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Meddlesome Market Share Notification Thresholds Can Have A Chilling Effect

By: Daniel S. Savrin, Bingham McCutchen LLP

In assessing the need for pre-merger filings in cross-border mergers and acquisitions, the problem of notification thresholds based on market share has, in recent years, receded. In the jurisdictions where such requirements persist, however, they continue to create difficulties in both evaluating whether notification is required and, when it is required, clearing the merger review process.

While many authorities that rely on share-based notification thresholds may discount the concerns widely expressed by the International Competition Network (ICN)(among others) on this issue, there is a need for a better understanding of the impact of such thresholds on small- and medium-sized transactions and, in particular, transactions among privately held parties. For larger cross-border mergers, the need to make notification filings and pursue merger review in an additional country may constitute a frustrating but manageable additional cost and burden. For small and medium-sized transactions—where there may be no need to file in nations that rely on sales- or revenue-based thresholds—the burden, delay and potential for public exposure associated with notification filings in a nation utilizing share-based thresholds may effectively hinder or quash the deal. This is particularly the case in transactions amongst firms with relatively small overall sales volumes that may, however, exceed the market share notification thresholds in one or more nations.

While it is not contended that any of the nations that utilize share-based notification thresholds intend to have such chilling effects, it must be recognized that reliance on such thresholds by certain nations are, in fact, "game-changers" for certain transactions. As such, for this additional reason, those nations that continue to utilize share-based notification thresholds ought to seriously consider either abandoning those thresholds entirely or, at a minimum, instituting minimum sales thresholds and providing market definition guidance so as to limit the impact of their continued reliance on market share thresholds.

The ICN, among others, has been instrumental in the effort to ask nations to reconsider their reliance on market share thresholds.[1] The most notable recent success in that effort, and one that will likely affect the majority of cross-border transactions, is China's decision not to rely on market share thresholds under its newly instituted Anti-Monopoly Law.

There have been a number of arguments put forward as to why the use of market share thresholds should be abandoned. The primary argument is that notification thresholds should be clear and understandable and based on objectively quantifiable criteria, so as to permit parties to readily determine whether a transaction is notifiable.[2] While it has been widely recognized that the business community, competition agencies and the efficient operation of capital markets are best served by clear, understandable, easily administrable, bright-line tests, the market share notification thresholds that persist fail to meet any of these standards.

Ironically, while market definition often proves to be one of the hardest and most-contentious issues in antitrust law, these thresholds pre-suppose that the parties can readily assess (often in a nation that has little or no developed law or guidance on the subject) how markets would be defined by the subject nation's authority and then determine what their relative shares are within that market. In addition to the difficulties of the market definition exercise, market share notification

[1] See, *e.g.*, International Competition Network, Recommended Practices for Merger Notification Procedures, *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractics.pdf ;International Competition Network Merger Working Group Notification & Procedures Subgroup, Setting Notification Thresholds for Merger Review, *available at* http://www.internationalcompetitionnetwork.org/media/library/mergers/Merger_WG_2.pdf

[2] *See, e.g.*, International Competition Network, Recommended Practices for Merger Notification Procedures at 3-4, *available at* *http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf*

thresholds pre-suppose that parties can readily determine their relative market share within every nation in which they operate or generate sales. While it is a generally accepted principle that notification thresholds should be based on information that is readily available to the parties in the ordinary course of business, competition authorities must acknowledge that -- even in the case of large businesses -- market share assessment is a difficult task and that reliable information, particularly on a nation-by-nation basis, is far from readily available to most businesses.

The analysis is further complicated by the range of market share thresholds in use (some range as low as 10%) and the absence, in many cases, of any *de minimis* standard. In the absence of *de minimis* standards, in some nations where there is a truly low volume of sales revenue measured, perhaps, in the hundreds of thousands or low million dollar ranges, merging parties are expected to undertake, among other things, a market definition exercise, a market size examination and a determination of their respective and combined share of sales within that market. Particularly where sales are truly *de minimis*, these burdens are imposed without a genuine productive purpose. Clearly, no nation should require notification where the volume of commerce involved is not sufficient to have a meaningful economic impact.

For a small- or medium-sized transaction that is not otherwise reportable, the many burdens imposed by market share notification thresholds may hinder or delay the merger process. For others, they may be far more obstructive. Notification may subject smaller transactions to costs and delays that are sufficient to deter the parties from pursuing the transaction. Notification, particularly in some smaller nations that rely upon market share thresholds, but have little record with respect to the merger review process or the maintenance of confidentiality, may create an insurmountable obstacle for some parties. These realities of the marketplace need to be taken into account as otherwise procompetitive transactions may be deterred by the well-intentioned but unfortunate use of market share notification thresholds.

Nations that rely on market share notification thresholds, and businesses that have a presence in those nations, would be well-served by a re-evaluation of the burdens imposed by such thresholds. While the harm they cause may be difficult to readily quantify, as the ICN and others have shown, the task at hand can be achieved by the use of clear, objective and proportionate standards that require notification only for transactions that might have a genuine impact on competition within the subject nation. In evaluating these concerns, China has recognized the wisdom of abandoning reliance on share based notification thresholds and it would be beneficial for both merging parties and the remaining competition authorities that rely on share based notification thresholds if they chose to emulate China's approach on this issue.