



Competition and antitrust in cross-border M&A: Guidelines for a successful transaction

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Overview

- Essentials of worldwide merger control and antitrust
- Practical considerations: “getting the deal through”
- Tips and hints for managing cross-border M&A

Essentials of worldwide merger control and antitrust

Competition and antitrust in a global market

- Corporate environment fully globalised
 - Corporate entities have multi-national bases of operations
 - International trade flows multiplying (EU-Ukraine trade tripled in value 2000-2007)
- Business, corporate, tax considerations and now...also competition becomes relevant
- Competition rules promote and maintain competitive markets and foster consumer welfare
 - Merger control – *ex ante* investigations of economic effects resulting from M&A and JV setting
- Competition regimes exist in most countries on all continents
 - Competition law in Ukraine developing since 1992 – now extensive framework of rules
 - 1957 EU Treaty includes competition-related provisions, while US antitrust system originated in last century
- Clear majority of all jurisdictions enforce merger control now also including India, Singapore...
 - Key exceptions remain: e.g. Hong Kong, certain African/Caribbean states
- Competition Authorities around world communicate via multi/bi-lateral networks and agreements
 - e.g. International Competition Network, European Competition Network, OECD, EU-US Agreement
- Impact → competition rules always a factor in cross-border M&A
 - ... as well as domestic M&A with no obvious “international” element

When do merger control rules apply?

- “Concentration”: change of control on lasting basis
- Change of control may result from
 - Merger of two or more previously independent companies
 - Acquisition by one or more companies of direct or indirect control of whole or part of other company
 - Creation of full-function joint venture
- “Control”: possibility of exercising decisive influence on basis of rights, contracts or any other means
- Object of control can include
 - 1 or more companies
 - Parts of companies
 - Assets of companies
 - Selection of assets (including intangible assets e.g. IPRs)
- Certain limited exceptions to obligation to notify
 - Internal corporate restructurings
 - Under certain circumstances, temporary acquisition of securities
 - Control acquired by office-holder in liquidation, winding-up and similar proceedings
 - Control acquired by “financial holding company”

Wide application of rules to many types of deal

- “Possibility to exercise decisive influence”
 - Decisive influence → power to determine the strategic commercial decisions of another company
 - Possibility is enough → no need to actually exercise such influence
- ...by “any means”
 - Complex assessment of legal and/or factual circumstances which may give rise to acquisition of control
 - Positive controlling rights
 - Veto rights
 - *De facto* control-commonality of interest, economic dependence
- Always consider wide scope of merger control, potential impact on your deal

Practical considerations: “getting the deal through”

Requirement to notify concentrations

- Any concentration – “change of control on lasting basis” – may trigger requirement to notify European Commission and/or national authorities within or outside EU
- Requirement to notify depends on meeting merger control thresholds
- EU thresholds are based on turnover figures
- At national level other thresholds may apply
 - Market shares (e.g. Ukraine)
 - Asset value (e.g. Russia)

Calculating requirement to notify

- Turnover in last complete financial year
- Net turnover after deduction of rebates, discounts, taxes
- Whose turnover?
 - Acquiring company/merging party → turnover of entire group
 - Target company → turnover of company (or part of company) to be acquired, including all subsidiaries
- Geographical allocation of turnover → turnover attributed to country where customer is located, i.e. where competition with alternative suppliers takes place
 - Location of customer is general principle, but consider also place of delivery and place where services are provided
 - e.g. delivery of products in Ukraine to UK-headquartered trader could be turnover allocated to Ukraine
 - Specific rules apply in certain sectors e.g. telecoms (termination calls), banking (interest, commission)
- Consider need for interaction between accounting/financial advisors, competition/legal advisers
 - Turnover data likely to be provided in first instance by in-house/external accounts team
 - Possibly calculated on different basis to that used for merger control purposes
 - Need to develop clear explanations for any potential inconsistencies in figures e.g. between merger filing and Annual Report

Notification thresholds – European Commission

High turnover deals meet merger control thresholds

- Threshold 1: notification required if
 - Combined worldwide turnover of parties exceeds **EUR 5 billion**; and
 - Combined Community turnover of each of 2 or more companies concerned exceeds EUR 250 million; unless
 - Each company achieves more than 2/3 of its Community turnover in 1 Member State

But also relatively small deals may be caught...

- Threshold 2: if Threshold 1 not met, notification required if
 - Combined worldwide turnover of parties exceeds EUR 2.5 billion; and
 - Combined turnover of companies concerned exceeds EUR 100 million in at least 3 Member States; and
 - In same Member States, aggregate turnover of at least 2 companies concerned exceeds EUR 25 million; and
 - Aggregate Community-wide turnover of at least 2 companies concerned exceeds **EUR 100 million**; unless
 - Each company achieves more than 2/3 of its Community turnover in 1 Member State

Notification – European Commission and/or Member States?

- EC, national and international notification levels often co-exist
- If concentration does not meet Commission thresholds it might still trigger notification at national level in 1 or more EU Member States
- Competition Authority in charge of the review of the deal may change...
 - Commission /national authorities referral and vice-versa is possible pre- and post-notification
 - Parties can request Commission to examine concentration when national thresholds are met in 3 or more EU Member States (Form RS procedure)
- Remember concentration might also have to be notified in non-EU countries particularly where filing thresholds are low, e.g. Serbia and Turkey

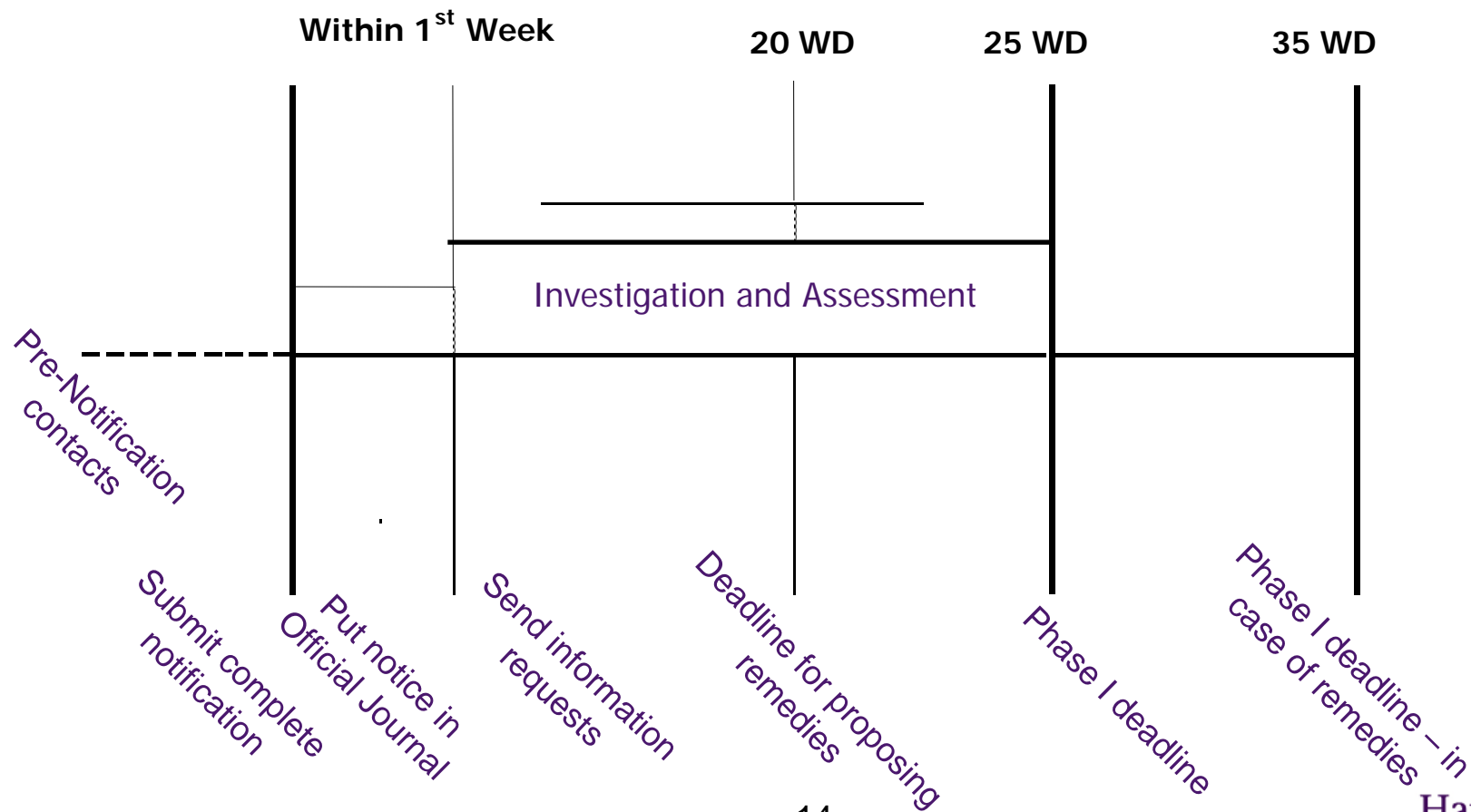
Notification thresholds – Cyprus

- Notification in Cyprus required if
 - Worldwide turnover of each of at least two parties exceeds EUR 3,4 million; and
 - At least one party engages in commercial activities within Cyprus; and
 - At least EUR 3,4 million of combined turnover of all of parties relates to disposal of goods or supply of services within Cyprus
- **Result** → Company with turnover of EUR 3,4 million in Cyprus must notify Cypriot CPC of **any** concentration where another party has total turnover EUR 3,4 million – even if target is not present or active in Cyprus

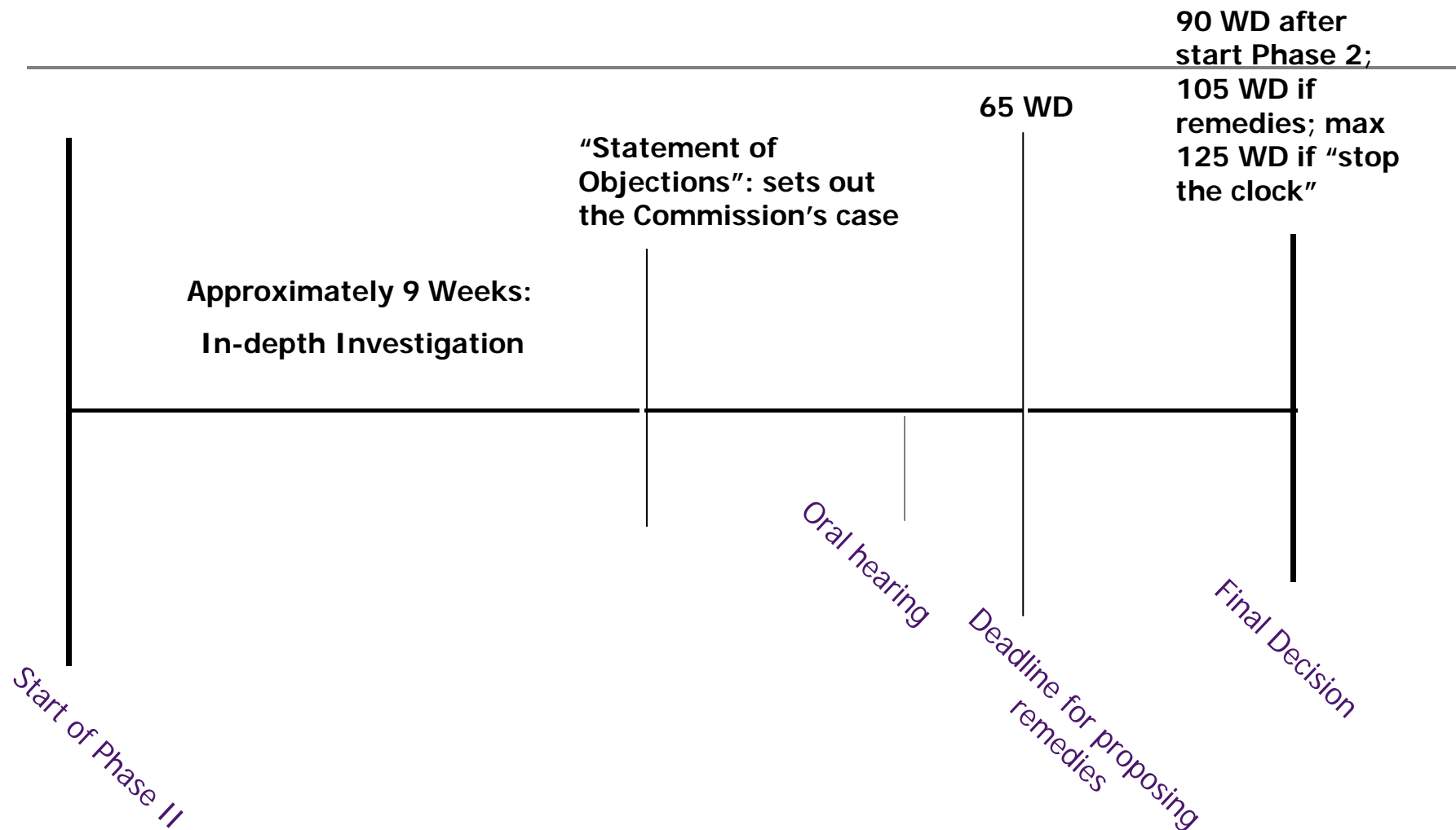
Timing and procedure

- Concentrations meeting merger control thresholds is typically notified using Notification Form – but exceptions e.g. Germany
 - Prior to implementation but exceptions exist, e.g. post-closing notification in Greece
 - Following conclusion of agreement for acquisition of controlling interest (with suspensory clause), announcement of public bid, e.g.
 - In Cyprus notification due in 1 week from corporate document signature
 - Prior to signing final agreement if parties demonstrate ‘good faith intention’ to conclude agreement (e.g. when they have agreed already on all the essential elements of the deal)
- Usually, notification comes with suspension obligation, i.e. parties cannot implement transaction before clearance
 - Exceptions exist e.g. Italy: provided concentration is notified prior to implementation, it could be implemented before clearance

Timing and procedure (ii) – ECMR Phase I



Timing and procedure (iii) – ECMR Phase II



Importance of getting it right – Gun-jumping risk

- Merger control systems typically provide for penalties for failure to comply with notification obligation and/or suspension obligation – “gun-jumping”
- Fines for failure to notify/completion before clearance can be extremely heavy
 - European Commission fined Electrabel EUR 20 million for completion before clearance (2009)
 - German Competition Authority fined Mars EUR 4.5 million, Druck-und-Verlagshaus EUR 4.13 million (2008-2009)
- Competition Authorities actively monitor companies, enforce rules
 - European Commission has used “dawn raids” – unannounced inspections of business/private premises – to investigate suspected gun-jumping
- Cypriot, Ukrainian Authorities both may impose fines for gun-jumping
 - Cyprus: up to EUR 85,430 plus EUR 8,543 per day for failure to fine, and/or up to 10% of parties’ total turnover plus EUR 8,543 per day for completing without clearance
 - Ukraine: up to 5% of acquiring party’s worldwide turnover

How to minimise risk of gun-jumping

- Until clearance, acquiring party **must not**
 - Implement acquisition
 - Start managing target, not even on *de facto* basis
 - Appoint directors to target board
 - Coordinate market behaviour with target, e.g. via a supervisory board
- Until clearance, parties **must**
 - Continue to operate as separate businesses
 - Only share information that is
 - Reasonably necessary for completing deal, planning integration
 - Not commercially sensitive

Tips and hints for managing cross-border M&A

Coordinate worldwide notifications

- TAKE YOUR TIME - Assess worldwide notification timing requirements at outset of transaction
 - ... Plan timing of notifications according to statutory/*de facto* review periods ...
 - Schedule completion of transaction after likely date of last approval
 - Pre-notification, 4-6 weeks for Phase I, but also “stop the clock” and Phase II may have to be factored in
- BUT not to much - Beware deadline for completion
 - In some countries, transaction must be implemented within 12 months of approval decision, or parties must re-notify
 - Ensure all other approvals are received inside this deadline
- Ensure consistency between all notifications
 - Consistency of basic facts: activities, turnover, estimated market share, structure of transaction
 - Consistency of “message”: market definition, competitive assessment
 - Remember multi/bi-lateral agreements between Competition Authorities
- DO NOT CREATE HOSTAGES TO FORTUNE, but ensure notification completeness

Maintain antitrust management during M&A

- Before and during merger control investigations restrict exchanges of information to “clean teams” of individuals
- Use confidentiality undertakings (ringfences, passwords) to avoid leaks of information from clean team
- Sensitive information includes
 - Current or future pricing strategies
 - Detailed cost information relating to specific products
 - Details of profit margins on product-by-product basis
- Ensure proper document production, circulation and retention to maximise legal privilege protection
 - EC more limited protection – in-house/non-EU attorneys do not benefit from legal privilege
 - UK/US more extended protection - in-house/non-EU attorneys benefit from legal privilege
- Smart drafting: monitor public relations – press releases, announcements, parties’ websites
 - Avoid statements that suggest anti-competitive behaviour or early implementation
 - Dangerous wording e.g. “Dominance”, “Discriminate”, “Market shares”...

Early competition input

- Involvement of competition specialists is key to avoid trouble and better shape the deal
- Focus on interrelated transactions – a way to save filing fees and minimize notification time and efforts
- Prepare appropriate corporate documents at an early stage to meet the notification evidentiary burden, anticipate issue and regulate conduct of concentration parties
 - Focus on SPA (suspensory clause)
 - Shareholder agreements are often essential in case of joint control
 - Cooperation, price revisions, reciprocal efforts in case remedies are required to have deal authorized
- Talk to the Competition Authority as a communication channel is always useful

Four key principles

- General rule on timing
 - Notification → Clearance → Implementation
- When negotiating transaction which might lead to “concentration”, start considering, as soon as possible, worldwide notification obligations
- Do not implement transaction before final clearance from Competition Authorities in all relevant jurisdictions
- If in any doubt → contact experienced competition lawyers with international and local knowledge

Remember that prevention is better than cure!

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