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# **Latham Antitrust Webinar Global Merger Control**

**Gaby Eickstädt, Jörg Kirchner, Bruce Prager,  
David Schwartzbaum, Susanne Zühlke  
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# Global Merger Control => Acquisition Agreement

Approach by M&A team

Step 1: Where do we need merger clearance?

Step 2: Risk assessment: Fast and unconditional approval?

Step 3: Impact of analysis on Acquisition Agreement.

Step 4: Anything else deal team needs to keep in mind?

# Step 1: Where do we need merger clearance?

Q: Where does the transaction need to be filed?

# Step 1: Where do we need merger clearance?

- More than 80 countries have merger control regimes, each with a different threshold.
- Need three key pieces of information:
  - Identity of the parties
  - Transaction structure (share deal, asset deal, joint ventures, minority shareholdings)
  - Revenues of the target by country
    - Discuss alternatives with target if difficult; in hostile bid scenario: „educated best guess“, Annual Reports, websites, etc.)
    - Leads to concise list of follow up questions.
- Best Practice: Get one clear and concise list, early on.

## Step 2: Risk assessment

Risk assessment: Fast and unconditional clearance?

Q: What is the timeline?

Q: What is the likelihood of unconditional clearance?

Fact-finding: How can you assess antitrust risk when information is limited. E.g. where does Seller assess potential buyers? What happens in a hostile bid situation?

Q: Which form could conditions of clearance take (if any)?

## Step 2: Sample timeline

- Assume A plans to acquire B, no major antitrust issues expected. The main overlaps are in the US and in Germany.
- Summary/Timeline (phase 1)/condition precedent
  - US – waiting period - 30 days - *probably*
  - Brazil – no stand-still – but need to **file within 15 wd** - *No*
  - Bulgaria – waiting period – 1 month - *maybe*
  - Germany – waiting period – 1 month - *probably*
  - Latvia – waiting period – 30 days - *maybe*
  - South Africa – waiting period - 20 to **40** working days - *probably*
  - Korea – **post-closing filing** – file within 30 days from closing - *No*
- Brief note on China.

## Step 2: Likelihood of unconditional clearance

- Global antitrust laws seek to prevent transactions that create or strengthen a dominant market position or lead to a significant lessening of competition.
- Why does buyer want to acquire target (strategic rationale)?
- Define relevant product and geographic market(s).
- Review overlaps
  - Horizontal: both parties selling in same market?
  - Vertical: Is one the (potential) customer/supplier of the other?
  - Conglomerate: GE/Honeywell?
- Review market position
  - Market shares, number of competitors, barriers to entry, etc.

## Step 2: Fact-finding

- Websites, Annual Reports/10K, public information, market studies
  - e.g. Gartner Reports in Software; IMS data in Pharma, etc.
- Information Memorandum, Deal Deck, etc.
- Discuss with buyer and target (as possible)
  - Sales department, M&A strategy unit, etc.

## Step 2: Conditions of merger clearance?

- Need to consider what would fix the antitrust problem economically, without requiring constant monitoring
  - *e.g.* divestiture, licenses, supply agreements, etc.
- A “quick fix” at the outset can lead to quick clearance and avoid significant costs and uncertainty.
- Protect crown jewels (i.e. make sure certain commitment requirements would be a deal breaker).

## Step 3: Impact of analysis on acquisition agreement

- Q: Condition to closing?
- Q: Which covenants?
- Q: Termination right by party(s) (unless in default).
- Q: Break fee if one party terminates?

## Step 3: Closing condition (1)

- There is no legal obligation under antitrust law to have a condition to closing regarding merger clearance.
- Pre-merger regimes just prohibit the closing prior to clearance under the threat of fines (and some nullity).
- A closing condition protects a party from an obligation to close a deal contrary to the law.

## Step 3: Closing condition (2)

- Choose countries carefully/ allow for a waiver.
- Condition to closing for one or both parties?
- Consider length of period parties are prepared to wait
  - (prolonged) Phase 1; Phase 2; litigation in US?
- Consider relationship with termination date.

## Step 3: Covenants

- Prompt and due filing; cooperation between parties
  - Standard clause
  - Filing within a certain number of business days? Normally not helpful ...
- Efforts the buyer must undertake to close the deal
  - Consider carefully obligations to resist or resolve a (potential) government concern, i.e. divestiture, litigation, etc.
    - Can be important, *e.g.* it would be problematic if Microsoft agreed no limits and then be required to divest its operating system for the acquisition of another software maker (or face damages for breach of contract).

## Step 3: Termination and break fees

- Termination rights by buyer and/or seller
  - A closing condition can backfire, if it can be used as an excuse not to close, even though there is a possibility to do so legally (e.g. by way of “carve-out”).
- Termination period must match antitrust timeline
  - Short termination period, if party does not want to be obliged to entertain phase 2.
  - Consider necessity of „certain funds“.
- Break fee
  - Make sure you discuss timeline with antitrust team to ensure break fee conditions are practical.

## Step 4: Things to keep in mind

- Manage confidential information carefully
  - Clean-teams, guidelines on information exchange in DD
- Communicate carefully
- No “gun-jumping”
  - Until closing, the parties remain two separate entities
  - Plan for integration, but do not implement it
  - Integration guidelines
- Some comments from the US perspective

# Questions?

## Antitrust Team



Gaby Eickstaedt  
Tel: +49.89.2080.3.8150  
E-mail: gaby.eickstaedt@lw.com



Bruce J. Prager  
Tel: +1.212.906.1272  
E-mail: bruce.prager@lw.com



Susanne Zuehlke  
Tel: +32.2.788.6305  
E-mail: susanne.zuehlke@lw.com

## M&A Team



Dr. Joerg Kirchner  
Tel: +49.89.2080.3.8040  
E-mail: joerg.kirchner@lw.com



David M. Schwartzbaum  
Tel: +1.212.906.1215  
E-mail: david.schwartzbaum@lw.com

**Munich**  
Maximilianhöfe  
Maximilianstraße 11  
80539 Munich  
Germany  
+49.89.20.80.3.8000  
+49.89.20.80.3.8080 (Fax)

**Brussels**  
Boulevard du Régent, 43-44  
B-1000 Brussels  
Belgium  
+32.2.788.6000  
+32.2.788.6060 (Fax)

**New York**  
885 Third Avenue  
Suite 1000  
New York, NY 10022  
+1.212.906.1200  
+1.212.751.4864 (Fax)