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Antitrust & Competition

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 new developments taking place in the various merger regimes around the world.

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ITALY: New Merger Control Turnover Thresholds

Italian merger control thresholds are adjusted annually to take into account increases in the gross domestic product deflator index. As of 16 March 2015, the Section 16(1) of Law no. 287 of 10 October 1990 now imposes a prior notification for all mergers where the following two conditions are met:

- The aggregate turnover in Italy of all undertakings is more than €492 million/$653 million (versus €489 million/$649 million); and
- The aggregate turnover in Italy of the target company is more than €49 million/$65 million (same as prior to the reform).

http://www.agcm.it/en/competition--mergers-and-acquisitions/notification-form/1776-foreword.html

POLAND: Changes to Merger Control Rules

Earlier this year, several amendments were introduced to the *Polish Competition and Consumer Protection Act* that are intended to simplify the merger control regime and strengthen antitrust enforcement.

Prior to the introduction of the amendment, the review period that applied to concentrations was two months. A new two-stage process has been introduced according to which non-problematic transactions will be cleared within the first stage, which is one month from the date of submission of a complete notification. The Polish competition authority will have an additional four months to review complex transactions, such as those that may require remedies or that require conducting market surveys.

In determining whether the turnover thresholds are met, besides the turnover of the acquirer group, only the turnover of the undertaking or the part of the undertaking over which the acquirer is taking control need to be taken account of. This is a significant departure from the previous system under which the turnover of the entire seller group was to be taken into account.

Previously, an exemption from the requirement to notify applied to the acquisition of control or the acquisition of assets where the target's Polish turnover did not exceed €10 million in any of the two preceding years. The amendments extend this exemption to a merger and the creation of a joint venture such that no notification is required if the turnover of each party in Poland does not exceed €10 million.

https://uokik.gov.pl/home.php

ROMANIA: Amendments of the RCC Merger Regulation

The Romanian Competition Council (RCC) has amended the *Regulation on economic concentrations* in force since August 2010. The new merger control rules were enforced by Order no. 438/2014 published in the Official Gazette of Romania no. 795 on 31 October 2014.

As an increased number of mergers are expected to be eligible for the simplified procedure, the new rules aims to lower the administrative burden for the merging parties, as well as for the RCC.

- **Pre-notification:** Merging parties are recommended to engage in prior discussions with the RCC at least two weeks before submitting their notifications and must inform the RCC of: the names of the merging parties; the markets where they are active; a summary description of the merger; and the manner in which control is exercised at least five days before the date of the pre-notification discussions (as opposed to the previous three-day term).
- **Simplified notification:** The simplified notification may now be submitted to the RCC if the parties have:
  - » a combined market share of a maximum of 20% of the relevant market (instead of 15% under the old rules) in horizontal relations; or
  - » an individual and combined market share of a maximum of 30% of the relevant market (instead of 25% under the old rules) in vertical relations.

BRAZIL: Pre-merger Control Rules on Collaborative Agreements

On 3 January 2015, the new rules on the submission of the so-called "collaborative agreements" to the Administrative Council for Economic Defense ("CADE") became effective. The mandatory submission of such agreements to CADE was already set forth in the new Brazilian antitrust law, which entered into force on 29 May 2012. The new rules aim at providing additional clarity to this matter by establishing the types of agreements that shall be considered "collaborative" in nature and, therefore, subject to CADE's premerger control.

Pursuant to Resolution No. 10/2014, which entered into force on 3 January 2015, an agreement shall be considered "collaborative" if it lasts for more than two years and the following additional conditions are met: the agreement gives rise to a horizontal overlap between the contracting parties or their respective groups and their combined market share is equal to or in excess of 20%; or the agreement creates a vertical link between the contracting parties or their respective groups, and one of them has a market share of at least 30% in one of the markets affected by the agreement, provided that (i) the agreement contains a profit/loss sharing provision or (ii) the agreement contains exclusivity obligations.

BRAZIL: CADE Releases Report Setting Parameters to Prevent Gun-jumping Practices

On 20 May 2015, CADE released the "Report for Analysis of Previous Completion of Concentration Acts" ("*Gun-Jumping Guidelines*"), setting the parameters to be used as guidelines during negotiations and for analysis of economic transactions, in order to prevent gun-jumping practices.

Seeking to set guidelines on the types of business activities that may lead to jumping the gun, the *Gun-Jumping Guidelines* divided such activities into three groups:

- Information exchange between the parties involved in a certain transaction;
- Definition of contractual clauses governing the relationship between economic agents; and
- Activities of the parties before and during the implementation of the transaction.

With regard to information exchange, the *Gun-Jumping Guidelines* stipulate that sensitive competitive information consists of specific information related directly to the performance of players' core activities, and they list the specific information of such nature. However, the *Gun-Jumping Guidelines* clarify that the presentation of aggregated data on counterparties, data with a certain time lag, as well as the establishment of an environment and mechanisms of neutrality (e.g., clean teams and parlor rooms) can minimize concerns about gun-jumping practices on information-sharing between competitors.

With regard to the definition of contractual clauses governing the relationship between economic agents, the *Gun-Jumping Guidelines* stressed those that will be subject to scrutiny by CADE (e.g., clauses preceding the execution date of the contract implying any integration between the parties and prior non-competition clauses, among others).

In relation to the activities of the parties before and during the implementation of the transaction, the report indicates the activities of CADE's greatest concerns, emphasizing specifically those that deal with the partial completion of a transaction before its clearance, such as:

- The transfer and/or enjoyment of overall assets (including securities with voting rights);
- The exercise of voting rights or relevant influence on the activities of the counterparty (such as decisions on pricing, clients, sales policy/planning, marketing strategies, interruption investments, discontinuation of products among others);
- The receipt of profits or other payments related to the performance of the counterparty;
- The development of joint sales strategies or marketing of products that constitute a single management unit;
- The integration of sales forces between the parties;

- The licensing of exclusive intellectual property to the counterparty;
- The joint development of products;
- The appointment of members to management bodies; and
- The interruption of investments, etc.

Finally, the *Gun-Jumping Guidelines* still stipulated (i) specific proceedings to be observed by independent committees (clean team, executive committee and parlor room) during negotiations of complex transactions or of those already in the antitrust analysis phase when necessary to exchange a significant volume of information; and (ii) possible penalties to be applied in cases of gun-jumping practices.

Since the enactment of Law No. 12529/2011, CADE has already imposed penalties for gun-jumping practices in six cases.

http://cade.gov.br/Default.aspx?60d322f7091ef230fa481b283a1f

CANADA: Increase of the Merger Notification Thresholds

On 7 February 2015, the Competition Bureau published its new merger notification threshold for the year 2015, entering into effect on the same day.

Canada merger control rules use a two-part test-based on the size of the transaction and the size of the parties to determine if a merger should be notified:

- The transaction size, which is updated annually in order to take inflation into account, is now C$86 million/€59 million versus C$82 million/€57 million in 2014.
- The thresholds related to the size of the parties remain unchanged.
- The parties, together with their affiliates, must have aggregate assets in Canada, or annual gross revenues from sales in, from or into Canada, of more than C$400 million (€273 million).

http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03872.html

USA: Higher Hart-Scott-Rodino thresholds

On 20 February 2015, new thresholds relating to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a, went into effect. The thresholds govern which mergers or acquisitions must be reported to the Federal Trade Commission and the Department of Justice. Since 2005, the thresholds have been adjusted annually according to the change in US gross domestic product.

Pursuant to the new thresholds, notification of mergers or acquisitions will be required if:

- The acquiring party will hold another person's assets or voting securities valued in excess of €57.4 million/$76.3 million (previously €57.4 million/$75.9 million) and the transaction involves one party with annual net sales or total assets in excess of €11.5 million/$15.3 million (previously €11.4 million/$15.2 million) and another party with annual net sales or total assets in excess of €114.8 million/$152.5 million (previously €114.2 million/$151.7 million); or
- The acquiring party will hold assets or voting securities of another person valued in excess of €229.7 million/$305.1 million (previously €228.4 million/$303.4 million).

https://www.ftc.gov/system/files/documents/federal_register_notices/2015/01/150121hsrthresholds7a.pdf

CHINA: First Anniversary of the actual application of China's simplified merger filing procedure

When MOFCOM introduced a simplified merger filing procedure by enacting the *Interim Provisions on the Standards that Apply to Simple Cases of Concentrations of Undertakings* on 11 February 2014 and the *Guidelines on the Notification of Simple Cases of Concentrations of Undertakings* on 18 April 2014, the new procedure was not well-received initially as there were inherent uncertainties due to (i) the application for the simplified procedure has a required 10-day public comment period and (ii) MOFCOM's guidelines were silent on how quickly a filing could be cleared under the so-called simplified procedure.

It was not until 22 May 2014 that the simplified procedure was actually applied for the first time in a "joint-to-sole control" case. This first case was cleared 19 days from the day it was available for public comments, which is much quicker than the time period generally required under MOFCOM's normal review procedure. Since then, more and more filings were notified under the simplified procedure. As of 21 May 2015 (the first anniversary of the application of the simplified procedure), 182 filings have been submitted through the simplified procedure. This is a relatively large number compared to the 262 filings received by MOFCOM in the entire year of 2014. Based on our observation, most of the cases using the simplified procedure could be cleared in Phase 1 (i.e., within 30 calendar days from the day when a case is made public for comments), and the quickest case was cleared within 15 calendar days.

Although it seems that the simplified procedure works very well, one cannot ignore the risks associated with this procedure. As far as we know, at least five cases were rejected by MOFCOM for using the simplified procedure after they were available for public comments. It means that the notifying parties of these cases would have to re-notify their cases under the normal procedure, which would be time-consuming and costly. Hence, before applying for the simplified procedure, the notifying parties need to ensure that their cases are qualified to use the simplified procedure, and, if necessary, MOFCOM may need to be consulted for greater certainty.

Since the simplified procedure can still be considered at an early stage, we expect that there will be more developments in both substantive and procedural aspects in the future.

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

HONG KONG: Competition Ordinance Comes Into Full Effect on 14 December 2015

The *Commencement Notice for the Competition Ordinance* (Cap. 619) (the "Ordinance") was published on 17 July 2015, appointing 14 December 2015 as the date for full enforcement of the Ordinance.

According to a press release issued by the Competition Commission (the "Commission"), the Commission is "*ready to be an effective enforcer of the competition law which will support Hong Kong's open economy by ensuring fair and free markets for all.*"

Immediately following the publishing of the commencement date, the Commission on 27 July 2015 published six final guidelines, jointly with the Communications Authority, that address the First Conduct Rule (restrictive agreements), Second Conduct Rule (abuse of substantial market power) and Merger Rule and procedural matters, including complaints, investigations and block exemption applications.

The Merger Rule in Hong Kong remains a voluntary regime which, for the time being, is only applied to undertakings that directly or indirectly hold a carrier license under the Telecommunications Ordinance (Cap. 106). The Merger Rule Guideline, which largely tracks existing guidance issued by the Communications Authority, preserves existing presumptions and safe harbors but stresses that they are merely indicative in nature and does not rule out intervention in cases where competition concerns are raised.

In the pipeline is the keenly awaited leniency policy for cartel conduct and a statement of the Commission's enforcement priorities.

The Commission's statement of enforcement priorities is an important document that will, short of identifying specific sectors or businesses, give businesses an idea of where the Commission intends to focus its enforcement activity and what considerations may drive the Commission's decision to commence an investigation or market study.

Businesses should ensure that their staffs understand the competition rules introduced by the Ordinance and how the rules affect commercial strategy and daily operations and start to take steps to reach a compliant position before the critical date of 14 December 2015.

http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/F2091B1D7DE087EC48257A240054AA88/$FILE/CAP_619_e_b5.pdf

COMESA: New Merger Control Thresholds

On 26 March 2015, the COMESA Council of Ministers adopted significant amendments to the COMESA merger control regime. A filing is now required if:

- Both undertakings, or either of them, operate in two or more COMESA Member States;
- The combined annual turnover or combined value of assets (whichever is higher) of all parties in COMESA exceeds €37.7 million/$50 million;
- The annual turnover or value of assets (whichever is higher) of each of at least two of the parties in COMESA exceeds €7.5 million/$10 million; and
- The merger has an appreciable effect on COMESA competition and trade, meaning that each of the parties do not achieve more than two-thirds of their aggregate turnover or assets in COMESA within one and the same Member State.

Furthermore, the Council of Ministers lowered the merger filing fee under the COMESA regime. The fee is now set at 0.1% of the combined annual turnover or value of assets of the parties in the COMESA region with a ceiling of €150,500/$200,000. The previous merger filing fee was 0.5% of the COMESA turnover or assets of the merging parties, subject to a cap of €376,360/$500,000.

http://www.comesacompetition.org/?p=898

MOROCCO: New turnover thresholds

The amendments of the Moroccan merger control rules came into force with Decree no. 2-14-652 of 1 December 2014, published in the Official Gazette on 4 December 2014.

Transactions will now have to be reported to the Competition Council, not only where the parties to the transaction hold more than a 40% market share, but also where aggregate global turnover is higher than 750 million dirhams (€68million/$76 million), exclusive of tax, or where the turnover of at least two of the parties in Morocco is higher than 250 million dirhams (€23 million/$25 million), exclusive of tax.

Furthermore, the government retains a "*right of evocation*" of the cases handled by the Competition Council which allows it either to request a phase-two analysis of a merger or to carry out its own analysis of the transaction.

http://www.sgg.gov.ma/Portals/0/BO/bulletin/FR/2014/BO_6314_Fr.PDF

EGYPT: New Prior Filing Requirement

In March 2015, the Egyptian Competition Authority published a new notification form and guidelines establishing a suspensory merger control regime.

The previous merger control rules applicable in Egypt required that notification to the Egyptian Authority be submitted within 30 days after the completion of a transaction.

Now the Egyptian Competition Authority has the power to review, prior to completion, all of the transactions involving a company with an annual turnover in Egypt of at least €12 million (as opposed to all companies with that level of revenue worldwide). The calculation is based on the turnover of the companies and related entities, including parents and subsidiaries.

Furthermore, the new rules now state explicitly that notifying a transaction to another Competition Authority—including COMESA—is not a substitute for the obligation to notify the Egyptian national competition authority.

http://www.eca.org.eg/ECA/Upload/StaticContent/Form/NotificationForm.pdf

ISRAEL: Antitrust Authority Proposes Merger Reform

On 31 March 2015, the Israeli Antitrust Authority (IAA) published a proposed amendment to Israel's Restrictive Trade Practices Law that reforms Israel's merger control regime.[1] The amendment contains several pertinent parts: (i) imposition of a general

1 The amendment also proposes to reduce import barriers.

prohibition on mergers that may raise reasonable concerns of substantial harm to competition; (ii) introduction of a voluntary merger notification; (iii) an increase in the merger control turnover thresholds; (iv) expansion of the definitions of "company" and "merger of companies"; (v) extension of the merger review waiting period; and (vi) increased transparency of discussions of the Advisory Committee to the Director General of the IAA.

Imposition of a General Prohibition on Mergers that May Raise Reasonable Concerns of Substantial Harm to Competition

Under the current law, if a merger is non-reportable because it does not meet the merger control thresholds, that merger is deemed lawful, even if it is believed that the merger could cause harm to competition.

The proposed amendment would alter the Restrictive Trade Practices Law to provide that all mergers that may create a reasonable concern of causing substantial harm to competition will be prohibited, regardless of whether the merger is reportable.

The amendment proposes to revise the Restrictive Trade Practices Law by enabling parties that believe that the merger will not create a reasonable concern of harm to close the transaction without submitting a notification to the IAA for prior approval pursuant to a voluntary notification system (discussed below).

The parties' assessment may be challenged, however, by the Director General of the IAA on the grounds that the merger does, in fact, give rise to a reasonable concern of harmful competition and violates Section 19 of the Restrictive Trade Practices Law, which could result in criminal proceedings against the parties.

Some have criticized the potential for criminal proceedings for a failure to notify a transaction that otherwise would be non-reportable.

Critics have argued that remedies for merger-related violations should focus on restoring competition and be limited to structural or behavioral remedies.

INTRODUCTION OF A VOLUNTARY NOTIFICATION SYSTEM

Under the proposed amendment, parties to non-reportable transactions may file a voluntary merger review notification.

Upon filing, the Director General will have 15 days to notify the parties whether or not the merger will be reviewed. A negative response or no response will be deemed as unconditional approval of the merger.

Critics have argued that the potential imposition of criminal penalties, however, effectively turns this voluntary notification process into a mandatory one.

Additionally, the voluntary notification may be viewed as a concession that the transaction is anticompetitive.

Finally, without more guidance from the IAA regarding which types of mergers may be viewed as anticompetitive, the voluntary notification process could bring uncertainty into the parties' merger process.

INCREASE IN MERGER CONTROL THRESHOLDS

The proposed amendment seeks to increase the current joint turnover threshold from NIS 150 million to NIS 250 million, the size of the parties' threshold, which requires the turnover of at least two merging parties be at least NIS 10 million, will remain the same.

However, if this threshold is not met, then the amendment proposes that if one of the parties to the merger has worldwide turnover of more than NIS 1 billion, a premerger filing will be mandatory.

Currently, premerger notification also is required when the merger creates a monopoly or if a party to the merger already is a monopolist. The amendment proposes to revise this requirement by adding a condition that when a merger creates a monopoly or involves a monopolist, the merging parties must have a joint turnover of NIS 100 million.

Note that transactions that may no longer be required to be reported because of the change in the merger thresholds could still face scrutiny if the transaction would cause a reasonable concern of substantial harm to competition.

Critics have raised concerns that the revised thresholds could lead to merger filings where the transaction has no connection to Israel. For example, a company with worldwide turnover of NIS 1 billion and turnover in Israel of NIS 250 million would be required to file under the amendment, even if the target had nothing to do with Israel.

EXPANSION OF THE DEFINITION OF "COMPANY" AND "MERGER OF COMPANIES"

The proposed amendment seeks to define "company" to include foreign companies and partnerships, regardless of whether the entities are incorporated or registered in Israel.

Currently, foreign companies must have a "nexus" to Israel for a merger control filing to be required. The proposed amendment gets rid of the "nexus" requirement; companies would be required to file so long as the thresholds are met.

The amendment also proposes to broaden the definition of "Merger of Companies" to include both corporate entities and natural persons, even if such persons hold no means of control in any corporate entity.

EXTENSION OF THE MERGER REVIEW WAITING PERIOD

Currently, all mergers must be reviewed within 30 days of filing.

This review period can be extended by the Antitrust Tribunal or by consent of the parties. If the Director General does not render a decision within the 30-day period, consent to the merger is deemed granted.

The amendment proposes to give the Director General unilateral authority to extend the review period to 120 days, excluding the initial 30-day period.

INCREASED TRANSPARENCY OF DISCUSSIONS OF THE ADVISORY COMMITTEE WITH THE DIRECTOR GENERAL

The amendment proposes to make public summaries of internal discussions of the Exemptions and Mergers Advisory Committee.

These published summary minutes will not include information that may harm competition or information that is exempt from disclosure according to Section 9 of the Israel Freedom of Information Act.

http://www.antitrust.gov.il/files/33601/New%20legislative%20proposals_31032015.pdf

UAE: New Implementing Regulations

The UAE passed Federal Law No. 4/2012 on the regulation of competition (the "UAE Competition Law") in October 2012, which notably aims to introduce a merger control regime within the UAE. The UAE Competition Law entered into force on 23 February 2013 and was fully effective in August 2013.

The UAE Competition Law provides that where a proposed "economic concentration" may affect competition in a relevant market, particularly to create or enhance a dominant position, a notification shall be submitted to the Ministry of Economy at least 30 days prior to the completion of the transaction.

An economic transaction is broadly defined by the UAE Competition Law as "*every conduct resulting in a transfer (merger or acquisition) in whole or in part of usufruct or rights in shares or liabilities from one firm to another, which enable a firm... to dominate directly or indirectly another firm.*" The Ministry of Economy has a 90-day period to examine the transaction in Phase I and 45 additional days in Phase II. The UAE Competition Law applies to all entities operating in the UAE and entities whose activities outside the UAE may affect competition in the UAE.

The Competition Law has been completed by the Implementing Regulation, which came into force on 27 October 2014 and aimed to clarify the information by including the merger filing, as well as the criteria that the UAE Ministry of Economy will take into account during the filing analysis.

Furthermore, the Implementing Regulation set out an appeal of the Ministry of Economy's clearance decision.

However, the Regulation does not specify the thresholds for determining which mergers must be reported to the Ministry for prior approval; it indicates that such thresholds will be determined by the UAE Federal Cabinet. ◆

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