

An investor's checklist

Tips on what to watch out for in global merger control

More than 75 countries worldwide have enacted merger regimes. Many of these regimes contain a standstill obligation, so that the deal cannot be closed before obtaining antitrust clearance. Antitrust concerns can lead authorities to prohibit a deal, or to require divestments.

Assessing the antitrust risk

Merger control identifies, and prohibits or appropriately limits, transactions that threaten to create or enhance a dominant market position or otherwise lessen or impede competition. The precise standard varies from jurisdiction to jurisdiction. Antitrust authorities are mainly concerned with horizontal antitrust issues, that is, the parties sell competing products and the transaction leads to high combined market shares; vertical restraints, in particular the potential foreclosure of a supplier or customer; or conglomerate antitrust concerns, where (absent horizontal or vertical overlaps) the combined product portfolio of the parties leads to market power.

Authorities generally review mergers in a two-step process. A first, shorter and more administrative, phase focuses on the initial assessment of potential concerns. In general, this review takes about one to two months. The timeframe varies from country to country. A second, longer, substantive phase follows to assess potential antitrust concerns in more detail. This is known as a second request in the US or a phase two review in the EU.

Identify filing requirements

No deal needs to be notified in all jurisdictions. The art is to narrow down the roster of potential jurisdictions efficiently. Most global merger regimes have filing thresholds that are based on the parties' revenues, while others focus on assets in their jurisdiction, on market shares, on the deal value, or on a combination of these factors.

The most efficient approach is to review the global revenues of the *target* in the last financial year, broken down by country and

allocated based on the customer's location. In combination with background information on the nature of the parties' activities, the antitrust team can quickly provide an initial view of global merger filing requirements with a limited set of follow-up questions. Frequent buyers, particularly private equity groups, should maintain their own revenue and assets breakdown by country to ensure quick availability of required data and consistency. The assessment will be more complex in joint venture deals, as many jurisdictions have two-party thresholds, which might be triggered by the joint venture partners alone.

The assessment is more difficult in hostile takeover situations, as a detailed revenue breakdown for the target is often not publicly available. Some jurisdictions accommodate this situation with procedures that require the target to provide information but this is not the case in all jurisdictions. It might be necessary to complete the analysis on the basis of assumed levels of sales or assets in a particular country, preferably jointly with the business team and subject to a post-transaction review. The antitrust team can provide appropriate thresholds, which will simplify the task. For instance, it is easier to confirm whether a party has more or less than €50 million in revenues in France (the French threshold) than it is to establish the precise domestic amount of revenues in that country.

Merger thresholds can be divided into two main categories: revenue or asset-based thresholds, and market share thresholds. Revenue and asset-based thresholds require a review of the parties' revenues and/or assets in a particular jurisdiction and come in many forms. In jurisdictions where the revenues or assets of one party alone can trigger a filing requirement, the buyer alone might trigger the filing requirement, and the target might not have a presence in that country. In this case, the parties should consider whether the transaction has any effects in that country. Generally, competition authorities seem to accept that there is an international principle that precludes them from taking jurisdiction if

the target has no revenues in a particular country. However, there are many variations of the effects test and its application should be assessed with local counsel on a case-by-case basis.

Some jurisdictions have market share thresholds. This requires that the parties define the relevant product and geographic markets and assess their combined market shares in these markets. The parties should document their analysis carefully. There is a risk that an antitrust authority would define a market differently, and conclude at a later stage that a filing was required for a particular transaction, with the potential for fines. Some jurisdictions (for example, Spain) allow for consultation with the authority on market definition, which allows a certain level of legal certainty for parties. However, that won't be possible in all cases. That said, we are not aware of any case where the parties were fined for not submitting a notification based on a market definition that was later challenged by an authority.

Timeline to closing

Once an initial review has been completed, a merger review timeline can be set out, which should be synchronized with the deal timeline. The biggest impact on the timeline results from merger regimes that impose a standstill obligation, meaning that parties are not allowed to close before obtaining clearance, and risk fines or even a request to demerge if they do. Some jurisdictions require that notification be submitted within a specified number of days (for example, Brazil, Portugal, Norway) from signing the first binding document. This could exert some pressure on the antitrust team to ensure the filings are submitted in time. Other countries only require a filing before closing (for example, Italy). This type of obligation puts the least pressure on the timeline.

The parties should allow appropriate time for preparation. In transactions where the parties are both global players with revenues in many countries, merger filings may be necessary in a significant number of countries foreign filing requirements might lead to a number of national merger filings being submitted. The forms and information requirements in each country vary. This difference is illustrated when contrasting the US HSR filing, which requires corporate documentation, limited sales data, and the submission of management presentations, with the EU Form CO, which requires the submission of a certain level of corporate documentation and a detailed description

of the parties' activities, a market definition and an assessment of the competitive conditions in that market. Submitting a complete and well-drafted notification is essential, as many authorities will stop the clock, causing delay, when requesting more information or clarification from the parties.

The review periods significantly vary from jurisdiction to jurisdiction. The review period in the US (without a second request) is 30 days (15 days for public takeover bids) and can be shortened. In the EU, the phase one review period is 25 working days (35 working days if the parties offer phase one commitments) and cannot be shortened. The European Commission also requires parties to undergo a one or two-week period of informal pre-notification discussions with its staff, which can be longer in complex transactions. Phase two reviews, if initiated, require a much longer time to complete (from three months to more than a year).

A concern for some parties is the fact that notifications are published. Parties often do not want the deal to become public before signing, but want to close quickly after signing. Antitrust and deal counsel need to work closely to evaluate the various timing options. For instance, the time to signing can be used to prepare all filings. Some jurisdictions grant clearance decisions before the statutory review period expires (for example, the US or Germany) and some, such as the EU, apply exceptions to public takeover bids. It might be possible to request a waiver of the standstill obligation in special cases. Many jurisdictions allow for a so-called carve-out scenario so that the transaction can be consummated in all jurisdictions in which the parties already obtained clearance or no prior clearance is necessary.

Sensitive communications

Parties should be careful to avoid violating antitrust laws in the context of contract negotiations. They must avoid exchanging sensitive information. Information that is already public is not an issue, neither is historical financial data. However, the parties must not exchange data with regard to prices, customers, production cost, product pipeline, contract bids or any other competitive parameter. If some of this data is necessary to establish the deal value, the parties can engage third-party consultants who may see more detailed data (because they are not competing with the target), and who can then offer their conclusions (without disclosing the data base) to the buyer.

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Parties should screen their sales teams from discussions, as they are closest to competitive interactions.

In many countries, management presentations on the deal to the boards or other governing bodies of the parties need to be submitted to the authorities, for example, the US 4c documents. The parties should take care to avoid language that might later implicate antitrust concerns. For instance, the terms “market” or “market share” are highly predetermined in antitrust analysis. Unless a detailed antitrust analysis has been undertaken, presentations discussing the competitive position in a particular segment should aim to use “segment”, “line of business”, “product line” where possible, avoiding the term “market”. Equally, the parties should avoid language such as: “we will dominate the market” or “we will crush our competition”.

The same concerns apply to any publications, press releases or other public statements about the deal. In situations that raise a competitive concern, antitrust lawyers should review presentations or public statements before they are distributed.

Contract negotiations

Common clauses in M&A agreements that relate to merger control include:

Cooperation. Often information will be required from both parties to complete the merger review process. As a result, the parties include a cooperation obligation. A lot of information may already be obtained during the due diligence process.

Conditions to closing. The parties should consider making a clearance in jurisdictions that have a standstill obligation as a condition to closing. However, this needs attention and should be discussed with antitrust counsel. In jurisdictions such as Brazil and Italy only prior notification, not clearance, is necessary. In other jurisdictions, in particular those with less practice, the review can take much longer than

published review periods. The parties should consider including waiver clauses to cover unexpected delays by merger regimes.

Closing dates/long-stop dates. In selecting the closing and/or long-stop date, the parties can decide whether or not they are willing to accommodate a second phase review, which could include certain conditions and obligations. Timelines coupled with break fees need to be reviewed carefully to ensure they work with the antitrust timeline. Sometimes the parties agree that all filings must be made within a specified time, often as short as five to 10 days. This should be avoided where possible. The closing date will exert the real time pressure, and the parties should leave some room for manoeuvre in the filing timeline.

Non-compete obligations. Often the buyer insists on a non-compete obligation to protect its investment. Generally, competition authorities around the world accept periods of two to three years; many countries accept five years. Non-compete obligations beyond five years are unlikely to be considered favourably by competition authorities around the world, unless there are specific reasons for doing so. A non-compete obligation must be limited to the target products and countries in which the target is active. Unspecific, or blanket, non-compete obligations are generally not accepted. Parties should take care to include a severability clause, which ensures that the non-compete obligation survives (where this is permitted under the local law) and remains enforceable to the extent it is considered legally permissible in a relevant jurisdiction.

Early antitrust review is recommended for any competition relevant provisions. Many jurisdictions require submission of the full text of the agreement and unusual clauses might raise concerns and result in delays.

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