European Union
Global merger control handbook – update

APRIL 2020

Merger control legislation changes since 1 July 2018

The EU Merger Regulation and its implementing instruments have not changed since the Global Merger Control Handbook was published. However, the following developments are worth mentioning as they may have an impact on mergers and acquisitions in the European Union.

THE INTERPLAY BETWEEN FDI AND MERGER CONTROL

- In recent years, Europe has observed a surge in foreign direct investment (FDI) control which has resulted in an increasing number of takeovers being blocked. FDI control and merger control are often seen as two sides of the same coin (with FDI control being the more "political" side of the coin and merger control the "economic" one). EU competition rules ensure that mergers and acquisitions do not result in concentration of economic power or the distortion of competition in the internal market, while FDI control allows Member States that have introduced FDI review procedures to screen FDI for potential threats to national security or public order.
- To this day, 14 Member States already have national screening mechanisms in force. As a result of the introduction of the EU FDI Regulation (entered into force on 21 March 2019), the Commission's influence on Member State's screening decisions will be increased. However, the EU FDI Regulation does not impose an obligation on all Member States to introduce a screening mechanism. Member States have until mid-October 2020 to implement the new framework into national law.
- The EU FDI Regulation seeks to protect EU companies from takeovers by overseas companies which would threaten security and public order. It will bring three key changes: (1) the Commission will be able to screen investment projects and issue non-binding opinions in specific cases (i.e. where an FDI may affect the security or public order of projects of "Union interest" or of Member States), (2) minimum procedural requirements will be imposed on those Member States that do have an FDI screening regime under the Regulation, and (3) an EU cooperation mechanism will be created to improve the cooperation between Member States and the Commission on screening decisions.

DLA PIPER

- However, the Covid-19 crisis has prompted strong reaction from the Commission which calls upon Member states "*to be particularly vigilant to avoid that the current health crisis does not result in a sell-off of Europe's business and industrial actors*".[1] The Commission is very aware of the increased potential risk to strategic industries since the start of the Covid-19 crisis. The vulnerability of EU companies as well as the potential for overseas bid is on the rise (in particular for healthcare-related industries). This is why the Commission calls upon Member States to (1) "*make full use already now of [their] FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors*" and to (2) "*set up a fully-fledged screening mechanism for those Member States that currently do not have a screening mechanism*". Going one step further, Commissioner Vestager told the Financial Times that she encourages Member States to buy stakes in EU companies "to stave off the threat of Chinese takeovers".[2]
- French Commissioner Thierry Breton made a statement that governments should also protect EU companies in the tourism sector, one of the first sectors to be severely hit by Covid-19, under the EU FDI framework. Although the EU FDI framework does not explicitly include tourism as a "strategic" industry, the Regulation applies to all sectors of the economy. The only condition for scrutiny is that the foreign direct investment in question must be likely to affect security or public order. Commissioner Breton said to European Parliament members that the sector will need protection from "*aggressive investment strategies from non-European companies that are trying to take advantage of the crisis to get a few extra European jewels in their crown*".

DELAYS IN THE CONTEXT OF COVID-19 - FINCANTIERI/ CHANTIERS DE L'ATLANTIQUE

- The Covid-19 crisis created a number of procedural challenges for the Commission, that needed to adapt its way of conducting business to the lockdown situation. In reaction to this situation, the Commission decided to encourage the delay of merger notification where possible and to prioritize cases where firms can show "very compelling reasons" not to delay notification.
- Regarding on-going Phase II proceedings, such as the Fincantieri/Chantiers de l'Atlantique merger, the Commission may try to win time by having the clock stopped. In the case of the proposed acquisition of Chantiers de l'Atlantique by Fincantieri, the deadline has been suspended by the Commission since 13March 2020. DG COMP, in its preliminary analysis, expressed concern that the transaction would reduce competition in the already concentrated and capacity constrained cruise shipbuilding market, where barriers to entry are high. Further, the Commission hinted at the insufficiency of buyer power to counterbalance the risk of post-merger price increases. Stopping the clock also allows the Commission to rethink its assessment based on the fact that the post Covid-19 competitive landscape of the cruise shipbuilding sector, as many other sectors, could be very different from the pre Covid-19 one. Assumptions on which the Commission relied to make this preliminary analysis may no longer be valid. In this context, stopping the clock may not only buy the Commission time but can also reduce the risk of having false positives and/or false negatives.

Landmark merger control cases since 1 July 2018

UPS/TNT (JANUARY 2019)

- On 16 January 2019, the Court of Justice of the European Union (CJEU) confirmed the General Court's judgement annulling on procedural grounds the Commission's decision prohibiting the acquisition of TNT by UPS. In doing so, the CJEU rejected the appeal brought by the Commission against the General Court's judgment.
- **General Court judgment:** the General Court had found in its judgment that the Commission infringed UPS' rights of defence by making substantial modifications to the price concentration econometric model after disclosure of the statement of objections and by not giving UPS the opportunity to comment on these amendments.
- **CJEU judgment:**
  - The CJEU found that the Commission must reconcile the need for speed with observance of the rights of the defence. In particular, when basing its decision on econometric models, the Commission must allow notifying parties to make their views known on the accuracy (objectivity) and relevance of such models. Therefore, the CJEU concluded that, following the modification of the econometric model used, the Commission should have given the notifying parties the opportunity to comment on these changes.

[1] Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 25 March 2020 (available here: https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf).

[2] Financial Times article, *Vestager urges stakebuilding to block Chinese takeovers*, 12 April 2020.

- Further, the CJEU confirmed the standard of proof upheld by the General Court, according to which the Commission's decision can be annulled if the procedural irregularity "*has denied [the parties] the chance, even if that chance is slight, better to defend themselves". The CJEU rejected the Commission's argument that the notifying parties should prove that "but for that procedural irregularity, the decision would have been different in content*".

ALSTOM/SIEMENS (FEBRUARY 2019)

- The proposed merger of Alstom and Siemens was rejected by the Commission, which found that it would have harmed competition in two markets (respectively the railway signaling systems and the very high-speed trains markets).
- The Commission found that the remedies proposed by the notifying parties did not provide sufficient guarantee of post-merger competitive pressure from the remaining competitors (e.g. divestment of a train currently not capable of running at very high speeds or restrictive licensing terms).
- In relation to the notifying parties' submission that there was competitive pressure from Chinese suppliers, the Commission considered that these suppliers are unlikely to represent a competitive constraint on the merging parties in the foreseeable future.
- The Commission's decision raised strong criticism. The main point of criticism was that the merger would (and should) have allowed the creation of an EU champion in order to level out the playing field against foreign companies enjoying subsidies (e.g. Chinese companies).
- The Commission strictly based its decision on its legal and economic analysis, despite any political pressure to allow the merger to go through.
- Germany and France tabled a Franco-German manifesto calling for a reform of current EU merger rules. Among the proposals one stands out: the introduction of a political "Phase III" in the assessment of concentrations.

GE/LM WIND (APRIL 2019)

- In April 2019, the Commission fined GE EUR52 million for providing incorrect information in its takeover of LM Wind.
- In January 2017, GE notified its proposed acquisition of LM Wind. In this notification, GE stated that it did not have any higher power output wind turbine for offshore applications in development, beyond its existing 6 megawatt turbine. However, through information collected from a third party, the Commission found that GE was actually offering a 12 megawatt offshore wind turbine to potential customers. As this information came to light, GE decided to withdrew its notification of the acquisition of LM Wind and to re-notify the transaction to the Commission a few days later (this time with all of the information).
- As the Commission's investigation confirmed the information collected from a third party was accurate, the Commission addressed a Statement of Objections to GE on 6 July 2017 for breaching procedural obligations.
- Since the information was rectified in the second notification, the decision to fine GE for providing misleading information did not affect the Commission's approval of the transaction.
- When setting the amount of the fine, the Commission takes into account the nature, gravity and duration of the infringement. The Commission can impose fines of up to 10% of the aggregated turnover of companies. The Commission held that GE "should have been aware" of the relevance of this piece of information for the Commission and that this infringement was "serious" since it prevented the Commission from having all of the relevant information at hand to properly assess the transaction.

TATA STEEL/THYSSENKRUPP (JUNE 2019)

- A joint venture between ThyssenKrupp and Tata Steel, respectively the second and third largest producer of flat carbon steel in the EEA, was rejected by the Commission.
- The Commission expressed concern that the merger would establish a single market leader in a highly concentrated industry, resulting in reduced choice in suppliers and higher prices for European customers in two market segments: (1) metallic coated and laminated steel products for packaging and (2) automotive hot dip galvanised steel products.
- During its investigation, the Commission considered the role of imports from third countries, but found that customers of the relevant products could not turn to imports to offset potential post-merger price increases.
- The Commission held that the divestures proposed by the notifying parties were insufficient as they lacked a range of assets, in particular (1) assets for the production of the necessary steel input to manufacture packaging steel and (2) adequate finishing assets to serve customers in the relevant geographic market where the merging parties mostly compete in.

CANON/TOSHIBA MEDICAL SYSTEMS CORPORATION (JUNE 2019)

- The Commission imposed two fines on Canon totalling EUR28 million for implementing its acquisition of Toshiba's medical-equipment business ("TMSC") before securing merger approval, resulting in so-called gun-jumping.
- Canon's acquisition of TMSC involved a two-step "warehousing" structure involving an interim buyer ("SPV"). As a first step, the SPV acquired 95% in the share capital of TMSC for EUR800 while Canon paid the purchase price of EUR5.28 billion in exchange for 5% of the shares of TMSC and an option to acquire the rest of the shares held by the SPV. As a second step, Canon exercised its share option, acquiring the remaining 95% of the shares of TMSC through the SPV.

- In the Commission's view, Canon should have notified the transaction prior to implementing the first step, as the two steps formed part of a single transaction. Therefore the Commission found that, by completing the first step, Canon breached the EUMR's notification obligation and its standstill requirement.
- Background: following the Commission's EUR52 million fine imposed on General Electric in April 2019 for providing incorrect information during the investigation of its planned acquisition of LM Wind and the fine of EUR124.5 million imposed on Altice in April 2018 for gun-jumping, it is clear the Commission is now more than ever focusing on procedural infringements of merger control rules.

VODAFONE/LIBERTY GLOBAL (JULY 2019)

- The Commission cleared Vodafone's purchase of Liberty Global's business in Czechia, Germany, Hungary and Romania subject to remedies.
- The Commission expressed concerns that the transaction would (1) eliminate competitive constraint in the market for the retail supply of fixed broadband services and (2) increase the market power of the merged entity in the market for the wholesale supply of signal for the transmission of TV channels, leading to quality degradation of the TV offer in Germany and/or restriction of the broadcasters' ability to provide additional services over the internet ("OTT" services).
- Vodafone made the following commitments: (1) to give Telefónica Deutschland wholesale access to the merged entity's cable network in Germany in order to replicate the competitive constraint exerted by Vodafone pre-merger; (2) to not contractually restrict broadcasters wishing to also distribute their content via an OTT service; (3) to not increase the feed-in fees paid by Free-to-Air broadcasters for the transmission of their linear TV channels via Vodafone's cable network in Germany (to not reduce the quality of the Free-to-Air TV offer to retail customers); (4) to continue to carry the HbbTV signal of Free-to-Air broadcasters (in order not to hinder broadcasters' ability to provide additional services through the HbbTV signal). Interestingly, these remedies were accepted by the Commission, despite they are all behavioral in nature.
- Appeals from Deutsche Telekom, German cable operator Tele Columbus and German regional telecom company NetCologne against the Commission's decision are pending with the General Court.

VAG/VARTA (DECEMBER 2019)

- In December 2018, the Commission approved the acquisition of Spectrum Brands' batteries and portable lighting business by Energizer, subject to the divestment by Energizer of its business of Varta-branded and unbranded household and specialty batteries to a suitable purchaser. In December 2019, the Commission found Varta AG to be a suitable purchaser and approved of Varta's acquisition of the divested assets under EU merger rules, subject to conditions. It is worth noting that even though this is a divestment case, it required additional remedies in order to be cleared by the Commission.
- The Commission initially had concerns about hearing aid batteries sold in the mass retail channel. In particular, Varta is active on the upstream market for the manufacturing and wholesale supply of such batteries to battery brands whilst the divested Varta business is a leading downstream supplier of these batteries. Therefore, the Commission found there was a risk post-acquisition for competitors on the downstream market, that rely on Varta's upstream supplies, to be shut out from the downstream market or to face higher prices, lower quality and less choice.
- To alleviate these concerns, Varta made the commitment to globally supply hearing aid batteries to any company currently or potentially active in the wholesale supply of hearing aid batteries under their own brand under certain conditions for a set period of time. This behavioural remedy was accepted by the Commission.

Web link to the competition authority

European Commission: http://ec.europa.eu/competition/

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