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WORLDWIDE MERGER NOTIFICATION REQUIREMENTS

J. Mark Gidley
George L. Paul

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ABOUT THE EDITORS

J. Mark Gidley chairs the White & Case Global Competition Practice. Mr. Gidley has experience in transnational transactions that span multiple, and often conflicting, antitrust regimes. He served as Acting Assistant Attorney General for the U.S. Department of Justice (DOJ) Antitrust Division in 1992-1993 and Deputy Assistant Attorney General for the Antitrust Division in 1991-1992. He is a 1986 graduate of Columbia Law School, where he served as Notes & Comments Editor for the *Columbia Law Review.*

George L. Paul is a partner in White & Case's Global Competition Practice. Mr. Paul has significant experience in antitrust counseling and litigation arising from U.S. and cross-border mergers and joint ventures. He regularly advises clients on merger control filings for global transactions, coordinates their HSR and international filing efforts, and defends merger and joint venture transactions substantively. He has written extensively on merger clearance topics relating to a number of countries. Mr. Paul is a 1992 graduate of the Harvard Law School.

TABLE OF CONTENTS

Montenegro
Morocco
Mozambique
Myanmar
Namibia
Nauru
Nepal
Netherlands
Netherlands Antilles
New Zealand
Nicaragua
Niger
Nigeria
Niue
North Korea
Northern Mariana Islands
Norway
Oman
Pakistan
Palau
Palestinian Authority
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Republic of Equatorial Guinea
Republic of the Congo
Reunion
Romania
Russia
Rwanda
Sahrawi Arab Democratic Republic
Saint Helena
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Samoa
San Marino
Sao Tome and Principe
Saudi Arabia
Scotland
Senegal
Serbia
Seychelles
Sierra Leone
Singapore
Slovak Republic
Slovenia
Solomon Islands
Somalia
South Africa
South Korea
Spain
Sri Lanka
Sudan
Suriname
Swaziland
Sweden
Switzerland
Syria
Taiwan
Tajikistan
Tanzania
Thailand
Timor-Leste
Togo
Tonga
Trinidad and Tobago
Tunisia
Turkey
Turkmenistan
Tuvalu
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States of America
Uruguay
Uzbekistan
Vanuatu
Venezuela
Vietnam
Yemen
Zambia
Zimbabwe

PREFACE

Where possible, we have attempted to confirm the existence or non-existence of a pre-merger or post-merger notification regime with the relevant national governmental authorities. Because foreign competition law changes rapidly, and often dramatically, all laws must be confirmed at the time of filing. There is always the possibility of more countries having joined the pre-acquisition notification trend. In addition, those countries with merger regimes continue to change their laws, regulations and policies. Work towards consummating any global transaction would, of course, require a more detailed, transaction-specific, compliance requirement study.

Moreover, a global offering may require the retention of local counsel in the jurisdictions. Many, if not most, countries also possess laws regulating foreign investment, which might also entail pre-merger notification. The scope of the present survey, however, has been focused on statutes involving competition concerns. This survey does not purport to contain all of the information that may be required to evaluate a transaction, and any recipient hereof should conduct its own independent analysis of any transaction and the data contained or referred to herein.

The information estimates and data contained herein were obtained from public sources and involved significant elements of subjective judgment and analysis (which may or may not be correct) and substantial uncertainties. The authors make no representation or warranty, express or implied, as to the accuracy or completeness of the information contained herein and nothing contained herein or in any such report or communication is, or shall be relied upon as a promise or representation, whether as to the past or future. The authors have striven to provide accurate summaries of the merger notification laws described herein, but assume no responsibility for its accuracy or completeness.

Neither the receipt of this survey by any person nor any information contained herein or supplied herewith or subsequently communicated to

any person in connection with a proposed transaction is or is to be taken as constituting the giving of legal advice by the authors or White & Case. Each person should conduct an independent assessment of the necessity of filing a merger notification with any authority and should consult legal counsel. Users are advised to retain appropriate legal counsel.

ACKNOWLEDGMENTS

The Editors would like to thank Hugh Verrier, Managing Partner of White & Case LLP, and the partners, counsel, associates and legal assistants of White & Case for their unwavering support and contributions to the survey. The Editors also thank the clients of White & Case who over many years have been responsible for introducing them to the wide world of global merger clearances.

This book began as a worldwide survey conducted for a single White & Case client in the early 1990s. That effort expanded into a White & Case Worldwide Survey that went through several editions. This book is a new effort, building off those earlier publications. As a result, the book reflects the insights of numerous associates, counsel and partners of White & Case LLP who have contributed their efforts over the years. This particular book would not have been possible without the conspicuous and tireless efforts of three White & Case LLP associates: Andrew Lee and Douglas Jasinski in the Washington office and Axel Schulz of White & Case Brussels.

The Editors also would like to express their deep appreciation to the many officials of competition agencies throughout the world for their helpful comments and suggestions to improve the scope and accuracy of this work. Over the years, competition agencies and other governmental representatives have been generous with their time in responding to our questions. Anyone who practices antitrust or competition law cannot help but be impressed by the professionalism of the representatives of competition agencies around the world, as well as the informal guidance they will offer to practitioners who bother to ask.

We are excited to have partnered with Wolters Kluwer on this edition of the survey. Their guidance and suggestions have substantially improved the end product.

And finally, we are as always, grateful to our wives, Bridget and Kelly. They were very understanding of the tremendous amount of work necessary to complete this project.

J. Mark Gidley
George L. Paul

FOREWORD

The Global Competition Practice at White & Case LLP is pleased to publish this 2008-2009 edition of the survey of worldwide merger notification requirements. This is the sixth edition of our worldwide survey, first issued in 1996 and now widely recognized both as the original and most comprehensive catalogue of merger notification and control regimes for jurisdiction around the globe, including the European Union.

We have prepared this survey in an attempt to educate and facilitate merger planning by providing the most comprehensive overview of worldwide merger reporting requirements. This year's edition provides up-to-date coverage of merger notification requirements in 217 jurisdictions. As a measure of comparison, our 2003-2004 edition covered 134 jurisdictions — underscoring the ever-increasing importance of worldwide merger control laws in successful merger planning today. Furthermore, it is noteworthy that the International Competition Network ("ICN") — a multilateral intergovernmental agency of competition law — has grown from 16 competition agencies in 2001 to more than 100 competition authorities today.

The increase in the number of countries adopting pre-acquisition notification regimes and substantive merger control competition laws also highlight the need for experienced antitrust counsel at the earliest stages of a transaction. Timing is critical to most acquisitions, and competition laws, numerous and often differing in scope and approach, can directly affect the planning, timing and ultimate success of the proposed transaction.

We are extremely grateful for the enthusiastic response of readers to our prior surveys, and particularly for your feedback and suggestions, many of which have been incorporated in the current volume. It has been especially satisfying to hear from so many diverse users of the survey — our clients, of course, but also law students and professors, public officials and policy-makers, journalists and commentators — to the effect that the survey is a unique and valuable tool, unlike any other in the completeness with which it captures and portrays the proliferation of merger-control laws around the world.

Notable Developments since the Last Survey

In this updated survey, we have incorporated many recent developments in merger control regimes around the world. Since the publication of our last edition, several notable jurisdictions have introduced or revised their merger control regulations that now mandate parties to notify their transactions prior to consummation.

Merger control regulations envisaged by both China and India, in particular, are expected to bring tectonic shifts in global merger control due to the broad scope of cross-border transactions that could potentially trigger pre-merger notifications in both jurisdictions. In China, for instance, the most recent regulations issued by the State Council in 2008 do not clearly delineate what types of transactions constitute "concentrations" that trigger merger notification. Caution, therefore, would dictate that parties contemplating minority equity acquisitions or joint venture formation in China that fall short of mergers must also weigh their notification requirements. In India, the proposed notification thresholds largely hinge on combined assets or turnover worldwide of the merging parties. In essence, this framework is likely to capture a large number of foreign-to-foreign mergers involving multi-national companies where the target has no business operations in India at all and therefore is unlikely to produce any competitive effects in India. Finally, both China and India have reserved discretion to investigate and divest mergers that fall outside the notification thresholds — potentially creating great regulatory uncertainties for many international transactions. We have detailed these and many other provisions in the country drafts that follow.

While China and India grabbed major headlines this year for their new merger notification laws, numerous other, noteworthy jurisdictions have also implemented new merger control regulations since our last edition. For example, Poland passed a new competition law in 2007 that largely replaced its prior merger control laws. Egypt has enacted its first national competition law in 2005 that requires *post*-merger notification of certain mergers. Saudi Arabia also passed its first comprehensive competition statute in 2004 that conditions merger notification on the parties reaching a certain level of market concentration. Last but not least, Jersey is a little-known, self-governing British Crown dependency to which few companies pay attention for merger compliance, but its new merger control law, enacted in 2006, has market share-based notification thresholds that are vigorously enforced. Meanwhile, several other jurisdictions — such as Hong Kong, Kyrgyzstan, and Paraguay — are expected in the near future

to adopt new competition regulations and have been carefully noted in the survey as well.

In Europe, two main developments include the enlargement of the European Union and the modernization of its merger control regime. In 2004, the European Union adopted a new Merger Regulation that revised the standard of review.[1] Under the new test, concentrations are prohibited that significantly impede effective competition in the common market or a substantial part thereof. The reform enables the Commission to block concentrations likely to distort competition, even where the merging parties fall short of achieving dominance. The modernized Merger Regulation puts EU merger control closer to the significant lessening of competition ("SLC") test in the U.S., and generally reflects the Commission's increased use of economics in its competition analysis. The second major European development includes the enlargement of the European Union. Ten, mostly Eastern European countries joined in 2004,[2] followed by the accession of Bulgaria and Romania three years later. Today, all 27 national merger control legislations have been largely harmonized with the EU standards, although some differences, both procedural and substantive, remain. An important change for individual Member States is the upward revision of notification turnover thresholds. Higher notification thresholds enable authorities to re-allocate their resources to focus on problematic mergers and other behavioral competition infringements, as well as lessening the burden for notifying parties whose proposed transactions fall short of the one-stop shop provided for by the European Commission. Notably, the EU-wide merger control harmonization goes beyond the EU borders: an increasing number of non-EU Eastern European countries have also modeled their merger control laws on the EU system.

Finally, we have also added a discussion of the ever-growing and continuing efforts by regional merger control regimes, such as CARICOM for the Caribbean countries, the Andean Community for South America, Comesa and Conotou for African countries, and Interstate Council on Antimonopoly Policy ("ICAP") for the Baltic States, many of which appear to have finally taken hold in recent years.

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 133/1.

[2] Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.

White & Case Antitrust Practice Continues to Grow Globally

Reflecting the rapid growth of merger control regimes throughout the globe, the White & Case global Antitrust/Competition Practice has also grown significantly around the world in recent years. For the past five years, the *Global Competition Review* has recognized White & Case as one of the top ten largest antitrust practices in its "GCR 100" Report. Since the last publication of this report in 2004, White & Case has grown from 103 antitrust attorneys globally to 147 — a more than 40% growth in just four years.

Purpose of the Survey

It is now 32 years ago that the United States Congress enacted the first comprehensive merger notification regime, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). Measured by its proliferation, the HSR regime has been an extraordinarily successful American export, with well over 100 countries or jurisdictions having followed this lead.

As cross-border transactions become increasingly common, parties are faced with an increasingly complex maze of merger notification requirements in a number of jurisdictions, each with its own rules, time frames, thresholds, substantive standards, policy aims and culture. Knowing if, how, when and where to notify the numerous government regulators about a pending international merger, acquisition or joint venture can be a daunting task, consuming valuable resources and time.

Our purpose in preparing this survey is to educate, to minimize confusion and to facilitate merger planning by providing an overview of the merger reporting requirements that exist across the globe. The survey incorporates not only our experience in evaluating pre-merger filing requirements in the 217 jurisdictions included in the text, but also, and more importantly, in coordinating worldwide merger filings for our clients.

The extensive revisions to the information found in this edition of the survey are based on information publicly available, as of the third quarter of 2008. It should be noted that the format for this survey is based on the merger control laws of the United States and the European Union, and is designed to highlight the most pertinent provisions of such statutes. Not all merger control statutes, however, are as comprehensive or as developed as the laws of countries with more experience in this area of regulation. Thus, for some countries, the delineated categories (*e.g.*, Status of Transaction at Notification) may not be applicable and have been omitted.

A broader survey including foreign investment regulation can be conducted upon request.

Key Issues Examined

In addition to the country-specific updates on merger notification requirements, we have also endeavored to provide our readers with practical and insightful articles on the most recent developments and trends in competition law practice around the globe. In the pages that precede our country-by-country analyses, our competition practitioners throughout the world present articles and commentaries that discuss several recent topics of particular interest, including:

- The revision of rules on acquisitions of foreign assets and voting securities issued by the Federal Trade Commission, authored by Martin M. Toto of our New York Office;
- Exclusive technology licenses and their Hart-Scott-Rodino Act implications in the United States, authored by Rebecca Farrington of our Washington Office;
- Analysis of the recent merger decision in *FTC v. Whole Foods,* authored by Noah A. Brumfield and Daniel Kanter of our Washington Office;
- Recent merger decisions and merger enforcement trends in the European Union, authored by Axel P. Schulz, Ian Reynolds and Pascal Berghe of our Brussels Office;
- Analysis of the recent decision by the European Court of Justice in *Sony-BMG,* authored by James R.M. Killick and Anthony Dawes of our Brussels Office;
- Introduction to and analysis of China's new Anti-monopoly Law and the relevant merger notification and control provisions, authored by Andrew J. Lee of our Washington Office; and
- Recent developments from the International Competition Network ("ICN") as a mechanism for harmonizing international merger control, authored by Douglas M. Jasinski and J. Frank Hogue of our Washington Office.

We thank the many White & Case attorneys from all over the globe who made this survey a reality. Many of White & Case's offices in 26 countries made valuable contributions, making this a team accomplishment. In particular, we gratefully acknowledge the contributions of Andrew J. Lee

in Washington, Axel P. Schulz in Brussels, Brian Strawn in Tokyo, and Iker I. Arriola in Mexico City. They were ably assisted by Daniel Kanter, Charles Moore, Anna Kertesz, Tamer Mahmoud, and Meytal McCoy in Washington, Pascal Berghe, Suzanne Innes-Stubb in Brussels, and Tomoko Sekiya in Tokyo.

J. Mark Gidley
George L. Paul
Editors

Washington, DC
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Part I
ISSUES IN WORLDWIDE MERGER ENFORCEMENT