

MAYER • BROWN

Global Strategies
DOING BUSINESS INTERNATIONALLY



The Importance of Global Merger Filing Coordination

Adrian L. Steel , Jr.
Partner – Washington, DC
+1 202 263 3237
asteel@mayerbrown.com

Dr. Jens Peter Schmidt
Partner – Brussels
+32 2 502 5517
jpschmidt@mayerbrown.com

Gerry O'Brien
Associate – Hong Kong
+852 2843 4355
gerry.obrien@mayerbrownjsm.com

April 27, 2011

Mayer Brown Speakers



Adrian L. Steel , Jr.
Partner – Washington, DC
+1 202 263 3237
asteel@mayerbrown.com



Dr. Jens Peter Schmidt
Partner – Brussels
+32 2 502 5517
jpschmidt@mayerbrown.com



Gerry O'Brien
Associate – Hong Kong
+852 2843 4355
gerry.obrien@mayerbrownjsm.com

Agenda

- Introduction
- Multi-jurisdictional filings - Issues & complications
- Solution - A coordinated global approach
- Case study #1
- Case study #2
- Final comments

Introduction

- M&A deals are again on the rise
 - But so is merger scrutiny....
 - More than 90 jurisdictions now have merger filing requirements, each with their own thresholds, procedures & decisional practices
 - The regimes impose a large burden on transaction participants, particularly as the deal 'risk' that must be managed can seem low for many M&As:
 - In most regimes 90%+ of deals cleared unconditionally
 - EU: 21 prohibition decisions out of 4500+ reviews (1 in last 3 years)
 - US: In 2010, 46 second requests out of 1,166 filings (4%); leading to 41 challenges -> 40 consent decrees/abandoned or restructured deals
 - PRC: 1 prohibition decision in 3 years
 - For business, the goal is to avoid substantive hurdles, and to jump the procedural hurdles without too much delay & cost

Multi-jurisdictional filings - Issues & complications

- Why achievement of the goal is becoming more difficult:
 - Continued evolution of mature regimes, but the goal of 'convergence' is a long way from reality
 - Continued proliferation of merger regimes:
 - Emerging markets particularly active
 - Often developing nations where industrial policy factors strongly in review, leading to uncertainty and a lack of transparency
 - New regimes often adopt aspects of mature systems, without the full framework of guidance/regulations that makes those systems workable (i.e. imprecise filing triggers); 'risk tolerance' issues thus come into play
 - Officials often reluctant to narrow their powers, leading to notification requirements for deals lacking any appreciable nexus with the jurisdiction
 - Lack of coherent legal approach to joint ventures

Multi-jurisdictional filings - Issues & complications (con't)

- Recent developments of note:
 - India
 - New merger regime commencing 1 June 2011, but uncertainty regarding mandatory notification thresholds & application to JVs
 - Pakistan
 - An 'on again' / 'off again' regime, and low mandatory notification thresholds continuing to cause headaches
 - China
 - Slow development of key explanatory rules, unaccommodating consultation processes, and now... national security review

Multi-jurisdictional filings - Issues & complications (con't)

- Recent developments of note: (cont'd)
 - Indonesia
 - A new regime plagued by uncertainty in terms of the transactions that should be notified and the approach of the regulator
 - Egypt
 - A post-closing notification scheme with low thresholds and uncertainty as to a local nexus requirement

Multi-jurisdictional filings - Issues & complications (con't)

- Common problems to overcome when submitting for review:
 - Unclear and evolving rules/guidance on mandatory notification triggers & the content of notifications
 - Determining when to notify in relation to 'voluntary' regimes
 - High volume of information required by many regimes
 - Review hold-ups despite absence of any clear competition concerns

Multi-jurisdictional filings - Issues & complications (con't)

- Common issues if a filing is required in *multiple jurisdictions*:
 - Keeping on top of emerging and constantly evolving regimes
 - Volume of work/time required by in-house lawyers and executives
 - Ensuring consistent messages to the regulators, particularly in light of growing cooperation and information exchange between agencies
 - Forecasting deal timing and approval prospects
 - Meeting the various 'deadlines' for notification

Multi-jurisdictional filings - Issues & complications (con't)

- Counseling on external communication process/board presentations:
 - Many regulators require submission of documents prepared to/by Board (US: "4(c) documents", EU: "5(4) documents", & mirror PRC provisions)
 - Careful drafting of such documents is appropriate in light of potential production to regulator
 - Official communications (presentations/speeches/analyst calls, etc) are also read by regulators
 - Expressions that can be misunderstood should be avoided
- Consistent advice on such issues is vital for efficiency/risk management

Multi-jurisdictional filings - Issues & complications (con't)

- Current Approaches:

- Outsourcing to different law firms in each jurisdiction

- Not a clear solution to the issue of ensuring consistent messages are provided to regulators
- Can be a challenge to identify the right law firm with relevant industry and other experience to deal with the competent national regulator

- Coordination by a single firm with a narrow presence

- Potential benefits of this can be lost if the relevant firm does not have an adequate presence & experience in relevant jurisdictions

Multi-jurisdictional filings - Issues & complications (con't)

- Coordination by firm with broad resources/presence
 - A single law firm is responsible for managing all merger filing aspects for client's deals, on a global basis:
 - Keeping and regularly updating merger control-related information - turnover, subsidiaries, etc (dataroom)
 - Determination of jurisdictions where filing is required, including via existing data on turnover/presence gained from previous deals
 - Analyzing substantive merger control risks which need to be reflected in sale and purchase agreements (SPAs)

Multi-jurisdictional filings - Issues & complications (con't)

- Coordination by firm with broad resources/presence (cont'd)
 - A single law firm is responsible for managing all merger filing aspects for client's deals, on a global basis:
 - Drafting consistently framed filings, according to each jurisdiction's requirements
 - Advising on timing of clearance prospects for relevant jurisdictions, again leveraging off learnings from past deals
 - Coordination with firms in additional jurisdictions as required, meaning one contact and billing point for clients
- Coordination method should be customized for businesses' needs & integrate seamlessly with legal/other resources

Solution - A coordinated global approach

- Benefits of the 'one firm' solution for a deal:

- Allows for:

- Early detection of filing requirements & issues/timing implications
- Reflecting merger control risks in SPAs & better risk management
- Less interruption with ongoing business due to more coordinated & cost-effective information gathering
- Consistent messages to regulators across multiple jurisdictions
- Taking advantage of 'on the ground' relationships with regulators
- Proper coordination between antitrust team & broader deal team

Solution - A coordinated global approach

- Benefit of the 'one firm' solution for *an ongoing period*:
 - Assists to expedite future filings & facilitate efficiencies via:
 - Centralized repository of info/data
 - Knowledge of where (personnel/reports) to get further information
 - Knowledge of regulator sensitivities/expectations re: client/industry
 - Ensures consistent messages to the regulator from deal to deal
 - Ensure consistent criteria for making a business decision not to file
 - Developing an approach for dealing with new regimes

Case Study #1

- SolarCo proposes to acquire ConglomCo's solar panels business (SPB)
- SolarCo sells mainly to India, China and Brazil (it is a major supplier for latter in particular)
- SPB's main facilities are in South Africa & Argentina, but it also has a small facility in Russia; it sells to distributors who mainly sell onto China, Brazil

Case Study #2

- USFoodCo proposes to form a 50/50 JV with EUFoodCo
- USFoodCo will contribute management expertise & cash; EUFoodCo will contribute distribution facilities
- JV will export food products to the EU with co-branding
- Both companies already sell significant volumes to Korea and China - but have no assets in those locations
- What happens if USFoodCo subsequently wants to buy out EUFoodCo's stake in the JV?

Final comments

- The proliferation of merger regimes means keeping up to date with developments is a 'full time job':
 - Only takes deficient knowledge of 1 regime to stop a deal in its tracks
- Coordination of filings by a single firm:
 - Reduces delays, costs and -most importantly- deal risks
 - Provides platform for ongoing refinement of filing process
 - Allows in-house lawyers to set basic ground rules, easily monitor costs, & then focus on other responsibilities to get the deal done

Questions & Answers



Mayer Brown Speakers



Adrian L. Steel , Jr.
Partner – Washington, DC
+1 202 263 3237
asteel@mayerbrown.com



Dr. Jens Peter Schmidt
Partner – Brussels
+32 2 502 5517
jpschmidt@mayerbrown.com



Gerry O'Brien
Associate – Hong Kong
+852 2843 4355
gerry.obrien@mayerbrownjms.com