Antitrust Review of Multijurisdictional Mergers: Navigating Complex Clearance Requirements
Managing Cross-Border Pre-Merger Reviews Amid Overlapping Substantive and Procedural Regimes

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Today’s faculty features:

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Antitrust Review of Multijurisdictional Mergers: Navigating Complex Clearance Requirements

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Topics to Cover Today

• Scope of International Merger Control Regimes
• Determining Reportability
• Content of Merger Notifications
• Coordinating Timing of Filings
• Coordinating Substantive Arguments
• Coordinating Outcomes
• Role of Merger Control in Deal Negotiations
Merger Control Regimes

• More than 100 merger control regimes
  – Most are state-based, but some regional
    • European Union; COMESA
  – Jurisdictions of all sizes have merger control
    • Isle of Jersey; Malta
• Regimes vary in complexity and experience
• Timing of filing and review vary
• Most mandatory if thresholds met
  – Notable exceptions include UK, Australia
• Most are now pre-closing; a few post-closing
Recent Examples
Core Merger Regimes

• Most active enforcers include:
  – Americas: US, Brazil
  – Europe: EU, UK, Germany, France
  – Asia/Pacific: Korea, China, Australia
  – Africa: South Africa

• Other jurisdictions to keep an eye on
  – Newcomers: India, COMESA
  – Jurisdictions with low thresholds, e.g.: Austria, Ukraine, COMESA
First Step: Reportability

• First step is to determine reportability
  – May want to address this during negotiations

• Very complicated process
  – No common methodology for reportability
    • Most use revenue thresholds
    • Some have asset or market share thresholds
    • Some require local nexus, some do not
    • US is an outlier, focuses on transaction value
  – Where reportability not obvious, written advice of local counsel may be required

• Will be cases where reportability still uncertain
  – Requires careful risk analysis with aid of local counsel
Reportability Thresholds

• Each jurisdiction has unique filing requirements
  – Two general types:
    • Revenue (turnover) or asset thresholds
    • Market share thresholds (may be one party or combined)
  – Some consider both
  – Most jurisdictions now require a local nexus – but still some outliers
  – Revenue thresholds have become “best practice” because they are objective and relatively easy to calculate. Complications include:
    • Jurisdictional origin of revenue
    • Definition of “turnover”
  – Market share complications include:
    • Different market conditions across jurisdictions
    • Need to commit to markets prior to full investigation
    • Need detailed data and agreement among parties
What If My Deal Is Reportable?

• Reportability affects timing
  – Even in non-strategic deals, filings take time
    • Complicated filings (EU, China, India) can take weeks to prepare in some cases
  – In strategic deals, timing can be uncertain
    • Some jurisdictions, including the EU and China, often delay acceptance of filings
    • Some jurisdictions have the power to “stop the clock” at various points in review process

• Parties should consider timing uncertainties
  – Can impact termination dates and finance timing
Content of Filings

- Complexity varies by jurisdiction
  - Some are fairly simple:
    - US: basic financial data and limited documents
    - Germany: basic description of parties and markets
  - Others require highly detailed submissions, requiring detailed descriptions of parties, markets
    - EU and all EU-based regimes
    - China
    - Brazil
- Simple filings take ~one week; others a month or more in complex transactions
- Some jurisdictions require filings by both parties; in others only one filing is required, usually from the buyer
  - Information will be needed from all parties in all cases
Coordination of Filings

• Timing
  – Alignment often not critical where no substantive issues
  – But can be essential where complex issues

• Need to consider jurisdictions with lengthy review periods (e.g., India)

• May be able to start discussions with staff in US, elsewhere prior to actual filings
  – Always useful to be in touch with staff in key jurisdictions early to have discussions on timing and substance

• Failure to coordinate the timing of filings may seriously complicate the substantive review and coordination of any remedies
Coordination of the Investigation

• Many jurisdictions now seek to cooperate in their reviews of common transactions
  – Bilateral and multilateral agreements in place to share non-confidential information on investigations
    • Particularly close relationships among US, EU, Canadian and EU member-state authorities
  – US and EU in particular look to parties to facilitate
    • Seek confidentiality waivers
    • May seek common interviews of parties, witnesses
• Failure to assist agency cooperation will, at best, annoy enforcers
  – By contrast, actively assisting cooperation may prove beneficial, particularly if remedies may be required
Aiding International Coordination

• Coordinate filings and other timing
  – If agencies have significantly different deadlines and decision points, very hard to coordinate
    • This does not mean that all filings go in at once; must consider timing of various decision points (Phase 2, etc.)
  – If one jurisdiction gets off track, discuss with others

• Agree to waivers
  – Better for agencies to be on common ground; but
  – Need to consider local privacy or data transfer laws

• Closely coordinate all submissions
  – Inconsistent submissions will ruin credibility worldwide
  – Assign global filing coordination to one experienced counsel (outside or in-house)
Impact and Risks of Coordination

• Close coordination may speed resolution
  – Agencies are more comfortable when aligned
  – However, do not assume one clearance helps obtain others, particularly serially

• Coordination reinforces need to have common arguments and factual support
  – Even where substantive standards may differ, cannot make contradictory arguments
    • Pre-2005, efficiencies created a major issue

• Process is burdensome across multiple jurisdictions
  – Coordinate local counsel activities
  – Centralize final review of all submissions
  – Coordinate multiple, conflicting, overlapping info requests

• Develop overarching themes up front; implement worldwide
Argument Alignment

• Cannot make contradictory or inconsistent arguments across jurisdictions
  – Even if agencies don’t talk, they may ask for submissions in other jurisdictions
• Requires knowledge of substantive differences across filing jurisdictions
• May require downplaying or avoiding certain arguments
  – E.g., efficiencies in 1990s
• Alignment must start before filing since filings may require submissions on key issues including market definition
Aligning Resolution

• Different jurisdictions have varying local market conditions and legal standards and thus may have varying resolutions
• Necessary, however, to avoid inconsistent or duplicative remedies
• Parties should encourage agencies to discuss need for multiple remedies
  – US, EU, member states, Canada particularly interested
  – Particularly important where markets are worldwide
• Will likely be more difficult with newer, more opaque regimes
Impact of Deal Negotiation

• Allocation of antitrust risk a growing issue
  – Subject of negotiation in strategic transactions
• In international deals, filing and substantive analysis need to occur early for risk assessment
  – Impossible to value risk without careful review
• Even in non-strategic deals, filing analysis can impact timing
  – Timing analysis may be required to determine termination periods and financing terms
  – For seller, timing may affect need for retention and other business continuity planning
• Important for parties to know what they will be facing and to be prepared
Best Practices

• Start early
  – Filing and substantive analysis can take time

• Stay coordinated
  – Appoint experienced counsel to manage global filings

• Stay consistent
  – Argument coordination is critical to ensure success

• Be cooperative
  – Merger review is not litigation – almost always better to facilitate the agencies’ review

• Keep an eye on the global clock
  – E.g., if we trigger a deadline in the US today, what does this mean for the review in the EU?
Resources

• ABA Section of Antitrust Law International Committee:
  • http://apps.americanbar.org/dch/committee.cfm?com=AT311000

• OECD competition resources:
  • http://www.oecd.org/competition/mergers/

• International Competition Network:
  • http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx
Questions?

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