more interventionist than that of the US, today these procedural differences may be a better explanation than any fundamental differences of policy.

Once again, if one deducts from the EU notifications those that were cleared under the simplified procedure to adjust the EU data for the fact that the EU system is mandatory rather than voluntary and so provide a more like-for-like comparison with the UK,27 the EU enforcement rate would be just under 14 per cent, ie much the same as the UK’s 14.3 per cent. On this basis, although the UK refers a greater proportion of deals to Phase 2, it brings enforcement action in a similar overall proportion of cases.

For all the concerns raised in respect of the Chinese merger control regime, including allegations that remedies are required in cases where market shares and other indicators would not ordinarily justify remedies, MOFCOM’s enforcement rate of 2.4 per cent is one of the lowest of the jurisdictions in this study. It is broadly in line with (but lower than) the US, and considerably lower than the EU.

Finally, Table IV compares rates of prohibition as a percentage of all notifications (less notifications that are out of scope). The prohibition rates in the EU, US and Germany are approximately twice that in China, while there were no prohibitions at all in the UK and France during the period in question. The number of prohibition decisions is, however, extremely small, making any statistical analysis less meaningful.28

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27 Once again, the purpose of this exercise is not to examine what the EU would be like if it literally adopted a voluntary system. See supra n 20.
28 Furthermore, in practice, the difference between a prohibition decision and remedies may often be the result of the parties’ unwillingness to accept remedies for commercial reasons rather than any difference in enforcement policy.
F. TESTING FOR CONFIRMATION BIAS

The final comparison this study makes is the number of Phase 2 cases which result in enforcement as a percentage of the total number of cases which enter Phase 2. This author regards such a measure as a reasonable test for so-called “confirmation bias”, ie whether there exists a negative prejudgment about cases referred to Phase 2 such that Phase 2 inevitably leads to enforcement action. Where remedies are available in Phase 1, any perception of confirmation bias is especially important as it will influence the decisions by the merging parties whether to offer remedies or fight the case in Phase 2.

The risk of confirmation bias is often levelled against the EU merger control regime on the basis that the same institution and, largely, the same case team decides whether to open Phase 2 proceedings and also decides the case at the end of Phase 2.

In contrast, the UK system that existed during the course of the study period, with separate Phase 1 and Phase 2 institutions, was regarded as the perfect (albeit expensive) antidote to the risk of confirmation bias. It remains to be seen whether the hybrid panel system adopted by the new Competition & Markets Authority is successful in achieving the best of both worlds.

While the US system is ultimately a judicial system, as the US agencies must bring proceedings before the courts to obtain an injunction if they want to prohibit a merger, most problematic cases are resolved by remedies attached to consent decrees issued by the agencies themselves. Whether the threat of having ultimately to go to court serves as an adequate counterbalance to the risk of confirmation bias by the US agencies is an open question. See Table V.

| Table V: Phase 2 Unconditional Clearances as a Percentage of all Phase 2 Referrals |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|
| 2007–13 | EU | US | China | UK | Germany | France |
| Phase 2 referrals | 58 | 156 | 172 | 328 | n/a | 62 | 139 | 9 |
| Enforcement | 126 | 149 | 113 | 262 | 21 | 71 | 80 | 32 |
| Phase 2 remedy | 23 | 97 | 52 | 149 | 20 | 21 | 25 | 7 |
| Prohibition | 5 | 15 | 10 | 25 | 1 | 0 | 22 | 0 |
| Withdrawal (Phase 2) | 9 | 37 | 51 | 88 | 0 | 15 | 33 | n/a |
| Phase 2 unconditional clearance | 22 | 7 | 59 | 66 | n/a | 25 | 59 | 2 |
| Unconditional clearance as % of Phase 2 referrals | 37.9 | 4.5 | 34.3 | 20.1 | n/a | 40.3 | 42.4 | 22.2 |

Note: see Annex 2 for more details.
The statistics show that, in all the jurisdictions in this study, less than 50 per cent of the cases referred to Phase 2 end with unconditional clearance. In other words, more than 50 per cent of the cases referred to Phase 2 end with enforcement action. The 50 per cent threshold is not, however, a guide to confirmation bias. Indeed, if more than 50 per cent of cases referred to Phase 2 were cleared unconditionally, this would bring into question whether Phase 2 referral decisions are being taken appropriately.

The only jurisdiction where one would expect to see more than 50 per cent of Phase 2 cases ending with unconditional clearance is China. Although comprehensive figures on the number of Phase 2 cases are not available, with an estimated referral rate of around 70 per cent but a total enforcement rate of just 2.4 per cent, it is clear that the vast majority of Phase 2 referrals in China end with unconditional clearance. This is clearly due to the disproportionately high number of Phase 2 referrals, and one would expect this to change as the proportion of cases referred to Phase 2 declines over the coming years.

Of the other jurisdictions, the percentage of Phase 2 cases resulting in unconditional clearance ranges from around 20 per cent in the US and France to around 40 per cent in the EU, the UK and Germany. The US combined figure in fact masks a striking disparity between the DOJ, with 34.3 per cent, and the FTC, with just 4.5 per cent, which appears to suggest that the FTC is more likely to challenge a transaction than the DOJ following a Second Request. Although the very low FTC figure is not in itself evidence of confirmation bias, the marked contrast with other jurisdictions which have an administrative model goes some way to dispel the notion that the US judicial system alone is an adequate antidote to allegations of confirmation bias.

While the inability of the parties to avoid Phase 2 by offering remedies at the end of Phase 1 may explain the lower proportion of US cases cleared unconditionally following a Second Request, it does not explain the stark difference between the DOJ and the FTC. Nor does it explain the difference with Germany, where Phase 1 remedies are also generally unavailable.

Although only two Phase 2 cases in France resulted in unconditional clearance, this is probably more a function of the very small number of cases (just nine) referred to Phase 2 since 2010; the statistically small sample says little about confirmation bias.

29 The US agencies do not publish data on unconditional clearances separately. This figure has therefore been derived from deducting the total number of enforcement cases from the total number of Second Requests. While this methodology has a number of drawbacks, as explained further in Annex 2, and the precise figure should therefore be treated with care, the combined figure of 20% for both agencies (and the individual percentages for each of FTC and DOJ) provide a reasonable indication of the ballpark for comparative purposes.

30 Ibid. The conclusion that the FTC appears statistically more likely than the DOJ to challenge a transaction once a Second Request has been issued was observed by Hewitt and Gillis, supra n 17. While Harty and Solomon, supra n 17, observe a similar trend in 2013, they regard one year’s figures as insufficient to draw conclusions as to the likelihood of a challenge.
Although there can be no absolute thresholds indicating the presence or absence of confirmation bias, this author would suggest that the UK figure of 40 per cent can serve as a reasonable benchmark since full institutional separation during the study period (as well as the independence of Competition Commission Panel Members) should mean the absence of confirmation bias during this period in the UK.\(^{31}\) The similar figures of around 40 per cent in the EU and Germany therefore suggest a relatively healthy Phase 2 process.\(^{32}\) Given that in two of the three jurisdictions the competition agency must establish “serious doubts”\(^{33}\) or an “expectation” of competitive harm,\(^{34}\) the fact that around 40 per cent of cases nevertheless emerge unscathed suggests that the parties have a reasonable prospect of rebutting the concerns raised. Indeed, these figures mask a more complicated pattern of underlying facts. Cases often raise competition concerns in more than a single market alone. In multi-market cases, the parties may be successful in rebutting concerns in some markets but not in others—an outcome that these crude statistics are unable to differentiate.

G. CONCLUSIONS

This paper has used publically available statistics to conduct an international comparison between a number of major merger control jurisdictions. The following conclusions can be drawn.

It is reasonable to expect that the volume of notifications is broadly proportionate to the volume of economic activity within a country, as expressed by its GDP. What one sees, however, is a very low ratio for the UK as a result of its voluntary system and thresholds that are relatively high, given the UK’s GDP;

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31 The UK statistics reflect only the previous system, with its independent Office of Fair Trading and Competition Commission, prior to the reforms and the creation of a single Competition & Markets Authority (CMA) on 1 April 2014.
32 This figure of 40% represents a remarkable evolution in EU merger control policy. Taking the earlier period of 1999–2002, when the European Commission’s enforcement zeal was arguably at its peak (covering the period of the decisions in Airtours/First Choice, Schneider/Legrand and TetraLaval/Sidel until the trio of Court of First Instance judgments in 2002 overturned those decisions on appeal, and the speech by Competition Commissioner Mario Monti of 7 November 2002 setting out proposed reforms), the percentage of Phase 2 cases ending with unconditional clearance was just 15%. While the author acknowledges that statistical results can be significantly influenced by selectively adopting different periods, the contrast with the period 2007–13 is nevertheless striking. In his speech on 7 November 2002, Commissioner Monti identified the importance of “a ‘fresh pair of eyes’ at key points of the enquiry. This will prevent that the natural tendency of all human beings of being convinced by their own arguments determines the outcome of our investigations” (available at http://europa.eu/rapid/press-release_SPEECH-02-545_en.htm?locale=en).
33 EU Merger Regulation, Art 6(1)(c).
34 UK Enterprise Act 2002, s 22. In Germany, s 40(1)(2) of the German Act against Restraints of Competition provides only that further proceedings should be initiated “if a further examination of the concentration is necessary”. 
and an exceptionally high ratio for Germany, given its very low thresholds. The jurisdiction which is the most difficult to explain is China: although it has a threshold which constitutes a similar percentage of GDP as the US, this results in a much lower number of notifications; similarly, although its threshold is significantly lower than the EU as a percentage of GDP, this results in a similar volume of notifications as a percentage of GDP (even disregarding the notifications that take place at Member State level in the EU). This discrepancy may suggest a higher level of non-compliance in China or a lower level of M&A activity, or it may simply be a function of a different distribution of economic activity (eg more economic activity generated by individuals and smaller firms less likely to be caught by the AML thresholds). In any event, as suggested by the ICN Merger Working Group, merger control regimes would do well to compare international statistics, relative GDP data and their own historical notification and transaction data in order to calibrate merger review thresholds in a more targeted fashion.

Except for the UK and China, Phase 2 referral rates vary within only a relatively narrow range. Indeed, the similar rates of referral between the EU and the US is an important indication of consistency, given the significance of these two major jurisdictions in international merger control. Indeed, one might argue that one would expect a much lower Phase 2 referral rate in the EU than in the US, given the availability of Phase 1 remedies. In other words, notwithstanding the number of cases cleared subject to remedies in Phase 1, it is surprising that the European Commission still refers a similar percentage of cases to Phase 2 as the US. It may be that the EU’s use of Phase 1 remedies is counterbalanced by the US’s broader jurisdictional reach, resulting in similar Phase 2 referral rates. While the UK and China have much higher rates of Phase 2 referral, this can be explained (at least in part) by, respectively, the voluntary nature of the UK system and China’s lack of resources, absence of a statutory test and other factors (discussed above) at this early stage of China’s merger control development. One might expect China’s referral rate to decrease substantially as its merger control system matures.

Enforcement rates also vary within a relatively narrow range, again leaving aside outliers—in this case, the UK and Germany. That the UK and Germany are outliers is again unsurprising: Germany has low mandatory thresholds that capture a large number of deals that present no competition concerns, while the UK’s voluntary system entails a higher proportion of deals likely to involve serious competition concerns. Leaving aside these outliers, the EU is at the top of the range, with an enforcement rate of nearly 6 per cent—which is more than double that of the US. With Phase 1 remedies outnumbering Phase 2 remedies by a factor of four, this higher level of EU enforcement is likely to be due to the wide use of remedies in Phase 1. This raises the legitimate question as to whether the availability of remedies in Phase 1, though welcome
in avoiding a lengthy further investigation, may lead to overenforcement in the EU. Although concerns have been raised in respect of the Chinese merger control regime, MOFCOM’s enforcement rate of 2.4 per cent is among the lowest of the jurisdictions in this study, indicating that the likelihood of remedies or prohibition is actually lower in China than in all but one of the other major jurisdictions in this study.

That around 40 per cent of Phase 2 cases in the EU, the UK and Germany result in unconditional clearance potentially suggests a robust Phase 2 process and an absence of confirmation bias. This is particularly so since the UK’s separate institutional structure for Phases 1 and 2 during the study period ought to be an effective antidote to confirmation bias, so its 40 per cent figure can act as a benchmark for other jurisdictions. This statistic, together with the higher overall enforcement rates in the EU, largely due to the acceptance of Phase 1 remedies, should give merging parties food for thought, and perhaps challenge the widely accepted notion that, where possible, it is better to give remedies in Phase 1 than to fight the case in Phase 2.35

Perhaps the most striking statistic is the very low percentage of FTC cases following Second Request resulting in unconditional clearance, at just 4.5 per cent (compared to 34.3 per cent for the DOJ).36 The marked contrast with other jurisdictions which have an administrative model goes some way to dispelling the notion that the US judicial system alone is an adequate answer to allegations of confirmation bias. Finally, while statistics are not available for China, it is clear from the high rate of Phase 2 referral and the low overall enforcement rate that the vast majority of Phase 2 cases result in unconditional clearance. This says more, however, about the high referral rate in the first place than about confirmation bias.

It is difficult to draw any general conclusions from the above. One theme, however, pervades the analysis. Important procedural differences may be a better explanation for the different rates of Phase 2 referral and enforcement than substantive policy differences. At one end of the extreme, one expects to see higher rates of Phase 2 referral and enforcement in voluntary systems and much lower rates in mandatory systems with low thresholds, which capture within the jurisdictional net a larger number of deals (in proportion to GDP). Less obvious to measure is the impact of the different remedy processes. The statistical evidence above seems, however, to suggest that the wide use of remedies in Phase 1 leads to a greater overall level of enforcement.

35 Of course, the advantage of being able to wrap up the investigation 35 working days after notification should not be underestimated and may nonetheless lead merging parties to the conclusion that a Phase 1 remedy is a better outcome even if it would not have been necessary had they fought the case through Phase 2.
36 See supra n 29.
Finally, this author notes that the most comprehensive statistics are published by the European Commission, and encourages other jurisdictions to publish equivalent statistics, thereby allowing international comparisons of the sort discussed in this paper to be more readily made. Indeed, this paper reveals that there is plenty of scope for further research in this area—something that would be greatly assisted by the publication of better and more comprehensive statistics by competition agencies around the world.

Annex 1: Overview of Statistics Used

<table>
<thead>
<tr>
<th>2007–13</th>
<th>EU</th>
<th>US</th>
<th>China</th>
<th>UK</th>
<th>Germany</th>
<th>France</th>
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<tbody>
<tr>
<td></td>
<td>FTC</td>
<td>DOJ</td>
<td>Combined</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Notifications</td>
<td>2,152</td>
<td>n/a</td>
<td>10,014</td>
<td>866</td>
<td>601</td>
<td>9,237</td>
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<tr>
<td>Out of scope</td>
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<td>338</td>
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<td>9,676</td>
<td>[866]</td>
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<td>8,725</td>
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<td>156</td>
<td>172</td>
<td>328</td>
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<td>2.7</td>
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<td>1.7</td>
<td>3.3</td>
<td>67</td>
<td>10.3</td>
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<td>as % of notifications less out of scope</td>
<td>2.7</td>
<td>1.6</td>
<td>1.8</td>
<td>3.4</td>
<td>67</td>
<td>12.5</td>
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<tr>
<td>Enforcement</td>
<td>126</td>
<td>149</td>
<td>113</td>
<td>262</td>
<td>21</td>
<td>71</td>
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<tr>
<td>as % of notifications</td>
<td>5.9</td>
<td>1.5</td>
<td>1.1</td>
<td>2.6</td>
<td>2.4</td>
<td>11.8</td>
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<td>as % of notifications less out of scope, of which</td>
<td>5.9</td>
<td>1.5</td>
<td>1.2</td>
<td>2.7</td>
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<td>14.3</td>
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<tr>
<td>Phase 1 remedy</td>
<td>89</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Phase 2 remedy</td>
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<td>97</td>
<td>52</td>
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<td>Prohibition</td>
<td>5</td>
<td>13</td>
<td>10</td>
<td>25</td>
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<td>Withdrawal (Phase 2)</td>
<td>9</td>
<td>37</td>
<td>51</td>
<td>88</td>
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<td>15</td>
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<tr>
<td>Total Phase 2 enforcement</td>
<td>37</td>
<td>149</td>
<td>113</td>
<td>262</td>
<td>21</td>
<td>36</td>
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<tr>
<td>Phase 2 unconditional clearance</td>
<td>22</td>
<td>7</td>
<td>59</td>
<td>66</td>
<td>n/a</td>
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### Unconditional clearance as % of Phase 2 referrals

<table>
<thead>
<tr>
<th>Year</th>
<th>EU</th>
<th>US</th>
<th>EU</th>
<th>US</th>
<th>EU</th>
<th>US</th>
<th>EU</th>
<th>US</th>
<th>EU</th>
<th>US</th>
<th>EU</th>
<th>US</th>
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<tr>
<td>2013</td>
<td>37.9</td>
<td>4.5</td>
<td>34.3</td>
<td>20.1</td>
<td>n/a</td>
<td>40.3</td>
<td>42.4</td>
<td>22.2</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>GDP</td>
<td>17,371</td>
<td>n/a</td>
<td>16,799</td>
<td>9,181</td>
<td>2,535</td>
<td>3,635</td>
<td>2,737</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>Notifications as percentage of GDP</td>
<td>12.4</td>
<td>n/a</td>
<td>59.6</td>
<td>9.4</td>
<td>23.7</td>
<td>254.1</td>
<td>30.7</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Threshold as percentage of GDP</td>
<td>2.0</td>
<td>n/a</td>
<td>0.45</td>
<td>0.7</td>
<td>4.7</td>
<td>0.19</td>
<td>2.5</td>
<td></td>
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<tr>
<td>Number of competition staff</td>
<td>728</td>
<td>538</td>
<td>611</td>
<td>1,149</td>
<td>[30]</td>
<td>298</td>
<td>237</td>
<td>170</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>Notifications (average per year) per competition staff member</td>
<td>0.4</td>
<td>n/a</td>
<td>1.2</td>
<td>5.8</td>
<td>0.3</td>
<td>6.5</td>
<td>1.0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### ANNEX 2: EXPLANATION OF STATISTICS USED

#### EU


#### US


Notifications minus those out of scope are reported separately as “Adjusted Transactions in which a Second Request Could Have Been Issued”. These figures omit from the total number of transactions reported all transactions for which the agencies were not authorised to request additional information. These include (1) incomplete transactions (only one party filed a complete notification); (2) transactions reported pursuant to the exemption provisions of sections 7A(c)(6) and 7A(c)(8) of the Hart–Scott–Rodina Antitrust Improvements Act of 1976; (3) transactions which were found to be non-reportable; and (4) transactions withdrawn before the waiting period began. In addition, where a party filed more than one notification in the same year to acquire voting securities of the same corporation, e.g. filing for one threshold and later filing for a higher...
threshold, only a single consolidated transaction has been counted because as a practical matter the agencies do not issue more than one Second Request in such a case. These statistics also omit from the total number of transactions reported secondary acquisitions filed pursuant to § 801.4 of the Premerger Notification rules. Secondary acquisitions have been deducted in order to be consistent with the statistics presented in most of the prior annual reports.37

Phase 2 referrals include all cases where a Second Request has been issued.

Phase 2 remedy includes all consent decrees, whether or not a complaint has been brought before a court.

Prohibition includes all cases where the agency brought a complaint before the court, and where it obtained an injunction which was not settled by consent decree or abandoned/restructured. In a very small number of cases, this may include cases where litigation was still pending at the end of year, and so may lead to a small overstatement. The statistics do not take into account the ultimate outcome of any litigation on appeal.

Withdrawal also includes restructuring as a result of the challenge by the agency, as described in the HSR Annual Report.

No data on cases where Second Requests were issued and which received unconditional clearances are published in the HSR Activity Reports. This figure is therefore the total number of Second Requests minus the total number of enforcement cases. Although this derived figure may therefore include each year some cases where Second Requests were issued but no enforcement action had yet been taken, this should even out over time, as those enforcement cases will then be included in the following year. Indeed, it is presumably the inclusion of enforcement cases where Second Requests were issued in the previous year that produces negative numbers of “unconditional clearances” for the FTC in years 2009, 2010 and 2012. In addition, enforcement cases published in the Activity Reports do not distinguish between those which were subject to pre-notification and Second Request and those few cases where enforcement action was taken in respect of non HSR-reportable transactions. Accordingly, this may lead to a modest overstatement of total enforcement activity as a percentage of cases where a Second Request was issued (and thus a modest understatement of the percentage of Second Request cases resulting in unconditional clearance).

China

Statistics are available only since 1 August 2008 when the AML came into force.

37 See eg HSR Annual Report Fiscal Year 2013, Appendix A, Summary of Transactions by Fiscal Year, n 2.
Sources of notifications received for 2008–13: DG Shang Ming, anti-monopoly enforcement press conference organised by the State Council Information Office, Beijing (11 September 2014).

Sources of notifications accepted and reviews concluded for 2008–12: DG Shang Ming, Review and Reflection of China’s Merger Enforcement, Presentation at the China Competition Policy Forum, Beijing (1 August 2013).


Sources of unconditional clearance cases: MOFCOM’s quarterly publications.

Sources of conditional clearance and prohibition cases: MOFCOM’s individual published decisions.

Phase 2 includes Phase 2 itself (90 days) and, where relevant, the extended Phase 2, or so-called Phase 3 (60 days).

MOFCOM does not publish statistics on the length of review process for each previous year, but has released some information on an irregular basis. Below are the statistics for two periods that MOFCOM has published:

• 1 August 2008 to 30 June 2010: around 130 cases were closed, 70–80 (around 54–62 per cent) of which were cleared in Phase 1, around 50 cases in Phase 2 (a little under 40 per cent) and less than 3 per cent of the cases in Phase 3. Source: MOFCOM 2010 Anti-Monopoly Work Press Conference, available at http://www.mofcom.gov.cn/article/zt_zhcjd/zhsw/201008/201008070708242.shtml.

• The first 10 months of 2013: a total of 161 cases were closed, of which 21 cases were cleared in Phase 1 (13 per cent), 130 cases in Phase 2 (81 per cent) and 10 cases in Phase 3 (6 per cent). Source: MOFCOM 2013 Year-End Work Review, available at http://www.mofcom.gov.cn/article/ae/ai/201312/20131200412789.shtml.

Based on the above statistics—194 cases closed in Phase 2 or Phase 3 out of 291 closed cases—the referral rate for the combined periods would be 67 per cent. While this omits 2011 and 2012, it provides a reasonable indication of the ballpark. The number of cases being referred to Phase 2 steadily increased as resources at MOFCOM became more stretched as notifications increased, and only started to come down again towards the end of 2013.

UK

UK Phase 1 statistics are derived from https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes.

UK-published Phase 1 statistics are based on “decisions” rather than notifications, and are for financial rather than calendar years.
Phase 2 outcome statistics are based on a breakdown of individual Competition Commission decisions during the period, kindly provided by the CMA.  

**Germany**

Statistics based on FCO Activity Reports and related press releases.

FCO Activity Reports are published online under the following link: [http://www.bundeskartellamt.de/DE/UeberUns/Publikationen/Taetigkeitsberichte/taetigkeitsberichte_node.html](http://www.bundeskartellamt.de/DE/UeberUns/Publikationen/Taetigkeitsberichte/taetigkeitsberichte_node.html).

The references for the press releases are:


The FCO did not publish a review press release in 2009.  

Comprehensive data for 2013 are not yet available, pending the release of the FCO’s Activity Report for 2013/14.

**France**

Statistics are based on information available from the French Competition Authority website: [http://www.autoritedelaconurrence.fr/user/tableaudcc.php](http://www.autoritedelaconurrence.fr/user/tableaudcc.php).

French statistics are from 2010 only. The French Competition Authority has been in charge of merger control only since 2 March 2009. Prior to this, the French Minister of the Economy handled merger review, and there are fewer data available for that period.

---

38 Curiously, the UK Competition Commission never regularly published statistics on the outcome of its cases. Hopefully, now that there is a unified authority conducting both Phase 1 and Phase 2, the CMA will do so.
GDP


Deal Volume

Deal volume figures are for 2013, based on the deal announcement date, derived from Thomson Reuters M&A League Tables. All deals involving a purchase of at least a 5 per cent stake, or 3 per cent with a value of at least US$1 million, are tracked, subject to criteria. Geographic allocation is based on the location of the target’s headquarters.

Jurisdictional Thresholds

Using the minimum threshold for any one party, ie €250m in the EU, $75.9m (assets) in the US, 400m RMB in China, £70m in the UK, €5m in Germany and €50m in France, converted to $US.39

Annex 3: Review of Staff Utilisation Statistics

A brief review of the competition staff number statistics published by GCR in 201440 is presented here to determine whether a lack of resources may deter case teams and their leaders from referring marginal cases to Phase 2. Dividing the average number of notifications per year over the period by the current number of staff published by GCR gives a figure for the number of notifications handled per staff number. This then provides an indication as to the level of staff utilisation. This brief review reveals that there is little correlation between staff utilisation and rates of referral.

39 See also supra n 8.
Agency staff numbers were taken from the GCR 2014 survey, available at [http://global competition review.com/surveys/article/36023](http://global competition review.com/surveys/article/36023). China is not included within the GCR survey—the MOFCOM staff numbers is an estimate based on the author’s understanding. The author acknowledges that this can only be a very crude indication; for instance, it assumes a constant number of staff over the period based on current staff numbers, is based on an annual average rather than actual annual volume of notifications over the period, and makes no allowance for staff allocation between mergers and other competition work.

A higher number of notifications per staff member may indicate that the case teams are more stretched, and thus less inclined to refer marginal cases. We see, for instance, that Germany has one of the highest numbers of notifications per staff member (6.1), perhaps indicating a more stretched team, but one of the lowest rates of Phase 2 referral (1.6 per cent). While France and the US have a similar number of notifications per staff member, they have very different referral rates (1.1 and 3.4 per cent, respectively). Although France has one of the lowest referral rates, it has what appears to be a less heavily utilised team, indicating no lack of resources to handle a Phase 2 investigation.

Of course, notification requirements and thresholds vary considerably. In Germany, as mentioned above, notification requirements tend to be less burdensome and the notifications thresholds are low, thus catching more straightforward cases, so one would expect a higher number of notifications per staff member than in jurisdictions with heavy notification requirements and higher thresholds. While the UK appears to have the team with the lowest utilisation (0.3 notifications per staff member), which might theoretically influence the relatively high referral rate (even after taking into account the voluntary

<table>
<thead>
<tr>
<th>2007–13</th>
<th>EU</th>
<th>US</th>
<th>China</th>
<th>UK</th>
<th>Germany</th>
<th>France</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FTC</td>
<td>DOJ</td>
<td>Combined</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Notifications less out of scope</td>
<td>2,152</td>
<td>n/a</td>
<td>n/a</td>
<td>9,676</td>
<td>[866]</td>
<td>497</td>
</tr>
<tr>
<td>Phase 2 referrals</td>
<td>58</td>
<td>156</td>
<td>172</td>
<td>328</td>
<td>n/a</td>
<td>62</td>
</tr>
<tr>
<td>as a percentage of notifications less out of scope</td>
<td>2.7</td>
<td>1.6</td>
<td>1.8</td>
<td>3.4</td>
<td>[n/a]</td>
<td>12.5</td>
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<td>Number of competition staff</td>
<td>728</td>
<td>538</td>
<td>611</td>
<td>1,149</td>
<td>[30]</td>
<td>298</td>
</tr>
<tr>
<td>Notifications (average per year)(^\ast) per competition staff member</td>
<td>0.4</td>
<td>n/a</td>
<td>n/a</td>
<td>1.2</td>
<td>5.8</td>
<td>0.2</td>
</tr>
</tbody>
</table>

\(^\ast\)Average per year based on approximate number of years for which statistics on notifications are available: seven years for EU, US and the UK, six years for Germany, five years for China and four years for France. See supra n 2.
nature of the system), during the study period the UK had separate institutions dealing with Phase 2 merger cases. Accordingly, one would not expect total staff numbers to influence the referral rate. Also, as discussed above, a voluntary system means that the cases that are notified tend to be more complex, so one would expect a lower number of notifications per staff member. This immediately reveals the dangers of using such crude numbers, and one is quickly drawn into a study of administrative efficiency which is outside the scope of this paper.
How To Streamline Multi-Jurisdictional Merger Reviews

By Matthew Perlman

Law360, New York (October 27, 2017, 2:31 PM EDT) -- The number of antitrust regimes around the world and the variety of merger clearance procedures makes closing a global deal challenging from a regulatory compliance perspective, but experts say attorneys can take steps to help streamline the process.

Around 130 jurisdictions have competition laws and enforcement agencies, each with their own merger review requirements. Since the regimes employ different thresholds for which deals even need be looked at, experts tell Law360 that one of first steps in guiding a multi-jurisdictional merger is to understand where the transaction will need to be cleared.

Robert Bell, a partner and head of the European Union and U.K. competition team at Bryan Cave LLP, said this is key to understanding the timing of a prospective deal, and is important information for companies to consider when they’re still negotiating.

“It’s very important to get antitrust counsel involved at an early stage so that you can do the pre-filing audit, working out where you may need to file and whether there are any substantive issues,” Bell said. “This is very important, particularly for boards that are considering transactions, because they’ll not only want to know the likelihood of issues arising, but what’s the likely timeline and when can we close the deal.”

While most of the antitrust enforcers use thresholds tied to the revenue generated by the businesses in the jurisdiction, there are notable exceptions, including in the U.S. where the threshold is tied to the deal value or the size of the parties.

Joshua Holian, a partner in Latham & Watkins LLP’s litigation and trial department, who is currently working out of Brussels, said other countries have thresholds linked to things like asset value or a business’ market share, meaning decisions have to be made about the relevant market, among other factors, in order to understand if a filing is required.

Further complicating the analysis is that many of the merger regimes are relatively new and are still making adjustments, which can make it challenging to keep up with the current requirements. Latham & Watkins has actually created an app called Global Merger Regimes to help clients keep tabs on all the requirements, and Holian said they have a team devoted to tracking the latest developments.

“In any given year, we see some countries amend their rules. So, even the hard and fast rules change all of the time,” Holian said. “It’s something you have to stay on top of.”

Bruce McCulloch, a partner on Freshfields Bruckhaus Deringer LLP’s the antitrust, trade and competition team in Washington, D.C., said the firm first develops a target list of jurisdictions that could potentially require filings based on regional revenue data for the businesses involved. That target list is then refined on a country-by-country basis, sometimes with the help of local counsel in the various jurisdictions, either from another Freshfields office or from a network of outside firms that they work with regularly.
Counsel for Freshfields’ antitrust team, Richard Snyder, said that it’s critical to get local advice because of the complexity of the requirements in certain countries and because the determination is critically important.

“Filing when you didn’t need to file and not filing when you did need to file are both pretty serious problems,” Snyder said. “Both for the client and for the process.”

While sorting through which antitrust regimes a deal might have to be reported to, attorneys are also pinpointing potential problem areas and possible solutions. Holian said this requires a deep dive with the client to get a thorough understanding of the business, the deal and the competitive environment that the companies are operating in.

“You then take that information and that feeds into the substance of what you put into the notification forms in a lot of countries, but more than anything it forms your strategy,” Holian said.

Applying this strategy will differ from locale to locale. The U.S. and European Union have some of the most important merger enforcement apparatuses because of the markets they cover, but their requirements and processes vary drastically.

Europe’s antitrust enforcer, the European Commission, has to approve eligible mergers before they can be consummated. The initial filing with the commission, called Form CO, requires companies to provide detailed market definitions, identify overlaps and describe their market share and those of their competitors. Many other enforcers require similar information upfront.

In the U.S., on the other hand, companies are required by the Hart-Scott-Rodino Act to report mergers that meet certain thresholds to the U.S. Department of Justice and the Federal Trade Commission. The agencies can then investigate the transactions and ask the companies for more information. They can terminate the waiting period, or simply allow the waiting period to expire. There’s no technical approval — only challenges if the agencies choose to initiate them.

The initial U.S. filings requirements are short on market data but include internal documents used by company directors and executives to analyze the deal.

“They've basically cut the lawyer out of the drafting exercise, and they just want to see what the parties are saying internally about the deal,” Holian said.

Bell said this means it’s important for companies to be careful when making statements about a potential transaction, particularly in board presentations. He also noted that the European Commission is starting to ask for such documents as well. If the statements pertain to the company’s ability to raise prices after the move or drive out a competitor, for example, it could create serious problems for the transaction, he said.

“Then you spend the rest of the time doing a damage limitation exercise,” Bell said.

If the U.S. agencies do request more information about a merger, experts say they’ll be asking for details similar to what’s called for by the European Commission, but tailored to the U.S. market.

Another difference, McCulloch said, is that the European Commission’s decisions rely heavily on the precedent the agency has established through its approvals and denials of deals in the past. This means that if the commission has defined a particular market before, a company will have to address that in their filing, while in the U.S. companies can largely argue what they want in terms of market definition.

“You would have to address their previous decision,” McCulloch said of the European Commission. “You can argue that the market has changed or that the decision was wrong, but you are stuck with that market definition, at least to deal with in the Form CO.”

Bell said it’s common for enforcement authorities in different jurisdictions to share information with each other, and said they will often have merging parties sign waivers to allow this. This means it’s important to make sure a company is making a consistent argument to the various authorities about a deal’s potential impact.
“You need to understand, with the client, what the pro-competitive reasons are for the merger, and how you're going to sell it,” Bell said. “And you need to be very sure that you've got the same message across all of the jurisdictions.”

Some regimes pose particular challenges even if that message is conveyed, like in China where mergers are reviewed by the Ministry of Commerce, known as MOFCOM. Bell said the authority has been growing in importance, along with the Chinese economy, but that it lacks the transparency provided by the other big enforces. He also said the controlled economy of the country, which is generally more open to outbound investments than inbound investments, injects a political element not present in other areas.

“Regardless of the economic defense, you may find that there's that political element and you have to negotiate that,” he said.

On deals that impact some of the dozens of other jurisdictions with their own regimes, many of which have requirements similar to those of the European Union but localized, experts said it’s important to strategize from early on in the process.

In some cases, this can mean forming teams to address competitive issues on a regional basis, tasked with crafting arguments and identifying possible remedies that could alleviate concerns across multiple countries, Snyder said. It also means working closely with the client to identify problems in specific areas or business lines and coming up with efficient solutions.

“The overarching point is communication, not doing repetitive work and not sending repetitive requests to clients,” Snyder said. ”A really close working relationship with the client is key.”

--Editing by Philip Shea.

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Multijurisdictional M&A Litigation

Gideon Mark*

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INTRODUCTION

This Article examines the seemingly intractable problem of multijurisdictional merger and acquisition (M&A) litigation. Virtually all M&A transactions result in litigation and more than 60% of deals generate suits in multiple courts. Currently there is no procedural mechanism to consolidate these duplicative suits, which increase litigation costs, waste judicial resources, raise the specter of inconsistent rulings and collusive settlements, and increase premiums for directors' and officers' insurance. This Article concludes that the

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optimal solution to the problem is amending 28 U.S.C. § 1407 to provide the Judicial Panel on Multidistrict Litigation (JPML) with authority to transfer civil litigation that is pending in different states to a single state for both pretrial management and trial by a single state court. That statute currently provides only for the transfer of civil actions that are pending in different federal districts. It does not permit transfers of state court suits from one state to another, and neither does any other statute.

The growing phenomenon of multijurisdictional M&A litigation has been well-documented. In 1999–2000, 11.9% of announced M&A offers with a value of at least $80 million generated litigation. In 2005, approximately 39.3% of deals with a minimum value of $100 million attracted a lawsuit. In 2013, shareholders challenged 97.5% of all M&A transactions with a value greater than $100 million involving U.S. public company targets. This was the fourth consecutive year in which more than 90% of all deals this size generated litigation. Shareholders challenge virtually all mergers announced, regardless of whether they are friendly or hostile, or whether the target company’s board of directors accepted or rejected the proposed acquisition. Likewise, most leveraged buyouts (LBOs) are subject to judicial challenge.

Many transactions generate multiple lawsuits in multiple jurisdictions. In 2013, there were an average of 6.9 lawsuits per transaction for deals valued at more than $100 million. Very often, when a transaction generates multiple lawsuits, the suits are filed in multiple jurisdictions. Of the 2013 deals, 62% were litigated in more than one court and 40.6% were litigated in more than one state. Multijurisdictional litigation is possible because shareholders who wish to challenge an M&A transaction’s proposed terms can choose to do so in a state court in the target corporation’s state of incorporation (typically

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5. Kevin M. LaCroix, Why M&A-Related Litigation Is a Serious Problem, THE D&O DIARY (Nov. 28, 2011), www.dandodiary.com/2011/11/articles/securities-litigation/why-ma-related-litigation-is-a-serious-problem/ (“[O]ne out of every two companies announcing an acquisition is sued and that is true whether or not the acquisition is friendly or hostile.”).
6. Brian Cheffins et al., Delaware Corporate Litigation and the Fragmentation of the Plaintiffs’ Bar, 2012 COLUM. BUS. L. REV. 427, 439–40 (2012) (showing that during the years 1994–2010 the proportion of LBOs involving a Delaware company that generated shareholder-initiated litigation never exceeded 60% until 2005, but beginning in 2005 the proportion was approximately 70% or higher in every year except 2009).
8. Koumrian, supra note 4, at 3.
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Delaware), in a state court where the target has its principal place of business (often California, Texas, or New York), or in a federal court in one of those two jurisdictions. The vast majority of M&A lawsuits involve corporations incorporated in Delaware but headquartered elsewhere. This problem of multijurisdictional litigation is not unique to M&A deals but is particularly acute in that domain.

M&A lawsuits can be filed as class actions, derivative suits, or individual actions by the bidder, the target company, or a shareholder. In typical deal litigation, the plaintiff alleges that the board of directors of the target company violated its fiduciary duties of loyalty, care, good faith, and fair dealing by conducting a flawed sales process that failed to maximize shareholder value. Virtually all M&A suits also allege that the proxy disclosures which set forth information concerning the board’s decision-making process, financial projections, and fairness opinions were inadequate, thereby depriving...

10. See Matthew D. Cain & Steven M. Davidoff, Delaware’s Competitive Reach, 9 J. EMPIRICAL LEGAL STUD. 92, 92 (2012) ("No other state competes effectively with Delaware in attracting public corporation charters . . . . The plain fact is that companies either charter in Delaware or, reflecting a locality bias, choose to incorporate in the jurisdiction of their executive headquarters."); Why Businesses Choose Delaware, DELAWARE CORPORATE LAW WEBSITE, http://corplaw.delaware.gov/eng/why_delaware.shtml (last visited Sept. 29, 2014) (stating that more than 60% of the Fortune 500 companies are incorporated in Delaware); Norm Noked, 2013 Delaware Decisions and What They Mean for 2014, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 20, 2014, 9:26 AM), http://blogs.law.harvard.edu/corpgov/2014/02/20/2013-delaware-decisions-and-what-they-mean-for-2014/ (noting that Delaware is the state of incorporation for 64% of the Fortune 500 and more than half of all companies whose securities trade on the New York Stock Exchange, NASDAQ, and other exchanges).


12. See John Armour et al., Delaware’s Balancing Act, 87 IND. L.J. 1345, 1351 n.32 (2012) (stating that the requisite personal jurisdiction over directors and officers is likely to exist in the state where the target is headquartered because most companies hold board meetings there).


shareholders of the ability to make informed voting decisions. In most cases the shareholders name the acquirer as a co-defendant for aiding and abetting the target's misconduct.

Merger litigation can have genuine value—in part by financing litigation against larger flawed deals that should be challenged. Shareholder litigation also provides a policing effect, as the threat of litigation may encourage greater transparency and fairness in deal-making. Merger offers potentially subject to shareholder litigation also provide a positive expected gain to target shareholders. Recent research indicates that whereas M&A offers subject to lawsuits are completed at a significantly lower rate than offers that are not subject to objection, litigation significantly increases the takeover premium in deals that are completed, and the expected rise in the deal premium more than offsets the fall in the probability of deal completion.

Merger litigation may yield tangible benefits, but many scholars, jurists, and other observers agree that most of this litigation is meritless and multijurisdictional M&A


18. See Marcia Kramer Mayer et al., Merger Objection Litigation, NERA ECONOMIC CONSULTING 7 (Dec. 6, 2011), available at http://www.nera.com/nera-files/NERA_Merger_Objection_Litigation_CityBar.pdf (describing a study of 141 settled M&A cases showing that in 70% of them, both the target and acquirer were defendants).

19. See Randall S. Thomas, What Should We Do About Multijurisdictional Litigation in M&A Deals?, 66 VAND. L. REV. 1925, 1948 (2013) (“[S]hareholder litigation has an important monitoring function to play in detecting and punishing parties that violate their fiduciary and contractual duties to target company shareholders.”); Ann Woolner et al., When Merger Suits Erode Only Lawyers, BLOOMBERG NEWS (Feb. 16, 2012), http://www.bloomberg.com/news/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuits-deals.html (quoting Professor Bernard Black for proposition that policing effects of litigation have real value that “might well justify the money we throw at plaintiffs’ lawyers”); Steven M. Davidoff, Corporate Takeover? In 2013, a Lawsuit Almost Always Followed, N.Y. TIMES DEALBOOK (Jan. 10, 2014, 12:20 PM), http://dealbook.nytimes.com/2014/01/10/corporate-takeover-in-2013-a-lawsuit-almost-always-followed/?_php=true&_type=blogs&_r=0 (“There is also the unquantifiable benefit that companies are on their best behavior because they know they will be sued if they are not”).

20. See e.g., Krishnan, Shareholder Litigation, supra note 1, at 1250 (finding that the probability of deal completion decreased by 7.8% when an M&A offer was subject to litigation, but this reduction was more than offset by an increase of approximately 30% in the average takeover premium in completed deals); Krishnan, Jurisdictional Effects, supra note 1, at 144 (reporting that litigation offers have a significantly lower completion rate—72.9% versus 79.4%—and a significantly higher average takeover premium in completed deals—43% versus 37%—compared to non-litigated offers); cf. Options for Directors in M&A Litigation, CORPORATE DISPUTES 7 (Jan.-Mar. 2014) (quoting Peter L. Welsh, Partner, Ropes & Gray LLP, for the proposition that, with respect to actual or threatened litigation, “[v]ery few deals are prevented from closing on schedule”), available at http://www.ropesgray.com/biographies/w/~/media/Files/articles/2014/January/Ropes_Reprint_Jan14ashx; PricewaterhouseCoopers, At the Crossroads Waiting for a Sign: 2012 Securities Litigation Study 8 (Apr. 2013), available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/pwc-2012-securities-litigation-study.pdf (noting only one instance in 2012 where a federal lawsuit filed by shareholders of the target company appeared to be a contributing factor in a transaction’s termination).

21. See, e.g., Stephen Bainbridge, Delaware Refuses to Feed the Sharks, PROFESSORBAINBRIDGE.COM (Sept. 13, 2013), http://www.professorbainbridge.com/professorbainbridgecom/2013/09/delaware-refuses-to-feed-the-sharks.html (“As suggested by the very low average settlement figure, the vast majority of these suits
litigation is highly undesirable. M&A litigation burdens companies and their shareholders by increasing expenses, wasting scarce judicial resources, and multiplying the danger of inconsistent rulings and collusive settlements. In insurance terms, M&A litigation has become a high frequency risk, with potential collateral consequences such as escalating pricing for directors’ and officers’ insurance, particularly at the primary level.

Various solutions have been proposed. This Article critiques the most common suggestions, and then proposes the most logical remedy: amending 28 U.S.C. § 1407 to provide the JPML with authority to transfer civil litigation that is pending in different states to a single state for pretrial management and trial by a single state court. To do so, this Article proceeds in four parts. Part I examines the recent sharp increase in multijurisdictional M&A litigation and the reasons for it. Part II examines the negative impact of such litigation. Part III analyzes the advantages and disadvantages of the most common proposals to solve the problem. These proposals include: (a) adoption by bylaw or charter amendment of exclusive forum provisions requiring shareholders to file stockholder class actions and derivative suits in the defendant company’s state of incorporation, thereby designating the Delaware Court of Chancery as the exclusive venue for such litigation in most cases; (b) congressional amendment of the Securities Litigation Uniform Standards Act’s (SLUSA) Delaware carve-out and the Class Action Fairness Act’s (CAFA) parallel provision, requiring shareholders to file class actions under the carve-outs (and shareholder derivative actions with similar effect) only in the courts of the defendant company’s state of incorporation; (c) increased cooperation and comity between state court judges of different states; (d) greater use of one-forum motions; (e) stricter enforcement of the first-filed rule and increased use of the doctrine of forum non conveniens; (f) court adoption of a rule, or congressional enactment of a statute, requiring

are strike suits brought in hopes that the corporation will pay off a nuisance settlement to rid itself of the litigation so the deal can go through.”; U.S. CHAMBER INST. FOR LEGAL REFORM, THE TRIAL LAWYERS’ NEW MERGER TAX: CORPORATE MERGERS AND THE MEGA MILLION-DOLLAR LITIGATION TOLL ON OUR ECONOMY 3 (Oct. 2012), available at http://www.dandodiscourse.com/files/2012/10/U.S.-Chamber-Institute-Paper.pdf (“Certainly no one can reasonably claim that there is credible evidence of fraud or other violations with respect to more than 90% of the large M&A transactions in the United States. If the allegations were real, there would be intense law enforcement focus on such a hotbed of fraud—by the Securities and Exchange Commission, the Department of Justice, and State Attorneys General. That has not happened.” (emphasis removed)).

22. See infra notes 81–100 and accompanying text.
23. See infra notes 101–03 and accompanying text.
24. See infra notes 104–19 and accompanying text.
25. See infra note 148 and accompanying text.
26. See infra notes 151–56 and accompanying text.
27. See John C. Coffee, Jr., M&A Litigation: More and More Dysfunctional, The CLS BLUE SKY BLOG (Mar. 25, 2013), http://clsbluesky.law.columbia.edu/2013/03/25/ma-litigation-more-and-more-dysfunctional/ (“The most logical answer to the chaos of multi-forum litigation would be to empower the U.S. Judicial Panel on Multi-District Litigation to coordinate state, as well as federal, litigation—at least if certain tests in terms of the size and significance of the transaction were met.”).
all merger-related securities litigation to be brought in the state of incorporation of the target company; and (g) enhanced scrutiny of attorneys’ fees in M&A litigation. As discussed below, all of the foregoing proposals suffer from serious defects that render them unsatisfactory.

Part IV proposes granting the JPML authority to transfer multijurisdictional M&A litigation to a single state for pretrial management and trial by a single state court. This authority would be granted by amendment of 28 U.S.C. § 1407, providing the JPML with authority to transfer civil litigation that is pending in different states, and that involves one or more common questions of fact, to a single state court, subject to certain criteria. With respect to M&A litigation, this Article proposes to limit such transfer authority to deals valued at more than $100 million involving publicly traded companies with an offering price of at least $5 per share. This proposal does not contemplate granting the JPML authority to transfer state cases to federal court.

Currently, the JPML has no authority over state court litigation.31 As a general rule no state court has the authority to transfer litigation to a court in another state or to federal court,32 and no state court has the authority to accept litigation transferred by a court of another state or federal court.33 Even though highly desirable, no mechanism exists to transfer a case from a state court in one state to a state court in another state. Amending 28 U.S.C. § 1407 to authorize the JPML to make such transfers is the optimal path. Authorizing the JPML to transfer M&A litigation will solve the multijurisdictional M&A problem without incurring disadvantages inherent in many of the alternative proposals.

In particular, authorizing the JPML to transfer M&A litigation without mandating transfers to Delaware’s Court of Chancery will not undermine shareholder rights. In contrast, most of the alternative proposals cede to management control over some of the primary mechanisms available to shareholders to address managerial misconduct—the right to a jury trial in a state other than Delaware and the opportunity to recover punitive damages in the cases that proceed to trial. The Delaware Court of Chancery provides neither, as it is a court of equity.34 This Article does not contemplate giving a preference to Delaware. Instead, it proposes identifying the jurisdiction of incorporation as merely one

31. See DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 3:13 (updated May 2014) ("The Panel has no authority over actions pending in state courts."); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, FOURTH § 20.31 (2004) ("Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court . . . ."); Yvette Ostolaza & Michelle Hartmann, Overview of Multidistrict Litigation Rules at the State and Federal Level, 26 REV. LITIG. 47, 66 (2007) (noting that one limitation of the multidistrict litigation (MDL) statute is that "there is no formal mechanism to coordinate state proceedings pending in far-flung states and involving common questions of fact").


33. Id.

factor the JPML should consider when making its transfer decisions regarding M&A litigation commenced in multiple states.

Expanding the JPML’s role has been a cornerstone of many attempts to reform the U.S. judiciary. This Article’s proposed expansion will solve the inability of federal and state courts to effectively manage multijurisdictional litigation in the M&A context and in many other contexts as well. The difficulties inherent in multi-forum litigation are not confined to internal corporate disputes. They also arise in numerous other types of disputes. Authorizing the JPML to transfer these other actions will yield many of the same benefits that will accrue in the M&A domain.

I. THE RISE OF MULTIJURISDICTIONAL M&A LITIGATION

Multijurisdictional M&A litigation is the new normal. This Article first examines the phenomenon from an empirical perspective. It then considers a number of the most common explanations for the emerging trends.

A. Background

Death, taxes, and deal litigation are three inevitable events. M&A litigation is not new, but the ubiquity of it is. As noted above, in 1999–2000, only 11.9% of announced M&A offers generated litigation. In contrast, in 2013 shareholders challenged 97.5% of all M&A transactions with a value greater than $100 million involving U.S. public company targets. It is not uncommon for large deals to generate ten or more lawsuits, and during the 2007–2011 period more than a dozen announced deals valued at more than $100 million apiece became the subject of 15 or more shareholder suits. The net result has been a wave of litigation. In 2013, shareholders filed 612 lawsuits concerning M&A deals announced

36. See, e.g., Edward M. McNally, Chancery Closing the Door to Multidistrict Litigation, DELAWARE BUSINESS COURT INSIDER (Oct. 9, 2013), http://www.morrisjames.com/newsroom-articles-194.html (noting that multistate employers may confront multijurisdictional litigation regarding the enforcement of non-compete provisions in their employment contracts).
37. Baltay, supra note 11 (quoting Professor Robert M. Daines).
38. Cain & Davidoff, supra note 3, at 1–2. A value of $100 million is a common floor in commentary about deals and deal litigation. See, e.g., Paul, Weiss, Rifkind, Wharton & Garrison LLP, M&A at a Glance: 2013 Year-End Round-Up 1 (Jan. 15, 2014), available at http://www.paulweiss.com/media/2345416/15jan14maroundup.pdf (using $100 million as its floor). In 2012 there were approximately 7600 M&A deals involving a U.S. target or acquirer, but most of those deals were smaller than $100 million. PricewaterhouseCoopers, supra note 20, at 8.
that year valued over $100 million. During the four-year period from 2009–2012, shareholders filed 2485 lawsuits concerning M&A deals valued over $100 million and announced during that period.

Most of the recent M&A litigation has been multijurisdictional. Sixty-two percent of deals announced in 2013 were litigated in multiple jurisdictions. Multijurisdictional litigation takes place almost exclusively in state courts. For various reasons, M&A plaintiffs have become averse to federal courts. Pleading burdens are stricter in federal court, especially since the Supreme Court decisions in Twombly and Iqbal, and federal judges are much more likely than their state counterparts to dismiss an M&A suit on a motion to dismiss or at the summary judgment stage. Fifteen federal securities class action suits concerning deals were filed in 2013 and only sixteen in 2012, compared with 44 and 41 in 2011 and 2010, respectively. The dominant trend in securities litigation in recent years has been a decline in federal class action suits and a corresponding increase in state court M&A claims.

41. Koumrian, supra note 4, at 2.
42. Robert M. Daines & Olga Koumrian, Shareholder Litigation Involving Mergers and Acquisitions, CORNERSTONE RESEARCH 1 (Feb. 2013), available at http://www.cornerstone.com/files/upload/Cornerstone_Research_Shareholder_Litigation_Involving_M_and_A_Feb_2013.pdf. The statistics concerning deal litigation should be considered in context. The number of deals valued at a minimum of $100 million attracting litigation did not change much annually during the 2006–2011 period, but the number of deals dropped sharply. See Matthew D. Cain & Steven M. Davidoff, A Great Game: The Dynamics of State Competition and Litigation 35 tbl.1 (Jan. 31, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984758 (showing a decrease from a total of 232 deals in 2006 to 127 deals in 2011; while the difference between deals subject to litigation remained relatively stable, with 99 deals subject to litigation in 2006, and 117 deals subject to litigation in 2011). One consequence is that the percentage of deals challenged by shareholders increased substantially. Id.
43. Koumrian, supra note 4, at 3.
45. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (extending Twombly’s pleading standard to all civil cases).
46. Feldman, supra note 34.
48. Foster, supra note 16; see also Jennifer Johnson, Securities Class Actions in State Court, 80 U. CIN. L. REV. 349, 384 (2011) (noting that M&A litigation has “replaced traditional stock drop cases as the lawsuit of choice for plaintiffs’ securities lawyers”).
M&A litigation commences very quickly. In 2013 the first suit was filed an average of 11.7 days after the deal announcement. Quick filings are likely motivated in part by the fact that first filings yield larger fee awards. More than 60% of M&A cases settle, and they do so almost as quickly as they are filed. On average, settlements occur 42 days after the commencement of M&A litigation. These cases settle early for several reasons. First, litigation is time-consuming and expensive. Second, defendants are eager to avoid delayed completion of their transactions, and if settlement does not occur prior to closing then resolution becomes much more difficult, and perhaps impossible. Third, settlement costs are quite modest when expressed as a fraction of the size of most deals, or when compared with bankers' and attorneys' fees incurred in completing the transactions.

Historically it was uncommon for M&A suits to settle pre-close on the basis of additional disclosures about the transaction, with no increase in the deal price. Now, such settlements are the norm. In 2013, shareholder plaintiffs in deal cases achieved only two monetary settlements in excess of $5 million and 84.8% of M&A settlements were made solely on the basis of additional disclosures.

Disclosure-only settlements have become the norm in deal litigation even though they provide virtually no tangible value to corporations and their shareholders. In recent years companies have provided their shareholders with more complete disclosures. This improvement can be partially linked to Delaware cases in which the Court of Chancery

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49. Koumrian, supra note 4, at 2; see also U.S. CHAMBER INST. FOR LEGAL REFORM, supra note 21, at 4 (noting that shareholders file two-thirds of M&A suits within two weeks of the proposed deal’s announcement). Critics of the current wave of M&A litigation sometimes suggest that quick filing is a new development, but this is incorrect. A study of 623 M&A-related class actions commenced in Delaware courts in 1999 and 2000 found that almost 70% were filed within three days of the announcement of the transaction. Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 VAND. L. REV. 133, 182–83 (2004).

50. See Woolner et al., supra note 19 (reporting that median legal fees are significantly greater in M&A cases filed within eight days of the deals’ announcement than for later-filed cases).

51. See Daines & Koumrian, supra note 42, at 5 (reporting settlement rates of 64% in 2012, 58% in 2011, 62% in 2010, and 61% in 2010). In 2012, the court dismissed approximately 33% of the cases it resolved and the parties voluntarily dismissed the remaining three percent. Id.

52. Id.

53. PricewaterhouseCoopers, supra note 47, at 27 (“The desire to avoid delays to complete the transaction and move ahead with the acquisition appears to be the primary explanation for agreeing to a settlement.”).


55. John C. Coffee, Jr., Foreword: The Delaware Court of Chancery: Change, Continuity—and Competition, 2012 COLUM. BUS. L. REV. 387, 392 (2012). This statement is less valid with regard to small-cap deals, which have been increasingly the target of litigation. See Steven M. Haas, The Small-Cap M&A Litigation Problem, HARRY L. SCH. ON CORP. GOVERNANCE AND FIN. REG. (July 31, 2013), https://blogs.law.harvard.edu/corgov/2013/07/31/the-small-cap-ma-litigation-problem/ (explaining that stockholders in small-cap deals are disproportionally harmed by excessive or frivolous M&A litigation).

56. Olga Koumrian, Settlements of Shareholder Litigation Involving Mergers and Acquisitions, CORNERSTONE RESEARCH 2 (Apr. 2014), available at https://www.cornerstone.com/getattachment/7b80347-124b-4b69-a5d5-575e33c5f61b/Settlements-of-Shareholder-Litigation-Involving-Me.aspx. This represented just two percent of all M&A settlements reached in 2013, compared with more than five percent in prior years. Id.

57. Cain & Davidoff, supra note 3, at 4. A different study yielded a lower figure. According to Cornerstone Research, 75% of the settlements in M&A cases in 2013 were disclosure-only. Koumrian, supra note 56, at 2.
approved disclosure-only settlements. But recent research, based on a sample of 453 large public company mergers from 2005 to 2012, found that disclosure-only settlements had no effect on shareholder voting. The supplemental disclosures, compelled by the settlements and appearing in the merger proxies, did not reduce the percentage of shares voted in favor of the deals. This finding is consistent with prior research covering the 2010–2011 period. After receiving additional disclosures, shareholders voted down only two of the 162 transactions in which the parties settled the litigation on a disclosure-only basis during that period. The additional disclosures’ negligible impact on shareholder voting strongly suggests that they provide minimal tangible benefit.

Disclosure-only settlements often encompass hefty fee awards. In 2013 the mean fee award in such settlements was $511,000, even after declining 24% during the 2010–2012 period. In general the Delaware Court of Chancery has done little to discourage disclosure-only settlements and it only rarely refused to approve them. More recently, Chancery judges have expressed greater skepticism about this kind of resolution, and have assessed the true materiality of the additional disclosures more critically. The results in select cases have been substantially reduced attorneys’ fees or outright rejection of the settlement.

58. See Phillip R. Sumpter, Adjusting Attorneys’ Fees Awards: The Delaware Court of Chancery’s Answer to Incentivizing Meritorious Disclosure-Only Settlements, 15 U. PA. J. BUS. L. 669, 686-87 (2013) (“[M]uch of the improved disclosure can be attributed, at least in part, to the disclosure-only line of cases.”).
61. Cain & Davidoff, supra note 3, at 4. By comparison, the mean fee award in non-disclosure settlements of deal litigation in 2013 was $2.7 million. Id. (However, these dollar figures are based on incomplete data for 2013.) Id. Attorneys’ fees may appear to be substantial, but they represent a tiny fraction of the value of the average transaction. See Shark Attack: Why American Firms Cannot Do Deals Without Being Sued, ECONOMIST.COM (June 2, 2012), http://www.economist.com/node/21556248 (noting that attorneys’ fees in 2011 settlements were less than 0.1% of the average deal’s value).
64. See Daniel E. Wolf, The Evolving Face of Deal Litigation, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 27, 2014, 9:19 AM), http://blogs.law.harvard.edu/corpgov/2014/03/27/the-evolving-face-of-deal-litigation/ (stating that “Delaware courts recently have become more skeptical of the value of these additional disclosures and the benefits they offer to shareholders”); see also Ladig, supra note 63 (speculating that disclosure-only settlements “may become a thing of the past” if scrutiny intensifies).
65. Wolf, supra note 64. For example, in In re Transatlantic Holdings Inc. S’holders Litig., C.A. No. 6574-CS, 2013 WL 1191738, at *3 (Del. Ch. Mar. 8, 2013), then-Chancellor Strine issued a bench ruling rejecting a disclosure-only, negotiated settlement of an M&A stockholder suit. And in In re Gen-Probe, Inc. S’holders Litig., No. 7495-VCL, 2013 WL 3246605, at *16 (Del. Ch. Apr. 10, 2013), the court slashed attorneys’ fees in a “terribly thin” disclosure-only settlement from $450,000 to $100,000. See also Press Release, Shareholders Recover No Money in Vast Majority of M&A Litigation, Cornerstone Research (Apr. 15, 2014).
Not all suits end with closure of the deal. Historically it was quite rare for post-close litigation to occur. But such litigation has increased in recent years, at least in some states. Other states, such as California, bar post-close claims for additional consideration because they are derivative. In 2013, litigation continued post-close in 25% of cases.

Post-close, no additional disclosures can be made. What can be done to accomplish a settlement in this situation, in those states where post-close litigation is permissible? The most obvious way to settle an M&A case post-close is to increase the deal price, but such additional consideration will not be covered by the target company's directors' and officers' (D&O) liability insurance and must be borne directly by the acquirer. The acquirer's insurer may cover the increased price, but this is unlikely. The situation is somewhat different with regard to coverage of post-close defense costs. The target's D&O insurance often fails to cover these costs, whereas the acquirer's insurance does provide coverage. Accordingly, the acquirer has an incentive to continue the litigation—which will be financed by its insurer—rather than settle and absorb the expense of a richer deal. The overall effect is likely to be an increase in M&A litigation expense and burden on the judicial system.

B. Explanations for the Rise of Multijurisdictional M&A Litigation

A number of theories have been advanced to explain both the rise in M&A litigation generally and the rise in multijurisdictional M&A litigation specifically. A non-comprehensive list includes all of the following: first, federal legislation designed to curb strike suits has driven plaintiffs' lawyers to state court, where they have pursued M&A-
related class actions; second, plaintiffs' lawyers, particularly those with weak cases, file suit against Delaware companies outside Delaware in the hope that less experienced non-Delaware judges will misapply Delaware law in plaintiffs' favor, third, whereas the application of Delaware law by Delaware judges is predictable, the application of Delaware law by non-Delaware judges is unpredictable, and this uncertainty increases the settlement value of the litigation; fourth, courts outside Delaware are less likely to limit or reduce plaintiffs' attorneys' fees awards; and finally, because state courts generally award attorneys' fees only to lead plaintiffs' counsel in any given case, plaintiffs' firms multiply their fee opportunities by filing in multiple jurisdictions. Multiple filings provide multiple opportunities for lead counsel appointment. The true explanation for the rise in multijurisdictional M&A litigation may reflect some combination of the foregoing theories.


77. See, e.g., Thomas & Thompson, supra note 76, at 1799 (noting predictability and certainty of outcome in most Delaware cases). Delaware's frequently lauded predictability has been disputed, in part because the reversal rate for decisions from the Court of Chancery is approximately 25%. See William J. Carney & George B. Shepherd, The Mystery of Delaware Law's Continuing Success, 2009 U. ILL. L. REV. 1, 15-16 (2008) (linking the high reversal rate to the indeterminacy of Delaware law).

78. Nathan, supra note 76; accord Coffee, supra note 55, at 393 ("[O]ne advantage to plaintiffs in litigating before a state court outside of Delaware is that defendants cannot easily predict the outcome. The bottom line is that uncertainty is desired by plaintiffs because it encourages settlement, particularly when defendants have much at risk.").

79. Nathan, supra note 76.

80. See Edward B. Michelleti & Jenness E. Parker, Multi-Jurisdictional Litigation: Who Caused this Problem, and Can It Be Fixed?, 37 DEL. J. CORP. L. 1, 11 (2012) ("Opening litigation on multiple fronts provides plaintiffs' counsel multiple opportunities to be the lead plaintiff, and therefore claim a bigger piece of the pie."); Charles M. Nathan, New Challenges and Strategies for Designating Delaware as Jurisdiction for Corporate Disputes, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (May 11, 2011, 9:31 AM), https://blogs.law.harvard.edu/corpgov/2011/05/11/new-challenges-and-strategies-for-designating-delaware-as-jurisdiction-for-corporate-disputes/ ("Plaintiffs' lawyers choose to file suits in multiple forums because by doing so they can create more opportunities to serve as lead counsel (particularly if they are late to the party and litigation is already pending elsewhere) and better position themselves for a fee award in any settlement."). This phenomenon has been driven in part by the U.S. Supreme Court's decision in Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996). In Matsushita the Court held that a broad release in one action controlled subsequent settlements in other jurisdictions, thereby creating incentives for plaintiffs and their counsel to file in a second jurisdiction if they were excluded from the initial suit. See Thomas & Thompson, supra note 76, at 1767 ("Matsushita has stimulated multijurisdictional litigation filings by plaintiffs' law firms by creating incentives for plaintiffs and their law firms left out of the litigation in the first court to seek a second court in which to file.").
II. NEGATIVE CONSEQUENCES OF MULTIJURISDICTIONAL M&A LITIGATION

M&A multijurisdictional litigation has a host of negative consequences. This Part describes the most important ones. For the reasons explained below, while critics of deal litigation have exaggerated the harm of deal litigation, that harm remains significant.

A. Increased Litigation Expense

It is frequently noted that increased litigation expense is one of the primary disadvantages associated with multijurisdictional litigation generally and multijurisdictional M&A litigation specifically. This expense results from the retention of multiple law firms, the preparation of multiple sets of pleadings and motion papers, and increased travel expense for corporate employees and counsel. But there is little empirical evidence to quantify this elevated expense in M&A cases and there is some cause to be skeptical about its significance. In general, deal litigation is sparse or phantom even if conducted in multiple jurisdictions. Such litigation typically settles quickly, following a brief, initial flurry of activity that includes limited discovery (if it has been expedited) and a few motions. M&A cases settle on average six weeks after the litigation commences.

Motions to expedite can be a major cost driver. During the 2004–2011 period, the percentage of acquisition-related and derivative cases in Delaware involving requests for expedited proceedings increased from 27.4% to 51.9%. Historically, it was almost

81. See, e.g., ROBERT L. HAIG, 5 BUS. & COM. LITIG. FED. CTs. § 60.22 (3d ed. 2012) (“Particularly in multidistrict cases involving hundreds or thousands of individual claims, duplication can easily cost $1 million and may even run more than $10 million.”).
82. See, e.g., Minor Myers, Fixing Multi-Forum Shareholder Litigation, 2014 U. ILL. L. REV. 467, 471 (2014) (“Multi-forum litigation promises shareholders no benefits and threatens them with considerable costs . . .”); Leo E. Strine, Jr. et al., Putting Stockholders First, Not the First-Filed Complaint, 69 BUS. LAW. 1, 20 (2013) (stating that in multi-forum corporate litigation “the extraction of economic rents and imposition of deadweight costs are a substantial problem”); U.S. CHAMBER INSTIT. FOR LEGAL REFORM, supra note 21, at 6 (asserting that multijurisdictional litigation “dramatically increases the cost of defense”).
85. See In re Revlon, Inc. S’holders Litig., 990 A.2d 940, 945–46 (Del. Ch. 2010); Coffee, supra note 55, at 397 (“Close students of M&A litigation have recognized that such litigation often has a ‘phantom’ character. Plaintiffs rush to file, then fight intensely over the appointment of lead counsel, but thereafter take little discovery, conduct no depositions, and make few motions.”); Thomas, supra note 19, at 1943 (“[T]he best empirical evidence shows that, in the majority of deal cases, little discovery is taken.”).
86. Daines & Koumrian, supra note 42, at 5.
87. Adam B. Badawi, Merger Class Actions in Delaware and the Symptoms of Multi-Jurisdictional Litigation, 90 WASH. U. L. REV. 965, 1003 (2013). Requests for expedited discovery in the Court of Chancery became so common that the court issued its own guidelines. See generally DELAWARE COURT OF CHANCERY, COURT OF CHANCERY GUIDELINES FOR EXPEDITED DISCOVERY IN ADVANCE OF A PRELIMINARY INJUNCTION
automatic for Delaware judges to grant expedited discovery in merger cases. \textsuperscript{88} Expedition has the effect of ratcheting up litigation expense. \textsuperscript{89} In Delaware, a motion for expedited discovery can be granted on the basis of good cause, a fairly low threshold which requires demonstration of a sufficient possibility of threatened irreparable injury and the existence of a colorable claim. \textsuperscript{90} The burden of demonstrating a colorable claim is minimal. \textsuperscript{91} Granting motions to expedite was once routine in Delaware, but now such motions are increasingly opposed by defendants \textsuperscript{92} and increasingly denied. \textsuperscript{93} The denial of expedition can minimize the opportunity for litigation expenses to multiply, as well as reduce the likelihood that plaintiffs will prevail or extract a settlement. Where expedition is denied, plaintiffs have no discovery with which to support a motion for preliminary injunction or settlement demand. \textsuperscript{94}

\textsuperscript{88} Feldman, supra note 34; Savitt, supra note 47, at 582 ("Deal litigation in the Court of Chancery is routinely expedited . . .").

\textsuperscript{89} See Strine et al., supra note 82, at 16 (noting the significant discovery expense resulting from expedition).


\textsuperscript{91} Ehlen, Civ. A. No. 8560-VCG, Letter Op. at 4.

\textsuperscript{92} Parsons & Tyler, supra note 75, at 498 (stating that historically, defendants, who prefer a Delaware forum, have agreed to expedited discovery in Delaware in order to push cases into that forum); Marc Wolinsky & Ben Schireson, Deal Litigation Run Amok: Diagnoses and Prescriptions, 47 REV. SEC. & COMMOD. REG. 1, 3 (2014), available at http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23029.14.pdf.

\textsuperscript{93} Parsons & Tyler, supra note 75, at 499 n.113 (noting that, during the limited period between January 1, 2011 to June 30, 2012, the Delaware Court of Chancery denied 13 of 27 contested motions to expedite); Paul J. Collins, The Chancery Court as 'Gatekeeper' in M&A Litigation, DEL. BUS. CT. INSIDER (Aug. 21, 2013), available at http://www.gibsondunn.com/publications/Documents/Collins-ChanceryCourtGatekeeper-DBCI.pdf (noting that motions to expedite proceedings were denied by the Chancery Court in numerous cases in 2012 and 2013); Armour, et al., supra note 12, at 1379 (stating that whereas many states routinely allow expedited discovery, Delaware courts are more selective in granting such requests); but cf. Kevin Miller, Alston & Bird, LLP, The Dynamics of Disclosure Claims: Projections and the Financial Analyses Performed by Financial Advisors 12 (2012), available at http://www.alston.com/files/Event/cd40770a-f294-4ab7-8732-daf33dc6f409/Presentation/EventAttachment/1166583a-f7d6-4d3a-aefb-476f8b6566/materials-1.pdf ("[T]he Delaware Court of Chancery has, with a few recent exceptions, increasingly been willing to grant expedited discovery and injunctive relief with respect to disclosure claims.").

\textsuperscript{94} See Wolinsky & Schireson, supra note 92, at 3 ("By denying motions for expedited treatment, the courts deprive plaintiff’s lawyers of the single most valuable tool in extracting a settlement: the threat of a ruling that will delay the deal close."); accord Richard H. Zelichov & Christina L. Costley, Stamping Out Merger Objection Cases Expedited Proceedings: A Privilege Not a Right, 15 BLOOMBERG BNA MERGERS & ACQUISITIONS L. REP. 1258, 1258 (2012), available at http://www.kattenlaw.com/files/21622_katten_muchin_zelichov_costley_articleFINAL.PDF ("Eliminating expedited discovery effectively erases plaintiffs’ primary leverage to force pre-closing settlements.").
In 2007, the median and mean defense costs of shareholder/investor D&O claims were $830,000 and $3,382,927 per claim.\textsuperscript{95} No doubt such costs have since increased.\textsuperscript{96} But costs remain relatively low\textsuperscript{97} and the common argument that shareholders are footing this bill\textsuperscript{98} is not quite accurate. D&O insurance typically pays all the costs associated with the defense and settlement of shareholder litigation, above a deductible.\textsuperscript{99} The company itself incurs an expense only to the extent of the deductible and a spike in D&O premiums attributable to increased M&A litigation. As discussed below, this spike has been modest, but it appears to be escalating. The rise in defense costs is in large measure a function of D&O insurers’ failure to exercise budget control,\textsuperscript{100} as opposed to harm inherent to deal litigation.

\section*{B. Wasted Judicial Resources}

Judges, practitioners, and scholars alike have decried the fact that duplicative litigation wastes scarce judicial resources.\textsuperscript{101} Waste occurs in several respects. When the litigation is active, judges in multiple jurisdictions must review the same pleadings and motion papers and may decide identical motions. When the litigation settles, judges may be required to resolve fee disputes among non-cooperating plaintiffs’ counsel in multiple states. Judges may use additional resources to assure that settlements involving litigation in multiple jurisdictions are not collusive. But the significance of these factors has been somewhat overblown. In general, the judiciary’s workload in multijurisdictional deal cases

\begin{footnotesize}
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\item \textsuperscript{97} See David Bradford, Merger Objection Lawsuits: A Threat to Primary D&O Insurers? 3 (2011), available at https://www.advisen.com/downloads/Merger_Objection_Suits.pdf (observing that merger objection lawsuits “come to a quick resolution, keeping defense costs low, and therefore tend to be relatively inexpensive for D&O insurers”).
\item \textsuperscript{98} U.S. Chamber Inst. for Legal Reform, supra note 21, at 5.
\item \textsuperscript{100} See id. at 1820 (“D&O insurers give public corporations and their directors and officers essentially a blank checkbook to cover the costs of defense.”).
\end{itemize}
\end{footnotesize}
is light to moderate because the litigation itself is sparse. For the most part, the judges' role in these cases is limited to monitoring the selection of lead counsel, managing expedited discovery motion practice, and reviewing settlements.\textsuperscript{102} None of these routine tasks are especially burdensome.\textsuperscript{103} Of course, some cases may involve both additional complexity and significantly more waste.

C. The Specter of Conflicting Rulings and Collusive Settlements

Critics of multijurisdictional M&A litigation frequently mention the potential dangers of conflicting rulings\textsuperscript{104} and collusive settlements.\textsuperscript{105} With respect to the former, the Court of Chancery observed that such litigation presents the risk that "two judges would apply the law differently or otherwise reach different outcomes, which would then leave the law in a confused state and pose full faith and credit problems for all concerned."\textsuperscript{106} This risk is genuine, but perhaps the most controversial manifestation in recent years occurred when the Court of Chancery itself overstepped its bounds. In the much-criticized 2012 decision in \textit{Louisiana Munic. Police Employees Ret. Sys. v. Pyott},\textsuperscript{107} the Court of Chancery refused to give preclusive effect to the final judgment of a California federal court dismissing a derivative suit parallel to a case pending in Delaware. This decision conflicted with a series of federal and state cases holding that dismissal of one stockholder derivative suit for failure to make pre-suit demand precludes other stockholders from bringing similar demand-excused suits.\textsuperscript{108} The Court of Chancery's conflicting decision reflected the court's efforts to establish itself "as the preferred and presumptive court for corporate litigation."\textsuperscript{109} This effort was checked, at least temporarily, when the Delaware Supreme Court unanimously reversed it in 2013.\textsuperscript{110} The Delaware Supreme Court held that where

\textsuperscript{102} Thomas, \textit{supra} note 19, at 1944.
\textsuperscript{103} See Thomas \& Thompson, \textit{supra} note 76, at 1801 ("Relatively few judicial resources are likely to be expended in this type of work . . . .").
\textsuperscript{104} See, \textit{e.g.}, Parsons \& Tyler, \textit{supra} note 75, at 508 (noting the risk of inconsistent findings of fact or rulings of law).
\textsuperscript{105} See, \textit{e.g.}, Griffith \& Lahav, \textit{supra} note 90, at 1096 ("Collusive settlement, in other words, may be a real and pervasive threat in merger litigation . . . ."); Joseph A. Grundfest \& Kristen A. Savelle, \textit{The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis}, 68 BUS. LAW. 325, 345 (2013) ("The collusive settlement problem . . . is broadly appreciated by the judiciary and academia . . . .").
\textsuperscript{108} See, \textit{e.g.}, \textit{In re Sonus Networks, Inc. S'holder Deriv. Litig.}, 499 F.3d 47, 53 (1st Cir. 2007) (affirming dismissal of derivative suit on basis of issue preclusion); Henik ex rel. LaBranche & Co. v. LaBranche, 433 F. Supp. 2d 372, 382 (S.D.N.Y. 2006) (dismissing derivative suit on basis of issue preclusion).
the law of the predecessor court recognizes privity between derivative stockholders, it
collaterally estops a subsequent derivative plaintiff from re-litigating demand futility in
Delaware under the Full Faith and Credit Clause.111

Commentary on the possibility of collusive settlements in M&A litigation often refers
to the Court of Chancery’s appointment in Scully v. Nighthawk Radiology Holdings, Inc.112
of special counsel to report on whether there was collusive behavior in connection with a
class action settlement. The special counsel’s 2011 report observed that, when settling
multijurisdictional litigation, defense counsel’s unquestionably proper forum shopping can
devolve into a “reverse auction” in which defendant seeks the lowest bidder among
plaintiffs’ counsel challenging the same conduct in different jurisdictions.113 In the most
egregious cases, the reverse auction can result in a collusive settlement in which a
plaintiff’s law firm accepts a low-ball settlement offer in order to secure attorneys’ fees.114
Such a collusive settlement may undervalue claims, under-compensate plaintiffs, and
undermine the legitimacy of the litigation process. What is not always underscored in
commentary is that the special counsel’s report concluded, and the Court of Chancery
subsequently agreed, that there had been no collusion in Nighthawk Radiology.115

Multijurisdictional M&A litigation no doubt makes reverse auctions a possibility, and
the reduction of such litigation could minimize that risk.116 But the absence of a collusive
settlement in Nighthawk Radiology—apparently the sole M&A case in which a Delaware
court appointed special counsel to investigate the possibility of collusion—casts some
doubt on the suggestion117 that reverse auction collusion is common. To date, there is no
published empirical evidence on the frequency issue.118 Moreover, as Professors Griffith

111. Id. at 617–18.
governance/governance-cases/Scully-v-Nighthawk-transcript.pdf.
that forum shopping should not be equated with collusive settlements).
114. See id. at 26–27 (identifying factors which suggest the possibility of collusion); see also Barbara J.
Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges, FEDERAL
classgde.pdf (“[A] reverse auction is the ‘sale’ of a settlement to the lowest bidder among counsel for competing
or overlapping classes.”).
2011) (“I agree with special counsel’s analysis of the law and assessment of what took place. As a result, I have
no concerns about the conduct of any attorney involved in this matter.”); but cf. Griffith & Lahav, supra note 90,
at 1097 (“[S]everal traditional factors indicating collusion were indeed present.”).
116. See Alan L. Beller, Selected Issues for Boards of Directors in 2014, HARV. L. SCH. F. ON CORP.
GOVERNANCE AND FIN. REG. (Feb. 1, 2014, 9:00 AM), https://blogs.law.harvard.edu/corpgov/2014/02/01/
selected-issues-for-boards-of-directors-in-2014/ (noting that reducing the likelihood of multiple courts hearing
the same case reduces the likelihood of reverse auctions).
117. See, e.g., Myers, supra note 82, at 509 (“Anecdotal evidence suggests that the reverse auction is
common in multi-forum shareholder litigation . . . ”); see also id. (arguing that reverse auction was involved in
recent litigation concerning Bank of America’s acquisition of Merrill Lynch).
118. See Thomas, supra note 19, at 1946 (noting absence of data on frequency of reverse auctions); Coffee,
supra note 55, at 394 (“The frequency of such ‘reverse auctions’ in this context is an uncertain empirical
question . . . ”).
and Lahav observed, it is very difficult to distinguish impermissible reverse auctions from defendants' valid exercise of their monopsony powers.\textsuperscript{119}

D. The Impact on D&O Insurance

Perhaps the most significant negative aspect of multijurisdictional M&A litigation has been its role as a cost driver for D&O insurance pricing. Deal litigation represents a significant liability exposure for both the companies involved in proposed transactions and their directors and officers. Directors have the responsibility to investigate, evaluate, and respond to a proposed takeover transaction, and they frequently find themselves named as defendants in connection with the performance of the foregoing duties.\textsuperscript{120} The exculpatory charter provisions corporations adopted under section 102(b)(7) of the Delaware General Corporation Law (DGCL)\textsuperscript{121} and equivalent statutes in many other states\textsuperscript{122} generally insulate directors from liability for monetary damages for breach of the duty of care, but not for breach of the duty of loyalty or bad faith conduct.\textsuperscript{123} Statutes in some states (not including Delaware) also extend protection to officers.\textsuperscript{124}

When directors and officers do face liability or legal expenses, they may be indemnified by the corporations they serve. The DGCL requires a corporation to indemnify a present or former director or officer included as a party to a proceeding by virtue of his or her service to the corporation, if he or she achieves success on the merits.\textsuperscript{125} The indemnification is for expenses, including attorneys' fees, that such a person actually and reasonably incurred in connection with the successful defense.\textsuperscript{126} The DGCL also prohibits

\begin{itemize}
\item \textsuperscript{119} Griffith & Lahav, \textit{supra} note 90, at 1098.
\item \textsuperscript{120} Dan A. Bailey, \textit{Director Liability Loss Prevention in Mergers and Acquisitions}, \textit{Chubb Group of Insurance Companies} 4 (2013), available at \url{http://www.chubb.com/businesses/ssi/chubb16452.pdf}.
\item \textsuperscript{121} \textit{Del. Code Ann.} tit. 8, § 102(b)(7) (2014). This section authorizes shareholders to include a clause in a corporation's charter eliminating personal liability of a director to shareholders for monetary damages for breach of fiduciary duty, provided that such clause does not eliminate liability for: (1) any breach of the director's duty of loyalty, (2) acts or omissions in good faith or which involve intentional misconduct or a knowing violation of law, and (3) any transaction from which the director derived an improper personal benefit. \textit{Id.}
\item \textsuperscript{122} See Richard B. Kapnick & Courtney A. Rosen, \textit{The Exculpatory Defense to Shareholder Derivative Claims}, 17 BUS. TORTS J. 1, 1 (2010), available at \url{http://www.sidley.com/files/Publication/abc89116669d-4de4-b4ec-18808940b54a/Presentation/PublicationAttachment/6552d128-8ac6-4713-aa7e-193e3817a3c7/Kapnick-Rosen_REPRINT.pdf} (noting that many states have enacted statutes similar to section 102(b)(7)).
\item \textsuperscript{124} Kapnick & Rosen, \textit{supra} note 122, at 1.
\item \textsuperscript{126} \textit{Del. Code Ann.} tit. 8, § 145(c); Robert F. Carangelo & Paul A. Ferrillo, \textit{Guest Post: Dispelling the Myths of Side A Directors and Officers Insurance}, \textit{D&O Diary} (Jan. 22, 2014, 4:33 AM),
\end{itemize}
a corporation from indemnifying a corporate official who was unsuccessful in the underlying proceeding and has acted in bad faith. Between those two extremes, the DGCL vests corporations with the discretion to provide indemnification to its officers and directors. Corporations routinely set forth their indemnification obligations by charter, bylaw or contract.

Directors and officers may also be entitled to payment of their attorneys’ fees in advance of any determination that they are entitled to indemnification. Most states have some form of advancement or indemnification statute, which is usually permissive, as in Delaware. The DGCL authorizes but does not require corporations to advance expenses their directors and officers incur in defending any action, suit, or proceeding that permits indemnification. Delaware law permits, but does not require, a company to advance legal fees incurred in defending a civil, criminal, administrative, or investigative suit or proceeding.

Corporate charters, bylaws, or contracts routinely make permissive advancement obligations and indemnification obligations mandatory. For example, bylaws often require companies to indemnify to the maximum extent Delaware law permits. Delaware courts generally enforce advancement and indemnification provisions as written. Those provisions thus serve as a potential first line of defense. But indemnification may be unavailable if the defendant corporation is financially troubled, insolvent, or if the law otherwise prevents it from indemnifying a director, officer, or

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127. DEL. CODE ANN. tit. 8, § 145(a), (b); Hermelin, 54 A.3d at 1094.
128. Id.
131. DEL. CODE ANN. tit. 8, § 145(e).
134. Gibson, Dunn & Crutcher LLP, supra note 123, at 4; cf. Zachary N. Lupu, Note, Fear of Commitment: Why CA, Inc. v. AFSCME Leaves Mandatory Advancement Bylaws Undisturbed, 80 FORDHAM L. REV. 1759, 1797 (2012) (“Delaware courts have interpreted and enforced mandatory advancement bylaws to craft expansive advancement rights.”). The courts enforce mandatory advancement provisions even where a company sues its directors, officers, or covered employees for serious corporate malfeasance. Waters & Baugher, supra note 129, at 37. This is because the issue of advancement is distinct from the issue of the ultimate merits, and advancement is required until the court determines the merits, which may require exhaustion of the appeals process. See, e.g., Ridder v. CityFed Fin. Corp., 47 F.3d 85, 87 (3d Cir. 1995) (“Under Delaware law, appellants’ right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them, and is separate and distinct from any right of indemnification they may later be able to establish.”).
employee. For example, applicable state law may prevent indemnification for settlements and judgments in derivative suits if the director or officer acted in bad faith.\(^{135}\)

Where indemnification is unavailable, D&O insurance may provide a second line of defense. Virtually all U.S. public corporations purchase D&O insurance.\(^{136}\) A typical public company D&O insurance program consists of a primary policy and one or more excess layer policies issued by different insurers. Each excess insurer agrees to pay for claims once the corporation exhausts the underlying layer. Ten or more layers are not unusual for large cap companies.\(^{137}\) A program typically provides three types of coverage: (a) Side A coverage for directors' and officers' non-indemnifiable losses, (b) Side B coverage that reimburses the company for indemnification paid to directors and officers, and (c) Side C coverage for the company's securities-related claims.\(^{138}\) In 2012, approximately 75% of public companies maintained a primary D&O insurance program structure that included Sides A, B, and C.\(^{139}\)

In M&A cases, the target's D&O insurance almost always covers the cost of defending both the target and the target's board.\(^{140}\) Similarly, the bidder's D&O insurance typically covers the bidder's defense cost where the bidder is sued on a theory of aiding and abetting the target board's alleged breach of fiduciary duty.\(^{141}\) Coverage of other costs is less clear-cut. For example, there is continuing uncertainty as to whether D&O insurance covers plaintiffs' attorneys' fees payable in connection with a settlement.\(^{142}\)

\(^{135}\) Gibson, Dunn & Crutcher LLP, supra note 123, at 3–4; R.J. Cinquegrana & John R. Baraniak, Jr., A Securities Litigator's Guide to D&O Insurance, Part II, LAW360 (Oct. 19, 2010), http://www.law360.com/articles/201541/a-securities-litigator-s-guide-to-d-o-insurance-part-ii (access required) ("Delaware law, and most bylaws, preclude indemnification where the individual officer or director is ultimately determined to have acted wrongfully.").


\(^{137}\) Baker & Griffith, supra note 136, at 810.

\(^{138}\) Gibson, Dunn & Crutcher LLP, supra note 123, at 4.


\(^{141}\) Id.

\(^{142}\) Compare Anthony P. Tatum & Shelby S. Guilbert, Jr., Securing D&O for Attorneys' Fees in Securities Cases, LAW360 (May 28, 2013), http://www.law360.com/articles/444555/securing-d-o-for-attorneys-fees-in-securities-cases (access required) ("[C]onsistent with the plain language of most D&O policies, courts generally view plaintiffs' attorneys' fees as just another type of damages. [Such] fees fall squarely within the scope of most D&O policies' definitions of key terms like 'loss,' 'damages' and 'claim,' and unless a D&O policy specifically excludes coverage for plaintiffs' attorneys' fees, such fees should be covered."), with Kevin LaCroix, D&O Insurance: Providing Coverage for Plaintiffs' Fee Awards?, D&O DIARY (May 29, 2013, 3:46 AM), http://www.dandodiary.com/2013/05/articles/d-o-insurance-do-insurance-providing-coverage-for-plaintiffs-fee-awards/ (arguing that "judicial views on this issue are hardly uniform"). The leading case is XL Specialty Ins. Co. v. Loral Space & Comm'n's, Inc., 82 A.D.3d 108, 116 (1st Dep't 2011), in which the First Department of New York's Appellate Division held over a vigorous dissent that an insured's payment of attorneys' fees to plaintiffs' counsel in a derivative lawsuit was a covered loss; see also Options for Directors in M&A Litigation, supra note 140 (quoting Alan Goudiss, Partner, Shearman & Sterling, for proposition that increasingly D&O insurers have
D&O insurance may also cover cash pay-outs from settlements. Such payments typically represent Side A losses because in many states D&O insurance may not indemnify derivative suit settlements. Almost all M&A litigation claims settle within or just above the D&O policy limit. In 2012, the average D&O policy limit for public companies was $132.6 million, and virtually all M&A suits settle for less than that sum. Defense costs count against the policy limit.

The overall impact of M&A litigation on D&O insurance is difficult to assess but appears to have been mostly negative. D&O insurance underwriters and advisors disagree about how to characterize the current situation. M&A litigation has been alternately described as a high-frequency, low-severity risk and high-frequency, high-severity risk. Possible insurance ramifications of the M&A litigation phenomenon include the following: (1) the inclusion of separate retentions for D&O renewals which specifically address M&A activity and are typically considerably higher than the securities fraud claim retention on the policies; (2) overall premium increases on D&O renewals, particularly at the primary layer of insurance; and (3) exclusion of coverage for M&A activity. In practice the third ramification is of no consequence because historically exclusions have had no

been resistant to covering attorneys' fees paid to plaintiffs' counsel “and have been demanding some form of contribution from the buyer”).


144. See Baker & Griffith, supra note 99, at 1806 (“Almost all shareholder litigation settles within the limits of the available D&O insurance.”).

145. See Towers Watson, supra note 139, at 9 (reporting results of a survey of 325 organizations, most of which had total assets/revenues in excess of $1 billion). Large cap companies (defined here as companies with market capitalizations of ten billion dollars or more) had an average D&O policy limit of $199.1 million in 2012. Id. Smaller cap public companies had lower limits. Id.


149. Kevin M. LaCroix, Why Mergers & Acquisitions-Related Litigation Is a Serious Problem, 7 RISK INSIGHTS 1, 3-4 (2012), available at http://www.connerstrong.com/resources/site1/news/Insights%20Winter%20Vol%20II%20Issue%201.pdf (“In insurance terms, M&A litigation has become a high frequency and high severity risk . . . . The severity risk is particularly acute given the exacerbating effects of escalating defense expenses and rising plaintiffs’ attorneys’ fees.”).
significant impact on D&O insurers’ overall responsibility to pay for shareholder litigation.\textsuperscript{150} The situation is, however, different with regard to the first and second ramifications.

D&O insurance companies annually re-price their policies.\textsuperscript{151} During 2012 and 2013, many D&O insurers were successful in securing separate and often substantially higher retentions for M&A claims.\textsuperscript{152} During the same period, premiums increased at least three to five percent for public companies and at least ten percent for private firms.\textsuperscript{153} Some evidence suggests even more significant increases.\textsuperscript{154} But the market has been bifurcated, with the most significant premium increases occurring in the primary layer of insurance and high excess rates remaining flat.\textsuperscript{155}

Many underwriters and other observers assign significant weight to M&A litigation as a factor in recent D&O rate hikes.\textsuperscript{156} Increased insurance expense reduces net income,
which in turn reduces earnings per share. In sum, one of the most negative aspects of multijurisdictional M&A litigation has been its adverse impact on D&O insurance pricing.

III. FLAWED SOLUTIONS TO THE PROBLEM OF MULTIJURISDICTIOINAL M&A LITIGATION

A number of solutions to the problem of multijurisdictional deal litigation have been proposed. This Article next analyzes the most common proposals. As will be seen, each of these proposals suffers from serious defects that collectively render them inferior to the solution proposed herein.

A. Exclusive Forum Provisions

The proposal that may have garnered the most support to date is adoption by bylaw or charter amendment of exclusive forum provisions that require derivative actions, stockholder class actions, and other intra-corporate disputes to be litigated exclusively in a designated forum—typically the Delaware Court of Chancery. Purported advantages to public companies and their shareholders of such provisions include: (1) resolution by Chancery, the preeminent forum in the United States for the litigation of disputes involving a company's internal affairs, and (2) preclusion of costly and duplicative litigation and the attendant risk of inconsistent outcomes. Regarding the first advantage, it is commonly asserted that Chancery is superior to alternative forums in terms of quality, experience, precedent, predictability of outcomes, and quickness of resolution. Nevertheless, such provisions have major drawbacks, as discussed below.


American courts traditionally were hostile to contractual forum selection clauses and often refused to enforce them on public policy grounds. This hostility ultimately abated, and state and federal courts now generally view such clauses as presumptively valid and assign the burden to the "party opposing enforcement to demonstrate that enforcement


158. See, e.g., Nathan, supra note 76 (“[Delaware] is virtually universally viewed as the preeminent jurisdiction for [M&A] litigation.”).


would be unfair or inequitable.” Judicial acceptance helps explain why forum selection clauses have become common in consumer and commercial contracts. Forum selection clauses in other contexts have been more controversial. In 2010, Delaware Vice Chancellor Laster suggested in dicta in *In re Revlon, Inc. Shareholder Litigation* that corporations are free to adopt “charter provisions selecting an exclusive forum for intra-entity disputes.” Such charter or bylaw provisions had been in use since at least 1991, but they were rare. Only 16 publicly traded entities had adopted such provisions by 2010.

Adoption accelerated in the wake of *Revlon*, as corporations took their cue from Laster’s dicta. By mid-2013, more than 250 publicly traded U.S. corporations had designated an exclusive venue for intra-corporate disputes, and most of these were Delaware-chartered corporations that had designated the Delaware Court of Chancery. A majority of these provisions had “been adopted in connection with [initial public offerings (IPOs)], restructurings or reincorporations in Delaware.” By 2013, the inclusion of forum selection clauses in corporate charters had become standard with IPOs, but most of the established companies adopting such a provision had done so through board-adopted bylaw amendments, rather than shareholder-approved charter amendments.

Exclusive forum provisions generally regulate the four types of corporate litigation most often brought in a representative capacity: (1) derivative actions; (2) suits asserting breaches of fiduciary duty; (3) actions arising pursuant to any provision of the DGCL; and (4) actions asserting claims governed by the internal affairs doctrine, which mandates that the law of the state of incorporation governs internal disputes between a company’s

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161. See id. at 267 (describing how courts have come to accept forum selection clauses, using the Colorado state courts as an example); Grundfest & Savelle, supra note 105, at 381.


163. *In re Revlon, Inc. S’holder Litig.*, 990 A.2d 940, 960 n.8 (Del. Ch. 2010).


166. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 944 (Del. Ch. 2013); see Allen, supra note 96, at 1 n.1 (noting that a small number of corporations have adopted exclusive forum bylaws in eight states other than Delaware).


managers and shareholders. In general, first-generation forum selection provisions were mandatory. They required all litigation encompassed by the provision to be litigated in the specified forum—almost always the Delaware Court of Chancery. In contrast, second-generation provisions (those adopted beginning around 2011) are typically elective. They permit a corporation to consent to an alternative forum. In the event of a challenge, the board’s decision to elect a particular forum under an elective provision is potentially subject to review for reasonableness, rather than pursuant to the business judgment rule.

Prior to 2013 there was considerable uncertainty about the enforceability of board-adopted forum selection bylaws. In 2011, the federal district court for the Northern District of California declined to enforce a forum selection clause in *Galaviz v. Berg*. In *Galaviz*, a case of first impression, the defendant directors of Oracle Corporation unilaterally adopted the forum selection clause as a bylaw after the majority of the purported wrongdoing had allegedly occurred and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect. Oracle is a Delaware corporation with principle executive offices located in California. The federal court denied defendants’ motion to dismiss on the ground of improper venue, reasoning that it would be inequitable to apply the forum selection clause to plaintiffs, who had purchased their shares before the directors adopted the bylaw and therefore had no notice of it. The court cited federal common law as the basis for its refusal to dismiss, glossed over *Revlon*’s dicta, and thereby avoided the underlying issue of the validity of the bylaw under Delaware corporate law. The court, however, suggested that the outcome might have been different if the clause had been adopted in the company’s certificate of incorporation, following a shareholder vote.

170. See Edgar v. MITT Corp., 457 U.S. 624, 645–46 (1982) (concluding that the internal affairs doctrine has federal constitutional underpinnings); McDermott Inc. v. Lewis, 531 A.2d 206, 209 (Del. 1987) (“We reaffirm the principle that the internal affairs doctrine is a major tenet of Delaware corporation law having important federal Constitutional underpinnings.”).


173. See Alexander & Mathews, supra note 172 (arguing for an application of reasonableness review).


175. Id. at 1174.

176. Id.

177. Id. at 1175.

178. Id. at 1175 n.6. *Galaviz* is discussed in Bonnie White, Note, Reevaluating *Galaviz v. Berg*: An Analysis of Forum-Selection Provisions in Unilaterally Adopted Corporate Bylaws as Requirement Contracts, 160 U. PA. L. REV. ONLINE 390 (2012), In In re Facebook, Inc. IPO Sec. & Deriv. Litig., 922 F. Supp. 2d 445, 463 n.16 (S.D.N.Y. 2013), the district court recognized “the considerable debate on the efficacy, enforceability and desirability of the use of forum provisions,” but declined to take a position while holding that such a clause voted into Facebook’s pre-IPO charter by shareholders was inapplicable to claims and parties in the case.
In February 2012, institutional plaintiffs filed substantially similar complaints \footnote{179} in the Delaware Court of Chancery against 11 corporations—seven of which are members of the Standard & Poor's 500 (S&P 500)—which had adopted exclusive forum bylaw provisions without shareholder approval. \footnote{180} The majority of the 11 defendant corporations promptly repealed their bylaw provisions, and plaintiffs dismissed their suits on mootness grounds. \footnote{181} Only Chevron Corporation (a Delaware corporation headquartered in California) and FedEx Corporation (a Delaware corporation headquartered in Tennessee) opted to litigate. \footnote{182} The court consolidated their cases into a single action for purposes of deciding the common legal issues. Chevron and FedEx then moved for judgment on the pleadings.

In June 2013, the Court of Chancery held in \textit{Boilermakers Local 154 Ret. Fund v. Chevron Corp.} \footnote{183} that the forum selection bylaws adopted by the Chevron and FedEx boards were both (1) statutorily valid under section 109(b) of the DGCL \footnote{184} and (2) contractually valid and enforceable. \footnote{185} Chancery also noted the following: (1) shareholders who object to board-adopted bylaws with forum selection clauses have other means of recourse, including the right to amend or repeal the bylaws and the opportunity to discipline directors during annual elections for their failure to accede to a stockholder vote repealing such a clause; \footnote{186} (2) as with other forum selection clauses, a plaintiff may argue that forum selection bylaws are unenforceable under the reasonableness standard adopted by the U.S. Supreme Court in the seminal 1972 decision in \textit{M/S Bremen v. Zapata Off-Shore Co.}. \footnote{187} (3) as with bylaw provisions generally, a board's exercise of

\begin{thebibliography}{99}

\footnote{180}{Id.}
\footnote{182}{See Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942 (Del. Ch. 2013) (explaining that the bylaw provisions of both Chevron and FedEx permitted actions to be commenced in a non-Delaware forum with the corporation's consent, and Chevron's amended bylaw also permitted suit to be commenced in any state or federal court in Delaware with jurisdiction over the subject matter and the parties).}
\footnote{183}{Id. at 934.}
\footnote{184}{DELA. CODE ANN. tit. 8, § 109(b) (2014).}
\footnote{185}{Boilermakers, 73 A.3d at 939.}
\footnote{186}{Id. at 956-57; see also David F. Larcker, Stanford Graduate School of Business Corporate Governance Research Program, \textit{Board of Directors: Selection, Compensation, and Removal} 2 (2011), http://www.gsb.stanford.edu/sites/default/files/documents/04.Board%20Recruitment_1.pdf (explaining that in practice, disciplining directors by voting them out has proved very difficult in the absence of major governance lapses; among public corporations in the United States, only two percent of directors who step down are dismissed or not reelected).}
\footnote{187}{M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) (holding that forum selection clauses are generally valid, unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"). The Supreme Court reaffirmed in December 2013 that forum selection clauses are presumptively valid and enforceable. See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas, 134 S. Ct. 568, 583 (2013) (holding that parties' contractual choice of forum should be enforced in "all but the most unusual cases").}
\end{thebibliography}
its powers under a forum selection bylaw is subject to challenge as a violation of the directors' fiduciary duties; and (4) a board's conduct in adopting such bylaws could be subject to challenge as a breach of fiduciary duty.

Adoption of forum selection provisions in bylaws ground to a halt in early 2012 with the onset of the *Boilermakers* litigation. Adoptions resumed in the wake of the Court of Chancery's *Boilermakers* decision. In the following seven months, by February 2014, more than 150 companies had amended their bylaws to adopt forum selection provisions, and by May 2014 the list of post-*Boilermakers* adoptees included 32 S&P 500 corporations. Virtually all of these provisions: (a) require litigation against the companies to commence in their jurisdiction of incorporation (which for most of them is Delaware), and (b) permit the boards of directors to consent to an alternate forum.

*Boilermakers* clarified, but did not resolve the enforceability issue, and this lack of resolution may operate to discourage more widespread adoption. First, as of this writing, the Delaware Supreme Court has not addressed the facial validity of forum selection provisions in either bylaws or charters. In October 2013, the stockholder plaintiffs abandoned an appeal in *Boilermakers*. In November 2013, the Court of Chancery, citing

188. *Boilermakers*, 73 A.3d at 963.

189. See Allen M. Terrell, Jr., *Court of Chancery Upholds Forum-Selection Bylaws Under the DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (June 26, 2013, 11:40 AM), http://blogs.law.harvard.edu/corpgov/2013/06/26/court-of-chancery-upholds-forum-selection-bylaws-under-the-dgcl/ ("The Court reiterated that a stockholder-plaintiff is free to sue in a forum other than the one in the bylaw and to argue . . . the forum-selection provision is being used for an inequitable purpose in breach of the directors' fiduciary duties.").


192. O'Bryan, *supra* note 190. Before the *Boilermakers* litigation commenced, 96% of forum selection bylaws adopted by Delaware corporations mandated the Delaware Court of Chancery as the exclusive forum. Allen, *supra* note 190, at 4. Of the post-*Boilermakers* bylaws, only 43% do so. Id. The remaining provisions establish that: (a) if the specified court (typically the Delaware Court of Chancery or a state court in Delaware) lacks personal jurisdiction, then jurisdiction vests in another Delaware state or federal court, or (b) jurisdiction will vest in the state and federal courts in Delaware. Id.


Boilermakers, upheld the validity of a forum selection clause in a corporate charter.195 The plaintiff shareholders did not appeal the ruling.

Second, while forum selection provisions in both bylaws and charters are now presumptively valid and enforceable in Delaware,196 it remains unclear whether non-Delaware courts will enforce such provisions if a shareholder files suit in a non-Delaware forum. Boilermakers will not bind courts outside Delaware. As previously discussed, in Galaviz the federal district court declined to enforce a forum selection bylaw. There has been considerable criticism of Galaviz,197 but other courts that have grown accustomed to

surrender-in-the-forum-selection-bylaw-battle/ (explaining that the decision of the Chancery Court was widely expected to be affirmed). The abandonment of the appeal most likely was a strategic move designed to avoid the precedential weight of a Delaware Supreme Court decision squarely in favor of forum selection clauses. See Allen, supra note 171, at 2 (“Compared to the decision from the Court of Chancery, such a precedent would make it more difficult to successfully mount an ‘as applied’ challenge to the enforcement of a forum selection bylaw in a non-Delaware court.”). Abandonment of the appeal was not the end of the road. In January 2014, Chevron moved in federal court in California, where an action parallel to Boilermakers was pending, for certification to the Delaware Supreme Court of the question as to whether Chevron’s forum selection bylaw is valid. Brian JM Quinn, Chevron Seeks to Certify Question, M&A LAW PROF BLOG (Feb. 4, 2014), http://lawprofessors.typepad.com/mergers/2014/02/chevron-seeks-to-certify-question.html. That motion was denied in June 2014. Dan Ivers, Correction: Judge Won't Let Del. Court Rule on Chevron Bylaw, LAW360 (June 26, 2014, 12:23 PM), http://www.law360.com/articles/551974/correction-judge-won-t-let-del-court-rule-on- Chevron-bylaw (access required).

195. Telephonic Hearing on Plaintiff's Motions for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court, Edgen Group Inc. v. Genoud, Civ. A. No. 9055-VCL (Del. Ch. Nov. 5, 2013), available at http://uk.p02del.practicallaw.com/es/Satellite?blobcol=urldata&blobheader=application%2Fpdf& blobkey=id&blobtable=MungoBlobs&blobwhere=1247708053296&ssbinary=true. In this case, Vice Chancellor Laster denied Edgen’s request for a temporary restraining order to block a shareholder suit from proceeding in Louisiana. Id. at 34. He did so even though the suit violated the forum selection provision in Edgen’s charter, which was valid as a matter of Delaware corporate law. Id. at 39. According to Laster, Edgen had to enforce the provision by first seeking dismissal in Louisiana. Id. at 40. Laster noted that Boilermakers appeared to contemplate that enforcement of foreign selection clauses would take place in the “foreign” court. Id. at 41. Edgen strongly suggests that, as a matter of comity, Delaware courts will permit the initial decision concerning the enforceability of an exclusive forum provision to occur in the non-Delaware court. Id. The case is discussed in Alison Frankel, Delaware Judge: Don't Sue in Delaware to Enforce Forum Clauses, REUTERS (Dec. 2, 2013), http://blogs.reuters.com/alison-frankel/2013/11/12/delaware-judge-dont-sue-in-delaware-to-enforce-forum-clauses/ (hypothesizing that “until the corporations have asked judges outside of Delaware to enforce the provisions and dismiss shareholder suits,” Delaware judges will not enforce forum-selection clauses that specify Delaware). Following Laster’s ruling, the parallel action was dismissed by the Louisiana state court in a summary order that does not specify whether the court relied on the forum selection bylaw or instead on traditional forum non conveniens principles. See Joel C. Haims & James J. Beha II, Commercial Division Enforces Forum Selection Bylaw, N.Y. L.J. (Feb. 19, 2014), available at http://media.mofo.com/files/Uploads/Images/140219-Commercial-Division-Enforces-Forum-Selection-Bylaw.pdf (discussing state courts’ decisions on the enforceability of forum selection bylaws).


197. Sec. e.g., Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 956 (Del. Ch. 2013) (asserting that the holding in Galaviz “rests on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders”); Sullivan & Cromwell LLP, supra note 191, at 9 (“Galaviz appears unlikely to carry much, if any, weight in the future—it was limited to its facts and was rejected in the Boilermakers and Safeway decisions.”); Grandtest & Savelle, supra note 105, at 405–08 (arguing that Galaviz was wrongly decided).
presiding over shareholder litigation may refuse to relinquish control over these cases to Delaware courts.\textsuperscript{198} They may rely on public policy grounds\textsuperscript{199} or reason that their states, unlike Delaware, provide for jury trials in M&A disputes.\textsuperscript{200} In short, because forum selection provisions are not self-enforcing, their efficacy will heavily depend upon the uncertain willingness of non-Delaware judges to enforce the provisions and dismiss stockholder suits filed in their courts.\textsuperscript{201}

Third, the Court of Chancery’s decision relates only to the facial validity of forum selection clauses on a statutory and contractual basis. Under Boilermakers, forum selection bylaws are presumptively, but not necessarily situationally, enforceable. The Court of Chancery acknowledged that application of a forum selection provision in a particular situation remains subject to challenge based on equitable principles or breach of fiduciary


\textsuperscript{200} For example, Article I, Section 16 of the California Constitution guarantees the right to a jury trial. In Grafton Partners L.P. v. Superior Court, 116 P.3d 479 (Cal. 2005), the California Supreme Court interpreted section 16 to render unenforceable pre-dispute contractual jury trial waivers. Plaintiffs in M&A litigation commenced in California may try to set aside forum selection clauses on this basis.

duty, but it failed to provide clear guidance regarding what factors might be relevant in assessing when and in what context courts should deem invalid the adoption or application of such a provision.

Fourth, the decision in Boilermakers has no binding effect on companies not incorporated in Delaware and not governed by Delaware law. Corporate statutes in states other than Delaware often do not provide the same explicit authority to include in a corporation’s bylaws any provision relating to the rights or powers of its stockholders such as DGCL section 109(b) provides. For example, neither the Minnesota Business Corporations Act nor the Washington Business Corporations Act provides such authority.

2. Exclusive Forum Provisions Provide a Sub-Optimal Solution

A company adopting a forum selection provision that designates Delaware is more likely to avoid multijurisdictional M&A litigation and ensure that such litigation proceeds only in Delaware. Nevertheless, these provisions are an undesirable solution for multiple reasons. First, an obvious effect of such provisions is to restrict the ability of plaintiffs to choose a less management-friendly forum that permits jury trials in M&A litigation and an award of punitive damages. Delaware, widely regarded as management-friendly,

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204. DEL. CODE ANN. tit. 8, § 109(b) (2014).


permits neither, because its Court of Chancery is a court of equity.207 Moreover, the common counter-argument that parties should litigate M&A cases in Delaware because its judiciary is far better-equipped than other courts to handle such cases208 is weak. In the last two decades specialized trial courts with dockets comprised primarily or exclusively of business cases have been established in at least 19 states where hundreds of Fortune 1000 corporations are headquartered—New York, Illinois, New Jersey, Pennsylvania, Massachusetts, Florida, and Ohio, among others.209 These business courts are modeled after Delaware’s Court of Chancery,210 and they are empowered to hear claims involving breach of fiduciary duty.211 Many of them are able to act expeditiously,212 and there is little or no evidence establishing that the courts are unable to apply the DGCL properly to disputes involving Delaware-chartered companies.213

vigilant in monitoring managerial power.”); Timothy R. McCormick et al., The Aggressive Pursuit of Merger Litigation Outside of Delaware, IN-HOUSE DEFENSE Q. 65, 66 (2013), available at http://www.tklaw.com/files/Publication/46e0d0d7-c5el-415c-b886-a4f47d258c1/AggressivePursuitofMergerLit.pdf (“[J]udges in other venues may appear more friendly to shareholders.”); Faith Stevelman, Regulatory Competition, Choice of Forum, and Delaware’s Stake in Corporate Law, 34 DEL. J. CORP. L. 57, 65 (2009) (noting that access to forums beyond Delaware’s equity courts “exerts a salutary, countervailing force against corporate managers’ preferences in Delaware corporate law”). Not surprisingly, the pro-business U.S. Chamber of Commerce’s Institute for Legal Reform ranked Delaware number one in the country in its State Liability Systems Survey every year that the organization conducted the survey during the 2002–2012 period. See U.S. CHAMBER INSTIT. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY 7 (2012), available at http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf. The survey considers such factors as the handling of class action lawsuits and judges’ competence and impartiality. Id. 207. See Hernand & Baxter, supra note 179 (“[C]ompanies favor shareholder litigation in the Court of Chancery because it is a court of equity, which is one of the principal reasons plaintiffs’ attorneys express for avoiding the court. As a court of equity, plaintiffs in Chancery Court cannot recover punitive damages (unless expressly authorized by statute) or demand a jury trial.”). However, other states may be moving in Delaware’s direction. At least two California Superior Courts have held that plaintiffs in merger cases are not entitled to jury trials, on the ground that breach of fiduciary claims are equitable in nature. Feldman, supra note 34. 208. See, e.g., Kent Greenfield, Law, Politics, and the Erosion of Legitimacy in the Delaware Courts, 55 N.Y.L. SCH. L. REV. 481, 482 (2011) (“The assertion of Delaware judicial superiority is so much a majority view that it in effect constitutes conventional wisdom within the corporate law academy.”). Professor Greenfield provides a dissenting view. Id. at 491–96. For another strong dissenting view, see Carney & Shepherd, supra note 77, at 4-17, 49–55. 209. See John F. Coyle, Business Courts and Interstate Competition, 53 WM. & MARY L. REV. 1915, 1918 (2012) (identifying states business courts have been established). 210. DEL. STATE BAR ASS’N COMM. ON JUDICIAL COMP., REPORT TO THE DEL. COMP. COMM’S 2012 1, 15 (Dec. 11, 2012), available at http://www.delawarepersonnel.com/class/docs/comp/2013_de_bar_assoc-report.pdf (“Competing states are modeling their business courts after the Court of Chancery.”). 211. See, e.g., N.Y. SUP. CT. R. § 202.70(b) (outlining court rules for New York’s commercial division, including permissible grounds for relief). 212. See Delaware’s Future: Ted Mirvis and His Charter Proposal, 12 M&A J. 1, 2 (2012) (quoting Wachtell, Lipton, Rosen & Katz partner Theodore N. Mirvis), available at http://www.mayerbrown.com/files/News/20179335-acdd-40e0-9772-b1449ea546d/Presentation/NewsAttachment/1d09538-1f38-45d0-814 4-485290e9164d/TheMAJoumalVol_12No_5.pdf (noting that state business courts can “move very quickly”). 213. See id. (quoting Theodore Mirvis for the proposition that rulings by non-Delaware business courts have not “created any issue about the development of the law”). After a long debate, California rejected the idea of a specialized business court in favor of specialized complex litigation courts. Lee Applebaum, Future Trends in State Courts: The Steady Growth of Business Courts, NATIONAL CENTER FOR STATE COURTS 70, 70 (2011).
in various business courts reveal high levels of satisfaction with such courts.214 Key states that lack business courts, but serve as headquarters for numerous large companies, are also quite capable of applying Delaware law.215

A second reason why forum selection clauses provide a sub-optimal solution is that, as indicated above, the enforceability of such clauses remains uncertain. Forum selection clauses fall short to the extent that predictability is one of the key attributes of an optimal solution.216 Indeed, prior to Boilermakers the total number of Delaware corporations with exclusive forum bylaws was declining, probably in part as a reaction to the legal uncertainty.217 Eight companies adopted exclusive forum bylaws during the January–October 2012 period, but 14 companies repealed such bylaws during that same period.218

This uncertainty is magnified because shareholder sentiment regarding exclusive forum provisions is far from uniform.219 Such proposals were new for the 2011 proxy season, following the 2010 Revlon decision. From the beginning of that proxy season to December 2013, fewer than 15 management proposals to amend corporate charters to add exclusive forum provisions went to a vote.220 In most instances the amendments passed, generally by a narrow margin, except where there was sizable insider ownership.221 However, recent successful votes have been characterized as unrepresentative of broader shareholder sentiment, in light of company-specific factors.222 During the 2012 proxy season, activist-investor Amalgamated Bank offered non-binding repeal proposals to an additional four corporations. Two of these companies repealed their bylaws prior to a

available at http://www.ncleg.net/documentsites/committees/BCCI-6628/2014-1-23%20Meeting/05-2%20The_Steadi_Growth_of_Business_Courts.pdf. But even the complex litigation courts have become very familiar with corporate litigation involving Delaware law. See Armour et al., supra note 12, at 1397 (discussing the considerable expertise of such courts).

214. See Coyle, supra note 209, at 1976 (citing surveys taken in Pennsylvania and Massachusetts).


216. See Mitchell Lowenthal, Enhancing the Promise of Exclusive Forum Clauses, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Aug. 21, 2013, 8:52 AM), http://blogs.law.harvard.edu/corpgov/2013/08/21/enhancing-the-promise-of-exclusive-forum-clauses/ (“[U]ntil the decisional law outside of Delaware (or other state of incorporation) accepts the validity of exclusive forum selection clauses, and the circumstances become well-defined where fiduciary duties require suits outside of the selected forum to continue there, the very uncertainty and inefficiencies that forum selection clauses are designed to address will to a meaningful degree remain.”).

217. See Allen, supra note 171, at 1–2 (noting that forum selection bylaw adoptions “ground to a halt” in 2012 after the Boilermakers litigation commenced); Coffee, supra note 55, at 401 (positing that legal uncertainty was one factor explaining why corporations were refraining from adopting forum selection clauses).


219. Id.


221. Id.

222. See Allen, supra note 96, at 4 (highlighting that “shareholder sentiment on exclusive forum provisions is far from uniform”).
stockholder vote. The remaining two companies (Chevron Corporation and United Rentals, Inc.) opted to take the repeal proposals to their shareholders, who defeated them.

The uncertainty surrounding exclusive forum provisions is further magnified because the major proxy advisory firms and many institutional investors oppose such provisions. Proxy advisors’ views are especially important because they are often relied upon by institutional investors—who hold approximately 60% of publicly traded stock—in casting their stockholder votes. Institutional Shareholder Services, Inc. (ISS) and Glass Lewis & Co. (Glass Lewis) control about 97% of the market for proxy voting advice. ISS is the more influential of the two firms, by virtue of its significantly greater market share. ISS has a market share of 61%, compared with approximately 37% for Glass Lewis. An ISS recommendation in favor of a given shareholder proposal increases the vote for approval by an average of 15%, and in other cases its influence is even greater.

ISS’s updated proxy voting guidelines for 2015 provide that it will review on a case-by-case basis those bylaws which impact shareholders’ litigation rights, including exclusive venue provisions. The updated guidelines identify multiple relevant factors, including: (1) the company’s stated rationale for adopting such a provision, and (2) the disclosure of past harm from shareholder lawsuits in which plaintiffs were unsuccessful or from shareholder lawsuits outside the jurisdiction of incorporation.

223. Id. at 5.
224. Id. at 5–6; see also Tom Hals, Companies Adopt Tweaked Forum Selection Bylaws, Study Finds, REUTERS LEGAL (Dec. 3, 2013), https://a.next.westlaw.com/Document/1c0d47fe05e1411e38e8080ec30f8d0a/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default (access required) (noting that many companies, fearing shareholder backlash, have declined to adopt forum selection bylaws).
226. The pervasive influence of proxy advisory firms has attracted growing attention. See generally James K. Glassman & Hester Peirce, How Proxy Advisory Services Became So Powerful, MERCATUS CENTER AT GEORGE MASON UNIVERSITY (June 2014), available at http://mercatus.org/sites/default/files/Peirce-Proxy-Advisory-Services-MOP.pdf (outlining the rise in proxy advisory firms’ power and related policy considerations); see generally Paul Rose, On the Role and Regulation of Proxy Advisors, 109 MICH. L. REV. FIRST IMPRESSIONS 62 (2011) (discussing the rise and role of proxy advisors).
227. Gregory, supra note 225.
generally opposes forum selection bylaws unless the corporation: (1) provides a compelling argument as to why the provision would directly benefit shareholders, (2) provides evidence of abuse of legal process in other, non-favored jurisdictions, (3) narrowly tailors such provision to the risks involved, and (4) maintains a strong record of good corporate governance practices. Glass Lewis has noted that exclusive venue provisions are not in the shareholders’ best interests because they effectively discourage derivative claims by increasing their associated costs and rendering them more difficult to pursue. An examination of ISS’s and Glass Lewis’s case-by-case recommendations suggests that, despite their official discretionary policies, as a practical matter both firms oppose exclusive forum provisions. Both firms supported the Chevron and United Rentals repeal proposals noted above.

Other key constituencies agree with the major proxy advisory firms that exclusive forum provisions are not corporate governance best practices. For example, both the Council of Institutional Investors (CII)—whose members have combined assets in excess of $3 trillion—and the American Federation of Labor and Congress of Industrial

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233. See Fitzgerald, supra note 231 (“For many companies, it will be difficult to obtain ISS support if they decide to ask shareholders to approve exclusive forum provisions, since the companies may be unable or unwilling to meet the factor related to disclosure of past harm suffered as a result of these types of suits.”); Theodore N. Mirvis et al., Implementation of a Forum Selection Bylaw, 50 BANK AND CORP. GOV. L. REP. (2013), available at http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22693.13.pdf (click on “Attached are materials” to access).

234. Allen, supra note 96.

235. See Policies on Corporate Governance Section 1.9, COUNCIL OF INSTITUTIONAL INVESTORS (May 9, 2014), http://www.cii.org/corp_gov_policies (“Companies should not attempt to restrict the venue for shareholder claims by adopting charter or bylaw provisions that seek to establish an exclusive forum. Nor should companies attempt to bar shareholders from the courts through the introduction of forced arbitration clauses.”); Stephanna F. Szolloski, Note, Oh the Places Stockholders Will Go! A Guide for Navigating Forum Selection Bylaws Outside of Delaware, 98 MINN. L. REV. 1980, 1996 (2014) (noting that CII “unequivocally opposes adoption of all forum-selection provisions”).

Organizations (AFL-CIO)\textsuperscript{237} have recommended that U.S. companies not restrict the
venue for shareholder claims by adopting exclusive forum provisions. Opposition by the
proxy firms and CII may have deterred more widespread adoption of forum selection
provisions.\textsuperscript{238}

Third, while the Court of Chancery did not address this issue, \textit{Boilermakers} makes it
increasingly likely that corporations will adopt forum selection clauses that specify
mandatory arbitration of shareholder claims, and arbitration entails a host of negative
consequences. In \textit{Corvex Management LP v. CommonWealth REIT}, a Maryland trial court
applied contract law principles to determine that an arbitration bylaw adopted by a real
estate investment trust was enforceable.\textsuperscript{239} The court concluded that plaintiffs had
knowledge of the bylaw, they assented to it by purchasing stock, and there was sufficient
consideration for it to be binding.\textsuperscript{240} The \textit{Corvex} decision, issued in 2013, has no
precedential value,\textsuperscript{241} but such decisions may become increasingly common, insofar as the
basic rationale of \textit{Corvex} is the same as the rationale in \textit{Boilermakers}. Indeed, two post-
\textit{Corvex} decisions issued in 2014—one of which approvingly cited \textit{Boilermakers}—
reinforced \textit{Corvex}.\textsuperscript{242} These cases have pushed the door open to widespread adoption of

\textsuperscript{237} See generally Proxy Voting Guidelines, AFL-CIO 20 (2012), available at
http://www.aflcio.org/content/download/12631/154821/proxy_voting_2012.pdf (providing proxy voting
guidelines for AFL-CIO members); Holly J. Gregory, \textit{The Elusive Promise of Reducing Shareholder Litigation
Through Corporate Bylaws}, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (June 9, 2014, 9:25 AM),
http://blogs.law.harvard.edu/corpgov/2014/06/09/the-elusive-promise-of-reducing-shareholder-litigation-
through-corporate-bylaws/ (noting opposition by AFL-CIO to such provisions).

\textsuperscript{238} Alan L. Beller, \textit{Selected Issues for Boards of Directors in 2014}, HARV. L. SCH. F. ON CORP.
GOVERNANCE AND FIN. REG. (Feb. 1, 2014, 9:00 AM), https://blogs.law.harvard.edu/corpgov/2014/02/01/
Item for Corporate Governance and M&A Checklists}, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG.
(July 14, 2014, 9:19 AM), http://blogs.law.harvard.edu/corpgov/2014/07/14/exclusive-forum-provisions-a-new-
item-for-corporate-governance-and-ma-checklists/ (noting that ISS recommended against approval by
stockholders of 11 exclusive forum provisions that were put to votes during the period January-early June 2014,
but each one passed).

\textsuperscript{239} Corvex Management LP v. CommonWealth REIT, No. 24-C-13-001111 (Md. Cir. Ct. May 8, 2013),

\textsuperscript{240} Id.

\textsuperscript{241} See Kevin LaCroix, \textit{More About Arbitration Clauses in Corporate By-Laws}, D&O DIARY (July 11,
2013, 12:43 AM), http://www.dandodiary.com/2013/07/articles/director-and-officer-liability-1-more-about-
arbitration-clauses-in-corporate-by-laws/ (noting that plaintiff Corvex filed a notice of appeal of the trial court’s
decision but later dismissed the appeal to pursue arbitration).

2014), available at http://www.sidley.com/files/News/83d08302-7548-492b-96c4-1a3679f9d4b00/Presen-
tation/NewsAttachment/266b3896-0448-4de1-8d39-45477e25fd31/Link_9_06-03-14.pdf (denying plaintiff
shareholders’ request for a declaratory judgment on the basis that the arbitration clause
contained in the company’s bylaws was invalid and unenforceable); Katz v. CommonWealth REIT, Case No. 24-
96c4-1a3679f9d4b00/Presen/attachment/b271d8d2-2bd9-4566-9ed4-3bd99105b696Link_7_06-03-
14.pdf (citing \textit{Boilermakers}, and concluding that “stockholders assent to a contractual framework that explicitly
recognizes that they will be bound by bylaws adopted unilaterally pursuant to Maryland REIT law”). \textit{Corvex},
\textit{Delaware County Employees Ret. Fund}, and \textit{Katz} are discussed in Andrew Stern et al., \textit{Two More Bullets to Fight
Corporate Activism}, LAW360 (May 15, 2014, 7:10 PM), http://www.law360.com/articles/536771/2-more-bullets-
arbitration provisions in bylaws. After all, an arbitration clause is nothing more than a specialized kind of forum selection clause.

Mandatory arbitration of intra-corporate disputes is unwise for numerous reasons. First, mandatory arbitration may be contrary to the anti-waiver provisions in section 14 of the Securities Act of 1933 and section 29(a) of the Securities Exchange Act of 1934. The provisions establish in substance that any condition, stipulation or provision binding any person to waive compliance with those statutes and their rules shall be void. Both provisions are designed to prevent negotiated deals that would undermine the protection offered by the securities laws.

The Securities and Exchange Commission (SEC) is hostile toward mandatory arbitration and generally will not allow a company to go public with such a provision, although it has said little about arbitration bylaws adopted by companies that are already public. In 2012, the SEC rejected an effort by The Carlyle Group L.P. to go public with a provision in its partnership agreement requiring individual arbitration instead of securities to-fight-corporate-activism (access required) (concluding that these decisions “suggest that other jurisdictions may view such provisions favorably”).

243. See Brian J. Quinn, Adoption of Exclusive Forum Bylaw Provisions, M&A LAW PROF BLOG (July 3, 2013), http://lawprofessors.typepad.com/mergers/2013/07/adoption-of-exclusive-forum-bylaw-provisions.html (predicting that Boilermakers may further open the door to widespread adoption of arbitration provisions in bylaws); Andrew W. Stern et al., A Template for Tamping Down Corporate Activism, LAW360 (July 8, 2013), http://www.sidley.com/files/Publication/bb0070b4-af61-4930-a79f-209e090b0f2/Presentation/PublicationAttachment/b89eb01d-5273-433b-b4a9-2c4e929588a0/A%20Template%20For%20Tamping%20Down%20Corporate%20Activism.pdf (noting that Corvex “can be viewed as a green light for the boards (of Maryland companies at least) to include broad arbitration clauses in their bylaws without seeking shareholder approval”).

244. See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 482-83 (1989) (holding predispute agreement to arbitrate claims under the Securities Act enforceable); Paul Weitzel, The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement through Arbitration Provisions in Charters and Bylaws, BYU L. REV. 65, 99 (2013) (“[A]rbitration agreements are typically analyzed as forum selection clauses.”). One countervailing factor which may discourage widespread adoption of arbitration bylaws is that pursuant to the Federal Arbitration Act there is virtually no judicial review of arbitration awards. See 9 U.S.C. § 10(a) (2012) (identifying four limited grounds for vacating an award); Barbara Black, Arbitration of Investors’ Claims Against Issuers: An Idea Whose Time Has Come?, 75 LAW & CONTEMP. PROBS. 107, 109, 120 (2012) (noting this very narrow review “may make the risk of an aberrational award unacceptably high” and that securities class actions and derivative suits are the paradigmatic high-stakes cases where such a risk is particularly unacceptable to issuers and leading proxy advisory firms will probably oppose such bylaws for the same reasons they generally oppose forum selection bylaws).


class actions. That same year it granted no-action relief to two corporations seeking to exclude stockholder proposals to amend bylaws to provide for mandatory individual arbitration under certain circumstances, stating that there was some basis for the view that such amendments would violate the federal securities laws. The SEC did not elaborate, consistent with its custom, but it is likely that it accepted the argument that the arbitration proposals, if adopted, would violate the anti-waiver provisions.

Second, if mandatory arbitration bylaws barring class actions are enforceable, "the logical outcome would be a marked decline in class actions," including meritorious actions. This would significantly reduce securities class action litigation’s policing effect. Third, to the extent that mandatory arbitration of shareholder disputes becomes the norm, this development risks degrading Delaware’s continued maintenance and development of its corporate common law. A similar degradation of contract law development related to broker-dealer disputes followed the imposition of mandatory arbitration in that context. To the extent that the development of Delaware corporate law is viewed positively, arbitration provisions are undesirable. Overall, the most commonly proposed solution to the problem of multijurisdictional deal litigation—the adoption and enforcement of exclusive forum provisions designating Delaware—has numerous disadvantages that collectively render it a poor idea.

B. Amendment of SLUSA and CAFA

A second common proposal is amendment of SLUSA’s Delaware carve-out and the parallel provision in CAFA to provide that class actions brought under the carve-outs (and


252. Cf. Allen, supra note 249, at 18 ("The Staff’s position is at odds with Supreme Court precedent that does not construe agreements to arbitrate as waivers of substantive rights."); Hal S. Scott & Leslie N. Silverman, Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes, 36 HARY. J.L. & PUB. POL’Y 1187, 1221 (2013) (disagreeing with the argument that arbitration proposals violate anti-waiver provisions); Barbara Black, Arbitration of Investors’ Claims Against Issuers: An Idea Whose Time has Come?, 75 LAW & CONTEMP. PROBS. 107, 108 (2012) (noting that the SEC “has never repudiated its staff position that an arbitration provision in a publicly traded issuer’s governance documents would violate the anti-waiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934”).


256. See, e.g., Fisch, supra note 206, at 740 (“Delaware law offers distinctive substantive and structural attributes that other commentators and I have argued make it particularly well-suited for regulating the public corporation.”).
shareholder derivative actions with similar effect) may be filed only in the courts of the defendant company's state of incorporation. Congress enacted SLUSA in 1998, three years after it enacted the Private Securities Litigation Reform Act (PSLRA).257 The PSLRA was enacted to address perceived abuses of class action litigation in securities litigation.258 Its multiple provisions limit recoverable damages and attorneys’ fees, provide a safe harbor for forward-looking statements, impose restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, authorize a stay of discovery pending resolution of motions to dismiss, and impose heightened pleading requirements in actions brought pursuant to Securities Exchange Act section 10(b)259 and companion Rule 10b-5.260

Congress convened hearings several years after the PSLRA was enacted to assess its impact. It found that to avoid the obstacles PSLRA created, plaintiffs began to file class actions under state law, often in state court.261 In response, Congress enacted SLUSA in 1998 to stem the shift from federal to state court and prevent private state class action securities fraud litigation from frustrating the objectives of the PSLRA.262

SLUSA precludes covered class actions based on state law claims alleging misrepresentations in connection with the purchase or sale of nationally traded or registered securities.263 To prevent SLUSA-precluded actions from being litigated in state court, SLUSA authorizes defendants to remove such actions to federal court.264 This ensures that federal courts have the opportunity to determine whether SLUSA preclusion has occurred. Any suit removable under SLUSA is precluded, and any suit not precluded is not


258. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81-82 (2006) (citing the House Conference report accompanying the PSLRA for proposition that “nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and ‘manipulation by class action lawyers of the clients whom they purportedly represent’ had become rampant in recent years”).


260. 17 C.F.R. § 240.10b-5 (2013). Section 10(b) and Rule 10b-5 broadly prohibit deception, misrepresentation, and fraud in connection with the purchase or sale of any security. Dabit, 547 U.S. at 78. The major provisions of the PSLRA are identified in Dabit, 547 U.S. at 81.

261. See, e.g., H.R. Rep. No. 105-803, at 14-15 (1998) (stating that “[t]he managers also determined that, since passage of the Reform Act, plaintiffs’ lawyers have sought to circumvent the Act’s provisions by exploiting differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act’s procedural or substantive protections against abusive suits are available”).

262. See Atkinson v. Morgan Asset Mgt., Inc., 658 F.3d 549, 554 (6th Cir. 2011) (“Congress enacted SLUSA to ensure that PSLRA’s standards govern fraud-based class actions involving securities.”); Erin O’Hara O’Connor & Larry E. Ribstein, Preemption and Choice-of-Law Coordination, 111 Mich. L. Rev. 647, 687 (2013) (“SLUSA was enacted to cut off an attempted end run around . . . [the PSLRA].”).


SLUSA thus prevents plaintiffs from evading the requirements of the PSLRA by artfully pleading what are essentially federal securities claims under the rubric of state common law.

SLUSA also includes a savings clause, known as the Delaware carve-out, which preserves certain state law actions based on the statutory or common law of the state in which the issuer is incorporated or organized. The savings clause is widely referred to as the Delaware carve-out because it has a disproportionate impact on Delaware, as more than 60% of Fortune 500 companies and more than 50% of all companies whose shares trade on major U.S. exchanges are incorporated there. If a federal court determines that an action may be maintained in state court pursuant to the carve-out, the proper course is for the federal court to remand. SLUSA’s legislative history suggests that the Delaware carve-out has two overlapping objectives: (1) preservation of state law actions brought by shareholders against their own corporations in connection with corporate transactions requiring shareholder approval, such as mergers and tender offers, whether or not the corporations issued nationally traded securities, and (2) deference to Delaware courts.

CAFA, enacted in 2005, effectively federalized class actions. CAFA permits the removal from state court to federal court of class actions involving at least 100 claimants where the amount in controversy exceeds five million dollars and there is minimal, rather than complete diversity—at least one member of the plaintiff class is of diverse citizenship from at least one defendant. CAFA, like SLUSA, has a Delaware carve-out. CAFA carves out an exception for class actions that solely involve “internal affairs or governance of a corporation or other form of business enterprise and arise under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized.”

Various commentators have argued that the Delaware carve-outs in SLUSA and CAFA facilitate multijurisdictional M&A litigation and elimination or amendment of the

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265. Kircher v. Putnam Funds Trust, 547 U.S. 633, 644 (2006); see Proctor v. Intertech., Inc., 584 F.3d 1208, 1228 (9th Cir. 2009) (“We now hold that SLUSA requires remand once a federal court dismisses precluded claims.”).
266. 15 U.S.C. § 77p(d); 15 U.S.C. § 78bb(f)(1)(A); see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 87 (2006) (describing the Delaware carve-out as applying to class actions based on the law of the state in which the issuer of the covered security is incorporated). SLUSA also includes other exceptions. It does not apply to class actions with fewer than 51 persons or prospective class members and it does not apply to actions brought on behalf of a state. Chadboume & Parke LLP v. Troice, 134 S. Ct. 1058, 1064 (2014).
267. See supra note 10 and accompanying text.
270. See O’Connor & Ribstein, supra note 262, at 689 (noting SLUSA’s legislative history “indicating that Congress’s respect for Delaware courts was a justification for the carve-out”).
271. Griffith & Lahav, supra note 90, at 1108.
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C. Judicial Comity

Another proposed solution is the expansion of comity and cooperation between courts. Judicial comity is the respect that courts of one jurisdiction exhibit to courts of another jurisdiction by giving effect to the other’s laws and judicial decisions. Comity is a cornerstone of the courts’ discretionary power to stay proceedings in deference to proceedings in another jurisdiction. Where comity is employed, judges weigh a variety of factors to determine which court is the most appropriate sole venue for parallel litigation. These factors might include the courts’ respective docket backlogs and subject matter expertise, the relative quality of the cases filed, the attorneys’ qualifications to pursue the litigation, and the competing jurisdictions’ interests in the defendant corporation’s affairs.
Comity's probable primary attraction is that it is a low-cost solution that requires no major modification of the current judicial system. There is currently no official conduit for judicial communication across jurisdictional lines and there is no central registry to track parallel litigation in different states. However, these deficiencies are not insuperable obstacles to greater judicial comity and cooperation. Instead, other issues prevent comity from being an effective solution to the problem of multijurisdictional litigation. An obvious problem, noted by some of comity's advocates, is that there is no policing mechanism to deal with non-cooperating judges or counsel. Even where cooperation does occur, there is little assurance that judges will reach an agreement on the appropriate forum. This is especially likely to be true in cases involving Delaware-chartered corporations, where Delaware judges generally perceive that they are much better-equipped to apply Delaware law. As indicated below, where a case is first-filed in Delaware, Delaware courts almost never agree to stay the litigation in favor of a parallel action filed elsewhere. They rarely agree to stay a Delaware action in favor of a parallel action involving the application of Delaware law. There is no reason to expect this situation to change.

D. One-Forum Motions

A fourth proposed solution is a specific application of comity—the increased use of one-forum motions. These motions are sometimes referred to as Savitt motions and often have the formal title of "Motion to Proceed in One Jurisdiction, Dismiss or Stay Litigation in the Other Jurisdiction, and Organize Counsel for the Putative Class." Such a motion has all of the foregoing objectives and typically asks the judges in each jurisdiction where plaintiffs have filed suit regarding merger activity to confer with one another, select a single forum in which the case will proceed, and stay or dismiss the parallel suits. On its face, the motion—which typically is filed in all forums where litigation regarding a deal is pending—does not favor proceeding in one jurisdiction over another.

By the fall of 2011, at least 16 such motions had been filed in the Delaware Court of Chancery. Some members of the Court of Chancery have endorsed one-forum

280. See Griffith & Lahav, supra note 90, at 1129 (observing that there is "no established mechanism for informing Delaware . . . courts of pending merger litigation in other jurisdictions" and no "central registry").
281. Id. at 1129.
282. See, e.g., Thomas, supra note 19, at 1957 (noting that judicial comity lacks policing mechanisms); Thomas & Thompson, supra note 76, at 1804 ("Because [comity] is an informal, judge-driven solution, the potential for defections is significant, and there is no policing mechanism.").
283. See, e.g., Thomas, supra note 19, at 1957 ("Delaware can legitimately claim that it has a special interest in the consistency of its law, which may suffer injury if other states' courts take license with it.").
285. Id.
motions, but there has been no consensus about relevant factors when resolving them. A non-exclusive list of factors considered by the Court includes whether: (1) the case involves important issues of Delaware law, (2) one jurisdiction is more familiar with the case than the other, (3) forum non conveniens factors weigh in favor of staying the Delaware litigation, and (4) the procedural posture of the parallel actions places them in conflict. The first factor, which is based in part on the internal affairs doctrine, is typically regarded as the most important.

Of the 16 one-forum motions that had been filed by the fall of 2011, all but one proceeded in a single forum after the motion was filed. Nevertheless, it is difficult to evaluate the success of such motions on the basis of this statistic because the filing of the motion is frequently accompanied by contemporaneous informal negotiations between the parties and it is problematic to disentangle the effect of the filing of the motions from the impact of negotiations. In many cases the parties reach an agreement that moots the motion, either by settling the case, or by plaintiffs' counsel devising a leadership structure and the parties voluntarily agreeing to proceed in a single jurisdiction.

There are good reasons to doubt the efficacy of one-forum motions. First, the most important factor in resolving these motions is whether the case involves an important issue of Delaware law. Delaware courts perceive, correctly or not, that they have no serious rivals in their ability to decide such issues. As a result, of the 16 one-forum motions that had been filed by the fall of 2011, only one resulted in a stay of the Delaware litigation. A second reason to be skeptical is that the success of one-forum motions depends heavily on cooperation between judges in multiple jurisdictions, thereby rendering the motions' outcome inherently uncertain. Third, defendants do not necessarily support the filing of

287. Flinn & McCormick, supra note 284.
288. Id.
289. Id.
290. Id.
291. 1 ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATION LITIGATION § 7.9 (Denise Seastone Kraft & K. Tyler O'Connell eds. 2013).
292. Id.
293. See Alison Frankel, Delaware Supreme Court Rebukes Chancery for Litigation Territorialism, On the Case, 27 No. 20 WESTLAW J. DEL. CORP. 3 (Apr. 5, 2013) (“There is little doubt that the judges on Delaware’s Chancery Court believe they are unrivalled in the business of overseeing corporate litigation.”).
294. Flinn & McCormick, supra note 284. The one motion resulting in a stay of the Delaware action was In re OptionsExpress Holdings, Inc. S'holder Litig., No. 6314-VCL (Apr. 28, 2011) (staying Delaware litigation in favor of Illinois litigation because Illinois judge was more familiar with the issues); see also Baltay, supra note 11 (“Delaware courts will rarely, if ever, stay Delaware merger litigation in favor of merger litigation pending elsewhere.”).
295. See, e.g., Alison Frankel, Delaware Is Not the Only State with Multi-Forum Problems, 27 WESTLAW J. DEL. CORP. *1, *2 (2012) (noting that Delaware Vice Chancellor J. Travis Laster regularly calls judges in other courts to seek coordination, after the filing of one-forum motions).
296. See Parsons & Tyler, supra note 75, at 512 (“Hence, like comity, this solution may be more aspirational than actual.”); accord Myers, supra note 82, at 520 (concluding that one-forum motions “are likely to fail in the most important cases”); Mirvis et al., supra note 233 (noting that one-forum motions “are widely disfavored and
such motions because it requires them to cede control over where the litigation will ultimately land. 297 Fourth, while former Chancellor Chandler supported the use of one-forum motions, current members of the Court of Chancery have been much more skeptical. 298

E. First-Filed Rule and Forum Non Conveniens

Another proposed solution is strict enforcement of a “first-filed” rule. A number of states, including Texas and New York, follow or are perceived to follow such a rule, which gives control of M&A litigation to the first stockholder plaintiff and associated law firm to file a representative action, 299 and has been described as follows:

The contemporary version of the rule provides that when parallel litigation has commenced in separate courts, the first-filed suit has priority, and subsequent actions are to be stayed or dismissed in deference to it . . . The foundation for the rule is respect for plaintiff’s choice of forum, comity, and the orderly administration of justice. 300

Faster filing typically yields higher attorneys’ fees, 301 but does not necessarily benefit plaintiffs, with the result that judges have been increasingly skeptical of applying a first-filed rule in shareholder representative actions. 303

In Delaware, the decision of whether to stay or to dismiss a Delaware action in favor of a first-filed foreign action is a matter of discretion for the court. Under Delaware’s McWane doctrine, introduced in 1970, the court must stay second-filed equitable claims in favor of equivalent first-filed claims in front of competent tribunals. 304 Specifically, a stay is justified when: (1) there is a prior action pending in another jurisdiction, (2) involving the same parties, (3) litigating the same issues, and (4) the court in the foreign forum is capable of rendering prompt and complete justice. 305
The Chancery Court has negated the first factor’s importance by finding, on multiple occasions, that second-filed Delaware actions were effectively contemporaneously filed, even where the second filing did not occur until three weeks after the original suit commenced. With respect to the second and third factors, complete identity of parties or issues is not required. Instead, the parties must be “substantially the same,” and the actions in question must be closely related and arise out of a common nucleus of operative facts. The fourth factor entails the accurate application of controlling law, and Delaware courts frequently find that it militates against a stay. Delaware judges are especially reluctant to dismiss or stay an action that involves an emerging or novel aspect of Delaware corporate law. But even where the case does not involve any novel aspect of law, Delaware courts have expressed their strong interest in adjudicating matters involving the internal affairs of Delaware corporations as opposed to deferring to earlier-filed actions in other jurisdictions.

One notorious example involved the sale of Topps Co., which led to actions first-filed in New York and subsequent litigation in Delaware. The courts in both Delaware and New York refused to issue stays, leading to actively litigated parallel cases until the parties reached a settlement. A more recent example in 2012–2013 involved shareholder objections to the sale of NYSE EuroNext to Intercontinental Exchange, which again resulted in parallel litigation in Delaware and New York. Overall, over the years the Chancery Court has found a number of reasons to both reject the first-filed rule and justify denying a stay of Delaware litigation under McWane. A 2013 review found no cases

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307. See Ryan v. Gifford, 918 A.2d 341, 347 (Del. Ch. 2007) (finding pending actions “differ in some respects” and letting them proceed).


309. *Id.* at *6.

310. 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 13.5 (2014). See also Stevelman, *supra* note 206, at 117 (arguing that the “novel issues” rationale is so malleable as to fail as a legitimate decisional criteria).


312. See *In re Topps Co. S’holders Litig.*, 924 A.2d 951, 953 (Del. Ch. 2007) (denying motion to stay or dismiss Delaware action in light of pending identical action filed in New York).

313. See *In re Topps Co., Inc. S’holders Litig.*, 859 N.Y.S.2d 907, at *7 (N.Y. Sup. Ct. 2007) (denying motion to stay or dismiss consolidated shareholder class action in favor of similar class action litigation pending in Delaware Chancery Court).

314. See Tom Hals, *Delaware, New York Judges Clash over Control of Merger Cases*, REUTERS (Feb. 6, 2013), http://www.reuters.com/article/2013/02/06/mergers-lawsuits-idUSL1N0B49VK20130206 (discussing the parallel New York and Delaware litigation); Stevelman, *supra* note 206, at 119 (concluding that in *Topps*, the Court of Chancery “makes something akin to a universal claim of right to keep forum over Delaware corporate lawsuits in parallel proceedings”).


where a Delaware court relied exclusively on the first-filed rule in granting a stay, when the Delaware plaintiffs wished to continue the Delaware action and had not previously filed a similar representative action elsewhere.\textsuperscript{317} This finding reflects Delaware's aggressive approach to resolving and retaining forum in parallel proceedings. When there is no earlier-filed action in another jurisdiction, Delaware courts may invoke the doctrine of forum non conveniens (FNC). Whereas the McWane burden is relatively light, under FNC a defendant seeking dismissal must show that litigating in Delaware would impose an overwhelming hardship based on one or more of the multiple factors originally set forth in \textit{Gen. Food Corp v. Cryo-Maid, Inc.}\textsuperscript{318} These factors include (1) the applicability of Delaware law to the controversy; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; and (4) all other practical considerations that would make the trial easy, expeditious, and inexpensive.\textsuperscript{319} To prevail under the FNC doctrine in Delaware, a defendant must meet the high burden of showing that the \textit{Cryo-Maid} factors weigh so heavily that the defendant will face overwhelming hardship if the lawsuit proceeds in that state.\textsuperscript{320} The FNC law of most other jurisdictions also requires courts to weigh a number of public and private interests, and it provides courts with a great deal of discretion.\textsuperscript{321}

The expanded use of FNC motions has been touted as one possible solution to the problem of multijurisdictional M&A litigation.\textsuperscript{322} A fundamental problem with this solution, however, is that such motions lack predictability. Currently, FNC motions are rarely used in M&A litigation,\textsuperscript{323} and when they are used the outcome is unpredictable,\textsuperscript{324} just as it would be with such motions in other kinds of litigation.\textsuperscript{325} To the extent that an

\begin{itemize}
\item \textsuperscript{317} Strine et al., \textit{ supra} note 82, at 52; see also Myers, \textit{ supra} note 82, at 521 ("Delaware courts have declined to stay Delaware actions in favor of earlier filed complaints in other states."); Palmer & Gray, \textit{ supra} note 157 ("The Court of Chancery does not follow a first-filed rule.").
\item \textsuperscript{318} \textit{Gen. Food Corp. v. Cryo-Maid, Inc.}, 198 A.2d 681, 684 (Del. 1964).
\item \textsuperscript{319} Brookstone Partners Acquisition XVI, LLC v. Tanus, No. 7533-VCN, 2012 WL 5868902, at *7 n.64 (Del. Ch. Nov. 20, 2012).
\item \textsuperscript{320} \textit{Martinez v. E.I. DuPont De Nemours & Co.}, 86 A.3d 1102, 1104 (Del. 2014); see BALOTTI \& FINKELSTEIN, \textit{ supra} note 310, at § 13.5 (2014) ("A defendant cannot prevail by showing that another forum would be more convenient or even that all six \textit{Cryo-Maid} factors favor a dismissal, but must establish with particularity that it would suffer overwhelming hardship if forced to litigate in Delaware.").
\item \textsuperscript{321} Strine et al., \textit{ supra} note 82, at 72.
\item \textsuperscript{322} See, e.g., Justice Jack B. Jacobs: Helping to Shape Delaware Law, METROPOLITAN CORP. COUNSEL (Apr. 28, 2014), http://www.metrocorpounsel.com/articles/28695/justice-jack-b-jacobs-helping-shape-delaware-law (quoting former Delaware Supreme Court Justice Jack B. Jacobs for the proposition that FNC "is one doctrinal tool that the state courts can use to try to solve the multiphorm problem").
\item \textsuperscript{323} U.S. CHAMBER INST. FOR LEGAL REFORM, \textit{ supra} note 21, at 9.
\item \textsuperscript{324} See Latham & Watkins LLP, Designating Delaware’s Court of Chancery as the Exclusive Jurisdiction for Intra-Corporate Disputes: A New ‘Must’ for Delaware Company Charter or Bylaws, CORPORATE GOVERNANCE COMMENTARY 3 (Apr. 2010), available at http://www.lw.com/upload/pubContent/...pdf/pub3510_1.pdf (observing that the outcomes of FNC motions to transfer or stay shareholder actions “are not predictable”).
\item \textsuperscript{325} In its most recent decision on FNC, the Delaware Supreme Court affirmed the dismissal of a toxic tort claim against DuPont, a Delaware corporation whose headquarters is located in Wilmington, Delaware. \textit{Martinez v. E.I. DuPont De Nemours & Co.}, 86 A.3d 1102, 1113 (Del. 2014). As the dissent noted, the majority opinion’s real point was that “Delaware corporate law should be decided in Delaware and that other jurisdictions should ‘stay in their lane’.” \textit{Id.} at 1116 (Berger, J., dissenting).
outcome is predictable, it is likely that Delaware will use the FNC doctrine to retain cases filed in its courts, even though in almost all cases the convenience of the parties cuts in favor of the foreign forum taking the case. A somewhat contrary objection is that the FNC factors merely parrot the contemporary minimum contacts analysis by focusing upon a defendant’s geographic connections to a state, and therefore, may be of limited utility in determining the appropriate forum in multijurisdictional M&A litigation. Delaware Supreme Court Chief Justice Leo E. Strine, Jr. and his co-authors concluded that: “[N]either the first filed rule nor the doctrine of forum non conveniens responds to the multi-forum litigation problem in a principled manner that promotes stable and cohesive development of the law or protects parties’ legitimate expectations.”

F. State of Incorporation Rule or Legislation

A sixth proposal is for courts to adopt a rule or Congress to enact legislation requiring that M&A litigation be filed in the target company’s state of incorporation. Some commentators have argued in favor of the former, and a committee of the New York City Bar Association, among other groups, has suggested the latter. Purported benefits of such a rule include an increase in efficiency, a decrease in undesirable tactical maneuvering, and greater comity. The stated basis for such a rule is the internal affairs doctrine, which some commentators contend has a constitutional underpinning. Some Delaware courts have concurred that the doctrine is rooted in the U.S. Constitution, and believe this justifies the resolution of M&A litigation in the forum where the target company is incorporated.

326. See Stevelman, supra note 206, at 135 (stating that “until the Delaware Supreme Court rules otherwise, the Court of Chancery can continue to exert its authority expansively to keep forum over these cases”); Armour et al., supra note 12, at 1386 (observing that Delaware courts rarely grant FNC motions in favor of litigating in another state court).
327. Thomas & Thompson, supra note 76, at 1796.
328. Strine et al., supra note 82, at 76.
329. Id. at 54. Accord Palmer & Gray, supra note 157, at 5 (“The [FNC] doctrine is grounded in geographical convenience which has little relevance in identifying the forum most appropriate for deciding a stockholder class action or derivative suit based on intra-corporate fiduciary duty claims.”).
330. See, e.g., Micheletti & Parker, supra note 80, at 41–46 (proposing and arguing in favor of adoption of a state of incorporation rule).
331. See Comm. on Sec. Litig., Ass’n of the Bar of the City of New York, supra note 101, at 9 (stating that a “potential way to eliminate the costs of duplicative litigation would be to enact federal legislation requiring all deal litigation to be brought in the state of incorporation”).
332. Micheletti & Parker, supra note 80, at 41.
334. See, e.g., McDermott, Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987) (“Application of the internal affairs doctrine is not merely a principle of conflicts law. It is also one of serious constitutional proportions ….”).
335. See Micheletti & Parker, supra note 80, at 42 (“[M]embers of the Delaware Court of Chancery that have analyzed this issue have strongly indicated their belief that the constitutional underpinnings of the internal affairs doctrine warrants deal litigation being resolved in the forum where the subject company is incorporated.”).
There are multiple problems with judicial adoption of a rule requiring M&A litigation to be brought where the target is incorporated. One major problem, as some proponents readily acknowledge, is that the rule would have to be “universally adopted in order to be universally effective.”336 Universal adoption is extremely unlikely, partly due to statutory developments. California, for example, enacted a statutory exception to the internal affairs doctrine.337 California is not alone. A New York statute provides that domestic rules, inter alia, on shareholder rights and mergers apply to unlisted foreign companies that conduct more than one-half of their business income activities in New York.338

Moreover, the notion that the internal affairs doctrine has a constitutional basis is far from settled. Many scholars believe it has no such basis.339 Given the unsettled nature of the doctrine’s underpinning, it would be easy for non-Delaware courts seeking to retain M&A litigation to justify rejecting a state of incorporation rule. This is especially true for those non-Delaware judges who chafe under the constant refrain that only Delaware judges are truly capable of applying Delaware corporate law or are opposed to such a rule for public policy reasons. Finally, it is difficult to see exactly how the internal affairs doctrine

336. Id. at 46.
337. See CAL. CORP. CODE § 2115 (West 2010). Under section 2115, enumerated provisions of California’s corporate law govern a company incorporated in another state if: (1) California residents hold more than half of the company’s voting stock, (2) the company conducts a majority of its business in California (as measured by its assets, payroll, and sales), and (3) the company’s shares are not listed or traded on a national exchange. The provisions of California corporate law imposed by section 2115 are often contrary to the corporate law of a foreign company’s home state. For example, California law mandates cumulative voting for the election of directors, whereas Delaware law permits, but does not mandate, such voting. Jeffrey Selman & J.R. Eppler, Cutting Down California’s Long-Arm Statute, LAW360 (July 11, 2012, 2:05 PM), available at http://www.crowell.com/files/Cutting-Down-Californias-Long-Arm-Statute.pdf. The Delaware Supreme Court held that section 2115 violates “Delaware’s well-established choice of law rules and the federal constitution . . . .” VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1116 (Del. 2005); but see Matt Stevens, Note, Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations, 48 B.C. L. REV. 1047, 1047 (2007) (critiquing VantagePoint).
338. N.Y. BUS. CORP. LAW §§ 1319, 1320 (McKinney 2012).
339. See, e.g., Christoph Allmendinger, Company Law in the European Union and the United States: A Comparative Analysis of the Impact of the EU Freedoms of Establishment and Capital and the U.S. Interstate Commerce Clause, 4 WM. & MARY BUS. L. REV. 67, 84 (2013) (“In sum, the question of whether the internal affairs doctrine is a constitutional principle mandated, inter alia, by the dormant Interstate Commerce Clause remains unresolved in the U.S.”); Reza Dibadi, (Mis)Conceptions of the Corporation, 29 GA. ST. U. L. REV. 731, 758 n.115 (2013) (“The internal affairs doctrine, however, does not rise to the level of constitutional imperative.”); Mark J. Roe, Delaware’s Competition, 117 HARV. L. REV. 588, 597 (2003) (“[T]he internal affairs doctrine is just an understanding, not a crisp constitutional rule . . . .”); Note, The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for its Continued Primacy, 115 HARV. L. REV. 1480, 1482 (2002) [hereinafter Note, The Internal Affairs Doctrine] (“[A]lthough there have been some suggestions over the years—primarily by the Delaware Supreme Court—that the [internal affairs] doctrine has a constitutional basis, the bulk of these arguments appear spurious.”); Richard M. Buxbaum, The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law, 75 CAL. L. REV. 29, 35 (1987) (“[T]he constitutional ‘Delawarization of state corporation law . . . is not what CTS intends or effects.’”). In CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88–89 (1987), the Supreme Court hinted at a dormant Commerce Clause basis for the internal affairs doctrine. It did so as well in a prior case. Edgar v. MITE Corp., 457 U.S. 624, 645–46 (1982). But both of these hints were mere dicta. See, e.g., Note, The Internal Affairs Doctrine, supra, at 1495 (“[T]he Supreme Court’s broad references to the constitutional status of the internal affairs doctrine in MITE were merely dicta . . . .").
provides support for legislation requiring plaintiffs to commence M&A litigation where the target is chartered, insofar as the doctrine governs only choice of law.\textsuperscript{340} It is not jurisdictional.

A second major problem with a state of incorporation rule or statute is that such a rule or law, like many of the alternate proposals reviewed herein, would clearly favor Delaware as the presumptive M&A litigation forum. As such, it would enhance Delaware judiciary’s widely perceived pro-management bias\textsuperscript{341} and deprive plaintiffs of the opportunity to seek a jury trial and punitive damages in other jurisdictions. The likely net result is that legislation would be politically unsustainable.\textsuperscript{342} The counterargument that jury trials are a poor idea because jurors are biased against corporations merits scant attention. There is very little empirical evidence of jurors’ bias against corporate defendants.\textsuperscript{343} The additional counterargument—that juries are irrelevant because M&A litigation almost never goes to trial\textsuperscript{344}—also deserves to be dismissed. What matters is the opportunity for a jury to resolve these cases and the possibility of an award of exemplary damages.

G. Scrutiny of Attorneys’ Fees

Another perspective is that the only viable solution is for judges to shift attorneys’ fees in M&A litigation to discourage overuse or abuse of the class action device while encouraging meritorious litigation.\textsuperscript{345} Under the American rule, parties generally bear their own attorneys’ fees and costs,\textsuperscript{346} on the basis that a potential plaintiff should not be discouraged by the possibility of losing the case and having to cover the defendant’s expenses. An equitable exception to the American rule provides for fee-shifting under the “common fund” doctrine, which was developed to prevent a plaintiff from being likewise discouraged when the benefits of winning the case will inure to others.\textsuperscript{347} A widely recognized corollary to the common fund doctrine is the “common benefit” or “corporate benefit doctrine, pursuant to which a plaintiff stockholder may receive an award of attorneys’ fees when the litigation provides a substantial benefit to the corporation

\textsuperscript{340} \textit{Restatement (Second) of Conflict of Laws} \textsection 302 (1971); Verity Winship, \textit{Bargaining for Exclusive State Court Jurisdiction}, 1 \textit{Stan. J. Complex Litig.} 51, 56 (2012).

\textsuperscript{341} See Griffith & Lahav, supra note 90, at 1112 (“A Delaware monopoly over merger litigation[] threatens to increase the state’s promanagement bias, leading to worse outcomes for plaintiffs . . . .”).

\textsuperscript{342} See Grundfest & Savelle, supra note 105, at 351 (“It is, however, far from clear that such a measure would be politically sustainable . . . .”).

\textsuperscript{343} Steveleman, supra note 206, at 101.

\textsuperscript{344} See Thomas & Thompson, supra note 76, at 1797 n.239 (“Almost no cases go to trial . . . .”).

\textsuperscript{345} See Dias v. Purches, No. 7199VCG, 2012 WL 4503174, at *5 (Del. Ch. Oct. 1, 2012) (stating that “[i]t is the ability of bench judges over many diverse jurisdictions to shift fees in a way that discourages overuse or abuse of the class action mechanism while encouraging meritorious suits”).

\textsuperscript{346} Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967) (“The [American rule] has long been that attorney’s fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore.”).

\textsuperscript{347} Id. at 719.

\textsuperscript{348} See, e.g., Dias, 2012 WL 4503174, at *5 (“Under the corporate benefit doctrine, plaintiffs may be reimbursed for attorneys’ fees and expenses in corporate litigation.”).
regardless of whether the benefit is pecuniary in nature. Supplemental disclosures can constitute a common benefit and plaintiffs’ attorneys in M&A litigation rely on the doctrine to shift fees in exchange for the disclosures they achieve for the shareholder class. Many critics believe the doctrine provides a perverse incentive for counsel to file suit early and often.

State and federal courts in the United States have widely adopted the corporate benefit doctrine. Delaware is among the states that adopted the doctrine. In Delaware, the court may award attorneys’ fees in M&A cases in connection with claims brought individually, derivatively, or as a class action. Once the court has identified a corporate benefit, the plaintiff may be entitled to an award of fees if: “(1) the lawsuit was meritorious when filed; (2) the action producing the corporate benefit was taken by the defendant before a judicial resolution occurred; and (3) the resulting corporate benefit was causally related to the suit.” If the claim satisfies those factors and the court decides to make a fee award, the court must then determine the amount of the award.

In general, courts have broad discretion to make an award of attorneys’ fees in M&A litigation. In many states, including California, the discretion to award fees is guided by a lodestar analysis, which begins by multiplying the number of hours counsel devotes to


353. Griffith, supra note 349, at 45.


356. See Armour et al., supra note 12, at 1370 (stating that courts in most states use a lodestar analysis).
the litigation by counsel’s hourly rate.357 The court may increase or decrease the lodestar figure depending on various factors.358

Delaware does not use a lodestar approach to determine the amount of the fee award. Instead, Delaware courts use a seven-factor analysis, set forth by the Delaware Supreme Court in Sugarland Indus., Inc. v. Thomas,359 which typically assigns the most weight to the seventh factor—the size of the benefit conferred on the shareholders.360 Delaware also considered awards in prior cases where similar disclosures were obtained.361 Delaware’s approach had been widely perceived to be more generous than the lodestar approach other jurisdictions use.362 Some recent statistics confirm this perception. In 2012, the mean attorneys’ fee award in an M&A case filed in Delaware was $1.26 million, compared to a general sample average of $716,000.363 Defendants often agree not to oppose the fee application in connection with settlements of M&A litigation,364 and historically the Court of Chancery approved the full amount of the attorneys’ fees the parties agreed to in settling both class actions and derivative suits.365


358. These factors include: (1) the novelty and difficulty of the litigation’s legal issues; (2) counsel’s skill in addressing the issues; (3) the extent to which the nature of the litigation precluded other employment by counsel; and (4) the contingent nature of the fee award. Ketchum v. Moses, 17 P.3d 735, 741 (Cal. 2001).


360. In re PAETEC Holding Corp. S’holders Litig., No. 6761-VCG, 2013 WL 1110811, at *7 (Del. Ch. Mar. 19, 2013). The remaining factors include: the amount of time and effort applied to the case by plaintiffs’ counsel, the standing and ability of plaintiffs’ counsel, the contingent nature of the litigation, the stage at which the litigation terminated, and whether plaintiff can properly receive all of the credit for the benefit conferred. Id.


362. John Armour et al., Is Delaware Losing Its Cases?, 9 J. EMPIRICAL LEGAL STUD. 605, 643 (2012); but cf. Micheletti & Parker, supra note 80, at 39 (asserting that “Delaware courts have historically been conservative when approving fee awards for disclosure-based or other therapeutic settlements”).

363. Matthew D. Cain & Steven M. Davidoff, Takeover Litigation in 2012 5 (Feb. 1, 2013), http://papers.ssrn.com/sol3/papers.cfm;abstract_id=2216727. The situation is different with respect to disclosure-only settlements. See Kounman, supra note 56, at 3 (“Over the last four years (2010–2013), fees requested and approved in disclosure-only settlements were, on average, slightly lower in the Delaware Court of Chancery compared with other courts.”).


365. Armour et al., supra note 362, at 643.
Beginning in 2000, however, Delaware courts began to examine fee awards in M&A cases more carefully. Some observers point to *In re Digex Inc. Shareholders Litigation* as a turning point. In that case, Chancellor Chandler reduced a $24.75 million fee to $12.3 million after the plaintiffs obtained a $180 million settlement. Other cases followed with fee cuts, skeptical rhetoric on the part of Delaware judges, or both. *Digex* may have been a turning point, but the practice of Delaware courts to reduce fee awards did not begin in earnest until 2011, when the Court of Chancery slashed a fee award from the requested $750,000 to $75,000 in *In re Sauer-Danfoss Inc. Shareholders Litigation*.

Delaware courts' greater scrutiny of fee awards in M&A litigation could reduce the incentive for plaintiffs' lawyers to file suit in Delaware courts in cases involving Delaware targets. But such a reduced incentive is unlikely to have a significant impact on the problem of multijurisdictional M&A litigation. While specific examples of Delaware fee reductions can be found during the period commencing in 2000, there is no evidence to indicate that, as a general proposition, Delaware courts are examining fee awards with such care that reductions have become commonplace. Delaware judges do not routinely demand to examine detailed time sheets when reviewing fee applications and they continue to regard a fee of $400,000-$500,000 as the standard rate for a settlement that provides one or two meaningful disclosures in a proxy statement. That rate, which is

367. See Armour et al., supra note 362, at 644 n.76 (listing Delaware cases in which fees were reduced); Richard A. Rosen et al., *Settlement Agreements in Commercial Disputes* § 27.10 (2013) (“Recently the court has given much closer scrutiny to therapeutic benefits before approving a settlement and application for attorneys’ fees.”).
368. *In re Sauer-Danfoss Inc. S’holders Litig.*, 65 A.3d 1116, 1119 (Del. Ch. 2011). In appendices to this case the court set forth ranges of attorneys’ fees awarded for disclosures of questionable quality ($75,000-$225,000), one or two meaningful disclosures ($300,000-$550,000), and exceptional or significant additional disclosures ($800,000-$1,200,000). Id. at 1141.
369. Armour et al., supra note 362, at 645.
370. See Griffith, supra note 349, at 28 (“Fee reductions, however, are not likely to solve the crisis in shareholder litigation because they are ad hoc and scattered, more the luck of the judicial draw than a comprehensive program of reform.”).
371. See Fukumura & Adams, supra note 351, at 5.
372. See Nate Raymond, Alison Frankel’s On The Case: Don’t Mess with Texas (if You’re a Lawyer for Plaintiffs in an M&A Case), ON THE CASE (Oct. 9, 2012), http://newsandinsight.thomsonreuters.com/Legal/News (“[T]he Delaware bench regards a fee of $400,000 to $500,000 as the going rate for a settlement that provides one or two ‘meaningful’ disclosures in a proxy statement.”); but cf. Karlee Weinnmann, Chancery’s Appetite for Fee Awards Wanes as Deal Suits Rise, LAW360 (Apr. 23, 2014, 5:51 PM), http://www.law360.com/articles/530863/chancery-s-appetite-for-fee-awards-wanes-as-deal-suits-rise (access required) (noting that more recently Vice Chancellor J. Travis Laster has “walked back on that range after it became something of an implied benchmark for litigants looking for disclosure-based settlements”).
373. See Dias v. Purches, Civil Action No. 7199-VCG, 2012 WL 4503174, at *6 (Del. Ch. Oct. 1, 2012) (stating that “[t]his Court has often awarded fees of approximately $400,000 to $500,000 for one or two meaningful disclosures, such as previously withheld projections” (citing *In re Sauer-Danfoss Inc. S’holders Litig.*, 2011 WL 2519210, at *18 (Del. Ch. Apr. 29, 2011)). Meaningful disclosures ordinarily include previously withheld financial projections, bankers’ analyses, and conflict-oriented information about fiduciaries or their advisors. See Phillip R. Sumpter, Adjusting Attorneys’ Fees Awards: The Delaware Court of Chancery’s Answer to Incentivizing Meritorious Disclosure-Only Settlements, 15 U. Pa. J. Bus. L. 669, 709-10 (2013). Where the consideration for a settlement in deal litigation is monetary, rather than therapeutic benefits, the fee award is typically expressed as a percentage of the benefit obtained. During the period of 2005-2011, the average fee
especially significant to defendants in the context of a small-cap M&A transaction, provides little incentive for plaintiffs’ counsel to reduce their Delaware filings.

To the extent that Delaware courts begin to scrutinize fee awards ever more carefully, that will simply increase the incentive for plaintiffs’ counsel to file in other states, where review may be less intense. Delaware courts are aware of this incentive. They have made some massive fee awards in recent M&A cases, and these awards may have been a strategic response to the observed phenomenon of plaintiffs opting to file in other jurisdictions where fees have been less carefully examined. Delaware courts are highly motivated to retain jurisdiction over major M&A cases for multiple reasons. One reason is that such litigation supports the Delaware Bar—a leading local industry. A second is that Delaware judges want to maintain their elite status, and the best way to accomplish that is by handling a steady flow of cases that involve large deals and/or are likely to generate important precedents.

One other recent development in Delaware is germane to this analysis. In 2014, the Delaware Supreme Court held in *ATP Tour, Inc. v. Deutscher Tennis Bund* that a non-stock corporation’s bylaw that eschewed the American rule and shifted litigation expenses, including attorneys’ fees, to the losing plaintiff in intra-corporate litigation was permissible award in Delaware M&A settlements involving only monetary consideration was 24% of the benefit conferred.

**RICHARD A. ROSEN ET AL., supra note 367, at § 27.10.**


375. See Raymond, supra note 372 (“At those rates [of $400,000–$500,000 for one or two meaningful disclosures] it’s well worth lawyers’ time to bring M&A disclosure suits.”); but cf. Bradley W. Voss, *Delaware Chancery Emphasizes Materiality as Key in Disclosure-Based M&A Settlements*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Feb. 21, 2014, 9:02 AM), https://blogs.law.harvard.edu/corpgov/2014/02/21/delaware-chancery-emphasizes-materiality-as-key-in-disclosure-based-ma-settlements/ (“Several recent statements by the court emphasize, however, that fee awards in the $400,000 to $500,000 range should not be perceived as automatic, or the ‘default.’”).

376. See Coffee, supra note 55, at 390 (“[R]educing fee awards increases the incentive for relatively mobile plaintiffs’ attorneys to sue outside of Delaware.”).

377. In *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), the Delaware Supreme Court approved a fee award of $305 million in a derivative action with claims for breach of fiduciary duty. The fee award was 15% of the $2 billion damage award and was the largest fee award ever made in a shareholder derivative action. Joe Palazzolo, *How Much Is $300 Million in Attorneys’ Fees?*, WALL ST. J. LAW BLOG (Dec. 28, 2011, 12:21 PM), http://blogs.wsj.com/law/2011/12/28/how-much-is-300-million-in-attorneys-fees/. In approving this fee award the Delaware Supreme Court declined to apply a suggested “megafund rule” that would cap fees at a low percentage when the damage award is substantial. The court stated that it would not “impose either a cap or the mandatory use of any particular range of percentages for determining attorneys’ fees in megafund cases.” *Americas Mining*, 51 A.3d at 1261.

378. See McCormick et al., supra note 206, at 70 (“[I]t seems possible that the Delaware courts have recently supported substantial fee awards strategically in response to evidence that they have lost cases that they previously would have heard . . .”).


380. See Armour et al., supra note 12, at 1381.
under the DGCL. 381 The court held: “A fee-shifting bylaw . . . is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws.” 382 The court stated that whether a fee-shifting bylaw is enforceable depends on the manner in which it was adopted and the circumstances under which it was invoked. Specifically, a fee-shifting bylaw may be enforceable if adopted by the appropriate corporate procedures and for a proper corporate purpose. 383 Among other authorities, the court cited Boilermakers 384 to support its decision. The court issued its decision in the context of a non-stock corporation, but the opinion may be equally applicable to traditional stock corporations. 385

Two weeks after the court issued the ATP Tour decision, the Corporation Law Section of the Delaware State Bar Association proposed an amendment to the DGCL—Senate Bill 236 386—that was intended to limit the applicability of the decision to non-stock corporations. 387 One obvious concern was that the widespread adoption of fee-shifting bylaw provisions “could drastically reduce the ability of stockholders to bring even meritorious claims” 388 and thereby diminish Delaware’s preeminence in the field of corporate law. A second concern was that fee-shifting would undermine the limited liability protections the DGCL affords to shareholders. However, the Senate withdrew Senate Bill 236 following substantial lobbying by the pro-business U.S. Chamber Institute for Legal Reform. 389 The Senate withdrew the proposed amendment in favor of Senate Joint

382. Id. at 558.
383. Id. at 559.
384. Id. at 560 n.38.
385. Some commentators have assumed equal applicability. See, e.g., Gibson, Dunn & Crutcher LLP, supra note 47, at 16 (“[T]he holding in [ATP Tour] may be read to apply to all Delaware corporations.”). However, no court had made such a determination by November 2014.
388. George S. Geis, Shareholder Derivative Litigation and the Preclusion Problem, 100 VA. L. REV. 261, 292 (2014) (noting that fee-shifting “may put an enormous damper” on shareholder derivative litigation); Karen Weinmann, Del. Attys. Push to Shield Stock Cos. from Fee-Shifting Ruling, LAW360 (May 22, 2014, 6:30 PM), http://www.law360.com/articles/540901/del-attys-push-to-shield-stock-cos-from-fee-shifting-ruling (access required); Brian JM Quinn, ATP, Fee Shifting, and Transactional Litigation, M&A LAW PROF BLOG (May 28, 2014), http://lawprofessors.typepad.com/mergers/2014/05/atp-fee-shifting-and-transactional-litigation.html (“Clearly, such a bylaw, if adopted and upheld, would bring the transaction-related litigation train to a screeching halt or at the very least dramatically alter the settlement dynamics.”). Both ISS and Glass Lewis oppose fee-shifting bylaws. Pursuant to its 2015 Proxy Voting Guidelines Updates, ISS will recommend that shareholders vote against bylaws that mandate fee-shifting whenever plaintiffs are not completely successful on the merits. Institutional Investor Services, supra note 230, at 7. Glass Lewis & Co. “strongly opposes” the adoption of fee-shifting bylaws and if they are adopted without shareholder approval will recommend voting against the company’s governance committee. Glass Lewis, supra note 231, at 40.
Resolution No. 12,390 which postponed consideration of fee-shifting until at least 2015.391 In the interim, mostly smaller stock corporations—emboldened by ATP Tour—began to adopt fee-shifting bylaws.392 During the period from May to September 2014, 24 public companies adopted bylaws or charter provisions mandating that an unsuccessful plaintiff in shareholder litigation must pay the attorneys’ fees (and expenses) of all defendants, and the adoption trend was accelerating during that period.393

Texas, second to California as the home of the most Fortune 500 companies,394 has taken a different path from the one Delaware pursued. In 2003, the Texas Supreme Court amended Rule 42 of the Texas Rules of Civil Procedure to adopt a lodestar approach to fee determinations. Section (i)(2) of the amended Rule, regarding class actions, also provides that “[i]f any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.”395 In 2013, the Fourteenth District Texas Court of Appeals held in Kazman v. Frontier Oil Corp.396 that Rule 42(i)(2) applied to preclude the award of attorneys’ fees in cash to class counsel when the class received injunctive relief in the form of additional disclosures but no cash and unanimously struck a $612,500 fee.397 Kazman followed the lead the Fifth District Texas Court of Appeals established in 2012 when it struck a $1.1 million fee award in a disclosure-only settlement concerning the merger of Centex Corporation and Pulte Homes.398

*Kazman* and *Centex* may operate as major disincentives to the commencement of M&A litigation in Texas. If, as speculated, fee awards in disclosure-only Texas settlements

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"become as much of a bygone Texas as cattle drives through Fort Worth," then plaintiffs may shift their M&A filings elsewhere. But this is not inevitable. In an effort to circumvent Kazman and Centex, some plaintiffs have commenced direct action suits seeking to enjoin shareholder votes on mergers, in lieu of filing class actions. On its face, Rule 42(i)(2) only applies to class actions. Accordingly, settlements of direct action suits could encompass significant fee awards, thereby restoring plaintiffs’ incentive for making Texas state filings. An alternative effect of Kazman and Centex may be to encourage class litigants to pursue their merger objection lawsuits in federal court in Texas, where Rule 42 has no application. Under any of these scenarios M&A litigation is unlikely to decrease, just as it is unlikely to ebb in Delaware.


The amendment of 28 U.S.C. § 1407 is a better solution. That statute provides for the temporary transfer of civil actions pending in different federal districts and involving one or more common questions of fact to a single district for pretrial management by a single judge. The statute provides in section 1407(a) that:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

The JPML is a group of seven United States circuit and district court judges whom the Chief Justice of the United States Supreme Court chooses for service, with no limitation

399. Raymond, supra note 372; accord Haims & Beha, supra note 394 ("Kazman effectively precludes merger litigation in Texas.").
400. Raymond, supra note 372 (quoting Texas attorney Harry Susman for the proposition that either plaintiffs will decline to file in Texas, or if they do file, plaintiffs’ lawyers will refuse to settle in the absence of a monetary award).
402. David Sterling & Danny David, Securities Litigation Update: Recent Texas Appellate Opinion Removes Incentive for Shareholders' Counsel to Settle Merger Lawsuits on the Basis of Additional Disclosures, BAKER BOTS (Aug. 22, 2012), http://www.bakerbotts.com/file_upload/Update201208Lit-RecentTexasAppellateOpinion.htm ("We expect Centex to have the perverse result of encouraging class litigants to pursue their claims in the federal courts of Texas...").
403. 28 U.S.C. § 1407(a) (2014). Many states have enacted mini-MDL statutes which in certain respects mimic section 1407. See Ostolaza & Hartmann, supra note 31, at 69-74 (identifying 15 states with mini-MDL statutes). In other respects the mini-MDLs differ significantly from their federal counterpart. For example, some of the state versions permit coordination for both pretrial and trial purposes, whereas the federal MDL permits only the former. Mark Herrmann et al., Creating Mini-MDL Statutes, 32 LITIG. 39, 39 (Fall 2005), available at http://www.jonesday.com/files/Publication/43684faa-fd6c-4990-a5b6-4cbb608b7391/Prezentation/PublicationAttachment/58687413-88b1-4620-897b-73e2108eaa8e/Herrmann_012006pdf.pdf.
on their terms, while they remain on their respective courts. Congress created the JPML in 1968 for the primary purpose of providing centralized management under court supervision of pretrial proceedings in multidistrict litigation (MDL) in order to assure the just and efficient conduct of such actions. The text of 28 U.S.C. § 1407 refers only to transfers for pretrial proceedings, and once a transfer occurs the transferee judge handles all discovery matters, pretrial motions, and pretrial alternative dispute resolution. While the text is limited, in practice, once the JPML orders a transfer, a case rarely comes back to its original district for trial.

Transfers under 28 U.S.C. § 1407 are made without consideration for either personal jurisdiction over the parties or the venue requirements of 28 U.S.C. § 1407. Instead, the JPML, functioning as the federal judiciary’s traffic controller, considers only two issues in resolving transfer motions in new dockets. First, the panel considers whether common questions of fact among pending civil actions exist such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions. Second, the panel considers which federal district judges are best situated to handle the transferred matters. As to the latter issue,
neither section 1407 nor the JPML's own rules provide any guidance. The concurrence of four of the seven panelists is required for any action to occur.\textsuperscript{410}

The JPML exercises broad discretion in deciding transfer motions\textsuperscript{411} and that discretion is usually exercised in favor of transfer. During the 2000–2007 period, the grant rate ranged between 67\% and 87\%,\textsuperscript{412} although more recently it declined to about 55\%.\textsuperscript{413} Appeal is available only by petition for a writ of mandamus or prohibition.\textsuperscript{414} To date, there have been no successful appeals.\textsuperscript{415} The overall result is that approximately one-third of all pending federal civil cases are part of MDL\textsuperscript{416} and in the JPML's nearly 50 years of existence, it has consolidated almost 400,000 lawsuits for pretrial proceedings.\textsuperscript{417} Such litigation has been called the "primary vehicle for the resolution of complex civil cases."\textsuperscript{418}

Congress should amend 28 U.S.C. § 1407 to provide the JPML with authority to transfer civil litigation that is pending in different states to a single state for pretrial management and trial by a single state court, subject to certain criteria. The same statutory criteria that currently condition transfers of federal cases should apply to state transfers. Specifically, for a transfer to occur under this proposal, there must be common questions of fact among pending civil actions such that centralization of those actions in a single district will further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions. With respect to M&A litigation, this Article contemplates that such transfer authority would be limited to deals valued at more than $100 million that involve publicly traded target companies with an offering price of at least five dollars per share. This proposal does not contemplate that the JPML would receive authority to transfer state cases to federal court. However, it does contemplate that such cases would be transferred for both pretrial proceedings and trial.

Authorizing the JPML to transfer M&A litigation will solve the multijurisdictional M&A problem while avoiding the negative aspects of many of the alternative proposals. Coordinating every M&A action arising from a single deal in one court, before one judge, would virtually eliminate the risk of inconsistent rulings.\textsuperscript{419} Judicial efficiency will increase and litigation expense will decline as costly duplicative discovery and motion

\textsuperscript{410} 28 U.S.C. § 1407(d).
\textsuperscript{411} Richards, supra note 406, at 315.
\textsuperscript{412} Heyburn, supra note 404, at 2229.
\textsuperscript{414} 28 U.S.C. § 1407(e).
\textsuperscript{415} Margaret S. Williams & Tracey E. George, Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation, 10 J. EMPIRICAL LEGAL STUD. 424, 435 (2013) ("Higher courts have never overturned a panel decision on transfer.").
\textsuperscript{416} Andrew D. Bradt, The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation, 88 NOTRE DAME L. REV. 759, 762 (2012).
\textsuperscript{417} Williams & George, supra note 415, at 427.
\textsuperscript{418} Bradt, supra note 416, at 785.
\textsuperscript{419} See Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 FORDHAM L. REV. 1643, 1667 (2011) ("Coordinating every action in one place, before one judge, all but eliminates the risk of inconsistent rulings.").
practice disappear.\textsuperscript{420} In turn, D&O premiums may decrease as the cost of litigation declines.

The MDL statute has been instrumental in expeditiously disposing of hundreds of thousands of complex cases since the late 1960s. Amendment of the statute as this Article proposes could produce the same salutary effect in M&A litigation and other kinds of state court litigation. Moreover, authorizing the JPML to transfer M&A litigation without requiring it to transfer to Delaware’s Court of Chancery will minimize the undermining of shareholder rights that many of the alternative proposals entail. Conversely, while this Article’s proposal would not require the JPML to transfer M&A litigation to Delaware, it does contemplate that a defendant’s state of incorporation would be one of multiple factors that the panel would consider when making the transfer decision.

This is not a radically new idea. Somewhat similar proposals have been advanced in the past. For example, the Uniform Transfer of Litigation Act (UTLA), promulgated in 1991, proposed to largely supplant forum non conveniens analysis “with an interstate transfer system akin to that at the federal level.”\textsuperscript{421} The primary difference between the UTLA and this Article’s proposal is that the former did not contemplate the involvement of the JPML in making case transfers.

One issue that may arise is whether an amendment of 28 U.S.C. § 1407 would be constitutional. It would be. The Commerce Clause of the United States Constitution\textsuperscript{422} provides constitutional authority for such an amendment, enabling Congress to deal with horizontal coordination issues that hinder the operation of an efficient national market. Investors buy, sell and hold stocks of publicly listed corporations on national securities markets across the United States, using interstate communications. Accordingly, the amendment would satisfy the requirement that the regulated activity substantially affect interstate commerce.\textsuperscript{423} The Full Faith and Credit Clause may provide a second source of constitutional authority for such an amendment.\textsuperscript{424}

A second potential issue is whether the JPML could handle the increased case load that would ensue. Some commentators have noted that the JPML is already inundated and has consequently slowed down the rate at which it issues transfer orders.\textsuperscript{425} To the extent that this is true it may be time to increase the size of the panel. But it is not clear that the panel is overwhelmed. In 2007, for example, the panel received only 98 transfer motions;

\textsuperscript{420} See Sherman, \textit{supra} note 406, at 2206 (observing that coordinated discovery is the primary benefit of the MDL statute).


\textsuperscript{422} U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{423} See John C. Coffee, Jr., \textit{M&A Litigation: More and More Dysfunctional}, N.Y. L.J. (Mar. 21, 2013), http://www.newyorklawjournal.com/id=1202592906739?slreturn=20140829194654 (access required) (“This legislation seems clearly constitutional given the impact of such litigation on interstate commerce.”).

\textsuperscript{424} See Winship, \textit{supra} note 340, at 79 (suggesting that the Full Faith and Credit Clause is a potential basis of congressional power to enact federal statute allocating jurisdiction among states in purely state law cases).

that number declined to 91 in 2013.\textsuperscript{426} During the 2000–2013 period, the annual number of new docket requests surpassed 100 only twice—in 2009, when there were 121, and in 2011, when there were 109.\textsuperscript{427} In addition, the JPML has no trouble acting quickly on transfer requests. According to one review, "\textit{\[t\]he panel now issues a final decision no later than four months and often closer to two months after the filing of a 1407 motion.\}"\textsuperscript{428}

**CONCLUSION**

Multijurisdictional M&A litigation has become an intractable problem. In 2013, shareholders challenged 97.5\% of all M&A transactions with a value greater than \$100 million involving U.S. public company targets. Many transactions generate multiple lawsuits in multiple jurisdictions. In 2013, there were approximately seven lawsuits per transaction for deals of this size. When a transaction generates multiple lawsuits, very often the suits are filed in multiple jurisdictions. Of the 2013 deals, 62\% were litigated in more than one court and 40.6\% of deals involved lawsuits in more than one state.

Multijurisdictional litigation has numerous negative consequences. It burdens companies and their shareholders by increasing the cost of litigation and the likelihood of inconsistent or unfavorable judgments. It wastes scarce judicial resources and raises the specter of collusive settlements. In insurance terms, M&A litigation has become a high-frequency risk, with potential collateral consequences that include escalating pricing for directors' and officers' insurance.

Various solutions have been proposed. For the reasons indicated herein, the most common proposals suffer from various defects that render them undesirable. A superior alternative is amending 28 U.S.C. § 1407 to provide the JPML authority to transfer civil litigation that is pending in different states to a single state for pretrial management by a single state court. Currently, the JPML has no authority over actions pending in state courts. As a general rule, no state court has the authority to transfer litigation to a court in another state, or to a federal court, and no state court has the authority to accept litigation transferred by a court of another state or a federal court. Accordingly, no mechanism exists to transfer a case from a state court in one state to a state court in another state. Such a mechanism is highly desirable, and amending 28 U.S.C. § 1407 to authorize the JPML to make such transfers is the optimal vehicle for this occur. Authorizing the JPML to transfer M&A


\textsuperscript{427} Id. Apart from resolving new docket requests, each year the panel also facilitates the transfer of approximately 6000 tag-along cases to existing MDL dockets. See United States Judicial Panel on Multidistrict Litigation, supra note 426 (reporting that the annual number of cases transferred as tag-along actions ranged between 5224 and 6272 during the period 2009–2013). MDL Panel Rule 1.1 defines a "tag-along action" as "a civil action pending in a district court which involves common questions of fact with . . . actions previously transferred . . . under Section 1407." Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation 1.1(h) (2011), available at http://www.jpml.uscourts.gov/sites/jpml/files/Panel_Rules-Amended-7-6-2011.pdf. During the years 2000–2013 the annual number of actions transferred as tag-alongs peaked at 11,620 in 2004 and declined to 5623 by 2013. See United States Judicial Panel on Multidistrict Litigation, supra note 426. About 90\% of tag-along transfers occur without objection, so the time commitment by the panel is modest. See Heyburn & McGovern, supra note 413, at 31. Annually, the panel must resolve objections to about 200 disputed tag-along transfers. Id.

\textsuperscript{428} Heyburn & McGovern, supra note 413, at 27.
litigation will solve the multijurisdictional M&A problem without incurring the negative aspects of many of the alternative proposals.

In particular, authorizing the JPML to transfer M&A litigation without requiring it to transfer to Delaware’s Court of Chancery will minimize the undermining of shareholder rights that most of the alternatives entail. The proposal set forth herein does not contemplate giving a preference to Delaware. Instead, the proposal identifies the jurisdiction of incorporation as merely one factor for the JPML to consider when it makes its transfer decisions regarding M&A litigation commenced in multiple states. Congress should amend 28 U.S.C. § 1407. Amendment promises a fair and effective solution to the vexatious problem of multijurisdictional M&A litigation.
Navigating Multijurisdictional Merger Reviews: Suggestions from a Practitioner

Ilene Knable Gotts*

As the world has become increasingly integrated and interdependent, many jurisdictions have adopted complex pre-merger antitrust review procedures. Identifying the jurisdictions where a transaction is reportable and managing a multijurisdictional merger review can be a challenging process, particularly for companies that do not frequently undertake multi-country transactions. Counsel engaged to represent a party in the transaction must balance the concerns regarding confidentiality pre-announcement with the need to ascertain pre-signing those jurisdictions for which obtaining approval prior to consummation will be required to close the transaction. Allocation of the regulatory risk, including the commitment of the buyer if faced with regulatory concerns, is an aspect of the contract that is, at times, heavily negotiated. The antitrust review process is complicated and can be expensive from both a resource and financial perspective. The proliferation of pre-merger control regimes has increased the risk of procedural and substantive

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conflict among reviewing jurisdictions in a particular merger;\(^1\) it has also prompted various efforts to promote international convergence.\(^2\)

To facilitate cooperation with non-US antitrust agencies, the US and its federal antitrust agencies have negotiated antitrust cooperation agreements and informal arrangements with several foreign jurisdictions that authorise – to the extent permissible under relevant laws or agreed to by the parties – the sharing of some information. Although considerable progress has been made in substantive convergence as a result of these (and other) initiatives, differences continue to exist. Moreover, the procedural differences among jurisdictions can complicate well-intentioned actions by the agencies and the parties to cooperate and coordinate the review of a transaction.\(^3\) This article will discuss these cooperation arrangements, provide some recent examples of coordinated multijurisdictional merger reviews and, finally, provide some suggestions to practitioners on how to manage the multijurisdictional review process.\(^4\)

**Cooperation arrangements among competition authorities**

To facilitate cooperation with other competition authorities, the US has negotiated formal and informal cooperation agreements with several jurisdictions. The first bilateral agreements were with Germany (1976), Australia (1982), the EU (1991) and Canada (1995). A second wave of agreements was negotiated with Israel (1999),

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2. For instance, the International Competition Network (ICN) has a Mergers Working Group that, among other things, has developed ICN-recommended practices and procedures relating to confidentiality and inter-agency coordination of merger reviews. See also ICN, *ICN Framework for Merger Review Cooperation* (June 2012), available at www.internationalcompetitionnetwork.org/uploads/library/doc903.pdf. The OECD Competition Committee's working group on enforcement and cooperation has similarly worked towards achieving multilateral convergence on merger notification procedures and practices, as well as in substantive areas. It operates at a governmental rather than an agency level and its membership consists mainly of developed countries. It provides an infrastructure for its members and observers to engage in sessions on substantive issues and in training programmes offered to developing jurisdictions.

3. For an article discussing the procedural differences between the US and EU and the impact of these process differences on substantive outcomes, see Deborah A Feinstein, 'Process Divergence As an Obstacle to Substance Convergence' (Summer 2012) 26 Antitrust 5.

Brazil (1999), Japan (1999) and Mexico (2000). The US also signed separate agreements on positive comity with the EU (1998) and Canada (2004). During the first Obama Administration, the US agencies (i.e., the Antitrust Division of the US Department of Justice (DOJ) and the US Federal Trade Commission (FTC)) entered into a memorandum of understanding (MOU) or agreement with the following entities: the Russian Federal Anti-Monopoly Service (2009); the People’s Republic of China National Development and Reform Commission, Ministry of Commerce, and State Administration for Industry and Commerce (2011); Chile’s Office of the National Economic Prosecutor (2011); and Government of India Ministry of Corporate Affairs and the Competition Commission of India (2012). These agreements and MOUs establish frameworks for cooperation and consultation between the signatory agencies regarding antitrust policy and enforcements. They do not, however, permit the US to release information to foreign competition authorities if US law prohibits the disclosure.

Hart-Scott-Rodino confidentiality protections

In Hart-Scott-Rodino (HSR) reportable transactions, the transaction parties are required to submit extensive confidential information to the US agencies—both as part of the initial filing and in response to government inquiries. In addition, during the course of an HSR investigation, the agencies may, and frequently do, obtain information from third parties, including customers, competitors and suppliers. Much of the information provided to the agencies is competitively sensitive. The US agencies are limited in what they can provide to another jurisdiction without the transaction parties’ (or third parties’) consent. Section 7A(h) of the HSR Act prohibits public disclosure of HSR Act submissions. Information provided under the HSR Act is not even subject to disclosure to a third party in response to a Freedom of Information Act (FOIA) request.

The US agencies can, however, share publicly available information with their non-US agency counterparts. In addition, they can share confidential agency information, that is, information that the agencies are not prohibited from disclosing, but normally treat as non-public. Examples of confidential agency information include:

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5 Positive comity is a principle of international law under which, on a voluntary basis, one jurisdiction takes into account the laws or decisions of another jurisdiction or the impact of its actions on another jurisdiction when acting.

6 The agreements are available at www.justice.gov/atr/public/international/int-arrangements.html.

7 The Act does permit disclosure to an administrative or judicial challenge brought by the US agency or Congress.

• disclosure that an investigation is open;
• public information about the parties;
• information regarding industries or business sectors;
• the agency’s analysis that do not contain or refer to a party’s confidential information;
• the status and timing of the investigation (without disclosing whether a filing has been made); and
• theories of harm that the agency is investigating. 9

Absent a waiver of the confidentiality restrictions by the parties, the agencies cannot share confidential business information, that is, confidential information about the business obtained from the parties to the transaction. The restrictions on information exchanges extend to the identities of third party complainants and witnesses and the substance of their complaints. 10

Confidentiality waivers

The sharing of information and coordination of investigations, including the determination of remedies, may be facilitated to the extent that the parties provide waivers of confidentiality to permit collaboration among the reviewing agencies. Even though waivers allow the US agencies to disclose confidential business information to other jurisdictions, they do not otherwise limit the protections afforded under the HSR Act. For instance, a waiver does not mean that the information thereafter becomes subject to FOIA disclosure. Granting such waivers by parties to allow the sharing of information between the US agencies and the European Commission (EC) 11 and Canada is now routine, and is becoming more common with other jurisdictions as well.

In 2005, the International Competition Network (ICN) issued a Report on Waivers of Confidentiality in Merger Investigations. 12 The ICN Report recognises that the grant of confidentiality waivers is consistent with its Guiding Principles and Recommended Practices for merger review, for instance, the Principles provide that reviewing jurisdictions should maintain the confidentiality of information obtained in their

10 Similar restrictions apply to certain non-US agencies as well. Without the parties' consent, the EC, for instance, cannot share Form COs, Article 11 responses, Statements of Objections or Article 6.1.c Decisions rendered under the Merger Control Regulation.
investigation. Another Principle urges jurisdictions reviewing the same transaction to ‘engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.’ A further, stated goal of coordination is consistent, or at least non-conflicting outcomes. In furtherance of that goal, the Recommended Practices provide that ‘competition agencies should encourage and facilitate the parties’ cooperation in the merger coordination process’ through, inter alia, the use of voluntary confidentiality waivers and the development of a basic waiver model that may be modified to suit specific circumstances.13

The ICN Report expressly points out that:

‘[w]aivers, however, are not appropriate in every case subject to concurrent review. In some cases, it is clear from the outset of an investigation that the case does not raise competition issues common to each reviewing agency. In any case, the decision whether to grant a waiver is in the sole discretion of the parties and competition agencies should not pressure parties to provide a waiver.’14

Differences exist among jurisdictions in the type of information protected from disclosure and the permissible uses of such information in exercising their enforcement powers. The most commonly protected class of information across jurisdictions is ‘confidential business information’. In addition, there are differences in the scope of information and investigative powers and procedures of various jurisdictions. For example, in the US, the agencies have the authority to take depositions and issue subpoenas for documents; some other jurisdictions may be less empowered. Also, in some jurisdictions, although the information provided will not be disclosed to the public, other government agencies may be able to access the file.

Differences in the recognition of privilege among jurisdictions can potentially complicate waivers of confidentiality by the parties. For instance, under EU law, the attorney–client privilege is more narrowly defined than in the US, as is the privilege afforded to in-house counsel. Grants of waivers to the EC, therefore, typically contain a specific exclusion for information that is privileged under US law, but not under EU law.15 The waivers with the US agencies can deal with these concerns by including language that: (i) the agency will not seek privileged, confidential information from foreign agencies; (ii) the parties will clearly mark such information as privileged; and (iii) if the agency receives such information,

15 See Parisi, 9 above, at n 32.
it will treat that information as being inadvertently produced privileged material. Thus, to the extent that the merger parties provide to the EC documents that would be accorded privileged treatment in the US, the EC will not disclose the information contained in those documents to the US agencies.

The DOJ and FTC adopted and recently revised Best Practices on Cooperation in Merger Investigations with the EC’s Directorate-General for Competition (DG Comp).16 In addition to providing a framework for the agencies to work together, the Best Practices provide guidance to firms about how to work with the agencies to coordinate and facilitate the review process. They provide some detail regarding coordination at key stages of the investigation, including when the agencies are considering possible remedies. In addition, the Best Practices recognise that transactions subject to review by the US agencies and DG Comp may also be reviewed in other jurisdictions. The Best Practices also focus on the role that waivers of confidentiality by the parties can play in facilitating the coordination of the review process, particularly regarding evidence relevant to the investigation.

The DOJ, FTC and the Chinese Ministry of Commerce (MOFCOM) have also issued joint guidance on case coordination.17 The guidance provides a framework for interagency cooperation when MOFCOM and one of the US agencies are reviewing the same transaction, including the exchange of information regarding the timing of the investigations, and substantive aspects of the review, such as market definition, competitive effects, theories, economic analysis and remedies.

In addition, the DOJ, FTC, Canadian Competition Bureau and Mexico’s Federal Competition Commission have initiated a merger discussion group among those agencies.18

The bottom line is that competition agencies no longer undertake merger reviews in silos, ie, those engaged in the analysis were not communicating or involving others who may have been engaged in similar exercises, reflecting a lack of cooperation among agencies. Antitrust counsel should anticipate and account for substantial cross-agency coordination and its impact on transaction review timing and substantive review.

Recent coordinated merger reviews

According to a submission by the US agencies to the OECD (Organisation for Economic Cooperation and Development) on 12 June 2012, during the fiscal year 2011, the FTC cooperated on 20 merger matters (of which 12 were completed within the fiscal year 2011) and the DOJ cooperated on 17 merger reviews.19 Interagency

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cooperation often serves to accelerate the review of multinational transactions, but does not necessarily result in uniform remedies or outcomes around the world. Some of the transactions involve situations in which the agencies of the more mature jurisdictions closely coordinated remedies – and even a few instances in which one or more jurisdictions relied on the remedy obtained by a jurisdiction in the transaction rather than imposing their own conditions on the transaction parties. In other transactions, although the agencies coordinated their investigation initiatives, the market conditions in the jurisdictions were sufficiently different to merit different outcomes and remedies.20

Cisco/Tandberg

On 1 October 2009, Cisco Systems Inc announced its proposed US$3.3bn acquisition of Tandberg ASA. The DOJ and EC obtained waivers from the transaction parties and third-party industry participants that facilitated the two jurisdictions working together throughout the investigation, including discussing the competitive effects of the acquisition and conducting joint meetings and interviews. As a result of this close cooperation, the DOJ was able to take into account the commitments that the parties were providing the EC to facilitate interoperability and closed its investigation on the same day that the EC announced its clearance decision (with commitments).21

Agilent/Varian

In July 2009, Agilent Technologies, Inc proposed acquiring Varian, Inc, for approximately US$1.5bn. According to the FTC’s complaint, Agilent’s acquisition would have reduced competition for three types of scientific measurement instruments. The EC conditioned the transaction approval on the divestiture of its laboratory gas chromatography business, triple quadruple gas chromatography mass spectrometry business, inductively coupled plasma-mass spectrometry business, and micro gas chromatography business.22 The Australian competition authority also approved the transaction on the condition that the companies undertake the same divestitures in Australia.23 The FTC consent required the parties to sell assets related to the manufacture and sale of the three of the four types of instruments

businesses specified by the EC to approved upfront buyers within ten days of the completed transaction. The Japan Fair Trade Commission closed its investigation after concluding the remedies obtained by the FTC and EC were sufficient to resolve any competitive concerns in Japan. The FTC noted that "throughout the investigation, FTC staff coordinated enforcement efforts with staff from [the EC, Australian and Japanese competition authorities]. This global cooperation effort was conducted under the auspices of the relevant bilateral cooperation agreements, the OECD Recommendation on cooperation among its members, and in the case of the EC, the 2002 Best Practices on Cooperation in Merger investigations." 24

Unilever/Alberto-Culver

On 27 September 2010, Unilever announced its proposed US$3.7bn acquisition of Alberto-Culver Company. The DOJ objected, alleging that the proposed acquisition would have eliminated substantial competition and given Unilever a near monopoly in the sale of value shampoo and conditioner, with shares of approximately 90 per cent in each of these markets; in addition, its share of highly concentrated hairspray would increase to over 45 per cent, enabling it to unilaterally raise prices. 25 The UK OFT raised concerns with respect to the bar soap business. Under the DOJ consent, Unilever agreed to divest two hair care brands. The DOJ cooperated with Mexico, South Africa and the UK during the investigation. As the DOJ reported, differences in the products affected by the merger, the product positionings and the market structures in the different jurisdictions resulted in different outcomes, with the UK’s OFT requiring the divestiture of Alberto Culver’s bar soap business, and the US focusing on divestitures in the hair care business.

Western Digital Corporation/Viviti; Seagate Technology/Samsung

On 7 March 2011, Western Digital Corporation agreed to acquire Hitachi Global Storage Technologies (now known as Viviti Technologies Ltd) from Hitachi Ltd for US$4.5bn. Both Western and Viviti manufactured and sold desktop hard disk drives (HDDs), which the FTC considers key inputs in computers and other electronic devices. In April 2011, Seagate Technology LLC announced its intention to acquire Samsung Electronics Co Ltd’s HDD assets. Both of the transactions had potential implications for competition in the same product markets. The FTC reported that it 'reviewed both matters at the same time in order to understand the effects on competition resulting from each transaction on its own, as well as

the cumulative effect of the relevant markets if both transactions were allowed to be consummated.'

The investigation revealed that separate product markets exist on the specific end-uses for HDDs because product features, pricing and competition differ-based on the end-use application. For many of these end-uses, the FTC lacked a basis for believing that the transactions would be anti-competitive. In the 3.5in desktop HDD market, however, the FTC concluded that consummation of both of these acquisitions would result in likely anti-competitive effects. Ultimately, the FTC determined that there were significant differences in the competitive implications of the two transactions. The FTC focused on the characteristics of the two firms being acquired in the proposed transaction – Viviti and Samsung – and concluded that an independent Viviti ‘was much more likely to be an effective competitive constraint in the desktop HDD market than would an independent Samsung’. At the time that the transaction was announced, Viviti was a strong, high quality and innovative competitor, identified by a number of industry participants as a ‘key driver of aggressive price competition’ and ‘well-positioned to grow its desktop HDD business’. In contrast, Samsung had struggled to be competitive in the market and was less likely to serve as a meaningful constraint on pricing in the market. Based on these findings, the FTC cleared the Seagate/Samsung transaction in December 2011, and on 5 March 2012, conditioned the approval of the Western/Viviti transaction on Western’s divestiture of Viviti’s desktop HDD assets to an identified upfront buyer, Toshiba Corporation. Toshiba did not currently compete against Western or Viviti in the sale of desktop HDDs; however, ‘[b]ecause Toshiba has extensive experience manufacturing [HDDs for use in mobile and enterprise applications], and has a worldwide infrastructure for the research, development and sale of desktop HDDs, [the FTC concluded that] Toshiba is well-positioned to replace the competition that will be eliminated as a result of the proposed transaction.’ The consent provided 15 days following closing for divestiture to close, extendable by another 15 days if required to get the requisite approvals from the other reviewing jurisdictions. The FTC indicated that it cooperated with ten foreign jurisdictions to review these transactions ‘and design remedies to resolve allegations that the deal would likely harm competition in the personal computer hard disk drive market.’


27 Ibid.


The EC, too, opened an in-depth investigation into both transactions. Pursuant to a priority rule based on the date of notification (Seagate had submitted its filing a day earlier than Western), however, the Commission assessed the Seagate/Samsung transaction on the basis of the market situation existing before the notification of the Western/Hitachi transaction. On 19 October 2011, the EC cleared the Samsung/Seagate transaction.\(^3\) The EC found that 'with at least three suppliers, customers will retain sufficient possibilities to switch suppliers. The EC also found that the removal of Samsung is not likely to lead to a risk of coordination among the remaining HDD suppliers.'\(^3\) In addition, the EC determined that the proposed transactions would not jeopardise the business of Japan’s TDK, an independent supplier of HDD heads, as the merged entity would buy a sufficient volume of components to keep the business viable.

On 23 November 2011, the EC cleared the Western/Viviti transaction conditioned on the divestiture of essential production assets for the same computer HDD market that the FTC subsequently focused on.\(^3\) The EC evaluated the Western/Viviti transaction as though the Seagate/Samsung transaction had already closed and, as a result, there was one fewer firm competing. The commitment required that Western not close its proposed acquisition of Viviti before concluding a binding agreement for the sale of the divestment business to a suitable purchaser approved by the EC.

In contrast to the FTC and EC, MOFCOM conditioned approval of the Seagate/Samsung transaction on Samsung being an independent competitor. At the end of China’s seven-month review of the transaction, MOFCOM concluded that the transaction would lead to anti-competitive coordinated effects and imposed behavioural remedies on the combined firm to:

- maintain Samsung HDD as an independent competitor, including by establishing an independent subsidiary to price and market Samsung products, independently produce, price and market the products, and impose a firewall to prevent information exchanges;
- increase the manufacturing capacity for Samsung products within six months of the decision;
- not change current commercial practices or force customers to purchase exclusively from Seagate;
- not require TDK (China) to exclusively supply HDD heads to Seagate;\(^3\) and

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32 Ibid.
34 In contrast to the EC's focus on ensuring that TDK had sufficient orders from the merged firm to be viable, MOFCOM focused on the impact that an exclusive agreement would have on competing hard drive producers.
invest at least US$800m in each of the next three years to bring more innovative products and solutions to consumers.

The decision allows Seagate to apply for waiver of the first two conditions after one year.\(^{35}\)

On 2 March 2012, MOFCOM announced its decision in the Western/Viviti transaction. Apparently, in the face of MOFCOM concerns, the parties withdrew and resubmitted the notification with MOFCOM's consent seven months into the review process, thereby causing the review deadlines to start over again. The competitive assessment of this transaction was basically the same as in the Seagate/Samsung decision, except that the combination of Western/Viviti would result in a 47 per cent market share, compared to 43 per cent share for Seagate/Samsung.

To address its concerns, MOFCOM required that:

- Western divest Viviti's computer HDD production assets to a third party within six months;
- Viviti's HDD business be operated as an independent competitor for a minimum of two years before Western could seek a waiver (as compared to Seagate/Samsung's one year requirement);
- Western and Viviti could not change their current business models or force customers to buy products exclusively from them;
- Western and Viviti must maintain the momentum of R&D investment of recent years; and
- a monitoring trustee would be appointed.\(^{36}\)

**United Technologies/Goodrich Corporation**

On 21 September 2011, United Technologies Corp (UTC) announced a US$18.4bn acquisition of Goodrich Corporation (Goodrich).\(^{37}\) As recently described by DOJ Director of Civil Enforcement Patricia Brink:

'The division, the EC, and the Canadian Competition Bureau cooperated closely throughout the course of our respective investigations with frequent contact among the agencies. In addition, the division had close discussions with other competition agencies, including the Federal Competition Commission in Mexico and the Administrative Council for Economic Defense in Brazil. This close

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\(^{36}\) Announcement of Decision after Anti-Monopoly Review to Impose Restrictive Conditions on the Approval of the Concentration of Undertakings for the Acquisition of Hitachi Storage by Western Digital, No 9 Announcement of MOFCOM, 2 March 2012, pursuant to Article 30, Anti-Monopoly Law (China), available at www.linklaters.com/pdfs/mkt/london/MOFCOM West DigitivHitachi ENG.pdf.

cooperation resulted in a coordinated resolution that will preserve competition in the United States and elsewhere. Cooperation in this matter occurred in each phase, from the beginning of the investigation through to the remedial phase. In the investigation phase, we along with the EC sought, and were granted by the parties, waivers of confidentiality that allowed us to coordinate closely from the very early stages in the investigation. We engaged in regularly scheduled conferences with both the EC and the Canadian Competition Bureau. These calls started out as weekly calls, but moved to almost daily as we proceeded with the investigation. We also engaged in joint meetings by video conference with the parties in the time leading up to our respective decisions on the matter. When our respective investigations moved into the decision phase, we worked hard to synchronize the outcomes of our respective investigations. Reviewing UTC's commitments made to the EC helped our staff be confident that the relief we would achieve was not inconsistent and did not impose conflicting obligations on the merged entity. We also required the parties to coordinate all of the divestiture packages and optional supply/transition services agreements to ensure consistency. Since the announcement of our settlements, we have worked closely with the European Commission to cooperate in the implantation of our two remedies.

On the same day that the DOJ announced its resolution and consent decree, the EC and Canadian Competition Bureau issued statements recognising the cooperation among the US, EC and Canada in reaching a coordinated remedy, and the intention of the US and EC to work together in implementing the remedies. The agencies focused on the potential competitive harm for several critical aircraft components, including generators, engines, and engine control systems. The DOJ consent required, among other things, that UTC:

- divest Goodrich assets relating to large main engine generators for aircraft;
- divest Goodrich's shares in Aero Engine Controls (AEC), a joint venture to manufacture engine control systems for large aircraft turbine engines;
- extend for 30 days after the divestiture of the engine control systems business the terms of contracts with certain Goodrich's engine control systems business customers;


• provide various supply and transition service agreements to the acquirers of the assets being divested; and
• extend the period for its joint venture partner, Rolls-Royce Group plc, to exercise its option to acquire the Goodrich business that provides aftermarket services for Rolls-Royce engines equipped with AEC engine control systems.

In the EC, UTC agreed to:
• divest Goodrich's businesses in aircraft electrical power generation and distribution systems;
• divest Goodrich's business in engine controls for small aircraft engines; and
• offer Rolls-Royce an option to acquire Goodrich's lean burn fuel nozzle R&D project.

The Canadian Competition Bureau statement indicates that, taking into account the DOJ and EC remedies, it was approving the transaction without any additional conditions.

Deutsche Börse/NYSE

Deutsche Börse and NYSE announced their proposed merger on 15 February 2011.40 The DOJ focused its inquiry on Deutsche Börse's minority interest in Direct Edge, the fourth largest operator of stock exchanges in the US that competes with NYSE for US equities exchange products and services. Although Deutsche Börse held only a 31.5 per cent interest in Direct Edge, it was that company's largest equity holder and held voting and special veto rights, including the right to veto certain significant corporate transactions and the entry of the company into certain businesses. Deutsche Börse also had the power to appoint three of the eleven managers of the company and had access to non-public competitively sensitive business information. The DOJ found that this combination of rights would provide Deutsche Börse post-merger with the ability to use its influence to induce Direct Edge to compete less aggressively in the future. Accordingly, under a DOJ consent, Deutsche Börse would divest its 31.5 per cent interest in Direct Edge, within two years, and relinquish immediately its rights to participate in the governance or business of Direct Edge.41

The DOJ consent became moot, however, when the parties abandoned the transaction following the EC's decision to prohibit the transaction.42 The parties

had offered to make certain concessions, but the EC rejected the concessions as being insufficient to address concerns over reduced competition on 'European financial derivatives traded globally on exchanges'. The parties terminated the transaction on 2 February 2012. Deutsche Börse AG has appealed the EC's decision. Although the DOJ and EU reached different conclusions in the same transaction, these differences in outcome were attributed to different competitive conditions in Europe and the US.

CPTN Holdings/Novell; Rockstar Apple/Nortel; Google/Motorola Mobility

In a series of patent-asset-related investigations involving patent portfolios in the mobile telecommunications area, the DOJ worked with various antitrust authorities to study the impact of the transactions, particularly to the extent the portfolios contained standard essential patents (SEPs). The focus of these investigations was whether, as a result of these purchases, the acquiring companies would be able to raise rivals' costs or otherwise foreclose competition. During the CPTN Holdings/Novell transaction, the DOJ worked closely with the German Federal Cartel Office. Since the parties had provided the agencies with confidentiality waivers, the agencies were able to discuss information on, and assessments of, competitive effects and coordinate on possible remedies. The DOJ and German Federal Cartel Office announced on the same day the conditions upon which they had each cleared the transaction.

In the review of the Nortel patent portfolio acquisition, the DOJ worked closely with the Canadian Competition Bureau. Finally, in the Google/Motorola Mobility transaction, the DOJ worked closely with the EC and had discussions with antitrust

45 See European Commission, Mergers: Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext – frequently asked questions (1 February 2012), available at http://europa.eu/rapid/press-release_MEMO-12-60_en.htm. (‘As is our practice, the Commission and the US DoJ cooperated closely in this matter, although the issues on which we focused were different. Whereas we were concerned about derivatives based on European underlyings, DoJ saw some issues in the US cash equity markets.’)
47 The CPTN/Novell transaction marked the first merger enforcement cooperation the DOJ has had with Germany in 20 years.
agencies in Australia, Canada, Israel and Korea. The DOJ and EC announced their
decisions in Google/Motorola on the same day. 49

Vivendi/EMI

On 21 September 2012, the FTC voted to close its investigation of the proposed
acquisition by Vivendi SA, parent company of Universal Music Group of EMI
Recorded Music. 50 Universal is the largest recorded music company in the world;
EMI is the fourth largest. Together with Sony and Warner, Universal and EMI
comprise the four ‘majors’ in the industry. Although independent recorded music
companies compete in the market for commercial distribution of recorded music,
the majority of independents rely on the majors to provide distribution services.

The FTC staff found that it did not have sufficient evidence of head-to-head
competition to conclude that the combination would substantially lessen
competition. Products are highly differentiated and companies compete for
distribution in multiple ways. The FTC considered the level of direct competition
between the merging parties across all of these different channels and concluded
that they had different product portfolios.

The staff also assessed the impact of the acquisition on the development of interactive
music streaming services. Specifically, the FTC considered whether Universal would
have enhanced bargaining leverage post-acquisition, allowing it to extract from
streaming services superior financial terms, or advantaged positioning for its content.
At issue was whether the transaction would lead to higher costs to interactive streaming
consumers or a more limited selection of recorded music. The staff concluded there
was limited direct competition between Universal and EMI. Staff also did not find
sufficient evidence of the potential for coordination post-acquisition. Specifically, the
Commission indicated that the market had changed since The Three Tenors. 51

The EC also reviewed the transaction and required commitments, including the
sale of EMI Recording Ltd, which owns the Parlophone record label – the home to
Pink Floyd, Tina Turner, Coldplay and David Bowie. In addition, Universal agreed
to divest EMI France and EMI’s 50 per cent interest in the Now! That’s What I Call
Music compilation. 52

The FTC notes that it worked closely with the EC throughout the investigation,

49 Press Release, US Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on its Decision to
Close its Investigations of Google’s Inc’s Acquisition of Motorola Mobility Holdings Inc and the Acquisitions of Certain
Patents by Apple Inc, Microsoft Corp and Research in Motion Ltd (15 February 2012), available at www.justice.gov/
opa/pr/2012/February/12-at-210.html; Press Release, European Commission, Mergers: Commission Approves

50 Press Release, Federal Trade Commission, FTC Closes Its Investigation Into Vivendi, S.A.’s Proposed Acquisition of


52 Press Release, European Commission, Mergers: Commission Clears Universal’s Acquisition of EMI’s Recorded Music Business,
but reached different conclusions because of different evidence unique to each jurisdiction.\textsuperscript{53} Although no remedy was needed in the US, the remedy obtained by the EC to address the different market conditions in Europe will impact the US market as well.

**Practical suggestions for managing multijurisdictional reviews**

Parties need to identify early in the transaction negotiations (ie, preferably prior to signing the definitive agreements in a consensual transaction) those jurisdictions potentially implicated by the transaction and establish the timetable for filings. This can be a time-consuming process, especially in transactions with globally active partners, or in matters involving minority share acquisitions or joint ventures. It is critical that the parties have an agreed approach for obtaining the requisite approvals. In a transaction with several filings, the parties may decide that it is best to prioritise the filings in the jurisdictions that have a longer review timeline and/or the potential to present more significant competition issues. By concentrating resources in the jurisdictions that raise the most substantive issues, it may ultimately permit the transaction to close sooner, since approval (with or without conditions) in the more difficult transactions may obviate the concerns in the remaining jurisdictions, thereby accelerating their review processes and the resources it takes to get approval in those jurisdictions. If the transaction involves novel markets or issues but the parties believe that one jurisdiction may have the resources or experience to understand more quickly that there are no or limited competitive issues, it may be best to prioritise filing in that jurisdiction first. Consideration should be given, however, as to whether 'finalising' approval in that jurisdiction will then make it more difficult for that jurisdiction to continue to 'cooperate' with other jurisdictions since it has now closed its review. Also, consideration should be given regarding possible negative reactions of the agencies to the extent that they perceive that the parties are strategically 'gaming' the process in a way that seeks to limit or pressure them, either procedurally or substantively. Early clearance from one or more jurisdictions may also be useful to advocate for positive outcomes in those jurisdictions with less-predictable procedural rules.

Other considerations on where and when to file include whether the agency staff is open to informal consultation and the extent to which the timetables for review are stringent and well defined. Business teams of all transacting parties should be briefed early and updated throughout the time between signing and closing regarding the complexity and timing of the merger reviews in the various

jurisdictions. For those not versed in the nuance – and sometimes even for those who are – the varying priorities and experience level of different agencies may result in perceptions of perplexing and potentially inconsistent approaches and positions. Keeping the business team apprised as to the process and the reasons for the differences in timing and approaches is critical to ensure that clients are not unnecessarily frustrated by the process.

As soon as possible in the transaction (hopefully before it is signed), assemble a team of experienced counsel in the key jurisdictions to get their input and assistance in dealing with the antitrust authorities in their jurisdictions. Share with them your overall strategy, provide the requisite background to identify what issues and concerns might arise, and discuss early on what information will be required to submit the filing. Share HSR item 4(c) and 4(d) documents with counsel in the other countries. It is not at all unusual for the staff in another jurisdiction to ask for a copy of the HSR filing and, if applicable, the EC Form CO; it is best therefore that counsel in those jurisdictions review the documents early enough in the process to determine what impact they will have for review in their respective jurisdictions.

In preparing filings, even if there are several different law firms involved to handle the various jurisdictions, it is important that the filings be coordinated to ensure consistency across the jurisdictions. As illustrated above, antitrust agencies often cooperate on merger reviews and it is critical that counsel for the parties be similarly coordinated. Inconsistencies on key issues, unless based on different economic or marketplace conditions in different filing jurisdictions, could cause delays and misunderstandings, and could even ultimately adversely impact the outcomes of the review processes. Thus, to the extent practicable, the filings should use similar language to describe the relevant products, markets, the competitors, market conditions, and efficiencies resulting from the transaction. Indeed, a commonly used technique is to prepare one detailed ‘master filing’ to be adapted to local rules and customs by counsel around the world.

Counsel for the parties should remain in frequent contact with the antitrust authorities to ensure that the filings are accepted for initial review and to ensure that any supplementary information provided to antitrust agencies is consistent across jurisdictions. It is also critical to ensure that the parties’ subject matter experts (ie, business executives with insight into the local market conditions, business development personnel with responsibility for the transaction and in-house legal teams) understand the review schedules and are available to respond quickly to information requests. Alert clients early on to the potential requests (or even the potential to offer voluntarily) to waive confidentiality from one or more jurisdictions and discuss with local counsel the best way to handle such requests, as well as what safeguards and conditions can be obtained, particularly to the extent that there
are differences across jurisdictions on issues such as privilege and access to the files by others outside of the antitrust authority. There are times when the coordination can expedite the review process and ensure that the remedies sought by the various antitrust authorities are not inconsistent or contain remedies that could have been avoided if considered by the agencies earlier during the review process. This is likely to be the case in markets that are global in nature. If it appears likely that there will be more than one jurisdiction intensely investigating the transaction and possibly seeking remedies, it may be in the parties' interest to facilitate the coordination of some of the jurisdictions earlier in the process in order to avoid delay later—should a jurisdiction otherwise lag behind and slow the overall approval process for its jurisdiction. It may be that the parties even find it in their interest to schedule joint interviews with business executives or provide copies of submissions to multiple agencies at the same time.

There are other times where the relevant markets are more local, that is, national or regional in scope, and significant differences in the market conditions and the parties' operations exist in the various localities. In such transactions, it may appear that there would be little gained by granting the waiver from an efficiency and substantive standpoint. But in some cases, even when the products differ substantially, cooperation may help the agencies to ensure that they were not reaching inconsistent outcomes and remedies.

Agencies, however, almost always ask for waivers, even when the likelihood that there will be a common set of concerns is not particularly high and it may be difficult to refuse while still appearing to be cooperative at the same time. In addition, even when there is little to be gained from a substantive standpoint, there still may be procedural/timing benefits from having the agencies become informed of the progress and timing of the review of the other agencies. It is also worth discussing with local counsel whether a refusal to grant the waiver will have adverse implications on the review by the staff in the jurisdiction. Counsel for the parties should be able to have an open discussion with the agencies at issue regarding the rationale for seeking the waivers and the opportunity to have a dialogue regarding the limited utility of the waiver in the particular transaction. Such discussions could also be useful to the extent that the overlapping products/markets vary from jurisdiction to jurisdiction or could be used to define a more limited scope of what information will be shared. Finally, in the right matter, the parties may be able to limit the sharing of certain other categories of documents, such as valuation materials and strategic plans that do not relate to the jurisdiction at issue. Do not be surprised, however, if you find that some of the agencies are not very flexible when negotiating the terms of waivers.
To the extent that different economists are engaged for different jurisdictions (even if within the same consulting firm), it is important to coordinate their arguments and approaches, as well as the data gathering that they undertake.

It is never too early to begin to strategise regarding what remedies might be needed and/or effective to resolve concerns and to discern whether such remedies are potentially acceptable from a business standpoint. Before engaging with any jurisdiction on remedies, vet the potential proposals with counsel in the other jurisdictions to determine what impact, if any, the various remedies (and the timing of offering such remedies) will have on the review in their respective jurisdictions. The Cisco/Tandberg, Agilent/Varian, and United Technologies/Goodrich transactions exemplify the benefits of counsel managing the review process and coordinating the resolution of issues among potentially concerned jurisdictions.

**About the author**

A member of Wachtell, Lipton, Rosen & Katz’s Antitrust Department, **Ilene Knable Gotts** represents and counsels clients on antitrust matters relating to mergers and acquisitions. Ms Gotts began her career as a staff attorney in the Bureau of Competition of the Federal Trade Commission. She has held numerous bar leadership positions, including Chair of the ABA’s Section of Antitrust Law and Chair of the New York State Bar’s Antitrust Section.

Ms Gotts is the editor of the ABA Antitrust Section’s Merger Review Process treatise and has had over 150 articles published on antitrust issues relating to mergers and acquisitions and Hart-Scott-Rodino compliance. She also is a frequent lecturer on antitrust topics. Ms Gotts serves as the Co-Editor of *Competition Law International* and on the advisory boards of *Antitrust and Trade Regulation Report*, Antitrust Counselor and *Antitrust Report*.

Ms Gotts received her bachelor’s degree magna cum laude from the University of Maryland, where she was elected to Phi Beta Kappa. Her law degree was awarded cum laude by Georgetown University Law Center in 1984.
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