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Outlook for 2011 of Merger Control in the EU: First Prohibition Decision in More Than Three Years

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Introduction

For just the 21st time in the 20-year history of EU merger control and the first time in more than three years, the European Commission has prohibited a proposed merger outright. On **January 26, 2011**, the Commission prohibited, on the basis of the EU Merger Regulation, a proposed merger between Greece's two largest airlines: **Aegean Airlines** and **Olympic Air**. The Commission considered that the merger would have resulted in a quasi-monopoly on the relevant air transport market since, together, the two carriers control more than 90% of the Greek domestic market.[1]

This is the first prohibition decision since the *Ryanair/Aer Lingus* case in 2007, which also concerned the air transport market.

These two most recent prohibition decisions show striking similarities, in that in both cases the proposed merger involved airlines that operated out of a hub in a national capital: Dublin in the case of the 2007 decision, Athens in the case of the 2011 decision.

The overall total of 21 prohibition decisions is to be measured against the approximately 4,500 transactions reviewed by the Commission since the EU Merger Regulation first came into force on September 21, 1990.[2] In the first full year of the rules after entry into force – 1991 – the Commission was notified of only **64** mergers meeting the EU threshold tests. Twenty years later, in 2010, the Commission received a total of **274** notifications of proposed transactions meeting the EU thresholds. In 2009, the volume of EU notifications was roughly the same. The busiest year thus far has been 2007 ("pre-crisis"), when the Commission reviewed more than **400** proposed mergers (also called "concentrations" in the technical language of EU merger control). EU merger control constitutes, in a way, an economic bellwether.

A reliable guide to the EU merger control "risk" of a specific transaction is to be found in the statistics. As a general guideline, over time, these show that about 88% of notifications are cleared at the end of the "Phase I" procedure, i.e. within 25 days of formal filing. Some potential transactions are dropped by the parties, and about 10% are referred by the Commission into the in-depth review procedure, known as Phase II. Of Phase II cases, about half are ultimately cleared without remedies/commitments, while the other half are cleared with them. As for the ultimate sanction of outright prohibition, the risk is extremely marginal when weighed against the total number of cases (as noted, 21 outright prohibition decisions for some 4,500 merger control cases in 20 years).

All merger control decisions are published on the website of Directorate-General Competition ("DG COMP") of the European Commission, as well as all relevant substantive and procedural rules applied by the Commission.[3] In addition, as of April 1, 2010, DG COMP has published a downloadable compilation of all currently applicable legislation and guidance documents.[4]

Recently, the new EU Competition Commissioner Joaquin Almunia noted that mergers and acquisitions play an important role in a competitive and healthy Europe and, for this reason, he said that the Commission should only intervene on the merits of a contemplated transaction where the proposed merger creates competition problems leading to higher prices or less innovation[5] on the market.

Finally, **going beyond the European Union to the rest of the World, multinational companies engaging in international acquisitions should bear in mind that some 80 jurisdictions worldwide now have merger control rules, many of them introduced within the last several years. For those cases in which the proposed acquisition involves a target having sales in various countries, dealing with a plethora of merger control rules on a worldwide scale entails time and cost, and may engender a significant impact on the timing of the transaction. In addition to the United States and Canada, the European Union (and 26 of its 27 Member States), China, Brazil, India, Russia and countries such as Nicaragua, Ukraine, Nigeria and Namibia now have merger control rules.** In 2010, Namibia's Competition Commission blocked a proposed merger between cement company AfriSam and rival Ohorongo.

I. EU Merger Control Rules at a Glance

Where companies are involved in a contemplated merger, acquisition or creation of a full function joint venture and have sufficiently significant sales in the European Union as to meet the EU's jurisdictional thresholds, the proposed transaction will be subject to control by the European Commission (the "Commission"), under the rules set out in the EC Merger Regulation No. 139/2004 ("ECMR").[6] The term used in the ECMR is "concentration", which encompasses all transactions entailing change of control of a business enterprise, the "target". The Commission has exclusive jurisdiction to review concentrations with a **Community dimension**, whereas mergers that do not have a Community dimension may be reviewed by the national competition authorities of the Member States ("NCAs") applying national rules on merger control.

The EU primary and secondary threshold tests are complex: as a general rule, the threshold tests will be met where the parties have more than **€5 billion** in combined worldwide revenues and at least two of them **€250 million** each in EU revenues; in some cases, the secondary threshold tests are met where the parties have more than **€2.5 billion** in worldwide revenues and at least two of them **€100 million** each in EU revenues.

Notification before the European Commission **is mandatory** for all concentrations with a Community dimension. There is a **standstill obligation**, i.e. the concentration must not be implemented before its notification and until it has been declared compatible with the common market pursuant to a Commission decision.[7] Failure to comply with this standstill obligation can entail **significant fines** for the companies concerned.[8]

On the merits, when assessing the impact of the notified transaction, the Commission will examine whether the merger will "**significantly impede effective competition ("SIEC test")**".[9] The SIEC test was introduced in 2004 by the ECMR in order to fill in the enforcement gap existing under the old regulation that allowed the Commission to block a merger only in the case of a creation or reinforcement of a dominant position, both individual and collective. When analyzing the compatibility of the merger with the common market and its effects on competition, the Commission applies the **Horizontal merger guidelines**[10] with regard to horizontal mergers, i.e. mergers between two or more companies that are actual or potential competitors in the same

product and geographic market, and the **Vertical merger guidelines**[11] with regard to (i) vertical mergers, i.e. mergers between two or more companies that operate at different levels of the production chain and (ii) conglomerate mergers, i.e. mergers between parties whose activities do not entail any horizontal or vertical overlaps, but which are complementary.

Under EU rules, the procedure is "front-ended". Even under the so-called "simplified procedure", considerable and detailed information and data must be supplied as part of the basic EU notification filing. In practice, constant and sometimes prolonged pre-notification contacts take place between the DG COMP case team and the lawyers of the notifying party(ies) before the filing is formally made. The purpose of the pre-notification contacts is to ensure that there is fundamental agreement between the case team and the parties' lawyers on the terms of the notification before the notification is formally filed and the clock begins to "tick". As a general rule, even in the most straightforward cases it takes a strict minimum of ten weeks to prepare a draft notification including the obtaining and analysis of voluminous information, drafting the notification, dealing with the Commission in pre-notification contacts and obtaining Phase I clearance.

II. Outlook for EU Merger Control in 2011

As noted, the beginning of 2011 was marked by the prohibition of the proposed merger between Aegean Airlines and Olympic Air. On the same date, on January 26, 2010, the Commission cleared **Intel's proposed acquisition of McAfee** subject to conditions.[12] The approval is conditional upon a set of commitments ensuring fair competition between the parties and their competitors in the field of computer security. Indeed, the Commission was concerned that rival IT security products could be excluded from the marketplace given Intel's strong presence in the world markets for computer chips and chipsets. In particular, the Commission worried about the high likelihood that the merged entity would embed its own security solutions into its chips and chipsets. To alleviate those concerns, Intel committed to ensuring the interoperability of the merged entity's products with those of competitors.

III. Scorecard of EU Merger Control in 2010

The year 2010 was marked by consistent and stable merger enforcement by the Commission despite the reduction of notified transactions due to the financial and economic crisis.

One of the most significant cases of the year remains the **Oracle/Sun Microsystems** merger, which was cleared unconditionally by the Commission's decision of January 21, 2010.[13] Oracle is market leader in proprietary databases, and Sun's MySQL database is the leading open source database. After an in-depth Phase II investigation, the Commission approved Oracle's takeover of Sun Microsystems without requiring any formal commitments, by simply accepting a series of public commitments made by Oracle in December of last year. It is highly likely that notifying parties might try to use this approach again when offering commitments in order to close Commissions' concerns regarding anti-competitive effects of the operation.

In another case, the Commission cleared the proposed acquisition of the **Sara Lee Corporation** by **Unilever**, subject to commitments by the parties.[14] After examining the contemplated acquisition, the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area ("EEA") or any substantial part of it. Even though the transaction did not initially qualify for the EU's one-stop shop review because the turnovers generated by the parties did not exceed any of the turnover threshold tests of the ECMR, under special referral rules the NCAs of Belgium, Germany, Spain, Portugal and the United Kingdom made a request that the Commission examine the impact of the proposed transaction on their territories. Given that the Commission has expressed concerns regarding the compatibility of the transaction with the common market, the merging parties offered structural commitments that consisted of the divestment of Sara Lee's Sanex brand and related business in Europe. This was

considered by the Commission as being sufficient enough to restore competition in all markets where the operation raised concerns.

IV. Merger Control in Major EU Member States

Under the EU's "one-stop shop" procedure, NCAs have jurisdiction over only those potential mergers that do not meet the EU primary or secondary thresholds. Of the 27 Member States, 26 have merger control rules. Three of the most important of them from a multinational Mergers and Acquisitions point of view are Germany, the United Kingdom and France.

A. Germany

In a recent legislative amendment of February 2009, an additional turnover threshold was introduced in order to supplement the jurisdictional test for merger review by the Federal Cartel Office (*Bundeskartellamt*: "FCO"). In addition to the worldwide turnover threshold of **€500 million**, at least one of the parties involved in the transaction must generate more than **€25 million** in Germany and – under the new additional threshold – another party must generate more than **€5 million** in Germany in the previous fiscal year.

In a 2010 leading case, the FCO reviewed a transaction concerning gas and electricity markets that consisted of the establishment of a joint venture in Plauen. The FCO had to investigate the existing **joint dominant position of RWE and E.ON**, the country's two largest electricity suppliers, and it arrived at the conclusion that the project will strengthen the joint dominant position of RWE and E.ON on the nationwide market for the supply of electricity, which will secure their sales and lead to market share additions[15]. According to the practice of the FCO, which has been confirmed by the Federal Court of Justice, the participation of a duopoly in a municipal utility secures its energy sales. However, in the second phase of the analysis, the FCO has cleared the creation of the joint venture, subject to conditions by the parties.

B. United Kingdom

Although **merger control filing is voluntary** in the United Kingdom, the Office of Fair Trading ("OFT") may review a non-notified merger that meets the threshold test upon its own motion at any time. Parties may prefer to notify the OFT of a merger that meets the UK thresholds[16] for clearance, rather than taking the risk of implementing the merger and then having to undo the operation, which might entail important financial and commercial consequences.

Amongst the recent UK cases, the OFT investigated Ryanair Holdings plc's ("Ryanair") acquisition of a minority shareholding in Aer Lingus Group plc ("Aer Lingus"). The European Commission investigated this public bid and decided to prohibit it in June 2007.[17] The parties appealed the prohibition decision unsuccessfully and the General Court ruled in July 2010 that the European Commission does not have the ability to examine or require divestment of minority shareholdings that do not confer "decisive influence" for the purposes of the ECMR.[18] Thus, on October 29, 2010, the OFT announced that it will investigate the operation under the Enterprise Act 2002. The OFT may treat as a relevant merger situation a minority shareholding where that shareholding gives its owner the ability to influence the behavior and policy of the target company materially, including the target company's strategic direction and commercial objectives. This is a lower level of control than the "decisive influence" test used by the European Commission under the EC Merger Regulation.[19]

C. France

The French thresholds leading to mandatory notification are straightforward: (i) combined worldwide revenues of all parties to the proposed mergers of **€150 million** (**€75 million** in retail distribution) and (ii) French revenues of at least **€50 million** by each of at least two parties (lowered to **€15 million** in retail distribution).

In 2010, the **TF1 group**, one of the major TV channels in France, has undertaken a series of substantial commitments before the Competition Authority to remedy the risks of adverse effects on competition that could result following the notified operation.[20] The project concerned the acquisition of a share of the **AB group** that provides the TF1 group with 100% of the capital of the NT1 station and 80% of the TMC station that, according to the analysis of the Competition Authority, might serve to strengthen the TF1 group's position in the markets for rights and advertising. In order to obtain an authorization by the Authority, TF1 had to promise that it will facilitate the circulation of rights for the benefit of competing channels, limit the broadcasting of works and programs within the group, and maintain the independence of the television advertising offers of TF1, on the one hand, and TMC and NT1, on the other hand.

On December 30, 2010, the Competition Authority cleared, subject to commitments, the merger between Veolia Transport and Transdev, respective subsidiaries of **Veolia Environnement** and of the **Caisse des Dépôts et Consignations** ("CDC") on the market for the road transport services for travellers.[21] On August 12, 2010, the European Commission referred to the French Competition Authority for review, for France, of the project to create a joint venture between Veolia Environnement and the CDC that would group their respective transport subsidiaries, Veolia Transport and Transdev. Following a Phase I investigation, the Competition Authority decided to launch an in-depth examination under Phase II on September 13, 2010. The Competition Authority considered that the proposed merger raised competition concerns on the urban and intercity public transport markets outside of the Ile-de-France region. In order to remedy the identified adverse effects on competition, Veolia Environnement and the CDC have assumed several innovative and substantial commitments such as financing the creation of a competition stimulation fund in the amount of €6.54 million and selling their share and assets in the urban and intercity public transport market of specific regions.

V. Merger Control Worldwide

Multinational companies engaging in multinational acquisitions should bear in mind that their operation might need to be notified before other Competition Authorities outside of the European Union, in countries in which the target enterprises have sales. In those cases where the target has sales in many jurisdictions, dealing with a plethora of merger control rules on a worldwide scale entails time and cost and may engender a significant impact on timing of the transaction.

More and more countries worldwide are developing stringent merger control rules allowing them to investigate with a high degree of scrutiny projects that might impact competition on their national markets. Thus, in 2010, Namibia's Competition Commission ("NCC") blocked a proposed merger between cement company AfriSam and rival Ohorongo, saying that it would "distort" competition in the country's cement market. **There are some 80 jurisdictions worldwide that have merger control rules, each with their own thresholds, procedures and decisional practices. In addition to the United States and Canada, the European Union (and 26 of its 27 Member States), China, India, Brazil, Russia and countries such as Nicaragua, Ukraine and Nigeria (not to mention Namibia) also have merger control rules.**

Companies should also be cautious about failure to notify concerning a transaction that might entail some significant economic consequences, as many NCAs have the means to investigate non-notified transactions on their own motion, imposing fines in the absence of notification (while requiring that the notification be prepared and filed after the fact or – worst case scenario – ordering the parties to undo the transaction). For instance, in China, MOFCOM (the Antimonopoly Bureau of the Ministry of Commerce) may impose fines up to Rmb 500,000 and also has the power to order unwinding of the transaction.

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[1] Commission Decision of January 26, 2011, Case COMP/M.5830 Aegean/Olympic.

[2] The exact number of notifications registered, from the original implementation of the ECMR (the first notifications were filed as of September 27, 1990) through December 31, 2010, is 4548.

[3] http://ec.europa.eu/competition/mergers/overview_en.html.

[4] The publication is available in electronic format only on the website of DG COMP.

[5] Joaquin Almunia, Press Conference on Unilever and Syngenta Mergers, November 17, 2010: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/658&format=HTML&aged=0&language=EN&guiLanguage=en.

[6] Council Regulation (EC) No. 139/2004 of January 20, 2004, on the control of concentrations between undertakings (the EC Merger Regulation), OJ, No. L 24/1 of January 29, 2004.

[7] Article 7 (1) of ECMR.

[8] In a decision of June 10, 2009, the Commission found that Electrabel had actually acquired de facto sole control over CNR as of December 23, 2003, and it imposed a fine of €20 million on Electrabel – see Commission Decision, Case **COMP/M.4994 – Electrabel/Compagnie Nationale du Rhône**, *OJ, No. C 279,* November 19, 2009, pp. 9–11.

[9] Article 2 of the ECMR.

[10] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ, No. C 31, February 5, 2004, pp. 5–18.

[11] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ, No. C 265, October 18, 2008, pp. 6–25.

[12] Commission Decision of January 21, 2010, Case COMP/M.5984 – Intel/McAfee.

[13] Commission Decision of January 21, 2010, Case COMP/M.5529 – Oracle/Sun Microsystems.

[14] Commission Decision of April 21, 2010, Case COMP/M.5658 – UNILEVER/Sara Lee Body Care.

[15] Federal Cartel Office, Decision of April 30, 2010, B8-109/09.

[16] The United Kingdom has an alternative threshold test:

- "*the turnover test*" – when the value of UK turnover of the enterprise that is being acquired exceeds £70 million (approximately €82 million); or
- "*the share of supply test*" – when the enterprises that cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25% of all those particular goods or services supplied in the UK or in a substantial part of it.

[17] Commission Decision of June 27, 2007, Case COMP/M.4439 – Ryanair/Aer Lingus.

[18] Judgment of the General Court, July 6, 2010, Aer Lingus Group plc v European Commission, Case T-411/07, European Court reports 2010, Page 00000.

[19] As stated in the OFT's Mergers – jurisdictional and procedural guidance (paragraph 3.15).

[20] Competition Authority, Decision No. 10-DCC-11, January 26, 2010.

[21] Competition Authority, Decision No. 10-DCC-198, December 30, 2010.