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legalinterview

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Accession of Romania & Bulgaria to the EU

The European Union is a union of democratic European countries bound by common institutions and committed to work together for peace and prosperity. Common values such democracy, freedom and social justice are defended by the European Union and by democratic decisions made at European level.

January 1st 2007 marked the entry of Romania and Bulgaria to full membership of the Union, taking the number of member countries to 27. Their accession promises to speed up domestic development hitherto stifled by their restrictive political past, releasing their undoubted potential for new prosperity and a promising future, benefiting themselves and the EU as a whole.

Misgivings about these two countries' contribution to the Union's prosperity and development can be dismissed when taking account of their geographical position. Both countries border the Black Sea, a region with fast developing markets and an important crossroads for trade between two continents, and also experiencing large-scale population movement. Above all, it is an area with major energy resources such as rich petroleum deposits and abundant timber.

Precipitate and rapid development can be expected since new investment and funds will flow into these countries from the rest of the European members seeking to take advantage of this promising new marketplace. This will transform these two mainly agricultural economies into industrialised ones, reducing the emphasis on agriculture which has declined significantly since World War II. However, Romania and Bulgaria still remain surplus food producers, and farming still occupies a major role in their economic life. The target is to trigger the region's development and as a consequence transform their economies, for they hold a strategic position for trade in the area.

At the same time both countries are suffering from severe problems such as illegal migration, organized crime, environmental pollution, rampant corruption, collapse of their social welfare systems and enduring political conflict. Furthermore, their political past differs from other EU members as Romania and Bulgaria are former communist democracies whose economies have not yet fully recovered from the fall of the Berlin Wall and the break up of the Eastern bloc.

Their transition to democracy and a free market economy has not been easy. The fall of communism and the loss of the Soviet market for Bulgarian goods led to a massive contraction of the economy. However, the EU's existing policies, together with planned strategies, are capable of remedying these problems.

The Balkan Peninsula has historically been politically unstable, and even now is prone to unpredictable political change. Another target, therefore, of EU strategy is achieving political stability, and the mere accession of these two countries to the EU implies that a first step has been taken in this direction. The prospect of unification and development of the Balkan region now offers the possibility of peace and prosperity to these historically financially and politically weakened countries.

It will take time and familiarisation with the EU agenda for the two new members to conform to European standards but, once achieved, one of the Union's main aims, the unification of currency, can be accomplished. This accession signals the climax of the EU's efforts to eliminate the political discrimination created by the Cold War.

The European Union encompasses the major part of Europe. Common values and principles define every country, and Romania and Bulgaria's accession shows that cultural variety does not stand in the way of political unity. The European Union is a step closer to its initial aims of the development and preservation of an effective unified market that will bestow maximum financial benefits, including free transfer of people, commodities and services.

A new face for Europe can be established, characterised by political stability, peace and security.

Maria Papadopoulou, Stavropoulos & Partners, Athens



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ANTITRUST, MERGERS & COMPETITION

United States Merger Law Update

In the United States, merger activity is governed primarily by two federal statutes - the Sherman Act and the Clayton Act.

The Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade and monopolization. This act is enforced primarily by the Antitrust Division of the US Justice Department ("DOJ") and penalties for violations include fines and criminal liability. The Clayton Act covers specific restraints on trade including exclusive dealing arrangements, tie-in sales, price discrimination, mergers and acquisitions, and interlocking directorates. Enforcement of this act is handled jointly by the US Federal Trade Commission ("FTC") and the DOJ. The Clayton Act provides for civil penalties, primarily consisting of preliminary injunctions prohibiting the consummation of a proposed transaction or orders of divestiture of any illegal transactions.

Section 7A of the Clayton Act is commonly referred to as the Hart Scott Rodino Antitrust Improvements Act ("HSR Act"). Under the HSR Act parties to certain types of mergers or acquisitions must notify both the FTC and the DOJ before closing a proposed transaction. The purpose of the HSR Act is to enable the FTC and the DOJ to determine which acquisitions are likely to be anticompetitive and to challenge such transactions before they are closed.

Whether a proposed transaction will be subject to the notification requirements of the HSR Act is determined by a two part test based on whether (i) one party has USD\$119.6 million or more in annual net sales or total assets and the other party has USD\$12 million or more in annual net sales or total assets ("size of the person test"); and (ii) the acquiring party will hold an aggregate amount of voting securities or assets of the acquired party valued in excess of USD\$59.8 million following the close of the transaction ("size of the transaction test"). However, a transaction must always be reported if the acquiring party will hold an aggregate amount of voting securities or assets of the acquired party valued in excess of USD\$239.2 million. Please note that the size of person and size of transaction thresholds are reviewed and updated annually.

When a transaction and the parties thereto meet the size of person and size of transaction tests, the FTC and DOJ must be notified. The notification procedure requires the filing of a Notification and Report Form (the "Form") and payment of a filing fee. The Form must be submitted to both the FTC Bureau of Competition and the DOJ, and there is a 30 day statutory waiting period (reduced to 15 days for acquisitions utilizing cash tender offers) before the transaction can be completed, unless early termination of the examination is granted by the FTC. If neither the FTC nor the DOJ believes the proposed transaction will substantially reduce competition in the applicable market then no further action will be recommended, and the parties will be free to consummate the transaction upon expiration of the waiting period.

In certain instances the DOJ or the FTC will issue a "Second Request" for additional information. Compliance with a Second Request is expensive and time-consuming and includes sets of interrogatories to be answered by the transaction parties. In instances when the FTC or DOJ has issued a Second Request, the HSR waiting period is typically increased by up to 30 days. The demands of a Second Request can, however, delay a transaction from closing for weeks, or months, depending on the documentation required and the timing of the FTC's and DOJ's review.

The Form requires the acquiring party (the target party being required to file its own Form on receipt of notice that the acquiring party has filed) to identify all of the parties involved, and the structure of the proposed transaction. The transaction parties must provide relevant documents including balance sheets and other financial data, copies of documents filed with the Securities and Exchange Commission, and submit planning and evaluation documents in connection with the proposed transaction.

The parties must disclose whether the acquiring party and the acquired party currently derive revenue from businesses that fall within any of the same North American Industry Classification System ("NAICS") industry and product codes. The acquirer must also provide details of previous acquisitions in the last five years of companies or assets engaged in businesses in any overlapping NAICS codes, and may also provide the agencies with voluntary information that may assist the review process.

Both parties must submit affidavits with their Forms, declaring that a contract, an agreement in principle, or a letter of intent has been executed and that each party has a bona fide intention of completing the proposed transaction. These mandatory statements govern when the parties may file a pre-merger notification. The affidavits are intended to ensure that the enforcement agencies will not be presented with hypothetical transactions for review.

Information submitted on the Form is shared only between the FTC and the DOJ. However, US taxpayer identification information will be collected and used and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. The only time information is made public is when the FTC issues an "early termination notice" (which contains only the names of the parties and the date of the notice) of the waiting period if it agrees not to investigate a merger. Such a notice would be placed on the FTC's website and published in the Federal Register.

The FTC has recently adopted rules under the HSR Act that substantially revise the treatment of unincorporated entities under the Act. These rules remove the preference formerly available to unincorporated entities over those that are incorporated. Under the old rules unincorporated entities rarely came within the HSR Act, while incorporated entities with the same levels of ownership and control did. The essence of the rules is to ensure consistent treatment of transactions involving corporations and unincorporated entities. With the advent of these rules, proposed transactions involving entities such as general partnerships, limited partnerships, limited liability partnerships, cooperatives and certain business trusts are now subject to the requirements under the HSR Act.

In addition to the waiting period, the HSR Act also imposes a filing fee, which can be substantial. These fees are tiered and increase based upon the size of the transaction.

Accordingly, when involved in a merger (or similar transaction) it is important to keep in mind the size of person and size of transaction tests, the notification requirements and waiting period imposed by the HSR Act, so as to avoid complications and delays resulting from non-compliance with the Act.

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Merger Control in Europe

In Europe, mergers are vetted by either the European Commission or by national competition authorities, which in the UK means the Office of Fair Trading and the Competition Commission. Which authority must be approached depends on the size of turnover of the parties and the geographical extent of the relevant transaction.

The current system of merger control in Europe is set out in Regulation 139/2004 ("the Merger Regulation") which states that certain transactions must be notified to the European Commission in Brussels in advance and cannot be completed before clearance is obtained. If the transaction qualifies for investigation then the application to the European Commission is a "one stop shop" and no approach need be made to any national competition authorities.

A transaction falls within the jurisdiction of the European Commission if it (a) constitutes a "concentration" and (b) has a "community dimension". Concentrations are mergers, acquisitions of control and certain types of joint ventures. A concentration will have a community dimension if certain turnover thresholds are exceeded. If a concentration does not have a community dimension no notification need be made to the European Commission and the matter should be looked at from a national competition law perspective.

Concentrations encompass combinations of businesses into one (in the sense of a true merger), acquisition of control (including decisive influence), and joint ventures which are "full function". Co-operative joint ventures (i.e. not full function) may be subject to national merger control laws and other European competition rules which prohibit anti-competitive agreements.

Concentrations have a "community dimension" when (a) one or other of two sets of world-wide turnover and (b) EC-wide turnover thresholds are exceeded. As the thresholds are subject to periodic review, advice on the current levels of threshold from time to time should always be sought.

Once notified, the European Commission has a period of 25 working days to decide either that the case raises no concerns or that it needs further investigation. If in-depth investigation is required the EC must decide whether or not the concentration is expected to impede effective competition in the Common Market, in particular as a result of the creation or strengthening of a dominant position. In practice, negotiations take place with the European Commission and often undertakings are obtained from the parties e.g. to divest parts of the business or other structural changes.

If a merger is expected to be anti-competitive it must be declared incompatible with the Common Market and will effectively be blocked. The Commission has powers to impose substantial fines on companies or individuals of up to 10% of aggregate world-wide group turnover of all companies concerned for infringing the Merger Regulation.

Where the Merger Regulation does not apply because the parties' turnover falls below the thresholds, national merger rules may nevertheless apply to a transaction. The UK merger control regime is completely different from the European system, and merger control rules incorporating reduced turnover and market share thresholds are contained in the Enterprise Act 2002 (derived

from the Fair Trading Act 1973). Unlike the European system, there is no requirement in the UK to notify a merger in advance for clearance. However, if a merger is not pre-cleared there is a risk that it will be referred to the Competition Commission and ultimately that it will be prohibited or at least subject to onerous conditions.

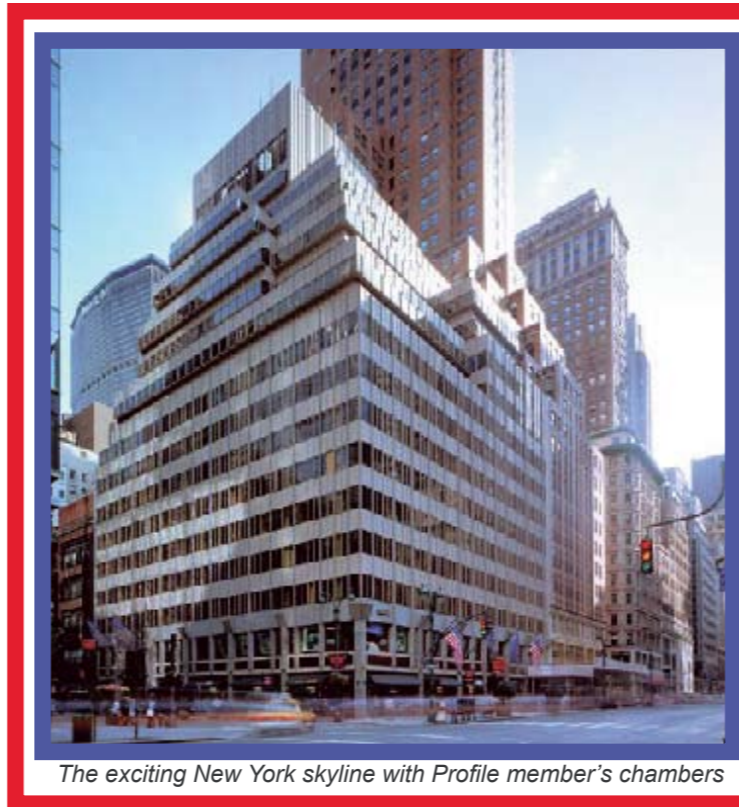
Under the UK regime, the Office of Fair Trading ("OFT") will make a decision whether or not to refer a merger to the Competition Commission for detailed investigation. The OFT must refer a merger where it has reasonable grounds for believing that the merger will result in a substantial lessening of competition.

If the Competition Commission finds that a merger is likely to result in a substantial lessening of competition in the UK, it has powers to prohibit the merger or impose conditions, including divestiture if the merger has already been completed. For these reasons mergers which are, or may be, likely to qualify for investigation (quite often it can depend on how you define the relevant market and resulting market share), are still notified by the parties to the OFT for clearance before they are completed.

In the event of notification the parties must set out their arguments why the benefits of merger will outweigh any resulting restrictions on competition. For example, there may be substantial potential competition from imports; customers may have substantial influence in the market place and this may counter any potential anti-competitive effects of acquiring a large market share. Analysis of other competitors and their respective market shares is also an issue. For example if the merged company has a resulting market share of around 30%, this is less likely to be a problem if there are two other competitors with around 30%. The position may be different if there is no other serious competitor in the marketplace.

Merger control in Europe and in the UK is unlikely to undergo any major change in the near future. The focus for both the European Commission and the UK competition authorities is on refining their own respective internal procedures and guidance.

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