Kluwer Competition Law Blog

Record fine for late filing in India: Time to set the deadline for reform?

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India's competition authority (the CCI) imposed a record-breaking fine of US$750,000 (50 million rupees) on General Electric (GE) earlier this year for failing to notify its tie-up with Alstom S.A. within the deadline required by the country's merger control rules.

The CCI is increasingly active in enforcing its merger regime. Since GE's case, the CCI has imposed a fine of US$150,000 on another US headquartered company for failing to notify its acquisition of a European headquartered business, and a fine of US$750,000 on an Indian company for a similar violation.

The CCI is not alone in taking a strict formalistic approach to violations of merger control procedures. In the past five years, over 30 merger control authorities across five continents have imposed total fines of over US$100 million for failure to file or for implementing without approval.

However, GE's case is different. The transaction was filed with the CCI. The CCI had sufficient time to review the transaction and completion occurred only after clearance was obtained.

What happened?

GE agreed to acquire the thermal power, renewable power and grid businesses of Alstom S.A.. The acquisition documents were signed on 4 November 2014 and the parties notified the CCI on 24 November 2014.

The CCI cleared the €12.5 billion deal, but initiated proceedings against GE for missing the 30 day filing deadline imposed by India's rules which, according to the CCI, began when GE publicly notified the deal to India's stock exchanges in May 2014.

An unnecessary rigidity

Over 120 jurisdictions worldwide have merger control laws. Fewer than 25 impose a deadline for notifying, typically after signing of the merger agreement. Click here to see a list of these jurisdictions. Instead, in the overwhelming majority of countries, the rule is simply that the transaction cannot be implemented until clearance has been obtained (the suspensory rule).

This makes complete sense: there is no need for a filing deadline because the suspensory rule incentivises the parties to file their transaction for clearance as soon as possible. This view is reflected in the International Competition Network's (ICN) Recommended Practices for Merger Notification Procedures, which states:

"*[J]urisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction should not impose a deadline upon the parties to file notification within a specified time ... Parties will have the incentive to file promptly after reaching an agreement because they know they will be unable to close their transaction until it has been reviewed."***[1]**

And yet a number of suspensory regimes (including major jurisdictions like India) still impose a requirement to file within a particular deadline.

It is not easy to find a compelling case for retaining filing deadlines in suspensory regimes. Not only is it unnecessary (for the reasons explained above), a filing deadline could actually disadvantage the parties and even the reviewing authority. A filing deadline of 7 days or 15 days – or even 30 days – can make it extremely difficult for parties to file a high quality notification on time, resulting in significant and unnecessary pressure being applied to the merging parties. Where the deadline is particularly short (e.g. 7 days or 15 days, as is the case in Bosnia Herzegovina, Faroe Islands, Malta, Mozambique, Montenegro, Paraguay and Serbia), parties run the risk of submitting an incomplete or incorrect notification – despite their best intentions. In extreme cases, parties might even elect not to file within the deadline in order to avoid knowingly submitting a deficient notification.

In larger transactions, the deadline might preclude a filing being made at an earlier stage (e.g. as soon as the parties had a good faith intention to merge). This can lead to unnecessary delays and pressure on the agency to expedite its review.

Devil in the detail

In GE's case, despite early informal engagement by GE with the CCI, GE and the CCI disagreed along the process over which of GE's actions constituted a valid trigger event in their interpretation of India's merger control regulations. Whilst GE argued that the requirement to notify arose upon the execution of a binding acquisition agreement (November 2014), the CCI considered that the 30 day filing deadline began when the deal was notified to the Indian stock exchanges in May 2014. In July 2015 the CCI published an amendment to its merger control regulations to clarify that a public announcement of a qualifying transaction made under India's takeover regulations would trigger the deadline for filing. It remains to be seen whether this will resolve all ambiguities in the law.

It is unsurprising that these sorts of debates arise. Not only is there a variety of ways of defining the trigger event (as demonstrated by the list of filing deadlines) but given the variety of documents and instruments which can be drawn up as a deal progresses (heads of terms, letters of intent, memoranda of understanding etc. with some binding and non binding terms), there are inherent difficulties in trying to define, in the abstract, exactly which step or document should set the clock running for notification.

GE argued that the terms of the Alstom deal were not crystallised at the time of making the public announcements to India's stock exchanges. According to the CCI's report[2], GE submitted that

there was *“no certainty as to the manner in which the transaction would take place, scope of the assets being acquired, the identity of the acquirer, the key commercial arrangements, etc.”* GE further stated that a merger notification at the time of the public announcements (made on the basis of a mere unilateral bid and without any definitive documents) would, at best, be premature and would not have provided a transaction description nor any assurance as to deal certainty.

The CCI dismissed GE’s argument on the basis that basic details of a proposed transaction are typically included in public announcements (including the parties involved and the number of shares to be acquired), and also cited the procedure by which parties can inform it of changes in the deal. It’s easy to see how such a filing obligation could be problematic for both the parties and the agency in any given transaction. If the structure of the transaction is not yet known or subject to change, the parties will not know what information to include in a merger notice. The deal the parties ultimately agree could be very different from the deal they notify (this would have been the case in the event that GE had made a CCI filing at the time of it making the public notices about the deal to India’s stock exchanges). Agencies then risk devoting a lot of time and resources to transactions which may change structurally over time (including even the identity of the parties), or which may not ever reach closing.

Learning from others

Filing deadlines are not a necessary feature of a modern merger control regime. The European Commission (EC) abolished its one-week filing deadline in 2004, citing that practice had shown that a strict enforcement of the deadline was neither realistic nor necessary. Commenting on the reform proposals in 2002, the International Chamber of Commerce (ICC) described the requirement as a “straightjacket” on parties which complicated the planning of parallel notifications (notably in the US and Europe).

The Brazilian competition agency (CADE) took similar action in 2012 when it removed its 15 business day filing deadline. It goes without saying that the removal of these deadlines has not impaired the ability of these authorities to carry out high quality merger assessments in a timely manner. In both regions, the rules prescribe a time period for the agency to carry out its review and parties are unable to close their transaction until approval has been obtained. Nor has either agency become a soft touch in relation to merger control procedures. In 2014, the EC imposed a fine of US$22 million (the second in this amount within 5 years) for failure to notify, and CADE has imposed seven fines totalling over US$8.5 million for similar offences in the last two years alone.

More to be done

Aside from the income from fines (which may not benefit the agency directly), agencies with suspensory regimes do not benefit from imposing a deadline for notification. Also, as the list of filing deadlines shows, there is no obvious consistency when it comes to defining the event triggering notification. It’s certainly easier to avoid trying to define a trigger event and instead focus on what must be achieved (i.e. clearance) before the transaction can be completed. The resulting uncertainties, together with the pressure for parties to file on time, is a major downside for the parties (and for the agency itself).

It is time for the ICN to renew its efforts to abolish filing deadlines in suspensory regimes.

[1] ICN Recommended Practices for Merger Notification and Review Procedures

[2] C-2015/01/241 (Order under Section 43A of the Competition Act, 2002)

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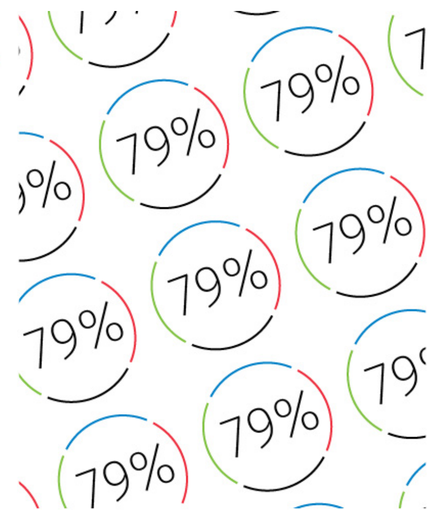

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