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MERGERS

Antitrust issues for companies executing M&A strategies

BY CLAIRE SPENCER

Antitrust law is an important consideration for any large company seeking to expand through M&A – particularly if that expansion will take them over geographical borders. The subtle differences between antitrust laws can break a deal if the buyer is not prepared. While the eventual aim of the global community may be to harmonise antitrust laws, this is unlikely to happen for some time, as the antitrust process has become increasingly complex of late. Despite this, antitrust legislation the world over has the common goal of consumer welfare enhancement, and to that end, there have been notable antitrust procedural developments in the US and Europe in recent years.

The US and Europe have been instrumental in the development of antitrust procedures. In recent years, both regions have made amendments to their antitrust approaches. Due to more diligence, the approval of deals by the US Department of Justice (DOJ) has increased. "Ultimately, the DOJ has not authorised a challenge to a merger in the past three years. The DOJ lawyers, however, conduct vigorous investigations with detailed analyses, request an enormous amount of information from merging parties, depose executives of the merging parties, and issue subpoenas to third parties. Competition analysis is much more sophisticated than it was in the past. The agencies no longer rely on structural presumptions of harm, but are examining more complicated competitive effects and discussing these competitive issues with the merging parties, consumers and competitors," says Andre Barlow, a partner at Doyle, Barlow & Mazard PLLC. For example, the DOJ recently approved a merger between XM and Sirius, the sole providers of satellite radio subscription services in the US, based on a decision that took into account more than brand competition, specifically the prospect of potential competition from other technologies. The approach of the Federal Trade Commission (FTC) is somewhat different. Where the DOJ seeks out other modes of competition as mitigation, the FTC focuses exclusively on the companies themselves, which gives them more scope for challenging deals. As a consequence, more deals were challenged. This should quash growing criticisms of lax antitrust enforcement in the US.

In Europe, recent changes have occurred in merger control procedures. Analytical methodology has become more transparent since the European Commission (EC) published its guidelines on the assessment of horizontal mergers and non-horizontal mergers. However, as Juan Rodriguez, a London-based partner at Sullivan & Cromwell LLP, points out, the guidelines have a downside. "Although these guidelines rightfully allow the EC a substantial margin of discretion when reviewing individual transactions, they set out the analytical framework that the EC applies in merger cases. They therefore provide predictability as to how the EC will frame its analysis. In addition, the 'safe harbour' working presumptions set out in both sets of guidelines are a useful yardstick for companies and their advisers wishing to assess the level of scrutiny that a merger may undergo when it has been notified to the EC." The method of analysis has also changed from a broad dominance-based test to one that provides for significant impediment to competition. In addition, EC demands for more extensive evidence have increased in merger cases. This has been driven largely by the EC's desire to safeguard against its decisions being overturned by the Court of First Instance.

Cause for concern?

Both the US and Europe have taken the concerns of the legal community on board, but it is clear that there are lingering issues and misgivings, particularly surrounding the frequency and success of merger challenges. However, it is important to remember that merger reviews take far longer nowadays due to the sheer volume of information that the relevant authorities are expected to sift through. Furthermore, the FTC challenged three mergers in 2007, and although it lost all three cases at the district court level, the end result was that one of those mergers was subsequently abandoned and one is currently being appealed.

A big issue, particularly for the EC, is the subject of vertical mergers. Kiran S. Desai, a partner at Mayer Brown International

LLP, believes that there are three schools of thought. "The first view is that of laissez-faire, where a vertical merger would not raise competition issues sufficient to warrant intervention by an antitrust authority. The second view is that, while in general it can be expected that vertical mergers do not raise substantive competition issues, they are capable of producing anti-competitive effects. Each transaction should be assessed on the merits but mergers satisfying certain conditions may be able to be assumed to raise no issues. The third view is that vertical mergers present no differences in principle to any other form of merger, they should be subjected to a full investigation and assessed on the merits." As a result of this conflict, the EC has established economic principles to guide practitioners through the mire, which closely resemble the second school of thought. For example, it outlines the sort of vertical merger that denies other companies to access an important supplier, which allows for a much quicker decision.

The US and Europe do share many of the same concerns across the board but it is fair to say that vertical and conglomerate mergers are viewed differently on both sides of the Atlantic. Although both agencies act in the interests of the consumer, and as such already have convergent goals, convergence of practices is the eventual aim, and how far the two markets have come in achieving that is difficult to quantify. "While there is a perception that the EC enforces antitrust law more aggressively than the US antitrust authorities, there is not that much difference in the way the European and US regulators conduct merger investigations," explains Mr Barlow. "The EC and the US antitrust agencies have the same goals of maintaining competition. The analysis and the approach are very similar. The EC and the DOJ's Antitrust Division increasingly co-operate when evaluating large acquisitions. The investigations of Cookson's acquisition of Foseco and Thomson's acquisition of Reuters are examples of the close cooperation that exists between the Antitrust Division and the EC."

The fact that both parties can work together and maintain a dialogue in this manner is very positive for the companies involved, to the extent that the messages they receive from both bodies are consistent. This means that the EC may not in fact be more aggressive than the US-based antitrust authorities in this regard. However, it is true the EC does take a less flexible approach to unilateral conduct, and there are differences from a procedural standpoint. Also, mergers are not ranked equally in the list of priorities on either side of the Atlantic; they have not been a major focus for the current US administration.

Cross-border issues and other complexities

While the relationship between the US and Europe may be good, cooperation between two or more nations does not always go as smoothly. "Political debate between connected countries should not feature in a merger control process given that merger control should be a matter of economics, not politics," asserts Mr Rodriguez. "The fact remains that a target's home government can put up obstacles. The EC has legal weapons to try to counteract such intervention, although faced with recalcitrance by an EU member state, the EC's only legal recourse is a lengthy action for infringement against the state. The best advice to merging parties that fear they may face political obstacles is first to engage a suitably qualified government affairs adviser and second, if the transaction has an EC dimension, engage at an early stage with the EC in order to give the EC maximum assistance in preparing to take action under EC law against the relevant member states."

Furthermore, there are third party reactions to consider. According to Mr Barlow, merging parties need to have a well organised outreach and contact strategy designed to explain the efficiencies and benefits of the deal to various stakeholders. "They must anticipate their opponents' arguments and rebut them when discussing the transaction with the antitrust agencies and politicians," he adds. "It is especially important in cross-border deals because third parties can influence the debate and the politics in various countries. This means that a strategy is needed for customers, competitors, and politicians located in various countries that may be impacted by the merger. In the US, politicians tend not to impact the antitrust analyses of transactions." However, politicians and state antitrust agencies can cause delays to the federal merger review process by encouraging the antitrust regulators to conduct a more thorough investigation. Merging parties should understand that regulators are under additional pressure and work with staff to provide them with all of the information necessary to approve the deal.

Cross-border deals are complicated at the best of times, and the antitrust authorities need to be thorough in order to preserve their reputation as protectors of consumer interests.

Additional complexities have come about from private equity deals and sovereign wealth funds. For example, in private equity deals, agencies must determine the identity of the purchaser, whether the purchaser has ownership interests in a competitor of the target, and what degree of control and influence the purchaser has over the firm that potentially creates the antitrust concern. This, coupled with the development of new merger regimes in countries such as China and India, could then lead to complexity in determining which countries' merger regimes apply. "This is because most merger regimes apply to transactions if the parties to the transaction satisfy certain turnover thresholds," explains Mr Desai. "The thresholds vary from country to country. Furthermore, determining the turnover of a private equity investor can be complex because of the complex structure of many private equity houses. For example, ▸▸

commonly there is an LLP structure, but the relationship between the general partner and the limited liability partners will vary from fund to fund. Of even more variation is the relevance of the manager, as well as the precise relationship it has with other funds or investment companies with which it has links."

Working with authorities and implementing remedies

Even if a deal is challenged, there are steps that can be taken to remedy the problem. Both the US and the EC are happy to negotiate if there is a possibility that the challenge can be avoided. "The time honoured remedy is to divest the overlapping business in the area of concern. This is clearly the authorities' preferred remedy as it provides a permanent solution that does not require follow-up monitoring. A hybrid 'quasi-structural' type of remedy involves a commitment to sell products or to grant access to infrastructure or intellectual property rights on fair and non-discriminatory terms backed up by an arbitration mechanism. This type of remedy has become increasingly frequent and has been used in mergers involving a variety of contexts," says Mr Rodriguez. However, due to the fact that arbitration proceedings based on the remedy are not public, it is impossible to determine how often the beneficiaries have had to invoke arbitration, and with what level of success. Mr Desai believes that some transactions cannot be remedied. "Competition authorities are more wary than ever about claims that remedies offered by the parties would be effective, following studies produced by several competition authorities that have concluded that many remedies the authorities accepted in the past were not effective in remedying the anti-competitive effects resulting from the transactions concerned," he says. Despite this general rule, it does seem that competition authorities have become open to increasingly complex remedies, many of which have a strong behavioural element.

Adhering to antitrust criteria can be difficult for companies with a large market share, and the increasingly complex structure of ownership that goes with cross-border deals. Combining this with private equity or sovereign wealth fund involvement does not make things easier. Cross-border deals are complicated at the best of times, and the antitrust authorities need to be thorough in order to preserve their reputation as protectors of consumer interests. Anecdotally, the EC takes that role more seriously than the US, but in reality, their goals are one and the same, if not their methods. ■

Kiran S.Desai
Partner
T: +32 2 502 5517
E: kdesai@mayerbrown.com
www.mayerbrown.com

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Kiran Desai is widely regarded as one of Europe's leading legal practitioners in the areas of national and international competition law and EU regulatory matters. Kiran provides comprehensive, in-depth guidance on EU general law, with particular emphasis on procurement law and with demonstrated experience in governmental affairs. Recently, Kiran has advised clients on regulatory issues concerning developments in nanotechnology.

Kiran has been representing clients on these and related topics for 16 years, practicing first in London and, since 1993, in Brussels. He joined Mayer Brown in 1987 and was named partner some ten years later. In 2006, Kiran was recognized in The Legal Media Group's Guide to the World's Leading Competition and Antitrust Lawyers. He is also recognised in the Legal Business Report's European Legal Experts 2008 in its Belgian EU and Competition.