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Merger Review on Both Sides of the Atlantic: A Comparison

大西洋两岸—美国及欧洲的并购反垄断审查制度比较

Although there are over 75 countries in the world with merger control regimes that, for the most part, apply to foreign-to-foreign transactions, the US and EU remain the key jurisdictions when assessing global mergers. This is the case once a transaction is announced and notified, but maybe even more so when legal teams of companies are assessing the chances of successfully implementing a planned transaction.

虽然全球有超过75个国家都制定了在大多数情况下适用于“外对外”交易的合并审查制度，但美国和欧盟仍然是评估全球并购交易的主要辖区。不仅交易一旦宣告和申报即面临该等情况，更是企业法律团队在评估能否成功实施计划交易时不容忽视的因素。

The reason is that other competition authorities look towards Brussels and Washington. Unless there are local specifications, it is unlikely that a country would stop a global deal if both the US and EU have approved it. When assessing the risk of a transaction, the first question will inevitably be: can we get it through in the US and the EU?

主要原因是其他国家和地区的反垄断管理机构都以布鲁塞尔和华盛顿的态度为标杆。除非有涉及到地方的具体规定，否则某个国家几乎不可能在美国和欧盟都批准的情况下叫停一宗全球性的交易。因而，当我们在评估交易的风险时，能否获得美国和欧盟的反垄断批准就不可避免地成为了首要问题。

In the not too distant future that question may also include China but, for the most part, the Chinese review remains more a question of effects on the deal timetable, not whether the deal is viable. While the US and EU reviews are very similar, there are a number of key differences that we have sought to highlight below.

虽然在不久的将来中国的态度和标准也可能引起广泛的关注，但中国的审查在很大程度上仍然只是影响到交易时间表而非交易可行性。虽然美国和欧盟的反垄断审查制度和程序十分相似，我们仍然需要意识到其中的某些关键性差异。

1. When Do I Need to Notify?

在何种情况下需要进行申报

The EU Merger Regulation (EUMR) applies to any “concentration” (including, for example, the acquisition of full or joint control over a business; acquisition or disposal of assets that comprise all or part of a business; and creation or dissolution of a “full-function” joint venture) where that concentration has, or is deemed to have, a community dimension. Two alternative tests set out the turnover thresholds which, if met by the parties to the transaction, will trigger the requirement of a merger control filing to the European Commission.

《欧盟合并条例（EUMR）》适用于任何具有或被视为具有欧共体规模的“集中”（例如，获得对企业的全部或共同控制权、对构成全部或部分业务的资产的收购和处置以及对“全功能合营企业”的创建或解散等）。两个交替使用的标准均规定了触发向欧盟委员会提出反垄断申报的交易双方营业额门槛。

Unlike in the US, there is no differentiation between foreign-to-foreign transactions and transactions involving parties based within the EU; a foreign-to-foreign transaction is caught by the EUMR in the same way as any other transaction (i.e., (i) if it is a concentration, and (ii) if it has a community dimension).

与美国不同的是，对欧盟而言，“外对外”交易与涉及欧盟境内各方的交易之间没有差异。前者以与任何其他交易相同的方式落入EUMR的管辖（即（i）如果属于“集中”，以及（ii）如果具有欧共体规模）。

In the US, pre-merger notifications are required for certain transactions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, codified at 15 U.S.C. § 18a (HSR), where: (1) one of the parties involved is engaged in US commerce or an activity affecting US commerce; (2) the size of transaction and size of person tests have been satisfied; and (3) no exemptions apply to the transaction.

而在美国，根据1976年颁布的《哈特 - 斯科特 - 罗迪诺反垄断改进法案》（即HSR法案），满足以下条件的交易将引发“合并前申报”的要求：（1）交易相关各方之一从事美国商业活动或影响美国商业的活动；（2）满足交易规模和交易方规模标准，以及（3）该交易不适用任何豁免。

The size of the transaction test is satisfied if the value of the target is in excess of US $78.2 million (note, all values are adjusted annually). The size of the person test is required where the size of transaction is in excess of US$78.2 million, but at US$312.6 million or less. Where the size of transaction exceeds US$312.6 million, the size of person is not required. The size of person test is satisfied if at least one of the persons involved in the transaction has US$156.3 million or more in annual net sales or total assets; and another person has US$15.6 million or more. Where an acquired person is not engaged in manufacturing, only its total assets are considered in determining its size, unless its sales are US$156.3 million or more.

如果交易目标的价值超过7820万美元，则满足交易规模标准（相关标准的数值每年都会有所调整）。如果交易规模在7820万美元以上且在3.126亿美元或以下时，则需要启动交易方规模标准。而一旦交易规模超过了3.126亿美元，则无需动用交易方规模标准。如果涉及交易的至少一方的年销售净额或总资产为1.563亿美元或以上，而另一方也拥有至少1560万美元或以上的总资产或年销售净额，则满足交易方规模的标准。如果被收购方不从事

制造业，则除非其销售额为1.563亿美元或更多，否则在确定其规模时只考虑其总资产。

Foreign-to-foreign transactions may be exempt from filing where the target did not generate sales in or into the US, or have assets in the US, during the most recent fiscal year, in excess of US$78.2 million. Even if a transaction exceeds this threshold, it will still be exempt if: (a) both the acquiring and acquired persons are foreign; (b) the aggregate sales of the parties in or into the US and aggregate total assets in the US, for the most recent fiscal year, were less than US$171.9 million; and (c) the size of the transaction is less than US$305.1 million.

当交易目标没有在美国销售或销售到美国，或者在最近一个财务年度内没有在美国拥有超过7820万美元的资产时，则该“外对外”交易就符合豁免申报的条件。而 即使交易超过此门槛，在满足以下条件时仍可豁免申报：（a）收购方和被收购方都是外国人；（b）在最近一个财年，双方在美国或进口至美国的合计销售额以及在美国的合计资产总额少于1.719亿美元；及（c）该项交易的规模小于3.051亿美元。

2. What Does the Filing Look Like?

申报文件应该是怎样的？

The form in which filings are made is very different in the two jurisdictions. The EU filing form (Form CO) takes a much more “narrative” approach. The notifying party must describe the market, and provide market data, in a very high level of detail even in relatively unproblematic cases. The EU filing now also has a relatively extensive obligation to the disclosure of internal documents.

两大辖区对申报所需提交文件的要求迥然不同。欧盟申报表（“CO表”）更具叙述性。申报方必须非常细致地描述市场、提供市场数据，甚至在交易几乎不存在问题的情况下也必须如此。欧盟申报制度现在还针对内部文件的披露制定了相对广泛的义务。

The notification must explain, inter alia, market definitions (product and geographic markets, affected markets, other markets in which the notified operation may have a significant impact), information on affected markets (such as structure of supply and structure of demand in affected markets), product differentiation and closeness of competition, market entry and exit, the importance of R&D and the relevance of cooperative agreements, and must provide contact details for customers, competitors, trade associations and suppliers.

申报通知必须要特别解释市场定义（产品和地域市场、受影响市场、通知项目可能造成严重影响的其他市场）、受影响市场的信息（比如受影响市场的供应结构和需求结构）、产品差异和竞争封闭、市场准入和退出、研究与开发的重要性、合作协议的相关性，以及提供客户、竞争者、贸易协会和供应商的详细联系方式。

A short form notification/Short Form CO can be used when notifying a concentration which is unlikely to raise competition concerns. The Short Form CO covers similar information to the Form CO, but in substantially less detailed. The exact level of detail required will depend on the merger on a case-by-case basis.

在申报不太可能引起竞争问题的“集中”时，可以使用简短格式申报/简短CO表。简短CO表包含的信息与CO表类似，但对这些信息的描述会简短得多。所要求的详细程度则取决于合并个案的情况。

By contrast, the HSR filing has a much more data-centered approach and less scope for the parties to advocate arguments or express a position, for instance, on market definition. Whilst the EU now also has extensive disclosure requirements for internal documents (e.g. board presentations), these documents typically have more relevance in the US proceedings than at EU level.

与之对照，美国的HSR申报采取更偏向数据为中心的申报方式，各方在例如市场定义等方面主张论点和表达立场的范围比较小。尽管欧盟现在也有针对内部文件的广泛披露要求（例如董事会报告），但是在美国的程序中，这些文件通常比在欧盟具有更多的相关性。

The HSR requires each party to the transaction to file a notification and report form (HSR Form), as opposed to the EU process where there is one single notification. In particular, the HSR Form requires filing persons to produce the following documents relating to the deal if they were prepared by or for an officer or director of the parties: (1) confidential information memorandum; (2) synergy or efficiency studies; and (3) any document that analyzes the proposed transaction with respect to markets, competition, competitors, market share, potential for sales growth or expansion into product or geographic markets.

与欧盟的流程相反，HSR申报要求交易各方各自提交通知和报告表（“HSR表”），而欧盟仅需要一份申报通知。特别是，HSR表要求，当与交易相关的文件是由交易各方的高管人员或董事准备时，申报人需要出具以下文件：（1）保密信息备忘录；（2）合并增效或效率研究；以及（3）任何对拟议交易进行分析的文件（涉及市场、竞争、竞争者、市场份额、销售增长潜力或者扩张所及产品或地域市场）。

In addition, the HSR Form requires the reporting of revenues from the last completed fiscal year; revenues must be allocated according to the industry in which the revenues were derived, as provided by the North American Industry Classification System (NAICS). For overlapping revenues in a NAICS code, only basic information is required. This is in stark contrast to the EU procedure where extensive information on overlapping products is required upfront.

此外，HSR表要求报告上一完整财政年度的营业收入，按照北美产业分类系统（NAICS）的规定，营业收入必须根据产生收入的产业进行分配。对于在NAICS法规中重叠的收入，只需要提供基本信息。这与欧盟的程序形成鲜明对比，在欧盟程序中，需要预先提供关于重叠产品的大量信息。

3. Does the Process and Procedure Differ Significantly?

流程和程序是否大相径庭？

The process at EU level, for a transaction that does not raise significant competition issues, is much more time consuming.

In advance of submitting the Form CO/Short Form CO, parties to a notifiable transaction de facto have to engage with commission officials at DG COMP in order to discuss the proposed transaction and the substance of any draft merger notifications (such discussions are entirely confidential). The parties will be informed of the type of information the commission believes it needs to assess the notified transaction. Often, two or even three iterations of a draft Form CO are circulated before the commission is willing to give the "green light" to formally notify, which can add significantly to the timetable.

对于不会引发显著竞争问题的交易而言，在欧盟层面的流程相对比较耗时。在提交CO表/简短CO表之前，各方必须就重要的交易相关事项与欧盟委员会竞争局（DG COMP）的官员接触，以讨论拟议交易和任何关于合并交易的申报草案的实质内容（此类讨论完全是保密的）。委员会将告知各方其认为评估交易所需的各类信息。通常，在委员会正式接受申报之前，CO申请表草稿会被退回两到三次，从而明显地拉长时间周期。

Post notification, the commission has 25 working days to analyze the transaction during its Phase I investigation. At the conclusion of a Phase I investigation, the commission can either: (i) clear the transaction (unconditionally or subject to agreed remedies); or (ii) open a far more detailed Phase II investigation, if the transaction raises competition concerns. If the transaction gets referred to Phase II, the commission will undertake an in-depth analysis of the merger's effects on competition. The commission then has 90 working days to make a final decision on the compatibility of the transaction (which can be extended).

申报之后，委员会将在长达25个工作日的第一阶段调查期间对该交易进行分析。该阶段调查结束之后，委员会可以：(i)给交易放行（无条件放行或须采取约定的补救措施）；或(ii)在交易引发竞争问题的情况下开展更为细致的第二阶段调查。如果交易被提交至第二阶段，委员会将对该并购交易对竞争的影响进行深入分析。 届时委员会有90个工作日（可以延长）对交易的兼容性做出最终决定。

All final decisions (in both Phase I and Phase II) are published on the DG COMP website, with references to the parties' confidential business information removed. The parties, or interested third parties, can lodge an appeal within two months of the decision.

所有的最终决定（包括第一阶段和第二阶段）都会发布在DG COMP的网站上，但删除各方的保密性商业信息。交易各方或利害相关第三方可以在决定发布后2个月内提出上诉。

In the US, each person to a transaction must submit a completed filing to both US antitrust enforcement agencies (the Department of Justice and the Federal Trade Commission), and the applicable filing fee must be paid, for the 30-day waiting period to commence (a 15-day waiting period applies for public takeover bids or certain transfers in bankruptcy). During this period, the agencies review the transaction and the parties may not take steps to consummate the transaction. If the transaction raises no competitive concerns, the antitrust agencies take no further action and the parties can take steps to consummate the transaction at the expiration of the 30-day period. The filing is confidential.

在美国，交易的每一方必须向美国反垄断执法机构（司法部和联邦贸易委员会）提交一份完整申报，并须支付相应的申报费，之后便开始了30天的等待期 （对于公开要约收购或某些破产转让交易则适用15天的等待期）。在此期间，上述机构会对交易进行审查，各方不应在此时完成交易。如果该交易被 认为不会引发竞争问题，则反垄断机构将不采取进一步的行动，各方便可以在30天期限届满之后继续完成交易。该申报是保密的。

The parties may request "early termination" of the 30-day waiting period, whereby the antitrust agencies may terminate the waiting period in advance of the full 30 days, if no competitive concerns exist. If granted, the parties' names and the fact of early termination are made public on the FTC website and in the Federal Register (a government publication). If early termination is not requested, or requested and not granted, the filing remains confidential.

各方可以请求“提前终止”该30天等待期，如果不存在竞争问题，反垄断机构可在30天届满之前提前终止该等待期。经批准后，各方的名称以及该提前终止的事实将在联邦贸易委员会的网站和联邦公报（政府刊物）上公布。未请求提前终止，或请求后未获批准的将继续予以保密。

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If either agency believes that further information is needed in order to complete the competitive analysis, then it may request additional information and documentary material from the parties (referred to as a "second request"), which requires the burdensome production of large amounts of information and documents. The process extends the waiting period until 30 days after the parties have substantially complied with the second request. Following the second request, the antitrust agencies can clear the transaction or seek a court order preventing the transaction from proceeding. In certain situations, the parties may have the option to withdraw the initial filings and re-file, which re-starts the 30-day waiting period (no new filing fee is required), giving the agencies additional time to review. This may prevent the need for a second request. The agencies may issue a letter for the voluntary production of some specific information during this time.

如果任何一家审查机构认为需要进一步信息以完成竞争分析的，则可以要求各方提供额外信息和文件资料（下称“二次要求”），此要求可能需要额外的繁重工作，以提供大量的信息和文件。该程序会延长等待期，直至各方基本上满足了二次要求后的30天。在二次要求之后，反垄断机构可能给交易放行，或寻求法院令以阻止

该交易的进行。在特定情形下，各方可以选择撤回首次申报再重新开始，以触发新的30天等待期（此时不需要再支付申报费），以便这些机构有更多的时间进行审查，这样可以防止触发二次要求。在该期间内，审查机构可以发函给申报方，要求其自愿提供某些 特定的信息。

4. What is the Substantive Test and Do Enforcement Priorities Differ?

何为实质性标准？执法重点是否有所差异？

On the face of it, the substantive tests do not differ significantly. While the European Commission will analyze whether a notified concentration would "significantly impede effective competition, in the internal market or a significant part of it, in particular as a result of the creation or strengthening of a dominant position," the test in the US under the Clayton Act is whether "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Moreover, both jurisdictions take an economics-based approach to their analysis.

表面上看来，欧盟和美国的实质性标准之间并无重大差异。欧盟委员会将分析所申报的"集中"是否会"严重损害整个内部市场或其重要部分的有效竞争，特别是由于支配地位的形成或加强"，而美国的标准则是基于克莱顿法案，主要分析"此种并购的效果是否可能实质性地减少竞争，或者是否可能导致垄断。"此外，两者均采取基于经济学的方式进行分析。

The European Commission's Horizontal Merger Guidelines set out the commission's general considerations when it assesses whether a merger is likely to have anticompetitive effects. The Commission will, on the whole, compare the likely post-merger market structure with the "counterfactual" (i.e., the market structure that would be likely to develop absent the merger).

欧盟委员会横向合并指南列出了其在评估并购项目是否可能产生反竞争效果时的一般考量因素。总的来说，委员会将合并后可能产生的市场结构与假设的市场结构（即该合并不存在时可能产生的市场结构）进行比较。

In the US, although the statutory standard is "substantially to lessen competition, or to tend to create a monopoly," the antitrust agencies have jointly published guidance explaining that transactions should not be permitted where they would tend "to create, enhance, or entrench market power or to facilitate its exercise." The antitrust agencies' guidance notes state that they consider whether the combination would facilitate increased prices, reduced output, or diminished innovation, or would otherwise harm consumers, as a result of the reduction in competition caused by the combination.

在美国，尽管法定标准是"实质性地减少竞争，或可能造成垄断"，但是反垄断机构共同发布的指导意见认为，有"创造、提高或巩固市场支配力或利于其发挥"倾向的交易应当被禁止。意见中提到，他们将考虑该合并是否促成价格的提高、产量的减少、创新的抑制或者对消费者权益的损害，而这些都是由合并造成的竞争减少的后果。

In terms of enforcement priorities, the European Commission has identified three primary objectives for 2016: (i) to assess and clear non-harmful mergers in a streamlined and quick manner, in particular by use of the Short Form CO, which counted for approximately 70% of notifications in 2015; (ii) remaining vigilant in order to ensure that markets are kept open and competitive in the internal market and to effectively underpin the commission's priorities, such as in the energy and digital sectors; and (iii) improving the EUMR in several areas, including, for example, with regard to minority shareholdings and streamlining the system of referrals between the commission and EU member states. In 2015, the commission published 320 merger control decisions, of which 222 were cleared at Phase I under the simplified procedure, 75 were cleared at Phase I under the non-simplified procedure, one was cleared at Phase II without remedies and 22 were cleared at Phase II with remedies. No mergers were prohibited (see page 13 of the Management Plan 2016).

就执法重点而言，欧盟委员会为2016年的反垄断审查确立了3个主要目标：(i)以精简高效的方式评估和放行无害并购交易(特别是通过简短CO表申报的交易)，这些交易占据了2015年申报总数的70%；(ii)保持警惕以确保内部市场的开放和竞争，同时有效地锁定委员会的工作重点，诸如在能源和数字产业；以及(iii)在若干领域改善EUMR，包括与少数股权有关，以及简化委员会和欧盟成员之间的转介系统。在2015年，委员会发布了320个关于反垄断申报的决定，其中222个在简化流程中的第一阶段就被放行，75个在非简化流程的第一阶段被放行，1个在第二阶段被放行且无需补救措施，22个在第二阶段被放行但需补救措施。没有合并项目被禁止。参见 欧盟2016竞争管理计划报告第十三页 。

The DOJ and FTC focus on identifying and investigating those mergers and acquisitions that raise potentially significant competitive concerns. According to annual statistics reported to Congress, 1,801 transactions were notified under the HSR in FY2015, of which the FTC challenged 22 (of these, 17 entered consent orders, two were abandoned and three went to litigation); and the DOJ challenged 20 (of these, two settled with the DOJ, 10 were abandoned/restructured to avoid issues and 10 were challenged in court).

美国司法部和联邦贸易委员会侧重于识别和调查可能引发重大竞争问题的合并和收购项目。根据一份报告给国会的年度统计数据，在2015财政年度，共有1801宗交易根据HSR法案进行了申报，联邦贸易委员会对其中22宗交易提出质疑（其中17宗获同意令，2宗被放弃，3宗进入诉讼程序）；美国司法部对20宗交易提出质疑（其中2宗与司法部达成和解，10宗被放弃/重新调整结构以避免问题，还有10宗已提交法院）。

Conclusion

结语

If the market situation is comparable in the US and European markets, there is a good likelihood that the authorities will ultimately reach the same conclusion. However, the differences in procedure and focus described above are still sufficiently great that internal assessments in the early phases of a transaction require the two jurisdictions to be considered separately.

Despite attempts to harmonize review criteria, there remains the risk of different timetables and even divergent results.

如果美国和欧洲的市场情况相当，则两地的反垄断审查机构很可能最终得出相同的结论。 然而，我们可以从上文所述中发现两者的审查程序和侧重点仍存在很大的差异，因而在交易早期阶段的内部评估过程中需要分别考虑两个司法管辖区。尽管有关方面正在向统一审查标准的方向努力，时间周期的差异甚至得出不同结果的风险却依然存在。

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