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Global Merger Control: Getting the Deal Cleared

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1. **The Issue**

    1. Over 60 countries around the world have merger control regimes designed to regulate acquisitions on competition law grounds. The theory is that it is preferable to prevent a company achieving a position of market power which would facilitate anti-competitive behaviour than regulate a dominant company after the fact. Therefore, the various merger control regimes around the globe have a common aim - to detect acquisitions which would result in an unacceptable degree of concentration in the market (often by requiring a compulsory pre-completion notification) and prohibit or modify them to erase the anti-competitive effects (if they have not yet gone ahead) or remedy the anti-competitive effects by ordering divestiture (where they have already been completed).

    2. When faced with the purchase of a multinational target, the buyer needs to make sure that, in every country where the target makes sales (and where, therefore the acquisition could potentially affect competition in the market place), (i) the deal is "doable" in the sense that the competition authority will not object to and prohibit; and (ii) all mandatory pre-completion (and sometimes post-completion) notification requirements and statutory waiting periods are respected. In many countries, a failure to take either of these steps has serious consequences. Not only can divestiture of the acquired business be ordered where there are anti-competitive effects, but, even where there are no substantive competition issues, there are often large financial penalties for a failure to comply with the procedures.

    3. It is therefore vital that companies, and in-house counsel in particular, devise a strategy for successfully navigating the world's increasingly complex plethora of merger control regimes each time a multinational target is acquired.

2. **Starting the Review: Where do I make a filing?**

    1. Start the process early, ideally about 4 weeks before the acquisition agreement is signed, assuming that the business people are prepared to sign an agreement which states that completion is subject to the satisfaction of a number of conditions which include the receipt of merger control clearance. If the aim is to sign the agreement and complete the deal simultaneously, the merger control review needs to be commenced even earlier to allow for time to determine where filings need to be made, prepare and submit the filings and then wait for clearance, all before the date of the simultaneous signing and completion. However, be aware that, depending on the countries where it is determined that a filing needs to be made, it may not be possible to sign and complete the acquisition on the same day, because unlike the position in the US (where it is possible to make a filing before signing the deal agreement), some jurisdictions which require pre-completion notification (for example, the EU) also stipulate that the filing can be made only after the binding agreement is signed.

    2. Assuming that the merger control clearance process dictates that there must be some time between signing and completion, the four weeks or so before signing must be used to determine the countries in which a filing is going to be made and to gather together the information to go into a draft filing for each country. These draft filings need to be in good shape by the time the agreement is signed, because in a number of countries, there is a very short time frame after signing within which the notification must be made. In the EU, a filing must be made within 7 days of the signature of a binding agreement. The US does not stipulate when a Hart-Scott-Rodino filing must be made, so long as the deal is not completed before the waiting period has expired.

    3. The merger control laws of almost every country contain thresholds (often financial or based on market share) which determine whether or not the competition authorities in that country have jurisdiction to regulate the acquisition. In addition, in many countries there are also thresholds (which may be the same as the jurisdictional thresholds, but might not be) above which it is necessary to make a mandatory pre-notification filing to the competition authority. In the countries where there are no mandatory filing thresholds, it is often possible to make a voluntary pre-completion notification seeking clearance before the acquisition is closed. In countries where a mandatory notification is required, there are often stiff penalties for a failure to file. The first job of an in-house counsel tackling the purchase of a multinational target is therefore to determine whether the thresholds for potential regulation of the acquisition and for making a mandatory filing are met in every country in which the target makes sales. The first thing to ask the business people for, therefore, is a breakdown of the target's worldwide sales on a country by country basis.

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4. In conducting this process, there is often in practice a materiality threshold. If the target makes only a very small amount of sales in a particular country and neither party has any physical presence there, the view may be taken that it is not even worth checking whether there is a merger control regime in that country, let alone whether, if there is, the jurisdictional or filing thresholds are met. This judgment call is often made on the basis that, even if the national competition authority decided to take action against the deal (which would be unlikely) there are no assets in the jurisdiction against which the authority could take enforcement action and moreover, there would be no great loss suffered if the merged entity was forced to stop making sales into that country.

5. Determining whether the thresholds in a particular country are met is often a tricky and time-consuming business. Where the thresholds are financial and based on the turnover of the parties (as they are in the US and the EU - see Attachment), there are usually specific rules on how to calculate turnover for this purpose. In the EU, the European Commission issued a Notice on the Calculation of Turnover for the purposes of the EC Merger Regulation. Often, it is necessary to add the turnover of businesses acquired since the date of the end of the last fiscal year and the date the agreement is signed, on a pro forma basis. Arriving at the necessary turnover figure usually requires adding together not only the local turnover of group companies within the jurisdiction, but also the revenues of other group companies located outside the country in question but which make sales into that country. In the case of thresholds based on market share (such as in Australia and the UK), it is necessary to carry out a market definition exercise beforehand to make sure that the scope of the product and geographical dimensions of the market have been correctly defined before the market shares have been calculated. Both the US and EC regulators have issued guidelines describing how they define markets. In addition, previous cases that involve the same markets can provide specific guidance. Once the market has been defined, it is sometimes extremely difficult to estimate what the combined market share of the buyer and the target would be, for example, in the absence of industry statistics.

6. A particular point to note when determining whether jurisdictional thresholds are met, is the peculiar situation of the European Union. In the EU, the EC Merger Regulation contains thresholds based on turnover, above which a mandatory filing must be submitted to the European Commission in Brussels. (See Attachment). If these thresholds are met, then the national competition authorities in the EU Member States have no jurisdiction to examine the deal. Conversely, if the thresholds are not met, no central filing to Brussels is required or possible and the parties must look to see whether the various thresholds in the 15 Member States, which are all different, are met. It is increasingly the case that businesses strive to bring their deals within the EC Merger Regulation (for example, by bringing an additional party into the deal, whose turnover will then be included in the calculations). The Merger Regulation means a "one-stop-shop", with only one central filing in the EU, and that the review will be carried out by the European Commission's Merger Task Force, a regulator which has gained a reputation for efficiency and effectiveness.

7. Once the countries where the local merger control applies have been identified (because the jurisdictional thresholds have been met), the parties need to gather market share data and other information about the markets in each of those countries. The aim is to assess the "doability" of the deal in each country (although this information will also be required to include in any filing which needs to be made). There is little point in expending the huge amounts of management time and legal fees required of a major corporate transaction, only to have the competition regulators in one or more countries prohibit it. Often at this stage problem products (assuming the target sells a portfolio of products) or countries can be identified and an assessment made about whether the purchaser would be willing to complete the deal minus that product or except in that country. If this is the case, then going ahead is realistic because there is the prospect of negotiating a conditional approval from the authorities ie. clearance on condition that the problem business is divested.

8. Where the jurisdictional thresholds in a particular country are also the thresholds for determining whether a mandatory filing must be made (for example, the EC Merger Regulation) or where separate mandatory filing thresholds are met, it is clear that, once it is determined that they are met, an action plan to achieve a filing in that country should be put in place. However, in some countries (such as Australia, the UK and France), there is no mandatory filing requirement. In these countries, if the system allows for it (which it does in Australia, the UK and France), a decision needs to be made as to whether to make a voluntary filing. Generally speaking, in cases where there is no substantive competition issue, no filing is made. However, if the parties' assessment of the "doability" of the deal is that it may not be doable or divestments of certain product lines in certain countries may be required (or if the parties simply want the comfort of clearance before completing the deal) a voluntary filing is often made. In deciding whether to make a voluntary filing, the likelihood of a complaint being made against the deal is an important factor. If you know that someone will likely make adverse representations to the regulator, it is better to have presented your side of the story first. It would not be wise to decide not to file in the hope that the regulator does not find out about the deal until it is too late: competition regulators scour the press and speak to each other about their case loads.

3. Preparing to File

1. The coordination of the making of anything from 3 to 15 country filings can be daunting task! Once the list of jurisdictions in which a filing is going to be made is compiled, and the local counsel in each country who will be making the filings have been identified, it is a good idea to appoint a member of your in-house legal department (or an external lawyer who has experience in these type of cases) as central coordinator. The main tasks of the coordinator are to work out what information is needed for all the filings and condense this into a sensible list for the business people, to make sure that every filing tells the same substantive story and to provide a realistic timetable within which the deal can be completed and ensure that this timetable is respected by all local counsel.

2. The amount of information which must be gathered to go into each filing varies enormously from country to country. In some cases (for example in the UK and Germany), a simple letter of a few pages is adequate. In others for example the EU (Form CO) and the US (HSR Reporting Form), a statutory form requesting in some cases reams of information must be completed. Generally speaking, though, all the competition regulators will want to know about the market(s) in which the parties operate, who their competitors, customers and suppliers are and details about the competitive conditions in those markets (market shares, ease of entry, competitive constraints)

competition regulators will want to know about the market(s) in which the parties operate, who their competitors, customers and suppliers are and details about the competitive conditions in those markets (market shares, ease of entry, competitive constraints).

3. As with the content of the filing, the list of documents which are required to be attached also varies greatly. This mostly affects the amount of paper which needs to be submitted (eg. volumes of deal documents) but there is also a substantive point. The management of companies should be very careful about having reports or studies prepared for them which analyse the deal from a competition standpoint. In a number of countries, it is a legal requirement to submit these documents along with the filing. In the US, this requirement is contained in Item 4(c) of the HSR Reporting Form. In the EU, the relevant provision is Section 5.4 of Form CO. Phrases such as "This deal catapults us into a dominant position" should be avoided.

4. When preparing the filings, it is important to realise that the competition authorities around the world are in regular contact with each other. There is very little point in defining the market in one way in one country, but then in a different way in another (with the aim of achieving low market shares in each, for example). Not only will this not work, but it will also mean a loss of credibility for the merged entity both on this deal and as regarding future contact with the competition regulators. The same goes for financial and market share data. For example, the total size of the worldwide market should be the same in every filing.

5. An increasing number of competition authorities provide an opportunity for or encourage pre-filing contact, either in the form of a meeting or via correspondence. Unlike the position in the US, where pre-notification contact with the authorities is discouraged, in other countries, the authorities more or less insist on such contact (for example, the European Commission). Often, the contact includes the discussions with the authority about a draft filing. This is beneficial for both sides. From the filing parties' point of view, it means that there is less chance that the filing, when it is eventually submitted, will be declared incomplete so that the review period does not begin to run. From the competition authority's side, the usually strict deadlines of the review period are effectively lengthened because it is familiar with the case and can start work on it before the filing is actually made. Also, the authority can be sure that it has all the information it needs before the clock starts ticking. There is an added benefit for the parties in that it is sometimes possible to observe the regulator's first reaction to the substantive issues (if any) and at least anticipate where the problem areas (if any) are going to lie. Pre-filing contact should not be confused with confidential guidance - which is the ability to approach a regulator with no fixed plans to make a filing and before a definite decision to go ahead and negotiate a deal agreement has been made, for the regulator's confidential initial reaction to the substantive issues in a case. Not all countries competition regulators offer the opportunity to obtain confidential guidance, which is unfortunate, because business people find it extremely useful.

4. Making the Filings

1. From the parties point of view, the sooner the various filings can be made, the sooner the necessary or desirable clearances can be obtained, the sooner the deal can be closed. However, the time when filings can or must be submitted is different from country to country. The most important question is always whether it is possible to make a filing before the binding agreement is signed. In a number of countries, such as the US, a filing can be made on the basis of a signed letter of intent. However, in many more jurisdictions, including the EU, it is only possible to make a merger control submission once a binding agreement has been signed. This inevitably means that the period in between signing and completion must be at least as long as the period given to the authority to review the transaction. In many countries, the merger control law stipulates a time, after the signature of a binding agreement, within which the filing must be made. In the EU, this period is only 7 days (although the European Commission has shown itself to be somewhat flexible where there are genuine time difficulties). It is nevertheless very important to have the filing more or less complete for these jurisdictions when the agreement is signed.

2. As for the formalities of filing, in many jurisdictions, copious copies of the filing are required. (In the EU, you have to file the original plus 23 copies of the filing and all supporting documentation). In addition, the European Commission requests the document itself to be the wet-ink copy signed by an authorised person within the filing parties or by counsel which has previously been granted a power of attorney, the wet-ink copy of which must be submitted. All this requires forward planning. Then, there is the issue of filing fees. An increasingly small number of countries do not charge a fee but those that do often charge over $10,000 and insist that the filing fee is paid on making the filing. The US filing fee is currently $45,000. The EU does not make a charge for filing at the time of writing, but is considering the introduction of a filing fee.

5. The Review Period

1. Once the filings have been submitted, each of the competition authorities examining the deal will have a set period within which to consider the acquisition and, usually, decide whether to open a second-stage in-depth investigation: The length of the initial first stage "look see" varies from country to country but the average is one month. In the US, the waiting period is 30 days. The EU's Phase I lasts one month, but that month does not include European Commission official holidays.

2. It is crucial for the parties to know exactly what they can do towards completing the transaction during this initial review period. In many countries there is a suspensory period, meaning that it is illegal to complete the deal during the review period. This is the case both in the US and EU. In other countries, such as Italy and Brazil it is absolutely no problem at all. Finally, there is an intermediate category (which includes many of the Eastern European countries such as Poland), where the deal can be closed, but the purchaser must not take any steps to integrate the two businesses until the clearance decision has been obtained. In the case of a public company, the purchaser will often be anxious to purchase enough shares immediately after announcement of the deal to make potential competing bidders regard the target as unattractive. In countries where suspension is mandatory, the issue concerns the number of shares in the target which the purchaser can buy during the review period without obtaining the level of influence over the target which the authorities regard as

purchaser can buy during the review period without obtaining the level of influence over the target which the authorities regard as challengeable under the merger rules. Because suspension is not mandatory in every country, if the purchaser is very anxious to substantially close the deal, depending on which countries are involved, it may be possible to close everywhere except in one or two countries which are then ring-fenced for the purposes of a delayed local completion.

3. During the review period the competition regulators will typically ask the parties further questions and seek the views of third parties (competitors, but more importantly, customers and suppliers) about the proposed combination. In many non-US jurisdictions such as the EU, the parties are required to include contact details (including a contact name) for these third parties in the initial filing. As a matter of courtesy, the parties sometimes contact their customers beforehand to inform them that contact by the competition regulators may be made, although absolutely no attempt must be made to influence their views.

4. The substantive tests which the regulators apply in each country may vary but they have a common aim, which is to prevent, on any relevant market, the creation or strengthening of a position of market power which will enable the merged company to behave in an anti-competitive fashion. In the event that, it appears that a regulator has concerns about the deal, in many jurisdictions including the US and the EU, the purchaser is able to offer "fixes", for example, a commitment to divest of a particular product line after completion. If the regulator agrees, clearance will be conditional upon the commitment. There may be statutory deadlines during the competition authorities review procedure within which such commitments must be offered (in order to give the competition authority time to consult third parties about whether the commitment would be effective to remedy any competition concerns). In the EU, the deadline in Phase I is three weeks after the filing is made. In Phase II, it is three months after the commencement of Phase II.

5. In looking at the substantive issues and in considering the appropriateness of commitments as remedies in a case where there are competition concerns, the competition regulators around the world consult with each other. There may be a formal agreement facilitating this (for example, the US-EC Antitrust Cooperation Agreement of 1991), but more often, the contacts are made informally. However, the regulators are required to keep secret, information submitted on a confidential basis (for example, market share data). This can hamper the usefulness of coordination between the regulators and it is helpful for them if the parties agree that the regulators can share information which has been submitted on a confidential basis. This cooperation is in concept often alarming for the parties, but it is positively beneficial when it comes to the question of commitments to allay any competition concerns. In a case with substantive issues, the goal must be to negotiate commitments which are acceptable to all the competition regulators reviewing the deal, and it is more efficient to be able to discuss proposed remedies with all the regulators at the same time.

6. The Clearances

1. In some countries, there is simply a set waiting period, after which the deal is presumed cleared provided that a second in-depth investigation stage has not been commenced. This is the position in the US (ie, if a "Second Request" requiring further information has not been received within 30 days, the merger is presumed cleared) although, it is possible for the deal to be granted "early termination". In other jurisdictions, such as the EU, a positive clearance decision is taken, which is often published in the EU, in the European Commission's Official Journal. The latter is preferable from a practitioner's point of view, because the parties, and indeed business in general, is able to understand the basis for the clearance and in particular, the regulators approach to market definition.

2. Assuming that the parties have not already done so, as soon as all clearances have been obtained and all waiting periods expired, they are free to close the deal.

3. In the event that a competition regulator has concerns about the deal which the parties have been unable to allay, through substantive arguments or by offering commitments, the deal will be pushed through, in that country, to a second phase in-depth investigation (in the US, the Second Request stage and in the EU, Phase II proceedings). Most sale and purchase agreements provide that completion is conditional upon clearance at the end of the first "look see" phase, so that, at this point, the deal (overall or in relation to the particular country in question) may be abandoned.

4. A second phase investigation in any particular jurisdiction brings with it a whole new set of challenges, each of which could be the subject of a separate presentation by itself.

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EU AND US FILING THRESHOLDS

1. EC Merger Regulation

A merger control filing will be required if:

(a) The worldwide turnover of the parties exceeds €5 billion and the EU turnover of each of them exceeds €250 million; or,

(b) The worldwide turnover of the parties exceeds €2.5 billion, the EU turnover of each of them exceeds €100 million, the turnover of the parties in 3 EU countries exceeds €100 million and the turnover of each of them in those 3 countries exceeds €25 million.

2. US HART-SCOTT-RODINO ACT

Barring the application of an exemption (including one of a series of exemptions for foreign acquisitions), the Hart-Scott-Rodino Act requires a US pre-merger notification for acquisitions that satisfy both of the statutory tests. The statutory tests measure the "size of the person" and the "size of the transaction." The "size of the person" test is satisfied when one "person" has annual net sales or total assets of at least US$100 million and the other "person" has annual net sales or total assets of at least US$10 million. The "size of the transaction" test is satisfied when the acquiring party will, as a result of the acquisition, hold at least 15%, or more that US$15 million, of the voting securities or assets of the acquired person.

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