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, differ¬ent 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.

COMESA: Upcoming Clarification on the Scope of COMESA Merger Control?

The COMESA Competition Commission (CCC), the new supranational merger control authority of 19 Member States,[1] started operating in Africa now more than one year ago, on the basis of jurisdiction thresholds calling for future clarification.

Indeed, "*the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of a business, where both the acquiring firm and target firm or either the acquiring firm and target firm operate in two or more Member States and where the relevant turnover or asset threshold test has been exceeded*" has to be filed to the CCC. However, the relevant turnover or asset threshold above-mentioned is so far set at zero.

Several notifications have already been handled and a set of Draft Merger Guidelines was published in April 2013, although the final version is still expected. These draft guidelines import a number of EU law principles regarding the delineation of product and geographic markets, the concept of exercising decisive influence, the treatment of joint ventures and assessment criteria.

However, further clarification is still needed on at least three key issues:

- **Zero threshold:** the draft guidelines fail to provide more clarification on cases where a notification is required. CCC has pointed to the different levels of economic development of Member States in the COMESA region and to the need to acquire experience. However, companies need more legal certainty on whether transactions are likely to trigger the threshold.
- **Limited local nexus:** the COMESA merger rules only require that at least one of the parties to a transaction operates in two or more COMESA Member States. The draft guidelines adopts a definition of the term "*operate*" that includes "*being directly domiciled in a Member State,*" "*having operations through exports, imports, subsidiaries etc, in a Member State*" but also "*deriving turnover*

in a Member State." This definition is too broad to provide adequate clarification as to the local nexus required.

- Allocation of jurisdiction: at the end of August 2013, the COMESA Court of Justice issued a ruling in the case of Polytol v. Mauritius about the applicability of the COMESA Treaty within COMESA Member States. The COMESA Court of Justice rejected the view that transactions notifiable to the CCC must also be notified to the national authorities where requirements are triggered. However, some Member States, such as Kenya, Mauritius and Zambia have not yet transposed the COMESA Regulation into national law. As a result, it remains unclear if CCC has an exclusive jurisdiction or if transactions notifiable to CCC shall also be notified to national authorities.

Proposed amendments of the COMESA merger rules are currently being discussed and are expected to come into force after COMESA Council of Ministers' approval. An extraordinary session of the Council could take place in April or May 2014.

http://www.comesa.int/

[1] Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

China: MOFCOM Publishes Simple Merger Review Rules

On 11 February, the Ministry of Commerce of the People's Republic of China (MOFCOM) published the final text of its Interim Provisions on the Standards that Apply to Simplified Cases of Concentrations of Undertakings (the Interim Provisions). Initially published for public comment in draft in April of last year, the Interim Provisions came into force on 12 February.

The Interim Provisions clarify the standards MOFCOM will use to distinguish simple cases from other cases meriting a more detailed review, and in that respect the rules draw heavily on the European Commission's 2005 Notice on a simplified procedure.[2] That said, the Interim Provisions are a "work-in-progress" as they do not stipulate a simplified procedure as such – they clarify what a simple case is but they do not provide a framework for the notification and assessment of simple cases. It is understood that procedural regulations of this kind will be introduced by MOFCOM at a later stage.

The Interim Provisions identify six categories of simple case:

- Horizontal concentrations where the aggregate market share of the parties in all horizontal markets is less than 15 percent;
- Vertical concentrations where the aggregate market share of the parties in all vertically related markets is less than 25 percent;
- Concentrations without any horizontal or vertical relationship between the parties ("conglomerate cases") where the aggregate market share of the parties in each market is less than 25 percent;
- Concentrations which involve the establishment of a joint venture outside China, where the joint venture does not conduct economic activities in China. In this context one might compare the corresponding EU rule which provides that a joint venture that has no, or negligible, actual or foreseen activities within the territory of the European Economic Area is eligible for simplified treatment;
- Concentrations which involve an acquisition of the equity or assets of a foreign enterprise, where the foreign enterprise does not conduct economic activities in China; and
- Concentrations which entail a change of control in respect of an existing joint venture where, post-transaction, the joint venture will be controlled by one or more of the parties who jointly controlled the joint venture before the transaction.

As with the EU rules, MOFCOM retains a high level of discretion in treating cases falling within these categories as non-simple in certain circumstances

under the new rules, which include a catch-all provision for cases which MOFCOM considers may have an anti-competitive effect.

http://fldj.mofcom.gov.cn/article/ztxx/201402/20140200487001.shtml

http://www.mayerbrown.com/files/Publication/273f4b62-c980-4e58-8f0c-71b3e43f6f5c/Presentation/PublicationAttachment/8ae01b0c-1646-454a-bfe0-7ca352f7fd52/140224-PRC-AntitrustCompetition.pdf

[2] The Interim Provisions therefore do not reflect changes made to the European Commission's practice as reflected in the revised Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 published in December 2013.

Germany: Amendments of the Competition Act

Many transactions have to be notified in Germany given the relatively low turnover thresholds that establish jurisdiction of the German authority – the Bundeskartellamt.

The recent amendments of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) came into force in June 2013 and implement certain substantive and procedural changes. In order to fully harmonize the substantive standard with the test applied by the European Commission, the Bundeskartellamt can now prohibit a transaction if it can be expected that it significantly impedes effective competition, in particular through the creation of strengthening of a dominant position. Like in the EU, the so-called SIEC test allows the Bundeskartellamt to assess scenarios where dominance may not necessarily exist but competition concerns arise.

The presumption of single-firm dominance has been maintained, but raised from 33 percent to 40 percent. Then, in order to avoid companies from slicing transactions, successive transactions (staggered deals) realized within two years between the same parties is treated as one transaction for turnover thresholds calculation.

In addition to structural remedies, the Act now explicitly allows behavioral remedies providing that such measures do not require continuous monitoring by the Bundeskartellamt. Procedurally, the Bundeskartellamt has gained flexibility as the second phase waiting period (four months as of notification) will be automatically extended by one month if remedies are submitted. Failure to comply with information requests can also lead to a suspension of the waiting period until the information is furnished. Despite the goal of greater harmonization with the EU regime, important differences remain, notably the requirement to notify minority shareholdings and non-full-function joint ventures.

EU: Merger Control Simplification?

In December 2013, the European Commission adopted a "simplification package" aiming at streamlining the review of certain transactions under the European Union merger regulation. The key changes are: (i) extending the scope of transactions to which the European Commission's simplified merger procedure applies; (ii) reducing the information requirements for notifications; and (iii) streamlining the pre-notification process.

The Commission raised the market share thresholds below which cases qualify for a simplified review; such review allows companies to use a shorter notification form for mergers that are unlikely to raise competition problems. The new market share thresholds are 20 percent for transactions involving horizontal relationships (instead of 15 percent before), and 30 percent for companies active in vertically related markets (instead of 25 percent before). In addition, transactions may qualify for the simplified procedure where the combined market shares are between 20 percent and 50 percent, but where the increase in market share is limited. It is expected, that the simplification package will allow the Commission to treat between 60-70 percent of merger cases under the simplified review procedure. A very lean "super-simplified" procedure has been introduced for joint ventures that are active entirely outside the European

Economic Area. For such cases, instead of submitting a notification form, the parties need only describe the transaction, their business activities and provide turnover of the parties to the Commission.

With the stated aim of eliminating and reducing the information requirements, the Commission has adopted revised forms. The revised Form CO and Short Form CO identify information in relation to which the Commission may grant a waiver from production of data such as those related to past acquisitions or capacity data.

However, there are instances where the Commission will be seeking more information disclosure from the parties than before. For example, the parties are now required to submit copies of the documents prepared by, for or received by any members of the "board of management," the board of directors or the supervisory board for the purpose of assessing or analyzing the transaction including documents where the transaction is discussed in relation to potential alternative acquisitions. Previously, the Form CO required parties only to submit copies of analyses, reports, etc., prepared by or for the members of the board of directors.

Even with respect to the Short Form CO, the parties need to provide copies of all presentations prepared by, for or received by any members of the board of management, or the board of directors, or the supervisory board analyzing the notified concentration, whereas this was not required previously.

Thus, the simplification package could actually increase the burden on the parties by requiring disclosure of additional information. Finally, responding to the growing concern of lengthy pre-notification phases, the Commission now accepts that transactions without horizontal overlaps or vertical links may be notified without engaging in the pre-notification process with the Commission's case team at all.

http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1269

USA: Antitrust Confidentiality Waiver Updated by US FTC and DOJ

On 25 September 2013, the US Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) jointly released an updated model waiver of confidentiality for use in civil matters involving non-US competition authorities. Confidentiality waivers allow for the sharing of confidential company information among the competition agencies of different countries and jurisdictions.

There are several key updates to the model confidentiality waiver. First, the model waiver revises how the FTC and DOJ treat privileged information. The model waiver makes clear that the FTC and DOJ will not use the confidentiality waiver to seek information that is protected under US legal privilege rules. If the FTC and DOJ receive information from another competition authority that would be legally privileged in the United States, the agencies will treat such information as if it were inadvertently produced and will return, sequester or destroy that information in accordance with the Federal Rules of Evidence and Federal Rules of Civil Procedure.

Furthermore, for the treatment of confidential information disclosed to non-US authorities and received by the FTC and DOJ, the model waiver provides clarity by separating such information in two sections. The waiver provides that information disclosed by the FTC and DOJ will be treated as confidential by the non-US authority in accordance with the laws of the jurisdiction in which that authority operates. The waiver further provides that any information indirectly received by the FTC and DOJ will be treated as if it were obtained directly by the FTC and DOJ, including with respect to confidentiality, destruction of documents and exemption from Freedom of Information Act disclosures.

http://www.mayerbrown.com/Antitrust-Confidentiality-Waiver-Updated-by-US-Federal-Trade-Commission-and-Department-of-Justice-09-30-2013/

UK: A New Single Merger Regulator, Updated Processes and Stricter Enforcement

On 1 April 2014 a number of changes to the UK merger regime will come into effect.

A single investigating body: The new Competition & Markets Authority, or CMA, will investigate mergers at both phase 1 and phase 2 – using separate teams for each phase. It will take over the powers of the Office of Fair Trading and Competition Commission, both of which will cease to exist.

Hold separate orders: Filing remains voluntary, and a deal can still be completed without UK clearance. However, the hold separate powers that existed under the old regime will be strengthened, making it considerably more difficult for a seller to require a buyer to take the competition risk in the transaction. If the CMA investigates a deal, whether or not it has been notified or completed, it can immediately impose a hold-separate order on the buyer, requiring it:

- to suspend integration of the target,
- to unravel any integration steps (for example, exchanges of information) taken before the CMA intervened and
- to continue to comply with the order until the outcome of the CMA's investigation.

The CMA may also require an independent monitoring trustee and a hold separate manager from within the target business to be appointed to ensure the order is complied with – penalties of up to 5 percent of global group revenues can be imposed for failure to comply. Notably, the CMA does not need to confirm in advance that it has jurisdiction over the deal before it exercises these powers.

Procedural updating: The notification and investigation process has also been updated:

- Notification will be on a prescribed Merger Notice.
- Although merger fees remain at the same level for the time being (£40,000 to £160,000), they will now be payable on publication of the CMA's decision.
- The CMA will have a new statutory deadline for its phase 1 investigation – 40 working days.
- There will be an additional 50 working days at the end of phase 1 for the buyer to negotiate remedies for any concerns expressed by the CMA in its phase 1 decision.
- The deadline for a phase 2 decision remains at 6 months, but there will be a fixed period of a further 12 weeks (extendable by 6 weeks for special reasons) within which to negotiate remedies required by the CMA at the end of phase 2.

Power to compel provision of information: Finally, the CMA will have the power to compel the parties to the deal and third parties to provide information, in the form of documentation and witness interviews, to assist its investigation as soon as it intervenes in a deal and even before the 40-day phase 1 timetable starts. Failure to provide information can attract a lump-sum penalty of up to £30,000 or a daily penalty of up to £15,000.

There will be no change to:

- **EU merger regime priority:** The UK merger regime will apply only if the EU regime (with its higher financial thresholds) does not apply.
- **The nature of deals covered by the UK regime:** Acquisitions of minority shareholdings as low as 15 percent are still covered, alongside mergers, acquisitions of full control or blocking rights, asset acquisitions and some joint ventures.
- **Jurisdictional thresholds:** The revenue and share of supply thresholds above which the UK regime applies remain the same.
- **Test for assessing mergers:** The "substantial lessening of competition" test used to determine whether a deal should be blocked or cleared will also remain the same.
- **Limitation period:** As under the old regime, the CMA will lose jurisdiction over a deal four months after it has been completed, or, if later, publicly announced.

USA: FTC Announces Higher HSR Thresholds for 2014

In the US, the filing thresholds are adjusted annually according to the evolution of the gross national product.

On 17 January 2014, the Federal Trade Commission revised the transaction size thresholds that determine whether companies are required to notify a transaction under the Hart-Scott-Rodino Antitrust Improvements Act (HSR). The new thresholds are effective from 17 February 2014.

A transaction is now subject to HSR where:

- The acquiring party will hold another person's assets or voting securities valued in excess of $75.9 million, approximately €55.3 million (previously $70.9 million or €55.2 million); and
- The transaction involves both one party with annual net sales or total assets in excess of $15.2 million, approximately €11.1 million (previously $14.2 million or €11.1 million) and another party with annual net sales or total assets in excess of $151.7 million, approximately €110.5 million (previously $141.8 million or €110.4 million);

OR

- The acquiring party will hold assets or voting securities of another person valued in excess of $303.4 million, approximately €221.1 million (previously $283.6 million or €220.7million).

http://www.mayerbrown.com/Federal-Trade-Commission-Announces-Higher-Hart-Scott-Rodino-Thresholds-for-2014-01-21-2014/

CADE: Three Public Hearings on Drafts of New Resolutions

On February 19, 2014, the Administrative Council for Economic Defense (CADE) has launched 3 public hearings on drafts of new resolutions: (i) Public Hearing No. 1/2014; (ii) Public Hearing No. 2/2014; and (iii) Public Hearing No. 3/2014. All three of them were open for suggestions until March 21, 2014.

Public Hearing No. 1/2014 refers to the draft of a new resolution that, if approved, will amend CADE's resolution No. 2/2012 with respect to: (i) definition of economic group applicable to investment funds; and (ii) notification of transactions related to acquisition of convertible debentures.

According to the proposed wording of the amendment, the definition of economic group will be broader and CADE is provided with the possibility to require, at its own discretion, the notification of the conversion of the debentures as well.

Public Hearing No. 2/2014 sets forth proposed amendments to CADE's resolution no. 1/2012 regarding transactions in the stock market and procedures applicable for challenging decisions rendered by the General-Superintendence approving transactions. The proposed amendments determine that transactions in the stock market are subject to the same rules currently in force with respect to public offerings. As such, transactions in the stock market that meet the criteria for mandatory notification may be closed prior to antitrust approval.

Public Hearing No. 3/2014 relates to the draft of a resolution that will set forth criteria applicable for assessment of obligation to notify associative agreements. As per article 90, item IV, of Law No. 12,529/2011 (Brazilian Antitrust Law), parties must submit to CADE's analysis their joint venture, consortium or associative agreements, provided that the minimum turnover thresholds are met.

Then, according with CADE's publication of 2013, the agency is continuing to consolidate and evolve antitrust law enforcement in Brazil.

Finally, due to the enforcement of the Brazilian antitrust law (Law No 12529/2011), CADE has already achieved a significant reduction in the average delay for merger filings analysis, down from 252 days in 2005 to 78 days (ordinary procedure) and 18 days (summary procedure) in 2013.

http://www.mayerbrown.com/CADE-launches-three-public-hearings-on-drafts-of-new-resolutions-02-26-2014/

India: Changes to the Competition Commission of India Regulations

On 28 March 2014, a notification has been published in the official gazette making changes to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. With the publication in the official gazette these changes have come into force. Some of the important changes are:

- A requirement to file shall be determined with respect to the substance of the transaction and any transaction structure which has the effect of avoiding notice will be disregarded;
- The exemption from notification of a transaction taking place entirely outside India with insignificant local nexus and effect on markets in India has been deleted;
- The filing fees has been increased to Rupees 1,500,000 (approximately $25,565 or €19,250) for a Form 1 filing and Rupees 50,00,000 (approximately $85,210 or €64,160) for a Form 2 filing.

The exemption from the obligation to notify if the *de minimis* thresholds are not satisfied will continue to apply. The applicability of the *de minimis* exemption is determined on the basis of turnover and asset thresholds in India. The *de minimis* exemption would be available if either of the following two tests is met for the last completed financial year:

- The value of the Target's Indian assets is less than or equal to INR 250 crore (approximately $43.56 million or €32.8 million.); or
- The Target's Indian turnover is less than or equal to INR 750 crore (approximately $127.8 million or €96.23 million).

In Brief

AUSTRALIA: NEW GUIDELINES ON MERGER CONTROL

The Australian Competition and Consumer Commission (ACCC) published its revised Informal Merger Review Process Guidelines (the Guidelines) on 26 September 2013 after a consultation process on draft Guidelines in July 2013.

The changes in ACCC processes now covered in the Guidelines include:

- The new pre-assessment process that enables the ACCC to concentrate its efforts on mergers that raise more significant concerns under section 50 of the Competition and Consumer Act 2010;
- The process by which merger parties are provided with feedback on issues and concerns raised by the market during a public merger review; and,
- A clarified approach to releasing public competition assessments, which are the published summaries of the ACCC's reasons for its decisions in complex or contentious merger matters.

http://www.accc.gov.au/system/files/Merger%20Review%20Process%20Guidelines%20-%2026%20September%202013_0.pdf

INDONESIA: ADDITIONAL INFORMATION REQUIRED FOR MERGER NOTIFICATIONS

In April 2013, the Commission for the Supervision of Business Competition (KPPU) introduced additional information requirements for merger filings (KPPU Decree No. 2/2013). Merger parties must now provide in their merger notifications to the KPPU:

- Pre and post-merger industry market structure information on the industry in which the parties conduct their business (including market share of the merging parties and their competitors); and
- Business plans for the upcoming three years and of their industry post-acquisition.

Previously, parties only needed to provide limited information to the KPPU, such as legal information, assets and turnover, and structure of the affiliated companies.

http://eng.kppu.go.id/?p=2089

INDIA: SIMPLIFIED FILING REQUIREMENTS

In April 2013, further amendments were introduced to the Competition Commission of India (Procedure in regard to the transaction of businesses relating to combinations) Regulations, 2011 (Combination Regulations) to simplify filing requirements and introduce greater certainty to the application of the merger control regime. The key changes to the

Combination Regulations are summarized as follows:

- It is no longer necessary to notify a transaction if an acquirer who holds more than 25 percent but less than 50 percent of shares or voting rights of a company acquires less than 5 percent shares or voting rights of the same company.
- There is no need to give a notification for mergers involving two companies where one company holds more than 50 percent shares or voting rights of the other company, or where more than 50 percent shares or voting rights of both merging companies are held by one or more companies within the same group.
- Certain amendments have been made to Schedule I (which provides a list of combinations that are ordinarily unlikely to cause an appreciable adverse effect on competition in India) to clarify the types of intra-group acquisitions that need to be notified to the competition authority and combine the available exemptions for acquisitions of certain current assets into a single category.

http://www.cci.gov.in/Newsletter/newsletterjuly2013.pdf

NORWAY: AMENDMENTS OF THE COMPETITION ACT

Among the amendments adopted by the Norwegian Parliament on 14 June 2013, the main changes in the merger control legislation are the following:

- Turnover thresholds will be increased to NOK 1 billion (approximately $170 million or €128 million) and NOK 100 million (approximately $16.6 million or €12.5 million) respectively.
- The current two-stage system, involving a rather simple notification followed by a comprehensive notification if the NCA finds that a further examination is required, will be replaced by just one notification.

http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2107/norway/

THAILAND: PRE-MERGER NOTIFICATION THRESHOLDS APPROVED

Although cross-sector merger control provisions have been in place in Thailand since the Trade Competition Act (1999) (TCA) came into effect, the filing regime has not yet been implemented, pending procedural and substantive sub-legislation being prescribed by the Trade Competition Commission (TCC) for the assessment of mergers and acquisitions under the TCA.

As a step towards enforcement, on 6 June 2013, the TCC approved the following pre-merger notification criteria:

- Mergers between enterprises having a total market share in any market for any goods or services of 30 percent or above, and a total turnover of 2 billion baht (approximately $65 million or €49 million) or above in the preceding year; and
- Acquisitions of shares (with voting rights) amounting to 25 percent or above of the total shares of a public company, or 50 percent or above of the total shares of a limited company, where the acquisition will result in the business of a company or both companies having a total market share of 30 percent or above in any market for any goods or services, and a total turnover of 2 billion baht (approximately $65 million or €49 million) or above in the preceding year.

At this stage, the above criteria are not yet effective and may be subject to further change, pending their official publication in the Government Gazette.

http://www.weerawongcp.com/data/know/49.pdf

TURKEY: NEW GUIDELINES ON MERGERS AND ACQUISITIONS

On 16 July 2013, the Turkish Competition Board published its "*Guidelines on the Conditions Accepted as Mergers and Acquisitions and the Concept of Control.*"

The Guidelines discuss a variety of important topics including:

- The concept of merger and acquisition
- *De jure* and *de facto* control, joint and sole control, conditions of negative control
- Conditions of full functionality and related transactions.

The Guidelines are largely in line with the EU merger control rules.

http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGuide%2fkilavuz14.pdf. ◆

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