

Managing Merger Control in the Era of Globalization

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GLOBALIZATION HAS DRAMATICALLY changed the practice of merger control. The number of countries with merger-control regimes—that is, a system under which parties to mergers, acquisitions, and other transactions must submit those transactions for review by antitrust authorities—has grown substantially.¹ Consequently, even parties to small acquisitions must navigate merger-control proceedings in at least a few jurisdictions around the globe.

Filing requirements vary by country, often greatly. In some jurisdictions, the filing obligation is triggered by volume of sales, and in others, by market share. For example, a filing is required in Germany if (1) the buyer's and target's combined worldwide revenues exceed €500 million, (2) one party's revenues in Germany exceed €25 million, and (3) the other party's revenues in Germany exceed €5 million. Brazil has alternative filing triggers—one based on revenues and one based on the parties' market share. Still, many aspects of the filing analysis and notification process are common across jurisdictions. Understanding the key similarities and differences among jurisdictions where filings are often required and preparing clients for what will be required of them will make the process simpler, more efficient, and more effective.

Counsel faced with navigating the rocky waters of international merger control and the filing requirements involved in the 100-plus jurisdictions in which a transaction may need to be notified should start with several foundational questions:

Is the Transaction Reportable?

The first step in any multi-jurisdictional filing analysis is determining whether the transaction falls within the scope of the applicable merger-control legislation, even before checking whether the relevant filing thresholds are met. Countries' merger-control laws identify one or more "qualifying events" that trigger filing obligations. A number of useful resources provide information on the filing requirements:

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▪ **Commercial guides.** One place to start is by consulting commercial merger-control overviews.² These guides contain responses to a standardized set of questions about filing requirements and procedures in dozens of jurisdictions. While these guides are convenient, it is important to double-check their information because they are usually updated only once a year and therefore may not cover recent changes. Private practitioners also publish guides.³ Numerous antitrust-news publications⁴ report on changes to existing laws, and these can be used to supplement the commercial guides.

▪ **Competition authority Web sites.** Most competition authorities have Web sites containing links to legislation and forms, and often to merger-control decisions as well. Most Web sites have a section translating key legislation into English. Several sites compile competition authority Web addresses.⁵ The International Competition Network,⁶ a forum through which national competition authorities cooperate to improve competition-law enforcement, also publishes helpful summaries of its members' merger-control requirements (although these are not necessarily updated regularly).⁷

▪ **Bar associations.** Some bar associations have Web sites that provide links to competition legislation in even far-flung jurisdictions.⁸ Some bar associations publish "hard copy" guides.⁹

▪ **Local counsel.** Local counsel in each jurisdiction can advise clients and other counsel if there is a filing obligation, especially in close cases. If the client or its primary counsel does not have local counsel in a particular jurisdiction, common ways to identify local counsel include asking colleagues for a reference, referring to commercial guides to identify the author of the chapter on filing in that country, and noting which local counsel serve as speakers and presenters at CLEs.

Quantitative events: Almost all jurisdictions require parties to notify share or asset acquisitions exceeding certain thresholds. Most jurisdictions require notifying the acquisition of 50 percent or more of a target company's voting securities or assets. Several jurisdictions (including Austria, Canada, Germany, Japan, Mexico, South Korea, and Taiwan) require notification where the buyer's shareholding reaches a lower level, e.g., 10, 25, or 35 percent.

Qualitative events: Most jurisdictions outside the U.S. follow the approach developed by the European Commission (EC), requiring filings where a buyer acquires "control" over a separate business (sometimes called an "undertaking").¹⁰ "Control" is usually defined as the ability directly or indirectly to exercise "decisive influence" over the target. Control may be "positive" or "negative."

Positive control includes the ability to cast a majority of the votes at the shareholder or board level or the contractual right to manage another company. Even without holding a majority of the voting shares, however, a shareholder may be deemed to have control if its minority position routinely accounts for a majority of the votes actually cast at the shareholders' meeting.

Negative control means the de jure or de facto ability to block the adoption of strategic business decisions, such as the

adoption of a company's business plan or budget, senior management appointments, or strategic investments. Such blocking rights often arise where the shareholders' agreement provides for supermajority voting or requires the votes of different parties' directors to make key decisions. A few countries, including Brazil, Germany, and the United Kingdom, allow the exercise of jurisdiction based on an "influence" standard that falls short of even negative control. In Brazil, for example, a minority share acquisition, no matter how small, can lead to a filing obligation if that minority shareholding gives the buyer some indicia of influence over target's management, such as the right to a board seat.

Joint ventures: Many jurisdictions expressly require the notification of "joint ventures." But many jurisdictions, particularly those that follow the EU model, limit this requirement to "full function" joint ventures, i.e., those that create stand-alone entities able to act independently of their parents. This distinction, which arose from a now-outdated jurisdictional compromise, has little substantive justification, but it can determine which competition authorities review a transaction. Note that some jurisdictions require the notification of joint ventures but do not expressly define the term.

Options: Most jurisdictions do not require filings when an option is acquired but do when an option is exercised. Some jurisdictions, however, may require the option acquisition to be notified at an earlier date if the option is certain to be exercised by a specific date or gives the acquirer strategic leverage over the target.

Debt acquisitions: Debt investments generally do not trigger filing obligations. Still, notification may be required if the debt agreement gives the buyer significant control rights over the strategic operations of the debtor, e.g., the right to appoint managers or directors of the debtor or to veto strategic decisions. Converting debt into equity usually requires notification if the conversion exceeds the otherwise applicable filing thresholds, although some jurisdictions, such as the United States, provide limited exceptions in bankruptcy reorganizations.¹¹

IP licenses: Although certain exclusive licenses are notifiable in the United States and Canada, most jurisdictions do not require notification of the acquisition of IP rights because IP rights alone are not considered to constitute a business. This does not mean, however, that such acquisitions are immune from antitrust scrutiny; instead, they are treated as potentially restrictive (non-merger) agreements rather than as asset acquisitions.

Does the Transaction Meet the Notification Thresholds?

Most jurisdictions' merger-control thresholds differ from HSR thresholds in that they are based on the size of the buyer and target rather than the size of the transaction. The most common form of threshold looks to both the parties' combined global or national sales and their individual sales within the jurisdiction. Additionally, some countries look to the value of the parties' assets, globally or within the jurisdiction. A small

minority of countries (notably Brazil, Israel, Portugal, Spain, Taiwan, and Turkey) require notifications when one or both parties' market shares exceed a specified level (usually 20 percent or higher). Although the thresholds are often expressed in simple terms, properly applying them is not always easy.

Whose sales or assets are taken into account? Most jurisdictions base their notification thresholds on the aggregate sales or assets of the "control groups" to which the buyer and the target, respectively, belong. A control group comprises the immediate entity, any entities it directly or indirectly controls, any parent entities that directly or indirectly control the immediate entity, and any other entities that the parents directly or indirectly control. Most (but not all) jurisdictions limit the relevant control group on the seller's side to entities or assets comprising the target, that is, excluding the seller and its retained businesses.

The "control group" concept differs somewhat from the U.S. concept of ultimate parent entity (UPE), in that "control" can involve voting rights, economic rights, management rights, and other positive and negative control rights. By contrast, in the United States the UPE is determined through bright-line tests: holding 50 percent or more of the voting securities or having the contractual right to appoint at least half the board directors of a corporation, or having 50 percent or more of the economic rights (profits or assets on dissolution) in a noncorporate entity.¹² This can lead to different outcomes where complicated ownership structures or management contracts are involved. For example, in private equity acquisitions, the EU will typically treat all investment funds under common management as a single group, whereas each investment fund is typically its own UPE for HSR purposes. Some countries, however, take a much narrower view of the relevant notifying entities, looking only at the immediate contracting parties.

How are sales calculated? Remarkably, most jurisdictions do not specify clearly how to calculate sales. The EU model, which is fairly widely followed, looks to sales of goods and services in the ordinary course in the last fiscal year, net of post-sale price adjustments (e.g., rebates) and sales taxes, adjusted for the sales of any businesses acquired or divested since the completion of the relevant financial year.

To which country should sales be attributed? How sales are attributed is a key issue because it can significantly affect the filing analysis. The EU model usually allocates sales to the country where the purchasing decision was made, which is usually the invoice address rather than the shipping or manufacturing address. Sometimes this means that sales are attributed to one country even though the product is actually shipped to another country (i.e., based on "bill to" versus "ship to" sales data). A few jurisdictions take different approaches. For example, one prong of Canada's test looks at sales "in or from" Canada, which essentially captures all sales originating in Canada, while the second prong of the test looks at sales "in, from, or into" Canada, which captures all sales with any connection to Canada.¹³

How are assets calculated? In jurisdictions with asset-based

thresholds, assets are usually calculated by reference to the target's "statutory accounts" (i.e., the accounts that a company is required to report under the laws of the jurisdiction of incorporation) in the jurisdiction. These accounts may differ from "management accounts" (the accounts that management uses to monitor the performance of the company as a whole), which often do not make clear distinctions between subsidiaries. Inexperienced antitrust counsel frequently miss filing requirements because of differences between management accounts and statutory accounts.

What is the reference year? Most jurisdictions refer to parties' sales or assets in the most recently completed financial year, although some refer to a calendar year. Other jurisdictions focus on the most recently completed financial year for which audited returns are available. Frequently, this means that the relevant revenues for filings made during the first three or four months of the year are likely the revenues for the second-prior year (e.g., the analysis filings made in March 2010 may be based on 2008 revenues). Complications can arise in cases where the target has undergone a lengthy bankruptcy reorganization because the most recent audited accounts may have no relation to the present size or performance of the company.

Which exchange rate should be used? Exchange rates can fluctuate dramatically over the course of a year, and using a spot rather than an average exchange rate can lead to significantly different outcomes. Some jurisdictions, including the EU, apply the average exchange rate over the course of financial year under consideration, as published by the Central Bank. Others, such as Canada, apply a single, end-of-year exchange rate as published by the national bank,¹⁴ while Mexico uses the most recent exchange rate published by the national bank.¹⁵ Many jurisdictions either do not specify the exchange rate or refer vaguely to good accounting practice, which may give the practitioner some leeway.

How is market share calculated? Calculating market shares is difficult for at least two reasons. First, the market-share analysis often needs to be done quickly and early in the process, before antitrust counsel have fully explored the extent of any overlaps in the parties' products or services. Second, the calculation implicates two ultimate questions in antitrust analysis: what is the proper market definition and does the transaction raise a substantive antitrust problem. To conduct the analysis, antitrust practitioners need to understand the parties' business, ask whether the client keeps market share data, determine whether there is any relevant precedent in the jurisdiction defining the market, and, if not, develop a defensible market definition. Here, as in other areas, one should not blindly accept the client's market share data because the client's business definition of the "market" may not constitute a relevant product market for antitrust purposes. In some transactions, it will be obvious that there is no overlap. In others, one or both of the parties may have such trivial revenues in the country that there is little risk that the market share threshold is met. Where there are significant overlaps and little precedent, the market-

share calculation starts approaching a full antitrust analysis, including consideration of supply and demand substitution.

Who Has to Notify?

Unlike the United States, most jurisdictions require a single notification and place the burden of filing on the buyer alone. The seller, however, usually possesses much of the required information. Therefore, it is essential for purchasers to secure a contractual obligation—generally included in the purchase agreement's antitrust covenant—requiring the seller's full cooperation to prepare merger-control submissions.

What Are the Sanctions for Failure to Notify/Obtain Clearance?

In many jurisdictions (e.g., the EU), a transaction is not legally enforceable until clearance is obtained. The sanctions for failure to obtain clearance, in most jurisdictions, fall on the buyer because it has the filing obligation and because, as a practical matter, the seller may no longer exist if the deal has closed. Frequently, the maximum fines are substantial (e.g., up to 10 percent of annual worldwide aggregate group revenues), although the actual level of fines imposed varies substantially from jurisdiction to jurisdiction. A number of jurisdictions have criminal sanctions, although actual instances of jail time are extremely rare. Perhaps more significant than the civil penalties for failure to file, however, is the harm to the client's reputation with the regulatory agency. Antitrust agencies tend to have long institutional memories, and companies that are perceived to cheat or to be arrogant receive closer scrutiny, even in benign transactions. Still, particularly in more far-flung jurisdictions, clients may be tempted to risk incurring the fines and ill will, especially where the likely fine will be significantly less than the financing or other costs of a delayed closing.

How Long Will It Take to Secure Clearance?

Timing is a critical issue, both for the antitrust lawyers and the deal people. One of the first questions every antitrust lawyer should ask the client or the corporate lawyers is, "When do the parties want to close?" The answer will drive the process, although several factors affect timing.

Filing deadlines. Most jurisdictions do not have filing deadlines because they simply prohibit parties from closing before clearance is granted or the waiting period expires. A handful of jurisdictions (including Brazil and Portugal) still require parties to submit their filing within a defined period after the parties sign a binding or definitive agreement, such as an executed purchase agreement (as opposed to a non-binding letter of intent or memorandum of understanding).

Earliest date for filing. The earliest date on which parties can file varies significantly. In Germany and Austria, for example, parties are free to notify a transaction regardless of whether they have any documentation or even the good faith intention to close. The EU allows parties to file on the basis of a letter of intent or memorandum of understanding, if the parties have the good faith intent to implement the transaction. A

number of jurisdictions, however, will not allow the parties to file without a definitive agreement.

Time required to prepare the notification. The time required to prepare merger-control filings should not be underestimated. As discussed below, most jurisdictions outside the United States require significantly more information about the parties and the markets involved, and parties often must provide notarized, and occasionally apostilled,¹⁶ translations of corporate documentation. Preparing a filing can take several weeks or more, even in deals without substantive issues. (If the transaction does present substantive issues, the parties should factor in even more time and/or dedicate more resources.) Often the parties (particularly sellers) want to proceed promptly to closing and do not want the notification process to delay closing. Counsel need to understand the client's scheduling needs, ensure that the client has realistic expectations, and build a realistic filing deadline into the transactional agreement—or at least avoid committing to an overly ambitious filing deadline. An unrealistic contractual deadline for filings can easily backfire, either because the client is unable to satisfy the condition, leading to a contract breach, or because, in the rush to prepare the notifications, important substantive issues are overlooked and later become obstacles to clearance.

Non-suspensive and post-closing filings. Like the United States, most jurisdictions prohibit closing the deal until clearance is granted or the waiting period has expired. Two notable exceptions—Brazil and Italy—allow parties to close before receiving clearance, subject to the risk that they will be forced to make divestitures if the transaction is subsequently challenged. These authorities also may order parties not to implement the transaction prior to clearance. Additionally, some countries (e.g., South Korea) merely require post-closing notifications for certain types of transactions.

Voluntary filings. In jurisdictions with voluntary filing regimes (notably Australia, New Zealand, Singapore, and the UK), the parties have no legal obligation to submit information about the transaction unless the antitrust authorities initiate proceedings. Despite the “voluntary” nature of this system, counsel should seriously consider filing (or otherwise voluntarily submitting information) in jurisdictions where a transaction is likely to raise competition issues, even if the transaction is not ultimately problematic.

Review periods. Outside of the United States, most jurisdictions follow a two-stage process, in which all notifiable transactions are subject to an initial review period, and transactions that raise antitrust concerns are subject to a second, in-depth investigation. Unlike the U.S. practice, not only the initial review but also the second-phase investigation is usually subject to binding time limits, typically one month to six weeks for the first phase, and two to four months for the second phase. Although this can facilitate estimates of the time required for clearance, several variables can still delay the process. For example, the regulators may deem the filing incomplete and require additional documentation before accepting the filing or starting the investigative period. On the

other hand, some countries (e.g., Germany) may issue clearance well before the first phase deadline if the transaction presents no substantive antitrust issues (similar to early termination in the United States).

Completeness. Waiting periods generally do not begin until the competition authority has accepted the filing as complete. In China and the European Union, this can add days, weeks, or even months to the process. The regulators may require dialogue or “negotiation” before accepting the filing as complete. Occasionally, a regulator will inform the parties several days or even weeks into the first phase (or sometimes second phase) that the notification lacked sufficient information about a particular issue, making the notification incomplete, meaning the investigative period has not yet begun. To minimize this risk, local counsel often advise providing what appears to U.S. counsel as more information than the notification instructions require, in order to forestall additional rounds of questions from the regulators that may delay clearance. Although local counsel usually are responding to the realities of the process in their own jurisdiction, primary counsel need to be watchful for local counsel who (from inexperience or other reasons) recommend providing too much information rather than too little—which also can invite unnecessary questions causing delays.

Pre-notification discussions. To minimize the number of incompleteness declarations, the EU introduced what is effectively a mandatory pre-notification period, during which the authority reviews and comments on draft filings, ostensibly to ensure completeness. A number of other jurisdictions have adopted this practice, with varying degrees of compulsion. Pre-notification discussions can add weeks or months to the process, particularly where a transaction has market-definition issues or involves high market shares. These discussions can be very helpful, not only by ensuring that the notification will be accepted as complete, but also by allowing parties to begin addressing competition issues before the authority's clock has formally started, thereby reducing the likelihood of a lengthy and expensive second-phase investigation. Pre-notification discussions, however, are not subject to time limits, and the duration is often outside of antitrust counsel's control. This can make it difficult to comply with rigid contractual filing deadlines, so contract language should provide an appropriate cushion for such discussions.

Holidays. Most jurisdictions extend their merger-review periods to account for intervening public holidays, and, in some jurisdictions, competition authorities formally close for summer or winter holidays. Consequently, local counsel should be consulted to determine whether there are any holidays that could affect the clearance timeline. Moreover, particularly in Europe, it is not unheard of for government reviewers to declare filings incomplete or throw cases into second phase if a crucial stage of the review would take place during a holiday period, when the agencies are understaffed. Therefore, European counsel often recommend avoiding filings that will be investigated during vacation or holiday periods, especially in August and December.

Derogation. Most merger-control laws allow the competition authority to grant a derogation (essentially a waiver) from the obligation to suspend closing until clearance. In practice, competition authorities grant derogations only rarely but may do so in compelling circumstances. While counsel should be careful to manage the client's expectations, counsel can explore whether a derogation might be available in cases of demonstrable urgency.

Considering all these factors, antitrust counsel may need to set or adjust a client's and deal counsel's expectations about the timing for clearance and closing. Early communication with clients and deal counsel about timing is critical where clearance delays could put deal financing or the buyer's exclusivity at risk. Where there are multiple filings, clients and deal counsel often find it helpful to have a table listing each jurisdiction where filings are required, the applicable waiting period, and whether it is suspensive, and to receive updated tables as filings are made and clearances obtained.

How Much Will It Cost?

This varies greatly. There are no fees for an EU filing. Many national jurisdictions, however, require filing fees, which can vary widely and add tens of thousands of dollars to transaction costs. For example, the filing fee in Brazil is approximately US\$25,000. Germany assesses a post-investigation administrative fee, ranging from approximately a few thousand Euros up to €50,000, based on the transaction's complexity.¹⁷

Filing fees are typically paid to local counsel, who then pay the fee for the client. Local counsel generally do not want to advance the fees, so the client should be prepared to pay local counsel before the filing is made.

What Is Submitted with the Filing?

Most merger-control regimes require the submission of significantly more information than HSR filings. Early in the filing process, counsel needs to identify someone at the client to collect the requisite information and documents. Typically, in-house counsel either serves as point person for such requests, or antitrust counsel works directly with the client's deal lead, CFO, comptroller, corporate secretary, division head, and/or other finance-department personnel.

Filing contents vary by jurisdiction, but the following are common elements in most jurisdictions:

Notification form. Most jurisdictions outside the United States require a detailed narrative description of the parties and their activities, the parties' local and worldwide revenues, the transaction structure, the deal rationale, the relevant product and geographic markets involved, and an assessment of the competitive effects of the transaction. Most jurisdictions require the buyer and the target to provide contact details for their top customers, suppliers, and competitors. Many competition authorities place a much greater emphasis on market shares—and often will not accept that companies are unable to estimate market shares. Although U.S. counsel instinctively chafe at the idea, companies often find themselves having to

provide “back of the envelope” market share estimates to satisfy filing requirements. Additionally, parties typically must describe entry and entry barriers, buyer power, efficiencies, research and development, and price levels. Other jurisdictions go even further. The EU, Poland, and China, for example, require parties to identify any trade associations they belong to; Taiwan requires the parties to describe the harm that would result if the transaction is not approved and the parties' cost of production or operation, prices, and sales of key products and services, for the last five years; Korea requires dates of incorporation, date of initial public offering (if applicable), and paid-in capital information for filing parties.

Transaction documents. With a few exceptions, most jurisdictions require at least a signed letter of intent or term sheet, if not a definitive agreement, to be submitted with the filing. Additionally, some jurisdictions (e.g., Brazil and China) require the agreement to be translated. This adds to transaction expenses, can add a day or more to filing preparations, and may make it difficult to sign and file immediately if the corporate lawyers are revising the contract right up until signing.

Corporate documents. Almost all jurisdictions require the submission of annual reports and financial statements, often covering several years. A number of countries require a range of other corporate documents. For example, Mexico requires certificates of incorporation and by-laws for each party to the transaction and their Mexican subsidiaries. Some countries require that these documents be notarized and apostilled, although in some cases a signed certification will suffice. Additionally, a number of countries require that most or all documentation be translated into the local language (although in many cases it is possible to negotiate with the competition authority to limit the scope of what must be translated). Antitrust counsel should not underestimate the time and cost required to obtain translations.

Substantive documents. With the notable exception of the EU, most jurisdictions do not require parties to submit internal documents analyzing the deal with respect to competition (like Item 4(c) of the HSR form). Most authorities, however, have the power to request such documents, so antitrust counsel should give clients the same guidance on document creation that they would give for HSR filings, such as not writing documents that exaggerate either party's competitive position, their ability to affect pricing post-closing, or that suggest an anticompetitive deal.

Is the Filing Confidential?

In some transactions, keeping the deal confidential is important to the parties. This is relatively easy in the United States, but parties have less control over confidentiality outside the United States. For example, some jurisdictions, such as the EU and Germany, publish a notice regarding the transaction upon receipt of the formal filing. This may be an issue for both parties (but particularly for a seller) if a definitive agreement has not been signed, because of business distraction and uncertainty for employees and customers. Antitrust counsel need to

understand confidentiality sensitivities up front and, if the other party to the transaction might not share those sensitivities, counsel need to address that in the contract covenants—and perhaps be prepared with a communications plan for employees, customers, and suppliers.

Is There a Way to Avoid Filing?

Eventually, every merger-control lawyer has a deal that appears to trigger a filing in some remote country where the filing thresholds are met but the target has no presence or the parties' combined sales amount to less than the cost of obtaining merger clearance. What then?

Look for statutory limits on jurisdiction. The scope of many countries' competition laws is expressly limited to acts that have an effect on competition within the country. There may be no such effect when the target has no sales or assets in the country.

Check the enforcement policy. Several countries have adopted formal or informal policies limiting the circumstances under which they will investigate an extraterritorial (i.e., foreign-to-foreign) transaction. Note, however, that even after closing, many jurisdictions will review a non-reportable transaction that raises substantive antitrust concerns if they learn of the deal. Local counsel will know whether the competition authority actively monitors press reports for deal signings and closings.

Ask the right questions. Merger control is a relatively new creature in many jurisdictions and, frequently, neither local counsel nor the regulator has much experience applying the law. Whether the law extends to extraterritorial mergers with no impact inside the territory is often ambiguous. Competition authorities usually take an expansive view of their jurisdiction. Particularly in formerly socialist-state jurisdictions, local counsel tend to defer to the competition authority's interpretation of its jurisdiction—usually saying, yes, a filing is required. When pressed, however, local counsel may concede that there is no precedent on the correct construction of the competition authority's jurisdiction and that the competition authority has never pursued extraterritorial mergers for failure to file and is unlikely to do so.

Accept reality. Sometimes there is no way to avoid filing. In such cases, counsel should be prepared to advise their client on the penalties and other legal consequences for failing to file and the likelihood of an enforcement action. Local counsel should advise primary counsel on those risks. In some cases, clients may be willing to accept the risk of not filing where the parties have a de minimis local presence and there really is no potential for competitive harm.

What Happens If There Are Substantive Issues?

Foreign jurisdictions have the power to block transactions between U.S. companies, as *Boeing/McDonnell Douglas*,¹⁸ *WorldCom/Sprint*,¹⁹ and *GE/Honeywell*²⁰ attest. The sophistication and capabilities of the antitrust authorities around the world can vary significantly, and the process can differ sub-

stantially from the U.S. process in many, but not all, respects.

Timing. The U.S. process is unusual in leaving control over the duration of the “second phase” process largely in the hands of the merging parties. Elsewhere, competition authorities are ordinarily required to clear or block the transaction within a set deadline, typically three or four months from launching the in-depth investigation. The process in the EU and many other jurisdictions tends to be “front loaded,” so the parties typically need to discuss remedies much sooner after formally notifying their transactions than in the United States. Therefore, it is crucial that antitrust counsel ensure that foreign filings are timed to allow negotiation of remedies simultaneously in all jurisdictions (or at least the jurisdictions that will take the most active interest), so as not to end up in a situation where one regulator rejects the remedies negotiated with another.

Inquisitorial versus Adversarial Processes. U.S. antitrust counsel are accustomed to an adversarial process in which the government is an adverse party that has to go to court or a court-like body to block or impose conditions on a transaction. Most other countries (with a few exceptions, such as Austria, Canada, and South Africa) follow an inquisitorial process, in which the competition authority both investigates and issues decisions on whether to clear or block a merger. This creates a significantly different dynamic from the U.S. process (although perhaps not as significantly different from certain aspects of the FTC's Part III administrative litigation process). First, the same entity that finds the facts also decides whether or not to block the transaction. This potential for bias is at least partially offset by greater transparency earlier in the process. For example, in the EU, parties have the right to review documents in the EC's files once it issues a “statement of objections” (a document setting out the EC's prima facie case). Second, counsel and the regulator necessarily interact differently in inquisitorial proceedings in part because of the regulator's relatively greater leverage in inquisitorial proceedings and in part because of the regulator's self-perception as an impartial truth-seeker. Such regulators may perceive the type of adversarial posture adopted by some U.S. counsel in proceedings before the U.S. agencies as a deliberate attempt to obstruct their investigation. Because the regulator has the power to block the transaction, aggressive, litigation-style tactics that might be considered in the United States can easily backfire elsewhere.

Appeals. In the inquisitorial process in most jurisdictions, parties generally can appeal negative decisions to a tribunal, but the ability of the competition authority to prohibit the transaction in the first instance usually means that, even if the parties succeed on appeal, the deal is often irrecoverable. This gives the competition authorities significant leverage to extract concessions. In principle, successful appellants can sue the EC for damages, but the Court of Justice has set the bar so high that successful actions will be few and far between.

Documents. Ironically, although civil law systems tend to place significantly less weight on oral testimony than does the United States, most merger control systems do not require nearly the same level of document production as does the

United States. This is partly because most competition authorities outside the United States do not need to go to court to block a transaction and partly because most authorities simply do not have the same resources as the U.S. agencies to review large volumes of documents quickly. For example, although the EC routinely requests copies of the parties' U.S. second request productions, practitioners often may find that the case team does not appear to have reviewed any of the substantively-interesting documents.

Third Parties. Most jurisdictions rely heavily on input from third parties, both to cross-check the information received from the merging parties and to identify any issues the merging parties may not have identified. This gives third parties greater access to the regulator compared to what occurs at U.S. agencies, although U.S. agencies also certainly place great weight on customer complaints. Regulators outside the United States are generally aware that third parties have their own agenda, but their dependence on third parties as sources of vital information can in some cases result in a perception of bias in favor of third parties, particularly where the merging parties are seen as uncooperative or obstructive.

Industrial Policy. A common stereotype of non-U.S. merger control regimes is that they are conduits for industrial policy rather than "pure" antitrust enforcers. This is much less true than it was in the past, and the main jurisdictions have embraced consumer welfare (or, in the case of Canada, total welfare) as the sole objective of merger control. There are some concerns that China may discriminate against foreign firms for the benefit of domestic industry.²¹ This is not to say that political objectives never play a role in merger control, but in most jurisdictions political considerations are no more frequent than in the United States. If political objectives influence merger control outcomes, it usually involves favoring a "national champion." A few jurisdictions, including Austria and the UK, expressly allow the government to intervene under certain circumstances implicating national interest (such as the UK approval of the Lloyds TSB/Halifax Bank of Scotland merger in the immediate wake of the financial meltdown in late 2008²²).

Conclusion

Merger-control work has become more challenging as more jurisdictions adopt new merger control laws or strengthen existing provisions. Though these requirements can be daunting, counsel can meet the challenge by surrounding themselves with written resources, familiarizing themselves with filing triggers, preparing a "cheat sheet" of filing thresholds in key jurisdictions, keeping up with developments through antitrust publications and CLE programs, preparing their clients and client's files for the day when a filing is required, and establishing a network of trusted local counsel. As the number of jurisdictions with merger-control laws grows, so does the sophistication of the governmental competition authorities that enforce the laws. As the global economy starts to recover, the number and size of deals will recover with it. Many com-

panies, including small or struggling companies, often seek to grow through mergers and acquisitions. For these reasons, counsel must be ready for the day their client's deal lands them in the complex world of global merger-control. ■

- 1 Brendan Pierson, *M&A Regulation Catching on Globally: Survey*, LAW360, Jan. 8, 2009, available at <http://www.law360.com/articles/82256> (by subscription).
- 2 See, e.g., GETTING THE DEAL THROUGH: MERGER CONTROL 2010 (John Davies consulting ed., 2010), available at <http://www.globalcompetitionreview.com/shop/product/171/merger-control-2010-/>; *International Comparative Legal Guides*, available at <http://www.iclg.co.uk/>.
- 3 See, e.g., J. MARK GIDLEY & GEORGE L. PAUL, *WORLDWIDE MERGER NOTIFICATION REQUIREMENTS* (Supp. 2010).
- 4 See, e.g., GLOBAL COMPETITION REVIEW, available at <http://www.globalcompetitionreview.com/>, and Competition Law360, available at <http://competition.law360.com/>; see also Mondaq, a Web site that aggregates articles and other publications from professional advisors, including antitrust lawyers. Available at http://www.mondaq.com/default.asp?section_id=1&product_id=9&topic_id=4.
- 5 See, e.g., <http://www.justice.gov/atr/contact/otheratr.htm> and http://ec.europa.eu/competition/nca/index_en.html.
- 6 <http://www.internationalcompetitionnetwork.org/members/member-directory.aspx>.
- 7 See <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx> (materials temporarily unavailable while the ICN updates its Web site).
- 8 See, e.g., the International Bar Association's Global Competition Forum Web site, available at <http://www.globalcompetitionforum.org>.
- 9 See, e.g., ABA SECTION OF ANTITRUST LAW, *COMPETITION LAWS OUTSIDE THE UNITED STATES—FIRST SUPPLEMENT* (2005).
- 10 Council Reg. 139/2004 (and related notices and guidelines): The European Community Merger Regulation (ECMR).
- 11 See 16 C.F.R. § 802.63.
- 12 16 C.F.R. § 801.1(b).
- 13 See Competition Act Amendments §§ 109, 110, available at <http://laws.justice.gc.ca/PDF/Statute/C/C-34.pdf>.
- 14 See <http://www.bankofcanada.ca/en/rates/exchange.html>.
- 15 See <http://www.banxico.org.mx/tipcamb/lleнарTiposCambioAction.do?idioma=en>.
- 16 An apostille is a internationally recognized form of certification under the 1961 Hague Convention whereby a public authority of the jurisdiction in which a document has been notarized certifies that the signature of the notary is authentic. In the United States, it is normally issued by the Secretary of State for the State in which the notary is accredited.
- 17 Act Against Restraints of Competition § 80(2); see also Information Leaflet on the German Control of Notifications, available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/06MerkblattzurDeutschenFusionskontrolle_e.pdf.
- 18 Commission Decision of 30 July 1997, Case No. IV/M.877—Boeing/McDonnell Douglas (conditional clearance).
- 19 Commission Decision of 28 June 2000, Case No. COMP/M.1741-MCI WorldCom/Sprint (prohibition decision), *overturned on appeal*, MCI v. Comm'n, Case T-310/00, 2004 E.C.R. II-3253.
- 20 Commission Decision of 3 July 2001, Case No. COMP/M.2220—General Electric/Honeywell (prohibition decision); *aff'd on appeal*, Case T-201/01—General Electric v. Comm'n, 2005 E.C.R. II-5575.
- 21 See Fei Deng & Gregory K. Leonard, *Incentives and China's New Antimonopoly Law*, ANTITRUST, Spring 2008, at 73, 75–76.
- 22 See e.g., Louise Smith, *The Lloyds-TSB and HBOS Merger: Competition Issues*, Standard Note: SN/BT/4907, Library of the House of Commons, Dec. 15, 2008, available at <http://www.parliament.uk/commons/lib/research/briefings/snbt-04907.pdf>.