Summer 2018’s top antitrust & competition stories
Falling foul of merger control rules can be expensive

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Governments put more hurdles in the way of foreign investment

A veritable ‘arms race’ towards stricter foreign investment controls is in full swing in many jurisdictions. This is having a real impact on timing and strategy for M&A deals.

No poach agreements: What’s the big deal?

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Beware the risks of a merger review morphing into an antitrust investigation

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Falling foul of merger control rules can be expensive

We recently reported on competition authorities around the world clamping down on procedural breaches of merger control rules (see our Predictions for 2018). These breaches range from early implementation of transactions prior to merger control clearance (a breach of the standstill obligation or “gun jumping”), to the provision of incorrect or misleading information to competition authorities.

This trend continues apace. And as the frequency and severity of fines increase, dealmakers need to pay particularly close attention to the rules. Below are some tips for staying clear of the risks.

Seek timely advice when considering using two-step deal structures

In competitive auctions, strategic buyers often use two-step deal structures. This is because the standstill obligation can place strategic bidders at a disadvantage if they face more protracted merger approval processes compared to non-strategic bidders. These structures have received scrutiny by competition authorities in the past and so care is required when using them. For example, the EC is currently investigating Canon for an alleged gun jumping infringement concerning a two-step transaction structure used in relation to its acquisition of Toshiba Medical (see our alert here).

The EC’s decision in this case is due later in the year and we expect it will shed light on the manner in which two-step structures will be assessed in the future, at least in the EU.

Carefully assess all interactions throughout the merger review process

Companies contemplating a transaction are entitled to start planning in advance in order to facilitate future integration. But if the interactions go too far, the behaviour can amount to early implementation and give rise to gun jumping.

Although a recent judgment by the Court of Justice of the EU (see our alert here) appears to give more leeway for merging companies to agree and implement preparatory measures that do not confer control or directly contribute to the eventual acquisition of control, parties should remain cautious. The EC’s €124.5m fine imposed on Altice in April of this year is a cautionary tale of how things can go wrong.

The EC found that Altice had begun implementing its acquisition of PT Portugal prior to notification and prior to clearance through:

> pre-closing covenants: veto rights over the employment of any officer or director of the Target; over changes to the Target’s pricing policies; and over a broad range of contracts;
> actual interference in the Target’s ordinary business conduct, such as instructions on how to carry out a marketing campaign; and
> unlawful exchange of commercially sensitive information (CSI), covering granular, non-historic and individualised financial data.

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Nicole Kar
The decision highlights the importance of carrying out an upfront antitrust review of the relationship between merging parties during due diligence before closing. Pre-closing covenants must not enable the buyer to exert control over the Target’s commercial policy or influence its ordinary course of business pre-closing. And while competition authorities acknowledge that merging parties need to exchange certain CSI in the context of a transaction, the appropriate safeguards must be put in place, through properly structured NDAs and/or clean team arrangements. It is worth noting that although the parties were competitors in this case, the rules on gun jumping apply to all buyers – whether trade or financial sponsors.

Don’t forget the importance of general antitrust rules

Moreover, interactions between merging parties can also infringe the general rules on anticompetitive practices which apply in transaction settings. The Australian Competition and Consumer Commission is currently investigating two companies concerning an asset sale agreement signed before the acquisition was completed (see Allens client alert here).

In the U.S., the FTC recently issued guidelines on exchange of information during pre-merger negotiations and due diligence. The FTC stressed that the later the stage of the transaction, the more information might have to be shared, which in turn requires that stronger safeguards be implemented.

Missed filings still happen and can be costly in more ways than one

Despite the prevalence of merger control laws, parties still fail on occasion to notify transactions for one reason or another. For example, in December 2012, the EC fined Marine Harvest €20 million for gun jumping and this was upheld by the General Court in 2017 (see our alert here). The U.S. DOJ also recently stated that it has at least two ongoing investigations for failure to notify, while China’s SAMR continues to intensify its enforcement in this area.

And it is not just the risk of fines which is important. Failure to notify can lead to the transaction being unwound, as was the case when the Philippine Competition Commission recently voided a merger in the shipping sector and fined the parties for failure to notify.

Consider the full range of procedural merger control rules

There are a range of merger control rules which can trip companies up, not just standstill obligations. Following the headline €110m fine imposed by the EC on Facebook in 2017 for the provision of incorrect/misleading information, the EC’s decisions in two cases raising similar issues are expected later this year, and other authorities are also active on this front.

“Competition authorities in South-East Asian jurisdictions have recently demonstrated that they are now a voice to be reckoned with, through their robust challenge of the Uber-Grab transaction which the parties did not notify, including in Singapore, Vietnam and the Philippines.”

Clara Ingen-Housz
Governments put more hurdles in the way of foreign investment

There has been a global shift in approach to foreign investment. Authorities are taking a far closer look at proposed investments, imposing conditions or even blocking transactions. The reasons for the greater scrutiny range from perceived heightened threats to national security, to anxieties about challenges to technological superiority in some sectors and, more generally, a political mood swing against the benefits of globalisation.

What does this all mean for potential investors?

Generally speaking, intervention under foreign investment rules is already much harder to predict than under the tried-and-tested merger control regimes. Our experience is that transaction timeframes are also subject to greater uncertainty, since many foreign investment regimes have very unclear and open-ended review timetables. Going forward, potential investors will have to navigate an increasing number of regimes, with significant differences in approach. The various reforms and proposals will mean potentially increased scrutiny and execution risk for a broader range of deals in a number of jurisdictions, as well as longer timeframes to completion. It is key for deal teams to consider how best to manage all this uncertainty at the outset and to address individual transaction challenges upfront in order to mitigate any potential risk and delays.

In the United States, President Trump recently signed into law the Foreign Investment Risk Review Modernization Act (see Linklaters client alert here). With Chinese investment particularly in mind, FIRRMAtakes significant changes to the U.S. foreign investment regime run by the Committee on Foreign Investment in the United States (CFIUS), including:

> significantly increasing CFIUS’s scrutiny of transactions involving companies in critical infrastructure, or critical technologies, and involving access to U.S. citizens’ personal data; and
> expanding the U.S. government’s jurisdiction in certain real estate transactions when in or part of airports, seaports or in close proximity to U.S. government or military facilities – even if the transaction does not involve an acquisition of a U.S. business.

Meanwhile, in Europe, a number of countries, including France, Germany and the UK, have proposed changes which would significantly increase their national security screening of foreign investments.

In the UK, new lower thresholds came into force in June for deals involving targets active in certain sectors perceived to be potentially sensitive (see Linklaters client alert here). Then, in July, the UK published a White Paper setting out a number of “longer term” reforms. The scope of these proposals is vast, capturing all sectors and all types of investment (even new projects and loans), with no minimum thresholds or safe harbours. The powers would also extend to transactions taking place abroad if they met an expansive UK nexus test. While notification would remain voluntary, the Government would have broad powers to “call-in” and suspend any transaction if it had a reasonable suspicion that it may raise national security risks. The Government expects roughly 200 notifications a year, with 100 going to a full national security review – a huge increase on the one review per year under the existing rules. For more information on this topic, click here.

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Christian Ahlborn
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Germany is way ahead of the game, having strengthened the rules and increased the notification obligations just last year for acquisitions in specified industry sectors related to public security such as IT, telecoms and critical infrastructure. These reforms have already resulted in more investigations since July 2017 than for the first 13 years of the regime’s existence. Then, in August, the German government issued its first ever veto decision against the takeover of a German company, due to concerns around the transfer of information to China and potential Chinese use of that technology (see Linklaters client alert here). Shortly thereafter, the German government confirmed it intends to tighten even further the rules it introduced just a year ago.

This is all against the backdrop of draft EU-wide rules for vetting inward investment, which would see the European Commission taking on a co-ordinating role between Member States (see Linklaters’ client alert here). The proposals are progressing rapidly through the EU legislative process – much more rapidly than expected – and are likely to be adopted by the end of 2018.

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No poach agreements: What’s the big deal?

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No poach agreements: What’s the big deal?

What are “no poach agreements” and why is everyone talking about them? These are agreements not to solicit another company’s employees, or to fix wages or other terms of employment. In each case, the employees don’t know about the agreements, which are “secret”. The agreements potentially restrict competition by preventing companies from recruiting or competing for employees by offering more competitive remuneration or employment terms.

The U.S. authorities have so far grabbed most of the headlines regarding no poach agreements. In October 2016, the Department of Justice and the Federal Trade Commission issued joint guidance, putting employers on notice that going forward the DOJ would proceed criminally against no-poach and wage-fixing agreements, punishable by fines of up to $100 million and up to 10 years’ imprisonment. These were previously pursued as civil violations and were usually settled with commitments to put an end to the agreements; for example, in 2010, the DOJ filed civil lawsuits against six large technology companies (including Apple and Google) and settled with no fines.

Although the DOJ is yet to bring a criminal prosecution, it is understood that a number of investigations are underway. Indeed, as Deputy Assistant Attorney General for Civil Antitrust Barry Nigro said recently: “It is a little bit shocking to see how common it is”. Several of the new investigations have arisen during the course of merger reviews; for example, Wabtec/Faiveley in 2015, where the parties ultimately settled with the DOJ. Meanwhile, the Washington state Attorney General recently reached settlements with various fast food chains including McDonald’s and Jimmy John’s in relation to no poach obligations in franchise agreements.

But no poach issues aren’t just receiving attention in the U.S. In Japan, the Japan Fair Trade Commission published a report in February 2018, which assesses hiring practices for service providers and sets out when behaviour might be problematic. It’s not yet clear what the next steps might be. Meanwhile in Hong Kong, following numerous complaints, the Hong Kong Competition Commission has published an Advisory Bulletin.

In Europe, several national competition authorities (including in Spain, the Netherlands and Croatia) have investigated no poach deals, including those made in the freight forwarding, hospitals and IT employment sectors. While the European Commission hasn’t previously looked at no poach agreements, there is clearly potential for them to fall foul of EU antitrust laws in the same way as other agreements that may be found to restrict competition.

The trend of antitrust agencies looking at no poach and wage fixing agreements is gaining momentum around the globe and we expect this to continue – particularly given the purported prevalence of such arrangements as a matter of standard HR practice within a number of industries. Nor are potential violations limited only to agreements with respect to wages – agreements among companies on any benefits, terms or conditions of employment could be subject to an enforcement action. In view of the serious nature of the possible penalties – in particular, criminal sanctions in the U.S. – companies and their HR officials should bear in mind as much as ever that their employee contracts have the potential to violate competition laws.

We expect the trend of antitrust agencies around the world looking at no poach agreements to continue – particularly given the purported prevalence of such arrangements as a matter of standard HR practice within a number of industries.

Douglas Tween
Beware the risks of a merger review morphing into an antitrust investigation

As the complexity and intensity of competition authorities’ requests for information in merger reviews continue to escalate, so does the risk of unearthing evidence of past or ongoing coordination. This, in turn, can trigger a civil or criminal antitrust investigation (which has the potential to quickly spread to several jurisdictions as authorities share this information). Businesses therefore need to be more careful than ever to check that their houses are in order before embarking on deals, particularly in overlap markets, to ascertain whether their internal documents or third-party complaints could come back to bite them.

In the U.S. (as noted above), many of the DOJ’s “no-poach” cases arose out of merger reviews, for example the antitrust investigation launched by the DOJ following the Wabtec/Faiveley merger in 2015, leading to a recent settlement deal. The DOJ is also understood to have uncovered evidence of a conspiracy to fix prices on canned seafood during another 2015 merger review, which led to a guilty plea and fine of $25m on Bumble Bee Foods last year and the indictment of its CEO in May of this year.

In Europe, we are aware of several such cases at Member State level. For example, in November 2016, the Belgian Competition Authority (BCA) carried out antitrust raids at the premises of several pharma wholesale distribution companies, suspecting them of engaging in illegal price fixing and market partitioning. What is notable is that the BCA took these steps after receiving suspicious responses from industry players during the market investigation of a deal that it subsequently cleared. The UK’s Competition and Markets Authority (CMA) fined two laundry companies £1.71m at the end of last year for market sharing via a horizontal trade mark cross-licensing agreement, in a case that came to the CMA’s attention in the context of two related merger reviews.

The Bayer/Monsanto mega-merger may have been cleared conditionally by the Brazilian antitrust agency (CADE) in February, but the authority has also opened a preliminary abuse of dominance investigation into unilateral conduct by the parties which – according to competitors, customers and trade associations consulted by CADE during the merger review – may have had anticompetitive effects. In Australia’s first gun-jumping case, the ACCC has instituted proceedings against Cryosite for alleged cartel conduct following an abandoned merger review and is also taking antitrust action against Pacific National and Aurizon for reaching an understanding during merger negotiations that would have led to Aurizon exiting the market. We also understand that African supranational regulator, the COMESA Competition Commission, has launched several antitrust investigations on the heels of its merger reviews, with a particular focus on distribution practices.

Finally, it is worth remembering that this trend can go both ways, i.e. mergers may be carefully scrutinised or even prohibited because they are taking place in industries under investigation or with a history of collusion. A number of competition authorities – including the DOJ, the European Commission and the CMA – have published guidance stating that evidence of past collusion, or of collusion in similar markets, may be relevant in assessing the likelihood of coordinated effects in a given merger. Indeed, no fewer than 12 mergers were prohibited primarily for these reasons by the South African Competition Commission between January and November 2017, with particular concerns raised about coordination relating to cross-shareholdings and directorships.

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Jonas Koponen