CHANGES IN THE LANDSCAPE: TRENDS IN GLOBAL MERGER CONTROL

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I. INTRODUCTION

Each time a major deal happens, over 120 competition regulators around the globe may take notice – each with its own assessment criteria and its own time frame. Although navigating numerous merger control regimes can seem a challenge for businesses seeking to remain compliant with competition law, increased cooperation and communication between competition authorities is moving us towards a standardization of approach in many areas. The global landscape for merger assessment is constantly shifting, and businesses need to be aware of how both the differences and similarities of approach by authorities worldwide may affect them.

We have identified a number of global trends currently affecting cross-border deals:

- increasingly strict enforcement of notification requirements;
- revival of coordinated effects as a basis for regulatory intervention; and
- stricter standards for remedies to be considered adequate.

For businesses these trends mean that planning transactions ahead of time in order to ensure merger control compliance becomes ever more important.

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II. INCREASED SCRUTINY OF FAILURE TO NOTIFY AND GUN-JUMPING

Most merger control regimes provide for a mandatory and suspensory notification framework. Not notifying a transaction or implementing it before approval ("gun-jumping") carries the risk of fines, and the level of fines is increasing fast. Gun-jumping is being taken increasingly seriously by competition authorities and, in 2016, 11 regulators across four continents imposed total fines of over €100 million.

Some mature regimes have increased their fines: in 2016 the U.S. Federal Trade Commission ("FTC") announced a 2016% increase in the maximum allowable daily fine for violating the U.S. premerger notification statute.[2] Also in 2016 South African Competition Commission imposed a fine some ten times larger than its previous highest fine for a failure to file, and according to the Commission's recently published guidelines the fines may yet go higher.[3] Less established competition authorities are also flexing their muscles, making clear that missing the filing deadline can prove costly. Toray Advanced Material Korea was fined USD $150,000 by Indonesia's competition commission ("KPPU") for being two days late notifying its acquisition of Woongjin Chemical – the first case of the KPPU imposing fines on a foreign company for failure to notify. And it seems that the longer the delay the higher the fine: LG International's 20-day hiatus before notifying its acquisition of PT Binsar Natorang Energi resulted in the KPPU's highest fine for failure to notify, and cost the company EUR 600,000.

Failure to notify a transaction is not necessarily the result of a company's conscious decision to disregard the merger rules – even straightforward revenue or asset thresholds can be difficult to interpret. Nor are overly complex filing thresholds necessarily the hallmark of less experienced competition law regimes – Germany has recently amended its merger control regime so that transaction value criteria can trigger a filing, and similar amendments are in train in Austria[4] and under discussion in jurisdictions including the EU and Sweden. Legislative proposals in Europe so far provide little clarity on calculation methodology, but companies in industries where players commonly have low actual revenues but potentially high future revenues (such as pharma and IT) should be aware that merger control planning is likely to get more difficult.

Establishing whether a filing threshold is met can be complex, but parties may stumble at an even earlier hurdle: is there a notifiable event in the first place? Different competition authorities use diverging definitions of "merger," "acquisition of control" and "joint venture," and this can trip companies up. For example, Canon structured its acquisition of Toshiba Medical Systems as a two-step transaction, and only notified the second step. China's MOFCOM considered the two steps to be closely related and indispensable components of a single transaction, and found that Canon should therefore have filed the first step for approval. Although it considered the transaction unproblematic in substance, MOFCOM imposed a fine of USD $43,000 on Canon – its first public fine for failure to notify imposed for a foreign-to-foreign transaction. The European Commission has recently sent a Statement of Objections to Canon alleging failure to notify in relation to the same transaction, and Japan's JFTC has also issued a warning that the first step of the deal triggered filing requirements in Japan. This makes the Canon case one of the few examples of different competition authorities raising such allegations in the same cross-border transaction.

Companies can run into problems even before the deal is formally concluded. The highest gun-jumping fine ever imposed by India's Competition Commission turned on whether the triggering event for a merger filing was the notification of the deal to the Indian stock exchanges or the subsequent execution of a binding acquisition agreement. The notifying company argued the latter to no avail, and was fined USD $750,000.[5]

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2 See: https://www.ftc.gov/news-events/blogs/competition-matters/2016/06/inflation-increases-maximum-civil-penalty-amounts (increasing the maximum allowable fine from $16,000 to $40,000 per day of violation).

3 *Life Healthcare Group Proprietary Limited/Joint Medical Holdings Limited* [April 17, 2016].

4 The new value-based threshold will enter into force on November 1, 2017.

5 *GE/Alstom* [February 16, 2016].

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A. A Danger Zone: Post-Notification but Pre-Approval

Once the merger has been notified, companies will be keen to take all necessary steps to ensure a swift and smooth post-closing integration. However, they may be constrained by merger control laws prohibiting the implementation of a transaction after notification has been made but prior to approval being received. Compliance with the “standstill obligation” is essential, but the boundaries between legitimate integration planning and gun-jumping can sometimes be difficult to establish. The French Autorité de la Concurrence imposed a record fine of EUR 80 million on Altice for interfering with the management and commercial policy of target company SFR while the merger control process was still ongoing. In the U.S., authorities traditionally take a hard stance on pre-approval implementation. The Department of Justice fined Duke Energy USD $600,000 because a tolling agreement that took effect before expiration of the statutory waiting period gave the company immediate control over the target’s output and the right to receive its day-to-day profits and losses.

The use of “carve-outs” can be especially complicated when it comes to walking the tightrope of legitimate pre-merger integration. When Technicolor acquired Cisco’s connected devices business, the parties carved out the Brazilian part of the transaction and continued with the remainder pending CADE’s review. CADE objected, and imposed a fine of approximately USD $9 million[6] on the parties – by far the highest fine for gun-jumping in the authority’s history. Carve-outs may be possible in some circumstances – for example, the UK’s CMA allowed Diebold to complete its 2016 acquisition of Wincor Nixdorf globally, excluding the UK – but competition authorities that permit carve-outs as a matter of practice are in the minority. That list includes Colombia, Mexico, Portugal, Romania, Slovenia and Spain.

B. Unpleasant Surprises

Businesses must beware the pitfalls of jurisdictions where merger control reviews can be initiated on the authority’s own initiative, even where the mandatory filing requirements are not met and even where the deal has closed. In China, MOFCOM reviewed *ex-officio* the merger of China’s two largest taxi app services in 2015, even though the parties did not trigger the revenue filing thresholds due to the nascent nature of the market.[7] This represented the only such use of these powers by MOFCOM to date. More than a year after the non-reportable deals were concluded, the U.S.’s FTC challenged Valeant’s acquisitions of Paragon and of Pelican Products, and Valeant was obliged to divest the businesses.

In the U.S., individual investors may be surprised to learn that they can run afoul of the premerger notification filing requirements. A hedge fund founder agreed to pay $180,000 in civil penalties to resolve FTC allegations that he violated the Hart-Scott-Rodino Act by failing to report his purchases of voting securities in an internet services company. In a separate action, an entrepreneur agreed to pay $720,000 in civil penalties to resolve FTC allegations that he violated the Hart-Scott-Rodino Act by failing to report his purchases of shares in two industrial companies.[8] In certain other jurisdictions, such as Colombia, fines can also be imposed on executives who fail to comply with reporting requirements.

Competition authorities are getting better and more innovative at identifying gun-jumping behavior, making increasing use of methods including proactive monitoring of the press, tip-offs by aggrieved competitors, or indications of a prior deal in a subsequent notification.

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6 BRL 30 million.

7 *Ex-officio* reviews in China are usually triggered by concerned stakeholders (in this case a rival taxi hailing service), and MOFCOM has so far shown caution in opening such reviews.

8 See FTC press release, “In Two Separate Actions, FTC Charges Investors with Violations of U.S. Premerger Notification Requirements,” (Jan. 17. 2017).

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III. THE REVIVAL OF COORDINATED EFFECTS CONCERNS?

Competition authorities worldwide increasingly ask whether a merger would create incentives for market participants to tacitly align their behavior. Such coordinated effects concerns are likely a reaction to continuing consolidation in many industries and the subsequent reduction in the number of credible market competitors.

The U.S. has long viewed coordinated effects as a basis for challenging a merger or acquisition. In its 1992 and 2010 Horizontal Merger Guidelines, the U.S. antitrust agencies identified a number of factors that may be conducive to successful coordination.[9] The Agencies seek to identify how a merger might significantly weaken competitive incentives through an increase in the strength, extent, or likelihood of coordinated conduct. The 2010 Guidelines also expand the definition of coordinated interaction to include "parallel accommodating conduct not pursuant to a prior understanding."[10]

In the EU, coordinated effects concerns have not been the basis for regulatory intervention since the European Commission's defeat in the 2008 *Airtours* case, where the General Court raised the bar for a finding of collective dominance. However, two cases in 2016 may herald the revival of coordinated effects concerns in Europe. In *AB InBev/SAB Miller*, such concerns shaped the remedy design and resulted in divestitures that fully removed the overlap between the merging parties. The Commission found that high market concentration, consistent presence of certain big brewers across the markets and high price transparency facilitated tacit cooperation between brewers. Internal documents from the merging parties indicated that brewers seek to engage in coordinated "follow the leader" type pricing at national level, with retaliation by "price leaders" in low market share segments if competitors did not follow the price increase.

Tacit coordination also arose in *Hutchison/Wind Italy*, where the Commission found that the Italian mobile phone market would be highly transparent, as prices and product characteristics were publicly available. Additional factors that would facilitate transparency included: (i) public signaling by senior executives (e.g. during investor calls), (ii) exchange of information through investment banks and (iii) high-level contacts between mobile network operator executives. The Commission considered that such tacit coordination would be sustainable because competitors who deviated from commonly beneficial market behavior could swiftly be disciplined. To secure the Commission's approval of the transaction, the parties had to offer commitments ensuring the market entry of a new operator in Italy.

Coordinated effects concerns are not unique to the U.S. and the EU, as the following examples demonstrate:

- Brazil: Coordinated effects concerns led CADE to impose in 2016 behavioral remedies in four high-profile cases.[11]

- Japan: The JFTC considered coordinated effects in *Idemitsu-Showa Shell/JX-TonenGeneral* and required commitments – the first case in a decade where concerns were raised exclusively on the basis of coordinated effects.

- South Africa: The Competition Commission prohibited in 2016 the proposed acquisition by packaging manufacturer Corruseal of Boxlee and Pride Pak, based on coordinated effects concerns. In light of ongoing collusion investigations in the affected markets, the Competition Commission found that coordination was likely as increased vertical integration in the industry made it easier to coordinate in the downstream market. Similarly, in June 2017 the Competition Commission bucked the international trend of approval when it prohibited the proposed merger in which Nippon Yusen Kabushiki Kaisha, Mitsui O.S.K. Lines Ltd and Kawasaki Kisen Kaisha Ltd propose to merge their container liner shipping businesses to form a joint venture. This prohibition was premised entirely upon a perceived likelihood of coordinated effects arising based on a history of collusion in an adjacent market.

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9 See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 2010 HORIZONTAL MERGER GUIDELINES § 7.2.

10 Id. at § 7.

11 Merger cases: *Saint-Gobain/Sicbras*; *JV Itaú-Unibanco/MasterCard*; *Bradesco/HSBC*; *The New Credit Bureau of Brazilian Banks.*

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IV. THE QUEST FOR A SUITABLE REMEDY - AND A SUITABLE PURCHASER…

Regulators across the globe increasingly request early identification of a divestment purchaser. Terminology might differ, but such structural remedies generally take one of two forms:

- The divestment purchaser must be identified and approved at the time of clearance (known as "upfront buyer" in the U.S. and "fix-it-first" elsewhere).

- Conditional clearance is granted but closing is delayed until the approval of the purchaser (known as "upfront buyer" outside the U.S.).

Businesses and practitioners expect "fix-it-first" and "upfront buyer" solutions to be used only where there is a material risk that a suitable divestment purchaser will not be found. However, looking at recent behavior of a number of competition authorities we see a different picture:

- EU: One third of European Commission decisions in 2016 requiring a structural remedy involved a "fix-it-first" or "upfront buyer" - a significant proportion for a remedy meant to be the exception rather than the norm.

- China: Three of MOFCOM's four conditional clearance decisions in 2015 and 2016 required a "fix-it-first" solution. MOFCOM has historically shown itself willing to impose behavioral commitments (unlike the U.S., which also required an upfront divestment buyer in all three of these cases), and this seems a clear example of international alignment.

- U.S.: The authorities are increasingly willing to litigate, and in cases such as *Electrolux/GE, Staples/Office Depot* and *Halliburton/Baker Hughes* have rejected proposed divestitures as inadequate and litigated successfully. Other cases, such as *Anthem/Cigna* and *John Deere/Precision Planting*, were challenged in litigation and have since been abandoned. The FTC's second remedy study, published in January 2017, emphasized that the most critical elements of a divestiture remedy are defining the package of divestiture assets and selecting the buyer. Other factors affecting outcome include: implementation of the remedy (including the buyer's ability to conduct adequate due diligence); the transfer and retention of customers; and the respondent's obligation to provide supply, transition services and employee access. The FTC is likely to take these factors into account in future cases.

- South Africa: The Competition Commission often requires remedies even in cases with no or minimal competition concerns, based on statutory public interest considerations which the regulator is obliged to consider. In the *Coca-Cola Bottling* and *AB Inbev/SAB Miller* cases, for example, although the transactions created very limited competition concerns in South Africa, the merging parties committed *inter alia* to a ban on retrenchments, the creation of a considerable skills and business development fund and the localization of production. In the 2015/2016 financial year, some 28 mergers were approved subject to public interest conditions (of which 25 involved employment-related conditions), compared to just 11 over the first decade of competition regulation in South Africa.

Not all competition authorities have demonstrated such an interventionist approach. In Latin America, many authorities are more hesitant to impose remedies in global transactions with a low or moderate local nexus. Since 2014, the overall number of mergers conditionally cleared has decreased in Chile, Colombia and Mexico, and the intervention rate is even lower for global transactions. In both Mexico and Colombia, only one global transaction was made subject to remedies in 2016 (*Boehringer Ingelheim/Sanofi* and *Diebold/Wincor Nixdorf* respectively) but, in both cases, the transaction was also subject to remedies in other jurisdictions. The Colombian competition authority has expressed concern in a recent OECD submission that intervention could lead to merging parties leaving smaller jurisdictions, eliminating the parties as effective competitors altogether. On the other side of the globe, even Japan's active Fair Trade Commission has shown restraint, requiring a remedy in only one foreign-to-foreign transaction in its 2016 financial year. Again, this transaction was also subject to remedies elsewhere.

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Overall, many competition authorities seem to adopt a "wait and see" approach for controversial global transactions. They will first observe how the deal is treated in the U.S. and the EU, if necessary postponing their decision and, in some instances, requiring a "me-too" remedy. However, truly global remedy packages, where a single set of assets or behavioral commitments address competition concerns in all jurisdictions, remain the exception. One example was the resolution of the *NXP Semiconductors N.V.* and *Freescale Semiconductors Ltd* deal in 2016 which was reviewed by the antitrust authorities in the U.S., EU, South Korea and China.[12]

"Upfront buyer" requirements can lead to a substantial delay in the transaction timetable, as well as adding an additional layer of complexity to the process. When planning a deal, parties must factor in that a "one-size-fits-all" remedy solution is unlikely to be found unless (i) the transaction involves a worldwide market with a clear-cut overlap, and (ii) an identified purchaser is willing to buy global assets or businesses. This is a high standard to meet.

V. LOOKING FORWARD

Gun-jumping or failure to file is increasingly likely to be detected due to use of sophisticated monitoring tools and *ex-post facto* reviews, as well as continuing international cooperation. Authorities are willing to impose high fines even for technical violations of notification requirements in non-problematic cases. Consolidation across industries has led to a revival of coordinated effects concerns and upfront scrutiny of potential divestment purchasers.

Stepping back and looking at the wider competition landscape, it remains to be seen to what extent the rise of protectionist rhetoric in major economies around the globe will influence and re-shape the mandate of competition authorities. Governments in jurisdictions including China and South Africa permit their competition authorities to go beyond pure competition concerns and to take into account public policy considerations, and have been criticized for the uncertainty, delay and bias these considerations infuse into the process. Will the U.S. and the UK, two long-standing champions of free trade, now go down the same path? In the last decade, international cooperation between competition authorities has focused on achieving non-conflicting outcomes when reviewing the same transaction. If the protectionist trend were to prevail, businesses and their advisors could easily find themselves entangled in a cross-border tug-of-war of conflicting industry policy considerations.

12 *NXP Semiconductors N.V. and Freescale Semiconductors Ltd*; FTC DKT. C-4560, January 21, 2016, where divestiture of the RF power amplifier business was required.

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