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Global Trends In Multijurisdictional Merger Fillings

Law360, New York (December 15, 2011, 3:17 PM ET) -- 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 new developments taking place in the various merger regimes around the world.

U.S.-EU Best Practices on Cooperation in Merger Investigations

On Oct. 14, 2011, the Competition Directorate-General of the European Commission (DG COMP), the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice (U.S. agencies) adopted a revised version of the 2002 Best Practices on Merger Cooperation.

The best practices establish an advisory framework for interagency cooperation in parallel merger investigations. They are intended to promote fully informed decision-making, minimize the risk of divergent outcomes, enhance the efficiency of investigations, reduce burdens on merging parties and third parties, and increase the overall transparency of the merger review process.

Communication Between Reviewing Agencies

Where substantial cooperation may be beneficial, the agencies should seek to agree on a tentative timetable for regular interagency consultations. Such consultations will be particularly useful at key stages of the investigation, such as:

1. In U.S. investigations, before the date the agency closes an investigation without taking action, before it issues a second request, and before the relevant DOJ section/FTC division makes its case recommendation to senior management;
2. In EU investigations, no later than three weeks after a Phase I investigation has been opened, before the opening of a Phase II investigation, before the closing of a Phase II investigation, and before issuing a statement of objections; and
3. In both U.S. and EU investigations, at the commencement of remedies negotiations with the merging parties, and prior to a final decision to seek to prohibit a merger.

Coordination on Timing

The best practices encourage fluent bilateral exchange of information about important developments related to timing during the course of their investigations.

The parties can facilitate coordination on timing by submitting parallel filings in the United States and the European Union.

Coordination on Collection and Evaluation of Evidence

In difficult cases, interagency coordination may include discussing, subject to confidentiality obligations, the agencies' respective analyses on market definitions, assessments of competitive effects and efficiencies, economic theories and theories of competitive harm, remedies and relevant past investigations.

The best practices acknowledge that waivers of confidentiality are common in cases involving cooperation between DG COMP and the U.S. agencies, and that these waivers enable more complete communication between the reviewing agencies and the merging parties regarding relevant evidence.

However, recognizing the rules governing legal professional privilege differ between the United States and the European Union, the best practices provide that the agencies will accept waivers provided by the parties to DG COMP that exclude from their scope evidence that is properly identified by the parties as, and qualifies for, in-house attorney-client privilege under U.S. law.

Remedies and Settlements

Interagency coordination is encouraged in order to avoid imposing inconsistent or conflicting remedies. The agencies should inform each other of any discussions or other developments with respect to remedies.

Early coordination is seen as particularly relevant where remedies include an up-front buyer and where DG COMP is considering remedies in Phase I investigations. Cooperation may also enable the design of a single remedy package which addresses the concerns of both agencies.

ec.europa.eu/competition/mergers/legislation/international_cooperation.html

Brazil: Approval from the CADE Required in 2012 Before Closing

Brazilian competition law was amended on Oct. 5, 2011. The new law will enter into force after 180 days.

The following are some of the key changes related to merger control.

Mandatory Pre-Closing Filing

With this reform, Brazilian competition law will now follow the International Competition Network Best Practices on merger control by requiring parties not to close any transactions subject to merger review prior to receiving approval from Brazil's Council for Economic Defense (CADE).

Penalties for noncompliance range from R (Brazilian reales) $60,000 to R$60 million, or approximately U.S.$32,000/€24,000 to U.S.$32 million/€24 million.

New Jurisdictional Thresholds

According to the new law, a filing will be required when the following two turnover thresholds are met:

- A Brazilian turnover of R$400 million (approximately U.S.$210.5 million/€163 million) for one of the applicants; and
- A Brazilian turnover of R$30 million (approximately U.S.$15.8 million/€12 million) for another applicant.

These thresholds increase the local nexus required with Brazil. However, as under current law, the turnover of the entire group of both the seller and the buyer must be considered.

As a result, if a subsidiary of a parent group with Brazil turnover in excess of the threshold is being sold, the threshold is met even though the target subsidiary itself may not meet the threshold.

Furthermore, the market-share test is eliminated.

Shorter Review Deadlines

The new law provides for a shorter merger-review time frame. The CADE's merger assessment will take a maximum of 240 days, although this deadline can be extended by an additional 60 days at the request of the applicants or by an additional 90 days by the CADE on the basis of a reasoned justification.

www.cade.gov.br/Default.aspx

Spain: New Notice for the Short-Form Procedure

The Comision Nacional de Competencia adopted a notice on its short-form notification procedure on Sept. 28, 2011, following public consultation.

Short-form notification was introduced in 2007 following the entry into force of the new Competition Act (Ley 15/2007) for transactions that are not expected to pose competition problems.

According to Article 56 of the Competition Act and Article 57 of the Implementing Regulation (Real Decreto 261/2008), short-form notifications can be submitted in the following cases:

- Where none of the parties are engaged in business activities in the same relevant market.
- Where there is no significant effect on competition:
    - The combined market share of the parties is below 15 percent;
    - The increment is below 2 percent and the combined market share of the parties is between 15 and 30; or
    - The individual or combined market share of the parties on an upstream or downstream market is below 25 percent.
- Where a party is to acquire sole control of a company over which it already has joint control.
- Where, in the case of a joint venture, the joint venture is not engaged in, or is only marginally engaged in, activities in Spain, i.e., its turnover is below €6 million.

In this context, the notice adopted by the CNC aims at clarifying which concentrations may also be eligible for short-form notification and which ones will require full-form notification.

First, concentrations that have a very limited impact on the market, other than those listed in Article 56 and 57, can also benefit from short-form notification. In such cases, the parties have to substantiate their request and its acceptance must be justified in the authority's report.

Second, full-form notifications will be required where a report from a sectoral regulator is required, where the parties request an exemption from the obligation to suspend the transaction prior to clearance, or where in-depth analysis will be required. When the authority requires a full-form notification after a filing on a short-form basis, the one-month Phase I deadline starts from the date of the full-form notification.

Finally, the notice also confirms that, in practice, the timetable assessment of a transaction filed on a short-form basis is shortened, notably because of the absence of a "stop the clock" procedure or additional information requests.

www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx

In Brief

Portugal

The Portuguese Competition Authority adopted guidelines on remedies in merger control investigations on July 28, 2011, following public consultation launched in November 2010.

From a procedural perspective, the guidelines differ in some respects from the European regime. For example, there are no fixed time limits to submit remedies.

However, the guidelines state that it would be advisable for parties to submit remedies within the first 20 working days of a Phase I investigation and within the first 40 working days of a Phase II investigation.

The guidelines also state that, in key stages of the procedure, the authority will hold meetings with the parties to allow them to better understand the concerns of the authority and the need and timing for remedies.

During Phase II investigations, in addition to arranging meetings with the parties, the authority will also try to convey its concerns by issuing a draft decision in order to allow the parties to submit remedy proposals in good time.

The authority will have to organize a second hearing for interested parties, if the initial draft decision is substantially altered as a result of new proposed remedies.

Germany

Legislative amendments to further align German competition law with EU competition law are under discussion. Proposed key changes are that:

1. The Significant Impediment of Effective Competition test would be introduced;
2. The market-share threshold for the presumption of single-firm dominance would be raised to 40 percent;
3. The timetable in merger control proceedings would automatically be extended if the parties offer remedies; and
4. The waiting period may be suspended if parties do not respond to information requests.

Any amendment to the existing regime are unlikely to enter into force before 2013.

Russia

On Sept. 17, 2011, the State Duma passed the "third package of amendments" to the Russian competition law in the second reading, the draft having been approved in the first reading on Sept. 9, 2011. One following reading will take place.

With regard to merger control, the bill currently contains several proposals aimed at taking a broader approach in order to reduce the volume of filings submitted to the Russian Federal Anti-monopoly Service.

The bill also provides that foreign-to-foreign transactions are only subject to Russian merger control if the turnover of the target company in the Russian market in the last calendar year was in excess of 1 billion rubles (approx. €24.75 million or U.S.$35.90 million).

Slovenia

A recent amendment to the Prevention of Restriction of Competition Act restructures the competent authority, the Competition Protection Office, into an independent agency as of Jan. 1, 2012.

Slovenian merger rules are largely harmonized with the EU Merger Regulation, and notification to the CPO is mandatory when the following jurisdictional thresholds are met:

1. The combined aggregate annual turnover of all undertakings concerned exceeds €35 million on the Slovenian market; and
2. Either the annual turnover of the target exceeds €1 million on the Slovenian market or, in the event of the creation of a joint venture, the annual turnover of at least two participating undertakings exceeds €1 million on the Slovenian market.

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