

Merger Investigations: Perspective of the Merging Parties

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Introduction (I)

- The single objective of any merger transaction is to close the transaction by the agreed closing date (unless it is a hostile take-over).
- Obtaining merger clearance, if required or advisable, is one of the steps in closing a transaction.
- The merging parties want to cooperate with the merger review agency to achieve their single objective.

Introduction (II)

- The merging parties (in particular, the acquiring party) typically create a plan to obtain merger clearance.
- Key elements of a plan are:
 - creation of a merger review team;
 - assessment of merger review risk;
 - consideration of acceptable remedies;
 - preparation for information requests;
 - coordination between merging parties;
 - dealing with reactions from customers, suppliers, competitors and general public;
 - for multi-jurisdictional transaction, coordination of merger reviews in all jurisdictions; and
 - strategy for merger review.

Merger Review Team

- A merger review team is created to deal with merger review under competition laws.
- It is typically composed of internal staff and external advisors including lawyers, economists and other experts:
 - internal staff would executives and relevant personnel, and
 - external advisors would include lawyer to make the merger filing as well as lawyers responsible for the transaction.
- In a multi-jurisdictional transaction, external lawyers are appointed in all relevant jurisdictions as well a lawyer is asked to coordinate and to direct merger reviews in all jurisdictions.

Assessment of Merger Risk

- For each jurisdiction for which a merger review is made, risk assessment includes
 - the length of the review period and the timing of a decision on the merits;
 - likelihood of clearance;
 - likelihood of serious complaints from competitors, third parties, governmental bodies;
 - the nature and extent of information requests; and
 - for a multi-jurisdictional transaction, the nature and extent of cooperation between jurisdictions.

Acceptable Remedies

- If there is some risk that the transaction may be seen by an agency to raise competition concerns, parties may consider as part of its strategic planning
 - if only in a preliminary way, what remedies they may be willing to offer to secure clearance, and
 - the timing to offer remedies.
- Senior executives are often reluctant to engage in thinking about remedies until they feel that a remedy is needed to secure clearance.

Information requests

- If a transaction raises some competition concerns, there is recognition that the merger review agency will likely make information requests to the merging parties.
- For the parties, the timeliness of their response to information requests would affect the speed of merger review.
- The parties want to submit a well-organised response to document and other information requests.
- The parties want information requests to be relevant and specific.
- In responding to information requests, the parties are concerned about preserving the confidentiality of much of the information submitted.

Coordination

- Coordination between merging parties includes:
 - ensuring consistency of presentations and positions to merger review agency;
 - controlling information sharing to personnel on a 'need to know' basis; and
 - controlling information sharing to minimise competition concerns during merger review and in the event, merger does not proceed.

Multi-jurisdictional Transaction

- A multi-jurisdictional transaction typically requires merger review in more than one jurisdiction.
- The role of coordinating counsel includes:
 - influencing which agency assumes review or takes lead;
 - ensuring consistency of positions taken in different jurisdictions;
 - managing the timing of review decisions;
 - coordinating confidentiality issues; and
 - resolving any conflict of proposed or suggested remedies.

Strategy for Merger Review

- A strategy for merger review may include one or more of the following elements:
 - position on whether or not to acknowledge at the outset that there *could* be competition concerns;
 - submission of a merger brief (in addition to the formal filing) with supporting expert studies to address, *inter alia*, possible competition concerns;
 - what to offer as a remedy and when to make an offer to address competition concerns; and
 - securing the support of third parties and neutralising any opposition to transaction especially coming from third parties and other governmental bodies.

Conclusion

- Merger parties who are well advised would have a well-defined strategic plan to secure clearance of the merger transaction from every relevant jurisdiction.

The End