WHITE & CASE

Time to end the EU's needless review of extraterritorial joint ventures

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Introduction and overview

The EU merger control regime is highly respected worldwide, and rightfully so. The European Commission (**"Commission"**) has, over the past 20 years, delivered rigorous yet efficient review in a transparent and pragmatic manner. However, there are some specific areas that are in need of reform.

This paper focuses on the area that is, in our view, the most obvious candidate for reform; the unjustifiable obligation to notify extraterritorial joint ventures (**"JVs"**). No business should object to Commission scrutiny of concentrations that could have an impact on competition within the EEA. However, where a concentration does not, and indeed cannot, have any effect on competition in the EEA, an obligation to notify the Commission is objectionable as a matter of principle and, given the costs involved, undesirable as a matter of economic efficiency.

In this paper we: 1) consider how existing rules can require notification of extraterritorial JVs; 2) demonstrate how these rules have led to absurd results in practice; 3) explain why the status quo is unsatisfactory on policy and practical grounds; and 4) put forward our view as to how existing rules and practices can be revised to eradicate this anomaly.

Existing rules can require the notification of extraterritorial JVs

Under the EU Merger Regulation (**"EUMR"**), any *"concentration"* with an *"EU dimension"* will, subject to very limited exceptions, fall within the Commission's exclusive jurisdiction. A concentration will be deemed to have an EU dimension where at least two of the *"undertakings concerned"* meet the turnover thresholds set out in Articles 1(2)-(3) EUMR.

In respect of JVs, the undertakings concerned include any entity exercising control over the JV and that entity's corporate group. For full function JVs, this means that the thresholds can be met solely on the basis of two parents' turnover – irrespective of the geographic location of the JV or the size of its activities and assets. As a result, JVs with no actual or foreseeable effects within the EEA can be subject to mandatory EU notification.

This has led to absurd cases being decided in Brussels: why does the EU need to review a pipeline in Vietnam, a Puerto Rican motorway, a tugboat in the Bahamas or outdoor advertising in Cameroon?

A significant number of JVs reviewed by the Commission and meeting the EUMR thresholds have no link to the EU at all. For example, the Commission has reviewed the following JVs:

- Acquisition of joint control by TNK-BP (which acquired its stake from BP, its then parent) in a gas pipeline wholly located within Vietnamese territory (*Case M.6193*).

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1 The views expressed are personal and do not necessarily represent those of the firm or of any of its clients.

- Acquisition of joint control by Goldman Sachs and Abertis Infraestructuras in a company managing and operating toll road concessions exclusively in Puerto Rico (*Case M.6335*).
- Acquisition of joint control by Siemens and Sinara in a company manufacturing and selling Russian locomotives that could not be used on tracks in the EEA (*Case M.5795*).
- Acquisition of joint control by Mitsui and Penske of a Lexus car dealership in Siberia (*Case M.6229*).
- Creation of a JV by JCDecaux and Bolloré, to provide outdoor advertising in Cameroon (*Case M.6156*).
- Acquisition of joint control by Statoil and Svitzer of a tugboat operator on Grand Bahama (*Case M.5783*).

There are many other similar examples where businesses have been obliged to notify JVs to the Commission despite the fact that these JVs have no prospect or possibility of expanding into the EEA or generating any turnover within the EEA.

The status quo is deeply unsatisfactory

i. Inconsistent with public international law and ICN recommendations

The requirement to notify concentrations with no EEA effects is at odds with public international law. In Gencor, the Court of First Instance held that the application of the EUMR is only justified "*when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community*". It is difficult to see how a Vietnamese pipeline or a Puerto Rican toll road concession could have any effect in the EEA, let alone an immediate and substantial one. So the requirement to notify extraterritorial JVs may not be compatible with public international law.

Furthermore, the status quo is inconsistent with the views of the International Competition Network ("**ICN**"). The ICN's recommended practices for merger notification state: *"jurisdiction should be asserted only with respect to those transactions that have an appropriate nexus with the jurisdiction concerned".* Can it really be said that outdoor advertising in Cameroon or a tugboat in Grand Bahama has an "appropriate nexus" with the EEA? The ICN goes on to recommend that "*each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory… [and] should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or assets levels within the territory of the jurisdiction concerned*". Regrettably, no such standards of materiality are found in the current EU regime for JVs.

ii. Setting a bad example

The Commission's merger control system is rightly held in high esteem internationally and is followed by other countries (e.g., India and China). We submit that the Commission, therefore, has the responsibility to set a good example to the rest of the world. Going against established ICN recommendations is not consistent with this responsibility. If other countries follow the Commission, it could lead to multiple needless reviews of JVs by jurisdictions where there is no local nexus.

iii. Waste of everyone's time and resources

In practical terms, the requirement to notify transactions with no actual or foreseeable effect within the EEA is a waste of time and resources. From the Commission's perspective, the current rules divert scarce resources away from scrutiny of concentrations that do effect competition within the EEA. Indeed, similar concerns regarding administrative efficiency were behind the 2004 abolition of the mandatory notification of agreements for exemption under the then Article 81.

From industry's perspective, the current rules impose a disproportionate burden. It is true that the Commission has attempted to reduce this burden by permitting "short form" notification of extraterritorial JVs under the simplified procedure. However, in reality this is of limited comfort. Too often the "short form" is not that short and the "simplified procedure" is not that simple. Notifying parties are still required to pre-notify (which can involve multiple drafts and information requests) and submit a lengthy notification (complete with information on relevant markets, market shares and parents' corporate structures). This entails significant costs in terms of management time and legal fees. Furthermore, as there is a bar on closing under Article 7 EUMR, completion may need to be delayed until the Commission has completed its, in our opinion, unnecessary review.

Given these serious concerns, we submit that reform is now essential.

The way forward

There is no justification for the Commission to review JVs having no impact on the EEA. This anomaly could be cured in a number of ways.

i. Reform EUMR to include actual or potential effects within the EEA requirement

Our preferred solution would be to revise the EUMR to introduce a requirement that a JV would only be notifiable if it produced actual or potential effects within the EEA. One way to achieve this would be to include a specific turnover threshold for the EEA activity of the JV itself. This would bring the EUMR in line with public international law and ICN recommendations and provide clarity in respect of the acquisition of joint control of existing businesses. For newly created JVs not yet generating turnover, a degree of self-assessment by the parties would be necessary. However, the success of the Article 101(3) self-assessment regime demonstrates this is unlikely to be a major problem.

ii. Interpret EUMR in accordance with effects doctrine

As noted above, under public international law, a State may only exercise jurisdiction if there is a substantial, direct and foreseeable relationship between the conduct in question and the State. If the EUMR were interpreted in accordance with this effects doctrine, the Commission would have no jurisdiction over Vietnamese pipelines and Puerto Rican toll road concessions. Encouragingly, there is some (albeit isolated) Commission precedent. In *WorldCom/Sprint*, the Commission acknowledged it had no jurisdiction to examine the effects of a merger absent "*immediate, substantial and foreseeable effects*" on the EEA. The authors are aware that, in the past, the Commission has been willing to informally agree that a JV did not need to be notified given the absence of effects in the EEA.

As this proposal does not necessarily require revision of the EUMR, it could be attractive from an administrative perspective. However, if the EUMR is not amended, there could be potential concerns in respect of legal certainty and invalidity of JVs governed by one of the laws of the EU. That said, this risk could easily be mitigated if the Commission issued guidance on when a JV would be deemed to have an effect within the EEA.

iii. Voluntary notification of extraterritorial JVs

If the Commission harbours any concerns that extraterritorial JVs could, on their specific facts, affect the EEA market, it could introduce a voluntary notification regime for such JVs. Echoing the UK approach, businesses would only need to notify a JV if they believe it would have an effect on the EEA. If a concentration has not been notified, the Commission would have a fixed period of time in which to open an investigation if it believed there could be an impact on competition within the EEA.

iv. Grant extensive waivers when notifying extraterritorial JVs

If the Commission is unwilling to consider any of the above proposals, we submit that, at a minimum, the Commission should systematically grant extensive waivers regarding the information to be submitted. Specifically, disclosure should be limited to what is strictly necessary to conclude that the JV will have no effect within the EEA.

Conclusion

There is no good economic reason why a JV involving a tugboat in Grand Bahama or outdoor advertising in Cameroon should be reviewed by the Commission. To the contrary, such review is economically inefficient due to the wasted costs. Reform of the rules for extraterritorial JVs is, therefore, clearly needed to remove this anomaly in the otherwise well-respected EU merger control system.

The good news is that reform of the merger review system is included in the Commission's 2013 Work Programme. The Commission has made it clear that it intends to simplify the amount of data that is needed in EU merger filings for non-EU JVs, and plans to launch a public consultation about this issue in the first quarter of this year. However, it is crucial that this reform address the root of the problem; that the EU should not assert jurisdiction over extraterritorial JVs.

Unfortunately, the Work Programme seems to only envisage a simplification of procedure rather than addressing the key problem of jurisdiction: it refers to the need to "*make notification easier and to include more non-problematic cases under the simplified procedure*". Moreover, recent statements from Commission officials suggest the focus will be on expanding the Commission's jurisdiction (to include minority shareholdings) rather than reducing it (to exclude extraterritorial JVs). If correct, it will be regrettable and a missed opportunity. By continuing to require businesses to notify concentrations with no impact on the EEA, the Commission is not only acting inconsistently with public international law and internationally established best practices, it is wasting its and others' resources.