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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Summaries of contributions --

14-15 June 2016

This document contains summaries of the various written contributions received for the discussion on Jurisdictional Nexus in Merger Control Regimes (123rd Meeting of Working Party No 3 on Co-operation and Enforcement, 14-15 June 2016).

*More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm>*

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BRAZIL *

Jurisdictional nexus for merger control derives: (1) from the application of competition law only to transactions that can produce effects in Brazil; and (2) from the need for transactions to fulfil local turnover thresholds in order for them to be subject to merger control; subject to the fact that agreements between companies for the purpose of taking part in public bids are exempt from approval by the authority, and the fact that CADE has residual jurisdiction to request the submission of notifications regarding operations that do not meet the turnover thresholds but raise competitive concerns (such as high market shares in the affected relevant markets). For a transaction to produce effects in Brazil, the affected market must either be international, or the economic groups of the companies involved must be capable of acting in the relevant national market in Brazil.

The law reform in 2012 brought Brazil into closer alignment with international recommendations, in particular by replacing local turnover for the previous market share thresholds. However, the thresholds do not require that the turnover or assets of the target company be taken into account.

BIAC *

While many jurisdictions have taken considerable steps towards implementing the OECD recommended practices, significant problems still exist in most jurisdictions. Many OECD countries continue as outliers to the trend towards greater compliance with the recommended practices, in addition to numerous non-member countries which are noncompliant. Continued outliers impose significant costs on merging parties, and the inefficient allocation of resources by competition agencies.

Of particular concern are the fact that many countries set sales or asset thresholds beyond what is required by local nexus; that buyer's activity in the jurisdiction alone (i.e., assets, revenues or, compounding the non-compliance problem, market share) can trigger a merger notification; and the use of non-objectively quantifiable criteria in setting notification thresholds.

Even when countries comply with international recommendations, BIAC believes that merger control thresholds are too low. There are a number of alternative options to deal with the risk of problematic transactions escaping review if merger control thresholds are lowered, such as sector specific thresholds or post-merger review of non-reportable mergers.

BIAC recognizes that some jurisdictions may be reluctant to change their merger notification thresholds for fear of losing the ability to challenge potentially problematic mergers. BIAC recommends a transitional "safety net" approach in these cases, whereby an agency that changes its notification thresholds maintains, for a transitional period, both jurisdiction over and the right to review and demand notification of transactions that would have been notifiable under the previous threshold

ESTONIA *

In Estonia local turnover thresholds are used to determine whether a concentration has to be notified. In addition to these thresholds, if within the preceding two years one and the same undertaking or an undertaking belonging to the same group has acquired control of undertakings or parts of undertakings which operate within one and the same sector of economy in Estonia, the turnover of the undertaking over which control is acquired shall include the turnover of the undertakings over which control has been acquired within the two years preceding concentration. The goal of this requirement is to control concentrations in economic sectors where the aggregate turnover of undertakings is relatively small or where there a large number of undertakings with a small turnover.

The present thresholds replaced the previous worldwide turnover thresholds applicable until 2006. The result of the worldwide turnover criteria was that many concentrations that did not have any impact on the Estonian market were notified while some important transactions were not caught by the Competition Act.

In order to set suitable thresholds, the turnover figures of many Estonian companies were analysed. In a few occasions the authorities found out about a concentration that would potentially restrict competition but was not subject to merger control, as the turnover thresholds were not met. Therefore, in 2015 a proposal was made to the Ministry of Economic Affairs and Communications to supplement the Competition Act and give the Competition Authority the possibility to request the notification of the concentrations that would potentially significantly restrict competition, even if the turnover thresholds are not met. Until now the proposed amendment of the legislation has not been adopted.

GERMANY

Under German competition law the obligation to notify a merger is triggered by a worldwide turnover threshold of all the participating undertakings of EUR 500 million. Additionally, the domestic turnover thresholds of at least two companies involved in the merger ensure that the merger has a sufficient nexus to Germany. Another provision guarantees the local nexus of the concentration: Section 185 (2) of the Act against Restraints on Competition requires domestic effects as a prerequisite for the application of German competition law, including merger control. This means that in Germany mergers that exceed the turnover thresholds are not necessarily subject to notification. Mergers have to be notified only if they have sufficient effects within Germany.

The domestic effects clause is an important filter in particular with regard to joint venture cases. In many instances, newly established joint ventures do not meet the turnover thresholds but, if their parents are two major companies, the turnover criteria are often met. Yet, many joint ventures target markets outside Germany and spill-over effects can also be excluded. The domestic effects clause makes sure that these cases do not have to be notified in Germany. In 2014 the Bundeskartellamt published a guidance paper on domestic effects in merger control with the aim to help companies and their advisers assess whether the effects of a concentration in Germany are sufficient to fulfil the requirements of the domestic effects clause.

HUNGARY *

In 1996, Hungary adopted merger control thresholds based on the aggregate net turnover of the undertakings concerned, and on the net turnover of the acquired undertaking or that of each of at least two undertakings. Local nexus is established by the thresholds for Hungarian undertakings being calculated on the basis of their world-wide turnover, while for foreign undertakings only the net turnover realised on the Hungarian market has to be taken into account. The turnover thresholds for “at least two undertakings that are parties to the transaction” has to be calculated using the turnover realised on Hungarian markets, in the case of both Hungarian and foreign undertakings.

In the last few years, the GVH has placed great emphasis on: (i) increasing the efficiency of M&A proceedings, (ii) easing the merger control-related administrative burdens of businesses, and (iii) decreasing the time frame of the merger investigations, mostly for so-called “simple cases”.

In this context, GVH is considering amending its merger control thresholds. While its aggregate turnover is one of the lowest ones in Europe in its absolute value, it is among the highest ones relative to GDP. GVH is also considering limiting the calculation to the net turnover realised on the domestic (Hungarian) markets in all cases.

Compared to other European countries, the relative value of individual turnover thresholds in Hungary is among the lowest. So, it is contemplated that it would be worth doubling this threshold (by increasing it to HUF 1 billion (circa Euro 3.2 million, USD 3.5 million). In order to allow for the revision of mergers which would cease to be notifiable if this increase were to happen, it is proposed that the GVH would either have the right to launch proceedings in relation to these transactions, or that parties could voluntarily notify these deals to the GVH.

INDONESIA *

Indonesian merger control came into force in 2010, many years it had been first foreseen in Law no. 5/1999. The Indonesian regime includes the possibility of voluntary pre-merger notification, subject to mandatory post-merger notification.

Competition law extends to any legal entity which is established and has an office in Indonesia, or that is not established but pursues business activities in Indonesia. Merger control is required only for companies exceeding certain asset or turnover thresholds.

The competition authority will only be concerned by mergers which impact competition in Indonesia. It is considered that the presence of group companies in Indonesia will have such an impact as long as the notification thresholds are met. Indonesia is unable to pursue a case-by-case domestic effects-assessment. As a result, the issue of local nexus looks into whether the business actor in question is subject to Indonesian competition law.

ITALY *

The choice of appropriate notification thresholds depends on a variety of factors, including identifying transactions with a material nexus in the reviewing jurisdiction. Notification thresholds are based on turnover or sales, as they provide an objective measure of the potential impact of a transaction on the market and this information is readily available to companies. Notification thresholds are updated by the AGCM on a yearly basis to reflect the increase in the gross domestic product (GDP) deflator index.

In the Authority's experience, the old test based on two alternative thresholds resulted in an elevated number of notified transactions, most of which had no significant competition effects. Moreover, this approach captured international transactions with no material impact on Italian territory. To remedy this, an exception for foreign-to-foreign transactions and joint ventures was introduced. In 2012, the two thresholds became cumulative, thereby eliminating the filing obligation in a significant number of cases where the turnover of the acquiring group in Italy was in excess of the first threshold, but the target itself only achieved limited sales in Italy. The rationale behind the new legislation was to release the AGCM's resources and staff from dealing with smaller concentrations and, at the same time, reduce unnecessary costs and burden for businesses, to align the Italian merger regime to the recommendations of international organisations like OECD and ICN, and to enable the Authority to focus more on serious antitrust infringements.

The Italian Competition Authority's experience confirms that it is not easy to achieve the optimal mix between effectiveness of a merger review system and avoidance of unnecessary burdens and costs on merging parties. The revised notification has significantly reduced the number of notifications of non-problematic transactions reviewed by the Authority. However, the experience with the new system so far has shown that an adjustment in the level of thresholds is desirable in order to minimize the risks that some potentially problematic transactions escape the merger review.

JAPAN

Under the Antimonopoly Act (hereinafter referred to as “the AMA”), any company planning a business combination which meets certain criteria is required to notify the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) in advance.

The current business combination regulations were introduced by the 2009 Amendment of the AMA (enacted in 2010). The Amendment included the change of the criteria as well as the thresholds for notification with a view to ensuring international consistency. For example, the notification requirement is applicable only to the cases in which both the company acquiring shares and the company issuing the shares have domestic sales that exceed a certain amount.

The 2009 Amendment of the AMA resulted in a decreased number of notifications filed, reduced the burden of the companies for the notification, and made it possible for the JFTC to allocate more resources to the review of business combination cases that have higher probability of violating the AMA. Therefore, it is considered to show that the Amendment appropriately reflected the intent of the 2005 Recommendations of the Council.

KOREA *

Under the merger control system adopted in 2002, the KFTC will only review business combinations that are highly likely to affect the Korean market. In particular, business combinations must be notified on the basis of the size of the combining companies. This includes the ability to review a business combination that occurs abroad, such as a business combination between multinational companies, but affects the domestic market.

Business combinations that include a foreign company are divided into two types: business combinations between exclusively foreign companies, and business combinations between a domestic and a foreign company. If the business combination involves a domestic company, it is presumed to have a sufficient local nexus. Since 2007, if a business combination involves only foreign companies, it must be notified only when a foreign company's turnover in Korea's domestic market exceeds 20 billion won and that company exceeds the relevant size of company threshold. Underpinning this approach is the idea that the best proxy for potential impact of a transaction in the national market is the foreign company's local turnover.

PORTUGAL

In Portugal, the merger notification thresholds include both a turnover threshold and a market share threshold.

In 2012, legislative amendments on both notification thresholds were introduced to ensure a more targeted merger control by the Portuguese Competition Authority (PCA) in terms of impact on competition, alleviating unnecessary administrative burdens on firms. At the same time, there was the concern to ensure that mergers that could raise competition concerns were kept under the PCA's scrutiny.

During preparatory works for the legislative reform of 2012, an in-depth analysis of the PCA's merger control case record was carried out, leading to the conclusion that the market share threshold should be kept.

The current notification thresholds thus ensure the necessary local nexus and guarantee that the PCA is able to assess mergers that are more likely to raise competition concerns, including in small markets where companies have small turnovers.

RUSSIA

In recent times, there is an increase in the number and size of merger transactions across the world, including Russia. Integration processes affect all the more enterprises from various industries, the number of deals with participation of foreign capital increases as well. Taking part in merger deals provides a kind of economic motivation for businessmen: expansion of sales markets, new opportunities for costs reduction, building of vertically integrated production systems, and improved capacity to access the capital market.

Some deals are subject of the prior-consent of the Russian antimonopoly authority in accordance with Article 27 of the Federal Law №135-FZ of July 16th, 2006 "On Protection of Competition" (Incorporation and Restructuring of Commercial Organizations Subject to the Antimonopoly Body Prior Consent).

Every year the number of transactions subject to FAS control is decreasing. Ten years ago we received around 6000 pre-merger and 44,000 post-merger petitions. After changes to the antimonopoly law (consecutive introduction of four antimonopoly packages of amendments) as well as abolishing notifying merger control (January 30, 2014) the figures fell down considerably. In 2015 FAS considered 1 793 pre-merger notifications and 165 post-merger notifications filed by economic entities. 1 703 pre-merger notifications were granted (noted) (of which 65 – with determinations) and 161 post-merger notifications; 46 pre-merger notifications and 4 post-merger notifications were refused.

The FAS Russia follows a policy of openness and transparency on the issue. All petitions from legal persons as well as decisions of the antimonopoly bodies issued upon the results of their consideration are put in the single, publically-accessible database on decisions of the FAS Russia, formed to execute the Road Map for developing competition and improving the antimonopoly law that was adopted by No. 1613-r Decree of the Government of the Russian Federation of September 06, 2012

SLOVAKIA *

Substantive changes in relation to jurisdictional nexus issues were made in 2011. Pre-2011, the use of a combined global total turnover criterion meant that mergers which often had minimal impact on the market in the Slovak Republic were subject to merger control – e.g. when the acquirer met the turnover threshold in the Slovak Republic and the target met the global turnover threshold –, while some mergers involving undertakings with significant activities in Slovakia were not subject to merger control because these undertakings did not meet the global turnover threshold. The 2011 reform focused on local nexus, with the merger notification criteria being redefined with the goal to eliminate the mandatory notification of concentrations in cases which do not have any impact on markets in Slovakia. In particular, all turnover thresholds now refer to activities in the Slovak Republic.

The process of setting thresholds was based on the ICN principles and the 2005 OECD Council Recommendation. It followed an examination of individual sectors of the economy, of the amount of sales achieved by companies in individual sectors, of other benchmarks based on past experience, as well as a comparison with the notification criteria of countries with a GDP similar to that of the Slovak Republic and the results of a public consultation process.

The basic approach for setting thresholds was to look back at several years of previously notified transactions and examine how changes in notification thresholds would have affected the sample of previous notifications. The goal, which has been achieved, was to adopt better targeted thresholds in order to catch a greater number of mergers with domestic reach without increasing the total number of notifications.

Despite this reform, some issues remain. A number of mergers without local impact are still caught by the thresholds, particularly joint ventures active abroad which are set up by foreign companies with unrelated activities in the Slovak Republic. At the same time, some mergers with potential anticompetitive effects are not caught by the thresholds – e.g. by small companies acting in local markets in Slovakia.

UKRAINE

The revision of Ukrainian legal provisions related to merger thresholds was essential for establishing of the local jurisdictional nexus in order to use the resources of the competition authority more effectively and to reduce unreasonable government intervention in business processes. Another reason to revise the Ukrainian legal provisions related to merger thresholds was the low thresholds which caused consideration by the Antimonopoly Committee of Ukraine (hereinafter – the AMCU) a large number of small transactions that didn't substantially affect the competition.

The AMCU conducted an analysis of nearly 1500 cases of real concentrations, considered in 2013-2014, and found that in fact cases of concentration are unevenly distributed in terms of turnover (value of assets) of their members.

A dual system of thresholds that includes two subsystems was submitted in the process of drafting the amendments to the Law of Ukraine “On Protection of Economic Competition” in the part of thresholds regime.

The first subsystem complies with classical system of three indicators. In order to determine the absolute value of thresholds (worldwide turnover / value of assets and the amount of turnover / asset value of at least two members of concentration in jurisdiction), the identical indicators used in 24 European jurisdictions that implement the system of three indicators and their correlation to the size of GDP were analysed.

The indicator of 30 million EUR was established as the threshold in terms of aggregate worldwide turnover (assets) of all participants. The indicator of 4 million EUR was established as the threshold in terms turnover (assets) of at least two concentration participants in Ukraine.

Another subsystem is used in the situation when both concentration participants have significant presence in the markets of Ukraine. This subsystem calls for mandatory significant presence (turnover / assets) in Ukraine only for the acquiree (target company). But this is also not enough for introduction of the obligation to obtain permission from the Antimonopoly Committee. This obligation appears only when another part of concentration (buyer) has very high worldwide indicators (value of turnover / assets is more than 150 million EUR).

UNITED STATES

To achieve an appropriate balance between identifying potentially anticompetitive transactions and avoiding unnecessary filing burdens, the United States federal antitrust agencies (the Federal Trade Commission (FTC) and Department of Justice (DOJ)) have broad notification thresholds with exemptions for transactions that are unlikely to raise competition concerns. The thresholds are complemented by a simple notification form, a short initial review period, expedited review of transactions that can quickly be identified as not raising competition concerns, and the ability to review transactions that do not meet the notification thresholds. The U.S. agencies' premerger notification program (administered by the FTC) allows for efficient and expedient review of more than one thousand proposed transactions annually.