Streamlining Multi-Jurisdictional Merger Control in a Globalised World: Best Practices

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1. Background

A significant number of countries worldwide now operate mandatory merger control regimes. Cross-border M&A activity, as a result, increasingly involves notifications in several jurisdictions. Most regimes are national in scope, however, important supranational merger control regimes exist - such as European Union (“EU”) merger control.

Whilst EU merger control operates as a “one-stop shop” for the entire EU for transactions meeting certain thresholds, 26 of the 27 EU Member States operate national merger control regimes for transactions that do not. As a result, many transactions require notification to multiple merger control authorities within the EU, each subject to its own procedural and substantive rules which vary significantly from jurisdiction to jurisdiction.

In such circumstances, it is in the interests of all stakeholders (i.e. merger control authorities, transaction parties and interested third parties) to have streamlined merger control investigations for transactions requiring notifications to several authorities. Doing so reduces the regulatory burden on the parties, limits the potential for conflicting decisions and remedies and increases efficiency in the form of time-savings - and, in the spirit of the age, it ought to reduce the load on the public purse(s).

Against this background, the national competition authorities of the EU Member States (the “NCAs”) have recently issued a set of Best Practices on Cooperation between EU National Competition Authorities in Merger Review (the “Best Practices”) which aim to improve cooperation between NCAs when reviewing transactions which require merger control notifications in more than one EU Member State. The Best Practices are modelled on a recently updated set of Best Practices on Cooperation in Merger Investigations issued by the European Commission and the US federal antitrust agencies which aim to improve cooperation in respect of transactions requiring both US and EU merger control notifications.

Whilst the bulk of the Best Practices concerns the steps to be taken by the NCAs to facilitate cooperation (summarised in section 2 below), they also contain useful guidance for transaction parties in relation to the steps they can take to enable the NCAs to cooperate more effectively. A summary of such steps is set out in section 3 below.

2. Cooperation between NCAs

The Best Practices are non-binding on the NCAs. The scope of appropriate cooperation in relation to specific transactions will be assessed on a case-by-case basis. The Best Practices stress that cooperation is not an end in itself and will only be engaged in cases that would benefit from it. For instance the Best Practices state that in straightforward cases cooperation may not be necessary or efficient.

A limited scope of formal cooperation already exists between NCAs in the form of the so-called ECA notice system pursuant to which the NCAs exchange basic, non-confidential information in relation to filings involving
multiple jurisdictions. Building on this system, the Best Practices state that each NCA reviewing a transaction which has been filed in multiple EU Member States should, in appropriate cases, liaise and keep the other NCAs concerned appraised of its progress at key stages of its investigation. Key stages include: (i) the outcome of the first phase investigation; (ii) an intention to open an in-depth investigation; (iii) the outcome of an in-depth investigation; and (iv) the launch and progress of any remedies discussions. The Best Practices also suggest the possibility of joint remedies discussions between the transaction parties and several NCAs.

In addition, subject to any limitations imposed by confidentiality restrictions (see section 3 below), the Best Practices encourage NCAs to discuss their respective jurisdictional and substantive analyses such as market definition, assessment of competitive effects, efficiencies, theories of competitive harm and the empirical evidence needed to test those theories, including exchanges of views on necessary remedies proposed by the parties.

3. Guidance for transaction parties

The Best Practices recognise that the cooperation of the parties to a transaction is required if meaningful cooperation between NCAs is to take place. Steps which transaction parties can take in this respect include:

- providing all NCAs concerned with basic non-confidential information in relation to the transaction at an early stage, if possible, during pre-notification discussions with the NCAs. In this context, the Best Practices envisage the possibility of joint pre-notification discussions with a number of the NCAs;
- aligning the timing of merger control reviews by submitting parallel merger control filings to the NCAs concerned as well as aligning the timing of submissions to the NCAs during such reviews;
- coordinating the timing and substance of remedy proposals submitted to the NCAs to ensure coherent, non-conflicting remedies. The Best Practices envisage the possibility of joint discussions on remedies with a number of the NCAs; and
- providing waivers of confidentiality enabling each NCA to share confidential information received from the transaction parties with other NCAs which are also reviewing the transaction. The annex to the Best Practices includes a model form of waiver for this purpose.

Conclusion

It is important to note that the parties to a transaction have no power to force the NCAs to cooperate if these do not consider it necessary or appropriate to do so. The flipside of the non-binding nature of the Best Practices is that the parties themselves are under no obligation to submit their merger control filings in a manner and at a time which enables the NCAs to cooperate effectively. Whilst it will usually be in the interest of the parties to do so, this will not necessarily be the case for all transactions. There may, at times, be merit in adopting a tactical approach, in particular in relation to the submission of proposed remedies.

Following the introduction of the Best Practices, parties to transactions involving multiple merger control filings will need to ensure even greater consistency of their filings. It is always advisable to present a consistent competition case to the various NCAs reviewing a transaction. Telling one NCA one thing about a market and painting an alternative picture of the same market in a filing to another NCA is never a good idea. As a result of the Best Practices, consistency has become even more important - in particular if the parties have waived confidentiality to enable greater cooperation between NCAs.

More broadly, however, whilst the formulation of the Best Practices is a welcome development and should increase the efficiency and speed of multiple reviews by NCAs, they are unlikely to have a radical effect on merger control filings in the EU. A much more effective way of reducing the burden on parties would be to lower the monetary thresholds at which merger control filings become subject to EU merger control. Doing so, would ensure that more such filings would benefit from the “one-stop shop” assessment by the European Commission. An alternative - or additional - measure would be to make EU merger control mandatory for transactions which require merger control filings in three or more EU Members States, regardless of whether monetary thresholds are met.

Such moves are, however, fiercely resisted by certain NCAs and their respective EU Member States which are keen to prevent the European Commission encroaching further on what they consider to be their turf. In the absence of such meaningful changes, it would appear that the NCAs are happy to settle for an uncomfortable fudge.

Transactions cleared under the EU regime also do not require separate appraisal in the non-EU Member States of the European Economic Area, i.e. Iceland, Liechtenstein and Norway.
The exception is Luxembourg which does not operate an ex ante merger control regime.

Parties may, however, request for a transaction to be appraised at the EU level if notification thresholds in at least three EU Member States are triggered. This route is not, however, frequently used in practice as it invariably adds to the time taken in reaching a decision, etc.

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