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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.

European Union (EU): White Paper on the Control of Minority Shareholdings

Following last year's public consultation on the proposed reforms to the EU Merger Regulation (EUMR), the Commission published on 9 July 2014 a White Paper notably focusing on an extension of the EUMR to noncontrolling minority shareholding acquisitions.

In its White Paper, the Commission proposes a "*targeted transparency system*," (i.e., only the acquisition of noncontrolling minority shareholdings that create a "*competitively significant link*" would be subject to the Commission's review).

The acquisition of a non-controlling minority shareholding creates a "*competitively significant link*" where:

- a company acquires a minority shareholding in a competitor or a vertically related company, **and**
- the parties together account for over 20% of the market concerned, or between 5 and 20% if accompanied by additional factors (such as rights which give the acquirer a "*de-facto*" blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target).

An acquiring party will be required to self-assess whether an acquisition creates a competitively significant link. If a party considers that it does (or if he has doubts), he can file a voluntary "*information notice*" with the Commission. The information notice will give basic information on the parties, the stake and competitive impact, and will be published in the Official Journal. On receipt of a notice, the Commission can either open an EU merger process or rule that further investigation is not required. Member States will be able to use the notice to call for a referral of the case where the transaction only affects a national or sub-national market; while third parties will be able to use the notice as a basis to submit comments.

The Commission proposes that a transaction will be subject to a compulsory waiting period (15 working days is proposed) once an information notice has been submitted.

The Commission will be able to investigate any minority stake acquisition (whether or not completed) within a period after the submission of an information notice (4-6 months is proposed). This is to enable it to deal with third party comments and to avoid it opening cases upon a precautionary basis. In the case of a completed transaction, the Commission will be able to impose interim measures to avoid the integration of the businesses pending its investigation.

A party acquiring a minority stake will always be free to proceed directly to the filing of a Form CO, the classic EU merger control filing form, on the basis that it anticipates that the Commission will exercise jurisdiction.

WHAT IS WRONG WITH THE CURRENT PROPOSAL?

No Useful Guidance On What Is Significant

The main concern with this proposal is that it offers business no practical cut-off between cases that are likely to be "significant" and those that are not.

Why, for example, does the investment in a competitor aspect of the test not have some market share threshold?

Similarly, the control aspect of the significance test, in particular the reference to a 5-20% stake with a board seat and access to sensitive information, looks likely to be met in just about all cases. That means that a lot will rest on the competitor/market share test, where, as noted, there is no easy to use threshold.

THE PROPOSAL IN ITS CURRENT FORM WILL NOT LIGHTEN THE ADMINISTRATIVE BURDEN ON BUSINESS

The Commission, in its introduction to the proposal, refers back to an existing commitment to make rules and procedures less burdensome for business. Ironically, with no practical safe harbor or threshold below which the parties can safely self-assess that a minority stake acquisition is not "significant", the Commission will inevitably drive business towards the use of "information notices," and more transactions will be subject to expense and delay.

The timetable for the review of a minority stake should be as short as possible and finite

Procedurally, the ability of the Commission to investigate an acquisition for 4-6 months after the date of an information notice looks unsatisfactory from a business perspective. One would expect the Commission to be obliged to assess an information notice within a set time and either to declare the stake "not significant" or process it under the Merger Regulation.

ANY TIMETABLE WILL INEVITABLY BE TIED TO THE NOTION OF A "COMPLETE" NOTIFICATION

Finally, it may be questioned whether parties will still be able to fill in an information notice adequately than to complete the current EU merger filing form (Form CO).

The very likely result will be that parties will be required to file a draft, which will then be made subject to a compulsory Commission comment and approval phase before it can be filed. This will extend further the timetables, burden and cost of controlling minority stakes.

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449&from=EN

European Union (EU): Report for the Simplification of Merger Control within the EU

On 19 December 2013, a report calling for a reform of merger control cooperation mechanisms between National Competition Authorities (NCAs) was submitted to the French Minister for Economic Affairs on behalf of the French Competition Authority.

This report will be handed to the EU Member States, notably in order to fuel the discussions concerning the forthcoming revision of Regulation N°139/2004 on the control of concentrations between undertakings.

This report follows two recent cases in which NCAs issued conflicting decisions on the same transaction, Eurotunnel/MyFerryLink[1] and Akzo Nobel/Metlac Holding.[2]

Consequently, the report makes the following recommendations:

- to further encourage the use of a one-stop shop, by allowing the companies that have to notify their transaction in at least two Member States (instead of three currently) to file directly before the European Commission;
- to remove all thresholds that are not formulated in terms of turnover and therefore appear to be less objective, resulting in a lack of predictability and legal certainty;
- to examine notifiable mergers under the EUMR and not under national laws when two or more national regimes are applicable to avoid potential inconsistencies between national substantial tests and review methods;
- to apply a similar timeframe for the review of any transaction notifiable in two or more Member States;
- to create a standard filing form for all jurisdictions, which would contain a list of standardized information to be provided to each authority.

http://www.economie.gouv.fr/files/rapport_concentrations-transfrontalieres_en.pdf

1 Autorité de la concurrence, 7 November 2012, Groupe Eurotunnel / SeaFrance, n° 12-DCC-154 50 and Competition Commission (CC), 6 June 2013, Groupe Eurotunnel S.A. & SeaFrance S.A.

2 Bundeskartellamt, 24 April 2012, Akzo Nobel N.V. / Metlac Holding S.r.l., n° B 3 / 187-11 and Competition Appeals Tribunal (CAT), 21 June 2013, Akzo Nobel N.V. / Competition Commission, n° 1204/4/8/13.

Germany: New Guidance on Domestic Effects in Merger Control

On 30 September 2014, the German Federal Cartel Office published a "Guidance on Domestic Effects in Merger Control" (Guidance) for foreign-to-foreign mergers, (i.e. mergers between companies based abroad). Unlike in the EU, the existence of appreciable domestic effects is a requirement under German law in order to be obliged to submit a pre-merger control notification. The Guidance facilitates the assessment of domestic effects by describing typical scenarios that either result in appreciable domestic effects or clearly can be ruled out as having such effects.

- **Transactions that clearly have domestic effects:** Transactions with only two parties involved will

always have domestic effects if the statutory domestic turnover thresholds are met (i.e. in the last fiscal year one party's turnover in Germany exceeded €5 million / $6.6 million and the other party's domestic turnover exceeded €25 million/ $33.2 million). In case the target company or the joint venture exceeds the domestic turnover threshold of at least €5 million/ $6.6 million, it is considered to be sufficiently active in Germany as a result of which appreciable domestic effects are being assumed.

- **Transactions that clearly do not have domestic effects:** This category includes transactions where a joint venture is only active abroad, and the parent companies neither actually nor potentially compete in the relevant product market in which the JV is active abroad (or will be active in case of a greenfield joint venture) nor in a domestic upstream and downstream market.
- **Case-by-case assessment in all other cases:** In all other scenarios, a case-by-case assessment has to be carried out. Such a case-by-case assessment focuses on the question of whether the joint venture's activities are of only "marginal" domestic effects. Effects are not marginal, if the joint venture's turnover (or expected turnover) in Germany exceeds €5 million or its domestic (expected) market share exceeds 5%.

The fact that the Bundeskartellamt recognizes that a transaction must have appreciable effects in Germany in order to fall under the German merger control regime is welcomed. However, the no-domestic-effects exemption only applies to a few clear-cut scenarios; in many other cases where the analysis is likely to be more complex, a straightforward notification will be the quickest and most pragmatic way to overcome the issue.

http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt%20-%20Inlandsauswirkungen_2014.pdf?__blob=publicationFile&v=2

Ireland: Major Reform Related To Merger Control

The reform provides for the merger of the two Irish authorities dedicated to the protection of competition and of the consumers into a single body, the "Competition and Consumer Protection Commission" (CCPC).

The current threshold test has been simplified by removing previous references to "*carrying on business in any part of the island of Ireland*" and "*world-wide turnover*." Then, the other turnover thresholds have been raised. All mergers should now be notified to the CCPC where:

- the aggregate turnover in Ireland of the merging parties is at least €50 million/$66 million (versus €40 million/$53.1 million prior to the reform), **and**
- the turnover in Ireland of each of two or more of the merging parties is at least €3 million/ $4 million (versus €2 million/$2.66 million prior to the reform).

The reform also extends the review periods, from 4 weeks to 5 weeks in phase I, and from 17 weeks to 20 weeks in phase II.

Beyond, it provides for a new regime specifically applicable to mergers of companies active in the media sector, which will have to be notified (if the thresholds are met) both to the CCPC and to the Minister for Communications, Energy and Natural Resources.

Finally, the parties will now be allowed to notify before the agreement is signed provided that they can demonstrate to the CCPC a good faith intention to complete.

All these provisions will take effect on 31 October 2014.

http://www.djei.ie/publications/commerce/2014/actno29of2014.pdf

Hungary: Clarification of a Number of Rules

On 1 July 2014, several amendments to the Hungarian merger control rules entered into force.

First, a pre-notification procedure has formally been established.

The new provisions also introduced an express prohibition of completion before clearance of the transaction, exemption being only possible where the following conditions are met:

- the parties justify that such exemption is necessary to protect the value of the parties' investment, **and**
- it does not change the market structure to an extent where it would be impossible to restore competition in case of a prohibition decision.

The new Act also reinforces the applicable sanction in case of violation of the suspension obligation. The Hungarian Competition Authority (HCA) now imposes a fine for early implementation of the transaction or for failure to notify a transaction; the maximum amount of this fine is up to 10% of the annual turnover of either the investigated undertaking or the group.

Regarding remedies, the new Act now states that they must be such as to *eliminate* any competitive concern, instead of "*to mitigate*" in the previous wording. The HCA is now empowered to publish a non-confidential version of the planned conditional clearance in order to allow third parties to comment.

Finally, the simplified procedure now lasts 30 instead of 45 calendar days.

http://www.gvh.hu/en/legal_background/rules_for_the_hungarian_market/competition_act

Cyprus: A New and More Harmonized Regime

In June 2014, the Cyprus merger control regime has been amended to be in line with EU law.

The thresholds have been slightly raised, and the Commission for Protection of Competition (CPC) now reviews any transaction which triggers the following thresholds:

- The worldwide turnover achieved by each of at least two of the undertakings concerned exceeds the amount of €3.5 million/$4.6 million (against €3.42 million/$4.54 million prior to the reform);
- At least €3.5 million/$4.6 million of the combined turnover of all undertakings concerned is achieved in the Republic of Cyprus (against €3.42 million/ $4.54 million prior to the reform);
- At least two of the undertakings concerned achieve a turnover in the Republic of Cyprus (against at least one of the undertakings concerned prior to the reform).

Foreign-to-foreign mergers that trigger the thresholds are caught even where the operation is not expected to have any impact on the competitive market in Cyprus.

In case of failure to notify the transaction, it is now possible for the Commission for Protection of Competition to impose a fine of up to 10 % of the annual turnover of the undertakings concerned, and to order the demerger, along with an additional fine of €8,000 / $10,625 for each day the infringement persists.

Control of Concentrations Law of 2014 Law no. 83(I)/2014

Russia: Abolition of Post-Completion Notification for Minor Transaction

On 30 January, 2014, a new amendment to the Federal Law on the Protection of Competition came into force in Russia.

Post-completion notification has been suppressed from the Russian merger control regime.

Any transaction triggering any of the following thresholds still has to be filed before completion:

- The total aggregate of all groups exceeds RUB 7 billion (about €142 million/$189 million), and the total aggregate assets of the target entity plus the target entity's group exceeds RUB 250 million (about €5 million/$6.6 million); **or**
- The total aggregate revenue exceeds RUB 10 billion (about €202 million/$268 million), and the

total aggregate assets of the target entity and its group exceeds RUB 250 million (about €5 million/$6.6 million); **or**

- When any entity related to the transaction is included on the register of companies with a market share of over 35% or has a market dominant position.

Also, following the amendment, certain intra-group transactions are now expressly exempted from notification. Are concerned transactions between legal entities that belong to the same "group of persons".

Federal Law No. 423-FZ, amending Federal Law No. 135-FZ "On the Protection of Competition" dated 26 July 2006

United States (US): A Federal Court Confirms the FTC's Legislative Powers

On 6 November 2013, the Federal Trade Commission (FTC) adopted new rules for pre-merger notification. These rules clarify the situations in which the transfer of pharmaceutical patents must be notified in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).

Accordingly, any transfer of exclusive pharmaceutical patents is potentially reportable, even if the patent owner retains certain rights to manufacture or to operate co-exclusive rights (e.g., the right to co-develop and co-commercialize the final product).

On 30 May 2014, a US District Court upheld the validity of these new rules, rejecting a request from the Pharmaceutical Research and Manufacturers of America (PhRMA) to overturn it. PhRMA claimed that the FTC lacked necessary powers for the adoption of new rules under the HSR Act. In addition, PhRMA stated that it was not the FTC's role to enact laws specifically aiming at regulating a particular industry.

The US District Court said that the "exemptions" provided for in the HSR Act gave authority to the FTC to take such measures. The pre-merger notification rules are thus deemed to exempt all industries with the exception of the pharmaceutical industry. But more importantly, the judges concluded that it was the FTC's duty to limit the application of these new rules solely to the pharmaceutical industry, in order for the federal agency not to exceed its powers to enact "necessary and appropriate rules.

http://www.ftc.gov/system/files/documents/cases/140530opinionremsj.pdf

Mexico: New Thresholds and New Powers for the Federal Competition Commission

The new Mexican merger control regime entered into force on 7 July 2014.

The unchanged thresholds defined below now exclusively take into consideration annual sales originating in Mexico and/or assets in the Mexican territory and are now applicable to foreign-to-foreign transactions:

- The value of the target exceeds the equivalent of multiples of the minimum wage in the Federal District of Mexico City, about €71.5 million/$95 million, **or**
- There could be an accumulation of 35% of the assets or stocks of a firm's worth of about €71.5 million/$95 million or having sales in Mexico of such amount or more, **or**
- Two or more firms with individual or combined sales of about €193.5 million/$257 million or more are involved and the additional assets or capital acquired in Mexico exceed about €34 million/$45 million.

The new regime has a suspensory effect as a general rule, whereas a non-closing order was only an exception under the former law.

After the parties have submitted their filing, the Federal Competition Commission (FCC) is required to issue a ruling within 15 working days. If the FCC requests additional information, a second review period opens, which has been extended from 35 to 60 working days.

Finally, the FCC is empowered to require additional information from the parties as well as from third parties and government agencies at any stage of the merger review.

Text: Federal Law on Economic Competition 7 July 2014

http://www.cfc.gob.mx/cofece/images/cofece/slider/aRT_CARRUSEL/DOF_Ley_Federal_de_Competencia_Economica.pdf (in Spanish)

Brazil: CADE Issues Revisions to Regulations on Merger Control

The Administrative Council for Economic Defense (CADE) has enacted two new Resolutions, published on 7 October 2014 in the Federal Official Gazette, which revise CADE's merger control regulations in several ways. The proposed changes to CADE's filing regulations concern both substantive and procedural aspects which impact the merger clearance process and include issues not sufficiently addressed by the Law No. 12529/11 (Brazilian Antitrust Law). The most relevant changes are briefly described below.

1. **Investment funds' economic groups** – for the purpose of calculating turnover figures, the following are to be deemed as a part of the same economic group in transactions involving investment funds:
   - the economic group of all shareholders directly or indirectly holding an interest equal to or more than 50% of the shares of the fund involved in the transaction, individually or pursuant to any kind of shareholders' agreement, and
   - the companies controlled by the fund involved in the transaction, as well as the companies in which the fund directly or indirectly holds an interest equal or superior to 20% of the corporate or voting capital.
2. **Consolidation of control** – transactions involving the acquisition of minority interests by a sole controlling shareholder no longer need to be notified to CADE.
3. **Subscription of securities convertible into shares** – these transactions should be notified to CADE, cumulatively:
   - the future conversion of such securities into shares meets the filing criteria for mandatory notification to CADE; and
   - the subscribed securities grant to the acquirer or subscriber the right to appoint management board members or directors, or vote on and/or veto rights concerning competition-sensitive issues, except for the rights already granted by law.

   The notification of transactions involving the subscription of securities, based on the criteria described above, precludes the need to notify the transaction again when the securities are converted into shares. For the transactions that may not meet the requirements above, the notification may be presented to CADE only upon the conversion of the securities, if such transaction meets the notification requirements.
4. **Transactions in the stock exchange or over-the-counter markets** – these transactions may be carried out regardless of CADE's clearance. The exercise of share rights, however, remains forbidden until CADE clears the transaction. If requested by the parties, CADE may grant an authorization for the exercise of share rights related to the acquired securities in the cases in which such measure is required to protect the value of the investment.
5. **Merger clearance fast track procedure** - the revised regulations altered and increased the number of situations in which the fast track procedure may be used to notify a transaction to CADE. Those situations now include the following:
   - transactions that result in horizontal overlaps with a combined market share lower than 50%, as long as by economic criteria, such as the Herfindahl-Hirschman Index (HHI), it is possible to show that the market share increase would be insignificant (variation under 200 points);

» transactions resulting in vertical integration, as long as the parties and their respective economic groups do not control a share that is more than 30% of any relevant market affected by the transaction (according to the former rule, this limit was a 20% share of the affected market).

http://www.cade.gov.br/upload/Despacho%20n%BA%20280-2014-Pres-Cade-Consulta%20P%FAblica%20n%BA%2001_2014.pdf

China: The MOFCOM Clarifies Important Merger Control Concepts

On 6 June 2014, China's Ministry of Commerce (MOFCOM) published new guidelines on merger control.

For the first time MOFCOM defines the notion of "control" in its general meaning and in the context of joint ventures. Article 20 of the Anti-Monopoly Law now defines a "concentration of undertakings" as three types of transactions:

- merger between undertakings;
- one undertaking acquiring control of another through acquisition of its shares or assets; or
- one undertaking acquiring control of another, or acquiring the ability to exercise decisive influence over another, by contract or other means.

The guidelines also give further guidance on the methods used for calculating the turnover thresholds that trigger the obligation to notify the transaction.

The guiding opinion also makes the following clarifications:

- Imports into China are included in the turnover within the territory of China. Exports are excluded.
- A participating undertaking's turnover excludes the turnover of undertakings that were sold or that were not under the undertaking's control in the preceding accounting year.
- The turnover of the participating undertaking that is jointly controlled by two or more undertakings includes all controlling entities' turnover.
- Only revenue related to the sold part will be considered for partial acquisitions, if the seller is not in control of the sold part after the transaction.

Finally, further details are provided on the pre-notification period, particularly regarding documents to be produced and the conduct of the proceedings.

Text: Guiding Opinions on Notification of Concentration of Undertakings on 6 June 2014

China: New Guidelines for Simplified Merger Control

On 18 April 2014, MOFCOM introduced a trial framework for the notification of simple concentrations or mergers the aim of which was to speed up the existing lengthy merger review process for cases that do not raise competition concerns and improve transparency with MOFCOM publicly announcing cases that it accepts under the procedure.

The Guidelines on the Notification of Simple Cases of Concentrations of Undertakings (Simplified Notification Guidelines) establish a procedural structure for the notification and assessment of transactions falling within MOFCOM's Interim Provisions on the Standards that Apply to Simple Cases of Concentrations of Undertakings (Simple Cases Classification Provisions).

The Simplified Notification Guidelines reduce the information burden for the qualified simple cases and launch a review procedure that potentially shortens the waiting time for obtaining approval from MOFCOM.

The Simple Cases Classification Provisions identify six types of mergers as being within the scope of "simple cases":

- When the aggregate market share of all parties involved in the concentration represents less than 15% in all horizontal relevant markets;
- When the market shares of the parties in all vertically related markets represent less than 25%;
- When the market shares of the parties in markets that are not horizontally or vertically related represent less than 25%;

- When there is the establishment of a joint venture outside China that does not have economic activities within China;
- When there is the acquisition of the equity or assets of a foreign company which does not have economic activity within China; and
- When the transaction implies a joint venture jointly controlled by two or more parties pre-transaction that will be controlled by one or more of these parties post-transaction.

While there are benefits to using a simplified notification, parties should be mindful that the transaction will be subject to greater public scrutiny as public consultation is an integral part of MOFCOM's review. Further, there is a risk of MOFCOM either rejecting a case for simplified treatment before it has initiated its review or, potentially, withdrawing simplified status even after its review has begun (e.g., if a third party challenges the use of the simplified procedure during the 10-day consultation period), in which case the notifying parties will then have to re-notify their transaction under the normal procedure. Where MOFCOM proposes not to grant simplified treatment initially or proposes to withdraw simplified treatment after its review has begun, the notifying parties will be afforded an opportunity to express their views.

http://www.mayerbrown.com/files/Publication/f8183275-feea-4060-918b-7e4795b257bf/Presentation/PublicationAttachment/7901ab75-f428-4eba-acdc-86bfc351b053/140429-PRC-Antitrust.pdf

Hong Kong: Competition Commission Publishes Draft Guideline on the Telecommunications Merger Rule

The Hong Kong Competition Commission (Commission) on 9 October 2014 published draft Guidelines to the Hong Kong Competition Ordinance (Cap. 619) (CO). Among the published draft Guidelines is a draft Guideline on the Merger Rule, as well as five other draft Guidelines on the conduct and enforcement aspects of the CO.

The Merger Rule under the CO applies only to mergers involving, directly or indirectly, holders of carrier licenses under the Telecommunications Ordinance (Cap. 106). There is currently no cross-sector merger control regime in Hong Kong.

The CO does not impose a mandatory obligation to notify a merger though the draft Guideline and notes that parties are encouraged to contact the Commission at the earliest opportunity where they may seek the Commission's informal advice on the intended transaction. The draft Guideline identifies two safe harbor measures the Commission intends to apply concurrently: the four-firm concentration ratio (CR4 Ratio) and the Herfindahl-Hirschman Index (HHI) test. Therefore, a merger that meets either one of the safe harbor measures will fall within the safe harbor. The draft Guideline also sets out the processes and procedures on a broad spectrum of issues, including how to seek informal advice from the Commission, offering commitments in respect of mergers and circumstances in which the Commission may investigate completed or anticipated mergers.

The draft Guideline on the Merger Rule is open for public comment from now until 10 December 2014. Once public consultation closes, the Commission expects to revise the draft and consult the Hong Kong Legislative Council for feedback. The Guidelines are likely to be adopted and come into operation in early 2015.

India: Fines on Tesco and Thomas Cook for Late Notifications

Transactions reportable in India must be notified to the Competition Commission of India (CCI) within 30 days of the:

- execution of any agreement or 'other document' for the acquisition or acquiring of control;
- approval of a proposal relating to merger of amalgamation by the Board of Directors.

"*Other document*" is explained in the CCI Regulations to be any binding document, by whatever name, conveying an agreement or decision to control, shares, voting rights or assets. It is also clarified that where such a document has not been executed but the intention to acquire is communicated to the Government or a statutory authority, the date of such

communication is deemed to be the date of the execution of the "other document" for acquisition.

In May 2014, Tesco was penalized rupees 30 million (€368,000/$489,000) for filing a belated notification in relation to its proposed notification of a stake in Trent Hypermarket Limited. The fine was imposed on the basis that Tesco had not filed a notification with the CCI within 30 days of filing of an application to the Department of Industrial Policy and Foreign Investment Promotion Board related to the transaction. In the same month, a fine of Rupees 10 million (€123,000/$163,000) was imposed on travel firm Thomas Cook for a delay in notification. In 2013, the CCI had fined three undertakings for late notifications. The fines ranged from Rupees 500,000 (€6,000/ $8,000) to Rupees 10 million (€123,000/ $163,000).

In view of the penalties imposed by the CCI for late notifications, undertakings that have business interests in India or intend to acquire business interests in India should be cautious and seek advice from counsel at an early stage to ensure that the filings are made in time.

Common Market for Eastern and Southern Africa (COMESA): New Clarification on The Proposed Amendments of the Merger Rules

As mentioned in the previous issue of the MMF, amendments of the COMESA's Regulations and Draft Guidelines are being prepared. Representatives of the COMESA Competition Commission (CCC) have already indicated a number of the comments made would be taken into account. Until the amended texts are published, the following update may be provided:

- **Zero threshold:** Under COMESA merger rules, "*a 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 notified to the CCC. However, no such threshold has been set so far. It now appears clear that the revision of the Guidelines will include a turnover test for determining whether a party has "*operations*" in a Member State. The level of the threshold still needs to be fixed. In the meantime, the CCC may be approached to determine whether a filing is necessary.
- **Local nexus:** Under COMESA merger rules, a transaction has to be filed to CCC when there is "*an appreciable effect on trade between COMESA Member States and which restrict competition in the COMESA*". The definition of "*appreciable effect*" is currently very unclear but the revised Guidelines are also expected to set a turnover test for determining whether a concentration has an "*appreciable effect*" on trade in the COMESA region.
- **One-stop shop principle:** In theory, the notification to the CCC is one-stop shop and does not require any further notifications to Member States competition authorities. In practice, this rule took some time to be fully implemented and several COMESA Member States, such as Kenya, Mauritius and Zambia, have continued to require a national filing for some time. The one-stop shop principle now fully applies in Zambia and Mauritius. The CCC continues discussions with Kenya.
- **Filing fees:** CCC officials have recognized that the applicable filing fee (0.5% of the merging parties' combined annual turnover or assets in the COMESA region, which is capped at $500,000 (€335,950)) is too high. A comparison with fees applied in other countries is currently being conducted in order to propose a significant decrease of the filing fee in the upcoming review of COMESA rules.

New rules need to be approved by the COMESA Council of Ministers, with the consequence that entry into force of the new rules is not expected before the end of this year. ◆

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