BCLP. Client Intelligent

Insights

EU M&A REGULATION IS GETTING TOUGHER – WHAT YOU NEED TO KNOW IN 2020 AND BEYOND

Oct 12, 2020

SUMMARY

The COVID-19 pandemic has made 2020 a difficult year for many companies looking to do deals. Competition agencies and other government regulators have in many cases slowed down their timeframes or even refused to accept regulatory filings. However, even putting the pandemic to one side, a number of new EU regulations and proposals are adding possible additional hurdles for companies looking to do deals – both now, and in the future. Companies need to ensure they are aware of the new obstacles in order to properly plan ahead and mitigate any potential deal risks. In addition to the EU's new foreign direct investment screening regulations coming into effect yesterday, the European Commission is proposing other deal obstacles such as a new foreign subsidies control regime and, of increasing importance, a change in its approach to accepting deal referrals from the competition agencies of EU Member States.

European FDI screening is here

In September 2018 (see here), we flagged the coming of the Commission's involvement for the first time in FDI screening through its proposal for a new foreign direct investment (FDI) screening regulation. The final regulation entered into full force yesterday adding an additional layer of regulatory scrutiny for mergers within Europe.

The new regime establishes a new EU-wide framework for reviewing FDI coming into the EU on the grounds of national security or public order, and encourages co-operation between Member States relating to any FDI that could present a threat on these grounds.

The key aspects of the new regime include in summary:

- a definitive list of the areas in which FDI may cause concerns, including: critical infrastructure (including transport, media, data processing/storage, defence), critical technologies (including AI, robotics, semiconductors), critical inputs (including energy and raw materials as well as

food security), access to sensitive information (including personal data) and freedom and pluralism in the media;

- the establishment of a cooperation mechanism between the Commission and Member States for the exchange of information and comments and importantly "opinions" by the Commission on planned or completed FDI that might threaten national security or public order;
- minimum standards for Member States' FDI screening regimes, including clear timeframes for screening decisions, the possibility for judicial redress of decisions and non-discrimination between third parties; and
- although the Commission does not have authority to clear or block any FDI, it can issue non-binding (but very influential) observations where it considers that FDI could threaten the aforementioned grounds in more than one Member State or for projects of EU-wide interest.

So, while the new regime is a long way from an "EU approval" regime for foreign investments as exists at EU Member State level and in many countries around the world (e.g. in the US, with its CFIUS regime), it nevertheless represents the first serious involvement by the European Commission in this space that has always been the domain of the Member States. And depending on how the new regime works in practice, we may see the EU looking to enhance its FDI powers over the coming years.

The Commission joins a number of authorities in the EU and beyond in what we are seeing as a new "FDI regulation wave". As our map tracking FDI regime developments globally shows, FDI regimes have been introduced or expanded in many EU Member States both in light of the COVID-19 pandemic and more generally as protectionist policies take hold in the EU and beyond. The expansion of the regimes in many EU Member States (including major economies such as Spain, France and Italy) could have a knock on effect with the Commission and several Member States possibly having to cooperate on FDI reviews under the regime. At the same time, proposals to introduce more rigid controls in other countries, including the UK (see our blog here), could add further burdens to companies to deals.

The new subsidies regime proposal arrives too

While FDI presents another regulatory hurdle alongside merger clearance for deals with a European dimension, more is on the cards. The European Commission is also intent on introducing another check on mergers – this time focussing on foreign companies active in the EU that receive state subsidies.

In June 2020, the Commission published a White Paper outlining plans to establish a new regulatory regime to control the impact of subsidies given by non-EU governments to companies active in the internal market. The objective is to ensure that all companies are playing by the same rules and that they are not receiving foreign aid that is distortive.

While the White Paper looks to address subsidies in other areas (particularly public procurement and more generally in relation to companies active in the EU), in the area of M&A it notably proposes controlling the use of foreign subsidies to facilitate acquisitions of EU-based targets through a mandatory notification regime.

Full clarity on the precise details of any regime requiring notification of mergers involving foreign subsidies is a long way off, but a senior European Commission official recently indicated a future regime could look a lot like merger control with mandatory notifications, a "Phase 1" and "Phase 2" review system and suspension of closing pending clearance. The official also indicated that notification in "Phase 1" could be a light on initial information requirements. However, it is too early to tell what impact this regime would have on deal timelines and it seems reasonable to assume that, even if many (indeed, possibly the significant majority of) notified subsidies do not raise concerns and are "cleared" quickly in a "Phase 1" review, if the Commission is concerned that the subsidy may have had a distortive effect, then an in-depth investigation could lead to significant delays to transaction timelines and possible remedies being required (e.g., paying back the subsidy) or deals blocked. The Commission also believes it would be most appropriate for it to be a "one stop shop" authority for such a regime.

It is unlikely that any new subsidies regime would be in place for several years at least and an initial consultation has just been completed with more dialogue and input from all sides to come. Nevertheless, non-EU companies involved in transactions within the EU should be aware of the Commission's increased interest in both the source of their finances and the intended target of their investment within the EU.

And expanding EU merger control – the Commission opens up to more referrals

Under Article 22 of the EU Merger Regulation, the competition agencies of one or more EU Member States are able to request that the European Commission review a proposed transaction that they consider will have a significant impact on competition in those Member States. While, strictly speaking, Article 22 of the Merger Regulation does not require that the transaction in question is in fact notifiable under the merger control regimes of those Member States, the European Commission's practice has historically been to only accept referrals in relation to transactions that in fact meet the filing thresholds in one or more Member States. That approach may, however, be about to change.

Last month, Commissioner Vestager announced that the Commission will soon accept referrals from Member States relating to transactions that it believes would significantly affect competition within the internal market, regardless of whether the transactions meet either European or national notification thresholds. Vestager hopes for this new approach to begin in mid-2021.

For some time, the Commission has been uneasy with its inability to review significant transactions that fall below merger review thresholds (which include so-called "killer acquisitions" involving "high

value/low revenue" acquisition targets missed by current thresholds). The Commission has rejected the German and Austrian approach that added a new "deal value" threshold to catch such cases and has instead sought the quicker route of just adjusting the referral policy position to help it take a look at such deals – a solution the Commissioner said was "hiding in plain sight".

While the Commission has said it will issue guidance as to when referrals under this new approach will be accepted, there is a significant risk that this approach will lead to huge uncertainty in relation to many transactions. Indeed, as things stand, if filing thresholds in the EU and Member States are not satisfied then (subject to a few "quirks" in certain Member States) a merger can safely be completed without merger control concerns. Under this new approach, even if no filing thresholds are satisfied, merging parties may be faced with uncertainty as to whether the transaction will be referred to the European Commission, which can lead to a significant impact on deal certainty and timelines. If the Commission does proceed with this proposal, it needs to produce very clear guidance setting out when it may accept referrals under this process, thereby allowing merger parties and their advisors to meaningfully assess the risk of any referral taking place. Absent this, the EU merger regime will fall far short of international best practice on jurisdictional clarity, predictability and certainty to the detriment of parties involved in M&A.

Preparing for the new regulatory environment

It is evident that the European Commission is looking to flex its muscles and have greater control over mergers and acquisitions that have an impact in the EU, and companies engaging in transactions may have to consider more than just competition law in the coming years in the context of regulatory aspects of deal planning. While the European Commission is looking to extend its reach, hopefully the European Courts continue to exercise the checks and balances on the scope of the Commission's powers, and ensure that both the procedural and substantive aspects of these new regimes and proposals are applied in a lawful, consistent and correct manner.

BCLP's Antitrust & Competition team is helping clients navigate this constantly changing EU landscape, and is engaging with the authorities on these developments and monitoring closely the new rules and proposals. Don't hesitate to get in touch with any of the lawyers listed for more information.

RELATED PRACTICE AREAS

- Antitrust
- M&A & Corporate Finance

MEET THE TEAM

Dave Anderson

Brussels

david.anderson@bclplaw.com
+32 (0) 2 792 2421

Paul Culliford

Brussels

paul.culliford@bclplaw.com
+32 (0) 2 792 2424

Tom Wright

Brussels

thomas.wright@bclplaw.com
+32 (0) 2 792 2437

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.