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Understand Foreign Pre-Merger Filings

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REGARDLESS of whether significant antitrust issues are raised by a proposed transaction, M&A lawyers in the United States are well aware of the need to plan for the possibility of pre-merger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976[1] and under the European Union Merger Regulation.[2] But they may be overlooking, at their peril, a number of foreign pre-merger filing requirements.

In the United States, if the transaction meets certain size-of-the-parties and size-of-the-transaction thresholds, the parties may not close until they file an HSR report form and observe the applicable waiting period. Since 1989, filing and waiting period requirements also have been imposed by the European Union Merger Regulation, primarily on the basis of the size of the parties. Many practitioners also are aware that Germany[3] and Japan[4] enacted pre-merger filing requirements before the United States, with the German law applying to a wide variety of international transactions involving German companies, assets or commerce.

The number of additional antitrust pre-merger filing regimes has proliferated exponentially in recent years, and threatens to complicate significantly pre-merger planning for international mergers and acquisitions, if not the deal itself. Several members of the European Union have filing requirements that apply if the European Union Merger Regulation does not, including Austria,[5] Belgium,[6] Greece,[7] Ireland,[8] Italy,[9] Portugal[10] and Sweden.[11]

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Most recently, the Netherlands adopted a premerger filing regulation[12] Other countries, such as France, Spain and the United Kingdom, have substantive merger control and voluntary filing provisions without mandatory premerger filings.[13]

A much larger and steadily growing list of countries outside the European Union also now impose pre-merger filing requirements, including Brazil,[14] Canada,[15] Hungary,[16] India,[17] Israel,[18] Kazakhstan,[19] Kenya,[20] Korea,[21] Mexico,[22] Poland,[23] Russia,[24] Taiwan[25] and many others. Many countries have voluntary filing systems as well.[26]

The international character of mergers and acquisitions, as demonstrated by recent transactions such as Exxon-Mobil, BP-Amoco and Coca-Cola-Cadbury Schweppes, is now commonplace. Serious international enforcement of substantive antitrust laws is also beginning to occur outside the United States and the European Union, although it is by no means the norm.

For example, Japan's Fair Trade Commission reportedly will investigate the Exxon-Mobil merger for compliance with Japan's recently amended Antimonopoly Law. There also is speculation that many countries in which Coca-Cola and Cadbury Schweppes rank first and second in soft drink sales will review Coca-Cola's acquisition of several Cadbury-Schweppes brands.

International antitrust filing requirements also are now commonplace, and accordingly must be a routine component of every closing checklist. In fact, counsel often must advise their clients at an early stage that they must file notifications (and coordinate any substantive antitrust issues) in several jurisdictions prior to closing, which may be a timely and costly process.

Parties contemplating mega-transactions may not be surprised by these requirements. Now that many smaller companies do extensive business overseas, however, a startling number of smaller transactions also face these types of impediments. Many of the countries with mandatory merger-notification statutes (Canada, Mexico, Japan, Brazil and Taiwan, among others) are important outlets for U.S. goods. Furthermore, many U.S. companies maintain operations in these countries.

For a variety of reasons, clients may be tempted to ignore certain newly enacted filing requirements in the interests of efficiently closing the deal. Turning a blind eye to such requirements is, however, increasingly perilous. Failure to abide by these pre-merger filing regulations can have serious consequences, including negative publicity, heavy fines, dissolution of an already-closed merger, or a "perpetual cloud" on title to the acquired assets. There is also increasingly less likelihood that such transactions will not come to the attention of the enforcement authorities.

Thus, even where a transaction raises no substantive antitrust issues, a thorough review of worldwide filing issues is not optional. In many cases, of course, substantive antitrust concerns will drive certain strategy decisions, and will largely determine whether the parties should file under any one of several voluntary filing regimes, as well as in certain mandatory jurisdictions that rely on market share thresholds.

Identifying Requirements

Special consideration always must be given to substantive antitrust, filing and political considerations in the home jurisdictions of the parties to the transaction. In other jurisdictions, various procedures can be followed to efficiently screen the locale for possible filing issues.

As an initial matter, the preliminary analysis can exclude all countries in which neither party has sales, assets or operations. No country's merger-notification regulation attempts to require notification of a merger between companies with no presence whatsoever in that country.

Identifying filing requirements in all other countries can be a more complicated matter. Some jurisdictions can be ruled out because their rules do not apply to so-called "indirect" transactions, e.g., where a local subsidiary is acquired indirectly through the acquisition of its parent. Other mandatory filing jurisdictions can be eliminated with minimal information about the parties or the transaction.

The variety of thresholds used among the various jurisdictions means, however, that there is no single way of efficiently identifying all filing requirements. Some regulations are triggered by the merging companies' worldwide revenue or revenue derived from operations in that country.

For example, in Israel, the Restrictive Trade Practices Act requires notification where the combined firm's market share exceeds 50 percent, where the combined firm's sales in Israel exceed 50 million New Israel Shekels (approximately U.S. $12.2 million), or where one of the merging firms is deemed a monopoly under the terms of the statute.[27] Others are triggered by worldwide or local market share or assets. For example, Article 11 of Taiwan's Fair Trade Law requires that:

If any of the following circumstances shall exist in respect of a combination of enterprises, an application for the approval thereof shall be filed with the central competent authority:

1. As a result of the combination, the surviving enterprise will acquire a market share reaching one third (1/3);

2. An enterprise participating in the combination holds a market share reaching one fourth (1/4); or

3. The amount of sales in the preceding fiscal year of an enterprise participating in the combination exceeds the amount publicly announced by the central competent authority.[28]

Screening Efficiently

Thus, there may be different ways of screening each individual transaction efficiently. The majority of transactions are most efficiently analyzed by counsel who engages the company in an ongoing, two-way exchange of information rather than by submitting to the company a single, exhaustive information request. It is imperative at the outset to have a general understanding of the proposed scope of the transaction, the parties' operations and any antitrust issues that are raised.

Initially, practitioners should focus on those countries in which assets or companies are being acquired, because these jurisdictions are the ones in which filing requirements are most likely to be found. The foreign investment regulations in such countries also will have to be examined.

Then, counsel will have to examine additional countries in which the parties have sales. If they have sales and operations in only a handful of countries, counsel may safely limit their investigation to whether the companies meet the relevant threshold in those few jurisdictions.

If, however, the companies' operations are global, or if their products are distributed globally (i.e. Coca-Cola, Exxon or IBM, or even smaller companies with global distribution), the company-data-first approach might pose significant difficulties and delays. Companies in the midst of a merger are not always the most willing or able to respond to lawyers' inquiries about sales in what they consider to be secondary markets.

In such cases, counsel alternatively might consider beginning with a complete list of countries with merger-notification regulations, and then, after determining the jurisdictional threshold for each, investigating with more precise questions the companies' presence under the standard enunciated in the applicable regulation. This procedure can be done in a way that minimizes the burden on the client at a time when it may be undergoing a major transformation due to the merger or acquisition. Of course, jurisdictions that also raise substantive antitrust issues will have to be addressed separately.

Obtaining Information

Obtaining comprehensive information about the filing requirements of all countries in the world, for the purpose of use as a screening aid, is no simple task. While there are numerous sources available, substantial effort must be expended in determining the current scope and application of these laws. Fortunately, such information is increasingly available on-line, including through foreign enforcement authority Web sites. Although many deals will require only limited research, other deals are greatly aided by an up-to-date database of filing thresholds.

Assuming the basic parameters of the deal are understood by counsel, such a database also can prove invaluable in limiting dramatically the scope of any initial information request to the client. Limiting the number of questions not only reduces the burden of responding, but also likely will improve the accuracy of the responses counsel will receive.

Approaching a client regarding its presence in Brazil, Mexico or Taiwan may produce a more accurate account of the company's operations than would a broad request for a breakdown of the company's assets, operations and revenues worldwide. This method may be especially appropriate where a client operates through subsidiaries; it is even more important given the chaos that can reign after a merger announcement.

In either case, after determining the proper jurisdictional standards, and after having gathered the best information regarding the companies' operations in those jurisdictions, counsel may make a preliminary determination as to (a) which countries raise no filing issues whatsoever, under any view of the then-current law, or (b) which countries appear to either clearly require a filing, or at least raise some issue in this regard. There will often be many countries for which no clear-cut answer exists even after consulting with the client.

At this point, because of restrictions on U.S. lawyers practicing law in foreign jurisdictions, it is usually necessary to obtain local counsel in those locations where counsel has determined that a filing is required, and in those jurisdictions where any ambiguity remains. Local counsel also can provide any gloss that colors the meaning of the applicable regulation, and insight on the treatment received by previous transactions. They will also have information regarding informal enforcement practices that may not be available from published sources.

Local counsel also may be aware of pending legislation or local political issues that may cause a transaction to be seen less favorably. For instance, there may be a new merger-control law pending in that country's legislature, or there may be an ongoing public debate over high prices in the industry in which the merging companies operate.

It also will be necessary to retain local counsel because they can assist in dealing directly with the company's local managers or subsidiaries to resolve factual ambiguities. Furthermore, effective local counsel may be aware of circumstances that local managers may be wary of divulging to their superiors.

In almost all cases, local counsel should be coordinated by a single antitrust counsel responsible for worldwide antitrust issues. Substantively, this approach ensures that a compelling and consistent argument is put forward in support of the merger in every jurisdiction. Cooperation among enforcement authorities is becoming more prevalent, and submissions to foreign authorities may be discoverable in the U.S. Thus, inconsistent positions before various countries' regulators, no matter how unintentional, can only cause unnecessary complications.

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Procedurally, coordination ensures that filing requirements can be complied with in a manner that ensures a timely closing of the transaction. It further ensures that information is handled centrally, and that the client is not bombarded with duplicative or otherwise unnecessary requests for information from lawyers in multiple countries.

Conclusion

Regardless of substantive concerns, international antitrust filings need to be a part of every closing checklist. Although many deals will trigger multiple filings, the filing process generally can be managed efficiently with early access to company information and effective screening using an up-to-date database of filing thresholds.

(1) Pub. L. No. 94-435, § 201, 90 Stat. 1390 (codified as amended at 15 USC § 18a (1994)).

(2) The Merger Control Regulation, Art. 4, 4064/89 O.J. 1990 L257/14.

(3) Act Against Restraints of Competition of 1958, § 24a, as amended.

(4) Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, § 15(2).

(5) Cartel Act of 1988, § 42A, as amended.

(6) Protection of Economic Competition Act, Art. 12, Law No. 91-2790.

(7) Law 703/77 on the Control of Monopolies and Oligopolies and Protection of Free Competition, as amended by Law 2296/95.

(8) Mergers, Take-Overs and Monopolies (Control) Act, § 5, as amended.

(9) Law on the Protection of Competition and the Market, Art. 16, Law No. 287 of Oct. 10, 1990.

(10) Decree-Law No. 371/93 of 29 October 1993, Art. 7.

(11) Swedish Competition Act, Jan. 14, 1993, § 37.

(12) Dutch Competition Act of May 22, 1997.

(13) Ordinance No. 86-1243 of Dec. 1, 1986 and Decree No. 86-1309 of Dec. 29, 1986, as amended by Decree 95-916 of Aug. 9, 1995 (France); Law 16/89, of July 17, 1989, Concerning the Defense of Competition, § 15 (Spain); Fair Trading Act of 1973, as amended, § 75A (U.K.).

(14) Federal Law 8,884 of June 11, 1994, Art. 54(4).

(15) Competition Act, R.S., c. C-23, s. 1; 1986, c. 26, s. 19.

(16) Law LVII of 1996 on Unfair Trade Practices and Restriction of Competition, § 26.

(17) Monopolistic and Restrictive Trade Practices Act of 1969.

(18) Restrictive Trade Practices Law 1988, § 17, Annual Statutes No. 1258, July 26, 1988.

(19) 1991 Law on the Protection of Competition and Restriction of Monopolistic Activity, Art. 10.

(20) Restrictive Trade Practices, Monopolies and Price Control Act, § 27(1).

(21) Monopoly Regulation and Fair Trade Act, as amended, Art. 12.

(22) Federal Law of Economic Competition, Art. 20.

(23) Counteracting Monopolistic Practices Act of Feb. 24, 1990, Art. 11, as amended.

(24) Act on Competition and Restriction of Monopoly Activity on Commodity Markets, as amended by Federal Law No. 701 of May 6, 1998.

(25) Fair Trade Law of Feb. 4, 1991, Art. 11.

(26) See, e.g., Australia's Trade Practices Act of 1974, §88(9).

(27) Restrictive Trade Practices Law 1988, § 17, Annual Statutes No. 1258, July 26, 1988. Some countries' merger-notification regulations, like Mexico's, express notification thresholds in terms of the merging companies' revenues, but do not specify if local (national) revenues or worldwide revenues should be used. This is a type of ambiguity that local counsel can often clarify. Local counsel in Mexico generally advise that the Mexican authorities look to local (national) revenues, rather than worldwide revenues, rather than worldwide revenues.

(28) FAIR TRADE LAW OF FEB. 4, 1991, ART. 11.