IN ANY M&A TRANSACTION, CONSIDERATION SHOULD BE GIVEN TO CERTAIN ADMINISTRATIVE PROCEDURES AND HOW TO MANAGE THEM

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According to the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2021, at least some 15 M&A deals worth more than $50 million failed for regulatory or policy reasons. Of these deals, three were rejected for national security reasons, four were not finalized for merger control reasons, and five were dropped owing to delays in obtaining host country approval of the transaction.

This highlights the importance of taking into account and managing administrative procedures in cross-border transactions.

In this area, did recent legislative or case-law developments have an impact on the way M&A transactions are being handled?

Yes indeed, and in particular as regards the control of foreign investments in France (IEF) and that of concentrations.

■ **Control of foreign investments in France (IEF):** over the years, regulations on the control of foreign investments in France have been amended from time to time in order to revisit or to extend to other sectors the procedures for controlling foreign investments in France. I am here referring to the 2018 decree extending such control to include the so-called sectors of the future, the PACTE law (Action Plan for the Growth and Transformation of Enterprises), or the measures taken in the light of the current global pandemic (measures which were recently extended until December 31, 2022). Obviously, this development has had an impact on practitioners, who are now systematically asking themselves how to apply these regulations whenever they contemplate an acquisition. This is also reflected in the figures published each year by the General Directorate of the Treasury: in 2021, 328 deals were reviewed by the Minister of the Economy, Finance and Recovery as compared to 137 deals in 2017. The stated objective of the reform of foreign investment control in France, according to the General Directorate of the Treasury, was to introduce a simpler, clearer and faster procedure. However, in practice, things have turned out to be slightly more complicated.

Merger Control: This extension of the scope of inspection is also illustrated by the recent reform of merger control, heralded by the publication on March 26, 2021 of the European Commission's guidance on the application of article 22 EUMR. The European Commission's stated objective - which was backed, in particular, by the French competition authority – is to investigate certain sensitive acquisition transactions such as those involving the digital economy where controllability thresholds (expressed in terms of turnover or market share in certain Member States) are not being met. Based on Article 22 of Regulation 139-2004 of January 20, 2004, any domestic competition authority will now be able to refer a transaction, even when small, (i.e. not exceeding national thresholds), to the European Commission for review, if it believes that the transaction overly affects the competitive situation on one or more markets. It is then up to the Commission to decide whether or not to investigate this state of affairs. Both the Member states and the Commission have been given much discretion to decide whether to refer cases or to accept referrals.

Reform of the "Article 22 referral" constitutes a major development.

The French competition authority is actively pressing for its implementation. On April 20, 2021, it announced that the Commission had initiated a procedure to investigate the acquisition of Grail by Illumina, following a referral request made by France to assert jurisdiction, which was subsequently joined by Belgium, Greece, Iceland, the Netherlands and Norway. This is the first time that the Commission has been investigating a concentration that is usually not subject to a notification obligation (being below domestic thresholds).

How do you address such procedures?

■ **IEF :** Unlike in merger control, in foreign investment control there is no threshold for assessing whether or not an investment transaction must be notified. Instead, three cumulative eligibility criteria must be met. These criteria relate to the kind of transaction being considered, the nationality of the investor and the business the target company is in. Generally speaking, and with some exceptions, the first two criteria are relatively easy to assess. The question of the target company's business is a more complex matter because the description of the activities mentioned in the Monetary and Financial Code is open to interpretation. Today, there is not as yet any case law likely to guide practitioners because the decisions taken by the Minister of the Economy, Finance and Recovery are not made public. When in doubt, it may be useful for the target company to request a ruling.

Things become even more complex when the target company also has equity interests or subsidiaries in other countries outside of France.

As a reminder, there exists no standard procedure across Europe, with each member state of the European Union retaining its freedom to enact regulations in this area, and the EU's foreign direct investment screening system, which came into effect in 2020, only establishing a mechanism for cooperation between Member states.

Where a group has foreign entities, it will be necessary to check whether or not local legislation on the control of foreign investments applies.

■ **Merger control:** Indeed, the procedure in terms of merger control is even more regulated. In particular, the recent reform of the French competition authority's guidelines aims to streamline the content of the notification dossier and to clarify the cases covered by the fast-track procedure (for example, cases where the combined market share of the companies involved is less than 25%). The goal is to speed up the review process for concentrations that do not pose specific difficulties. Thus, in the case of a fast-track procedure, the timeframe within which the Authority must render its decision is on average fifteen working days, whereas it usually takes twenty-five days for other transactions that do not give rise to difficulties (authorized in "phase 1").

However, this objective of simplification has its limits thanks to the "Article 22 referral" procedure, for which it can be tricky to anticipate the transactions likely to be affected by this procedure – a downside that echoes that of the foreign investment control procedure.

The legal uncertainty surrounding companies is further compounded by the fact that a domestic competition authority can request an "Article 22 referral" to the European Commission, even though the transaction has already been closed. In practice, the Commission considers that a referral is no longer appropriate when more than six months have elapsed since the concentration was implemented. However, in exceptional circumstances, the Commission might accept a referral beyond this six-month period. Another cause of unpredictability is the possibility that third parties (e.g., competitors) may inform competition authorities of the existence of a transaction eligible for "Article 22 referral".

■ **IEF :** The obligation to control foreign investments in France is still recent and will undoubtedly continue to evolve over the next few years with the publication, in the coming months, of guidelines aimed at better defining the activities concerned.

At what juncture in the acquisition process should one enquire about these controls?

■ **IEF :** as early as possible, given the above-mentioned difficulties and the lengthening of deadlines. For a company or a business that is up for sale in the short term, it may be advantageous for the target company to make a prior application for a business review (a ruling). This is bound to reassure prospective investors and, if necessary, to avoid delaying the timetable for carrying out the transaction. On the investor's side, this issue must now be incorporated into the due diligence process.

■ **Merger control:** As with the control of IEFs, anticipation is crucial in order to take into account the delays and costs generated by the procedure. From now on, two main situations are to be distinguished:

- if the acquisition is subject to consolidation control, deadlines are regulated, even if for complex transactions they may be extended or even suspended... In practice, involving the competition law experts, with whom we work at KPMG, as early as possible in the pre-notification procedure, will facilitate exchanges with the competition authorities and ensure that proposals which might raise possible concerns on their part are more relevant and feasible;

- if the transaction is not, presumably, subject to merger control because thresholds do not appear to have been exceeded, one must henceforth consider that an authority will implement the "Article 22 referral" procedure. Lacking developed decision-making practice in this area, the cases subject to IEF control could potentially feed into our analysis of the situation. The pros and cons of asking the Commission for an informal opinion on whether a transaction is eligible for "Article 22 referral" procedure must be carefully weighed.

What is the impact of these procedures on the timing of acquisition transactions?

■ **IEF :** since the 2019 reform, deadlines have been extended with the investigation period being increased from 2 months to a total of 75 working days, i.e. almost 3 months. This extension is due, on the one hand, to the need to be able to escalate certain transactions to the European level as part of the screening procedure and, on the other, to a change in the procedure for requesting authorization, which now comprises two discrete phases, a first phase of 30 working days and a second phase of 45 working days.

■ **Merger control:** if the transaction is subject to merger control, the timetable is tightly regulated, and the procedure must be monitored in parallel with the control of IEFs.

How do you handle this issue in the transaction documents?

■ **IEF :** If this issue has not been fully addressed in advance, it is usual to include a condition precedent in the transaction documents. This clause must be drafted with due care, because the authorization granted by the Minister of the Economy, Finance and Recovery may be a conditional one.

■ **Merger control:** as for the control of EFIs, it is essential to insert a condition precedent providing that the transaction must be validated by the competent competition authority or authorities, as well as a clause governing the exchange of information in the event of notification, or if the "Article 22 referral" procedure is triggered.