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MERGER CLEARANCE ISSUES IN RELATION TO MERGERS CAUGHT SIMULTANEOUSLY BY EU AND US MERGER CONTROL

Introduction

1. The development of cooperation between the EU and US merger control agencies has been evolutionary in nature. It can be traced through a limited number of mergers where the issues at stake generated significant trans-Atlantic political interest and where a lack of coordination between the two agencies was seen to have had a potential (or actual) negative impact. The first such landmark case is traditionally said to be Boeing/Macdonald Douglas in 1997. The merger was cleared in the US but made subject to remedies in the EU. The US agency intervened in the EU procedure and is credited with reducing the severity of the EU remedies. There is no doubt that cooperation between the agencies (although not formalised until later) began to develop in the light of Boeing/Macdonald Douglas. Thereafter, the next case that can be singled out as of strong influence in the developmental process is the GE/Honeywell case of 2001. It will be recalled that, somewhat sensationally, this case was cleared in the US but blocked in the EU. The Commissioner's (Monti's) press release at the time acknowledged that, despite best efforts, the two agencies had not been able to reconcile their different views on the substance. The GE/Honeywell case caused a major review of US/EU cooperation in trans-Atlantic mergers and led to the 2002 accord, entitled "**Best Practices on Cooperation in Merger Investigations**" (the "**Best Practices accord**"). The terms of the accord are considered briefly in the text below, but it is perhaps worth pointing out that cooperation between the two agencies is on a continuum and is needs driven; in other words **full** cooperation as envisaged in the accord is reserved for those comparatively rare cases where there is commonality in the competition issues arising from the merger on both sides of the Atlantic; while lesser levels of cooperation occur in relation to the majority of cases where the degree of commonality is limited (owing to the different dynamics and characteristics of US and EU markets).

Strategic considerations in coordinating the process before the EU and US merger control agencies

2. The Best Practices accord, as stated, provides the basis for coordination on timing and process between the EU and US merger control agencies:

- merging parties (and third parties) will be encouraged to waive confidentiality so that documents and data can be exchanged between the two agencies (under the bilateral anti-trust Treaty of 1991 between the US and EU, data cannot be exchanged without such consents);

- merging parties will be encouraged to agree to joint agency interviews of executives;

- the agencies will encourage the parties to cooperate so that the agencies can coordinate their respective timetables (this may involve a multi-party meeting between the merging parties and both agencies);

- the EU and US agencies will designate contact persons for the purposes of organising communications between the two agencies. This will include a tentative timetable for consultations at "key moments" in the respective merger processes – viz:

  (i) before the US closes its investigation without action;

(ii) before the US issues a second request;

(iii) no later than three weeks after the beginning of an EU phase I investigation;

(iv) before the EU opens a phase 2 (in-depth) investigation;

(v) before the EU closes a phase 2 investigation without a Statement of Objections (a formal written statement of the Commission's case in relation to a merger) or two weeks before a Statement of Objections is issued;

(vi) before the relevant DOJ/FTC section/division makes its recommendation to the relevant DAAG or FTC Bureau Director; or

(vii) at the commencement of remedies negotiations;

- consultations may also take place at the EU Competition Commissioner, Director General for Competition or Deputy Director General for Mergers levels and their US counterparts at the DOJ and FTC.

3. There will be a danger that the EU case will commit the US case to market definitions/anti-trust arguments at an early stage – this reflects the fact that the EU merger control process is essentially front-end loaded, i.e. the case (including market definition and a consideration of competitive effects) has to be written up and submitted "at the outset" by means of a complex filing form (Form CO);

4. There may be a need for early US regulator dialogue on the substance and early white paper(s) in order to put the US case on a parallel track to the EU case, in other words, so that the US procedure can to some degree match the front-end loading of the EU process;

5. The EU notification will require the production of a relatively limited number of documents (so-called 5(4) documents) analysing the transaction and prepared for the board or shareholders meeting and covering elements such as: market shares; competitive conditions; competitors; the rationale for the concentration; expansion of markets; market conditions.

6. US 4(c) documents have a wider reach. The EU Commission will often call to see 4(c) documents in trans-Atlantic cases, and there have been difficulties where 4(c) documents have been called for by the EU late in the process, with the result that earlier arguments/submissions have been cast into doubt; or that explanations are required of the documents with consequential time delays.

7. Both 5(4) and 4(c) documents can contain "**hostages to fortune**" in the sense of extravagant or, *prima* facie, anti-competitive statements and the client(s) must therefore be warned in advance to control the content of such documents; for example, by having drafts screened by outside Counsel.

8. It is quite possible that an HSR filing (without a white paper) would be ready substantially in advance of an EU filing on Form CO, given that the HSR filing does not require the same degree of upfront advocacy and data.

9. This raises the issue of the degree to which US and EU filing timetables can be coordinated.

10. In practice, merging parties have some ability to control the point at which an agency begins work on a file – for example, the point of filing can be controlled as well as the completeness of the filing. That is why the Best Practices accord **emphasises** the importance of the cooperation of the merging parties in relation to timetabling.

11. The EU merger review process is, as stated, essentially a front-end written and documented one – commencing with the parties' notification upon Form CO – and followed (typically) by extensive further written submissions and culminating in a Commission decision at the end of the first phase (usually five weeks) either concluding the case (with or without remedies)[1] or referring it to an in-depth investigation in a second stage (lasting approximately five months plus). Where a second stage review is opened, the notifying parties will be given access to the Commission's file. Here, the parties will be able to analyse all non-confidential third party evidence. In a second phase case, a "Statement of Objections", a written document setting out the Commission's concerns in relation to the merger, will also be sent to the parties. The latter will have a right to reply in writing. Finally, the merging parties will be offered a chance to put their case orally before the Commission (and representatives of the Member States' regulators) in a so-called Oral Hearing.

12. Under the EU merger procedure, third parties have clearly defined rights of participation. Those showing a sufficient nexus to the case, will have a right to see and comment upon a non-confidential version of the Statement of Objections and to present at the Oral Hearing.

13. The written record of the Commission's view of a merger case (including third party evidence) (as well as oral exchanges) offers real insights into the anti-trust issues. Insofar as the EU analysis is relevant to the US one, this can be of considerable value in a trans-Atlantic case; not least because those insights will begin to become apparent at a comparatively early stage (certainly within the first five week first phase).

Merger challenges

14. EU merger decisions can be appealed by the merging parties to the Courts in Luxembourg (the Court of First Instance). Interested third parties (e.g. customers and competitors) also have rights of appeal.

15. Appeals can be made upon a "fast track" basis (this guarantees a review period of approximately 12 months).

16. A run of successful appeals against Commission merger decisions (including a recent award of damages) have made the Commission increasingly demanding in terms of evidence gathering and the completeness of Form COs – the EU merger notification form.

Substantive law: similarities and differences in what allows a merger to pass muster in the EU and US

17. The substantive test for EU merger control in the EU is as follows:

> *"A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market."*

18. Generally, and at a high level, one might say that the EU merger test is concerned with both negative impacts upon consumers, and impacts upon competitors and market structures. Most commentators agree that greater account is taken of the interests of third party competitors and market structures under the EU process than in the US (where the main emphasis is upon consumer interests). Additionally, in the EU (and despite recent reforms) it is generally accepted that less emphasis is placed upon efficiency arguments than in the US.

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[1] Where first phase remedies are given the first phase is extended to seven weeks.

Cross-ownership issues

19. The application of EU merger control relies upon a "substance over form" approach to legal entities and corporate groups – one where *de facto* lines of "control" (rather than legal ownership or legal control) are the key to assessing the parameters of the anti-trust assessment. For example, in a private equity context, this will typically mean that entities providing investment advice and appointing directors who will sit on portfolio companies' boards to steer investments strategically will be seen as the "**controlling entities**" for EU merger control purposes, rather than the actual entities holding legal title to the portfolio companies. This has a material impact in EU merger control as the same "fund advisors" tend to oversee a large number of different funds and a wide range of portfolio investments, with the result that a wide range of competitive relationships between portfolio companies and a target have to be considered.

20. In contrast, the HSR might be said to take a more rigid legal control approach, with the result, for example, in a private equity context, that portfolio investments, even though owned by the same private equity group, can be left out of the US HSR anti-trust analysis.

Remedies

21. The EU merger regulation has a well-established remedies process enabling cases to be solved:

    (a) in an extended first phase (the period is extend from five to seven weeks);

    (b) in a second phase (typically at the end, but occasionally early in the second phase).

22. There are well-established guidance and standard texts for the:

    (a) wording of remedies;

    (b) the types of remedy that will be acceptable (the emphasis is upon structural as opposed to behavioural remedies);

    (c) the use of a trustee (to monitor compliance with the remedy – typically a member of one of the major accountancy firms);

    (d) the timing of remedies (in the case of a divestment, typically six months to exchange and three months thereafter to complete);

    (e) the lack of need for an upfront buyer (exceptions do occur but most remedies permit completion "subject to" the divestment);

    (f) the ability of the trustee to step in and effect a divestment at any price if the divestment is not made (never to date used).

23. There is no equivalent of the US crown jewel provision, although it is possible for parties to offer one remedy and then be obliged to implement another, more attractive one, if the first is not implemented within a specified timescale.

24. The Best Practices accord specifically indicates that the EU and US agencies will strive to ensure (so far as possible) that remedies will not impose inconsistent obligations upon the merging parties (recognising that identical remedies will often not be appropriate). Remedies are one of the important case milestones where the agencies have agreed to communicate and discuss. In practice, the need for and practicality of coordination on remedies will vary greatly from case to case.

The business justification for the deal

25. A starting point in EU anti-merger analysis is the so-called "counterfactual" – i.e. what would be the competitive status quo in the absence of the merger or how much competition would be lost as a result of the merger? The "business justification" for the merger also provides a basis for an explanation of the potential efficiencies of the merger and the benefits to consumers. While relevant in both jurisdictions, efficiency arguments are, as stated, likely to be of greater influence in the US.

STRATEGIES FOR PARALLEL INVESTIGATIONS BY THE EU AND US AGENCIES – IMPORTANT CONSIDERATIONS/STEPS

Frequent and direct communication between the legal teams

26. It perhaps goes without saying that in a true trans-Atlantic case (one where some or many of the market conditions and dynamics between the US and EU are common) it is vital that:

    (a) the anti-trust case is strategised and designed jointly;

    (b) the submissions to the agencies in each jurisdiction are shared in draft in order to ensure consistency;

    (c) there are regular debriefs of communications with each regulator; and

    (d) 5(4) and 4(c) documents are shared and scrutinised for issues.

27. Success in the above largely comes down to: common sense; chemistry between the two legal teams and the right spirit of cooperation. There will be a tendency for the EU team to have to define and write up the case earlier, in view of the requirement of the EU procedure for a substantial upfront written form with market definitions and advocacy; and this, in practice, places some pressure upon the EU legal team, to keep the US team on the same page (tactically and substantively).

Frequent and direct communication between the regulators

28. As noted above, the Best Practices accord between the US and EU agencies of 2002 sets out the key principles of communications between the agencies, see paragraph 2 above. In implementing the advice/strategy under paragraph 26 above, it must always be borne in mind that the two agencies will be in regular contact, and (subject to waivers) will be sharing data.

Coordination on timing

29. The Best Practices accord between the US and EU agencies places much emphasis upon timetable coordination; while at the same time recognising that any such coordination needs the active cooperation of the merging parties.

30. As stated, it is typically easier and quicker to launch an US HSR filing than an EU filing – in view of the latter's requirement for a substantial written filing form, defining markets and assessing competitive effects and market dynamics. However, both processes offer some scope for holding up filing and controlling merger review timescales. An important point to note is that the EU provision requiring the filing of a Form CO within seven days of signing has gone – parties can now take contact with the Commission and indicate that a filing is under preparation and the Commission will allow the parties to take as much time as is necessary to prepare the filing (the transaction cannot, of course, complete until EU clearance has been obtained).

Lobbying / preparing third party comment

31. Because the EU merger process lays considerable emphasis upon the evidential contribution of third parties – it is important in a difficult case to try and prepare and influence third party opinion. Effective lobbying strategies are vital in complex cases and will typically bring together a combination of legal teams, public relations advisors and relevant members of the client company. Because EU Member States are consulted before second stage decisions are taken by the Commission, lobbying will extend to the regulators of the Member States in complex second stage cases.

Conclusion

32. Active cooperation between the EU and US merger control agencies will occur in **all** trans-Atlantic mergers and advisors and parties must prepare themselves accordingly if they are to conduct an effective merger clearance campaign. The extent of the cooperation will be driven by the degree of commonality in the anti-trust issues on the two sides of the Atlantic; but perhaps the salient message to retain is that, whatever the degree of commonality, a regular dialogue will now take place in all trans-Atlantic cases.

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