Multinational merger review

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The proliferation of merger notification regimes around the world, from about a dozen in 1999 to over 70 today, has significantly increased the complexity and costs of a multinational merger. It is no longer unusual for a transaction to be reviewed by competition authorities in several countries, many of which have varying merger notification threshold requirements and differing standards of review. The strategies counsel will need to implement to navigate this multi-jurisdictional review process will vary by jurisdiction and depend upon, among other things, the size and scope of the transaction and the nature and seriousness of any potential competitive issues. The manner in which the competition authorities react to the transaction and the extent to which customers and rivals complain about it will also influence counsel's strategies. Regardless of whether counsel plays a proactive role with the competition authorities or adopts a 'wait and see' attitude, clearing the deal will require time, attention, and patience.

The need for patience, plus advance preparation and good strategic planning, is especially evident in the merger review process for substantial global transactions, particularly those that raise significant competitive issues. Although the strategy used to clear an individual transaction must be tailored to the specific facts, some of the following recommendations may be appropriate.

Early involvement by competition counsel is crucial. One of the most important elements of successfully navigating the maze of global merger notification regimes is early involvement in the transaction by skilled competition counsel. Substantively, competition counsel can advise not only on the potential antitrust risks the transaction creates under various regimes, but also on key provisions in the merger agreement that may influence clearance. Provisions related to the clearance procedure include clauses governing the actions the parties must take to satisfy competition authorities and terms that allocate the antitrust risk. Provisions related to more substantive antitrust issues include non-compete clauses, licensing provisions, and integration procedures. Proper structuring of substantive competition matters in the agreement and careful crafting of contract language may reduce or eliminate antitrust risk. Dealing with these issues early should smooth the notification and review process and protect the parties in the event of an adverse finding by a competition authority. Early involvement also allows competition counsel to identify the jurisdictions in which pre-merger filings are necessary—a sometimes difficult task that requires data that are not readily available.[1] Identification of these jurisdictions up-front minimises the risk of being surprised by the need for review by, or any possible delay associated with, an unanticipated competition clearance.

Early involvement also allows competition counsel to develop the themes that will be used to explain and defend the transaction, which is crucial to a successful review. The themes should take into account background information about the parties and the industry, and should clearly articulate the business rationale for the deal in a manner that explains its pro-competitive benefits, eg achieving economies of scale, offering a new product or service, or engaging in cost-effective research and development. Early involvement also allows counsel to ensure that public comments and press releases do not undermine the pro-competitive theme to be articulated to the regulators.

The competition team. Once the notification jurisdictions are identified, counsel can begin to assemble a team of local counsel in each jurisdiction to assist in preparing the notifications. This team can be quite large, depending upon the scope of the transaction, and all team members (including counsel in multiple jurisdictions) must work cooperatively to clear the transaction. The parties should mutually select any economic or industry experts necessary to assist them in reviewing the transaction and, where possible and necessary, jointly present the transaction's benefits to the competition authorities. Alternatively, the parties should communicate fully and equally with experts for the parties and all parties should have access to the experts, their work product, and their theories. Ideally an expert with a good reputation with the authorities and a clear understanding of the merger process should be engaged. The best expert is a thoughtful, well-respected economist—and if the expert also understands the industry, that is an extra benefit.

While cooperation should be the underlying theme of the competition team, it is prudent to designate one lawyer to take the lead in developing the overall strategy and directing the efforts of local counsel and the expert team. This increases the effectiveness of the overall team, minimises duplication and costs, and eliminates the risk of inconsistent positions. The parties must speak with one voice around the world in the pre-merger notification filings and in any submissions to competition authorities. This means that the competition team should start on the same page and be in constant communication and coordination as the facts and issues evolve. Practically, it may be prudent to prepare an outline of the themes to be used to defend the transaction (and all supporting facts) and answers to any prominent antitrust questions that could be raised by multiple authorities. Draft submissions to any competition authority may be circulated to the entire team to assure consistency.

Preparing for the merger review. Preparation for the merger review, including work on the various merger notifications, should begin as soon as possible. The most efficient way to accomplish this task is for competition counsel to be given early access to key documents and executives, which allows counsel to understand the transaction and the industry and to identify potential competition issues in advance. This will be extremely useful in analysing the competitive effects of the transaction. Strategic planning documents, marketing materials and business analyses are particularly important and may be produced to competition authorities. For example, under the US Hart-Scott-Rodino (HSR) Act, certain documents prepared by or for an officer or director of the company analysing the competitive effects of the transaction must be attached to the HSR pre-merger notification form.[2] Similarly, EC merger notification rules require

that certain documents regarding the competitive effects of the transaction be submitted with the Form CO. Interviews with senior management and marketing personnel will assist counsel in understanding documents and the industry and in putting the transaction in context.

Early drafting of pre-merger notification forms also is important. There are two types of pre-merger notification regimes—compulsory and voluntary. In compulsory notification regimes, filing is required if certain filing thresholds are met and, in many cases, sanctions are imposed for failure to file or late filing. For example, Ireland's competition law requires a pre-merger notification within one month of execution of the agreement and failure to file may result in criminal penalties.[3] Other compulsory pre-merger notification jurisdictions, such as Brazil, require pre-merger filing, but allow the parties to close while clearance is pending.

In voluntary pre-merger notification regimes, filing is not mandatory, but may be recommended if the transaction will have a significant impact in a country. Voluntary pre-merger notification regimes do not impose penalties for failure to file. However, even 'voluntary' notification regimes can intensely scrutinise a transaction and impose conditions for its clearance or attempt to block it. More significantly, the authorities of certain 'voluntary' competition regimes have the power to challenge the legitimacy of a transaction post-merger. As a result, for certain high-profile transactions with significant competitive concerns, it may be more prudent to complete the competition review up-front, even voluntarily, than to risk a post-merger 'unscrambling of the eggs'. For example, the United Kingdom has a voluntary merger notification regime, but British competition authorities can investigate a merger on their own initiative.[4] Parties that do not notify a transaction with a significant effect on the British market to the Office of Fair Trading (OFT) run the risk that OFT may require suspension of the transaction or even unwind it. Determining in which voluntary jurisdictions to file therefore requires a clear understanding not only of the specifics of the transaction and its possible competitive effects, but also of the potential perceptions and issues the transaction may generate in multiple countries. It also may require consideration of whether any competitive issues the transaction may raise in 'voluntary notification' jurisdictions are essentially the same as those in mandatory notification jurisdictions (and therefore more likely to be addressed by the latter jurisdictions in any event) or significantly different.

Certain jurisdictions have adopted mandatory post-merger filing requirements.[5] In these jurisdictions, filing is usually required within a certain time-limit following closing. Although preparation of these notifications is important, early preparation is not as crucial.

Early drafting of merger notifications is particularly important in jurisdictions that require notification within a short period of a specific triggering event, such as execution of the agreement.[6] Many pre-merger notifications require detailed industry information, such as industry market shares, information as to the cost of production or operation for the past several years, and details regarding the level of investment required to enter the industry. It can be difficult and time-consuming to obtain these data, and advance work on these notifications will prevent missing filing deadlines.

Dealing with competition authorities. Once the transaction becomes public, depending upon the transaction's public profile and the competitive issues associated with it, counsel may want to consider meeting with key competition authorities. This meeting, which allows counsel to outline the benefits of the transaction before competitors—or even more damaging, customers—complain to the agencies, is particularly appropriate for substantial transactions guaranteed to attract agency attention because it provides the authorities with a pro-competitive rationale for the deal to keep in mind during the review process. Additionally, such a meeting will give counsel insight into the agencies' concerns, allowing counsel to respond quickly.

At some point in the review process, presentations by senior management may aid the competition agencies in their review. In fact, in certain circumstances, an effective means of conveying the pro-competitive benefits of the transaction and pre-empting and answering questions by competition authorities is to arrange a meeting between company management and the agency staff reviewing the transaction early in the review process. The business people attending the meeting should be sufficiently knowledgeable about both the transaction and the industry to explain its structure and the competitive rationale. The management team visiting the agencies also should be briefed in advance of the meeting regarding the regulatory process, the key competitive issues, and the possible questions that may be raised during the course of the meeting, as well as the general scope of any replies.

Counsel should assume that there will be coordination among the various competition authorities, particularly on large, substantively challenging transactions. In such instances, the parties may consider providing filings and submissions in one jurisdiction to the other or executing a waiver allowing the competition authorities to discuss their respective reviews.[7] Certain reviewing authorities may ask for such a waiver and may request that the parties waive confidentiality provisions. This needs to be assessed on a case-by-case basis. In some cases, cooperation may benefit the parties by enhancing the likelihood of consistent outcomes.

Effective advocacy before the competition authorities will also help reduce the review process. In dealing with competition authorities, it is absolutely critical that counsel maintain their credibility and carefully guard their reputation for integrity. Unless there is a realistic possibility that the transaction will not be noticed, a proactive approach with the reviewing agencies often is most productive. In certain circumstances, counsel will need to provide quickly the key facts about the industry and the transaction so the agencies can understand the issues. Verifiable facts and sound economic evidence are preferable to and more successful than legal arguments. In assembling and presenting this evidence, counsel should recognise that the competition authorities will discuss the possible competitive effects of the transaction with both customers and competitors.

Dealing with politics. Political issues can take on particular significance in the merger review process. In certain instances, such as *Boeing/McDonnell Douglas* or *GE/Honeywell*, the transaction also involves national political concerns. Specific industries, such as telecommunications and defence, are most likely to raise such concerns. Indeed, some merger notification laws are drafted to require notification of transactions that may not meet the traditional filing thresholds, but occur within a particularly sensitive industry. For example, certain acquisitions of public utilities or financial institutions must be notified in Italy regardless of whether filing thresholds are met,[8] and under French law, transactions in the audiovisual sector require a compulsory referral for advice to the Superior Audio-Visual Council.[9] In other jurisdictions, even where the law does not explicitly tie the merger notification to the industry, the authorities may do so implicitly.

It is important that counsel be aware of these political sensitivities and their practical effect on clearing the transaction. Increased scrutiny, delay, and, in some cases, even derailment of the transaction can result from non-antitrust matters such as security concerns, employment questions, and 'national champion' issues. In many cases, counsel will need to work with management and other legal specialists to craft responses to these concerns. Additionally, counsel may wish to review and comment on other regulatory filings to ensure they do not undermine any competitive themes. Because competition authorities may take such factors into account in reviewing

the transaction, the successful competition team must do so as well.

Practical tips. Prudent competition counsel will decide where to notify the transaction based upon a full and clear understanding of the parties, the transaction, and the relevant national laws. It is important that the competition team consult with each other and with the parties in making these determinations so as to assure consistency.

While exploration of the facts and careful drafting of the notification form should take precedence, it is important that time-consuming key details involved in filing do not get lost in the process. Experienced competition counsel will manage many of these details for the parties. For example, in certain countries, the merger agreement must be translated into the local language and attached to the filing. Filing timetables should take into account the time necessary for such a translation. It is likely that translation of the merger notification form itself also will be required because often the notification is initially drafted in a common language, such as English, to allow the entire competition team to review and comment on it. Additionally, certain merger notification regimes require the parties to execute affidavits approving the form and authorising local counsel to file on the parties behalf. Use of documents executed in one jurisdiction in an official filing in another jurisdiction may require an apostille, if the country concerned has executed the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents,[10] or authentication by national government authorities if the country in which the document is being filed has not executed the Convention. This is a time-consuming process that takes several days at least.[11] A filing schedule should allow for this process, as well as for the time it takes for the original authenticated document to reach local counsel.

The proliferation of pre-merger notification regimes throughout the world has significantly complicated the merger review process. With advance strategic thinking and effective advocacy, however, the process can be successfully completed without unnecessary expense or delay.

Notes

1 For example, some jurisdictional thresholds are based on market shares, which often require extensive research. The US agencies and the European Commission (EC) have outlined the basis for relevant market definition in similar terms, but both analyses are highly fact-dependent, so counsel need time to develop the facts relevant to market definition. See, eg, 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 1; Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ 371 (12 Sept. 1997).

2 See Item 4(c) of the instructions to the Hart-Scott-Rodino Notification and Report Form, available at http://www.ftc.gov/bc/hsr/091002InstructRpt.pdf.

3 Competition Act, 2002 § 26(4) (2002) (Ir.).

4 Enterprise Act 2002, §§ 22, 24, and 34 (UK).

5 For example, Brazilian merger regulations require filing within 15 days of execution of the agreement. Law No. 8884/1994, Article 54(4). The Polish merger regulations require filing within seven days of execution of a binding document, including a memorandum of understanding. Act on the Protection of Competition and Consumers of 15 Dec. 2000, § 94(4).

6 The US antitrust authorities have emphasised international cooperation between competition authorities in merger review. See, eg, Timothy J Muris, Chairman, FTC, 'Merger Enforcement in a World of Multiple Arbiters', speech before the Brookings Institution Roundtable on Trade and Investment Policy (21 Dec. 2001); R Hewitt Pate, Assistant Attorney General, Antitrust Division, US Dept. of Justice, 'The DoJ International Antitrust Program—Maintaining Momentum', speech before the American Bar Ass'n Section of Antitrust Law, 2003 Forum on International Competition Law (6 Feb. 2003). The United States has formal antitrust cooperation agreements with several countries that provide that each country will notify the other of competition law enforcement activities that are likely to affect the other's important interest and will share information and coordinate enforcement efforts. See Agreement Between the Gov't of the United States of America and the Gov't of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws (3 Aug. 1995), State Dept. No. 95-205, KAV No. 4415, 1995 WL 596161; Agreement Between the Gov't of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (4 June 1998), State Dept. No. 98-106, 1998 WL 428268; Agreement Between the Gov't of the United States of America and the Gov't of Japan Concerning Cooperation On Anticompetitive Activities (7 Oct. 1999), State Dept. No. 99-137, 1999 WL 1083830.

7 Law 287/1990 § 8 (as amended by Law No. 57/2001) (It.) [public utilities]; Law 287/1990 § 16(2) (It.) [banking].

8 Law No. 86-1067 (as amended by law 2001-420) (Fr.), Art. 41-4.

9 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 5 Oct. 1961, Art. 3.

10 Authenticating documents is literally a paper-chase, requiring seals and signatures from multiple government officials, and completion of this process can take several days even for the most efficient counsel due to the inherent delays built in the various bureaucracies.

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