



Successful Merger Clearance

How BCG Helps Clear the Path for Acquisitions

This brochure, one of a series of eight describing BCG's capabilities in deal transaction and integration, encourages acquirers to assess potential antitrust concerns and prepare accordingly. These concerns are rising both in the European Union and the United States.

The brochure describes merger clearance as a way to reduce the risk of delays and concessions, if not outright blockage, in gaining governmental approval. Deals that are compelling on paper might lose most of their value if antitrust authorities require spin-offs or constraints on vital operations, or postpone closing for several months. Acquisitions are already a time of high uncertainty, and buyers can reduce some of this uncertainty by preparing possible concessions while preserving key elements of the deal.

While acknowledging that every acquisition is different, the brochure explains the main steps to take in preparing for antitrust issues. These include reassuring sellers that deals will gain approval and scoping out ways to sell off certain operations without a fire sale. Clearance teams need both an understanding of regulators' mindset and a strategic sense of capturing value from acquisitions.

Introduction

Why Work on Merger Clearance?

With antitrust concerns increasing in recent years, any large acquisition of a similar business is going to attract attention. Regulators in much of the world are objecting to combinations on multiple grounds. When they allow a deal to proceed, they can still require remedies that weaken its economics. Time-consuming investigation and negotiation can also reduce the deal's strategic benefits.

These roadblocks appear even before a deal is announced, as acquirers negotiate with target companies over terms. When a company puts itself or a division up for sale, it considers not just the price offered but also the likelihood of the deal being approved by regulators. Delays and concessions mean a smaller real payoff, so sellers may simply reject offers from certain companies out of hand.

Fortunately, acquirers can do a great deal to improve their prospects with both sellers and regulators. The first step is to understand the potential antitrust concerns with a proposed deal. How might regulators view the combination and its effect on competition? What can the acquirer do to proactively mitigate those concerns, either by providing a convincing framework to regulators that the transaction does not harm competition or by restructuring the deal in advance? As part of this preparation, the acquirer might also create a list of potential concessions that would still preserve the economics of the deal.

This advance work on merger clearance will increase the certainty of carrying out a deal, and help avoid long and time-intensive approval periods. Buyers will reap more of the acquisition benefits, and faster. It can also help them strike better deals with sellers.



BCG Has Navigated Merger Clearances for Many Clients. This Is What We Could Do for You

As they work toward a deal, acquirers often pay insufficient attention to merger clearance, leaving themselves underprepared for potentially difficult negotiations with regulators. Corporate staffs typically lack the capacity to respond to detailed information requests with tight deadlines. They also do not have the time to devise potential concessions and assess how each might affect the economics of the deal. Acquirers often spend more time and money dealing with merger challenges after the announcement, and with a worse outcome than they would have with advance due diligence.

BCG has extensive experience in developing the economic and business arguments for mergers. We have the sophistication and staffing to handle the sudden demands that merger clearance is likely to impose on your organization. In addition to assessing the deal's effects on markets, we suggest modified arrangements and prepare responses to likely regulator requests. We work closely with regulators and lawyers, and can orchestrate a smoother regulatory approval process. Overall, we can boost the deal certainty without undermining its economics.



A Quick Guide to Merger Clearance

Merger clearance is the process of gaining regulatory approval for a deal and, if required, carrying out remedies imposed by regulators. Generally, regulators come from the government's competition authority, but national security may apply in some cases; and may affect more mergers post COVID-19. Most countries require acquisitions above a certain size to show that the deal will not significantly reduce market competition. Regulators have stepped up oversight in recent years, with European regulators alone blocking six major deals with a total value exceeding \$59 billion, from 2014 to 2019. The larger the deal, the more likely it is that regulators will force acquirers to carry out divestments and other remedies.

Legal advice is essential for understanding how a deal might concern regulators, and so is strategic advice. BCG's knowledge of market dynamics complements legal expertise by explaining how competition works in markets or how synergies play out in a large organization. Lawyers may also lack the business experience to communicate a de-averaged, granular view of markets to overcome regulators' macro-level view of dominance.

Companies need this understanding in crafting an acquisition, pitching it to the target, and then obtaining permission from regulators. The deal has to meet antitrust concerns while still generating enough value to justify the expense and effort of carrying it out. Innovative solutions are more likely to come when acquirers consider both strategic and legal issues.

Even when regulators approve a deal, they may exact severe remedies that undermine its value. Here, too, companies need strategic as well as legal advice. Ideally, companies will prepare ahead of time and be ready with a set of proposals that would preserve the deal's economics. They will know which remedies they can accept and which render the deal unworkable.

In the European Union (EU), the European Commission requires notification for any merger with total global revenues exceeding €5 billion and EU-wide revenues exceeding €250 million each (of at least two parties). Any merger with global revenues in the €2.5 billion to €5 billion range, but with EU-wide turnover exceeding €100 million, also requires filing. The initial phase of consideration lasts up to 25 business days, but the authorities can impose a second phase of up to 90 business days, or more with extensions, if they opt for additional investigation.

The US government has two antitrust authorities: the Department of Justice, which typically handles business-to-business industries, and the Federal Trade Commission, which usually focuses on consumer-oriented industries. For both, the transaction threshold for filing is a \$360 million purchase price, or one party has sales above \$180 million and the other has at least \$18 million. Phase 1 lasts 30 days, with a potential Phase 2 lasting several months due to information requests. Acquirers can challenge the decision in court, including any remedies, but doing so will further delay the deal.

Neither of these authorities defines market concentration in a way that guarantees merger clearance. The Herfindahl-Hirschman Index, widely used by economists, is just one indicator; regulators can still use their judgment on potential competitive effects. Acquirers must therefore explain why their deal would not upset the competitive balance.



In either jurisdiction, acquirers should try to avoid going into Phase 2. Requests for information can eat up much of an organization's time as well as delay the financial and strategic gains from the deal. Customers may react poorly to the uncertainty, giving the acquirer's rivals opportunities to attack. Only 2% to 4% of transactions typically proceed to Phase 2, though this number is increasing with deal value.

The best way to avoid Phase 2 is to prepare thoroughly for the notification process before announcing the deal. That means gathering market information and using previous rulings as guidelines to the regulators' perspective to compose arguments for approval and for any acceptable remedies. Acquirers have only a short window of time to dissuade regulators from a Phase 2 investigation, and the best way to do so is to answer their questions quickly and completely.

Regulators can demand a variety of remedies to address their concerns about a deal. Most

of these involve divestment of assets, either specific product lines or operations in a specific market, by either the acquirer or the target. In some cases, the regulator might require certain behaviors, such as sharing intellectual property or key infrastructure with rivals. Concessions might also include supply chain obligations. Firewall provisions aim to prevent the dissemination of information within a merged firm, such as sharing upstream supplier information that would help a downstream business unit compete with rivals.

Besides the overall increase in antitrust scrutiny, merger clearance can affect the deal process itself. In cases where a target company has multiple suitors, it might discount bids that it expects to draw heightened scrutiny. On the regulatory side, in both the United States and Europe, we have seen concerns about certain foreign acquirers weakening national security. Acquirers that prepare ahead and factor in these dynamics can capture more value from their deals.



Real Deals, Real Results: BCG Helped Konecranes Overcome EU Concerns

KONECRANES®

Another challenging deal involved Konecranes' 2017 acquisition of MHPS/Demag, the heavy-cranes division of US-based Terex. Demag was headquartered in Germany and had a sizable market share in Europe. Konecranes, based in Finland, expected intense scrutiny from the European Commission, so it hired BCG to help with merger clearance.

Our consultants set up a war room in Brussels and coordinated efforts with Konecranes' executives and legal counsel. They created and crystallized a variety of remedy options, then analyzed each for its effect on total shareholder value from the deal. Based on this analysis, they crafted the negotiation strategy for remedies, which resulted in full EC approval in Phase 1. BCG also supported the divestment of the remedy assets with a vendor due diligence process.



Modeling Merger Clearance Before the Deal Is Signed

Delays and denials in merger clearance affect sellers as well as acquirers. In cases where companies have multiple bidders, sellers may discount the bids for combinations likely to face regulatory scrutiny.

In response, we've seen prospective buyers partner with another bidder that acquires the part of the seller's business that is the source of regulatory concerns. This type of structure

may alleviate the seller's potential misgivings about deal certainty. However, such deals are inherently complex to craft. They may also require the original buyer to offer a financially attractive deal to its bidding partner, thus eroding the economics of acquiring the target.

BCG can support clients in crafting these collaborations and modeling the financial implications.



Preparing for Regulators

Companies can greatly improve the odds of success by preparing for the regulatory review well in advance of announcing the deal. We recommend a six-step process.

First, the acquirer should set up an antitrust team with responsibilities separate from the groups working on target integration. The antitrust team scopes out the regulatory process in the relevant jurisdictions. Then it proactively assesses the risk of regulatory challenges by defining the relevant markets and evaluating the deal against the approval thresholds. A common measure of market concentration is the Herfindahl-Hirschman Index, but the team might apply other metrics developed from industry expert interviews. The team might then suggest refining the deal structure and considering alternative arrangements if needed.

From there, typically a month before announcing the deal, the antitrust team engages in prenotification processes with regulators—setting the negotiating strategy, developing contingency plans, etc.—to maximize the chance of approval in Phase 1. If regulators raise concerns, the team can negotiate, and even suggest divestitures and other remedies. Once approval is granted, the team should go

over the integration plans to reflect any finalized remedies.

These steps can involve an enormous amount of technical work, under tight deadlines. BCG adds value by supporting the antitrust team in collecting and analyzing data and by suggesting ways to accommodate regulators' concerns. We can coordinate the data transfer and communication between internal stakeholders such as business units or the management, and external advisors such as lawyers, and the regulator. A successful process requires oversight on tactics, topic owners, and overall progress. As outside advisors, we can help ensure the independence of merging companies prior to the deal's close, including preventing gun-jumping practices.

Deals that move into Phase 2 impose a high cost, even if the merger is ultimately approved. That's why BCG emphasizes advance preparation. We aim for rapid response to regulators' questions; complete, consistent, and easy-to-understand communication; prompt data collection and transfer; and positive face-to-face interaction.



Managing Potential Remedies

Cost and revenue synergies are usually essential to a deal's rationale, and easy to lose if regulators demand divestitures and other remedies. Experienced buyers analyze the expected synergies by business, function, and region, and consider various regulatory scenarios. For each scenario, they can assess the one-off costs of likely divestitures relative to the total value expected from the deal. From there, they can set a proactive regulatory strategy that balances goals for value creation with regulatory risk.

Acquirers must sometimes engage in game theory analysis in offering potential remedies. In some cases, the offer can prevent worse concessions from being imposed by the regulator; but in others, the acquirer might end up stuck with a remedy that could have been avoided.

When divestiture is likely, acquirers will want to make advance arrangements to avoid disposing of assets at fire-sale prices. In one recent health care merger, European regulators required the buyer to divest a drug and the associated business operations, including potentially the commercial, R&D, and manufacturing operations. The exact scope of the divestment would depend on which company was acquiring

the drug. There were several potential acquirers, but the regulators determined that one company was particularly well positioned to preserve competition. With this designated buyer, the acquirer received less than half of the drug's estimated value to the business, substantially undercutting the overall deal.

Acquirers can reduce this risk by approaching potential divestitures as rigorously as they would a regular divestment. BCG can help with an analysis of the buyer universe, including the value creation rationale for each potential buyer, as well as the operational scope of a divestiture that would address both the buyer's needs and the regulator's concerns. Dealmakers should develop strong marketing materials that present a compelling equity story and meticulously prepare for due diligence, management meetings, and negotiations. (see the *Sell Side Success* brochure).

While acquirers tend to focus on landing the target and integrating it, investing in advance to reduce value leakage from fire-sale discounts may be more fruitful than squeezing out the last few dollars from synergies.

Designing and Implementing Hold-Separate Arrangements

To carry out a divestment remedy, acquirers often establish a hold-separate arrangement. This allows the deal to close before the acquirer can divest the asset in question.

The arrangement typically involves ring-fencing the business by limiting information flows with the main organization. The parties must also ensure that they treat the ring-fenced business no differently, or that it acts no differently, to weaken its competitive position.

Ring-fencing can be organizational, maintaining separate commercial teams, for example, or limiting the distribution of reports that contain sensitive data such as pricing. Regulators can also require more expensive technical measures, such as systems changes to prevent access to sensitive data.

Beyond the direct costs of a ring-fenced arrangement, the separation may impede the acquirer's efforts to integrate the target's operations, postponing synergies and other benefits. It's important that companies avoid overkill in ring-fencing. Regulators are often open to pragmatic solutions here, but reaching agreement depends on companies developing a well-considered approach that is clearly communicated to regulators. BCG has helped a number of companies with this.

BCG's consulting support is well positioned to design and carry out the ring-fencing, including any required service-level agreements. We can also help select the monitoring trustee and the hold-separate manager. We can draw on vast knowledge in organizational design practices in setting up the separated entity as a stand-alone business.



Lessons Learned

01

Merger clearance work can improve acceptance not just from regulators but also from the company being acquired.

02

Acquirers are often worn out by the effort and stress of merger clearance, leaving them with little time for value-generating activities, such as synergy realization.

03

Without advance preparation, acquirers can get swept up in the momentum for a deal and end up with remedies that take away most of the deal's benefits.

04

Not getting clearance in Phase 1 is usually costly, both directly in greater effort and expense, and indirectly in delayed or lost synergies. Advance preparation improves the odds of Phase 1 approval.

05

Acquirers can influence regulators by doing their homework and anticipating concerns.

06

It's essential to set up a separate antitrust team to handle merger clearance. Regular integration teams won't have the time or specific knowledge required to carry out the necessary tasks.




Deals That We've Helped Happen

2020


2020



Strategic advisor in JV transaction




2020/2019




buying 49.99% of Santander Securities Services from

Strategic advisor to the buyer and on PMI

Value not disclosed




2020



Strategic advisor on PMI

\$21B



2020




Strategic advisor on PMI

\$16B




2020



Strategic advisor on PMI

\$8.5B



2020




Strategic advisor on PMI

\$5.0B




2019

2019



Strategic advisor to the buyer

Value not disclosed



2019



buying 22.5% shares of

Strategic advisor to the buyer and on PMI

Value not disclosed



2019



buying 5% share of

Strategic advisor to the buyer

\$200M




2019

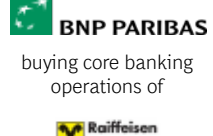


Strategic advisor to the buyer

€910M




2019




buying core banking operations of

Strategic advisor on PMI

\$956M




2019




Strategic advisor to the buyer, Strategic advisor to the buyer and on PMI

\$484M




2019




Strategic advisor to the buyer and on PMI

\$2.9B




2019



Strategic advisor on PMI

\$28B



2019

2019



Strategic advisor on PMI

\$2.2B



2018

2018




Strategic advisor to the acquirer in JV transaction

c. \$40B




2018



DAIMLER

combined their mobility services in an equally owned joint venture



2018



buying 72% of




Strategic advisor to the buyer

\$51M




2018



Strategic advisor to the buyer and on PMI

Value not disclosed



2018

FERRERO

buying US candy business of



Strategic advisor to the buyer


\$2.8B



2017


2017

FERRERO




Strategic advisor to the buyer

\$1.2B




2017




Strategic advisor on PMI

\$24B




2017




Strategic advisor to the buyer

Value not disclosed




2017



Strategic advisor to the buyer

\$5.2B




2017




Strategic advisor to the buyer

\$160M




2017



Strategic advisor to the buyer

\$0.9B



Meet Our Team

BCG's experts represent a rich and diverse group whose experience comes from solving the key issues faced by companies around the world. For every focus area, we also have local experts who provide pivotal insights into the dynamics of individual markets.

TRANSACTION & INTEGRATION EXCELLENCE GLOBAL AND REGIONAL LEADERSHIP



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Jeff Gell is a Managing Director and Senior Partner based in BCG's Chicago office. He is a core member of BCG's Consumer, Operations, and Corporate Finance and Strategy practices and leads the Transaction and Integration Excellence business globally.



Chris Barrett

Managing Director and Partner

Chris Barrett is a Managing Director and Partner based in BCG's Dallas office. He joined BCG in 2001, and has worked on Post-Merger Integrations across many industries, geographies, and topics. Chris has also worked in our Los Angeles and Amsterdam offices.



Dr. Jens Kengelbach

Managing Director and Senior Partner

Dr. Jens Kengelbach is a Managing Director and Senior Partner based in BCG's Munich office. He is the Global Head of M&A and the Leader of the BCG Transaction Center.

BCG's Transaction and Integration Practice Encompasses:



More than 150 partners and 700 trained professionals across all seniorities, each with significant experience in corporate development and corporate finance.



Teams that always combine the specialist's expertise with our proven industry expertise, bringing strategic know-how to all industries and geographies.



A "solution first" mindset to help constructively manage the dealmaking process at the strategic "macro" level as well as at the levels of detail required.



Daniel Friedman

Managing Director and Senior Partner

Daniel Friedman is a Managing Director and Senior Partner based in BCG's Los Angeles office. He is the Los Angeles Office Leader and the Leader of the Transaction and Integration Excellence business in North America.



Jesper Nielsen

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Jesper Nielsen is a Managing Director and Senior Partner based in BCG's London office. He is currently the Regional Leader of our Transaction and Integration Excellence business in Western Europe and South Africa.



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Teemu Ruska is a Managing Director and Senior Partner based in BCG's Helsinki office. He is the Regional Leader of our Transaction and Integration Excellence business in Central and Northern Europe and the Middle East.



Leif Neumann

Associate Director

Leif Neumann is an Associate Director based in BCG's Hamburg office who joined BCG in 2012. He is a member of BCG's Transaction Center and is the dedicated PMI expert in Germany and Austria, in Central and Eastern Europe, Middle East and Affiliates.



André Kronimus

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André Kronimus is a Managing Director and Senior Partner in BCG's Frankfurt office and the global Topic Leader for Corporate Finance & Strategy (especially end-to-end M&A and PMI) in Health Care, Life Sciences, and Chemicals. He is a core member of both the Corporate Finance & Strategy and Health Care practice areas as well as the BCG Transaction Center and the European Corporate Finance Task Force.



Sébastien Bard

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Sébastien Bard is a Partner and Associate Director based in BCG's Paris office. He joined BCG in 2009 and is a core member of the Financial Institutions practice and specializes in leading large-scale transformation and PMI programs.



Niamh Dawson

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Niamh Dawson is a Partner and Director based in BCG's London office working primarily in BCG's Transaction Center. She is an expert on PMI, change management, and culture.



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Partner and Associate Director

Kim Thomas is a Partner and Associate Director based in BCG's Copenhagen office. He is BCG's Global Topic Leader for carve-outs and a core member of the BCG Transaction Center.



Read All About It

Our clients operate in nearly every industry and region around the world, and they come to us for fresh approaches to the issues that matter most to them. Through a rigorous analysis of each client's individual situation, we develop customized solutions that meet the organization's specific needs. The case examples here illustrate how we help clients sharpen their capabilities, create value, and deliver sustainable advantage.



The Clean Team Advantage
How BCG Enhances M&A Success



Successful Due Diligence
How BCG Supports Strategic Due Diligence



Successful Business Separations
How BCG Supports Carve-Outs



Successful Target Search
How BCG Helps Find Strong M&A Candidates



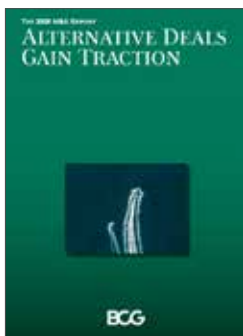
Successful Merger Integration
How BCG Helps Maximize the Value from a Deal



Successful IPOs, Spin-Offs, and Dual Tracks
How BCG Supports Effective Transactions



Sell-Side Success
How BCG Supports Divestitures



The 2020 M&A Report
Alternative Deals
Gain Traction

Transaction

CENTER

BCG's Transaction Center is the hub of the firm's global M&A expertise and provides businesses with end-to-end transaction support, including strategic decision-making in mergers and acquisitions, preparing and executing divestitures, and supporting IPOs and spin-offs. The Transaction Center combines BCG's deep sector expertise with our comprehensive knowledge of, and experience in, all aspects of M&A across all sectors and industries. These services complement the process-focused offerings of investment banks. With more than 300 professionals worldwide, we concentrate on the commercial drivers of the business plan and equity story. We help both corporate and private equity clients execute deals efficiently and, more importantly, maximize value.

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