Merger Review in the US and Europe: Some Thoughts and Issues for Dealing with Multiple Enforcement Authorities

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*The views expressed herein are solely those of the author, and do not necessarily represent the positions of the Federal Trade Commission or of any individual Commissioner.

Simplified Comparison of US and EC Merger Investigation Process

Investigation Event	US	EU
Pre-investigatory discussions with agency	Occur only occasionally – and at sole discretion of counsel.	Occur routinely and often are lengthy – parties may submit draft Form CO and will interact with DG Comp staff regarding contents and requirements for filing.
General triggering event for formal investigation	HSR Notification Form (notification oriented – does not include antitrust assessment apart from information contained in existing 4-c documents).	Form CO (includes fairly detailed antitrust assessment -- EC process thus tends to be more front-loaded for merging parties).
Timing of preliminary / First Phase investigation	30 calendar days (except for cash tender offers and bankruptcies, where initial waiting period is 15 days).	25 working days (unless undertakings offered – then 35 working days).
Full phase / Second Phase trigger	Issuance of Request for Additional Information ("Second Request") – a detailed request for documents and information regarding the proposed transaction and the markets in which the parties operate.	Issuance of Decision finding transaction "raises serious doubts as to its compatibility with the common market."
Full Phase / Second Phase timing & events	Timing = Second Request compliance plus 30 days (unless extended by agreement among parties). (In cases of cash tender offer or bankruptcy, this post-compliance waiting period is reduced to 10 days.) Staff must evaluate all evidence and make recommendation -- either to clear transaction or to sue to block it. Agency heads must make final decision by end of waiting period.	Timing = 90 working days (extensions of 15-20 days in specific instances). DG Comp issues formal "Statement of Objections" and parties provide written response during this phase. Also, parties gain access to Commission file. Formal Oral Hearing is conducted. DG Comp provides proposed decision to Advisory Committee, which then issues Advisory opinion. Commission then renders decision.
Meetings with agency during investigation	Common for parties to meet with staff and agency managers, up to and including FTC Commissioners or Assistant Attorney General, at various points during investigation.	Various meetings (state of play meetings, triangular meetings) may occur during each phase of investigation. Formal Oral Hearing (second phase)

At the end of the investigation . . .

- In the EU, DG Comp prepares a proposed decision for review by the Advisory Committee, which then issues an advisory opinion. The full Commission then adopts a decision, typically two weeks prior to the statutory decision deadline.
- EC decisions are subject to judicial review by the European Court of Justice, initiated by its Court of First Instance (CFI). Decisions to prohibit transactions may be challenged, as well as decisions to clear.
- Appeals to the CFI may be prosecuted by "any natural or legal person . . . against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former." (EC Treaty Art. 230) Thus customers and competitors, among others, generally have standing to challenge a Commission merger decision.

- In the US, agency staffs prepare a recommendation for the agency heads. If the agency wishes to prohibit a transaction, it must file a complaint alleging a violation of section 7 of the Clayton Act. Complaints are adjudicated in Federal District Court (or in cases where the FTC seeks permanent injunctive relief – before an agency Administrative Law tribunal).
- Decisions by US agencies to clear a transaction generally are not subject to judicial review. However, private causes of action under Clayton Act section 7 are available to plaintiffs suffering "antitrust injury." (Note that standing in the US is more limited than in the EU.)

Simplified Comparison of Evidence Collection Methods

US	EU
• Voluntary interviews • Written declarations (typically obtained from customers, competitors, suppliers, other industry sources) • Compulsory process for documents and sworn testimony (including testimony of merging parties' officials and of 3rd parties) • Second Request response and other submissions provided by merging parties and interested 3rd parties.	• Voluntary interviews • Compulsory process to obtain written responses to questionnaires • On-site inspection of books and records (including authority to seal business premises) • Submissions of merging parties and interested 3rd parties

Brief Thoughts on Substantive Standards

- In general, substantive standards for merger enforcement are similar in the US and EU, and a detailed assessment of differences is beyond the scope of this program.
  - Both governments recognize and typically focus upon the potential for unilateral and/or coordinated effects in horizontal mergers and both recognize potential for vertical effects in specific cases.
  - Both also recognize the potential for countervailing arguments such as ease of entry, efficiencies, buyer power, and failing firm to affect the competitive analysis.
  - The ECMR requires consideration of specific additional factors in merger analysis, and DG Comp occasionally has pursued additional theories of harm. Moreover, many would contend that competitors' interests generally are afforded additional weight in the EU than in the US, where consumer welfare typically is considered paramount.
- What is important for counsel to merging parties is that they have a strong understanding of the likely substantive similarities and differences that may be at work in any given case, and that they be able to strategize accordingly.
- In addition, counsel considering remedial proposals will need to understand each jurisdiction's remedy requirements, as well as how a remedy in one jurisdiction may affect the other.

Timing

- While the US and EU investigatory schemes share certain similarities, their nature and timing can differ significantly in complex cases.
  - Preparation of the Form CO requires more analysis up front, and EU investigation is somewhat front-loaded:
    - Parties often will meet with EC staff before filing, and may submit a draft of Form CO. This interactive process can take from a few weeks to months before the EC approves the proposed Form.
    - Moreover, parties typically will make additional written submissions during first phase – and the EC is required to issue a written decision at the end of the first phase.
    - Parties are encouraged to initiate remedy proposals early in the process.
    - In short, parties typically must be prepared to provide detailed assessments of the antitrust merits early on. Accordingly, the pre-filing planning stage may be more intensive and may take additional time than in the US, where HSR filings often can be prepared in a relatively short period of time.
    - The timing of both first and second phase investigations is set forth expressly in the ECMR (Article 10), and thus there is no room for deviation save for the express limited extensions provided therein. If the Commission fails to render a decision within the express time frames, the transaction is cleared automatically.
  - By contrast, HSR investigation tends to unfold at a different pace:
    - HSR form provides relatively little information regarding likely competitive effects.
    - Preliminary phase investigation typically entails collection of limited additional information from merging parties and 3rd parties; second request decision is made based on whether substantial additional investigation is warranted – but does not necessarily require finding that merger is likely to harm competition. Agency makes no formal determination on merger at this stage.
    - Thus most evidence/information is collected after the second request has been issued. Moreover, the time required to comply with an agency second request can vary wildly from company to company and transaction to transaction.
    - Remedies can be proposed at any time, though the agencies typically will require several weeks to analyze the sufficiency of any remedial proposals.
    - Unlike the EC's second phase, the second HSR waiting period can be extended by the merging parties indefinitely, and thus parties are in a position to afford (or not) additional time for agency staff to complete its investigation, for meetings with agency decision-makers, etc.
- Given the differences in timing in the two jurisdictions, it is not uncommon for merging parties to hold back from formally submitting their Form CO until after second requests are issued in the US.
- Managing the process requires detailed attention to timing, both during the planning stages and during the course of the agency investigations.

Agency Coordination/Cooperation

- The current bases for US-EU cooperation on merger investigations can be found primarily in two documents (attached as Appendix A hereto):
  - 1991 Cooperation Agreement
  - 2002 US-EU Merger Working Group Best Practices on Cooperation in Merger Investigations
- The stated goals of such inter-governmental cooperation are to promote fully informed decision-making, minimize the risk of divergent outcomes, facilitate coherence and compatibility in remedies, enhance investigational efficiency (and reduce burdens on merging parties and 3rd parties) and to increase the overall transparency of the merger review processes on both sides of the Atlantic. (See Best Practices document at ¶ 3.)
- The Working Group's best practices provisions are well summarized in the hand-out prepared by Julian Ellison. Suffice it to say that they provide a detailed mechanism for full cooperation between the US and EU antitrust authorities when conditions warrant.
- In most cases, however, cooperation occurs on a less formal basis, with the level of coordination varying depending upon the need.

Agency Coordination/Cooperation (Cont'd)

- In the course of many transnational investigations, US and EC enforcement authorities:
  - Notify one another that an investigation has commenced.
  - Encourage parties to waive confidentiality restrictions so that documents and other confidential information may be shared, and help to facilitate such waivers.
  - Discuss (often in regular staff-to-staff conference calls) evidence gathered and conclusions reached throughout the course of the investigations, as well as the timing and procedures at play.
  - Discuss remedial possibilities to determine likely effects in each jurisdiction.
  - Occasionally send representatives to meet in person with the other's staff, and/or to observe hearings and review evidence (where allowed).
  - Occasionally compare notes regarding industries and markets, even outside the context of a specific dual investigation. (This typically can occur where one agency has recent experience in a particular industry that the other is investigating.)

Thoughts on US-EU Coordination

- Both US and EU merger enforcement authorities are committed to working together where appropriate to ensure efficient investigations and even treatment. Coordination isn't always easy, and often requires substantial assistance from the merging parties (and even 3rd parties).
- While there have been and may yet be occasional substantive disagreements over merger enforcement policy in specific cases, US and EU enforcement authorities have sought to minimize such occurrences, and to ensure that they do not result from a lack of coordination between the investigating staffs.
- The authorities also take seriously each others' factual findings and conclusions. Of course, actual differences in the affected markets on each side of the Atlantic can result in different factual conclusions in any given case.
- Merging parties should take into account, and where appropriate take advantage of, the enforcement authorities' willingness to coordinate and to share information with one another.

Summary/Conclusions

- The US and EC have roughly similar enforcement standards but different procedures that may make coordination appear challenging.
- Counsel in a true transnational case must account for these differences and develop a strategy for dealing with them. This requires, at a minimum, strong internal coordination between US and EU counsel for the merging parties.
- Timing alone can present a difficult hurdle – and parties may wish to consider how best to time filings on both sides of the Atlantic, as well as when to present white papers, remedy proposals, etc.
- Moreover, because investigations in the EU and US tend to develop at different paces, parties must be particularly conscious of how approaches taken (and statements made) before one enforcer may bear on positions taken before the other.
- The level of coordination that occurs between merger enforcement authorities varies by transaction, and can range from relatively little to full and routine cooperation among agency staffs during the course of the investigation.
- The enforcement authorities typically are eager to coordinate with one another in truly transnational cases where joint issues are presented, and thus are likely to seek cooperation from the merging parties. In most cases, government-to-government coordination will help to minimize the risk of divergent results, increase efficiency of investigations, and help the parties' counsel better manage the overall review process. By actively embracing such coordination merging parties may be able to more effectively present their arguments. However, counsel must consider the full range of issues arising from such coordination and develop a true "global" strategy well in advance of filing.