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# Global Strategies

DOING BUSINESS INTERNATIONALLY



## Merger Control – A Global Update

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# Mayer Brown Speakers



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# Agenda

- Introduction
- New or significantly revamped regimes
- Latest developments in key jurisdictions
- Trends in merger assessment and review processes globally
- Expectations for 2012
- Guidance on managing multi-jurisdictional filings
- Final Comments

# Introduction

- More than 90 jurisdictions now have pre-merger filing requirements, each with their own thresholds, procedures & decisional practices
- In most regimes, 90%+ of deals cleared unconditionally ... but the process can still cause long delays, and identifying/fulfilling filing obligations can be an intensive exercise if not well managed
- One of the difficult tasks is keeping up to date with developments, as:
  - new regimes keep emerging
  - existing regimes continually adjust their filing 'triggers' and standards
  - uncertainty remains about the scope of even well-established regimes
- The aim of this webinar is to assist to ensure you're 'up to date' with key developments from 2011, and well placed to deal with any filing processes required for deals in 2012

## Latest developments in key jurisdictions - China

- No change to the tests for mandatory notification, but events in 2011 provided additional clarity on how aspects of these tests apply PLUS new guidelines on substantive assessment
- Escalating Mofcom workload (notifications up 52% in 2011, leading to long delays - BUT new internal expedited review process will help)
- Mofcom decision-making becoming more transparent; but increased confidence = more prone to challenge deals cleared elsewhere
- A new 'national security review' process has commenced
- New measures imminent on:
  - Penalties for failing to notify relevant transactions
  - Further fast-track procedures for deals obviously raising no concerns
  - Increased powers for Mofcom to review deals that do not trigger mandatory notification

## Latest developments in key jurisdictions - U.S.

- New HSR requirement that firms provide information regarding activities and minority holdings of “associates” that are neither parents nor subsidiaries of the filing party – focused on **private equity groups** and **master limited partnerships**.
- “Associate” -- entity that is not a parent or subsidiary of acquiring person but that:
  - (a) manages acquiring person’s operations or investment decisions (“managing entity”);
  - (b) controls , is controlled by, or has same parent as managing entity;
  - (c) manages, is managed by, or is under common operational or investment management with managing entity; or
  - (d) whose operations or investment decisions are managed by acquiring person.
- HSR Form Items 6 and 7 require **acquiring person only** to report information on associates, associate subsidiaries, and entities in which associates hold minority interests that derive revenues in same NAICS codes as acquired entity or assets.

## Latest developments in key jurisdictions - U.S. (cont'd)

- New requirements for documents that must be submitted with HSR filing.
  - Item 4(c) requires filing parties to produce documents produced by or for officers or directors analyzing acquisition with respect to market shares, competition, competitors, markets, and potential for sales growth into product or geographic markets.
  - Now in addition to Item 4(c), **new Item 4(d) requires:**
    - (i) – all Confidential Information Memoranda (CIM) prepared by or for officers or directors of the Ultimate Parent Entity of the acquiring or acquired entity; if there is no CIM, must provide documents given to buyer serving a “similar function.”
    - (ii) – all studies, surveys, and reports prepared by investment bankers, consultants, or other third-party advisors for officers or directors which analyze the same subject matter as covered in item 4(c) – includes documents created both by engaged advisors and advisors seeking engagements, even if not hired (“pitch books”).
    - (iii) – all studies, surveys, analyses and reports analyzing synergies and/or efficiencies of the deal prepared by or for any officer or director.

## Latest developments in key jurisdictions - U.S. (cont'd)

- Changes to HSR Item 5 Revenue Reporting Requirements
  - Welcome Changes
    - New Item 5(a) – limits reporting to revenues for the filing person's most recent fiscal year.
    - The new HSR form no longer requires revenue reporting using a 2002 base year. Therefore, companies no longer need to collect and aggregate historical sales data, as previously required by Item 5.
  - New Requirements
    - The new Item 5(a) requires filing companies to report revenue by NAICS code for products manufactured outside the United States that are sold directly to U.S. customers.
    - In the past, such revenues were not reportable.



# Latest developments in key jurisdictions - Europe

- 'One Stop Shop' – but case referrals:

- Pre-notification – by the parties:

- Referrals to member states (Article 4(4))
    - Referrals to the Commission (Article 4(5))

- Post-notification

- Referrals to member states (Article 9)
    - Referrals to the Commission (Article 22) :

- As of 31/12/2011, total of 26 Article 22 requests
      - 'Dutch clause'? N.B Luxembourg
      - Timing & delays: *SC Johnson / Sara Lee* withdrawn, June 2011

- Erosion of legal certainty: carefully negotiate CPs to closing and transaction drop-dead dates <sup>9</sup>



## Latest developments in key jurisdictions - Europe

- Rare outright merger prohibition: Brussels, 1 February 2012, *'Commission blocks proposed merger between Deutsche Börse and NYSE Euronext.'*
- Commissioner Joaquín Almunia said: *"The merger between Deutsche Börse and NYSE Euronext would have led to a near-monopoly in European financial derivatives worldwide. These markets are at the heart of the financial system and it is crucial for the whole European economy that they remain competitive. We tried to find a solution, but the remedies offered fell far short of resolving the concerns."*
- Eurex, operated by Deutsche Börse, and Liffe, operated by NYSE Euronext, are the two largest exchanges in the world for financial derivatives based on European 'underlyings.' They compete head-to-head and are each other's closest competitors.

# Latest developments in key jurisdictions - Europe

- Spain

- New Notice for the Short-form Procedure: Aims to clarify eligible mergers

- Germany

- Legislative proposals to align with EU in 2013
- Gun-Jumping: ‘Domestic Effects’ and *EMC / Cisco* case

- Portugal

- Guidelines on Merger Control Remedies

## Latest developments in key jurisdictions - Brazil

- Brazilian competition law was amended on 30 November 2011, and will enter into force on 29 May 2012
- Mandatory pre-closing filing
  - Under the revised law, Brazilian competition law will require parties not to close any transactions subject to merger review prior to receiving approval from the CADE
- New jurisdictional thresholds
  - According to the new law, a filing will be required when the following two turnover thresholds are met:

## Latest developments in key jurisdictions - Brazil (cont'd)

- A Brazilian turnover of R\$400 million (approximately US\$210.5 million/€163 million) for one of the applicants; and
  - A Brazilian turnover of R\$30 million (approximately US\$15.8 million/€12 million) for another applicant
- While these thresholds increase the local nexus required with Brazil, the turnover of the entire group of both the seller and the buyer must be considered
  - As a result, if a subsidiary of a parent group with Brazil turnover in excess of the threshold is being sold, the threshold is met even though the target subsidiary itself may not meet the threshold
  - The market share test is eliminated

## Latest developments in key jurisdictions - Brazil (cont'd)

- The new law consolidates the merger review process into CADE and gives CADE 240 days (extendable by 90 days) to complete its merger review
  - While it is hoped that CADE will seek to complete its review in a much shorter time to conform to international practice, concern exists as to whether CADE will have sufficient resources to do so
- Transition – Not clear whether and to what extent the new law will apply to transactions pending on 29 May 2012

# New or significantly revamped regimes - India

- Merger control provisions effective 1 June 2011; a mandatory & suspensory filing regime, with deals to be cleared if they will not have an appreciable adverse effect on competition
- When filing must be made: Within 30 days of board approval/contract
- Test for notification:
  - Is the transaction a "combination" (interpreted in a broadly similar way to "concentrations" under EU law)?
  - Do relevant parties to the combination meet specified asset and/or turnover thresholds
- BUT filing "*need not normally*" be made if (1) merger takes place entirely outside India & would have an **insignificant impact\*** in India; (2) \*If target has minimal domestic assets (~US\$55m) or turnover (~US\$166m); or (3) certain acquisitions made by way of investments;

## New or significantly revamped regimes - India (cont'd)

- Notification process: Pre-notification consultation possible (given the CCI's tendency to make additional information requests in respect of submissions to date, this may be prudent to avoid later delay)
- Short form notification available if no horizontal or vertical overlaps, or limited horizontal overlaps only (i.e. combined share <15%) ; but note CCI may form its own view on this after submission
- Review process: Technical max of 210 days (180 per CCI practice); Phase I = max. 30 days, with deals only be moved into Phase II if CCI forms a prima facie opinion that there are competition issues
- Progress and take-outs to date: 19 deals cleared to date, all within Phase I (although some with a portion of Phase I suspended); notable decisions concerning need to consider Seller turnover when applying thresholds & limitations on applying intra-group transfer exemption



## Latest developments in key jurisdictions - Russia

- On 6 and 7 January 2012, the “Third Antimonopoly Package” to the Russian competition law became effective
- With regard to merger control, the revised law contains several proposals aimed at taking a broader approach in order to reduce the volume of filings submitted to the FAS
- Filing thresholds increased for all transactions:
  - Global assets of either party in excess of 7 billion roubles (approx. \$234 million USD) or global turnover of either party in excess of 10 billion roubles (approx. \$333 million USD)

## Latest developments in key jurisdictions - Russia

- No filing required for a foreign transaction if the target (i) has no subsidiaries or assets in Russia, and (ii) has turnover in Russia of less than 1 billion roubles (approx. \$31.5 million).

## Latest developments in key jurisdictions - Others in brief

- Slovenia - Independent Authority Created
- Pakistan - Notification thresholds set at very low levels (would catch most multinational deals) BUT conflicting views on the extent to which obligation applies to deals outside of Pakistan
- South Korea - On 27 December 2011, the Korea FTC announced its plan to extend the scope of the pre-closing business combination filing obligation to encompass share acquisitions effective 1 January 2012. Previously, share acquisitions were subject to a post-closing filing obligation regardless of the size of assets or turnover of the transacting parties. Now, share acquisitions which meet the filing thresholds will be subject to pre-closing review by the KFTC like mergers and other control transactions. The revision does not apply to transactions signed before 1 January 2012

## Trends in merger assessment & review processes

- Increasing convergence on standards for substantive review?
- Increasing cooperation between regulators,. i.e.
  - US-EU Best Practices on Cooperation
  - Cooperation agreements signed in 2011 between China regulators and U.S. & U.K. counterparts
- Ongoing financial crisis concerns raise questions about the prospect of increasing protectionism/departures from review norms

# Expectations for 2012

- Europe: continued penalties from DG COMP and national authorities for failure to (i) file; (ii) submit full information; (iii) avoid providing misleading information to the authorities; more case referrals?
- Brazil: Significant “growing pains” in implementing the new review scheme accompanied by major timing challenges for global transactions
- China: Imposition of penalties on business operators who fail to notify relevant transactions, following new regulations in this area and statements by senior Mofcom personnel

# Guidance on managing multi-jurisdictional filings

- **How to manage the process of identifying where notifications may be required**
  - Industry / country focus, e.g. a mining transaction with African aspects should note new authorities, such as Botswana
  - Create stand-alone Rest of World merger control team amongst Mayer Brown ‘deal team’ competition lawyers, to manage foreign counsel, with direct lines into business to obtain relevant information
- **Jurisdictions where special care is needed:**
  - Jersey: recent fines for failure to notify (also Norway)
  - China: Time-management aspects critical; current long review delays but certain steps will help expedite process
- **Expectations for review timing:** e.g. Italy, Ukraine

# Final Comments

- Many important developments over recent months; the proliferation of 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
- Multinationals should consider strategies to allow cost-effective and prudent management of merger filing issues
  - i.e. Coordination of advice and filings by a single firm in liaison with in-house teams:
    - Reduces delays, costs and -most importantly- deal risks
    - Provides platform for ongoing refinement of filing process / database of information
    - Allows in-house lawyers to set basic ground rules, easily monitor costs, & then focus on other responsibilities to get the deal done

# Questions & Answers





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