Kluwer Competition Law Blog

Merger Control: To fee, or not to fee, that is the question (and some practical tips)

Gavin Bushell (Baker McKenzie, Belgium) · Saturday, November 21st, 2020

The European Court of Auditors' Special Report published on 19 November 2020 is an interesting read for a dark COVID winter evening: "*The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight*".[1]

In respect of merger control, the Report (and the European Commission's Response to the ECA contained in it) confirms that the Commission is currently evaluating selected aspects of the EU Merger Regulation, such as the effectiveness of the turnover-based thresholds. Results of that evaluation are expected in early 2021. This will not be news to practitioners in Brussels.

What is notable, however, is that the European Commission rejects the ECA's recommendation to impose a fee for merger filings under the EU Merger Regulation. In fact, the Commission's Response indicates that it had in fact considered this suggestion in 2018, and had decided against it.

"*The Commission considered the option of introducing filing fees in 2018. As it did not appear to constitute a promising source of significant financial resources, it opted for the Competition Programme within the Single Market Programme in the context of the Multiannual Financial Framework for 2021-2027*".

As I have always been an advocate for less red tape and a regulatory framework that facilitates M&A, I can only applaud the European Commission's merger policymakers here. Filing fees should not be imposed for what is essentially a public service (i.e. ensuring the healthy structure of markets). Recovery of authority costs cannot really be a driver when the same authority has fined Google approximately EUR 6.25 billion in the last three years.

But this decision is notable. For two reasons.

Firstly, it marks an apparent U-turn by the European Commission on this subject. In 2003, the European Commission recommended that it be given the power, but not the obligation, to introduce filing fees as part of its proposed amendments to the (recast) Merger Regulation.[2] However, the European Council of Ministers did not grant this authority, and the reasons why are not known (its deliberations are confidential).

Secondly, it goes against the growing trend of merger control authorities around the world imposing filing fees. As a result, I think this is an important decision that other authorities

considering this question should review carefully before proceeding.

Back in 2005, the ICN conducted a review of filing fees.[3] At that time, it reviewed the then 73 jurisdictions with merger control laws and found that 31 jurisdictions had merger control filing fees of some form (roughly 42%).

Today, at Baker McKenzie, we use our proprietary Global Merger Analysis Platform (GMAP) to track merger control laws around the world in detail in real-time.[4]

Of the 136 jurisdictions with merger control laws covered on GMAP, 72 appear to have some form of merger control filing fee provisions (roughly 53%). This includes 22 EU Member States (including the UK until 31 December 2020) and at least 10 jurisdictions that have introduced merger filing fees since the 2005 ICN Report (Albania, Cyprus, Denmark, Iceland, Kenya, Latvia, Lithuania, Malta, the Netherlands and Serbia).

This shows not only the truly global nature of merger control law today, but that an increasing number of jurisdictions are now imposing filing fees. All of which adds to the global cost of doing the deal. It is true (as recognised by the ICN Report) that filing fees are unlikely to be a consideration leading parties to restructure a deal to avoid filing fees. Yet, the costs are mounting for merger parties.

Here are some practical points on navigating the merger filing fees on a transaction.

1. **Identify where filings fees are required early on and prepare your (internal) client accordingly for the pain.**

An early and quick multi-jurisdictional assessment will indicate where filings are triggered, and whether a filing fee is applicable. Your (internal) client may need to take steps within their organization to line up the budget and facilitate payment of the filings around the world, in local currencies. Putting in place the work plan for this upfront can avoid stresses later in the process under time pressure.

GMAP indicates that today you may need to consider potential fees if you are contemplating filing in any of the following jurisdictions: Albania, Angola, Austria, Barbados, Bosnia Herzegovina, Botswana, Brazil, Bulgaria, Cameroon, Canada, COMESA, Costa Rica, Croatia, Cyprus, Czech Rep., Denmark, Ecuador, Estonia, Germany, Greece, Greenland, Guernsey, Honduras, Hong Kong, Hungary, Iceland, India, Ireland, Jersey, Kenya, Kosovo, Latvia, Lithuania, Macedonia, Malawi, Malaysia, Malta, Mexico, Moldova, Montenegro, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Saudi Arabia, Serbia, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Swaziland, Switzerland, Tanzania, Thailand, UK, Ukraine, United States, Zambia and Zimbabwe.

2. **Be aware that the filing fees can vary dramatically between jurisdictions.**

There is no standard common approach for fixing filing fees. The 2005 ICN Report identified at

least four types of merger filing fee: flat fees, fees for service, tiered fees based on complexity, and tiered fees based on the size of transaction/size of revenues.

Since 2005, the filing fee matrix has become even more complex, with variations on these types and also the introduction of separate fees for clearances.

Flat fees are imposed in a number of countries and can range from the tokenary to the significant. For example, at the lower end are Czechia with CZK 100,000 (approximately EUR 3,700), Estonia with EUR 1,920, Greece with EUR 1,100, Iceland with ISK 250,000 (approximately EUR 2,200), Malta with EUR 163, Poland with PLN 15,000 (approximately EUR 3,700), Slovenia with EUR 2,000 and Ukraine with UAH 20,400 (approximately EUR 800) At the higher end, for example is Canada with a fixed fee of approximately CAD 75,000 (approximately EUR 48,000).

A variation on the flat fee type can be found in certain countries. For example, in Austria, a flat fee of EUR 3,500 applies in Phase I, but this can be supplemented by a higher fee if the case goes to Phase II. That higher fee is determined by Cartel Court and can vary up to EUR 34,000 (constituting effectively a fee for service).

Fees for service can be found in other countries such as Barbados (where the fee can vary depending on whether the authority deems the transaction to be good or bad for competition), Germany (where the fee can vary depending on the economic importance of the transaction and the review efforts of the authority) and Switzerland (where the Phase II fee can vary on the hours spent on the review by the authority against an hourly rate). Hungary also imposes a supplemental administration service fee (in addition to the filing fee) of approximately EUR 10,500.

Tiered fees based on complexity exist in jurisdictions such as Cyprus (where EUR 1,000 Phase I and EUR 6,000 Phase II fees apply), and India (where fees differ according to whether a Form I notification or a Form II notification is used based on affected markets).

Tiered fees based on the size of the transaction can be seen in other countries, including in Honduras, Jersey, Nigeria, Paraguay, Peru, and the Philippines. In the United States, there is a graduated fee schedule that increases with the value of the notified transaction: USD 45,000 for transactions valued less than USD 180 million; USD 125,000 for transactions valued at USD 180 million or more but less than USD 899.8 million, and USD 280,000 for transactions valued at USD 899.8 million or more.

Tiered fees based on the size of the parties' domestic or global revenues exist in a number of jurisdictions such as Albania, Cameroon, Latvia, Lithuania, Moldova, Montenegro, Mozambique, Pakistan, Portugal, Saudi Arabia, Serbia, Spain, Tanzania, the UK and Zambia.

Tiered fees based on a combination of the size of the parties' domestic revenues or assets also exist (often with rather elaborate or complex formulae). For example, in Botswana, COMESA, Ecuador, Kenya (where there is also a separate health care sector filing fee), Malawi, Namibia, and Zimbabwe.

Finally, certain jurisdictions may also impose a clearance fee as well as a filing fee, such as in Bosnia, Bulgaria, Kosovo, Macedonia, Papua New Guinea, and Romania. This means you pay to get your clearance decision as well as having to make the filing.

Guidance from local counsel will be needed to confirm the precise amount of any filing fee (and

this should be checked well in advance of any filing).

3. **Note that you may not know the level of the fee upfront.**

In certain countries, the authority will determine the filing fees post-decision, as for example, in Germany and Honduras.

The German authority's guidance provides that the amount of the fees is determined according to the personnel and material expenses of the cartel authority, account being taken of the economic significance of the concentration. In principle, the fee may not exceed EUR 50,000, but it may in exceptional cases be doubled.[5] This means your (internal) client could be facing a EUR 100,000 shock after a difficult merger review in Germany.

4. **Recall that fees may also be payable or shared by a seller and/or a target.**

Filings fees may be payable on both sides if filings are made by each of the parties or if both sides are responsible for a joint filing, for example, in Canada.

Regardless of whether it is explicitly provided for under the relevant merger law, certain parties may also seek to allocate the payment of filing fees between the parties as part of their deal discussions. It may be prudent to raise this in advance with your (internal) client so that the issue is managed at an appropriate point in the discussions, and not simply traded away (or worse forgotten about until it is too late).

5. **Organise for payment of fees to avoid a time squeeze or a delay to your filing.**

Certain jurisdictions require the filing fee to be paid in advance or at the same time as filing, such as in Albania, Austria, Barbados, Bosnia, Botswana, Brazil, Bulgaria, COMESA, Iceland, India, Jersey, Kosovo, Latvia, Lithuania, Malawi, Malta, Montenegro, Mozambique, Namibia, Portugal and Spain.

In Croatia, Denmark, Greece, Greenland, Ireland, Kenya, Mexico Moldova, Romania, Russia, Slovakia, and Ukraine, the proof of payment has to be attached to the notification form, whilst in Angola, Cyprus, Czechia, Hungary, South Africa, and the United States, the clock will not start without payment.

As a good housekeeping note, it is also prudent to consider who will actually pay the fee, whether this is your (internal) client directly or the local law firm (who would then – if it is possible – add the fee as a disbursement). Having discussions upfront about these technicalities with your (internal) client and the relevant local counsel can save time.

Concluding remarks

I grant you that this topic is somewhat dry and technical (but in these economically challenging times, money is still money folks) – but I hope this blog piece provides some practical guidance on merger filing fees.

Bottom line, there is no getting away from global merger control filing requirements in M&A today, and filing fees are just part of the cost of doing business.

I do believe that they should be discouraged where possible, as they are not justified, even as a form of service recovery. Government budgets are sufficiently large to accommodate essential merger control services – and cartel fines arguably provide a more lucrative source of funds where those budgets are constrained. Merger filing fees simply constitute a further tax on law-abiding businesses. Particularly for the large majority of cases that present no substantive issues.

At least for now, the European Commission is taking a very sensible approach to the issue of merger filing fees – and other authorities around the world should be encouraged to follow the European, and not the US, example.

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[1] See, https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf.

[2] See, Article 23(e) of European Commission proposal of 11.12.2002, COM(2002) 711 final, OJ C 20, 28.01.2003, available here https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:C2003/020/06&from=EN.

[3] See, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_FilingFees.pdf.

[4] See, https://www.bakermckenzie.com/en/insight/publications/2015/12/global-merger-analysis-platform-gmap.

[5] See, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20German%20Merger%20Control.pdf?__blob=publicationFile&v=3.

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This entry was posted on Saturday, November 21st, 2020 at 2:08 pm and is filed under European Commission, European Court of Auditors, European Union, Merger control, Merger fees
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