National merger control – Towards further convergence in multi-jurisdictional filing processes

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This article departs from the newly published draft "Best Practices on cooperation between EU national competition authorities in merger review" and conducts a more detailed assessment of the current state of filing procedures in the Member States of the European Union. Recent signals show that there is an increasing awareness of the national authorities and the European Commission regarding the burden imposed on companies by multi-jurisdictional merger filings and, hence, the importance of adapting and harmonizing the regulatory requirements accordingly. Although the European Commission may not interfere with the national legislative processes, it needs to act as a driver to this effect. The article enumerates the principal areas where there is still room for progress in merger procedures. It is only when national legislations have been harmonized and the national authorities have integrated similar ways of acting with respect to merger control that the cooperation as pre-conceived in the Best Practices will indeed be effective.

1. INTRODUCTION

Any junior competition law associate has been confronted with his or her first merger filing analysis. During the first months of employment and typically with a transaction clock ticking, the junior will be learning, first hand, how to manage such analysis, researching desperately, the latest news regarding the new Indian merger regulation "soon to be published", trying to understand what the Russian authorities mean by "local assets" and, realizing that despite European harmonization at all levels, each member state of the European Union actually has its own "Merger Regime".

Multi-jurisdictional filings account for a large part of many competition lawyers work and represent a lot of effort in terms of time and money for many international companies. It is crucial for all parties involved in a transaction to be able to implement their agreement and proceed to closing as soon as possible and, arguably; many transactions are being delayed because of the complexity and diversity of the regulatory merger filing requirements that have to be fulfilled. The European national merger control regimes remain the initial legal framework of reference and, with the exception of the referral mechanisms of articles 4, 9 and 22 of the EU Merger Regulation, national merger procedures are not harmonized at EU-level. There is no legal basis for cooperation with respect to merger control between the competition authorities within the EU, similar to that granted by Council Regulation 1/2003 for the enforcement of articles 101 and 102 TFEU.

Various attempts to increase coordination at the European level between authorities have been made in the past. The association between the European authorities called "The European Competition Authorities" (ECA) was the first initiative to this effect.

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For merger control in particular, the ECA has created a procedural guide relating to the exchange of information between members on multi-jurisdictional merger filings[144]. Further on, in 2008, several European competition authorities[145] signed the Marchfeld declaration,[146] whereby they stressed the importance of promoting and strengthening cooperation in the field of competition law enforcement and policy, including merger control. However, save for the setting up by the ECA in 2001 of an informal information system whereby authorities that are notified of a transaction pass on this information to other authorities, no concrete measures as to how cooperation should become smoother have yet been taken. At international level, both the International Competition Network (ICN)[147] and the Organization for Economic Cooperation and Development (OECD)[148] have been far more active for some time now, focusing on transnational merger control proceedings and producing recommendations and guidelines to allow for smoother regulatory proceedings[149]. While this article only focuses on the European Union, it is interesting for the practitioner to see that many of the recommendations made by these two organizations during the last ten years have contributed to considerably facilitating the filing procedures and merger assessments in many countries both inside and outside Europe.

2. THE EU MERGER WORKING GROUP BEST PRACTICES

It appears however that the European national competition authorities as well as the Commission are now starting to focus on this part of the regulatory framework. Created in January 2010, the EU Merger Working Group, a working group chaired by the Commission and two national competition authorities and with a remit to reinforce cooperation by creating a permanent structure for technical discussions has now presented a draft Best Practices published for comments regarding cooperation between national competition authorities in merger cases[150] (the "Best Practices"). The aim is to publish a final version of the Best Practices in the autumn of 2011. Additionally, Vice-President Almunia, commenting on the current merger control rules in a speech in March 2011[151], indicated his intention to launch a debate regarding further partnership between the European competition authorities on this matter.

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http://www.bundeskartellamt.de/wDeutsch/download/pdf/ECA/ECA_procedures_guide_post_Athens.pdf.

145 The competition authorities that signed the Marchfeld declaration are the competition authorities of Austria, the Czech Republic, Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, the Slovak Republic, Slovenia, Croatia and Switzerland as well as DG Competition of the European Commission.

146 http://www.bwb.gv.at/SiteCollectionDocuments/MemorandumofUnderstanding.pdf.

147 ICN's 'Recommended practices for merger notification procedures' at www.internationalcompetitionnetwork.com.

148 OECD's 1999 'Report on notification of transnational mergers' DAFFE/CLP(99)2/FINAL at www.oecd.org.

149 For a detailed screening of these two organisations works in relation to multi-jurisdictional merger review, see Marco Botta 'Multi-jurisdiction mergers and acquisitions in an era of globalisation: The Telecom Italia – Telefónica case', [2008], Global Antitrust Review, p. 97.

150 Draft/Best Practices on cooperation between EU national competition authorities in merger review. Published for public consultation on 28 april 2011. See http://ec.europa.eu/competition/consultations/2011_merger_best_practices/index_en.html.

151 Reference is made to the speech addressed by the Vice-President Almunia 'EU merger control has come of age' at the conference "Merger Regulation in the EU after 20 years' co-presented by the IBA Antitrust Committee and the European Commission on 10 March 2011. In this speech VP Alumnia stated that with respect to merger control, "*companies are calling for more convergence on procedures, substantive tests and remedies*' and that "[he] *would like to launch a debate by asking how* [to] *strengthen*

The Best Practices are intended to provide guidance to the National Competition Authorities (the "NCAs"), the merging and third parties on how cooperation among the authorities will be managed in multi-jurisdictional merger cases. The Best Practices pre-conceive cooperation between the authorities on matters such as procedures, the substantive analysis and assessment of remedies. They also encourage the merging parties to contribute to this cooperation by allowing for the alignment of the review proceedings and providing waivers of confidentiality to the authorities to enable more effective communication.

The scope of cooperation, as outlined by the Best Practices, needs to be further clarified on various points[152] and ideally should go beyond its current state. It is regretful that the document is too vague on, for example, clearly defining the situations where the cooperation becomes necessary or the exact scope of the cooperation, by including practical examples. Arguably, these guidelines do not provide any revolutionary input for competition lawyers who in most cases already strategically initiate parallel proceedings in all EU member states and keep the various pertinent authorities aware of the proceedings in other jurisdictions to ensure as a smooth process as possible. Nevertheless, the document is an initial and very important step towards further discussion regarding greater efficiency in terms of proceedings and – to the extent relevant in the particular case – harmonized assessment with respect to both the merits of a case and remedies. In addition, it is already of great benefit for many European companies if, in the future, the parties can where relevant refer to this document in order to persuade smaller and less experienced European competition authorities to listen and learn from their more experienced colleagues with respect to discussions on substantive issues and remedies.

However, it should be stressed that any such cooperation may only be beneficial to the extent the competitive conditions on the geographical markets are similar and provided that the need for cooperation is not being used by the authorities as an excuse to slow down the review process in each individual jurisdiction. Similarly, any assessment of the merits or the remedies should eventually be made exclusively with reference to the national legislative framework to ensure legal certainty for the parties involved.

In addition, the level of cooperation needs to remain at the appropriate level. National merger control is and will remain a national competency and the assessment of a merger could not be compared to the assessment of practices under articles 101 and 102 TFEU. The parties still want to master the various national processes and be part of the discussions with each competition authority. Indeed, even if the competitive conditions and the overall argumentation remain the same, a specific line of argumentation and related evidence will almost always be developed for each country. Hence, the solution suggested by some comments to the Best Practices, of one authority (for example the authority in the country which is the most affected by a transaction) acting as a *one-stop-shop* and taking the lead in coordinating exchanges between the authorities and with the notifying parties, appears unrealistic and not desirable.

[the] *partnership in merger control, perhaps adapting the patterns of the existing ECN structure for antitrust*'.

[152] See all comments received at http://ec.europa.eu/competition/consultations/2011_merger_best_practices/index_en.html.

3. COOPERATION COULD ONLY BE EFFECTIVE IF THERE IS REAL COHERENCE IN THE EUROPEAN NATIONAL LEGISLATIVE FRAMEWORKS

More importantly, the Best Practices and the recent statements by VP Almunia opened up the possibility for a wider discussion regarding merger control procedures in the EU and the issues and costs such filings represent for many companies[153]. Indeed, as many of the practices referred to in the draft are already established and the authorities already discuss matters informally in multi-filing cases, complex or not, the main issue still remains the differences in the legislative frameworks and procedures.

Today, all 27 EU member states have different merger filing requirements, and while many of the national legislations have been developed to capture transactions with a clear effect on the national markets, it is still sometimes difficult to see the rationale behind some European merger control regimes where filings are almost systematically triggered for larger companies, despite only *de minimis* presence by one or all parties. In addition, while many countries apply thresholds based on turnover, some jurisdictions still base the whole or part of their turnover thresholds on market shares[154] which oblige the parties to take a view on market definition at a preliminary stage and may lead to legal uncertainty as to the obligation to file or not.[155].

Further, in most jurisdictions, the review periods and the information to be provided almost always remain the same for complex and non-complex mergers, exacerbating the companies and unnecessarily delaying even transactions presenting null merits issues because of the unreasonable level of information to be submitted. Arguably, for these situations, it should be standard to develop short form procedures, thereby limiting the extent of the information to be provided. Overall, it is necessary to harmonize the level of information to be submitted in merger filings. While some jurisdictions only require a minimum level of information in their filing forms, other jurisdictions require information which in many cases may seem totally irrelevant with respect to the transaction considered or request that company-related documents or transaction agreements should be translated. Sometimes it is possible to informally ask for waivers but the response will always depend on the case handler and the parties may not rely on this for full legal certainty. It has been suggested that the Commission and the national competition authorities propose "a model notification form" both in a long and a short format to harmonize the level of information to be submitted. This indeed appears to be a very appealing initiative. Going even further, why not imagine a single form used by all competition authorities with a first part that would be the same for all jurisdictions

[153] See ICN 'Report on the Costs and Burdens of Multijurisdictional Merger review'. The report identifies the "unnecessary " costs and classifies them into four categories: (i) costs associated with assessing notifications requirements where notification thresholds are imprecise and/or subjective; (ii) costs associated with complying with notification requirements for transactions lacking an appreciable nexus with the reviewing jurisdictions; (iii) costs associated with complying with unduly burdensome filing requirements, including translation and formalistic procedural requirements; and (iv) costs associated with unnecessary delays in the merger filing and review process.

[154] The European countries which still base all or part of their jurisdictional thresholds on market shares are Latvia, UK, Spain and Portugal.

[155] See, for example, ICN 'Recommended practices for merger notification procedures' Section II, A, Comment 1

including the information relating to the parties and completed by the parties once[156] and with a second part including any country specific information, to be completed separately for each jurisdiction?

In addition, in many cases with no or very limited overlaps, even a shorter time period for review would lighten the impact of the merger review on the overall transaction schedule. Some authorities such as the Swedish or the German authorities often clear transactions presenting no issues on the merits before the deadline. However, this will often depend on their workload and is not a practice the parties may systematically rely on. Paradoxically, receiving a clearance before deadline may sometimes also disturb the transaction timeline since all necessary arrangements for the execution of a transaction have been made for a closing date which the parties have agreed based on statutory timelines. It is therefore important that the parties always have full legal certainty as to when a decision may be expected. One suggestion could be to introduce for all cases where a short form notification is triggered either a shorter statutory time period for review or at least the possibility to request "early termination" such as that provided for by the US procedural rules.

A reduced format for the information to be provided as well as a reduced review period in non-merits cases would not only be in the parties' interest but also in the authorities' interest as it will thus enable them to allocate more resources and focus on larger more complex transactions.

Other aspects are the further harmonization should focus on are the notion of concentration, the criteria for the substantive assessment as well as the structure of remedies. First, with respect to the notion of concentration, not all Member States have the same interpretation. In some member states, such as Germany, even minority shareholdings[157] need to be notified under the merger rules and the EU Merger Regulation's definition of a "full function joint venture" has not been adopted by all legislators. Secondly, different substantive standards may render cooperation difficult since transactions may sometimes be scrutinized differently. For example, an agreement between undertakings may be considered and analyzed as a concentration under German merger control rules while the same agreement may be analyzed based on article 101 TFUE (or the equivalent national rule) in another member state. As pointed out by some commentators to the Best Practices, this difference in standards is not acceptable for companies developing business in a common market[158]. Finally, it would be desirable to have a coherent approach throughout Europe with respect to what remedies may or may not be acceptable to enable companies to plan for their engagements in a transaction at an overall level.

4. CONCLUSION

It suffices to review the state of various European merger control regimes in the early part of 2000 to note that important steps toward harmonization in particular on the

[156] Similar to sections 1 to 5 in the Form CO. Admittedly, the question of a common language for this first part of the notification remains to be resolved.

[157] It is expected that the Commission in the near future will start analyzing the question regarding notification of minority shareholdings.

[158] See comments submitted by McDermoot Will & Emery to the draft Best practices at http://ec.europa.eu/competition/index_en.html.

procedural level have already been made, resulting from the accession of many new eastern European countries to the European Union and also thanks to the work performed by organizations such as the ICN and the OECD. However, a second step in such convergence work must now be taken with respect to the more substantive assessments. Although the European Commission may not currently interfere with national merger controls and cannot impose any requirements on the 27 Member States on how to proceed, it needs however to serve as a driver to this effect, either within the ECN extended to merger control or by continuing the work within the Merger Working Group. Indeed, many European companies have their principal place of businesses in Europe and hence are most likely to trigger in the majority European merger filings. The Commission needs to work together with the European competition authorities and suggest standards and produce models to increase the level of coherence between the national merger control frameworks. It is only if there is increased convergence with respect to the general legislative framework for merger assessments, that the intended cooperation as currently recommended by the Best Practices would be fully accomplished.

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