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Recent Changes and Proposals in Merger Control Legislation in Selected Countries: Implications for Acquisitive Companies

June 2, 2011

As the global economy continues to show signs of improvement, more countries—including the UK, India, and Brazil—are moving toward rules that require approval of transactions prior to closing—even when neither of the parties to the transaction is domestic. The news is not all bad; some countries, such as India, Spain, and Turkey, have adopted *de minimis* standards that exempt transactions with minimal local impact. Brazil is also considering a *de minimis* test.

India

Under the recently enacted Indian Merger Control Regulation, transactions meeting certain thresholds that are signed or approved by a company's board of directors on or after June 1, 2011 will trigger a reporting requirement. The Indian rules incorporate a complex web of thresholds with a mix of Indian and worldwide assets or revenues for the acquiring group and for individual parties. After discussion with leading local counsel in India, however, we have determined that, until 2016, parties will not have to report deals where the target has (i) assets in India of less than approximately US$55 million or (ii) Indian sales of less than approximately US$165 million.

If the *de minimis* rules do not apply, the parties may not be allowed to close for as long as 210 calendar days. However, India's Competition Commission has indicated that it expects parties will be able to close transactions that do not raise antitrust issues 30 calendar days after filing.

The filing fee is approximately US$22,000, but when the parties are not competitors, they may file a short-form notification with filing fees of approximately US$1,100.

United Kingdom

For the last 45 years, the UK has had a voluntary merger filing system. There is no clear evidence that there was more consumer harm in the UK than in many countries in the EU and elsewhere that have adopted mandatory merger filing rules. Because it can be difficult, if not impossible, to turn the clock back on an already closed transaction that threatens harm to competition, the UK Department for Business, Innovation, and Skills recently proposed that the Office for Fair Trading consider adopting a mandatory merger filing regime. If the OFT does adopt such a system, they will have to set transaction or party size thresholds, but they have not yet done so. The government is still considering different options for filing fees.

The consultation period for a potential rule change will close on June 13, 2011.

Spain

Spain has enacted legislation to reduce the number of filings where transactions are unlikely to raise competition issues in Spain. Currently, parties must report a transaction to the National Competition Commission when target or parties (i.e., buyer group and target) combined have 30% or more of a market, or if each party's revenue in Spain exceeds approximately US$80 million and the parties' combined revenue in Spain exceeds approximately US$320 million.

Spain's Sustainable Economy Act, which went into effect on March 6, 2011, established a *de minimis* exception relating to the market share test for reportable transactions where (i) the target company's revenue in Spain is less than approximately US$14 million *and* (ii) there is no market where the parties' individual or combined share of sales in Spain exceeds 50%. We expect the increase in share to 50% will substantially reduce the number of filings.

Brazil

For large (and sometimes for not-so-large) companies, a merger filing in Brazil is a routine aspect of any transaction, even when one of the parties does minimal business in Brazil. The parties are generally able to close before receiving approval, but must submit a filing 15 business days after executing an agreement.

The Brazilian Congress is considering legislation that would require a pre-closing filing with a mandatory waiting period and that would change the notification thresholds, including exemption from filings based on a *de minimis* test. Under the current version of the bill, the parties will be required to make a filing if one party has Brazilian sales of least approximately US$620 million and one *other* party has Brazilian sales of at least approximately US$25 million. The Congress is also considering abolishing the requirement that parties must file when the target or parties combined have a 20% or more share of a market in Brazil. The parties will not be allowed to close without approval. The review period could be as much as 240 calendar days, but transactions that do not raise any competition issues could be cleared within 60 calendar days of filing.

There is no indication of when the Congress might approve the bill, but if it does become law, it appears unlikely to take effect before late 2011.

Turkey

Turkey's new rules, which went into effect on January 1, 2011, substantially reduce the number of pre-merger filings. Perhaps most significantly, parties need not file at all if they do not compete against each other in Turkey. Further, the parties must file only if (i) the combined Turkish revenue of the parties exceeds approximately US$60 million and each of at least two parties has Turkish revenues exceeding approximately US$20 million *or* (ii) the worldwide revenue of one party exceeds US$300 million and the Turkish revenue of any *other* party exceeds approximately US$3 million. Parties no longer need to file only because one party (or the two parties combined) had Turkish sales that accounted for more than 25% of a market. There are no filing fees.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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