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Cooperative Competition?

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Guidance: Best Practices on Cooperation between EU National Competition Authorities in Merger Review, LNB News 09/11/2011 39

Abstract

The national competition authorities of the European Union have jointly published a document setting out the best practices which they should aim to follow when co-operating in the review of certain multi-jurisdictional mergers. Matthew Hall, a partner at McGuireWoods LLP, discusses the scope, aim and likely impact of the document with Robert Matthews

Analysis

The EU Merger Working Group, which consists of the national competition authorities of the EU with responsibility for merger review, has just published "Best Practices on Cooperation between EU National Competition Authorities in Merger Review". The document sets out the best practices which those authorities should try to adopt when they co-operate in the review of mergers that meet the requirements for notification or investigation in more than one Member State. It also lists the steps that merging parties and third parties are encouraged to take to facilitate co-operation between the authorities.

Scope

Matthew Hall outlines the scope of the document: "It only relates to transactions which raise difficult jurisdictional or substantive issues and only applies within the EU. A large majority of transactions which are filed for merger clearance in multiple jurisdictions in the EU do not raise such issues and often filings would in such cases be required in countries outside the EU in any event. The issues with such transactions, particularly the level of work required to make the filings and delay to the closing of the transaction, will remain."

Hall explains that the common problems which arise in relation to competition cases involving multiple jurisdictions are the work required, delay and--where issues arise--differences in analysis by the regulators of the substantive issues and remedies, and timing differences. He says: "These problems make the process uncertain in terms of timing and--where issues arise--in terms of the ultimate overall result of the analysis, ie whether the deal will ultimately be allowed and, if so, in what form. This affects the principal parties and their ability to finance and complete transactions expeditiously."

Desirable Development?

He believes that the introduction of the set of best practices is a desirable development. "In practice much of this co-operation between authorities already goes on, but codifying it in this way is helpful, not least

because it ensures a focus on the need for co-ordination and allows parties to request that it is done."

However, he says that improved co-operation between the EU national competition authorities will not solve all of the problems that commonly arise. "There will be no impact on the majority of cases, which raise no jurisdictional or substantive issues. For cases which do raise these issues, there will be little or no impact on the work required. There may be some improvements in terms of timing and delay, but since each country has to abide by its own procedural rules, the scope for this is fairly limited. The greatest impact should be in the area of aligning the analysis of substantive issues and remedies, which should facilitate the process and lead to greater certainty as to the outcome, and may help with timing certainty as well."

Possible Problems

Hall warns of certain drawbacks: "From the point of view of parties, since this type of co-operation already happens to a large extent in practice already, having it codified does not make any real difference. However, to the extent that it does create even greater information sharing between regulators in difficult cases which raise substantive concerns, it could produce the result that regulators tip each other off about concerns from particular customers or particular areas of concern about the transaction, which might make obtaining clearance for the transaction more difficult. Jurisdictions which do not consider that issues arise may come under pressure--real or implicit--from other regulators to look more closely at a transaction than would otherwise have been the case."

He also points out a gap in the proposals: "A big issue is that jurisdictions outside the EU are not covered, and many transactions which need to be filed in several EU states also need to be filed outside the EU, often in Brazil, South Africa, Ukraine, Russia and some other states."

Points for Practitioners

As for the impact on practitioners, Hall says: "In practice, in most cases the document will make no difference since most transactions which need to be filed in multiple jurisdictions do not raise material concerns. For more difficult cases, the document emphasises the need for up-front planning to cover all jurisdictions as to, in particular, the message for stakeholders, the substantive arguments and the remedies. It is notable in this regard that the document refers to the provisions of waivers of confidentiality at the pre-notification phase. In addition, all countries where there is conceivably an issue should be focused on even more closely. The position in non-EU states, including the need for waivers to allow co-ordination by the regulators, should also be considered.

"As in any merger control process, the risks which need to be appreciated are, in particular, timing not being as expected, eg due to timing differences between jurisdictions or one regulator holding things up because it finds issues where others don't. As noted, up-front planning and preparation is key and a worst case should be assumed, or at least planned for. Therefore it should be assumed that issues could be identified and remedies may be required, if the case at all justifies this view."

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