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Antitrust Law
Global Review Regimes

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Recently, Alcan Inc. of Montreal faced daunting challenges when it pursued a merger with a rival that it believed would produce beneficial efficiencies and synergies. Alcan ultimately hired competition lawyers from 35 law firms from all over the world and filed 16 antitrust notifications in eight different languages, all with different deadlines, information requirements and approval processes. For the United States alone, Alcan produced 400 boxes of documents, 11 CD-ROMs and approximately one million pages of e-mail. Alcan estimates that the process cost in excess of $10 million, not including lost productivity.

This proliferation of merger review regimes around the world threatens to deter merger candidates from exploiting potential post-merger efficiencies, which may, in turn, do more to harm than protect consumers. The European Commission (E.C.'s) recent rejection of the General Electric-Honeywell merger may be a harbinger of things to come, considering that nearly 70 countries administer some form of merger review, with another 10 to 20 considering the same. Though the E.C. based its GE-Honeywell decision on differences of opinion regarding the bid's potential effect on competition, substantive policy differences are but one brick in an ever-growing wall of regulation.

Lack of uniformity among merger review regimes

The proliferation of review regimes, from about a dozen in 1990 to over 60 today, has resulted in added complexity and associated costs to multinational merger participants. This complexity is due largely to a lack of uniformity. Typically, a jurisdiction requires the merging entities to submit notification within a specified period after a triggering event if the merger meets a specified threshold. In the United States, merging companies cannot close for at least 30 days after a premerger filing is made if the size thresholds are reached.

The triggering event differs by jurisdiction. In the United States and Canada, merging entities may file as early as when they reach an agreement in principle or sign a nonbinding letter of intent. In other jurisdictions, like the E.C., the parties must reach a definitive agreement before filing. Still others have no definitive

notification deadline at all, so long as the parties do not consummate the deal before the end of the statutory waiting period.

Notification thresholds differ in size and type by jurisdiction as well. Some countries base their thresholds on product market share, while others, such as Russia, look to the aggregate size of the transaction, turnover or total assets of the merging parties to trigger notification. Even European Union member states have been unable to standardize filing obligations and timing.

Market share thresholds are particularly burdensome in that they may require extensive analysis for each market at issue merely to determine whether notification is required. Another disadvantage of market share tests concerns their subjectivity. Further, data regarding each market, especially data in the hands of competitors, may be difficult to obtain and thus difficult to integrate into a meaningful analysis.

Other countries base their reporting thresholds on global turnover. Though this test is appealing due to its relative simplicity and the availability of data, it poses another problem: It may have no correlation to the parties' economic presence in a given jurisdiction.

Even when jurisdictions agree on the type of threshold, the size that triggers notification may vary wildly. While some thresholds, like Russia's, are relatively small (approximately $300,000 in combined assets), others, like Argentina's, are very large ($2.5 billion in turnover).

Assuming notification is required, the cost to comply with potentially dozens of premerger review schemes, in terms of time, money and lost productivity, is significant. Although filing fees may represent a small fraction of the overall cost, they quickly add up and may deter the merger of smaller entities that could gain the most from the increased efficiencies a merger offers. Filing fees required for transactions that have few or no anticompetitive effects represent a subsidization of the requiring country's competition bureaucracy. The United States requires a filing fee ranging from $45,000 to $280,000 for each filing, which resulted in $195 million in revenue for fiscal year 1999.

Document production costs can be high as well. Due to a lack of uniformity in filing regimes, merger candidates must produce an assortment of documents to meet the requirements of each country in which it files. Although much of the required information is common to every regime, many jurisdictions require additional data unique to it.

The delay between merger agreement and approval by each reviewing country exacts opportunity costs as well. As the number of reviewing countries grows, so will the uncertainty regarding whether and when each jurisdiction will approve the

transaction. Thus, merger candidates may elect to forgo the merger altogether if costs from the expected delay outweigh the expected efficiency gains.

This lack of transparency is present particularly in jurisdictions with relatively new review regimes. In most cases, parties must hire local counsel in each country, which can be costly.

Differences in policy goals and market conditions may lead to divergent analyses of merger bids, potentially resulting in different outcomes. As the GE-Honeywell merger recently illustrated, inconsistent decisions may also create political friction. Even where goals are identical, differing market conditions may dictate opposite decisions. A merger of two widget manufacturers in the United States may represent only 10% of the domestic market, but 80% of the market in Europe.

Just as a merger may have disparate effects on competition in different countries, remedies imposed on merging parties can make perfect sense in one country, yet create a problem in another. For example, a party that sells widgets and many other products worldwide may be forced to divest itself of the widget division in Greece. This remedy may make perfect sense from Greece's point of view, despite the fact that it is the only place where the merger would lessen competition in widgets.

Antitrust regulators, practitioners, business leaders and international business organizations have taken steps to address merger review issues. Initially, cooperative efforts were limited to the United States and the E.C. The recent proliferation of merger review law throughout the world, however, may have rendered bilateral cooperation obsolete. The European Union has called repeatedly for standardization of merger review and control procedures, and has repeatedly supported efforts by the World Trade Organization (WTO) to address these issues. But the United States has rejected the WTO model and instead favors the creation of a separate body that would not infringe on the authority and sovereignty of its members.

Other organizations are working toward standardized review as well. In September 2000, the American Bar Association Antitrust Section and the International Bar Association announced plans to sponsor a study that would review the financial burden to the global economy that the dozens of merger review regimes impose. The Organization for Economic Cooperation and Development also has pressed for harmonization of merger review.

Movement for a Global Competition Initiative

Recently, competition law officials and professionals have begun informal discussion regarding the creation of a Global Competition Initiative (GCI). The concept is the product of the 2000 International Competition Policy Advisory Committee report submitted to then-Attorney General Janet Reno and then-Asst. Attorney General

Joel Klein, which suggested that the GCI facilitate consensus-building on global competition issues. The proposal gained momentum in September 2000 when Klein expressed public support for the formation of the GCI at an E.U. conference on competition. It gained further momentum from its strong endorsement by European Competition Commissioner Mario Monti.

Several organizations, including a group of major multinational corporations, have begun compiling "best practices" in an effort to reform the multi-jurisdictional merger process. Best practices likely will focus on two areas: limiting merger notification requirements only to those mergers that will have a significant impact in the reviewing jurisdiction and reducing the burden of merger review.

Support for standardization is building as well. Business leaders in particular have applauded efforts in Europe to create a standardized notification form that relieves transacting parties from the burden of converting what is essentially a common set of data into each jurisdiction's distinct format. Some also have encouraged the use of work-sharing, which would split the work between reviewing jurisdictions, saving both reviewing countries and transacting parties duplicative transactions costs. But work-sharing is likely to be controversial because it would require some surrender of national sovereignty.

While attention on the burdens inherent in multijurisdictional review continues to mount, concrete reform is likely far off. There are signs, however, that the inertia may be broken. The E.C.'s rejection of the GEHoneywell merger bid may be just the wake-up call needed to spur both the business community and regulators to deal with the merger review chaos and promote greater international merger review.

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