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Competition Law Merger Notification Issues in International Transactions

John F. Clifford and Omar Wakil

McMillan Binch LLP
Toronto, Canada

john.clifford@mcmillanbinch.com (+ 1.416.865.7134)
omar.wakil@mcmillanbinch.com (+ 1.416.865.7087)

Introduction[1]

Cross-border mergers frequently trigger a multitude of pre-closing antitrust reviews. Reviewing jurisdictions include those with well-developed competition laws such as Canada and the United States, as well as an ever-expanding roster of newcomers. Different substantive and procedural regimes can make a multi-jurisdictional transaction a complex, expensive and time-consuming process.

The economic liberalisation and technological change of the last 10 to 15 years have profoundly altered the global economy.[2] In the words of one commentator, "[m]arkets have overtaken the strong and insular economic authority of the nation state."[3] With economic liberalisation, nations have come to recognise the importance of competition "as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world"[4] and the importance of antitrust laws to safeguard competition in market economies. As a consequence, competition laws are being enacted rapidly, with most of these incorporating some form of voluntary or mandatory pre- or post-merger notification and review. Today nearly 70 jurisdictions have merger notification regimes — as recently as 1990 there were closer to a dozen.[5] The proliferation of reporting regimes can present a serious challenge to the business community and their counsel. The pace of change and the lack of reliable sources of information in some jurisdictions compound the problem.

In presenting this paper, our goal is to highlight some of the process issues that attorneys must grapple with when managing international transactions, all of which can impact the time and cost to complete the transaction; the paper is not intended to catalogue comprehensively the differences in the world's merger control regimes (or address substantive competition issues of any kind). We hope that after a review of the paper, transaction attorneys will appreciate the need to seek antitrust advice, and seek it early, on their multi-jurisdictional deals.

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[1] This paper was first presented at a meeting of the American Bar Association, Business Law Section on April 2, 2005. The authors are grateful to David G. Anderson, Allen & Overy LLP, for his comments on an earlier draft of the paper.

[2] International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report* (Washington DC: US Government Printing Office, 2000) at 33, online: <http://www.usdoj.gov/atr/icpac/finalreport.htm> (date accessed: 1 February 2005) [hereinafter "ICPAC Report"].

[3] E M Fox, "Competition in world markets: a global problem in need of global solutions" in Global Competition Review (April/May 2000) at 17.

[4] ICPAC Report s*upra* note 2 at 33.

5 See "The Merger Review Working Group: Fulfilling the Promise of the International Competition Network", Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, Presented at The Third Annual Conference of the International Competition Network, Seoul, Republic of Korea (21 April 2004) at page 2.

Jurisdictions with merger control / notification regimes include: Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Greenland, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Poland, Portugal, Romania, Russia, Slovak Republic, South Africa, South Korea, Spain, Sweden, Switzerland, Taiwan, Thailand, Turkey, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, Vietnam, Yugoslavia.

Merger Notification Threshold Tests Which Are Difficult to Apply

Although no two jurisdictions have precisely the same merger notification threshold test, most base their thresholds on some measure of assets and / or revenues. The thresholds in the EC Merger Regulation have been adopted in many countries, but revised to suit local needs.[6] But even with the popularity of the European approach, there remain a remarkable variety of threshold tests based on local or worldwide assets / revenues and / or market shares.

Market share tests

A number of countries (for example, Brazil, Greece, Latvia, Portugal, Russia, Slovenia, Spain, Taiwan and Turkey) employ mandatory reporting regimes based at least in part on market share tests. For example, in Slovenia notification may be required if the "companies involved in the concentration, including affiliated companies, jointly achieve more than 40 percent of sales, purchases or other transactions on a significant part of the Slovenian market." In this and other cases, share thresholds can be triggered and merger notification required regardless of whether there is any competitive overlap between the parties. In other words, although the merger could have no effect on competition, the fact that one party has a high share (even if the other party's share is 0%) could trigger a notification obligation. Although initially it is up to the parties to determine whether a market share threshold test has been crossed, it remains open to the regulatory agency to second guess.

It is no surprise that thresholds such as these generate considerable uncertainty because market definition is such a subjective, fact-intensive and economics-intensive process – the absolute opposite of what business needs to ascertain legal obligations in time-constrained situations.

Low financial thresholds

Some countries, like Estonia, have merger notification thresholds based on worldwide assets or turnover. In Brazil, notification was until very recently required if merger parties had worldwide sales in excess of R400 million (approximately US$130 million). Other countries, like Germany, Norway and Russia, have thresholds based on very low local turnover. German notification may be required if low worldwide turnover threshold are met and only one party has €25 million (approximately US$33 million) in German turnover. Similarly, merger parties may have a notification obligation in Norway if their Norwegian revenues exceed NOK 20 million (just over US$3 million). Russia's threshold varies (see below), but, at the moment, the prior approval of the Ministry of Antimonopoly Policy may required in connection with mergers involving "commercial organisations with an aggregate balance-sheet value" of a remarkably low US$350,000.[7]

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[6] See J W Rowley QC, D I Baker, O K Wakil and W T Miller, eds, *International Mergers: The Antitrust Process*, 3d ed (London: Sweet & Maxwell, 2000-2005).

[7] An approximate estimate; the legislation requires notification if the parties' assets exceed 100,000 times the minimum monthly salary.

Legislation in several jurisdictions does not explicitly state whether the relevant thresholds apply to the merger parties' local or global assets and / or turnovers. Although the extremely low levels of some of these thresholds suggest that legislators had local mergers in mind when setting the values, the relevant agencies often take a different view. One would assume a merger in any jurisdiction would require at least local effects to trigger the application of the legislation, but where there is no specific reference, the nexus between merger and market may be minimal (*e.g.,* modest export sales).

Unclear thresholds

Yet other jurisdictions have thresholds based on references to opaque, non-monetary values such as "economic units" or monthly minimum wages. For example, Russian legislation requires notification if the worldwide assets of the merger parties are in excess of 100,000 times the minimum monthly salary. Although ultimately referable to objectively established values, such thresholds do not allow non-local counsel to establish readily whether there may be a notification obligation.

At the extreme, even lawyers in jurisdictions with well-developed merger notification regimes such as the United States and Canada encounter tricky issues that may make it difficult to determine easily whether merger parties have pre – (or post) closing notification obligations. (All of these uncertainties can add time and expense to the merger process.) For instance, the Canadian *Competition Act* does not require pre-merger notification in connection with the acquisition of non-voting shares. However, where shares are acquired that can convert to voting shares or have limited voting rights triggered on the occurrence of certain circumstances, those shares may (later) be considered voting shares the acquisition of which may require pre-merger notification. In such circumstances, the pre-merger notification obligation would only arise when the right to vote arises (*e.g.*, upon conversion to voting shares) and not on the initial acquisition of the shares. This can create considerable uncertainty, as there may be a notification obligation at some point in the future, perhaps well after the initial acquisition of shares, and perhaps well after transaction and antitrust lawyers have completed their work on the acquisition.[8]

Opaque Triggering Events

In many jurisdictions the filing timeframe, or triggering event, is also far from clear. To illustrate, Brazilian legislation stipulates that notification is required within 15 business days from the date that the transaction was "realized." Initially, most practitioners took the view that the realization date equated with the transaction closing date. However, the antitrust authorities consider that any agreement signed by the parties that could affect

[8] This uncertainty is compounded by further uncertainty as to what sorts of voting rights may trigger the merger notification obligation. Full conversation to voting shares clearly would trigger a notification obligation; but what about the occurrence of an event that might give rise to a more limited voting right such as the right to vote only on a particular issue? The *Competition Act* defines "voting share" as "any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing" but the phrase " is continuing" has not been interpreted by the Canadian Competition Bureau, Competition Tribunal or courts.

competition—potentially even a Memorandum of Understanding—may trigger the notification requirement. Fines for failing to file (or filing late) range from approximately US$22,000 to US$2.2 million, and the authorities have historically been aggressive in enforcing violations of these vague laws.

Early Filing Deadlines

Many countries require that filings be submitted very quickly after a transaction emerges. For example, in Argentina notification of a public tender bid must be made within seven days of announcement. All other transactions are notifiable following closing. And although the European Commission has recently relaxed its rules, the national rules of nearly half—11 of 25—member states of the European Union theoretically require filings to be made within 7-30 days of signing or announcing a merger agreement.

Although deadlines are in practice sometimes flexible, the statutory requirements may be difficult to meet for transactions that emerge quickly (even if closing may be far in the distance) unless early work is done on relevant filings. Such timeframes compound the other uncertainties, complications and costs of doing global deals. In both hostile and confidential situations, the problem is exacerbated. Confidentiality requirements of public market transactions often hinder the ability to get the deep enough into an organisation to get the information needed to complete worldwide filings.

Burdensome Filing Requirements

America's straightforward HSR filing has not been the model followed in most of the world's jurisdictions. Many regimes call for notifications that require detailed substantive analyses to be made at an early stage of the transaction. Part of the distinction reflects a theoretical divide between jurisdictions with "clearance" statutes and those with "notification" laws. In Europe, for instance, the huge amount of information required by the Form CO is arguably justified as the review process results in a clearance decision. The light US and Canadian filing requirements reflect the fact that notification is designed (merely) to put agencies on alert and to give them an opportunity to seek additional information and / or challenge a merger; most cases do not result in a formal decision.

However, the fact remains that completing merger review process can be burdensome. This is true not only of the EU, but also Brazil, China, South Africa, Turkey and every European jurisdiction that has modelled reporting requirements on the EU model. (Indeed, some notification regimes require a detailed substantive analysis just to determine whether a filing is required!) Numerous jurisdictions also require merger parties to supply quantities of data that are often difficult and time-consuming to obtain yet add little real insight into the relevant substantive issues. For instance, Argentina requires that sales be broken down by local customs code categorization and Mexico "requires exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not they have any relevance to the competition analysis, and otherwise imposes highly formalistic burdens that are not needed for the competition authority to make its judgments".[9]

Unsolicited Bids

Unsolicited takeover-bid transactions give rise to a unique set of issues. The law of many jurisdictions does not contemplate transactions other than negotiated, consensual deals. This is reflected in their antitrust notification rules that require the submission of a single filing with detailed information about both parties before the notification will be considered complete.[10] In a hostile bid situation, the target may be unwilling to provide the detailed information required by antitrust authorities and thus make it difficult for the bidder to make the filings and obtain the clearances it requires (or desires) before closing the bid, potential giving the target a strategic advantage. And, the antitrust agency may have no effective way to compel the target to provide the required information.[11]

The Costs of Multi-jurisdictional Deals

Transaction lawyers and their clients also should be prepared to incur significant expenses if multiple merger notifications are necessary, regardless of whether the transaction raises substantive issues. The most obvious costs are merger notification filing fees. In the US, a filing fee of US$20,000 per acquiring person per transaction was introduced in 1990; today it ranges from US$45,000 to US$280,000 depending upon the size of the transaction. Canada, Germany, Hungary, Spain, South Africa, the UK and 20 other jurisdictions have filing fees. (They are important—some may say crucial—sources of agency funding in a number of counties and because of that there is a real likelihood that more and more jurisdictions will implement them over time.)

Other costs include out-of-pocket costs (*e.g.*, lawyers' and economists' fees and document production / translation costs[12]); regulatory delay (i.e., lost savings, efficiencies and synergies due to the running of a statutory waiting period or full-blown investigation); lost employee time and management attention; and excessive relief (i.e., remedies intended to solve a non-existent or unlikely competitive problem or relief in which the costs outweigh the competitive benefits).[13] The ABA and International Bar Association recently commissioned PriceWaterhouseCoopers to carry out a study of merger review costs. Amongst other things, *A*

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[9] See ABA Antitrust Section, *Report on Multijurisdictional Merger Review Issues* (May 1999) at 8, online <http://www.abanet.org/antitrust/comments/1999/icpacmr.html > (dated accessed: 1 February 2005).

[10] For example, Argentina, Czech Republic, Poland and South Africa.

[11] In Canada, the target has a statutory obligation to provide the information required to complete its portion of a notification filing within 10 days (or 20 days, if the bidder files a long form filing) of being notified by the Commissioner of Competition: Competition Act, s. 114(3). Similar rules exist in the US.

[12] Translation costs can be significant. Jurisdictions such as Czech Republic, Russia and Slovenia may require deal documents to be translated before certifying a notification as complete.

[13] See J Sims and D P Herman, "The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation," 65 Antitrust Law Journal (1997) 865.

tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews[14] estimates that the average multi-jurisdictional transaction involved eight completed or considered filings and that the external costs of merger reviews averaged €3.3 million (approximately US$3.7 million using June 2003 exchange rates). The study also found that the internal and external costs of merger review represented, on average, 42% of transaction costs.

Some years ago Jacques Bougie, then President and Chief Executive Officer of Alcan, summarised some of the issues Alcan faced in connection with the review of the proposed Alcan-Pechiney-Alusuisse merger[15]:

- There were over 40 countries in which the parties had assets and / or revenues that may have triggered merger notification thresholds.
- More than 35 law firms provided antitrust advice.
- Two new merger control regimes entered into force between the initial public announcement of the transaction and its completion.
- Sixteen merger notification filings were ultimately made (not counting one post-completion merger filing and two foreign investment filings).
- Over US$100,000 in merger notification filing fees were paid.
- Notifications were ultimately submitted in eight different languages: Czech, English, German, Polish, Portuguese, Russian, Spanish, and Turkish.
- It took almost half a year to comply with the US Justice Department's "second request" for documents; Alcan's Montreal office alone generated 400 boxes of printed material, and one million pages of e-mails and thousands of Pechiney and Alusuisse documents had to be translated from French and German into English.

To make matters worse, much of this work had to be duplicated as the three-way transaction failed to proceed in the face of concerns expressed by the European Commission; the parties later completed two, two-way transactions in 2000 (Alcan-Alusuisse[16]) and 2004 (Alcan-Pechiney[17]).[18]

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[14] See *A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews* (June 2003) <www.pwcglobal.com/uk/eng/about/svcs/vs/pwc_mergers.pdf> (dated accessed: 3 February 2005).

[15] See also J. Bougie, "Reflections on the Merger Task Force at the Turn of the Millennium: the Requirement for Convergence of Multijurisdictional Merger Review Systems," European Commission, *E.C. Merger Control: Ten Years On* (London: International Bar Association, 2000) 73-81.

[16] See "Alcan Merger with Alusuisse Creates Global Leader in Aluminium-based Automotive Products and Services" (10 October 2000) online <http://www.alcan.com> (dated accessed: 3 February 2005).

[17] See "Final Results of Alcan's Offer Exceed 95 Per Cent of Pechiney Securities Tendered" (8 January 2004) online <http://www.alcan.com > (dated accessed: 3 February 2005).

Conclusion

The moral from all of this? As noted at the outset: seek antitrust advice and seek it early. Many international transactions can and often are small enough to avoid mandatory pre-merger notification, and many others require only two or three notifications. However, transaction lawyers and the business people who hire them should not be caught off guard by the potential costs and complexities of multi-jurisdictional merger reviews. At the extreme, competition concerns in a major foreign jurisdiction may bring the entire transaction into question. The transaction lawyer should therefore consult antitrust counsel early in the transaction process. The initial size-up of potential foreign filings and substantive risk often can be completed quickly and without the assistance of foreign counsel, but consulting and perhaps retaining foreign antitrust lawyers will be necessary in other cases. If filings are necessary, foreign counsel will almost certainly be required, and ought to be engaged early enough to ensure that foreign merger filings and reviews are completed as expeditiously as possible. The goal of all involved can and should be the same: minimise the risk that the antitrust process will delay or stymie completion of the proposed transaction.

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[18] The authors represented Alcan in connection with its multi-jurisdictional merger filings on the proposed three way Alcan-Pechiney-Alusuisse merger and the subsequent Alcan-Alusuisse and Alcan-Pechiney mergers.

About the authors

John Clifford is a partner in the Corporate and Competition Law Groups of McMillan Binch LLP. John's corporate/commercial experience is diverse. He has extensive experience on negotiated acquisition and divestiture transactions (on both the buy and sell side), debt financings and corporate re-organizations. He works closely with in-house counsel and senior executives to provide advice and guidance on the management of legal issues that arise as part of the day-to-day operation of business, including review/preparation of contracts, corporate governance, privacy and legal compliance, responding to litigation threats, contract terminations and employment issues.

John has advised clients on hundreds of merger transactions and regularly assists clients to respond to Competition Bureau investigations into matters such as unlawful conspiracies and abuse of dominance. This includes responding to so-called "Section 11 Orders", making submissions to the Competition Bureau and co-ordinating client-Competition Bureau interactions. He also regularly provides advice on strategic alliances and other joint ventures, grey marketing, pricing and distribution practices, advertising issues and compliance programs.

John is identified as a leading antitrust/competition lawyer in the *Chambers Global Guide, Euromoney's Guide to the World's Leading Competition and Antitrust Lawyers, The Martindale-Hubbell Legal Directory* and *The Canadian Legal LEXPERT Directory*.

John is vice-chair of the Canadian Chamber of Commerce, Competition Law Task Force and vice-chair of the Antitrust Committee of the American Bar Association's Business Law Section. He is the past-Chair of the Canadian Bar Association's Competition Law Section's Reviewable Matters and Private Action Committee and co-chaired the CBA's Section 45 Task Force (which considered proposals to amend the Competition Act conspiracy offence).

John is a Director, Honourary Counsel and Secretary of the MS Society (Ontario Division).

Omar Wakil is an antitrust specialist at McMillan Binch LLP. His practice covers all areas of antitrust / competition law and foreign investment review. He works with clients involved in a wide range of businesses, including beverage alcohol; chemicals; confectionery; financial services; fine art auctions; health care; and mining, metals and packaging. In addition to handling domestic merger reviews, he has been responsible for the coordination of worldwide antitrust and foreign investment clearances on a number of multi-jurisdictional transactions. He also assists clients with a variety of criminal and civil competition law investigations.

Qualified as a solicitor in Ontario and England and a member of the Brussels Bar, in 2003 Omar was seconded to a leading international law firm in Brussels where he advised clients on antitrust issues arising under European law.

Omar speaks frequently on competition law issues at professional conferences and universities in Canada and Europe. He has also written extensively in the area and is also co-ordinating editor of the loose-leaf service *International Mergers: The Antitrust Process* (3rd edition: Sweet & Maxwell, London).