

PHASES OF M&A

Where competition law opportunities and challenges are hidden?

Typical examples in the Baltics

Letter of Intent

- / Non-disclosure agreement (NDA)
- / Clean team agreement (CTA)
- / Exchange of commercially sensitive information about the target
 - / Prima facie assessment of permissibility of the transaction (from a merger perspective)

Due Diligence



/ Does the transaction qualify as a "merger"? Not just business/share acquisition but also:

- / Asset deals, incl. business swaps, procuring dealership deals, and leases (e.g. in retail)
- / Minority acquisition
- / Change of type of control
- / Joint ventures
- / Transaction results in an increase in "market share."
- / In light of previous transactions (several transactions constituting one)
- / Necessity to obtain a merger clearance in one or more jurisdictions / EU, if thresholds are fulfilled
- / "Easy" (standard, short filing) merger if there are no issues, or a "difficult" (long-form filing)
- / Possible defences in case of a "difficult" merger (failing firm defence, competition economics)
- / Antitrust violations
- / Previous unnotified transaction
- / Information exchange if it is "commercially sensitive" (exchange via consultants, not parties)
- / Several transactions within 2 years constitute a "merger."
- / Starting preparing the merger filing (to speed up the clearance process)
- / Kickstarting the pre-merger consultations with the NCA
- / Alignment of the merger clearance process with the necessity to obtain other clearances, e.g. in Latvia: National Security clearance from the Cabinet of Ministers (in other jurisdictions: FDI clearances), SOE clearances, clearances from other regulators (e.g. telecom)

Correct relevant market definition is of the utmost importance. The wrong definition may completely change the potential outcome of the merger. Often relevant market definition for the merger clearance process differs from the general market perception by the business. It may also happen that there has been no market definition adopted by NCA or even EU Commission for certain goods or services, or the approach to some market definitions changed in the relevant merger by the NCA considerably. E.g. In 2017 Latvian NCA prohibited RIMI from entering retail premises at the shopping centre "DOMINA Shopping" as a result of a novel approach - the definition of the relevant market based on a distance (isochron) of a 13-minute drive around DOMINA Shopping mall that was highly debated by the market at that time.

At least a couple of JV mergers are decided by Latvian NCA each year, including extraterritorial applications, e.g. several groups of companies operating inter alia in Latvia, Lithuania and Poland establishing a JV that will operate only in Bulgaria in the hotel business, still obliged to notify the merger in Latvia.

SPA



- / Merger Clearance as a condition precedent.
- / Parallel Merger Clearances in several jurisdictions.
- / Timeframe for filing the merger notification.
- / Timeframe for submitting and obtaining a merger clearance (Completion date).
- / Remedies acceptable to buyer/seller.
- / Hell or high water clause, break fees.

In many cases, the timeframe for submission of the merger clearance and Completion date is not realistically aligned with the clearance process as defined by the law and practice of the NCA.



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Post-closing procedures



/ Merger clearance procedures.

/ Obtaining other clearances.

/ Standstill (no exercise of control and limited exchange of information before merger clearance).

/ "Gun jumping" (implementation of the transaction prior to merger clearance).

/ Remedies

Diverging decisions by NCAs in the Baltics:

/ Owner of "Apollo Kino" was permitted to buy Forum Cinemas in Latvia (with structural remedies) and Lithuania while precluded in Estonia in 2021.

/ Recently acquisition of Baltic Mill (which owned Lithuanian pasta producer Amber pasta, Lithuanian flour producer Malsena and Latvian flour producer Rigas dzirnavnieks) by Dobeles dzirnavnieks, (which is a subsidiary of Estonian flour producer Tartu Mill), a pasta producer, was precluded in Lithuania, while cleared in Latvia and Lithuania, based on "failing firm" defence.

Post-transaction issues



/ Ex-post control:

NCAs may request merger filing within 12 months from the concentration regardless of the turnover of the undertakings if:

/ in Latvia: (1) joint market share >40% and (2) strengthening of dominance or significant reduction of competitiveness

/ In Lithuania: a dominant position is created or strengthened thereof, as a result of which competition may be substantially decreased.

/ Violations of any competition law.

/ Post-transaction agreements with partners of the target (if the buyer is a competitor).

/ Fines for unnotified mergers – up to 3% of the annual net turnover in Latvia, up to EUR 400 000 in Estonia, and up to 10% of the annual net turnover in Lithuania.

In 2019 the owner of the LETA news agency (MM Grupp) was fined over the 2015 acquisition deal by the Latvian NCA. MM Grupp sold BNS-Latvija and Mediju Monitorings to a third party, Estonia's AMP Investeeringud, but later LETA hired the vast majority of employees inside these companies. This de facto transfer of the employees to the acquirer prior to merger clearance was not disclosed in the merger notification.

In 2012-2020 three ex-post procedures were initiated, while at the end of 2021 and 2022, two cases were initiated in Lithuania.





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