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Merger Control Notification: Penalties for Failure to Notify

With the recent imposition of substantial civil penalties on MacAndrews & Forbes Holdings (US$720,000) and on Barry Diller (US$480,000) for failing to comply with the reporting requirements of the Hart-Scott-Rodino (HSR) Act in connection with the acquisition of voting securities of Scientific Games Corporation and Coca Cola Co., respectively, it is timely to remind acquiring and acquired parties that not only must the complex HSR regulations be taken seriously, but also that many other countries impose substantial monetary penalties for noncompliance with their merger control regulations. Listed below are the statutory penalties for noncompliance with merger control notice requirements in those jurisdictions where merger filings are frequently required in connection with cross-border transactions.

Jurisdiction	Penalty	Representative Example
United States	A party that fails to comply with the requirements of the HSR Act (including officers, directors or partners thereof) may be liable for up to US$16,000 per day that such party is deemed to be in violation.	MacAndrews & Forbes Holdings Inc., a firm owned by Ronald O. Perelman, did not make the required subsequent filing under the HSR Act for acquisitions of voting securities of Scientific Games Corporation made in June 2012, which was more than five years after it had made an initial HSR Act filing to acquire voting securities of the same issuer in 2007. MacAndrews & Forbes made a corrective HSR Act filing on August 16, 2012 with respect to the June 2012 acquisitions. The Agencies deemed MacAndrews & Forbes to be in continuous violation of the HSR Act from June 4, 2012 through September 17, 2012 (the date on which the waiting period for the corrective filing expired). MacAndrews & Forbes agreed to pay US$720,000 to settle charges that it violated the HSR Act.
Argentina	Penalties for failure to file can be up to AR$1 million (approximately US$185,000) per day of delay. The Ministry of the Economy has substantial discretion in determining the ultimate fee.	The National Tribunal for the Defense of Competition (“Antitrust Authority”) has increased its aggressiveness in penalizing mergers and acquisitions that have failed to file under the Antitrust Law (No. 25,156, amended by Decree No. 1019/99 and 396/01). In 2011, the antitrust authority levied fines for an inadvertent delay in filing. GlaxoSmithKline and Stiefel Laboratories were each fined

SQUIRE SANDERS

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		AR$1,760,000 (approximately, US$325,000), or AR$8,000/day for each day of delay.
Brazil	Any failure to notify or gun-jumping could result in a penalty ranging from R$60,000 to R$60 million (approximately US$27,000 to US$27 million). Penalties can be, and are, applied to and collected from any of the parties (seller or buyer). Failure to pay the fine will lead the competition enforcement agency to start proceedings for collection in a federal court.	The general superintendence of the Administrative Council for Economic Defense (CADE), in April 2013, began investigating the Brazilian food giant JBS SA's recent acquisitions. Of the 12 cases the agency approved as part of that agreement, only six were reported to the agency. Even though CADE concluded that the transactions did not raise competition problems, the agency nonetheless took action against JBS for its failure to notify some of the transactions on time, and fined the company R$7.4 million (approximately US$3.3 million). In addition to the fine, JBS entered into a settlement whereby it is required to notify all future acquisitions for the next 30 months regardless of size.
Canada	Failure to comply with the pre-merger notification requirements in the Act constitutes a criminal offence with possible fines of up to CDN$50,000 (approximately US$47,000).	To date there have been no convictions for failure to notify a transaction prior to consummation and no fines have been issued.
China	Undertakings failing to notify the Ministry of Commerce (MOFCOM) where a pre-merger notification is necessary may be subjected to various penalties. MOFCOM may order the undertakings to cease the implementation of the business combination, dispose of shares or assets, or transfer businesses within a given time period. MOFCOM may also impose a maximum fine of ¥500,000 (approximately US$81,500).	No penalties so far have been applied in practice, however, Shang Ming, Director General of MOFCOM's Anti-monopoly Bureau (AMB) and Chairman of the General Office of the State Council's Anti- monopoly Commission, has made enforcement against failure to notify a reportable transaction a priority for the antitrust authority.
European Union	The European Commission has the power to impose fines of up to 10% of aggregate worldwide turnover on the parties if they intentionally or	In 2009 the Commission imposed a fine of €20 million (approximately US$26 million) on Electrabel for acquiring without prior approval (in 2003) a

SQUIRE SANDERS

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	negligently fail to notify a merger with Union dimension.	minority stake in Compagnie National du Rhône (CNR) which gave it 47.92% of the voting rights. Looking into shareholder voting patterns involving CNR, the Commission concluded that Electrabel had consistently obtained an absolute majority enabling it to have resolutions passed and that this, along with other factors, constituted *de facto* control. The General Court of the EU acknowledged that the failure to notify by Electrabel was negligent and that the transaction did not raise competitive concerns. The court nevertheless upheld the substantial fine and found that Electrabel's conduct was "far from excusable error."
France	Penalties for not filing a notification with the French Competition Authority fall upon the notifying parties (acquirers). The parties may be directed, subject to a periodic penalty, either to file the concentration or to demerge. In addition, the Authority may fine the concerned parties as follows: • For corporate entities – a maximum of 5% of their pre-tax turnover in France from the previous financial year (plus, where applicable, the turnover in France of the acquired party over the same period). • For individuals, a maximum of €1.5 million (approximately US$1.95 million). Notifying a transaction without waiting for prior clearance from the French Competition Authority can result in similar fines.	Examples of penalties for non-notification include: €57,700 fine (approximately US$75,000) imposed in 2006 on Pan Fish for failure to notify the acquisition of Fjord Seafood; €250,000 fine (approximately US$325,000) imposed in 2008 on SNCF for failure to notify the acquisition of Novatrans; €392,000 (approximately US$510,000) fine imposed in 2012 on supermarket group Colruyt France for failure to notify the acquisition of UGCA Unifrais; and, in February 2013, France's Competition Authority fined pension and health insurance fund Réunica €400,000 (approximately US$513,000) for failing to notify its acquisition of rival Arpège.
Germany	Failure to pre-notify can lead to fines of up to €1 million or, in the case of undertakings, of up to 10% of their total worldwide group turnover in the preceding business year. Submission of an incorrect or incomplete filing constitutes an administrative offence	In 2009 a fine of €4.13 million (approximately US$5.4 million) was imposed on the publishing house Druck- und Verlagshaus for deliberately not having notified an acquisition eight years earlier. In 2011 the FCO fined an agricultural cooperative €414,000

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	and can lead to a fine of up to €100,000. The same applies to the failure to submit a post-merger completion notice or an incomplete, incorrect or late completion notice. A fine of up to €1 million or, in the case of an undertaking, up to 10% of its total worldwide group turnover in the preceding business year, can be imposed if the notifying parties intentionally include or make use of incorrect or incomplete information in the notification with a view to causing the German Federal Cartel Office (FCO) to refrain from issuing a prohibition decision or from opening a second phase investigation.	(approximately US$530,000) and the German waste management operator Interseroh €206,000 (approximately US$265,000) for failing to notify the FCO.
India	Where parties fail to meet the mandatory filing requirements of the Competition Act of 2002, the Competition Commission of India (CCI) may issue a penalty of up to 1% of the total turnover or assets of the combining entities, whichever is higher.	The Competition Commission of India has yet to impose any penalties for failure to file or delayed filings. It is not anticipated that the CCI will continue to take this lenient view going forward.
Japan	If the parties fail to make the required filing or close in breach of the waiting period, a fine of up to ¥2 million (approximately US$20,000) may be imposed. The Japanese Fair Trade Commission can also apply to the court for annulment of any statutory merger or demerger for which the parties failed to file, but has never done so.	To our knowledge no such criminal penalties have ever been imposed, although parties that have failed to file are often requested to file a delayed report with a brief explanatory note setting out the reason for such delay and measures to be taken to avoid such failure in the future.
Korea	If a notifiable merger is not reported, the Korean Fair Trade Commission (KFTC) may impose an administrative fine of up to ₩100 million (approximately US$88,000) upon those companies that failed to file. This sanction is enforced without fail as long as the violation is detected.	In May 2013 the KFTC reviewed all deals completed in 2011 as publicized on the Korean Investor's Network for Disclosure System (KIND). The inspection resulted in 22 cases of non-reporting by 21 companies. The KFTC imposed fines against these 21 companies totaling nearly ₩200 million (approximately US$176,000). The KFTC is particularly active in penalizing failures to provide notice of mergers, however, this is the first time the KFTC has actively initiated a search of the

SQUIRE SANDERS

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		public disclosure system to uncover noncompliance with the merger control rules.
Mexico	In accordance with 2011 amendments to the Mexican Competition Law, penalties for not filing reportable transactions may be up to 5% of parties' involved turnover in Mexico.	According to the annual reports issued by the Mexican antitrust authority, the Comisión Federal de Competencia (CFC), the CFC has issued fines 53 times since 2003 for failure to properly file a notification. The average fine has been MXN$213,000 (approximately US$16,500). Grupo Mexico S.A.B. de C.V., for example, was fined MXN$287,000 (approximately US$21,600) in 2011 for failure to notify the CFC of its hostile takeover of the Grupo Aeroportuario del Pacífico, an operator of 12 Mexican airports.
Russia	Failure to submit a required pre-completion or post-completion filing is regularly penalized by fines on legal entities and on managers. In cases where the resulting transaction or incorporation limited competition, the Federal Antimonopoly Service (FAS) may also apply to a court to invalidate, in full or in part, agreements and other transactions for which its prior authorization or subsequent notice was required but has not been obtained or given, or to liquidate a company if it was incorporated without prior approval. These penalties are applied rarely.	The Russian FAS reported that it has issued 15 sanctions for violating the procedures relating to filing a notification. For example, in 2011 CJSC Bank Globex was fined RUB300,000 (approximately US$10,000) for failure to notify the FAS for its acquisition of 85% of the voting shares of OJSC Natsionalnyi Torgovyi Bank.
South Africa	In respect of intermediate or large mergers, the failure to notify, and/or implementation prior to approval being obtained, exposes the parties to administrative penalties of up to 10% of turnover, as well as potential injunctions on implementation. Sanctions for failing to notify are typically applied.	In 2008 the Commission entered into a consent order with Bonheur 50 General Trading (Pty) Ltd and Komatiland Forests (Pty) Ltd to settle charges the parties implemented a merger without prior notification to the Commission. Bonheur and Komatiland agreed to pay an administrative penalty of ZAR500,000 (approximately US$50,000). In June 2011 a fine of ZAR100,000 (approximately US$10,000) was imposed on a group of purchasers, including Royal Bafokeng Holdings (Pty) Ltd, for closing a merger without

SQUIRE SANDERS

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		prior approval.
Taiwan	Sanctions for not notifying a transaction, or for closing prior to termination of the waiting period, include fines ranging from NT$100,000 (approximately US$3,300) to NT$50 million (approximately US$1.7 million) for each violation, and possible orders to cease or unwind the combination.	In 2009 the Taiwan Fair Trade Commission (TFTC) found that Taiwan Digital Fiber Technology Co., Ltd. had failed to file a pre-combination notification for its acquisition of more than one-third of the issued shares in Peikang Cable TV Co., Ltd., Chia-Lien Cable Corp., CNT CATV Co., Ltd., Da-Tun Cable TV Co., Ltd., and Westcoast Cable TV Co., Ltd., which resulted in directly and indirectly controlling the business operations of these five cable TV companies. The five cable companies comprised more than 50% of the market in their franchise areas and their acquisition triggered a notification requirement with the TFTC. The TFTC imposed a fine in the amount of NT$1 million (approximately US$33,300) on Taiwan Digital Fiber Technology Co., Ltd.
United Kingdom	Filing in the UK is voluntary, so there are no penalties for completing a merger without notifying the UK's Phase I merger control authority (currently, the Office of Fair Trade (OFT)) in advance. If a deal is completed without OFT pre-clearance, the acquiring party bears the antitrust risk, as the OFT retains the ability to request a filing in respect of a completed merger and, if it has substantive concerns, to refer the merger to the Competition Commission (CC), which may impose remedies, such as divestment. The OFT has the power, in certain cases, to impose a "hold-separate" order on the parties to a completed merger, preventing any further integration of the merging parties. Generally, the OFT seeks an agreement rather than imposition of an order. The OFT can enforce compliance with a hold-separate order by obtaining an injunction from a court. As of April 1, 2014, when the	It is increasingly common for the OFT to seek initial hold-separate undertakings when it requests a filing with respect to a completed merger. It remains to be seen how frequently and with what levels of intrusiveness the CMA will seek to use its new powers to unravel historical integration on an interim basis. We are aware of no cases where the OFT has taken formal enforcement action with regards to compliance with initial hold-separate undertakings. In 2006, however, upon learning that extensive integration of the completed *Stericycle/STG* merger had continued even after Stericylce had given hold-separate undertakings to the OFT, the CC (once the merger was referred to it) imposed by order (having failed to agree suitable undertakings with Stericycle) a monitoring trustee and then a hold-separate manager (HSM) to ensure that the two businesses were held separate pending the outcome of the CC's investigation. The CC ultimately ordered a partial disposal

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	Enterprise and Regulatory Reform Act 2013 comes into effect, the OFT will have the power to impose, not only in respect of completed mergers but also in respect of anticipated mergers, both "hold-separate" orders and, for the first time, orders to unravel any action already taken. This will no longer be conditional on the OFT having reasonable grounds to suspect it has jurisdiction to make a reference under the applicable jurisdictional tests. The new Competition and Market Authority (CMA) (which is to replace both the OFT and CC) will be able to impose significant financial penalties (of up to 5% of worldwide turnover) for failure to comply without reasonable excuse.	remedy to address its substantive competition concerns.

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