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EDITOR'S NOTE

Process Divergence As an Obstacle To Substance Convergence?

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IN RECENT MONTHS, THERE HAVE BEEN signs that antitrust agencies around the world are continuing to engage in efforts to more closely align the way they investigate mergers. Brazil has become the latest country to impose a pre-notification process of merger review. It follows other countries, such as India, that have also recently adopted HSR-like processes—requiring initial filings on transactions, followed by waiting periods during which the agencies investigate to determine whether to clear or block a transaction, or to require remedies.

In October 2011, the United States and the European Union celebrated twenty years of cooperation by issuing a new Guide to Best Practices on Cooperation in Merger Investigations.[1] The Guide suggests actions that merging parties can take to help facilitate cooperation during various stages of an investigation. The Guide also advocates that parties should allow the agencies to share information, sign confidentiality waivers, coordinate the timing of filings across jurisdictions, and discuss timing with the agencies as soon as possible. Finally, the Guide notes that in the remedial stage, cooperation is especially valuable to ensure consistent remedies; merging parties should therefore coordinate the timing and substance of remedy proposals and engage in joint discussions with the agencies.

Considerable strides have been made in substantive convergence. Horizontal merger guidelines across the world are consistent in seeking to protect competition and consumers and thus focusing investigations on the potential for harmful unilateral or coordinated effects.[2] Yet differences remain. For instance, in reviewing Intel's acquisition of McAfee, the EU required Intel to disclose information and provide technical assistance so that competing security software vendors could take advantage of new Intel microprocessor features.[3] On the same facts, the FTC required no relief.

And even when the EU and the U.S. come to the same result, other jurisdictions may not. In two recent transactions involving hard disk drive (HDD) businesses, the EU and the U.S. cleared both deals under the same conditions, while China imposed significant remedies. The EU and the U.S. both unconditionally cleared Seagate's acquisition of Samsung's HDD business and approved Western Digital's proposed acquisition of Hitachi's HDD business with the requirement that Western Digital divest certain Hitachi assets. In contrast, the Ministry of Commerce in the People's Republic of China (MOFCOM) imposed significant global behavioral remedies in both transactions, including requiring the acquirer to operate the target business separately until MOFCOM reconsidered the transaction, which would take place a minimum of twelve months later.

These differences can be explained by a variety of factors. First, in some cases, the different jurisdictions are simply enforcing different underlying statutes, which inevitably lead those jurisdictions to different results. One only has to compare the DOJ's jurisdiction to prevent mergers "that may tend substantially to lessen competition" with the FCC's "public interest standard" to understand why each agency's relief in the Comcast/NBCU transaction was so different. Some antitrust enforcers are similarly confronted with mandates to examine transactions on bases beyond preservation of competition.

Second, there are times when different jurisdictions confront different facts and there is no reason to seek substantive convergence. In the Unilever/Alberto Culver case, the UK's Office of Fair Trading (OFT) concluded that Unilever's acquisition of Alberto Culver would substantially lessen the competition for bar soaps in the UK. The OFT required Unilever to divest Alberto Culver's bar soap business, including the Cidal, Wrights, and Simple brands.[4] In the U.S., there were no issues with bar soaps, but the DOJ did conclude that the transaction raised issues in the U.S. markets for shampoo, conditioners, and styling aids and required divestiture in those areas.

Third, even when the underlying facts are the same, there can be different results simply because of different precedents and different approaches to enforcing the antitrust laws.

Yet, the often different processes that agencies use to begin investigations, obtain information, and consider remedies undoubtedly also limit substantive convergence. Indeed, for all the steps the EU and the U.S. have taken to converge on substance, the processes largely remain different, and it is difficult to think of a significant process change that either has taken because of things they have learned from the other. As one senior DG Competition official of the EC said at a recent presentation: "Process convergence may be more difficult than substantive convergence."

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The Process Differences Between the U.S. and the European Commission

The process differences between the U.S. and the EC are notable from the outset and occur throughout a merger investigation.

The Form. The U.S. HSR form typically requires that each party to a transaction separately provides certain information, such as the products and services from which it obtains revenues, the corporate structure, and a description of the transaction. It also requires the parties to submit pre-existing documents analyzing the transaction, including offering memoranda, studies, surveys, and analyses prepared by third-party advisors, and documents relating to anticipated efficiencies and synergies. The HSR form no longer requests information about vertical relationships between the companies.

In contrast, EU law requires that parties to a transaction submit one filing with extensive narrative information. The requisite information includes descriptions of all product overlaps, the market shares and competitors, top suppliers and top customers, and discussions of the "affected" markets—both horizontal and vertical. While the EC may request documents analyzing the transaction informally, the Commission does require that such information be submitted with the filing.

Pre-filing Discussions. In the EU, the parties will often contact the agency before submitting a filing. The parties and the agency reviewer will interact until the reviewer deems the filing complete and appropriate to submit. That process can take weeks or even months. The Commission typically finds it useful to have pre-notification contacts with notifying parties even in seemingly non-problematic cases. In contrast, in the U.S. it is common for the parties simply to submit their filings and wait for the agencies to contact them, even in transactions that the agencies are likely to investigate thoroughly. In some cases, the parties will make the strategic decision to contact the agencies before submitting their filings. In other countries, the practice varies as well, with some requiring advance discussions in all cases and some requiring advance discussions only in cases likely to raise significant issues.

Timing. The range of waiting periods varies considerably—both on their face and in actual practice. In the U.S., for most transactions, the HSR Act imposes a thirty calendar day initial waiting period followed by a second waiting period of thirty days after both parties have substantially complied with any requests for additional information. In reality, however, the actual timelines can vary substantially. Some parties begin discussions before the HSR filing is submitted, in an attempt to avoid a second request or to narrow the issues. Parties will also sometimes withdraw and refile their HSR filing in order to "extend" the first waiting period for another thirty days. And almost inevitably, the agencies ask for additional time after the parties have complied, a request difficult to refuse when staff indicates they will otherwise have to prepare as if they are going to challenge the transaction. The statutory timetable in the U.S. offers at best a rough guidepost of the timing.

In the EU, the initial waiting period (referred to as Phase I) does not begin running until the EC staff accepts the filing, a process that can takes weeks or even months. By statute, Phase I is twenty-five business days, while the basic period for a Phase II investigation is up to ninety business days. An extension of twenty business days may be sought by the parties no later than fifteen business days after the initiation of Phase II proceedings, or by the EC at any point, with the parties' consent.

The newest countries to add suspensory merger investigation regimes have timelines that can be quite lengthy. For instance, in India there is an initial thirty-day period that can be followed by 180 days for an in-depth investigation. The Brazilian authorities can take 240 calendar days or more to issue a decision.

Obtaining Information. The process by which the agencies obtain information is also different. In the EU, questionnaires—to the parties, to competitors, and to customers—requesting extensive narrative responses, are the norm. In the U.S., the FTC and DOJ staffs tend to request pre-existing documents/data and conduct interviews, rather than obtaining narrative responses. In the EU, the Commission can request information from third parties at any time, subject to penalties for late or incomplete responses. In contrast, the FTC and DOJ rarely, if ever, obtain compulsory process to issue requests for information to third parties until a second request has been issued.

Timing of Remedy Negotiations. In the EU, remedy negotiations must take place during a structured timetable. Remedies need to be offered by set times during Phase I and Phase II, and there are limits to the extent the investigation periods can be extended to allow the Commission to consider potential remedies. The FTC and DOJ can accept remedies at any time. Yet while the agencies can accept remedies without requiring full compliance with the second request, and do so with some frequency, it is more often the case that remedies come only after the parties have already complied fully with a second request.

Accepting Remedies and Challenging Transactions. It is well understood that the EU and the U.S. have different regimes for challenging transactions. The FTC and DOJ must obtain an injunction from a federal court to block a transaction, and such a process usually occurs in a matter of months. The EU can block a transaction by issuing a prohibition decision, but can be sued for that decision, a process that can take years.

The U.S. authorities have complete freedom to clear a transaction: the FTC cannot be challenged on its decision to accept a remedy; likewise, the DOJ has considerable freedom to accept remedies, subject only to the Tunney Act requirements that a federal judge examine the consent to make sure that it is in the public interest, considering the competitive

impact of the consent and the entry of such judgment upon competition in the relevant market. In contrast, in the EU, competitors and others can appeal the Commission's Phase I and Phase II clearance decision with commitments to the European Courts if they are able to show a sufficient interest in having the contested measure annulled.

The Impact of These Process Differences

These differences do not merely affect the process by which an authority conducts an investigation, they may affect the substantive outcome as well.

Obtaining Information. It is difficult to determine whether the differences in the way information is obtained lead to substantive differences or is a result of underlying differences in substantive views. Certainly, the initial filing required in the EU focuses on vertical issues in a way that the HSR form does not—and could lead to more attention to such issues.

Timing Differences. Timing differences may be the most significant obstacle to substantive convergence. In their Best Practices Guide, the EU and the U.S. suggest that parties make their filings at the same time in order to allow the agencies to coordinate their investigations. This is easier said than done.

The EU process of requiring pre-filing discussions with the staff to make sure the filing—which contains extensive information—is complete, means that delaying the HSR filing until the EC filing is made would put the U.S. authorities substantially behind the EC in terms of learning about the transaction. The parties could begin discussions with the FTC and/or DOJ at the same time they begin discussions with the EC, but such a course can have downsides. First, reaching out to the U.S. agencies may suggest the transaction is problematic since it is more often the norm in the U.S. to make the filing and wait for the agencies to determine how and whether to conduct an investigation. Second, in a transaction where there is a dispute between the agencies over clearance, i.e., which agency will review the transaction, a filing must often be made to force the agencies to resolve the dispute.

And even apart from the strategic considerations, filing in both jurisdictions at the same time does not guarantee that the timing of the EU and U.S. investigations will in fact run in parallel. In the EU, the parties could have considerable pre-negotiation discussions, make their filing, and then thirty-five business days after filing, accept Phase I remedies that conclude the matter. If the parties held off the U.S. filing until they made the EU filing so the initial thirty-day waiting periods ran in parallel, they would still be in the middle of responding to any second request when the EC closed the investigation with remedies.

If the EU process goes into a Phase II, and there is a second request process in the U.S., there is a greater chance of alignment of timing—but typically only if the parties enter into a timing agreement in the U.S. to agree not to close for a period of time after they have submitted their second request responses. While the parties may determine that this makes strategic sense in some cases, they may not always wish to do so.

Given these various scenarios, it is inevitable that in some cases either the U.S. agency or the EC must make a decision before the other agency obtains all the information that it would like. This timing divergence is magnified when considering all the other regimes in which a transaction might be notified. As a result, there may be times when the country that makes a decision first must do so without full consultation/cooperation with the other agency, making it more difficult for the agencies to ensure they are aligned on the outcome of a transaction.

Legal Requirements to Block or Accept Remedies. The procedural requirements involved in clearing/blocking transactions can also lead to substantive differences. The U.S. authorities may be more hesitant to attempt to prohibit a transaction, knowing the burden is on them to convince a federal court to enjoin a transaction—and that parties regularly fight such challenges. On the margin, in the EU, the Commission may be somewhat more likely to challenge a transaction knowing that the parties are less likely to undergo an extensive process to challenge a prohibition decision.

Similarly, the fact that the EC's decision to clear a transaction with remedies can be challenged by third parties—something neither the FTC and DOJ face—may make the Commission likely to require more stringent remedies and to obtain conduct remedies that satisfy the concerns of competitors compared to the U.S., particularly in close cases.

That process differences inevitably will lead to different substantive outcomes, at least to some extent, is not surprising. And if the different outcomes are relatively minor, they are not terribly troubling. But as more countries become more active in antitrust enforcement, with both substantive and procedural differences that could greatly impact the outcomes of cases, it may be time for increased discussion of how the processes may be an obstacle to the convergence both parties and many antitrust authorities alike seek. ■

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[1] U.S.-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (Oct. 2011), *available at* http://www.justice.gov/atr/public/international/docs/276276.pdf.

[2] *See, e.g.*, Rachel Brandenburger & Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, ANTITRUST, Summer 2011, at 48.

[3] Case COMP/M.5984—Intel/McAfee, Comm'n Decision at 63 (Jan. 26, 2011), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m5984_20110126_20212_1685278_EN.pdf.

[4] Case ME/4805/10—Unilever/Alberto Culver Co., OFT Decision at 6 (June 16, 2011), *available at* http://www.oft.gov.uk/shared_oft/mergers_ea02/2011/unilever.pdf.