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UPDATE

Antitrust Considerations for Global M&A Transactions

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This update provides an overview of merger notification requirements in the United States, Europe and China, and practical considerations for global M&A transactions requiring regulatory reviews in jurisdictions around the world.

Summary Table

	U.S.	Europe	China
Regulatory Authority	FTC / DOJ	European Commission (DG COMP)	MOFCOM
Merger Thresholds[1]	Size of transaction exceeds $78.2 million	Combined worldwide turnover >€5B; and E.U.-wide turnover of each of at least two parties >€250M OR Combined worldwide turnover >€2.5B; E.U.-wide turnover of each of at least two parties >€100M; in at least three Member States, at least two parties have turnover of >€25M each and >€100M combined	Combined worldwide turnover of RMB10B (or combined China turnover of RMB2B) and at least two parties each with China turnover of RMB400M
Review Period	30 day initial waiting period, which can be extended by issuance of a Second Request to 30 days until after substantial compliance (in most cases)	Phase I: 25 working days (35 working days if remedies offered) Phase II: 90 working days (105 working days if remedies offered)	Phase I: 30 days Phase II: 90 days Phase III: 60 days
Filing Fees	$45,000 - $280,000	No filing fees	No filing fees

U.S. Merger Review Process

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) requires that proposed acquisitions of a certain size (including certain minority interest acquisitions) be reported to the U.S. Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ). The value of the transaction must exceed $78.2 million in order to require an HSR filing. Transactions exceeding $78.2 million but below $312.6 million must also meet a size-of-parties test where one party has at least $15.6 million in sales or assets and the other party has at least $156.3 million in sales or assets. The HSR thresholds are adjusted annually. The HSR Act and HSR rules provide certain filing exemptions, including acquisitions solely for the purpose of investment (up to 10% of outstanding voting securities), acquisitions of certain foreign voting securities and assets, stock dividends and splits, and acquisitions in the ordinary course of business.

Most transactions that meet HSR filing thresholds require *both* parties to file a premerger notification form with the FTC and DOJ. The acquirer must also pay an HSR filing fee, which is $45,000, $125,000, or $280,000 depending on the value of the transaction. Once the parties file their HSR forms, they must observe a 30 calendar day waiting period (i.e., Phase I). The waiting period for cash tender offers and certain bankruptcy transactions is 15 calendar days. Either party can request "early termination" (ET) of the waiting period, which can be granted prior to expiration of the 30-day waiting period if both agencies determine that further review is unnecessary. A transaction that receives ET is published on the FTC's website and the Federal Register, so parties may not want to seek ET if they want their deal to remain confidential.

If either the FTC or DOJ wants more time to review the transaction at the end of the initial 30-day waiting period, it can issue a Second Request, which initiates a full-phase (i.e., Phase II) investigation. To avoid or delay issuance of a Second Request, the acquirer also has the option to "pull and re-file" its HSR form if it wishes to restart the initial 30-day HSR waiting period in order to give the FTC or DOJ more time to review the transaction. Once issued, a Second Request extends the waiting period until 30 calendar days after *both* parties substantially comply with the Second Request (10 days for cash tender offers and certain bankruptcy transactions).

European Commission Review Process

Council Regulation 139/2004/EC (the EUMR) applies to acquisitions of control (defined as the ability to exercise "decisive influence") on a lasting basis that meet certain turnover thresholds,[2] either by one party alone, or by two or more parties acquiring joint control over a "full-function" joint venture (*i.e.,* an autonomous economic entity). This includes acquisitions of outright control (*e.g.,* acquisition of a majority of shares), acquisitions of legal or de facto control through other means such as contractual or voting rights (*e.g.,* through board representation or a shareholder agreement), and acquisitions of "negative" control over strategic matters such as adoption of the budget and business plan, or appointment/removal of senior management (*e.g.,* a minority investment with a veto over such matters). See the above summary table for the filing thresholds.

Transactions falling within the scope of the EUMR require prior notification and clearance before a transaction can be completed. Parties are required to submit a pre-notification draft for review by the Commission, which typically takes two to four weeks to complete prior to formal notification (although this can take longer in cases that raise complex issues). The Phase I review period is 25 working days, extended to 35 working days if remedies are offered. At the end of Phase I, the Commission will either approve the transaction (unconditionally or subject to remedies) or, if potential concerns are identified which cannot be resolved in Phase I, open an in-depth Phase II investigation which lasts for up to 90 working days, extended to 105 working days if remedies are offered.

China (MOFCOM) Review Process

China's Anti-Monopoly Law requires that a "concentration" must be notified to the Ministry of Commerce (MOFCOM) if certain turnover thresholds are met. "Concentration" includes a merger of undertakings, acquisition of control over other undertakings by acquiring their equity or assets and gaining control or decisive influence over other undertakings by contracts or other means (e.g., through certain types of veto rights). There is no interest percentage threshold for establishing control; MOFCOM conducts a facts and circumstances evaluation of whether decisive influence exists based on various factors. In addition, the notification obligation applies to the creation of a joint venture where two or more undertakings acquire joint control over the joint venture.

The thresholds for notification are as follows: (i) *either* the combined worldwide turnover of all parties to the transaction exceeds RMB10 billion *or* the combined turnover within China of all parties to the transaction exceeds RMB 2 billion, in the preceding financial year; *and* (ii) the turnover within China of each of at least two parties in the preceding financial year exceeds RMB400 million. However, MOFCOM has discretion to review transactions that do not meet the notification thresholds if the transaction has or may have the effect of eliminating or restricting competition.

The initial review period is 30 days (Phase I), which starts only after MOFCOM accepts the notification as complete (which in practice may take around one month or more). MOFCOM may initiate a further review period of another 90 days (Phase II) if a more detailed investigation is required, which in turn can be further extended by up to 60 days (Phase III) by MOFCOM under certain circumstances. The option to "pull and re-file" the notification is also possible in China if the parties wish to give MOFCOM more time to review.

Since early 2014, MOFCOM has implemented a streamlined review procedure that may be applied to cases involving the following situations (subject to MOFCOM's discretion to review such cases under the normal review procedure):

- transactions where the parties have a combined market share of less than 15% if they compete in the same market;
- transactions where each of the parties has a market share of less than 25% if they are operating in the vertically related market;
- transactions where the parties neither compete in the same market nor operate in vertically related markets and each of the parties has a market share of less than 25% in relation to each market relevant to the transaction;
- creation of offshore joint ventures with no economic activities in China;
- acquisition of equity or assets of offshore entities with no economic activities in China; or
- change from joint control to sole control of a joint venture (except where the sole-control party and the joint venture compete in the same market).

Although this streamlined procedure provides no guarantee as to the review period, so far the majority of cases under the streamlined procedure have been cleared in Phase I.

Practical Considerations for Global Deals

Large, cross-border M&A transactions often require notifications to be filed in a number of jurisdictions in which antitrust clearances must be obtained before the deal may proceed. For the largest global M&A deals, it is not uncommon for parties to have to file notifications in more than a dozen jurisdictions around the world. These regulatory requirements raise a host of complex issues, and a prolonged review in multiple jurisdictions can be time consuming, costly, and frustrating for buyers and sellers eager to move forward with the deal. Indeed, a lengthy antitrust review in a single country – including where the parties have a relatively small presence – can add significant delay to the parties' ability to close a transaction. Careful planning is thus critical in any large multi-jurisdictional transaction, especially in transactions that may raise substantive antitrust issues. Parties involved in these types of transactions, however, can take a number of steps to maximize the chances of obtaining antitrust clearance in a timely and efficient manner.

1. **Consider antitrust implications early in the process.** For deals involving parties with sales or operations in multiple jurisdictions, it is important to determine as early as possible the extent of the notifications that are likely to be required. Many jurisdictions have "suspensory" filing obligations,

meaning that the parties must notify the proposed transaction to the local antitrust authority and observe a mandatory waiting period before the deal may close. In some jurisdictions, these suspensory filing obligations apply even if the parties do not compete and/or have minimal operations within the jurisdiction. As a result, it is critical to conduct an early and thorough assessment of the jurisdictions in which the transaction may need to be notified. Also essential is conducting a preliminary risk assessment of the likelihood the transaction may raise competitive concerns that may lead to a prolonged investigation or challenge. Experienced antitrust counsel should be involved as early as possible in these assessments, which will help inform the transaction timeline, negotiations of the transaction agreements, and the extent of antitrust impediments to completing the transaction. For example, a transaction that does not raise competitive concerns may receive clearance during the initial review period (which, in many jurisdictions, is 30 days or less), but a transaction that raises potential competitive concerns could be subjected to an extended review lasting nine months or longer, a requirement to divest assets or agree to other commitments, or a challenge to the entire transaction.

2. **Understand the nuances of the local review processes.** After identifying the jurisdictions in which a transaction may need to be notified, parties should ensure the legal team includes local lawyers in those jurisdictions. Although the review process is set by statute in many jurisdictions, there are often unwritten rules and customs that attorneys experienced in working with the local antitrust authority will understand. Knowledgeable local antitrust lawyers assisting the primary deal legal team can be a valuable asset – and, at times, a key factor in obtaining prompt clearance or being subject to an extended review.

3. **Develop a coordinated approach and consistent themes.** If the transaction has the potential to raise competitive concerns, it is critical for the parties to develop a coordinated approach across jurisdictions and maintain consistent arguments in filings and other communications with various regulatory authorities. This is particularly important because the antitrust authorities likely will seek waivers from the parties allowing them to communicate and share information with each other during the course of their investigations. Thus, representations or arguments made to one authority are likely to be communicated to another authority. As a result, local market dynamics in each of the jurisdictions must be analyzed to ensure that key arguments are accurate and consistent across jurisdictions. This approach typically requires parties to interview key business people and analyze key documents during the diligence process so that the key arguments in defense of the transaction across all jurisdictions can be developed. In addition, the timing of merger notification filings also must be considered early in the process. In some cases, parties may find it advantageous to prioritize or sequence merger notifications depending on the jurisdictions involved.

4. **Be prepared.** Once the merger review process has begun, parties should be prepared to respond quickly to questions raised by the antitrust authorities. This requires advance planning and close coordination with antitrust counsel, as well as local counsel in each jurisdiction, to gather information the antitrust authorities may require both in the initial merger notification forms and in subsequent informal or formal requests. This information typically includes documents discussing the transaction, the parties' business plans, pricing and marketing plans, market share data, industry reports, customer information, win/loss reports, and sales data. To manage this process, it is often helpful to designate a key contact within each company that will be responsible for providing information responsive to each antitrust authority's information request. Given that many jurisdictions have initial review periods of 30 days or less, responding quickly to information requests can mean the difference between early clearance and an extended review. Parties also should be prepared to attend in-person meetings with the authorities and to make senior company officials available to be interviewed by the authorities about the transaction.

5. **Eliminate potential distractions.** The regulatory review process also can be significantly delayed if the antitrust authority believes the parties may have engaged in inappropriate conduct, such as improper information sharing or "gun-jumping." Although parties typically want to move forward with a deal as quickly as possible, the parties must take care not to inappropriately share competitively sensitive information or take steps that could be perceived as integrating the businesses prior to obtaining regulatory clearances and consummating the transaction. This is particularly important in the context of an add-on acquisition for a portfolio company, or when a private equity firm undertaking an acquisition already has an investment in a competitor to the current target. Antitrust counsel should be involved in the diligence process and review any acquisition agreement covenants governing the target's conduct of business between signing and closing. All integration planning should be conducted with the input of counsel, and agendas should be prepared and approved by counsel before integration planning meetings are held involving both parties. It also may be useful in some cases to establish diligence or integration planning "clean teams" involving third parties (such as industry consultants) or company personnel that do not have responsibility for sales, marketing, or pricing.

6. **Consider the end game.** Lastly – and perhaps most importantly – if the transaction is likely to require a remedy to proceed (i.e., the transaction is unlikely to obtain antitrust clearance unless the parties divest assets or take other action to resolve the alleged anticompetitive harm resulting from the transaction), parties should consider remedy options *before* signing the acquisition agreement. Finding the appropriate scope of divestitures that will satisfy multiple antitrust authorities across jurisdictions can be complex and difficult, especially where the products at issue do not involve an entire standalone business. Moreover, because certain antitrust authorities may require parties to identify a buyer and negotiate a divestiture agreement before granting clearance, remedies designed to resolve concerns in a number of transactions will need careful planning and coordination.

Although this article provides just a few tips, parties that consider the antitrust implications of a large, cross-border M&A transaction early on in the process can better position themselves to maximize the chances of timely and efficient antitrust clearance and lessen the risk of any unexpected "surprises" that may delay or even derail a transaction.

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1. The merger notification rules in the United States, Europe and China are complicated and have been simplified here for ease of presentation. Other thresholds and exemptions may apply.
2. Transactions that fall below these thresholds may be subject to merger control rules at the national level.

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