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ANTITRUST CLIENT BRIEFING

Does the EC's Decision on *Aegon* Signal the Renaissance of Article 21 EUMR?

Companies contemplating concentrations at risk of undue national intervention should consider using the protections afforded by Article 21 EUMR.

March 2022

The Development

On 21 February, the European Commission (Commission) determined that Hungary's decision to block the acquisition of the Hungarian subsidiaries of Aegon Group by Vienna Insurance Group AG Wiener Versicherung Gruppe (VIG) constituted a breach of Article 21 of the EU Merger Regulation (EUMR) (Decision).[1]

The Decision is of material significance as it marks the first time in 15 years that the Commission has used Article 21 EUMR.[2]

Background

In August 2021, the Commission cleared the acquisition by VIG of sole control over entities of Dutch Insurer Aegon in a number of European countries.[3] VIG is the holding company of Vienna Insurance Group, an international insurance group offering life and non-life insurance, mainly in Central and Eastern Europe.

The Commission concluded that the concentration did not raise any competition concerns, taking into account a number of factors, including the limited combined shares of the parties post-transaction and the existence of well-established players that could effectively constrain the merged entity.

However, a few months before clearance by the Commission, Hungary blocked the concentration based on emergency amendments to its Foreign Direct Investment (FDI) screening legislation — which was introduced on 8 April 2021 during the COVID-19 pandemic — arguing that the concentration threatened its legitimate interests.

In October 2021, the EC opened an investigation to determine whether Hungary had breached Article 21 of the EUMR.[4]

Article 21 EUMR

In accordance with Article 21 EUMR, the Commission has exclusive competence to examine concentrations with a Union dimension.

Member States cannot apply their national merger regimes to such concentrations or undermine the Commission's exclusive jurisdiction in any way, unless the measures in question: (i) protect legitimate interests other than those covered by the EUMR and (ii) are compatible with the general principles and other provisions of EU law.

Public security, plurality of the media, and prudential rules are recognised as legitimate interests. Member States may take measures to protect such interests without prior notification to the Commission, but they need to ensure that the measures are "necessary and proportionate for the protection of any interest".[5]

The Member State concerned must communicate any other public interest[6] to the Commission, which the Commission shall recognise after an assessment of its compatibility with the general principles

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and other provisions of EU law before the measures referred to above may be taken. The Commission shall inform the Member State of its decision within 25 working days of that communication. In the meantime, the Member State cannot take any measure to protect such interests until they have been recognised by the Commission.

The Court of Justice has recognised that the Commission may also adopt decisions declaring a breach of Article 21 in the absence of any communication by the Member State.[7]

In the case at hand, Hungary — according to the Commission's findings — failed to comply with its obligations, as it neither communicated nor justified its decision before implementing the veto.

Moreover, following the investigation, the Hungarian authorities justified the veto alleging the need to protect a fundamental interest of society. However, the Commission considered that Hungary's explanations were inadequate and fell short of being considered a legitimate interest, given that VIG and Aegon are well-established EU insurance companies with an existing presence in Hungary.

The Commission's Decision orders Hungary to withdraw its veto by 18 March 2022. In the event that Hungary fails to implement the Decision, the Commission may initiate an infringement procedure before the Court of Justice. The parties could also directly invoke the Decision before national courts.

Practical Significance

The *Aegon* Decision proves that the Commission is determined to implement Article 21 EUMR and defend the one-stop-shop principle of EU merger control. In order for the parties to complete their envisaged transaction, Hungary would need to withdraw its veto.

The importance of the *Aegon* Decision cannot be overestimated. At a time when FDI regimes are on the rise[8] and Member States are increasing their parallel assessments of concentrations with a Union dimension, the risk that national interests are outweighed and the effectiveness of EU merger control is undermined is particularly high. Indeed, the Commission must ensure that the boundaries of the recognised legitimate interests (public security, plurality of the media, and prudential rules) are not pushed beyond their limits. In order to guarantee the *effet utile* of Article 21(4) EUMR, Member States must also notify measures when there are serious doubts as to whether national measures liable to prohibit, submit to conditions, or prejudice a concentration with a Union dimension that genuinely aims to protect a recognised interest and/or comply with the principles of proportionality and non-discrimination.[9]

For merging companies, rigorous enforcement of Article 21 EUMR by the Commission might provide a safeguard against undue interventions from Member States, either imposing conditions to the merger or directly blocking the transaction, as was the case in Hungary. Concentrations in areas in which national interests may play a particular role, such as energy, transport, health care/pharma, IT, or telecoms, might be particularly affected.

Companies contemplating concentrations that could be at risk of undue national intervention should meticulously consider at an early stage of their transaction planning whether they might be able to structure their transaction to qualify for EU assessment. This would allow them to trigger the

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Commission intervention against undue measures imposed by a national authority and could eventually lead to the adoption of a decision under Article 21 declaring these measures void and requesting the MS to withdraw them. Such mechanism is not available for transactions under merger review at national level.

Contacts

If you have questions about this briefing, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Carles Esteva Mosso
carles.estevamosso@lw.com
+32.2.788.6266
Brussels

Werner Berg
Knowledge Management Counsel
werner.berg@lw.com
+32.2.788.6151
Brussels

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[1] Case M.10494, *VIG / AEGON CEE*, Commission Decision of 21 February 2022.

[2] The last time the Commission made use of Article 21 EUMR was in 2007 (Case COMP/M.4685, *Enel / Acciona / Endesa*, Commission Decision of 5 December 2007).

[3] Namely, Hungary, Poland, Romania, and Turkey.

[4] In parallel, VIG appealed the veto of the Hungarian authorities before the Court of Budapest. The appeal was dismissed by the lower court, being appealed before the Supreme Court. VIG also asked the Supreme Court to request a preliminary ruling on the application of Article 21(4) EUMR. Thus, it is likely that the case will be referred to the Court of Justice of the European Union in Luxembourg.

[5] Case COMP/M.4197, *E.ON/Endesa*, Commission decision of 20 December 2006, para. 56.

[6] In its past decisional practice, the Commission has recognised other interests as legitimate, such as the regulated prices in utilities as established by the Water Industry Act (Case No IV/M.567, *Lyonnaise DesEaux /Northumbrian Water*, Commission Decision of 21 December 1995, para. 7).

[7] For instance, in *Secil/Holderbank/Cimpor* dealing with the joint takeover by Swiss Cement group Holderbank and the Portuguese cement group Secil of another Portuguese cement producer, Cimpor, the Court of Justice concluded that the Commission was entitled to adopt Article 21 decisions declaring a public interest incompatible with EU law even in the absence of such communication by the Member State (Judgment of the Court of Justice of 22 June 2004, *Portugal v. Commission*, case C-42/01, para. 36).

[8] For instance, to name a few examples, Italy has just extended its special FDI powers through 2022, broadening the scope of sectors under scrutiny during the pandemic. Equally, Germany has also broadened the scope of what is understood as critical infrastructure under its FDI regime, having clear implications on the scope of FDI screening.

[9] Case COMP/M.4197, *E.ON/Endesa*, Commission decision of 26 September 2006, para. 25.

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