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Tracking Global Merger Control Changes For 2017

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Law360, New York (January 31, 2017, 1:05 PM EST) -- 2017 introduces new layers of complexity to the already challenging task of identifying which countries around the world will claim jurisdiction to review a given M&A transaction. Multiple jurisdictions have either modified their merger filing thresholds or are considering such changes. Several other countries have newly introduced merger reporting requirements, adding themselves to the list of more than 100 jurisdictions that the parties in an M&A transaction must consider as they identify their filing obligations.

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A Few Examples

EC: Potentially Expanding Notification Requirements

The European Commission is considering a rule change designed to bring more transactions between competitors into the EC review process. Historically, the EC has based its filing requirements on the parties' turnover (both globally and in EC member states). Now, however, the EC is evaluating whether to amend its filing thresholds to capture deals with potentially significant competitive effects that today fall below the filing thresholds. To do so, the EC would implement a "complementary deal value threshold," designed to capture transactions in which a sizeable portion of the deal value derives from lines of business where the parties compete or operate adjacent to one another. The EC is expected to publish its proposals in the course of Q3 2017.

Germany: Potentially Revising Size of Transaction Thresholds

The German Federal Ministry of Economic Affairs has proposed introducing a new alternate merger filing threshold based on the value of the transaction (as opposed to the parties' respective turnovers) in the most recent amendment of the German Act Against Restraints of Competition. The proposed "size of transaction threshold" would apply if the deal value exceeds €400 million, in addition to other factors. The ministry is expected to enforce the amendment in early 2017. With this new test, Germany joins a small "club" of jurisdictions around the globe (Argentina, Canada, Mexico, the Philippines and the United States) that also consider deal value when assessing merger control jurisdiction.

Italy: Potential New Filing Thresholds

In 2014, the Italian Competition Authority (Autorita Garante della Concorrenza e del Mercato) issued a recommendation to amend the national merger filing thresholds so as to streamline the types of transactions being caught. Today's filing thresholds require parties file notifications in Italy if (1) the parties' combined revenues in Italy exceed €495 million and (2) the target's revenues in the country exceed €50 million. The proposed amendment would change the second prong of the threshold to require that at least each of two of the parties have revenues in Italy exceeding €30 million. While the legislative bodies have not yet adopted this proposal, the newly appointed Prime Minister Paolo Gentiloni stressed that it is a priority for his cabinet, and final approval is expected within 2017.

U.K. Potentially Revising the De Minimis Thresholds

The U.K.'s Competition and Markets Authority is considering increasing the de minimis thresholds below which the CMA may choose not to refer a case for an in-depth investigation. The exemption allows the CMA to exclude cases from in-depth review if the burden and administrative cost of the review would be disproportionate to the size of the market concerned.

Currently the threshold for markets to be considered sufficiently important for an in-depth investigation is £10 million, and the CMA proposes raising that threshold to £15 million. The CMA also proposes changing the threshold for when markets are generally considered to be insufficiently important to justify an in-depth investigation from £3 million to £5 million. In cases with a market size between these two thresholds, the CMA will continue assessing whether potential harm resulting from the merger would be greater than the cost of the investigation. The public consultation the CMA launched on the topic will be completed in February 2017, with the outcome expected in Q2 or Q3 2017.

The Philippines: Building Upon a New Merger Control Regime

The Philippines Competition Commission began requiring filings under its merger control regime in June 2016. For 2017, practitioners anticipate new rules and interpretations regarding the implementation of that review process. The PCC began imposing a filing fee of PHP250,000 (approximately $5,000) on notified transactions in January 2017, for example. More substantively, the PCC may further clarify a note it published last September, which indicated that parties must seek clearance before executing a definitive M&A agreement. Such a requirement can have a dramatic impact on the merger reporting timeline and strategy for parties to a global transaction, particularly when news of the transaction is not yet public and a routine PCC investigation could tip off markets to the deal. To date, the PCC has published no news of any enforcement action against parties for filing after announcing their deal; but, until this notification rule is clarified, parties with reportable transactions in the Philippines must remain cautious.

The developments in the Philippines set the tone for at least two more Association of Southeast Asian Nations member states that are expected to activate their merger control regimes in 2017: Thailand and Myanmar. There is no regional ASEAN merger control regime; however, the more ASEAN member states adopt a national system, the tighter the cooperation links will likely be, and in the longer term a regional regime might emerge.

UAE: Implementing Merger Controls Based on Market Shares

The United Arab Emirates begins its first full year of enforcing the merger control requirements under its

competition law. Enforcement remains at early stages, and practitioners expect to learn more in 2017 on how UAE will interpret and apply its merger control program. For example, UAE's competition law requires notification for a transaction if the parties' combined market share exceeds 40 percent of the "overall transactions in the relevant market." However, guidance is not yet available on how transactions are calculated under this formulation.

Also unclear is when UAE's competition law requires parties to submit a filing, when one is triggered: Under the language of the competition law, the notification should be submitted at least 30 days prior to the completion of the transaction, while the implementing regulations require submission at least 30 days prior to the conclusion of the transaction agreements. This distinction obviously can make a substantial difference to the notification process and timeline for parties that have a reportable transaction in UAE. Nevertheless, once a filing is made, the UAE Ministry of Economy will typically issue a certificate of initial submission which entitles the parties to execute the transaction agreements with a merger control clearance condition. As such, practitioners will be looking to the UAE for further guidance on this issue.

Africa: The Continued Rise of National and Regional Regimes

Parties that generate substantial revenues in Africa face an ever-evolving regulatory filing landscape. Following the relatively successful implementation of the merger regime in the Common Market for Eastern and Southern Africa, other regional schemes such as the East African Community (EAC), the Economic Community of West African States, the Economic and Monetary Community of Central Africa (CEMAC) and the West African Economic and Monetary Union have begun claiming (or considering) merger control jurisdiction. Some of these bodies have had unenforced merger control rules for years, but have recently showed a willingness to act upon them (for instance, EAC appointed five new commissioners in 2016, while CEMAC also appears to be operational and has been receiving notifications). We expect merger enforcement in these jurisdictions to continue to grow in 2017.

Ukraine: Revised Thresholds and Failure-to-File Penalties

An amendment of the Ukrainian merger control regime was adopted in 2016, reducing the number of transactions likely to require filings. Previously, a single party's turnover in Ukraine could trigger a notification obligation, even if the other party had almost no presence in the jurisdiction. With the new changes, at least two parties must have in-country sales or assets exceeding €4 million to trigger a notification. This amendment on the filing thresholds combined with a simplified review process in certain cases requiring less detailed information — in particular less details on related parties, directors and their relatives, subsidiaries and market shares in unrelated markets — and less formalities, contributed to a more streamlined, less burdensome and efficient regime.

Additionally, the Anti-Monopoly Committee published in September 2015 the Recommendations on Calculation of Fines for Violation of Ukrainian Competition Law, which outline the AMC's methodology to calculate fines and introduce a one-year amnesty period for past merger control violations. The application of this methodology has already resulted in an increase in the level of fines for non-notification, but the fines have also become more predictable and consistent. Companies were given a grace period of one year to report past failures to file in return for a fixed fine of UAH102,000 (approximately €3,650) (Amnesty Procedure). This Amnesty Procedure proved to be popular both among local businesses and multinational corporations, and was prolonged until March 15, 2017.

Chile: Voluntary Regime Becomes Mandatory

In August 2016, Chile introduced a number of amendments to its merger regime, most notably transforming the regime from a currently voluntary to a mandatory preclosing merger regime. Under the new proposed thresholds, a transaction will require notification to the Fiscalia Nacional Economica if the: (1) combined turnover of the parties in Chile in the financial year preceding the transaction is approximately $70 million, and (2) turnover in Chile of at least two parties in the financial year preceding the transaction is approximately $11 million. Chile will start enforcing the mandatory preclosing merger regime in May 2017 at the earliest. The new law also introduced some additional provisions, which are already in force: first, a prohibition on interlocking directorates between competitors and second, an obligation to notify post-closing acquisitions of minority shareholdings within competitors exceeding 10 percent.

Argentina: Post-Closing Regime Becomes Suspensory Preclosing

In 2015, the Argentine National Commission for Competition Defence released a draft new competition law, which introduces a preclosing review system (and abolishes the current post-closing notification system). The new law may be enacted in 2017, although there is as yet no information on the new proposed thresholds the Argentine government is considering.

Implications

Identifying the merger control filing obligations that attach to a particular transaction is a critical early step in any transaction. The results of a global merger control analysis inform whether the parties need to notify competition authorities about their transaction, whether they will have "stand-still" obligations during a review waiting period, and how much time to budget for the merger review process, among other considerations. The constantly moving merger control landscape, coupled with global authorities' increased enforcement against non-notification and early implementation of transactions, highlights the need for diligent and thorough assessment of filing obligations.

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