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Client Alert

Antitrust

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Omnicom/Publicis: Lessons in How to Keep Merger Clearance Traps From Derailing Your Deal

Advertising giants Omnicom Group and Publicis Groupe called off their US$35 billion merger on May 8, 2014, terminating a transaction that would have created the largest advertising company in the world.

Publicis chairman, Maurice Lévy, and Omnicom CEO, John Wren, said in a joint statement, "The challenges that still remained to be overcome, in addition to the slow pace of progress, created a level of uncertainty detrimental to the interests of both groups and their employees, clients and shareholders. We have thus jointly decided to proceed along our independent paths. We, of course, remain competitors, but maintain a great respect for one another."[1] While there were a number of reasons the deal collapsed nine months after it was announced, merger clearance—notably delays in securing antitrust clearance from China's Ministry of Commerce in China—contributed to the demise.

The collapse is a huge setback for both companies and its employees. Nine months of distraction will have taken a toll, and it will be back to the drawing board as both companies seek other means to expand and improve their services, and realize efficiencies and reduced costs.

China Speed Bump

The parties announced the transaction in July 2013, and, by February, the parties had secured unconditional merger clearances in no fewer than 12 jurisdictions, including Europe, the United States, Canada, India, Turkey, South Africa and South Korea.[2]

But more than six months after the deal's announcement, China clearance remained outstanding. The transaction was filed with MOFCOM, the agency responsible for administering merger control. MOFCOM is notorious for being the last jurisdiction to clear a transaction that is subject to global filings, for a number of reasons, including the process of inter-agency review. Parties may spend months negotiating with MOFCOM, but other government agencies must review and approve the merger. Some merging parties have complained that these other agencies often interject concerns, such as industrial policy, unrelated to competition.

1 http://newsflash.publicisgroupe.net/uploadedDocs/20140509_09-05-14_PRESS_RELEASE_ENG_FINAL.pdf.

2 Press Release, November 13, 2013, http://newsflash.publicisgroupe.net/uploadedDocs/20131101_13-11-01_FTC_ENG.pdf; Investor Presentation February13, 2014, at 36, http://www.publicisgroupe.com/en/media/display/id/7206.

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MOFCOM recently implemented guidelines to speed review of "simple" merger cases. These changes are welcome, but it remains too soon to determine what effect this procedure will have.

Even Local Deals Are Global and Global Deals Are Local

Most merger clearance regimes require clearance *before* parties are permitted to close the transactions. In other words, parties have to clear each and every hurdle before they cross the finish line. In Omnicom, the parties were clearly frustrated that China was holding back its clearance. The parties had seemingly sailed through major antitrust players like Canada, the EU and the United States, and from small, yet sophisticated, regimes such as Turkey, South Africa and South Korea. But this progress slowed at China, and this can cause significant deal uncertainty, fear and doubt. In this environment, the festering of culture clashes, the loss of key talent, lack of focus of competition and ultimately the collapse of the transaction, are all heightened risks.

For dealmakers, the increasing complexity of merger controls demand they take affirmative steps to protect their deals.

Three critical planning steps are important to bear in mind:

- Plan ahead. In the past, antitrust counsel was often consulted only late in the game—as an afterthought. No longer. Antitrust counsel has to be part of the process at the early stages to ensure that parties are aware and can plan for all potential merger review filings, even in far-flung jurisdictions.
- Prepare for clearance timing. The timing of filings in multiple jurisdictions has to be carefully coordinated with the closing date and with careful attention paid to those jurisdictions having pre-merger notification requirements, those that require notice to be filed after the deal is complete and those that require both.
- Centralize strategy. The deal needs to have a single point of accountability to quarterback all the filings around the world in order to ensure that something said to the authority in India doesn't come back to haunt you in Iceland.

Merger Planning and Information Sharing: How Far Can You Go?

Merging parties typically engage in a wide variety of information sharing and coordination, ranging from initial due diligence to transition planning. Integration teams anxious to hit the ground running often push to share competitively sensitive information in an effort to make future planning more efficient. But the Omnicom/Publicis collapse shows the potential dangers of premature information sharing and the need for careful attention to the process as much as the content.

Before a merger is consummated, the antitrust laws limit the merging parties' ability to share competitively sensitive information and integrate operations. By following appropriate guidelines, parties to a terminated merger can continue competing without having compromised their competitive strategies.

- Companies should consult with antitrust counsel to manage risks associated with obtaining necessary information for diligence and integration purposes. Careful planning and process documentation can reduce the risk of an allegation of improper information sharing.
- Companies should avoid exchanging any information beyond what is necessary for valuing the transaction and setting the stage for post-merger integration. Detailed, current competitive information presents the highest risk.
- Confidential information acquired during premerger due diligence should be shared only with counsel and with business people who have a demonstrated need to know, and not with those individuals who could use it for competitive purposes.
- For necessary but extremely sensitive information, aggregation or using third-party vendors (a "clean team") to review and summarize the information should be considered.
- Negative covenants (e.g., providing the acquiring party a right to review high-threshold, material assumptions of liability) have legitimate purposes. But care should be exercised in determining their scope and potential carve-outs. Counsel should be involved in both drafting and implementing such provisions. Imagine the damage that can be done to a seller's business if it has foregone material contract renewals with key customers in anticipation of a merger closing.

In summary, always recognize the importance of a robust integration planning strategy that respects each party's competitively sensitive information and avoids one party assuming too much control too early. Our mantra for merging clients is "business as usual" until closing.

Timing, Timing, Timing

Parties must focus not only on *if* they will secure merger clearances, but *when*. China is the poster child for jurisdictions raising issues concerning timing. Exacerbating the problem is that China's merger control law is broadly written and construed so that many mergers with only minimal contact with China may require MOFCOM's review.

Each merger control regime is unique. The US Hart-Scott-Rodino form requires only minimal information from merging parties, ensuring that parties can file early and start the review period clock. In the EU, the Form CO requires much more substantive information and therefore takes longer to complete, depending on the complexity of the transaction and industry. It can require as little as a couple weeks for straightforward transactions to several months for very complex deals. Once filed, each jurisdiction has its own review procedures, which further complicates timing. As noted above, in China the review period itself and the process for resolving any competitive concerns takes longer than it does in most other major jurisdictions. As a result, the decision to file in China should not be taken lightly, and parties must plan for a lengthy review period.

To accommodate the lengthy reviews, parties can ensure the termination dates in the underlying agreements take this into account and make provision for the payment of retention bonuses for key employees to reduce churn related to deal uncertainty. Most importantly, however, is managing the expectations of all relevant stakeholders. If you know delays are likely, the "challenges" of dealing with a slow "pace of progress" are more manageable.

Conclusion

The collapse of deals because of the length of the merger control review process—as opposed to substantive competition issues—is an unfortunate reality of a quilt-like merger control process. Despite attempts at international cooperation to streamline the merger control process, the differences between regimes can be vast. Fortunately, with small but proactive steps, parties can mitigate the risk that lags in the global merger clearance process could derail their merger efforts.