Close scrutiny of M&A under merger control rules

Antitrust authorities in major jurisdictions can be expected to continue their close scrutiny of M&A deals raising competition concerns, whether or not such deals are reportable. In addition, some jurisdictions are moving to streamline their merger control regimes.

Focus on the US

In the US, premerger filings under the Hart-Scott-Rodino (HSR) Act have recovered from recessionary levels—indeed, both FY 2012 and FY 2013 saw about twice as many filings as FY 2009. It is also notable that over a dozen consummated, non-reportable deals have been challenged during the Obama Administration.

The US agencies continue to pursue aggressive merger litigation strategy. In addition to various quantitative economic analyses, internal business documents prepared by the parties are increasingly relied upon by the agencies as evidence on key issues, such as relevant markets and potential anticompetitive effects. In this context, everyone involved in such deals (including investment bankers and other outside advisors) should be cautioned from the beginning to exercise care, to be measured, clear and precise in writing about the transaction and to avoid over-blown rhetoric or speculation about the potential impact on markets, prices or other competitive matters.

Mergers, joint ventures or other cooperative arrangements should be reviewed from an antitrust standpoint *early in the planning stages,* so that antitrust risks can be appropriately identified, and addressed or managed. In addition, the merging parties' coordination of filings and strategy on a worldwide basis is necessary given cooperation of authorities around the globe.

Focus on Canada

Canada's highest court will be addressing lower courts' application of the substantial prevention of competition test for requiring a merger remedy in *Tervita Corporation et. al. v. Commissioner of Competition* (Tervita). Tervita is notable as the Canadian Commissioner of Competition's first court challenge of a merger since 2005 and the first case involving a non-notifiable merger.

Focus on the European Union

On January 1, 2014, a package of measures to simplify the procedures for notifying mergers under the EU Merger Regulation came into effect. Specifically, the European Commission revised the simplified merger procedure notice to expand the categories of cases to which it will apply. It also reduced the amount of information that needs to be provided in merger notifications and published revised versions of its model texts for commitments and trustee mandates and accompanying Best Practice Guidelines.

Following a Commission consultation on a major revision of EU merger control rules in 2013, the Commission is, among other things, considering modifying the mechanisms for pre- and post-notification referrals of merger cases from national competition authorities to the Commission. The most controversial proposal would extend the scope of the EU Merger Regulation to acquisitions of non-controlling minority shareholdings.

In this regard, the Commission has looked to the US, UK and Germany for examples of regimes which already subject non-controlling minority stake acquisitions to a merger control regime. In the most likely scenario, the Commission would propose a system under which it would have discretion to select cases to investigate. In other words, the notification of a non-controlling minority stake meeting certain thresholds would be mandatory, but not all cases would be pursued by the Commission.

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One of the EU Member States which is also in the process of revising its merger control rules is Poland. The planned amendment to Polish competition law which is likely to be in force in 2014 foresees several measures aimed at relaxing the merger control procedure and making it more transparent, although it remains to be seen how it will be implemented.

The repercussions of the 2007-2008 financial crisis are still being felt in some merger control cases and in particular, the increase in the number of merger cases in which the failing firm defence is raised. For example, the Commission accepted a failing firm argument in the Olympic Air/Aegean and Nynas/Harburg mergers in 2013. The postal sector is also facing upheavals on several fronts: legislative measures forcing its liberalization, the restructuring of the sector following changes in market trends, and the Commission's close scrutiny, including a decision in January 2013 to prohibit the UPS/ TNT Express merger (which decision has been appealed by the parties).

Focus on China

China's merger review authority, the Ministry of Commerce (MOFCOM), has continued to impose conditional approval on global mergers, including the mergers of Glencore-Xstrata, Marubeni-Gavilon, Baxter-Gambro and MediaTek-MStar. Notification of the recent merger of Thermo Fisher-LIFE was submitted in July 2013 and granted conditional approval on January 14, 2014. In the past 5 years since China's Anti-Monopoly Law came into effect, MOFCOM has granted conditional approvals in less than 3% of the total cases submitted and reviewed. However, there is a clear trend towards more conditional approvals based on the 11 conditional clearances in 2012 and 2013. In addition, the review period can be very long and can involve re-filing for cases with significant competition issues. For example, the MediaTek-MStar took 14 months to obtain final clearance. To date, this was the longest review period undertaken by MOFCOM. Multinational companies are advised to budget an appropriate amount of time for China's merger review when planning for their deals.

Despite this, MOFCOM has taken steps to streamline its review process for mergers that raise no competition issues. In 2013, MOFCOM released a draft regulation setting forth six different scenarios that qualify a case for a simplified review process. Three of the scenarios are based on market share criteria, two on the economic effect of the proposed transaction within China and one on the control between the parties of the proposed transaction. The draft regulation does not specify the procedures of the simplified review. It is expected that MOFCOM will issues new rules relating to the simplified review process.