NEW REGULATORY HURDLES IN M&A TRANSACTIONS

I. INTRODUCTION

In the case of M&A transactions, all participants strive for a quick *closing* and thus legal certainty in the future. Previously, an M&A transaction was checked *ex ante* by the responsible competition authorities if certain turnover thresholds were exceeded to determine whether the project would create or strengthen a dominant position. However, this legal certainty is now lost due to the most recent practice and case law of the European Court of Justice (hereinafter referred to as "**ECJ**"), since, even if the turnover thresholds are not met, there is the possibility of an *ex post* content review and, if necessary, a reversal obligation.

In addition, in the recent past, a control of foreign direct investments was added for M&A transactions in areas of critical infrastructure. This protection against foreign influence in the EEA is now supplemented by a mandatory approval procedure for transactions in all sectors if the purchaser has received foreign subsidies of a certain amount within his group in the past.

II. PREVIOUSLY ONLY EX-ANTE MERGER CONTROL

Both, European and national competition law, have so far only pursued the principle of "*preventive control*" in order not to create an artificial monopoly through an M&A transaction or not to jeopardise a market structure that promotes competition.

For M&A transactions, this means mandatory notification with national competition authorities or the European Commission (hereinafter referred to as "**Commission**"), if the transaction leads to a concentration within the meaning of competition law and exceeds certain turnover thresholds. Such envisaged M&A transaction is subject to a suspensory obligation until its approval. A violation hereof will lead to fines of up to 10% of the global group turnover.

Since recently, also M&A transactions, which did not exceed any turnover threshold test, were referred to the Commission to be reviewed according to Art. 22 of the Merger Regulation. This means that, even in the absence of a filing requirement, a competition authority can apply Art. 22 of the Merger Regulation and hereby encourage the Commission to review an envisaged transaction within 15 working days after becoming aware of it. The prerequisite for this is at least *prima facie* evidence for a considerable restriction of competition in the Member State of the referring competition authority.

III. NEW INSTRUMENT OF AN EX-POST MERGER CONTROL

The ECJ introduced in its decision in "*Towercast*" (C-449/21) the possibility for national competition authorities to assess a transaction *ex post* whether it constitutes an abuse of a dominant position according to Art. 102 TFEU. Prerequisites for this are that (i) the transaction had no *ex ante* filing obligation with a national competition authority due to not meeting national turnover thresholds or the Commission's thresholds since the transaction is not of community-wide importance within the meaning of Art. 1 FKVO, and (ii) the transaction has also not led to a referral to the Commission pursuant to Art. 22 of the Merger Regulation.

IV. REVIEW OF FOREIGN DIRECT INVESTMENTS

Due to the EU FDI Screening Regulation, M&A transactions have in recent years been subject to an additional approval requirement at the national level *ex ante* if a company with its registered office or head office outside the EU, EEA or Switzerland acquires a share of at least 10%, 25% or 50% or a controlling influence in an EU resident company. However, such an approval requirement currently only applies to acquisitions of shares by target companies in sectors that the respective Member States consider to be a sensitive economic area (e.g. operation of critical and digital infrastructure, essential areas for security and public order).

Here, too, an M&A transaction that requires such filing is subject to a suspensory obligation. Sanctions for infringing the suspensory obligation range from fines to imprisonment.

V. INTRODUCTION OF THE REVIEW OF SUBSIDIES FROM THIRD COUNTRIES

On 12/07/2023, the "*Regulation on Foreign* On 12/07/2023, the "*Regulation on Foreign Subsidies Distorting the Internal Market*" (hereinafter referred to as "**FSR**") will come into effect, which is binding and directly applicable in all EU Member States. Contrary to the review of a foreign direct investment, a potential review according to the FSR covers all transactions independent of the industry and is carried out centrally by the Commission and not by the respective national authorities.

The goal is to prevent distortions of competition on the EU internal market in the future through foreign subsidies to companies operating in the EU. Therefore, there will be a filing requirement of M&A transactions in which at least one participating company, that generated at least EUR 500 million in turnover in the EU, received foreign subsidies of at least a total of EUR 50 million in the last three years. Violations of this filing obligation are subject to fines of up to 10% of the worldwide group turnover.

The Commission was granted corresponding new review and investigation powers (e.g. requests for information and inspections) both for the period of the implementation of an M&A transaction and after a *closing*. These Commission's powers amount to a maximum of 150 working days, i.e. about eight months. This deadline appears to be an ambitious goal, as the approval process for state aid within the EU has lasted up to about twelve months in the past.

VI. CONCLUSION

In practice, these new developments mean that M&A transactions could potentially require more – partly *ex ante* - approvals, which are usually handled by different authorities. This makes it difficult to plan the point in time for *closing* and/or requires a significantly longer period between *signing* and *closing*.

At the same time, it opens up even more opportunities for competitors, third parties, as well as customers and suppliers of the companies involved in the transaction to encourage a competition authority via the anonymous whistleblower system or by means of an official complaint to review a transaction in advance or even after *closing* for its competitive aspects with regard to a potential market dominance or a distortion of competition due to foreign subsidies.

In addition, the legal uncertainty increases for the companies involved if, due to a lack of merger control, a transaction after *closing* could be qualified as an abuse of dominance under Art. 102 TFEU with unforeseeable consequences. *Worst case scenario* would probably be a reversal of the transaction.

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