LegalTimes WEEK OF April 22, 2002 • VOL. XXV, NO.16

Premerger Notification in Latin America

The Southern Strategy

BY MATTHEW L. CANTOR

If one lesson can be learned from the European Commission's deal-killing challenge to the proposed General Electric-Honeywell merger after U.S. authorities had OK'd the combination, it is that compliance with foreign antitrust statutes by American-based international corporations cannot be disregarded. While the antitrust enforcement efforts of the EC are well-publicized, antitrust enforcement in other foreign jurisdictions has not received the same degree of media attention.

But a lack of ink and sound bites does not mean that corporations can ignore the antitrust laws of non-EC nations with impunity. Consider the competition statutes of four of Latin America's major markets.

Over the past decade, Brazil, Argentina, Mexico, and Colombia have all enacted laws requiring premerger notification for transactions involving companies that have substantial assets in these countries or that have historically derived substantial revenue from these countries. Noncompliance with these mandatory notification laws can lead to the imposition of heavy fines or other penalties. Companies with business in Latin America must take heed.

BRAZIL

Brazil adopted its premerger notification law in 1994. Since then, the Brazilian antitrust authority, known as CADE, has been diligent in its efforts to give problematic mergers a rigorous review. For example, AMBEV, a company resulting from a merger within the Brazilian brewery industry, was forced to divest significant assets as a condition for that merger. (Otherwise, AMBEV would have commanded a 70 percent share of the market.)

Under Brazil's statute, premerger notification of qualifying mergers must be made to the antitrust agency no later than 15 days after a binding agreement is signed. For these purposes, a "binding agreement" can mean something as informal as a signed letter of intent. Even if definitive documents have not yet been negotiated, a signed letter of intent triggers the 15-day period.

Most premerger filings are made pursuant to the provision that requires filings where one of the merging parties, or the group of companies to which it belongs, had revenues in the preceding year of more than $160 million worldwide. (All references in this article are to U.S. dollar figures. The figures are approximations because the exchange rate between Latin American and U.S. currencies is continually fluctuating.)

A premerger filing must also be made if the combined entity would account for 20 percent of a particular product or geographic market. In order to determine the relevant market for filing purposes, attorneys should generally consult CADE precedent (which, as a relative measure, offers significant guidance).

Noncompliance with the notification law can lead to a fine of up to approximately $1 million per day until filing is made. To date, the Brazilian government has yet to fine merging parties more than $60,000 for noncompliance.

Once notice is provided, Brazilian law does not prohibit the parties from immediately closing their deal. In other words, unlike in the United States, there is no waiting period that must be observed during Brazil's merger review process.

ARGENTINA

The Argentine premerger law was also adopted in 1994. Yet there are still relatively few precedents defining the operation of this law.

The statute provides that a filing with the Argentine antitrust commission must be made no later than seven days after an agreement is signed or a deal is announced where the parties meet a filing threshold. Notification must be filed if the merging parties have more than about $200 million in "turnover" derived from Argentine—not worldwide—operations. ("Turnover" is defined as revenues less certain taxes.)

While penalties of up to approximately $1 million per day can be imposed for each day that the parties are out of compliance with the statute, penalties will generally not be imposed so long as the parties have yet to close the transaction.

Like Brazilian law, Argentine law does not provide for any waiting period.

Mexico

Mexico's premerger notification law was enacted in 1992 and became effective in 1993. The Mexican antitrust commission has actively enforced these premerger notification requirements and rigorously reviewed mergers.

A filing in Mexico must be made when the target company has assets located in Mexico and either the value of the transaction exceeds approximately $53 million, *or* 35 percent of the equity or assets of the target are being acquired and the value of the target is more than approximately $53 million, *or* the joint assets or sales volumes of the merging parties exceeds approximately $200 million and the transaction is valued at more than approximately $21 million.

The filing must be made before closing of the transaction. Mexican law does not provide for any post-filing waiting period.

Colombia

Colombia's premerger notification law was enacted in 1999. There is little precedent regarding its application.

The law specifies that parties to a combination must file—before closing—when the combination involves more than about $6 million in Colombian assets that will be "integrated" *or* when the combined entity will account for 20 percent of a particular market. Unfortunately, it is difficult as yet to predict how the Colombian antitrust commission will define the relevant market for purposes of a particular merger review. Accordingly, parties should take a conservative view when judging whether a merged entity will have broad enough market power to warrant filing a premerger notification.

The fines imposed on parties who have failed to notify Colombian antitrust authorities of a transaction subject to premerger notification have been relatively small so far. But Colombian officials can seek to unwind a closed deal if mandated notification did not occur.

Unlike in other Latin American states, a premerger filing in Colombia initiates a waiting period—30 business days. Thus, unless the parties file as soon as premerger notification becomes necessary, the waiting period may well delay the closing of the transaction. Colombian officials can also extend that waiting period if they request additional information and documentation relevant to the transaction. Indeed, unless the parties file quickly, they may be forced to delay their closing even though other jurisdictions—such as the United States—may have already granted antitrust clearance.

Finally, companies doing business in Latin America should not assume that, aside from these four, Latin American countries generally ignore antitrust issues. Countries other than Brazil, Argentina, Mexico, and Colombia have adopted laws that do not require premerger notification, but that do create processes for *voluntary* premerger notification. And the benefit of these laws is that even voluntary notification can "insulate" parties from later antitrust liability.

In sum, international corporations must provide premerger notification in those Latin American countries that require filing when certain notification thresholds are met. This is especially true in Mexico and Brazil, where antitrust enforcement has been taken seriously. Indeed, in order to comply with all filing deadlines and to prevent delay of closings, merging parties should determine whether filings are needed either before or very soon after their agreement is finalized.

Matthew L. Cantor is a partner at New York's Constantine & Partners, a law firm specializing in antitrust counseling and litigation. Cantor has provided representation and counseling on Latin American antitrust issues. He can be reached at mcantor@cpny.com. Fabio Figuera of the Brazilian firm of Veirano & Advagados Associados and Allen Dolberg, an associate at Constantine & Partners, helped prepare this article.