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The European Commission's Enforcement Priorities and the Debate on the Reform of the EU Merger Control Regulation

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EU merger control celebrates its 25th anniversary this year. On 13 March 2015, the EU Commissioner for Competition Margrethe Vestager gave a speech on merger reform and market definition noting that, although there is no room for complacency, the EU merger control regulation ("**EUMR**") seems to be humming along nicely.

On 17 March 2015, the Commissioner Vestager was echoed by Carles Esteva Mosso, Acting Deputy Director General for Mergers at DG COMP, who further commented on the EUMR's current reform debate and on the European Commission's ("**Commission**") enforcement priorities.

This alert provides a brief overview of these developments and of their implications for corporations, private equity funds and institutional investors which are doing, or planning to do, business in the EU.

A busy 2014 for merger control with further M&A consolidation expected to continue

In 2014, the number of transactions filed with the Commission was 303 (the highest level since 2004). The Commission conditionally cleared 17 transactions and did not issue any prohibition decision. The Commissioner Vestager noted that since 1 November 2014 (when she took office) there has been an M&A boom resulting in close to 90 decisions, 8 Phase II ongoing cases and more complex cases in the pipeline.

The pharmaceutical and telecom sectors have attracted most of the Commission's scrutiny. By way of illustration, in *Novartis/Glaxo* the Commission mainly focused on innovation and expressed concerns that, post-transaction, Novartis's current effort to launch its treatment for skin cancer and its broader clinical trial program would have been abandoned. In order to dispel the Commission's concerns, Novartis committed to divest the skin cancer business so as to ensure the worldwide development of this treatment as well as its commercialisation in Europe.

As regards the telecom sector, the EU telecom sector has been characterized by *in-market* consolidation as opposed to cross-border consolidation and 4 to 3 merger. In these mobile telephony deals (Austria, Ireland, Germany), the markets were always defined as national. The Commission expressed concerns because an important competitive pressure that previously existed in the market would have been removed post-transaction. In all these cases, the Commission conditionally cleared the transactions by ensuring that new players would enter the market.

For 2015, the Commission is expecting a steady increase in the number of notifications with further M&A consolidation in Europe, notably in the telecom sector (e.g. Orange's proposed acquisition of Jazztel in Spain and the announced merger between TeliaSonera and Telenor in Denmark).

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Against this background and given the serious implications for companies, it is also worth mentioning the hardline approach taken by the Commission against violations of the "standstill obligation" (or gun jumping). In *Marine Harvest*, the Commission imposed a EUR 20 million fine on Marine Harvest for acquiring *de facto* control over its competitor Morpol without notifying the transaction and receiving clearance from the Commission. Significantly, this fine is identical to that imposed by the Commission on Electrabel in 2009 (backed by the EU Courts) and sends a clear signal that the Commission will not tolerate breaches of the "standstill obligation" for reportable transactions under the EUMR.

The debate on the EUMR reform

Although the current EUMR regime did not require the same level of intervention as in 2004, when the EU merger control regime was significantly reformed, the Commission considered to: (i) streamline and simplify the EUMR process ("Simplification Package"); and (ii) expand the scope of the EUMR so as to cover acquisitions of non-controlling minority shareholding (the "Commission's White Paper").

Simplification Package

At the end of 2013, the Simplification Package was adopted with the aim of cutting red tape and enhancing transparency. Thanks to recent reforms aimed at streamlining procedures, almost 70% of the merger cases are now treated under the simplified procedure (approximately 10% of cases have moved from the normal procedure to the simplified procedure).

As a result, the burden on companies is reduced and the Commission can focus on the most complex cases. In an effort to enhance transparency, the Commission has also recently started publishing the Competition Merger Brief with the aim of outlining the Commission's reasoning. The enhancement of transparency represents a top priority for the Commissioner Vestager.

The Commission's White Paper

The Commission's White Paper of July 2014 proposed a "targeted transparency system" pursuant to which acquisitions of non-controlling minority shares with an EU dimension would be subject to the submission of an information notice (as opposed to a full-fledged Form CO notification) when the acquisition qualifies as a "competitively significant link."

The Commission justified such proposal by referring to an enforcement gap in the EUMR where a non-insignificant number of potential problematic transactions would escape scrutiny. By way of illustration, in *Ryanair/Aer Lingus* the Commission could not prevent Ryanair from acquiring almost 30% of Air Lingus's shares even if the Commission considered that the proposed transaction could result in price increases and less competition. The UK competition authority was able to review the transaction and eventually required Ryanair to sell most of its stake in Air Lingus.

However, the proposal relating to the inclusion of minority shareholdings within the scope of the EUMR will inevitably raise the administrative burden on businesses compared to the current system.

Many respondents to the Commission's public consultation on the Commission's White Paper expressed serious concerns. These concerns revolve around proportionality issues since many respondents considered that there were too few cases to warrant such an intervention.

The Commission has publicly taken note of these concerns. The Commissioner Vestager stated that the Commission would need to examine this issue further.

Other issues emerging from the debate on the EUMR reform

Although they do not form the object of any formal proposal, the Commission's recommendations for the EUMR reform have prompted a debate on the following issues:

- *Relationship between merger control and competitiveness* (e.g. definition of geographic market and evolution of economy). The Commission's position is that merger control properly adapts to the changing market realities. In particular, as regards the geographic scope for market definition, the Commission's decisional practice consists of an increasing number of decisions with an EEA/global scope.
- *Jurisdictional issues in the IT/high-tech sector*. Certain Member States questioned whether the current EU turnover thresholds were satisfactory in order to ensure that there is a proper review of transactions that might be of relevance despite the limited EU turnover of one of the merging parties and whether alternative jurisdictional criteria based on the value of the transaction could be taken into account. This proposal must be read in conjunction with the recent cases in the IT/high-tech sector (*Facebook/Whatsapp*) where the Commission was ultimately able to assert jurisdiction on the basis of an Article 4(5) referral. Whilst the Commission informally indicated that it shared such concerns, EU top officials do not anticipate any change to the turnover threshold mechanism in the near term and expressly ruled out the inclusion of any market share jurisdictional threshold.
- *Further convergence among national merger control regimes.* There are ongoing discussions between the French, German and Italian competition authorities as regards steps that would enhance further convergence for the review of merger cases.
- *Approach to remedies*. The Commission informally indicated that it does not intend to deviate from the Remedies Notice of 2008. The Commission confirmed its preference for structural remedies (e.g. divestitures) given their straightforward nature and the limited amount of monitoring that such remedies entail. However, the Commission has shown a willingness to consider behavioral remedies in the context of non-horizontal mergers. By way of illustration, the *Airbus/Safran* joint venture was conditionally cleared on the basis of the merging parties' behavioral commitment to supply components to third parties.
- *International cooperation.* The Commission considers the EU/US Best Practices for coordinating merger reviews to be a model for cooperation with non-EU competition authorities. From a timetable perspective, companies can expect increased international cooperation between the Commission and other competition authorities, particularly in the context of global transactions when engaging in remedies discussions.

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