Centralizing Merger Controls

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Gotts
Ilene Gotts introduced the panel and provided an overview of the topic that the panel was to discuss.

Mergers and acquisitions are a global phenomena, with many mergers requiring filings in several different jurisdictions. However, merger reviews continue to occur on a national level. As John Fingleton recognized in a recent ICN speech, a system of national regimes in a world of international markets risks considerable harm to competition and consumers at an international level as it can result in a failure to address: (1) private anticompetitive behavior; (2) unwarranted public restrictions on competition; (3) potential chilling effects from differing substantive standards and policies; and (4) burdens caused by duplicative and inconsistent procedures.

The number of jurisdictions requiring pre-merger notification is spreading. Some developing countries, such as Indonesia, are positioning themselves to review mergers. Other countries, such as Japan, are revising premerger filing requirements to cover a broader range of transactions. Today, there are over 80 notification regimes and many require premerger—rather post-merger—filings.

The multiplicity of merger controls raises the issue of coordination among the different countries' antitrust agencies. In particular, it raises the following questions: (1) How can one obtain consistent outcomes when mergers are being reviewed by several different countries? (2) Can individual countries achieve their national objectives when other countries are reviewing mergers that affect them? (3) How can countries lower merger review costs by coordinating their reviews?

Coordinated multi-national merger review is complicated by the fact that different countries have different levels of experience with merger review. Some have substantial experience, while others only recently adopted mandatory merger review regulations. Given the ongoing changes, it is unclear how efforts to coordinate merger reviews will proceed. Some experts, such as Eleanor Fox, have proposed that a "central merger review authority" (like the WTO) coordinate merger reviews. While, at least in the near term, this appears unlikely, there may be some interim steps that could be taken to alleviate some of the potential for substantive and procedural divergence, as well as eliminate some of the costs, burdens, and time associated with multiple merger reviews.

This panel looks at a number of different countries' merger review policies to identify issues raised by multi-jurisdictional merger review. It also discusses the ways in which one might: (1) reduce costs/burdens of complying with premerger notification requirements; (2) promote a common approach to how to assess the competitive effects of mergers; and (3) design effective remedies to address concerns of multiple jurisdictions.

Tojo
Yoshizumi Tojo provided an overview of recent developments in merger review in Japan, using the Japan Fair Trade Commission's (JFTC's) recent review of BHP Billiton's proposed acquisition of Rio Tinto's shares as an illustrative case.

This merger, which was publicly announced on February 6, 2008, involved the combination of two leading producers of iron ore and coal (coking/metallurgical coal) imported into Japan. There was a concern that the merger might have a substantial adverse effect on the Japanese market because the merging parties produced around 60% of Japan's iron ore supplies.

This acquisition involved multiple jurisdictions, not just the JFTC. Others that investigated the acquisition included: European Commission, Australia, and the US DOJ. As a result, the merger involved potentially conflicting national interests.

The US DOJ cleared the merger fairly early and the Australian authorities (ACCC) cleared it in October, 2008. The JFTC opened an investigation in July 2008, serving a demand for information through public notification. Under Japanese law, the parties faced potential criminal charges.

The JFTC's investigation of this acquisition was complicated by the fact that the acquisition occurred before a H-S-R type of premerger notification requirements were fully equipped in Japan (that assured the submission of information) and by the fact that parties didn't have any assets in Japan (which made it more difficult for the JFTC to develop an effective remedy).

The European Commission also decided to oppose the merger in November 2008. Afterwards, Billiton's abandonment of the TOB due to the global economic meltdown allowed the Japanese to close their investigation on December 2, 2008.

The only competitive assessment of the acquisition was issued by the ACCC. They concluded that the change in number of suppliers (from three to two) was unlikely to affect competition given: (1) supply/demand factors (e.g., growth in global demand led to ongoing expansion and entry); (2) competition from the remaining major supplier, Vale; (3) the presence of countervailing buying power (e.g., steel makers); and (4) evidence of recent new entry and expansion despite high barriers to entry. The Australians also concluded that there was no clear incentive to limit quantities in the short term or to limit capacity growth in the long term, so there would be no anticompetitive effect on the "global seaborne supply of iron ore."

In the ensuing discussion, it was pointed out that this case occurred before Japan's merger law changed and that it would be even easier for the JFTC to intervene to stop a merger today.

Baker
Donald Baker discussed recent changes in Chinese antitrust law, focusing on China's review of mergers. As background, he noted that, for at least 20 years after the US adopted its modern merger

law in 1950, considerable confusion reigned—as agencies attacked and courts outlawed various mergers that we would regard as competitively harmless today. He suggested that it behooves us to show some patience as the Chinese agencies and courts try to sort out what economic principles and political presumptions to apply under the "broad gauge" merger law that China recently enacted.

This new law has been applied to at least three mergers, each of which raises a distinct set of circumstances: (1) Coca Cola/ Huiyuan Juice Group Ltd.—an essentially conglomerate merger involving quite different beverages; (2) InBev NV/SA/Anheuser-Busch Companies, Inc.—where the focus was on minority foreign ownerships in competing Chinese breweries; and (3) Mitsubishi Rayon Co Ltd/Lucite International Group Ltd.—a horizontal merger with very substantial market shares in China.

> Coca Cola/Huiyuan involved Coca Cola's attempted acquisition of a leading Chinese fruit drink company. However, China's Ministry of Commerce (MOFCOM) blocked Coca-Cola's proposed acquisition under Article 28 of China's Anti-Monopoly Law (AML). This was MOFCOM's first merger prohibition after the AML came into effect on August 1, 2008. MOFCOM's concerns included: (1) A concern that Coca Cola would use its market position to disadvantage smaller beverage companies ("Coca-Cola could use its market dominance in carbonated soft drinks to limit competition in the market for juice through tying, bundling, or other exclusive transactions"/ "the concentration will also reduce the room for small and medium-sized juice companies to survive, and will have an adverse effect on the structure of competition in China's juice market."); (2) A concern that Coca Cola's control over a strong Chinese brand would increase its market power ("because brands can restrict entry to the market, it would be hard for the threat of potential competition to remove the restrictive effect of competition."). MOFCOM is rumored to have urged Coca Cola to divest the Huiyuan brand name as a remedy, but Coca Cola was believed to have been unwilling to do this.
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> Inbev/AB involved InBev's proposed acquisition of AB. This was the first merger decision published by MOFCOM under the AML. The merger raised competitive issues because Inbev and AB both owned a minority positions in two Chinese breweries (Zhujiang Brewery and Tsingtao Brewery respectively). MOFCOM conditionally approved the merger in a decision that was published on November 18, 2008. The conditions in the approval included: (1) restrictions on increases in AB's existing 27% equity share in Tsingtao Brewery; (2) restrictions on increases in InBev's existing 28.56% equity share in Zhujiang Brewery; and (3) restrictions on the acquisition of any stake in China Resources Snow Breweries and Beijing Yanjing Brewery, two of China's largest domestic brewers. MOFCOM also directed InBev-AB to inform it of any change in its controlling shareholders or the shareholders of InBev's controlling shareholders.
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> Mitsubishi/Lucite involved Mitsubishi Rayon's proposed acquisition of Lucite. This transaction involved a competitive overlap in the manufacture of methyl methacrylate (MMA). The merging firms jointly controlling 64% of Chinese capacity. MOFCOM conditionally approved the acquisition on April 24 2009. The merging parties were required to spin off 50% of Lucite's MMA capacity. This divestiture was handled like a western-style divestiture: there was a hold separate until the assets were sold off and, if the divesture did not occur in a specified time, a divestiture trustee would have been appointed.

Chinese antitrust review appears to involve the application of a broad set of principles. However, it appears that the principles diverge somewhat from US principles. In particular, it appears that the US antitrust authorities start with a greater presumption of efficiencies.

In the subsequent discussion, it was pointed out that there isn't a lot of precedent, which makes it very scary to advise clients (both about substance and procedural issues). However, it is quite helpful that they are publishing at least short descriptions of the factors underlying their decisions. Indeed, China appears to be ahead of other countries that are in their first year of merger review.

Davidson
Ken Davidson discussed the draft guidelines on premerger notification and merger review that were released by the Indonesian Business Competition Supervisory Commission (KPPU) in March. He based his comments, in part, on the experience he had from being an FTC resident advisor to the KPPU from August 2002 through July 2003 and his experience with merger review at the FTC.

His comments were based on draft regulations that he was asked to review because the final regulations have not yet been translated into English.

The Indonesian Guidelines reflect international practice in general and the American system in particular. The substantive antitrust standard borrows heavily from the American merger guidelines. Nonetheless, they are a fairly daring assertion of authority for a competition agency, especially one operating in a civil law jurisdiction. The Indonesian competition law, passed in 1999, prohibits anticompetitive mergers and requires that mergers be reported in 30 days of consummating the merger. To create a premerger notification system, the KPPU has established a voluntary premerger reporting system. Although the reporting is voluntary, the KPPU has committed itself to being bound by its premerger determination (thus it is sort of the opposite of the US system where review is mandatory, but not binding on the government).

The KPPU's creation of a binding premerger notification review process seems like an excellent approach given that the uncertainty and costs of post-merger review and remedies are potentially high and ineffective in restoring competition.

Having said this, there are two facts about the KPPU that should be recognized. First, the KPPU is one of the most active competition agencies in transitional economies and have adjudicated more than 50 cases since 2003. Second, the decisions have not focused on market power; most have involved bid rigging and similar issues.

In his review of the draft Indonesian guidelines, Davidson made a number of suggestions:

(1) The definition of acquiring and acquired person does not make clear that the person includes all related entities, not merely the legal entities that are the parties of the transaction. This is crucial, given the US experience under HSR.
(2) Reportability in the proposed rules is determined solely by the size of the parties to the transaction test. This would unnecessarily make tiny transactions reportable simply because they are between large parties. He suggested a size of transaction test.
(3) The proposal contemplated only three possible outcomes for reported transactions (a no objection letter, an objection letter, and a conditional no objection letter). However, it would be sensible to have a fourth outcome: a "no determination" letter where a party fails or refuses to supply information needed to complete a timely review of the merger.

(4) The proposal contained no procedure for judicial review of the KPPU's determination about reported mergers. This appears to be unfair to the parties who object to the determination and could defeat the purpose of providing premerger review. Allowing for potential court review would appear to be desirable.
(5) Finally, to encourage persons who may report proposed mergers, but do not report, Davidson suggested that it may be sensible to establish more restrictive standards for transactions that could have been reported but were not reported. This difference in standards was justified by reference to the tighter time limits that are imposed on the KPPU when doing post-merger reviews compared to the more flexible premerger review process.

Stern

There are more than 80 jurisdictions that have merger reporting requirements. Mergers are affected by both substantive and procedural differences in merger review regimes. Moreover, differences in jurisdictions may require different, and potentially conflicting, remedies.

Ronald Stern focused on the challenges raised by a multi-national merger in which different antitrust agencies may propose potentially conflicting remedies (perhaps because they have somewhat different antitrust concerns). He used the General Electric Company/Instrumentarium OYJ merger as a case study to illustrate the types of problems that may arise and how these problems might be resolved.

The GE/Instrumentarium merger was announced in December 2002 (and a Form CO was submitted on February 28, 2003). While the merger was subject to review by a number of different jurisdictions, three jurisdictions had serious concerns: US, EU, and Canada.

Instrumentarium (including its Datex-Ohmeda division) was a producer, manufacturer, and supplier of anesthesia machines and mechanical ventilators. While there were a number of overlaps between Instrumentarium and GE, the overlap on which the US, Canadian and EU antitrust authorities focused was patient monitoring (critical care monitors), although the DOJ was also concerned about mobile C-arm x-ray machines used in surgery.

The different jurisdictions were on somewhat different time tables and were using somewhat different review procedures. Because the EU was somewhat ahead of the US, the merging parties started consent negotiations with the Europeans before the DOJ had decided whether it would issue a complaint. The EU negotiations led to an agreement under which GE Healthcare was forced to divest the Spacelabs Medical division of Instrumentarium (the division that contained a portion of Instrumentarium's critical care monitors). Ultimately, the US and Canadian authorities agreed that this remedy was adequate to address any competition law concern regarding patient monitors. This mutually acceptable remedy resulted from numerous discussions that focused on making sure that the different agencies were all comfortable with the settlement and that their requirements were consistent. In this transaction, the issue of defining a consistent scope of the divestiture across multiple jurisdictions was made easier by the fact that Spacelabs had been a separate company that had recently been acquired by Instrumentarium and had not yet been integrated into Instrumentarium's monitoring business.

With respect to Canada, while the Canadian authority typically wants to have its own order, in this case the Bureau agreed to avoid having its own duplicative order. Instead, the Bureau asked GE to

publish a statement that made it clear that the EU order had global ramifications (and thus the Canadians could point to the EU settlement as a resolution of any Canadian concerns).

With respect to the US, DOJ wanted its own order. This meant that the merging parties had to work with both the US and EU authorities to reach a consistent settlement. Substantial work was required because the initial US proposal had terms that could have resulted in inconsistent requirements that would have conflicted with the EU order that had been negotiated earlier. Ultimately, the DOJ was willing to modify its language so that it was consistent with the language in the European settlement agreement. The modifications that were obtained included: (1) The DOJ was willing to accept an arrangement under which there would be a single trustee (acceptable to both the EU and the DOJ) that would handle the divestiture if it wasn't completed in a timely fashion. (2) The merging parties obtained a clause that protected them if the trustee proposed to sell the assets to a party that the EU had not approved.

As this case study evidences, it would be helpful if a system of best practices were adopted to facilitate the negotiation of consistent remedies when multiple jurisdictions are investigating mergers. While deals where this is an issue are not common, they do occur.

In the discussion that followed, it was pointed out that it is particularly difficult to develop these arrangements in a time-sensitive merger. It was suggested that the ICN might play a role in developing these best practices.

General Discussion

The coordination among different government entities has some precedent in the US, since there is a need for federal and state enforcers to coordinate their activities.

While the conflicts between jurisdictions can clearly be a problem, at least some of the jurisdictions (particularly the US, EU, and Canada) now have a track record of working together to resolve some inconsistencies.

Antitrust law differs from other areas of the law in that it requires economic predictions of future market effects to determine legal liability. This leads to uncertainty on projections and principles--which increases the likelihood of differences across antitrust agencies.

When comparing international antitrust regimes, one must recognize the interplay between competition policy ("invisible hand" of the market) and politics ("seen hand" of government intervention). Politicians will sometimes want to allow a large anticompetitive merger if it preserves a national champion or promises to preserves jobs in a politically sensitive area. The long run losses to consumers of allowing a merger are much less visible than short term survival or stability. Often national competition agencies are international allies, since they have common goals and frequently have to deal with other parts of their governments that serve and protect other constituencies (commerce, labor, transport, etc.).

There are significant differences across antitrust regimes.

1) Some have an explicit "public interest" standard in which competition policy can be overruled by public interest. However, others factor this in as an informal consideration.

2) Regimes differ with respect to how competition policy is enforced. Some have a judicial approach (go to court to settle differences). Others have an administrative system (where regulations and negotiations resolve antitrust issues).

When HSR was enacted, it wasn't known that the US would move from a judicial system to more of an administrative system. However, there hasn't been a merger case at the Supreme Court since HSR was enacted. Today, it would be a rare case for it to be worthwhile for merging parties to wait until the Supreme Court hears an appeal of a merger case.

There was an informative workshop sponsored by the DOJ and FTC last January that related to capacity building at the antitrust agencies. A commentary on this workshop is available at www.kennethdavidson.com (or on the AAI website).