Practitioner's perspective

Solving the global jigsaw

How do you manage the risks linked to local merger control laws? Samantha Mobley and Grant Murray explain

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Approximately 120 jurisdictions worldwide have merger control laws. Almost all provide for penalties for failure to notify qualifying transactions. Most laws are suspensory, which means the deal cannot close until regulatory clearance is obtained.

Leading global competition authorities are committed to convergence – but the reality for a busy in-house lawyer is a dizzying array of national (and sometimes regional) merger control regimes to navigate.

The risk is real: more than 30 merger control authorities across five continents imposed total fines of over US$90 million for failure to file or unauthorized implementation in the last four years alone. This includes two fines totalling ₹40 million (US$598,000) in India; a fine of US$22 million by the European Commission; and five fines totalling over US$2 million in Brazil.

Three compliance tips can help you manage the risks of non-compliance with local merger control laws.

1. Obtain a robust assessment of regulatory risk: Early awareness of national merger control rules and a robust and principled evaluation of the risks of failing to notify are vital. Difficult decisions may need to be made about whether to notify.

Local knowledge of the rules and a seasoned commercial assessment of the risks is essential. A useful "no names" enquiry can often be made of the local competition authority, e.g. to confirm a tentative conclusion on whether a notification is needed. If so, local advisers may be able to use pre-filing consultations with the local competition authority to ensure that it is reviewed quickly and without holding up the wider timetable.

2. Spot issues early on: National rules still vary widely including on issues such as when a transaction will amount to a notifiable merger or acquisition.

Companies may have been caught off-guard, not realizing, for example, that the first step in a series of planned corporate acts may be enough to give rise to a notifiable merger, triggering a notification obligation under merger control rules.

In many countries, the acquisition of a minority interest with related veto rights on key issues such as business plan, budget and key personnel can confer "control" and constitute a notifiable event. But the acquisition of a minority interest can give rise to a notifiable merger for other reasons, which might come as more of a surprise, e.g. a seemingly small equity interest may be of greater significance amid low voter turnout.

Make sure that corporate planners know where the pitfalls may lie, especially when dealing with target companies with global operations.

Early involvement of merger control specialists can ensure that a notification does not delay closing or, if required, can enable the deal to be restructured to avoid a notification requirement.

3. Manage the risks between signing and completion: Companies have been fined for implementing transactions after filing, but before obtaining permission to complete. There is often much pressure not to stand in the way of efforts to maximize deal value, but merger control rules generally require companies filing their merger competitors to remain independent on the market until approval is granted. The pressure to integrate results in details being exchanged between competitors which should not be, or even in the buyer taking control of the target prematurely ("gun-jumping").

The line between legitimate pre-acquisition conduct or planning and "illegal" integration is not always clear. However, two issues may help manage the risks:

- *Deal documentation:* Although a buyer may seek protection from adverse changes in the value of the seller's business in the pre-closing phase, the deal documents should clearly specify what that means. In broad terms, gun-jumping concerns are unlikely to arise when the buyer asserts influence over decisions going beyond the ordinary course of business.
- *Gun-jumping guidelines:* Provide detailed guidance on what is permitted in the run-up to completion. That guidance needs to be tailored to market realities (including the competitive relationship between the parties) so that as much planning can take place as possible without overstepping the mark.

Merger control authorities worldwide are increasingly baring their teeth when it comes to non-compliance with notification and standstill obligations. The trend is not confined to one region or type of authority or company. In-house counsel can manage the risks by:

(a) obtaining specialized local input to interpret the rules and the risks; (b) ensuring that corporate planners know where the merger control pitfalls lurk (for example, in relation to minority interests, joint ventures, etc.) so that they know when to ask for merger control advice; and (c) providing pragmatic gun-jumping guidance so those involved in integration-planning know what is permitted between signing and completion in relation to the target's assets, products, customers and suppliers, and systems.

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