Multijurisdictional Merger Filings

NEWS AND RECENT DEVELOPMENTS

Cross-border mergers frequently trigger pre-closing antitrust reviews. Such reviews are complex and can be fraught with risk. With more than 90 countries now having obligatory premerger filing requirements, different substantive and procedural regimes can make a multijurisdictional transaction an expensive and time-consuming process.

It is common these days, in both developed and emerging market economies, to have merger control laws. Additionally, national competition authorities around the world are moving closer to a "common competition culture." Now that doing business often means doing business globally, preparation for multijurisdictional filings should be a routine part of the overall business strategies developed by companies and their advisers. As a result, organizations involved in mergers and acquisitions need to be aware of the breaking developments taking place in the various merger regimes around the world.

Greece: Post-Merger Notifications Not Required Anymore

A New Competition Act entered into force in Greece on April 20, 2011, introducing changes in different areas of competition enforcement.

The main change introduced in relation to merger control is the abolition of the post-merger notification requirement for mergers with no significant effects on the Greek market.

Under the previous regime, mergers that failed the pre-closing notification test needed to be notified post-closing with the Greek Competition Authority (i) if they led to a concentration of more than 10 percent in a given product market in Greece, or (ii) where the aggregate domestic turnover of the parties involved was more than EUR 15 million. The post-closing merger notification was a particularity of the Greek merger control system, it led to an unnecessary administrative burden for companies and had an unclear purpose, as no relevant decision was ever adopted by the Greek Competition Authority.

The primary notification thresholds remain unchanged in the New Act.

http://www.epant.gr/img/x2/categories/ctg334_1_1303911232.pdf

United States: New Reporting Requirements

On July 7, 2011, the US Federal Trade Commission (FTC) issued significant changes to the premerger Notification and Report Form required under the Hart-Scott Rodino Act. Under the new regime, the thresholds remain unchanged but companies will notably have substantially greater reporting requirements relating to their ownership of minority interests in other companies:

- An acquiring firm now must report certain information regarding entities that are not affiliates (e.g., parents, subsidiaries), but that are "associates."
- An acquiring party also must list any minority holdings that overlap with the acquired entity or

acquired assets. This requirement includes listing each associate that holds a minority position of five percent or more in an entity, including a minority position in a non-corporate entity, and that derived dollar revenues in the most recent year from operations in industries that overlap with the acquired company. Further, for each such holding by an associate, the acquiring party must identify the entity in which the interest is held and the percentage held. Companies will also be required to list each associate of the acquiring party that, in the prior year, generated revenue in the same industry as the acquired company.

- While filing parties no longer have to report revenues for a base year (most recently 2002), the revised HSR Form will require the submission of additional documents. These include analyses of synergies, even if these analyses do not mention competitive issues. In addition, such documents must be submitted even in transactions in which there is no competitive overlap.

The new rules will become effective on August 18, 2011.

"Changes to Premerger Notification Reporting Requirements Could Add Costs and Complexity to Some Filings"

"Premerger Notification; Reporting and Waiting Period Requirements"

India : Implementing Regulations Revised

India's merger control regime entered into force from June 1, 2011. This means that all transactions that meet the specified thresholds have to be notified to the Competition Commission of India (CCI). There is a "standstill obligation" prohibiting completion until the CCI has issued a clearance decision.

In May 2011, the CCI published the rules applicable to merger review. The new regulations follow a consultation on a draft regulation published in March 2011. This regulation does not differ much from the that draft.

The amendments are as follows:

- Clarification of transactions that do not have to be notified, such as mergers that take place entirely outside India and would only have an insignificant impact on local markets or certain acquisitions made by way of investments.
- Adoption of a five-year exemption to filing requirement if the target has domestic assets less than approx. €41 million or US$54.4 million, or domestic turnover less than approx. €123 million or US$163.3 million.
- Simplification of the notification forms.

"Competition M&A Rules in India Finalized"

Russia: Clarification on Foreign-to-Foreign Transactions Soon?

The *"Third Antimonopoly Package"* was approved on June 28, 2011 by the Russian Federation's government and is expected to come into force in autumn, after being submitted to and adopted by the State Duma.

Under this Package, merger rules would be amended to clarify the application of Russian merger regime to foreign-to-foreign transactions.

Transactions resulting in an acquisition of control over foreign target companies, or of assets located in Russia that belong to foreign target companies, will only be subject to the Federal Antimonopoly Service's clearance when the foreign target supplied goods for more than 1 billion rubles (approx. €24.75 million or US$35.90 million) to the Russian market during the last calendar year.

This clarification will be welcome as it will allow to reduce the number foreign-to-foreign transaction filings before the Russian Competition Authority.

http://www.fas.gov.ru/spheres/antimonopoly.html?theme=2

In Brief

Finland. On March 11, 2011, the Finnish Parliament approved the new Competition Act, which is expected to come into force in September 2011.

The Act will introduce a number of changes relating to merger rules, notably with a view toward greater harmonization with EU Law:

- The present dominance test in merger will be extended to a test broadly covering any Significant Impediment of Effective Competition (SIEC test).
- A number of procedural improvements are also introduced (suppression of time limit for notification, stop the clock mechanism, etc.).

The Finnish Competition Authority has announced guidelines on merger control in preparation that are expected to enter into force in a similar time frame.

Mexico. The legislative reform process that was initiated in April 2010 with respect to the Mexican Competition Act has resulted in a series of amendments that became effective as of May 11, 2011.

The amendments are intended to simplify administrative procedures regarding the notification of certain type of mergers, enhance the transparency in and streamline the Federal Competition Commission's (FCC) review process for mergers. The changes include new exceptions to the obligation to obtain merger clearance, such as in the case of corporate restructurings. The amendments also provide for a shorter notification period for transactions to expedite the review process. The FCC will also have to issue general guidelines every five years on issues such as calculation of administrative fines, definition of the relevant market and substantial market power, which are to accompany its regulations.

Croatia. A new regulation has been announced on notification and assessment of concentrations for the Competition Agency. Unlike the old rules, the new regulation introduces the forms for the concentration notification, which are similar to those at the EU level. The new rules provide clearer guidelines on information and documents that must be provided by notifying parties when filing a concentration.

China. On June 13, 2011, China's Ministry of Commerce (Mofcom) released a draft version of new interim measures relating to China's merger control regime for public consultation.

The draft *Interim Measures on Investigating and Sanctioning Violation of Notification Obligation for Concentration between Undertakings* (Interim Measures) detail the steps Mofcom may take to investigate whether a business operator has failed to comply with the mandatory notification obligation that applies to certain transactions under the Anti-Monopoly Law (AML). The Interim Measures also set out the penalties that may apply in such cases.

The US and Chinese antitrust agencies are also expected to sign a cooperation agreement in August 2011 that would notably reduce the risk of the imposition of conflicting remedies in merger cases.

Hong Kong. In June 2011, the Hong Kong government confirmed that the general prohibition on restrictive agreements in the region's new cross-sector Competition Bill is not intended to be used to challenge M&A transactions, and that the Bill may be amended to reflect this. Concern had been expressed after government representatives stated that the general prohibition *would* be able to be used to challenge M&As that appreciably restrict competition—notwithstanding that the Bill contains specific merger review provisions that (reflecting previously announced government policy) apply only to the telecoms sector.

According to the current legislative schedule, the earliest the Bill may be passed is the second calendar quarter of 2012. ◆

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