11th Annual BIICL Merger Conference

Tuesday 21 January 2014
09:00 to 16:00

Foundation Universitaire,
Rue d’Egmont 11
1000 Bruxelles
Programme cont…

13:45-15:45    PANEL 3: Hot Topics

Chair: Philip Marsden, British Institute of International and Comparative Law

- Minority stakes: merger control below ‘control’?; Theory and practice, and the ramifications of possible EUMR changes
- Simplifying procedures in the EU and beyond: unintended consequences for global deals?
- The rise of MOFCOM and other multi-jurisdictional challenges

Johannes Luebking, DG Competition
Nelson Jung, OFT
Emily Roche, Rio Tinto
Clara Ingen-Housz, Linklaters Hong Kong
The future of EU Merger Control: Minority stakes

Johannes Lübking
DG Competition

British Institute of International and Comparative Law
Brussels, 21 January 2014

All views expressed are strictly personal and do not necessarily reflect the official position of the European Commission
Possible reform of the Merger Regulation

• Objectives of the proposed reform:
  • Ensure that EU merger control is **comprehensive**:
    → Address possible enforcement gap with respect to minority shareholdings
  • Ensure that EU merger control is **efficient**:
    – Streamline referral process
    – Technical improvements ("housekeeping")

• Process up to now:
  • Public consultation based on staff working document (June-September 2013)
  • 70 replies by stakeholders
• Next step: Publication of a White Paper (in 2014)
## Minority shareholdings – theories of harm

<table>
<thead>
<tr>
<th>Theory of Harm</th>
<th>Silent Stake</th>
<th>Rights short of control</th>
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</thead>
<tbody>
<tr>
<td>Horizontal unilateral effects</td>
<td>✓</td>
<td>✓</td>
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<tr>
<td>Coordinated effects</td>
<td>✓</td>
<td>✓</td>
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<td>Input foreclosure</td>
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<td>Customer foreclosure</td>
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Acquisition of non-controlling minority shareholdings – Is there an enforcement gap?

• The Commission has no jurisdiction under the Merger Regulation to examine cases of acquisition of minority stakes which do not confer control ...

• ... but where it has jurisdiction, the Commission:
  – takes existing minority shareholdings into account when analysing effects of a merger on competition
  – may require divestiture of minority stake as condition for clearance

• ... leads to the unsatisfactory situation that control depends on timing of acquisition of minority stake
Minority shareholdings: to be addressed by Articles 101 and 102 TFEU?

- Antitrust rules do not cover all problematic cases:
  - Article 101: "agreement or concerted practice the effect of which is to restrict competition"
    - Share purchases via stock exchange?
    - Articles of association – impact on 3rd party shareholders?
  - Article 102:
    - Acquirer must be dominant
    - Acquisition must constitute an "abuse"
      » Acquisition of minority stake as anti-competitive foreclosure?
Minority shareholdings: to be addressed by Articles 101 and 102 TFEU (cont'd)?

• Antitrust rules are not fit for the theories of harm
  • Acquisition of minority stake creates a lasting structural link, not anti-competitive conduct
• Antitrust procedures do not provide legal certainty
  • Quasi-unanimous stakeholder demand for voluntary notifications
Findings

• Need to extend EU merger control to the acquisition of non-controlling minority shareholdings
• Appropriate to apply substantive test of EU Merger Regulation
• Limited number of cases expected, but relevant enforcement activity
• Objective: to strike the right balance with a system that
  1. ensures to catch the (relatively small) number of potentially anti-competitive transactions
  2. avoids unnecessary administrative burden
  3. fits in the existing system of merger control at EU and national levels
The solution considered

• How the system works is closely linked to the thresholds/definition of minority stakes captured
• Is a targeted approach possible?
  Commission's competence could be limited to transactions creating a "competitively significant link", i.e. acquisitions of stakes:
  • that come with a certain level of influence (such as board representation, information rights, …) and
  • in competitors or firms active in an upstream or downstream market
• Which procedure to apply?
  • Not necessarily prior notification or full standstill obligation until clearance
  • Some mandatory information needed in order to allow the Commission and Member States authorities to select the cases they wish to investigate
Other aspects to be considered

- Delineation to Article 101 TFEU
  - Cooperation and similar agreements
  - Joint ventures
- Delineation of competences between Commission/Member States
  - Same turnover thresholds as under current Merger Regulation
  - Referrals
- Procedure
  - Possibility of voluntary notifications?
Simplification of EU Merger Control

Johannes Lübking
DG Competition

British Institute of International and Comparative Law
Brussels, 21 January 2014

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Simplification Package

Entered into force on 1 January 2014

Objectives
  • Streamline procedures and cut red tape
    • For non-complex cases/simplified procedure
    • Reduced information requirements for all cases

Effects
  • Save cost and time for business
  • Focus resources on problematic cases
Extending the scope of the simplified procedure

• 20% combined share in case of horizontal overlaps (previously 15%)

• 30% share upstream and downstream in case of vertical relationships (previously 25%)

• New category: 50% combined share and HHI delta below 150
Streamlining Form CO, Short Form CO and Form RS

- **Short Form CO**
  - Targeted information requirements
  - De minimis information requirements for JVs with no activities in EEA ("super-simplified procedure")

- **Overall less information required, e.g.**
  - Higher threshold for affected markets → less affected market, less information requirements, overall less market shares

- **Internal documents:**
  - Only board/shareholders meeting documents
  - Studies, presentations, etc. – not mere e-mails
  - Documents concerning the transaction (including in comparison to alternative projects)

- **More scope for waivers**
Accelerating pre-notification process

- Continues to be offered as service
- Notice recognises explicitly that pre-notification may not be needed in all simplified cases
Programme cont…

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The Rise of MOFCOM

A Critical and Comparative Evaluation

Clara Ingen-Housz
Partner, Hong Kong

21 January 2014
Brussels

BIICL Conference
Outline

- Topic: In less than 5 years, China has become the world’s third major pillar of merger control enforcement
  - How did it happen? What to think of it? Where is MOFCOM going?
- MOFCOM is a growing giant with uneven foundations
  - Gatekeeper to the most important transactions due to low thresholds, BUT
  - Major weaknesses in:
    - Review process
    - Substantive Analysis
- Notable developments (International co-operation)
Gatekeeper to Most Transactions

- Jurisdictional tests cast a very wide net
  - Thresholds are low and not regularly updated
  - “Concentration” is broadly construed (but no minority stakes yet)
  - Non FF JVs; no nexus with China
- MOFCOM handles a very large number of cases
  - 600+ decisions since 2008, ~200 decisions/year, other stats
- MOFCOM will impose its views
  - The Coca Cola/Huiyuan “blitz”: China’s GE/Honeywell?
Review Process

• A **Protracted** Process
  • Procedural issues
  • Political issues
• Efforts for reform
  • Looking at the reality of the deal (PE Firms)
  • Simplified procedure – work in progress…
• MOFCOM’s next big challenge: **Procedural rights and transparency**
  • Transparency efforts: publicity (but incomplete), communication
  • Improvements needed: confidentiality, being informed, being heard
Substantive analysis – Theories of Harm

- MOFCOM is catching up…
- But is going its own way on:
  - Dominance
  - Dynamic assessment
  - Competition analysis v industrial policy
  - The use of economics
Substantive analysis - Remedies

- Politics
  - NDRC and relevant ministries intervention is inevitable
- Preference for *behavioural remedies*
  - Prohibition from engaging in certain lines of business
  - Continuation of pre-merger practices
  - “Hold separate”
  - Requirements on price, quantity, R&D, or contract terms
- Inefficiencies
- Recent flexibility
International co-operation agreements

- MOFCOM’s agreements:
  - EU - ✔
  - US - ✔
  - UK - ✔
  - Other Asian jurisdictions
  - RCEP (Regional Comprehensive Economic Partnership, ASEAN+6) – ✔

- International organisations:
  - ICN - X
  - OECD – X
Contact

Clara Ingen-Housz

Competition/Antitrust Partner, Hong Kong
Tel: +852 2901 5306
Email: cih@linklaters.com