

**Morgan Lewis**

# **M&A ACADEMY**

**What to Know about Merger Control Filings, and Avoiding Antitrust Traps**

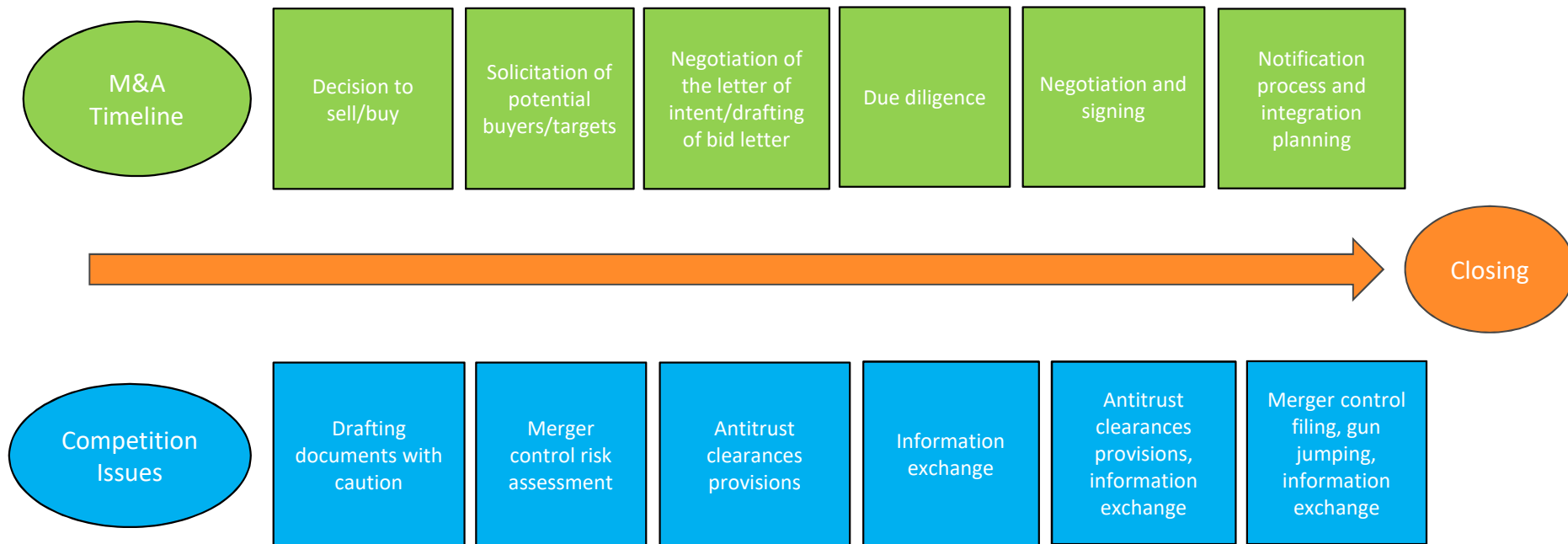
**David Brenneman, Joanna Christoforou and Christina Renner**

March 3, 2020

The background features a dynamic, abstract composition of light trails. On the left, numerous thin, parallel red lines streak across the frame, curving towards the right. Below these, a series of thicker, more prominent blue lines also curve from the bottom left towards the top right, creating a sense of depth and movement. The overall color palette is dominated by deep blues and vibrant reds, with a dark blue gradient in the lower right corner.

# **COMPETITION LAW MOMENTS IN M&A TRANSACTIONS**

# Competition Law Moments



# Drafting Documents With Caution



- Internal Documents rarely remain internal
- Submitting deal documents in merger filings
- Dos and Dont's

# Merger Control Risk Assessment



- What types of transactions are reportable ?
- Where does this have to be filed ?
- Do the parties to the transaction compete ?
- How long does the review take ?

# ***Jurisdictional Thresholds Under the EU Merger Regulation (EUMR)***

- An **EU merger filing** is required if one of the two following **turnover tests** is satisfied:

## **Test 1**

- a) the Parties' combined worldwide turnover exceeds €5bn (approx. US\$5.5bn); **and**
- b) the EU-wide turnover of each of at least two Parties exceeds €250m (approx. US\$279.8m); **unless**
- c) each of the Parties achieves more than two-thirds of their EU-wide turnover in one and the same Member State.

## **Test 2**

- a) the Parties' combined worldwide turnover exceeds €2.5bn (approx. US\$2.7bn); **and**
  - b) the EU-wide turnover of each of at least two Parties exceeds €100m (approx. US\$111.9m); **and**
  - c) the Parties' combined turnover in each of at least three Member States exceeds €100m (approx. US\$111.9m); **and**
  - d) the turnover in each of those three Member States by each of at least two of the Parties exceeds €25m (approx. US\$27.9m); **unless**
  - e) each of the Parties achieves more than two-thirds of their EU turnover in one and the same Member State.
- Under the '**one-stop-shop**' principle, a filing with the European Commission precludes national filing requirements at individual Member State level (even if the national thresholds are also exceeded).

# UK Jurisdictional Thresholds

- The UK merger filing regime is **voluntary**. However, under the Enterprise Act 2002 (EA02), the UK Competition and Markets Authority (CMA) has jurisdiction to review mergers where at least one of the two following tests are satisfied:
  - **Turnover Test**: the Target's UK turnover exceeds £70m (approx. €79.7m/US\$89.2m); **or**
  - **Share of Supply Test**: the merger creates or enhances a share of supply in the UK (or a part of it) of 25% or more.
- There are **reduced thresholds** for transactions in certain **sectors impacting national security**, that is (i) military or dual-use goods which are subject to export control; (ii) quantum technology; or (iii) computer processing units. For these sectors only, a filing is required if:
  - **Turnover Test**: the Target's UK turnover exceeds £1m (approx. €1.1m/US\$1.2m); **or**
  - **Share of Supply Test**: The Parties' combined share of supply or the Target's share of supply is 25% or more.

# ***BREXIT: Allocation of Merger Control Jurisdiction During the Brexit "Transition Period"***

- The **Transition Period** began on Exit Day (midnight (CET) on 31 January 2020) and is currently due to end at midnight (CET) on 31 December 2020.
- **During** the Transition Period, the UK will broadly continue to be treated as if it were an EU Member State under the EUMR:
  - the 'one-stop-shop' principle under the EUMR will continue to apply;
  - the division of jurisdiction between the European Commission and the CMA over mergers which are notifiable under the EUMR or the EA02 will remain the same; and
  - UK turnover generated by merging parties will need to be taken into account when establishing whether a merger satisfies the EUMR jurisdictional thresholds.



# ***BREXIT: Allocation of Merger Control Jurisdiction After the "Transition Period" – European Commission***

- At the **end** of the Transition Period, the **European Commission** will retain exclusive jurisdiction to review a merger (and the CMA will therefore not have jurisdiction over the case) in the following scenarios:
  - a merger has been formally notified to the European Commission before the end of the Transition Period;
  - the European Commission has, before the end of the Transition Period, accepted an Article 22 EUMR referral request (referral request from National Competition Authorities of Member States); or
  - the European Commission has, before the end of the Transition Period, accepted an Article 4(5) referral request (pre-notification referral request by the parties).

# ***BREXIT: Allocation of Merger Control Jurisdiction After the Transition Period – CMA***

- At the **end** of the Transition Period, the **CMA** may have jurisdiction to review a merger that has not been formally notified or subject to referral to the European Commission before the end of the Transition Period.
- Merging parties are encouraged to approach the CMA to discuss whether it might be useful to begin pre-notification discussions particularly where:
  - the merger might not be formally notified to the European Commission before the end of the Transition Period; and
  - the merger is likely to meet the UK merger control filing thresholds.

# ***BREXIT: Allocation of Merger Control Jurisdiction After the Transition Period – General Notes***

- **After** the end of the Transition Period:
  - mergers will **no longer** be subject to the EUMR one-stop-shop principle in relation to the UK (i.e. the European Commission and the CMA may review the same merger in parallel);
  - UK turnover will no longer be relevant for determining whether EUMR thresholds are satisfied; and
  - the European Commission will no longer have jurisdiction to investigate the effects within the UK of any mergers (with the exception of mergers that have been formally notified or are subject to referral to the European Commission **before** the end of the Transition Period).

# CLE Code

We will now announce the CLE code. Please save this number; you will be asked to provide this code in a survey immediately following the presentation today, which will generate once you exit the WebEx application. Please be sure to take the survey and apply the code where necessary in order to receive credit.

Please email Erik Scott at **[erik.scott@morganlewis.com](mailto:erik.scott@morganlewis.com)** if you have any questions.

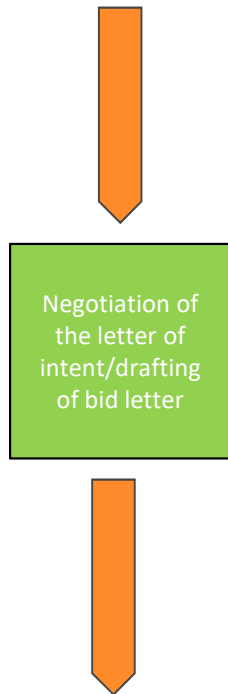
# ***HSR Nuts & Bolts: The Basics***

- Pre-closing notification (a.k.a. suspensive)
- Each side of the transaction files
  - Filings submitted to DOJ and FTC
- Initial 30-calendar-day waiting period
  - Early termination (ET) of the waiting period
  - “Pull & refile” (another 30 days)
  - Second request (6-plus months)
- Fees: \$45K, \$125K, \$280K depending on deal value
  - Buyer pays unless parties decide otherwise

# ***HSR Nuts & Bolts: Jurisdictional Thresholds***

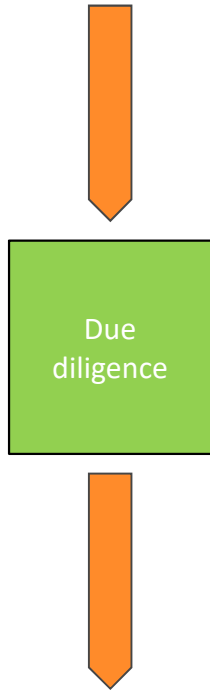
- Assets, voting securities, exclusive IP licenses
  - Non-passive minority acquisitions of voting securities
  - Conversions into voting securities
  - Economic control of partnership or LLC
  - Joint venture formations
- Two jurisdictional tests (adjusted annually)
  - Size-of-transaction test: above US\$94M
  - Size-of-person test: US\$188M sales/assets and US\$18.8M sales/assets
  - SOP eliminated for transactions valued above US\$376M
- Valuation
  - Liabilities for asset vs. equity acquisitions
  - Contingent consideration
- Exemptions, exemptions, exemptions
- \$43,280 per day in civil fines

# Antitrust language pre-negotiation/bid



- High-level antitrust assessment
- Timing
- Bid letter or direct acquisition

# Information Exchange



- Competitors or not competitors
- NDAs and clean teams
- Bidding process or direct acquisition



# Antitrust Clearance Provisions



- CP or no CP
- HOHW
- Timing
- Cooperation obligations

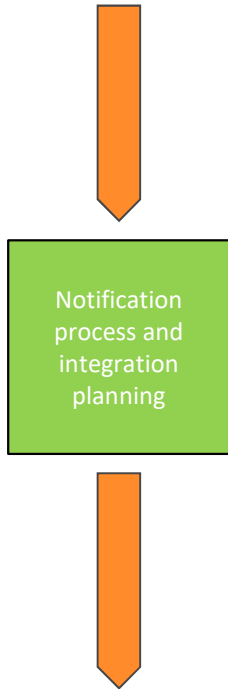
# ***Contract Negotiations***

- Antitrust covenant
  - “hell or high water” v. “walk-away”
  - Where to file and when to file
  - Who pays fees (filing, attorneys, economist)
  - Cooperation of parties and counsel
- Stand-still provisions
- Drop dead dates and reverse break-up fee
- No other actions that would cause delay representation/covenant
- Cooperation provisions
  - Who leads antitrust defense?

# ***Contract Terms: Risk Allocation (Options)***

- Buyer accepts all structural and conduct relief and, at the request of Seller, agrees to litigate; Buyer may direct defense
- Buyer agrees to litigate or pay RBF if unsuccessful
- Buyer agrees to divest up to a specified amount of assets, *i.e.*, assets valued at \$x, or assets generating sales or EBITDA of \$y
- Buyer agrees to divest up to a specified amount of assets AND pay RBF if agency finds divestiture insufficient by drop dead date
- No duty to divest or litigate, but Buyer must pay RBF if no antitrust approval by drop dead date (long timeline)
- Buyer agrees to short drop dead date (with or without RBF)

# Merger Control Filings



- Drafting of filings
- Involving local counsel
- Handling information requests

# Gun Jumping and Information Exchange



Notification  
process and  
integration  
planning

- Integration planning vs. gun-jumping
- Integration planning vs. anticompetitive information exchange
- Remedies discussions vs. anticompetitive information exchange

# Biography



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David represents leading private equity sponsors, Fortune 250 companies, and other prominent privately held companies with respect to the antitrust aspects of mergers & acquisitions (M&A), joint ventures, and other business combinations in the technology, telecommunications, life sciences, and financial services industries, among others. David regularly advises parties to multimillion and multibillion-dollar mergers and acquisitions reviewed by antitrust enforcement agencies throughout the world, and has defended several high-profile transactions before the Antitrust Division of the US Department of Justice (DOJ), the US Federal Trade Commission (FTC), and the European Commission.



# Biography



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Joanna Christoforou focuses her practice on EU and UK competition law and antitrust, including competition law litigation in the European and English Courts. Joanna defends clients in cartel or abuse of dominance investigations, competition disputes, dawn raids, damages actions, merger control, restructuring, and joint ventures, and advises clients on a range of competition law matters. Joanna advises clients in relation to mergers reviewed by the European Commission and the CMA, including complex mergers requiring divestments, and has experience handling multi-jurisdictional merger filings in different sectors.



# Biography



## **Christina Renner**

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Christina Renner concentrates her practice on EU and German merger control and antitrust law, with experience in cartels and general behavioral matters, abuse of dominance, and EU state aid laws. Christina has represented clients in merger proceedings reviewed by the EU Commission and the German Federal Cartel Office, as well as the French, Austrian, and Belgian competition authorities for over 15 years. She has specific experience in handling multi-jurisdictional and often large filings for a variety of clients and regularly advises on complex competition compliance matters.



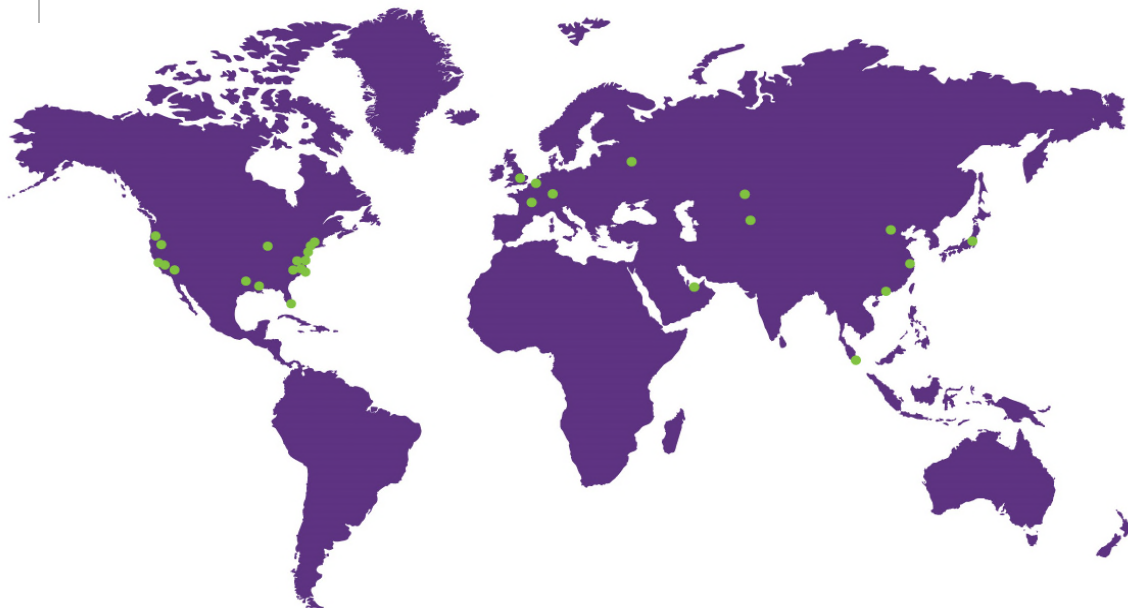


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Middle East  
North America

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