Spotlight on Global Merger Control

In today's highly competitive commercial environment, businesses are under ever more pressure to generate deals that deliver real value, at minimum cost, and quickly. Regulatory burdens, however, are slowing the pace of deal-making while increasing the cost of getting deals completed.

In many cases, part of this increasing burden can be attributed to merger control. As the number of authorities worldwide with jurisdiction to review, approve or prohibit mergers and acquisitions grows each year, it can be a challenge for companies to navigate quickly and efficiently the plethora of different rules that apply. Each authority seems to follow its own procedure, timeline and standard of assessment.

This article considers the mounting complexity of compliance with merger control regulations around the world. We will briefly look at the steps that have been taken to reduce compliance costs and the prospects for further improvement. Finally, we will provide practical tips for companies embarking on deals to ensure that the merger control process runs as smoothly and painlessly as possible.

Three Key Questions

In this section we will outline the basic framework of merger control, focusing on the key questions that deal-makers should ask before embarking on a transaction.

1. Does My Deal Need to Be Notified?

In a merger or acquisition transaction, one of the first questions that will need to be answered is whether the deal requires merger control notification. Although this may seem straightforward, there are more than 90 different competition authorities worldwide that enforce merger control laws. This creates myriad different thresholds for filing, as well as different ways of defining a change of control, calculating sales and identifying the relevant parties. All of this means that determining where merger control filings need to be made can be a costly and time-consuming process.

In most jurisdictions, a notifiable transaction is one that leads to a lasting change of control over a business. The acquisition of a controlling shareholding or of assets constituting a viable business will almost always fall within this definition, as will the creation of a joint venture that will operate independently in the marketplace. One area where authorities have varying opinions, however, is whether the acquisition of a minority interest in a company requires a merger control filing.

In many jurisdictions (including the EU) the acquisition of a minority interest needs to be notified only if the buyer will be able to exercise some form of control over the target following completion of the transaction.[1] This includes negative control, meaning that a buyer acquiring a minority stake in a company with veto rights over key commercial decisions made by that company may have to notify the authorities of that acquisition. In some countries, however, a threshold applies above which any acquisition of shares – even if they do not confer control – must be notified. These jurisdictions include Austria and Germany, where acquiring a non-controlling stake of 25 percent or more in a company is automatically notifiable. In Canada, as well, the acquisition of a 20 percent interest may trigger notification if the acquired corporate entity has assets or revenues that meet the size-of-transaction threshold (currently at CDN$77 million) and size-of-parties threshold (CDN$400 million). The US merger control regime, which is similar to the Canadian system, requires transactions to be notified if the size-of-transaction and size-of-parties thresholds are met and no exemption applies.

---

[1] In the US, most acquisitions need to be notified if the value of the assets or voting securities in question is (currently) greater than US$68.2 million.

Despite a consensus that deals should be notified only if they have a "local nexus," in some cases filing thresholds can still be met by deals that will have no, or minimal, effects in a given jurisdiction. In certain countries, poorly drafted thresholds mean that filings can be triggered even when only one party is locally active. In others, the thresholds will be satisfied as long as both parties are active – even if one has extremely limited sales. Either scenario can result in uncertainty for companies trying to comply with their worldwide merger control filing obligations.

2. How Long Will It Take?

Like filing thresholds, the length of the merger review process also varies greatly. Depending on where notification is required – and whether the deal raises competition concerns – a company will need to factor a period ranging from four weeks to six months, or even longer, into the completion timetable.

Some competition authorities, including those of Argentina, Cyprus and India, set a deadline for notification following a "triggering event." For example, Argentina requires notification within one week of the conclusion of a binding merger agreement, the publication of a tender offer or the transfer of acquired shares.[2] It is more common in most jurisdictions for merger control authorities to allow the parties to notify any time after an agreement is in place, provided that they do so before consummation of the transaction. Pre-completion notification, in almost all cases, carries with it a standstill obligation: once the parties have notified a deal to the authority, they may not implement the transaction until it has been approved or the authority's review period has expired. This obligation is usually enforced through the threat of substantial fines.

The standstill obligation is typically the element of merger control with the greatest impact on a deal's timing. Since the deal cannot be implemented until it has been approved, the parties must agree on a completion date that allows sufficient time for the competition authority's review. Most authorities operate a two-phase system, in which unproblematic deals are approved quickly (Phase I) and those which raise competition concerns are subjected to more prolonged scrutiny (Phase II). Phase I will generally take approximately one month – 30 days in the US and 25 working days for the European Commission – with Phase II lasting an additional three to four months. Certain jurisdictions allow themselves considerably longer periods of time. In Brazil, for example, recent antitrust legislation (effective as of May 2012) introduced an extensive maximum 330-day period for the authority's review.[3] It should also be noted that in some countries such as China it can take up to a month or more for the authority to accept the merger notification for substantive review.

3. Will the Deal Get Through?

It is worth remembering, particularly while preparing a filing, that the vast majority of cases are approved expeditiously. In 2011, the European Commission cleared 95 percent of all notified mergers in Phase I and required commitments to address competition concerns in only 5 percent of them. Similarly, in the US, 95.9 percent were cleared without receiving a second request from the antitrust agencies (a second request in the US is the equivalent of a Phase II investigation in Europe). It remains relatively rare for deals to enter Phase II, and rarer still for an authority to block a deal outright.

In cases that do raise substantive competition concerns, particular care must be taken if the parties are required to offer commitments that are intended to ease competitive concerns in one or more

---

[2] See Defense of Competition Law 25,156, amended by Decree Nº 1019/99 and Decree 396/01. Argentine filing rules vary by transaction, and competition counsel should be consulted.

[3] It remains to be seen how the Brazilian waiting period will work in practice. Even though the Brazilian competition authority has stated that most mergers will be cleared well in advance of the 330-day maximum review period, it does not help deal planning when the review period is uncertain.

countries. Where possible, a single package of remedies should be negotiated to address the concerns raised in all jurisdictions. Such negotiations with various investigating authorities can be costly and protracted, and there can be no guarantee that the remedies will be universally accepted. Recently, NYSE Euronext and Deutsche Börse were able to satisfy the US Department of Justice that their merger should be approved following substantial divestments but could not convince the European Commission to approve the deal even on the basis of a larger divestment package. The Commission's decision prohibiting the deal is currently under appeal.

Often, a deal will have a greater impact in one country than it does in others. It is therefore not uncommon for a filing to be approved in all but one jurisdiction where the case is subject to detailed investigation and – if a standstill obligation applies – closing is suspended pending the outcome. To address this problem, certain competition authorities will permit the parties to complete a transaction with a carve-out or hold-separate arrangement for the country where regulatory approval is delayed. This procedure can be difficult to implement in practice, and is rarely used.

Room for Improvement

Most competition law practitioners, not to mention corporate counsel who have been through the experience of filing multiple merger notifications around the world, would agree that there is scope to improve the existing framework of such multijurisdictional merger control. The sheer volume of different regimes together with their wide variations in approach undermine certainty, consistency and efficiency.

This being said, there are limited prospects for progress any time soon. Perhaps the most effective model of international cooperation in merger control currently is the EU's "one-stop shop," which allows parties to avoid multiple filings in the EU by submitting a single notification to the European Commission. Even this system, for all its merits, is far from flawless: many hundreds of transactions are still notified in more than one EU country each year. In any event, it is very unlikely that such a system could operate outside Europe, which has regulations permitting parties who have merger control filing obligations in three or more Member States to transfer the merger review from those states to the European Commission in Brussels.

Practical Tips

Although merger control may seem like a time-consuming distraction from the primary goal of completing a deal, the process can be managed to minimize unnecessary costs and delays. Below we set out five golden rules to help in most situations:

1. Consider Merger Control as Early as Possible

It is never too early to consider the merger control implications of a proposed deal. Given that the process can affect the timing, cost and even feasibility of a transaction, it makes sense to conduct a preliminary analysis of competition issues as soon as the deal starts to take shape. This may include forming an initial view concerning the jurisdictions in which merger control filings may be required, analyzing whether competition concerns are likely to arise, and if so, developing possible remedies that may be appropriate to address these concerns. It is a good idea for companies that are regularly involved in mergers and acquisitions to keep up-to-date revenue data on a country-by-country basis in order to assess quickly where merger control filings might be required.

2. Build Merger Control Into the Corporate Timetable

Once it is clear that one or more filings will be required, sufficient time must be factored into the deal timetable. This includes allocating adequate time before the closing date for the preparation and drafting of the filings, pre-notification discussions with the authorities (if required) and expiration of all

SQUIRE SANDERS

applicable standstill periods (including the possibility of extensions). These considerations may also influence the timing of public announcements or other corporate milestones concerning the deal.

3. Reflect Merger Obligations in the Corporate Agreements

The requirement for merger control approval should be acknowledged when negotiating the key transactional documents. Many competition authorities will ask to see documents such as a copy of the share purchase agreement with the filing, and some specifically require as a condition precedent that antitrust approval be obtained. When drafting, the parties should consider the extent of their commitment to using best efforts to achieve approval at Phase I (or Phase II). This can include requiring either party to make structural changes to their business (e.g., divestments) or offer other commitments (e.g., licensing technology or IP) to get the deal approved by the regulatory authorities. A long-stop date could also be fixed by which point, if approval has not been obtained, either party can give notice to terminate the deal. Even if merger filings are not required, a seller may ask a buyer to warrant that it has carried out a competition analysis and determined that no filings will be necessary (and that it will pay any fines incurred if it is wrong).

4. Maintain Communication Between the Corporate and Competition Teams

Throughout the commercial negotiations and the merger control process, the corporate and competition teams should remain in regular contact. Competition counsel should provide updates on the progress of the filing, and their corporate counterparts should communicate any significant developments on the business side. It may also be necessary to coordinate merger control teams in multiple jurisdictions. Competition issues should also be considered when preparing public statements or internal documents, such as board presentations, which often have to be disclosed to competition authorities. To avoid the preparation of documents that inadvertently raise competition issues, documents that are prepared by the parties that discuss markets, market shares, competition or competitors (including CIM-like documents) should be reviewed by competition counsel prior to being finalized and distributed.

5. Stay Committed

Finally, parties should be prepared to commit to the merger control process for the duration. It may be helpful to establish a single point of contact within the company, or a merger control team, with responsibility for the process from initial information gathering through approval. Be prepared to receive information requests after the filings have been made (and to respond to those requests rapidly), and to attend meetings with the authorities reviewing the deal. Above all, ensure that no steps are taken to implement the deal – from the transfer of controlling shares to appointment of board members – before every mandatory pre-completion approval has been received and the transaction has been consummated.

Contacts

Will Sparks
T +32 2 6277 610
will.sparks@squiresanders.com

Barry A. Pupkin
T +1 202 626 6662
barry.pupkin@squiresanders.com