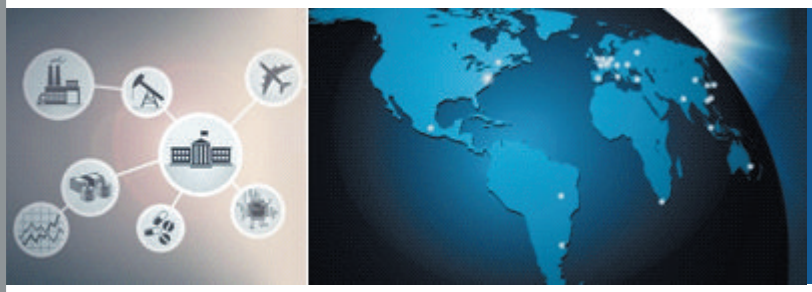
Global Merger Control Update
Volume I | Issue 1 | May 2017

JONES DAY



GLOBAL MERGER CONTROL UPDATE

This is the quarterly Jones Day *Global Merger Control Update,* which will discuss recent developments in existing regimes and the emergence of new merger control regimes worldwide.

In recent years, there has been a surge in merger control enforcement around the world, beyond the major jurisdictions. There are currently over 110 jurisdictions with merger control regimes. Some are more active than others, but all must be taken into consideration when assessing the antitrust risks of a cross-border M&A transaction.

In this issue, we discuss recent key changes to the existing regimes in Austria, Chile, Germany, Hungary, India, and Ukraine. Although the changes are generally steps in the right direction, various provisions also result in subjecting international transactions to national merger control regimes that have little to no effect on their national markets. Nevertheless, not filing in such cases would amount to a breach of the stand-still obligation.

Also featured in this issue is the entry into force of the Philippines's new regime.

Key Changes to Existing Merger Control Regimes

Germany and Austria Add a Transaction-Value Based Threshold

Germany
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[read more]

IN THIS ISSUE

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Chile Begins Mandatory Merger Control Regime

Chile passed an important amendment to its merger control regime, which is inspired by regimes in force in other jurisdictions, in particular the European Union.
[read more]

Hungary Revises Thresholds

Hungary's recently revised thresholds, set out below, entered into force in December 2016.
[read more]

India Increases Merger Control Thresholds

The Indian Ministry of Corporate Affairs amended its merger control regime in March 2016.
[read more]

Ukraine Adjusts Merger Control Thresholds

In a welcome step, in the Ukrainian Parliament implemented a review of the existing merger control thresholds.
[read more]

First-Time Regime

Philippines Creates New Antitrust and Merger Control Regime

The Philippine Competition Act was signed into law in July 2015 and creates a comprehensive antitrust and merger control regime.
[read more]


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Future issues of the Jones Day *Global Merger Control Update* will discuss more new developments in merger control regimes worldwide.

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Key Changes to Existing Merger Control Regimes

Germany and Austria Add a Transaction-Value Based Threshold

Germany

The new German law introduces a transaction-value based threshold of €400 million (approx. US$425 million). This change attempts to close a perceived enforcement gap, whereby certain mergers of considerable economic importance are not captured by the current thresholds, which are exclusively based on revenues. This gap is perceived to exist, in particular, in pharmaceutical and IT-related cases.

If the parties meet the combined worldwide turnover threshold (>€500 million, approx. US$531 million), and one party meets the domestic turnover threshold (>€25 million, approx. US$26 million), but neither the target nor any other party meets the second domestic turnover threshold (>€5 million, approx. US$5.3 million), a transaction is nevertheless notifiable, if:

(i) The transaction value exceeds €400 million (approx. US$425 million), and

(ii) The target has significant activities in Germany.

The transaction value includes the purchase price (including all assets and other monetary payments that the seller receives from the acquirer in connection with the transaction) and the value of any liabilities of the seller assumed by the purchaser. In complex M&A transactions, the calculation of that value may not be straightforward, for example, in purchase agreements involving "earn out-clauses," whereby a portion of the purchase price is made conditional upon the target's future performance.

According to an explanatory memorandum, whether a target is "active" in Germany is to be established based on the location of the target's customers—more specifically, the location of the designated use of the products. According to this condition, a target would be "active" in Germany where, for example, users in Germany would benefit themselves from the services offered by the target. More importantly, it is expressly stated that being "active" in Germany does not require achieving any revenues in Germany.

The explanatory memorandum does not establish how to determine whether the target's activity in Germany is "significant." The criteria to be taken into consideration include the sector or the maturity of the market concerned. Guidance is provided via specific examples. The condition would be met where, for example, the target markets a free software product, but the product is targeted at all consumers and used by more than 1 million users in Germany. On the other hand, where the target achieves considerable turnover worldwide but not in Germany, the old turnover-based threshold should apply.

The changes will enter into force in the coming weeks.

Austria

Similarly, effective as of November 1, 2017, Austria's amendments introduce a €200 million transaction-value based threshold. In addition to the current thresholds, which remain in place, a transaction will also be reportable if the following four cumulative conditions are fulfilled:

(i) Combined worldwide turnover of the undertakings exceeds €300 million (approx. US$318 million);

(ii) Combined Austrian turnover of the undertakings exceeds €15 million (approx. US$16 million);

(iii) The "value of consideration" for the transaction exceeds €200 million (approx. US$212 million); and

(iv) The target has significant activities in Austria.

Regarding the interpretation of thresholds (iii) and (iv), similar considerations as for Germany (below) apply. It is also expected that the authority will issue guidelines to clarify its interpretation of the new threshold.

[return to homepage]

Global Merger Control Update
Volume I | Issue 1 | May 2017

JONES DAY

Key Changes to Existing Merger Control Regimes

Chile Begins Mandatory Merger Control Regime

Chile passed an important amendment to its merger control regime, which is inspired by regimes in force in other jurisdictions, in particular the European Union.

As of June 1, 2017, a mandatory prenotification regime has replaced the prior, voluntary regime. In addition, new filing thresholds have been adopted:

> (i) Combined sales in Chile of both parties (acquirer and target in an acquisition scenario) of UF1.8 million (approx. US$72.8 million, €68.5), and
>
> (ii) Each party (acquirer and target in an acquisition scenario) has sales of UF290,000 (approx. US$11.7 million, €11 million) in Chile.

After notification, the authority has 30 days to review the transaction, after which the authority must either unconditionally or conditionally approve the transaction or extend the review period by another 90 days (Phase II). The transaction can only be prohibited after a Phase II investigation. The transaction cannot be closed during the review period.

The new regime also creates an obligation to inform the antitrust authority, within 60 days, of the direct or indirect acquisition of more than 10 percent of the shares or capital of a competing company, if both parties each have annual sales of UF100,000 (approx. US$4 million, €3.68).

[return to homepage]

Global Merger Control Update
Volume I | Issue 1 | May 2017

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Hungary Revises Thresholds

Hungary's recently revised thresholds, set out below, entered into force in December 2016:

> (i) Combined aggregate net sales of the parties (acquirer and target in an acquisition scenario) in Hungary exceeds Ft15 billion (approx. €48.3 million or US$53.5 million) and
>
> (ii) Aggregate net sales of each of at least two of the groups of undertakings concerned (acquirer and target in an acquisition scenario) in Hungary exceeds Ft1 billion (approx. €3.1 million or US$3.5 million); or
>
> (iii) Combined aggregate net sales of the parties (acquirer and target in an acquisition scenario) in Hungary exceed Ft5 billion (approx. €16.2 million or US$17.5 million), and the transaction may significantly lessen competition on the relevant market.

[return to homepage]

Global Merger Control Update
Volume I | Issue 1 | May 2017

Key Changes to Existing Merger Control Regimes

India Increases Merger Control Thresholds

The Indian Ministry of Corporate Affairs amended its merger control regime in March 2016. Most importantly, the applicable merger control thresholds increased:

(i) Value of assets in India exceeding ₹20 billion (approx. US$310 million, €291 million) of the target or the acquirer (not the acquirer group, only the acquiring legal entity and its subsidiaries), or both; or

(ii) Indian sales exceeding ₹60 billion (approx. US$930 million, €876 million) of the target or the acquirer (not the acquirer group, only the acquiring legal entity and its subsidiaries) or both; or

(iii) Value of assets worldwide exceeding US$1 billion (approx. €941 million), including at least ₹10 billion (approx. US$155 million, €145 million) in India, of the target or the acquirer (not the acquirer group, only the acquiring legal entity and its subsidiaries) or both; or

(iv) Sales exceeding US$3 billion (approx. €2.2 billion) worldwide, including at least ₹30 billion (approx. US$465 million, €437 million) in India, of the target or the acquirer (not the acquirer group, only the acquiring legal entity and its subsidiaries) or both; or

(v) Combined value of assets in India exceeding ₹80 billion (approx. US$1.2 billion, €1.2 billion) of the target and the acquirer group; or

(vi) Combined Indian sales exceeding ₹240 billion (approx. US$3.7 billion, €3.5 billion) of the target and the acquirer group; or

(vii) Combined value of assets worldwide exceeding US$4 billion (approx. €3.8 billion), including at least ₹10 billion (approx. US$155 million, €145 million) in India, of the target and the acquirer group; or

(viii) Combined sales worldwide exceeding US$12 billion (approx. €11.3 billion), including at least ₹30 billion (approx. US$465 million, €437 million) in India, of the target and the acquirer group;

(ix) Unless the value of the target's Indian assets (including subsidiaries) does not exceed ₹3.5 billion (approx. US$54 million, €51 million); or the target's Indian sales (including subsidiaries) do not exceed ₹10 billion (approx. US$155 million, €145 million).

In addition, the Ministry extended the Small Target Exemption [item (ix) above] until March 4, 2021. In March 2017, the Ministry expanded the scope of the Small Target Exemption to include transactions structured as mergers or amalgamations (previously, only acquisitions were covered).

The same amendment also clarifies that for purposes of the acquisition of a business, division or portion of an enterprise, only the assets and sales generated by that business are to be considered for assessing whether the filing thresholds are met. These changes appear to be inspired by the EU merger control regime.

Lastly, the Ministry extended a previous amendment, which defines "group" for the purposes of the above thresholds. Two companies are to be considered part of the same group where they are in a position to (i) exercise 50 percent or more voting rights in the other company; (ii) appoint more than 50 percent of the members of the board; or (iii) control the management or affairs of the other company.

The amended regime came into force in March 2016 and will apply until March 2021.

[return to homepage]

Global Merger Control Update
Volume I | Issue 1 | May 2017

JONES DAY

Key Changes to Existing Merger Control Regimes

Ukraine Adjusts Merger Control Thresholds

In a welcome step, in the Ukrainian Parliament implemented a review of the existing merger control thresholds. The filing thresholds were increased, but remain low by international standards. Since May 2016, they are as follows:

> (i) Combined parties' worldwide value of assets or turnover exceeding €30 million (approx. US$31.8 million) and the combined value of Ukrainian assets or turnover of at least two parties exceeding €4 million (approx. US$4.4 million) in the last financial year (increased from €1 million, approx. US$1.1 million); or
>
> (ii) Ukrainian turnover or assets of target or of at least one "of the founders of a new entity" exceeding €8 million (approx. US$8.5 million) and worldwide turnover of at least one other party exceeding €150 million (approx. US$160 million) in the last financial year.

Nevertheless, various provisions continue to set the Ukrainian regime apart from most other international merger control regimes:

- For purposes of the first threshold, the "parties" are to be interpreted as including the controlling seller that ceases to control the target post-transaction.
- Also, for purposes of the second threshold, a recent statement by the Ukrainian authority [Antimonopoly Committee (AMC)] seems to indicate that the "target" is also to be interpreted as including the controlling seller.

Hence, given this wide interpretation of the thresholds, Ukraine remains a jurisdiction where filings are potentially required despite a very limited local nexus.

Other important amendments include the removal of the market share-based test (35 percent), and the introduction of a simplified 25-day fast-track procedure, applicable where:

- Only one party is active in Ukraine, or
- Combined market shares do not exceed 15 percent on overlapping markets, or 20 percent on vertically related markets.

[return to homepage]

Global Merger Control Update
Volume I | Issue 1 | May 2017

First-Time Regime

Philippines Creates New Antitrust and Merger Control Regime

The Philippine Competition Act was signed into law in July 2015 and creates a comprehensive antitrust and merger control regime. Prior to this date, there was no such regime in the Philippines. Following a transitory period during which an interim merger control regime applied, the Philippine Competition Commission published the Implementing Rules and Regulations (IRR) of the Philippine Competition Act, which entered into force 15 days after their publication in June 2016.

Under the IRR, transactions are reportable where:

> (i) The aggregate annual gross revenues in, into or from the Philippines, or value of the assets in the Philippines of the ultimate parent entity of at least one of the acquiring or acquired entities, including that of all entities that the ultimate parent entity controls, directly or indirectly, exceeds ₱1billion (approx. US$21.5 million, €19.0 million), and
>
> (ii) The value of the transaction exceeds ₱1billion (approx. US$21.5 million, €19.0 million).

For purposes of this second threshold, the "value of transaction" is defined as follows:

With respect to a proposed merger or acquisition of assets in the Philippines, if either:

> (i) The aggregate value of the assets in the Philippines being acquired in the proposed transaction exceeds ₱1billion (approx. US$21.5 million, €19.0 million); or
>
> (ii) The gross revenues generated in the Philippines by assets acquired in the Philippines exceed ₱1billion (approx. US$21.5 million, €19.0 million).

With respect to a proposed merger or acquisition of assets outside the Philippines, if:

> (i) The aggregate value of the assets in the Philippines of the acquiring entity (including affiliates) exceeds ₱1billion (approx. US$21.5 million, €19.0 million); and
>
> (ii) The gross revenues generated in or into the Philippines by those assets acquired outside the Philippines exceed ₱1billion (approx. US$21.5 million, €19.0 million).

With respect to a proposed merger or acquisition of assets inside and outside the Philippines, if:

> (i) The aggregate value of the assets in the Philippines of the acquiring entity (including affiliates) exceeds ₱1billion (approx. US$21.5 million, €19.0 million); and
>
> (ii) The aggregate gross revenues generated in or into the Philippines by assets acquired in the Philippines and any assets acquired outside the Philippines collectively exceed ₱1billion (approx. US$21.5 million, €19.0 million).

After submission of the notification, the Commission has 15 days to determine whether the notification is complete, after which the Phase I review period of 30 days begins. In case of a Phase II investigation, the

Commission has another 60 days for its review. Parties are barred from closing the transaction during the Phase I or Phase II review.

[return to homepage]