

Antitrust Review of Multijurisdictional Mergers: Navigating Complex Clearance Requirements

Managing Cross-Border Pre-Merger Reviews Amid Overlapping Substantive and Procedural Regimes

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Today's faculty features:

James W. Lowe, Partner, **Wilmer Cutler Pickering Hale and Dorr**, Washington, D.C.

Hartmut Schneider, Partner, **Wilmer Cutler Pickering Hale and Dorr**, Washington, D.C.

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Strafford Publications Webinar
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Jim Lowe
WilmerHale

Hartmut Schneider
WilmerHale

Topics to Cover Today

- Scope of International Merger Control Regimes
- Determining Reportability
- Content of Merger Notifications
- Coordinating Timing of Filings
- Coordinating Substantive Arguments
- Coordinating Outcomes
- Role of Merger Control in Deal Negotiations

Merger Control Regimes

- More than 100 merger control regimes
 - Most are state-based, but some regional
 - European Union; COMESA
 - Jurisdictions of all sizes have merger control
 - Isle of Jersey; Malta
- Regimes vary in complexity and experience
- Timing of filing and review vary
- Most mandatory if thresholds met
 - Notable exceptions include UK, Australia
- Most are now pre-closing; a few post-closing

Recent Examples



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Core Merger Regimes

- Most active enforcers include:
 - Americas: US, Brazil
 - Europe: EU, UK, Germany, France
 - Asia/Pacific: Korea, China, Australia
 - Africa: South Africa
- Other jurisdictions to keep an eye on
 - Newcomers: India, COMESA
 - Jurisdictions with low thresholds, e.g.: Austria, Ukraine, COMESA

First Step: Reportability

- First step is to determine reportability
 - May want to address this during negotiations
- Very complicated process
 - No common methodology for reportability
 - Most use revenue thresholds
 - Some have asset or market share thresholds
 - Some require local nexus, some do not
 - US is an outlier, focuses on transaction value
 - Where reportability not obvious, written advice of local counsel may be required
- Will be cases where reportability still uncertain
 - Requires careful risk analysis with aid of local counsel

Reportability Thresholds

- Each jurisdiction has unique filing requirements
 - Two general types:
 - Revenue (turnover) or asset thresholds
 - Market share thresholds (may be one party or combined)
 - Some consider both
 - Most jurisdictions now require a local nexus – but still some outliers
 - Revenue thresholds have become “best practice” because they are objective and relatively easy to calculate. Complications include:
 - Jurisdictional origin of revenue
 - Definition of “turnover”
 - Market share complications include:
 - Different market conditions across jurisdictions
 - Need to commit to markets prior to full investigation
 - Need detailed data and agreement among parties

What If My Deal Is Reportable?

- Reportability affects timing
 - Even in non-strategic deals, filings take time
 - Complicated filings (EU, China, India) can take weeks to prepare in some cases
 - In strategic deals, timing can be uncertain
 - Some jurisdictions, including the EU and China, often delay acceptance of filings
 - Some jurisdictions have the power to “stop the clock” at various points in review process
- Parties should consider timing uncertainties
 - Can impact termination dates and finance timing

Content of Filings

- Complexity varies by jurisdiction
 - Some are fairly simple:
 - US: basic financial data and limited documents
 - Germany: basic description of parties and markets
 - Others require highly detailed submissions, requiring detailed descriptions of parties, markets
 - EU and all EU-based regimes
 - China
 - Brazil
- Simple filings take ~one week; others a month or more in complex transactions
- Some jurisdictions require filings by both parties; in others only one filing is required, usually from the buyer
 - Information will be needed from all parties in all cases

Coordination of Filings

- Timing
 - Alignment often not critical where no substantive issues
 - But can be essential where complex issues
- Need to consider jurisdictions with lengthy review periods (e.g., India)
- May be able to start discussions with staff in US, elsewhere prior to actual filings
 - Always useful to be in touch with staff in key jurisdictions early to have discussions on timing and substance
- Failure to coordinate the timing of filings may seriously complicate the substantive review and coordination of any remedies

Coordination of the Investigation

- Many jurisdictions now seek to cooperate in their reviews of common transactions
 - Bilateral and multilateral agreements in place to share non-confidential information on investigations
 - Particularly close relationships among US, EU, Canadian and EU member-state authorities
 - US and EU in particular look to parties to facilitate
 - Seek confidentiality waivers
 - May seek common interviews of parties, witnesses
- Failure to assist agency cooperation will, at best, annoy enforcers
 - By contrast, actively assisting cooperation may prove beneficial, particularly if remedies may be required

Aiding International Coordination

- Coordinate filings and other timing
 - If agencies have significantly different deadlines and decision points, very hard to coordinate
 - This does not mean that all filings go in at once; must consider timing of various decision points (Phase 2, etc.)
 - If one jurisdiction gets off track, discuss with others
- Agree to waivers
 - Better for agencies to be on common ground; but
 - Need to consider local privacy or data transfer laws
- Closely coordinate all submissions
 - Inconsistent submissions will ruin credibility worldwide
 - Assign global filing coordination to one experienced counsel (outside or in-house)

Impact and Risks of Coordination

- Close coordination may speed resolution
 - Agencies are more comfortable when aligned
 - However, do not assume one clearance helps obtain others, particularly serially
- Coordination reinforces need to have common arguments and factual support
 - Even where substantive standards may differ, cannot make contradictory arguments
 - Pre-2005, efficiencies created a major issue
- Process is burdensome across multiple jurisdictions
 - Coordinate local counsel activities
 - Centralize final review of all submissions
 - Coordinate multiple, conflicting, overlapping info requests
- Develop overarching themes up front; implement worldwide

Argument Alignment

- Cannot make contradictory or inconsistent arguments across jurisdictions
 - Even if agencies don't talk, they may ask for submissions in other jurisdictions
- Requires knowledge of substantive differences across filing jurisdictions
- May require downplaying or avoiding certain arguments
 - E.g., efficiencies in 1990s
- Alignment must start before filing since filings may require submissions on key issues including market definition

Aligning Resolution

- Different jurisdictions have varying local market conditions and legal standards and thus may have varying resolutions
- Necessary, however, to avoid inconsistent or duplicative remedies
- Parties should encourage agencies to discuss need for multiple remedies
 - US, EU, member states, Canada particularly interested
 - Particularly important where markets are worldwide
- Will likely be more difficult with newer, more opaque regimes

Impact of Deal Negotiation

- Allocation of antitrust risk a growing issue
 - Subject of negotiation in strategic transactions
- In international deals, filing and substantive analysis need to occur early for risk assessment
 - Impossible to value risk without careful review
- Even in non-strategic deals, filing analysis can impact timing
 - Timing analysis may be required to determine termination periods and financing terms
 - For seller, timing may affect need for retention and other business continuity planning
- Important for parties to know what they will be facing and to be prepared

Best Practices

- Start early
 - Filing and substantive analysis can take time
- Stay coordinated
 - Appoint experienced counsel to manage global filings
- Stay consistent
 - Argument coordination is critical to ensure success
- Be cooperative
 - Merger review is not litigation – almost always better to facilitate the agencies' review
- Keep an eye on the global clock
 - E.g., if we trigger a deadline in the US today, what does this mean for the review in the EU?

Resources

- ABA Section of Antitrust Law International Committee:
 - <http://apps.americanbar.org/dch/committee.cfm?com=AT311000>
- OECD competition resources:
 - <http://www.oecd.org/competition/mergers/>
- International Competition Network:
 - <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>

Questions?

Jim Lowe

WilmerHale

Washington, DC

james.lowe@wilmerhale.com

Hartmut Schneider

WilmerHale

Washington, DC

hartmut.schneider@wilmerhale.com