MERGER CONTROL
— Managing Competition

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AS WE KNOW, THE INTERNATIONAL M&A COMMUNITY IS TAKING MERGER CONTROL MORE SERIOUSLY THAN EVER; HAVE YOU EXPERIENCED MAJOR REFORM? IF SO, WHAT BROUGHT ABOUT THIS CHANGE IN YOUR JURISDICTION?

Since the Merger Regulations are only a year old, it is a little too early to expect any radical change. However, several issues that have been raised with the Commission by industry, have been considered seriously and addressed by the Commission, which has infused confidence and certainty in the industry.

WHAT ARE THE PRIMARY MERGER CONTROL ISSUES IN YOUR JURISDICTION? HOW CAN THESE BE OVERCOME IN ORDER TO BRING A TRANSACTION TO A SUCCESSFUL CLOSE?

As the merger control regime in India is only a year old, the primary issues revolve around the practice and procedure in filing a notification form as well as substantive issues given the lack of guidance and precedent. Further, determining the trigger event and making confidentiality claims are other issues which routinely arise in merger control filings. The Commission has rejected a notification for being premature, as in its view, the trigger event had not occurred. This is particularly an issue where a transaction is undertaken through a series of steps which involve acquisitions as well as mergers, as the trigger events are different for both. In relation to confidentiality claims, the Commission is hesitant to grant confidentiality and the parties are required to give detailed, specific and genuine reasons whilst making such confidentiality claims.

Our advice to clients is to be aware of and prepare for a filing as soon as possible and to interact with the Commission during the review period, after a notification has been filed, to resolve any issues.

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AS WE KNOW, THE INTERNATIONAL M&A COMMUNITY IS TAKING MERGER CONTROL MORE SERIOUSLY THAN EVER; HAVE YOU EXPERIENCED MAJOR REFORM? IF SO, WHAT BROUGHT ABOUT THIS CHANGE IN YOUR JURISDICTION?

With the promulgation of the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("Communiqué") (1st of January 2011), which harmonised the Turkish merger control regime with that of the European Union, the Turkish Competition Authority has set new jurisdictional thresholds that can easily be satisfied by global companies in terms of notifiability. Therefore, more and more foreign-to-foreign transactions are being notified that have arguably no impact on the Turkish market. Put it differently, pursuant to Article 2 of the Law on Protection of Competition No. 4054, foreign-to-foreign mergers fall within the scope of the Turkish merger control regime, to the extent they affect the relevant markets within the territory of the Republic of Turkey. Nevertheless, merely sales into Turkey may trigger notification necessity, to the extent the thresholds are met and the transaction results in an overlap between the activities of the transaction parties (global overlap is sufficient as long as one of them conduct sales of relevant product into Turkey), or no affected market but merely the thresholds are met and the transaction results in a joint venture formation (note that even if JV will never have sales into Turkey, this factor is not considered). It should also be noted that Turkish merger control regime does not contain a de minimis rule nor a genuine foreign-to-foreign exemption. The only exemption from notifiability is in case where the transaction exceeds the turnover thresholds but neither a JV nor an affected market arises out of the transaction. In those cases, the parties are relieved from notifying their transaction since the Board does not have jurisdiction over the transaction.

ARE THERE ANY STATUTES AND REGULATIONS CONCERNING MERGER CONTROL THAT ARE UNIQUE TO YOUR JURISDICTION? DOES THIS CREATE/PREVENT ANY OPPORTUNITIES?

The relevant legislation on merger control is the Law on Protection of Competition No. 4054 dated 13 December 1994 ("Competition Law") and the Communiqué published by the Turkish Competition Authority. In particular, Article 7 of the Competition Law governs mergers and acquisitions, and authorises the Competition Board to regulate through communiqués which mergers and acquisitions should be notified in order to gain legal validity. In accordance with this provision, Communiqué, as the primary instrument in assessing merger cases in Turkey. The New Communiqué sets forth the types of mergers and acquisitions which are subject to the Competition Board's review and approval, together with some significant changes to the Turkish merger control regime.

WHAT TYPE OF TRANSACTION HAS TO BE DECLARED TO THE LOCAL COMPETITION AUTHORITY IN YOUR JURISDICTION?

The Communiqué defines the scope of the notifiable transactions in Article 5/I as follows: merger of two or more undertakings; acquisition or control by an entity or a person of another undertaking's assets or a part or all of its shares or instruments granting it the management rights.

Except for joint ventures, transactions that do not result in an affected market are not notifiable even if the thresholds sought for notification are exceeded. A market is deemed as being affected when the market has "a possibility to be impacted by" the transaction, and (i) where two or more of the parties have commercial activities in the same product market (horizontal relationship), or (ii) where at least one of the parties is engaged in commercial activities in markets which are upstream or downstream from the product market of the other party (vertical relationship).

If the transaction does indeed result in affected markets or even if there are no affected markets, but a joint venture is created, the notification thresholds under the Communiqué No. 2010/4 must be evaluated. Accordingly, the transaction will be subject to the Board's approval if; (i) the total turnover of the parties exceeds TL 100 million (approx. US$ 59.88 million) (approx. EUR 43 million) in Turkey and the respective Turkish turnovers of at least two of the parties individually exceed TL 30 million (approx. US$ 17.9 million) (approx. EUR 12.9 million), OR (ii) the worldwide turnover of one of the parties exceeds TL 500 million (approx. US$ 299.4 million) (approx. EUR 215.3 million) and the Turkish turnover of at least one of the other parties exceeds TL 5 million (approx. US$2.99 million) (approx. EUR 2.15 million).

WHAT PERCENTAGE OF M&AS ARE PREVENTED BY MERGER CONTROL REGULATION IN YOUR JURISDICTION? WHAT ARE THE MAJOR OBSTACLES?

Since the requirements under the merger control regime deem only certain transactions subject to the approval of the Competition Authority, certain amount of transactions are consummated without the need for the Competition Authority's scrutiny. According to the Annual Report of the Competition Authority, in 2011, 253 submissions were made compare to 2010 where 276 submissions were made. This shows that the new merger control regime has eliminated approximately 9% of the transactions that were previously subject to the Board's notification requirement.

ARE THERE MORE OBSTACLES WHEN AN INTERNATIONAL WISHES TO ACQUIRE A STAKE IN A DOMESTIC COMPANY?

From a competition point of view and merger control regime, there are no obstacles set forth that apply solely to international corporations. That said, companies in certain industries are subject to special regimes that require the consent of particular authorities. For instance, the transfer of shares and amendments to the articles of association of banks require the prior approval of the Banking Regulatory and Supervision Agency, and a similar approval of the Energy Market Regulatory Board is required for companies holding energy production licenses. Another example is that the majority shareholders in companies holding a class A license for airport ground-handling services are required to be of Turkish nationality. Similar nationality requirements exist for companies active in the defence industry.

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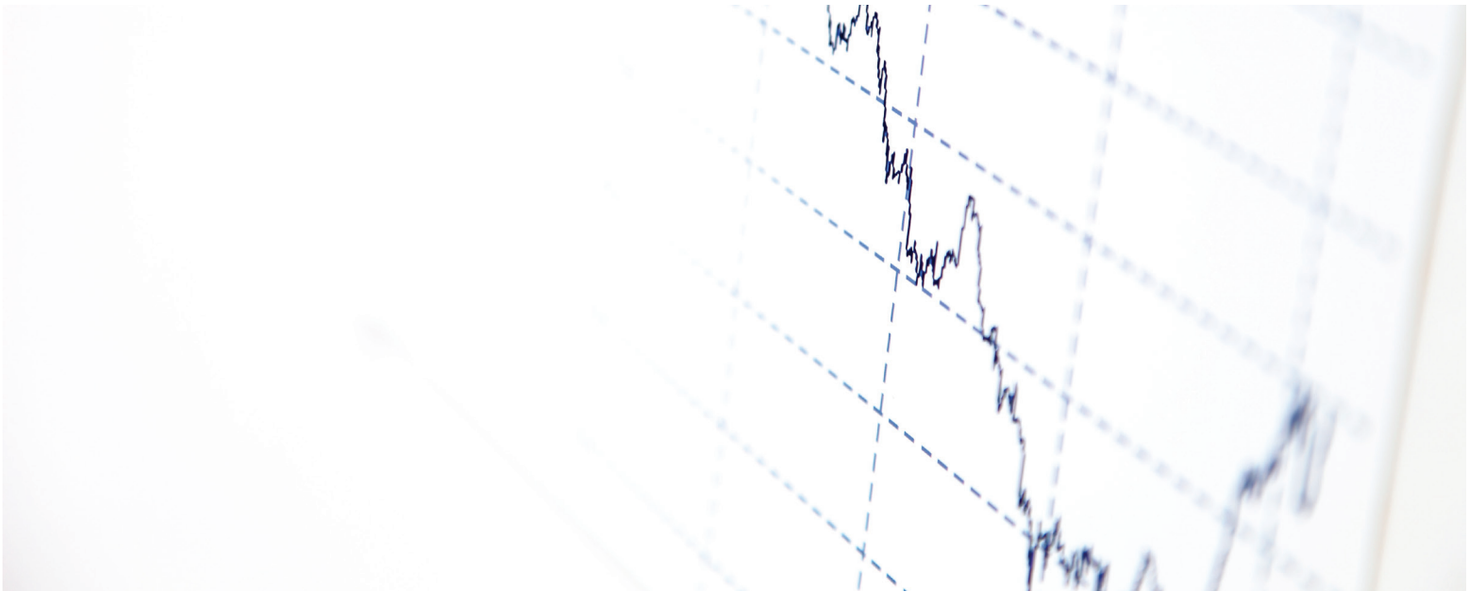

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AS WE KNOW, THE INTERNATIONAL M&A COMMUNITY IS TAKING MERGER CONTROL MORE SERIOUSLY THAN EVER; HAVE YOU EXPERIENCED MAJOR REFORM? IF SO, WHAT BROUGHT ABOUT THIS CHANGE IN YOUR JURISDICTION?

We have a long standing law prohibiting anti-competitive acquisitions and a highly developed voluntary notification and review procedure. There have been changes in approach from time to time, including increased focus on transactions in concentrated sectors and coordinated effects analysis. There has been some minor legislative change to reinforce the ability of the ACCC to review what it calls creeping acquisitions, i.e. smaller scale acquisitions by corporate with an already strong market position.

WHAT TYPE OF TRANSACTION HAS TO BE DECLARED TO THE LOCAL COMPETITION AUTHORITY IN YOUR JURISDICTION?

We have a voluntary notification process in Australia and no general prohibition on closing a transaction without ACCC clearance. However, the ACCC does expect to be notified and to review acquisitions where there may be a competition issue. It can go to court for an injunction to stop an acquisition on interim or permanent basis – so it is routine for it to be notified.

In general under the 2008 Merger Guidelines 2008 merging parties are encouraged to notify the commission where both of the following apply:

Substitutes: The products of the merger parties are either substitutes or compliments,

20 per cent market share: The merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s.

The Foreign Investment Review Board (FIRB) does also routinely refer acquisitions notified to it under the Foreign Acquisitions and Takeovers Act to the ACCC for review. The general requirement is that foreign persons notify the FIRB before acquiring an interest of 15 per cent or more in an Australian business or corporation that is valued above $244 million.

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HOW HAS THE ECONOMIC CRISIS ALTERED MERGER CONTROL IN YOUR JURISDICTION?

To what extent crisis creates or should create an exception from existing regulations is much debated depending on economic theories represented. Different stakeholders express diverging views whether there should be a special competition law governing during the crisis. Some argue for a relaxation of existing rules applicable to merger control, to prohibition of cartels as well as abuse of dominance. Supporters of this view argue that competitors should be allowed to form cartels to rescue themselves from the crisis. Such demands gain often political popularity as there are often sensitive situations involved, for instance, loss of jobs and closure of big businesses. Others stand for strict application of existing rules without any exceptions.

Despite pressure to relax existing regulations, both the legislator as well as the Federal Cartel Office ("FCO") have resisted successfully to introduce and apply an exceptional competition law. They stick to the principle that only protection of undistorted competition can ensure a functioning market.

This being said, it does not mean however, that the economic crisis did not have any effects on competition law and merger control in particular. First, probably the most obvious consequence of the crisis was the downsized M&A activity on the market in general. This has on the one hand led to less merger control work for the FCO. On the other hand we have seen more horizontal mergers in attempt to consolidate certain markets. Such mergers often demand more in-depth scrutiny by the competition authorities.. Finally, an impact of the crisis on the legal and economic assessment by the FCO cannot be excluded either. Setting aside the fact that economic crisis alters substantially the market conditions and relationships among the stakeholders, in cases affecting certain industries stuck within the midst of the crises, the competition authorities seem to have used its discretion more generously in interpreting certain theories of harm, e.g. by accepting certain commitments rather than issuing a prohibition decision.. In this respect the FCO even partially considered behavioural commitments a viable option and, thus, anticipated one of the changes which will be introduced once the current 8th reform of the German Act against Restrictions in Competition comes into force early next year.

SALANS
A different approach

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Dmitry Taranyk, Counsel, and Predrag Krupez (Associate) of Sayenko Kharenko discuss Merger Control issues in Ukraine.

PLEASE SUMMARISE THE PRIMARY STATUTES AND REGULATIONS THAT GOVERN MERGER CONTROL IN YOUR JURISDICTION. WHAT ARE THE JURISDICTIONAL THRESHOLDS?

- The Law on Protection of Economic Competition of 11 January 2001 is the main legal instrument, underpinning the Ukrainian merger control rules. It provides for key definitions, including what amounts to a 'concentration', which undertakings can be regarded as 'participants to the concentration', what is 'control', what amounts to 'decisive influence'. It also provides for the financial thresholds, namely:

(i) the aggregate worldwide value of assets/sales for all parties to the concentration, including related entities, must meet/exceed EUR 12 million;
(ii) the aggregate worldwide value of assets/sales for each of at least two of the parties to the concentration, including related entities, must meet/exceed EUR 1 million; and
(iii) the value of assets/sales in Ukraine of at least one party to the concentration, including related entities, must meet/exceed EUR 1 million.

- The AMC's approval is also required for any concentration to which the merging parties' combined market share meets/exceeds 35% of the market and the surviving entity would face insignificant competition.

- The Law on the Antimonopoly Committee of Ukraine of 26 November 1993 regulates the powers and competencies of the AMC.

- The AMC Regulation on the Procedure for Obtaining the AMC's Approval for Concentrations of Undertakings of 19 February 2002 (No. 33-R) lays down the rules for obtaining and timing of the merger review process.

- The Resolution of the Cabinet of Ministers of Ukraine (Cabinet) on the Cabinet's Approval of Concerted Practices and Concentrations of Undertakings of 28 February 2002 (No. 219) regulates the power of the Cabinet to approve concentrations which were unsuccessful in securing the AMC's approval.

DOES YOUR DOMESTIC AUTHORITY COOPERATE WITH INTERNATIONAL ANTIRUST AUTHORITIES? ARE SOME COUNTRIES MORE COOPERATIVE THAN OTHERS AND DOES THIS REFLECT IN THE OVERALL M&A PICTURE?

The AMC enjoys a degree of informal cooperation with certain CIS states, including Russia and Kazakhstan, with high profile visits and information exchanges being commonplace. The authority also monitors the activities of the European Commission and regulators from certain EU Member States. We are aware of instances when the AMC initiated investigations or issued information requests as a response to publications that appeared on the European Commission's website. In particular, if the AMC discovers that a concentration with Ukrainian elements is bound to be closed, it could approach the merging parties, requesting explanations as to why a merger approval was not sought in Ukraine.

Nevertheless, it is fair to say that the AMC lacks resources to effectively monitor all foreign-to-foreign transactions that technically require merger clearance in Ukraine. The AMC is also known to, on occasion, rely on the market definitions developed by the European Commission, especially in cases when the authority lacks experience in a particular market.

HOW COSTLY IS THE PROCESS IN TERMS OF TIME AND MONEY?

In terms of time, according to the effective regulations, the notification submission is supposed to be reviewed by the AMC within 45 days from the date of its submission (Phase I). During the first 15 days, the AMC is supposed to conduct an initial review and may return the application without considering it, if it determines that the application is incomplete. During the subsequent 30-day period, the AMC analyses the submitted information and decides whether to grant or deny the approval. However, it should be mentioned that the AMC tries to scrutinize every application in an attempt to find an excuse for returning it as being incomplete, followed by a request for additional information to be submitted. Thus, we would recommend allocating about 60 days for the AMC approval after the filing date.

In addition, if the AMC discovers any grounds based on which the concentration can be prohibited or needs to engage in complicated research (i.e. if it comes to the view that the relevant market is an important one or that the concentration involves parties with very high market shares), it may open a Phase II review that may last up to 3 months and this period can be suspended until the AMC receives any subsequently requested information. The prospect of a Phase II review very much depends on how wide the relevant product market is as well as the relevant market shares of the parties to the concentration. If the merging parties are facing tight deadlines, we can usually negotiate with the AMC to expedite the process considerably (please refer to question 3). In terms of filing expenses, merger notifications are accompanied with a filing fee, amounting to UAH 5,100 (approx. EUR 500).

WHAT ARE THE MOST COMMON MERGER CONTROL ISSUES IN YOUR JURISDICTION AND HOW HAVE THEY BEEN ADDRESSED BY THE REGULATORS?

Unfortunately, the most common issue is the completeness of the notification bundle. Namely, as mentioned above, the AMC looks for any excuse to return notifications as being incomplete. Thus, applicants are advised to ensure that the right balance is struck between the information that is really needed for the AMC to make its decision, so as to avoid having the notification turned down, and the information that is technically required by the legislation (the quantity of which is highly burdensome). Therefore, when drafting merger notifications, we take extra care to ensure that our clients are not overburdened by the sheer volume of information and documents that they are technically required to provide.

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SNR Denton was formed from long standing, successful firms, who saw the importance of competition law/merger control in meeting clients' commercial objectives and widening the options open to them.

Our clients have tended to cluster in a number of economic sectors in which we have developed particular expertise. In the EU, these are energy, TMT/sport, retail and banking/financial services. We help clients develop a proactive strategy through to clearance.

UK merger control is governed by the Enterprise Act 2002. The process is a two stage one, the Office of Fair Trading (OFT) refers mergers to the Competition Commission (CC) if they may result in a substantial lessening of competition.

The OFT has jurisdiction if either the target's UK turnover exceeds £70 million and/or if it creates or enhances a 25% share of supply of any goods/services in the UK.

The OFT actively co-operates with antirust authorities internationally, for example, in the ECN.

Merger filings are voluntary, this reduces the cost in cases that raise no issues. In other cases, the costs will depend on the complexity of the issues. Additionally, a fee is payable to the OFT for merger clearance. From October 2012, the fee will be £160,000 where the target's turnover exceeds £120 million.

The economic crisis has meant that the OFT has more frequently met the failing firm argument, ie that the alternative to the merger is withdrawal of the target from the market. Although sceptical, the OFT will accept it where there is "sufficient compelling evidence".

The OFT and CC are to be combined into a single Competition and Markets Authority. Although the two phase approach to merger investigations will be retained, this institutional reform will inevitably amount to a very significant change.

The best piece of advice ever given to me was find out what everyone else knows and begin where they left off!

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To date, the merger control regime in Switzerland must be considered rather lenient in comparison to other jurisdictions. Whilst, as in other countries mergers of previously independent enterprises and the direct or indirect acquisition of control over a company or its assets by one or more companies are potentially notifiable concentrations, filing thresholds are high (worldwide aggregate turnover of at least CHF 2 billion or a Switzerland-wide aggregate turnover of at least CHF 500 million and at least two of the companies involved must have reported individual turnovers in Switzerland of at least CHF 100 million), and the authority can only oppose a concentration if it creates or strengthens a dominant position that leads to the elimination of effective competition in the relevant market.

A proposal by the Federal Government is now being discussed by the Swiss Parliament to bring the substantive test in line with the EU's "Significant Impediment to Competition" test. If this proposal were adopted, more concentrations would likely be opposed or cleared only subject to remedies. Moreover, the Government proposes to simplify notification duties for concentrations that are already under scrutiny of the EU competition authorities, and to allow the Swiss competition authority to coordinate deadlines and procedures the European Commission. In current proceedings legal counsels try to align EU and Swiss procedures by giving the authorities the right to exchange information and to coordinate the timing of the filings to the extent possible.

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In recent years, there has been an increasing amount of public criticism of the concentrated nature and structure of the various market sectors in Israel. This criticism reached a peak in the summer of 2011, when the burgeoning social protest movement in Israel took to the streets to protest against Israel's rising cost of living.

Consequently, the public debate focused on the regulation of these markets and several recent changes were subsequently made to Israel's Antitrust Law, which expanded the powers and authority of the Israel Antitrust Authority ("IAA").

ARE THERE ANY STATUTES AND REGULATIONS CONCERNING MERGER CONTROL THAT ARE UNIQUE TO YOUR JURISDICTION? DOES THIS CREATE/PREVENT ANY OPPORTUNITIES?

Uniquely, the Israeli Antitrust Law provides that the carrying out of a merger which requires notification and approval, prior to approval being granted is a criminal offence, even if the merger does not raise any competitive concerns. The punishment specified in the Law for such offence is up to three years' imprisonment, or up to five years imprisonment in aggravating circumstances. Criminal and administrative fines are also imposed under the Israeli Antitrust Law.

WHAT ARE THE PRIMARY MERGER CONTROL ISSUES IN YOUR JURISDICTION? HOW CAN THESE BE OVERCOME IN ORDER TO BRING A TRANSACTION TO A SUCCESSFUL CLOSE?

There are very few cases where a merger poses such threat to competition that approval is not possible. Even in difficult circumstances, a realistic approach based on the analysis of the market structure and the competitive concerns will lead to a productive dialogue with the IAA and the agreement on conditions that will not take away the substance and 'raison d'aitre' of the contemplated transaction.

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AS WE KNOW, THE INTERNATIONAL M&A COMMUNITY IS TAKING MERGER CONTROL MORE SERIOUSLY THAN EVER; HAVE YOU EXPERIENCED MAJOR REFORM? IF SO, WHAT BROUGHT ABOUT THIS CHANGE IN YOUR JURISDICTION?

Transactions are indeed to be carefully analyzed as to whether or not they trigger filing obligations under the Austrian merger control regime.

While in the past, failure to notify may not have been pursued so often by the Austrian authorities, this has changed. To date, several fines for "gun-jumping" have been handed down. For example, upon application by the Federal Competition Agency, the Cartel Court recently imposed a fine even for an only belated notification (25 Kt 1/10). While the fine was relatively small, this was due to the facts of the case; the Cartel Court found that the merger did not give rise to competition concerns, there were arguments that the effects doctrine applied (the involved undertakings had their corporate seats in Germany and not Austria) and, moreover, there were further mitigating circumstances (inter alia, the undertaking concerned helped in clarifying the facts of the case).

Moreover, national competition authorities work more and more closely together. For example, upon initiative of the Austrian Federal Competition Agency, a cooperation between the competition authorities of Austria, the Baltic States, Bulgaria, Croatia, Hungary, Poland, Rumania, Slovakia, Slovenia, and Switzerland, the so called "Marchfeld Forum", became operational in March 2010. I.e. filing in one jurisdiction may mean that also a competition authority in another jurisdiction becomes aware of the transaction. If such transaction were to be filed in the other jurisdiction as well but was not, the undertakings concerned may face the above described "gun-jumping" proceedings.

WHAT PERCENTAGE OF M&AS ARE PREVENTED BY MERGER CONTROL REGULATION IN YOUR JURISDICTION? WHAT ARE THE MAJOR OBSTACLES?

The substantive test for clearance in Austria is whether or not the merger leads to the creation or strengthening of a dominant market position (Cartel Act, s 12). Highly complex merger projects, typically such which involve high market shares (> 30%), are most likely to receive close antitrust scrutiny by the Official Parties.

As to the percentage of prevented mergers, it can be said that practically none of the notified mergers are actually forbidden by a negative decision of the Cartel Court. According to the Federal Competition Agency's statistic, approx. 95% of notified merger cases are cleared within Phase I.

The reminder of cases either reached Phase II (some 4%) or ended in some other manner (eg by revoking the notification).

The rather high clearance rate is linked to the fact that the parties can offer remedies, which, if accepted, leads to a conditional clearance.

ARE THERE MORE OBSTACLES WHEN AN INTERNATIONAL WISHES TO ACQUIRE A STAKE IN A DOMESTIC COMPANY?

When an international undertaking wishes to acquire a domestic one, there are no more obstacles than in a purely domestic transaction. The only thing one may mention is that filings have to be made in German, which may be seen as an obstacle by non-German speakers.

WHAT ARE THE PRIMARY MERGER CONTROL ISSUES IN YOUR JURISDICTION? HOW CAN THESE BE OVERCOME IN ORDER TO BRING A TRANSACTION TO A SUCCESSFUL CLOSE?

The substantive test in Austrian merger control is whether or not a dominant market position is created or strengthened by the notified transaction.

In practice, market shares are the main indicator whether or not a transaction poses a competition problem. Having said that, the Federal Competition Agency has several people who are professional macro or micro economists. It employs all sorts of economic analysis. Already in 2006, the Federal Competition Agency had commissioned a study on the economic techniques to delineate the relevant market and apply the Herfindahl-Hirschman index. Further, it can be mentioned in this context, that where a merger concerns sectors subject to specific regulation (eg telecoms), the authority closely collaborates with the experts from the sector regulators.

If a merger raises concerns, the notifying parties can offer, the official parties (ie the Federal Competition Agency and the Federal Cartel Prosecutor) request and the Cartel Court impose conditions and/or remedies. Such conditions/remedies can be given both in phase I and phase II. In absolute terms, there are not many clearances subject to conditions and approximately as many of them were arrived at during phase I as during phase II proceedings. However, in relative terms, there is a rather high likelihood that phase II proceedings end in a conditional clearance. If problems arise, parties are usually well advised to think about remedies to bring the transaction to a successful close.

HOW WELL DOES YOUR DOMESTIC AUTHORITY COOPERATE WITH INTERNATIONAL AUTHORITIES? WHICH REGIONS ARE THE MOST COOPERATIVE?

Our impression is that the Austrian Competition Agency is quite active in cooperating with other national and international authorities. It seems that there is a well-established connection to the European Commission as well as a close working-relationship. The same applies to the German Bundeskartellamt, where it is advisable to coordinate on adviser's side any Merger Control filing which is simultaneously filed with the German Bundeskartellamt and the Austrian authority.

Apart from that, it can be noted that the Austrian competition authority has established particularly good links with Central and Eastern European competition authorities. The Austrian competition authority is the founding partner of the so-called Marchfelder competition forum, which is an organisation to foster the activities of the competitions authorities of Austria, Bulgaria, Estonia, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia, Slovenia, Croatia and Switzerland.

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