

Saving time and headaches clearing the antitrust hurdle for mergers and acquisitions

Regardless of whether a transaction might give rise to antitrust concerns, the merger review timeline can often be a critical element of the overall deal timetable. Some practical steps can facilitate a smoother and shorter process.

Introduction

The merger review process can generate headlines when a transaction is considered to give rise to competition concerns and is therefore challenged by an antitrust authority. Of course, the vast majority of transactions raise no such issues. Nonetheless, because in most jurisdictions globally the criteria applied to trigger a merger review process are related to the parties' revenues or asset values rather than their competitive position, transactions might be subject to a merger review and require notifications irrespective of any potential antitrust issues. Statutory waiting periods which prevent completion of the transaction before approval may apply, and authorities may impose fines or even order the unwinding of the transaction where the parties fail to notify a transaction or "jump the gun" by completing a transaction before obtaining the required approval(s). This briefing provides an overview of recommended process steps to help expedite the merger review.

An increasingly complex merger control landscape

The scope of international merger review is extensive and has been expanding in the last years:

- Some 130 jurisdictions globally now have some form of merger control, most of which are mandatory and require approval prior to the transaction being completed.
- Merger control laws may apply to mergers, acquisitions of companies, transfers of assets, formation of and certain changes to joint ventures, as well as acquisitions of non-controlling minority interests in some jurisdictions (e.g., Germany, Japan, U.S.).
- Transactions between two domestic parties may not trigger (just) a domestic filing but various international filings, for instance, if the parties generate revenues or hold assets abroad. Moreover, some jurisdictions have filing thresholds based on worldwide rather than domestic revenue or assets, and consequently require filings for transactions that have

Key issues

- Even transactions without a substantial nexus to a jurisdiction may still trigger local merger notification and associated standstill requirements, which can have an impact on the timeline to closing
- Merger review delays can be mitigated through appropriate preparation, planning and coordination steps that streamline the path to clearance from a procedural point of view

little or no impact on the local market.

As a result of this broad scope, for example, a transaction between two domestic companies in California or in Dubai whereby one of them increases its stake in their joint venture may require merger approvals in Europe or Asia. Similarly, consortium deals or joint ventures might technically trigger merger filings in jurisdictions where the target or joint venture entity is not active merely due to the revenues

generated or assets held by the parents / consortium partners.

A few steps to help expedite the merger review process

Good practice dictates that antitrust aspects are considered early as part of the identification and negotiation of transactions. Mandatory merger notifications and/or substantive antitrust issues can have a major impact on the feasibility and shape of the deal, the negotiation priorities of the parties, and the transaction timeline. In particular, in the context of a transaction that might be challenging from an antitrust perspective, parties should ensure that:

- the transaction agreement contains appropriate antitrust-related warranties and representations, conditions precedent and covenants;
- the antitrust risk is taken into account in the protection of their financial interests (such as through breakup fees); and
- they (and their advisors) are careful in the preparation of internal and external documents discussing the impact of the transaction (such as in documents prepared for the board of the company).

Even where a preliminary antitrust analysis does not suggest any substantive concerns, *e.g.*, because the parties are small players and/or provide mostly unrelated products or services, a considered approach to antitrust issues throughout the process remains important, particularly in relation to timing. A non-antitrust-concerns-transaction could still trigger multiple merger filings worldwide, each with its own

In-house counsel checklist

- Reminding business team and financial advisers of document creation risks and gun jumping risks
- Determining whether outside counsel needs to be instructed and instructing outside counsel as appropriate
- Gathering data for preliminary filing analysis (see box above)
- Preparing preliminary filing and substantive antitrust risk analyses
- Determining whether outside economists need to be instructed and instruct outside economists as necessary
- Assessing likelihood of antitrust concerns and the appropriateness of offering remedies to address them
- Keeping informed about changes to the transaction structure and documents
- Providing input into formulation of (antitrust) conditions precedent, taking into account the preliminary filing analysis
- Determining filing timeline and strategy
- Instructing local counsel in jurisdictions triggering a filing as appropriate
- Preparing streamlined information request for the business to allow preparation of notifications (including arranging meetings or calls with the business teams if appropriate)
- Arranging for the required formalities (power of attorney, signature pages)
- Preparing (or assisting the other party in the preparation of) the notifications, depending on the company's role in the transaction
- Coordinating with PR, reviewing press statements as appropriate and determining whether external public relations and/or public affairs assistance is required to facilitate antitrust clearance

formalities, timing and sanctions. If these filings are not identified efficiently and early in the process, they may lead to delays or fines where a required filing was ignored. Absent appropriate preparation, time may be lost collecting the required information for a filing analysis, identifying and instructing local counsel, preparing various notification forms, and complying with notification requirements that trigger varying and unsynchronised waiting periods, all of which could add weeks of delay to the implementation of the transaction.

To limit unnecessary delay in the process, some practical steps might be taken. The relevance and the relative importance of each of the steps may vary depending on the parties, the type and complexity of the transaction and the nature of the process.

Instructing experienced coordination counsel early

If outside counsel is to be tasked with the preliminary assessment of merger control requirements worldwide (as is typically the case, particularly for larger transactions), parties should

identify the law firm that will coordinate the assessment and implementation of all or most of the antitrust filings globally in relation to the transaction. Ideally, this central contact is involved early, such that it can also review the relevant provisions of the transaction agreements being negotiated (e.g., antitrust conditions precedent). Having one coordinating counsel with extensive experience on the applicability of jurisdictional thresholds across the globe undertake the multijurisdictional filings analysis in the first instance generally helps to save time and limit costs, compared to seeking formal advice from lawyers in each country to assess whether local thresholds are met. While local counsel feedback might still be required in unclear cases, there is often an advantage to instructing experienced coordinating counsel with established relationships with local lawyers who can hit the ground running.

Gathering expeditiously the information required to conduct a preliminary multijurisdictional filing analysis

A multijurisdictional filing analysis in two stages generally tends to be most efficient.

The initial stage serves to eliminate jurisdictions where the transaction clearly does not meet the notification requirements, determine jurisdictions where the notification test is met, and identify the jurisdictions for which additional information would be required to confirm whether a filing would be necessary. In a further stage, additional information is sought in relation to jurisdictions for which a conclusion was not reached at the

first stage, and local counsel advice might be needed in cases where the applicability of local criteria is unclear.

Having the right information ready from the start allows coordinating counsel to complete the multijurisdictional filing analysis and begin preparation of filings quickly. The basic information needed in the initial stage includes:

- **Revenue information:**

Typically it is most efficient to provide a list with recent full year global revenue information broken down by country (and not by region), in the currency in which it is reported in the ordinary course of business.

Revenue information is understood to mean the "net" value of sales, after deduction of sales rebates, VAT and other revenues related taxes, and group internal revenues. Revenues typically appear in companies' accounts under the heading "net sales," "revenues," "revenues from sales," "sales," "sales turnover," or "turnover."

The revenue information should be based on the last audited accounts. However, if there have been acquisitions or disposals since the last reported set of accounts, the figures should be adjusted by adding revenues from acquisitions and removing revenues from disposals. Also, if the last audited accounts are about to be superseded by more recent figures, it is good practice to already take the new figures, if available, into account.

The revenue information will need to be provided for the entire group of the buyer(s) (or the parents establishing the joint

venture), including all companies controlled by or controlling the buyer(s), such as the majority shareholder (including the revenues of all the companies controlled by that shareholder). Revenue information should also be provided for the entire target group; while the target group would not ordinarily include the seller (or other companies of the seller group that are not being acquired), this information may be requested for certain jurisdictions at a later stage.

As a rule of thumb, revenues should be allocated by country based on the location of the customer, although exceptions may apply.

Companies frequently engaging in M&A activity may consider maintaining an updated country-by-country breakdown of revenues so that revenue information does not need to be gathered afresh for each transaction.

- **Information on the location of subsidiaries and branches, and value of assets:**

Providing the list of the parties' subsidiaries and branches around the world usually allows coordinating counsel to eliminate filings in a number of jurisdictions in which the criteria triggering a merger notification require one or both parties to have a local subsidiary or branch (e.g., Croatia, Egypt). Similarly, confirmation that the parties do not hold assets in jurisdictions where they have no subsidiaries or branches often allows counsel to eliminate a significant number of filings. To the extent the parties have information on the

Key information to be prepared for a multijurisdictional filing assessment

- **Revenues:** for each group participating in the concentration (e.g., buyer group, target group, joint venture parents' groups, depending on the type of transaction), the "net" value of sales, after deduction of sales rebates, VAT/other revenues related taxes and group internal revenues, if available, audited, and for the most recent financial year, by jurisdiction, worldwide. Revenues should be allocated to the relevant jurisdictions based on destination, *i.e.*, the location of the customer.
- **Subsidiaries, branches and assets:** a list of the parties' subsidiaries and branches around the world with confirmation (if true) that parties do not possess assets where they do not have a subsidiary or a branch, as well as the value of the parties' assets worldwide. Information on value of assets in specific jurisdictions may also be required.

value of assets held broken down by jurisdiction available, this could limit the scope of requests for supplementary information from coordinating counsel at the initial stage. If one or all parties do not maintain an asset breakdown, coordinating counsel will typically request information on assets for the relevant jurisdictions at a later stage.

In the subsequent phase(s) of the multijurisdictional filing analysis process, additional information may need to be gathered for a limited number of specific jurisdictions, such as information on the precise value of assets (e.g., Canada, Ukraine), subsidiaries' or seller's revenues (e.g., Brazil, Mexico), export revenues (e.g., India, South Africa) or parties' activities and market shares (e.g., Spain, UAE).

Assessing where filings might be triggered requires information from both parties. In the early stages of a negotiation process, the party requesting a multijurisdictional filing analysis might not have the required information from the other party(ies),

and might even be unable to obtain it without breaching competition law prohibitions on the exchange of competitively sensitive information. However, the information from only one of the parties might already help to eliminate some jurisdictions, while the remainder of the necessary information could be shared between the parties' outside counsel on a confidential basis as the deal progresses.

Providing copies of the transaction and internal documents

The provisions agreed by the parties may influence whether a filing needs to be made. For example, depending on the precise governance rights agreed between the two parents of a joint venture, only one or both parents will be considered parties to the transaction. Establishing contacts between antitrust team / counsel and deal team / counsel helps keep antitrust counsel informed of any material changes to the transaction documents throughout the negotiations.

Antitrust counsel should also at the outset be provided with any (draft) internal documents evaluating or analysing the transaction. Having such documents (which often need to be submitted to the authority as part of the notification) enables antitrust counsel better to understand the rationale of the transaction, and assess substantive risks and their likely impact on the overall timing.

Developing a notification strategy

When a transaction may trigger notifications in multiple jurisdictions, the notification strategy should take into account the differences in the notification requirements, formalities and review timelines between jurisdictions where the transaction will be notified, to ensure that the closing of the transaction is not held up by a late filing in a given jurisdiction. The likelihood of substantive issues being identified in certain jurisdictions and strategic considerations also impact the timing of the multijurisdictional filings. The strategy should address in particular:

- **Appropriateness of notifying the transaction in jurisdictions where doing so is voluntary:** under voluntary regimes (e.g., Australia, Singapore, the UK), the authority normally has the power to investigate a transaction that has not been notified, sometimes even after closing. Filing voluntarily may be appropriate in cases where there is a material risk of the authority challenging the transaction, for example because of competitors or customers complaining.
- **Compliance with merger regimes that require a notification at a specific point in time:** under most regimes, the

parties may notify whenever they want, subject to the prohibition to implement the transaction before the clearance decision (*e.g.*, Brazil, China, EU, U.S.). Under some regimes, merger filings may even take place post-closing (*e.g.*, Argentina, Indonesia). However, in a small number of jurisdictions (*e.g.*, COMESA, India, Serbia) the transaction must be notified within a certain period of time after the announcement of the transaction or the signing, or even prior to signing.

- **Possibility of filing before the signing of the transaction agreements:** in some jurisdictions, antitrust filings can be made based on draft agreements or even a detailed term sheet, as long as the basic terms are agreed upon and no longer subject to change (*e.g.*, Colombia, EU, Switzerland). Making use of this possibility may help save time, as long as the key terms are indeed final. However, because the authorities will often make the fact that a filing has been made public, an early filing may not be suitable in all circumstances (*e.g.*, if the deal cannot be publically announced before signing).
- **Pre-notification contacts with the authorities:** in some jurisdictions it is common to have "pre-notification" discussions, with the authority prior to filing, which can significantly extend the total time required to clear the transaction. Failure to engage in such discussions entails a significant risk of the notification being considered incomplete in some jurisdictions (*e.g.*, the EU). At the same time, ensuring that

the authority receives all the information it deems relevant to its review helps speeding up the review process. In some jurisdictions, the review period starts running only after the authority confirms that it considers the notification to be complete (*e.g.*, China, Kazakhstan).

- **Particularly long review timelines:** certain merger regimes have unusually long review periods, even for transactions that do not pose substantive antitrust issues (*e.g.*, Brazil, Saudi Arabia, Vietnam), or give the authorities broad powers to suspend or interrupt the review period (*e.g.*, Cyprus, India, the Netherlands). The length of these procedures, if potentially triggered, should be taken into account in the design of an overall filing strategy in the context of the deal timetable.
- **Temporal validity of clearance decisions:** an additional complexity to devising a successful global filing strategy follows from the fact that in certain jurisdictions, the clearance decision is only valid for a certain period of time, within which closing must take place (*e.g.*, Estonia, Russia). If the transaction needs to be notified in such jurisdictions, the different filings will need to be timed so that all necessary clearances have been obtained and are still valid by the time closing takes place.

Anticipating formalities

The actual notification of the transaction may involve certain formal requirements. Putting appropriate processes in place to be able to deal

expeditiously with such requirements helps saving time:

- Some jurisdictions may require particular formalities for a power of attorney authorising external counsel to notify the transaction and represent the company before the antitrust authority to be valid (*e.g.*, authentication by a notary public, certification by a public authority). They may also impose restrictions on who can sign the notification form or the power of attorney and require "wet ink" originals of signature pages for the notification to be accepted. It can be beneficial to ensure that individuals with signing authority are warned and available to sign, to avoid scenarios in which notifications are delayed as time is wasted locating and getting hold of such individuals, or consider whether documents could be signed in advance and held by antitrust counsel for release at a later time.
- In some jurisdictions, payment of a filing fee is a requirement for notifying (*e.g.*, Austria, South Africa), and the authority will not accept the notification without proof of payment of the fee. Outside counsel might agree to advance the fee, but if not, it is important to understand where fees need to be paid and to have the correct amounts wired to local counsel in a timely manner. This may require involving the company's finance department early on.

Streamlining the process of preparing the required notifications

The larger the number of notifications required, the more complex the global merger review process is likely to be,

but potentially also the more efficiencies can be generated through centralised management and coordination of the preparation of the notifications. Actions that may assist in streamlining the notification process include:

- Ensuring that the other party(ies) are contractually required to cooperate expeditiously in providing information for and finalizing the required notification forms. Depending on the type of transaction and the jurisdiction, the formal duty to notify may lie with one or the other party or both parties jointly, but in each case, it will typically be necessary to have the assistance of the other party to prepare the notification. It can help to put coordinating counsel in touch with counsel for the other party(ies) to the transaction early where appropriate, to develop a constructive and cooperative working relationship which should help further expedite merger review preparation.
- If law firms that have not worked on transactions for the company before are involved, where applicable and to the extent possible, providing them with a copy of one or two recent notification forms submitted in their jurisdiction. Having such a copy will enable the lawyers to reuse information that is not specific to the transaction and limit the time and costs involved in the preparation of the filing (assuming no material changes have taken place in the meantime).
- Ensuring that the business is prepared to answer the requests for information from coordinating counsel in a complete, accurate

and timely manner. For the benefit of getting outside counsel up to speed rapidly in particular, it may be beneficial to set up preliminary calls with the relevant business people so that they can explain the competitive dynamics of their industry the legal team.

- Considering the use of a single notification form that can serve as a template for others that require similar information. For example, where an EU notification is required, (a draft of) that form is often provided to local counsel and used as the basis for other notifications because it is substantively one of the most extensive notification forms imposed by countries with notification regimes. Such a template for competitive analysis could avoid individual local counsel reinventing the wheel, thereby ensuring consistency of the data and arguments across jurisdictions, as appropriate. However, it does not dispense with the need to adapt the form or to collect information needed for local requirements. In particular, this approach might not work where a notification requires entirely different information, needs to be filed well before the EU notification or where the parties' activities in the EU differ significantly from those in other jurisdictions.
- Considering early in the process whether the transaction may raise substantive issues for which the involvement of consulting economists to develop defensive arguments would be beneficial, and involving them early in the process. In transactions raising substantive antitrust concerns, involving consulting economists

at an early stage can help ensure that the legal arguments presented have an economic underpinning and that the appropriate data to support these arguments is collected from the outset.

Conclusion

Transactions might raise different substantive antitrust issues based on the facts of each case. The significance of such issues and the time required to assess them could ultimately, from an antitrust point of view, have the greatest impact on a transaction's timeline to closing. However, implementing the measures highlighted above may at least help to limit unnecessary and costly multiplication of efforts and procedural delays.

Authors



Dieter Paemen

Partner

E: dieter.paemen@cliffordchance.com



Tim Cornell

Partner

E: timothy.cornell@cliffordchance.com



Richard Blewett

Partner

E: richard.blewett@cliffordchance.com



Alex Nourry

Partner

E: alex.nourry@cliffordchance.com



Chandralekha Ghosh

Senior Associate

E: chandralekha.ghosh@cliffordchance.com



Aleksander Tombiński

Associate

E: aleksander.tombinski@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Avenue Louise 65, Box 2, 1050 Brussels, Belgium
© Clifford Chance 2017

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

www.cliffordchance.com

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.