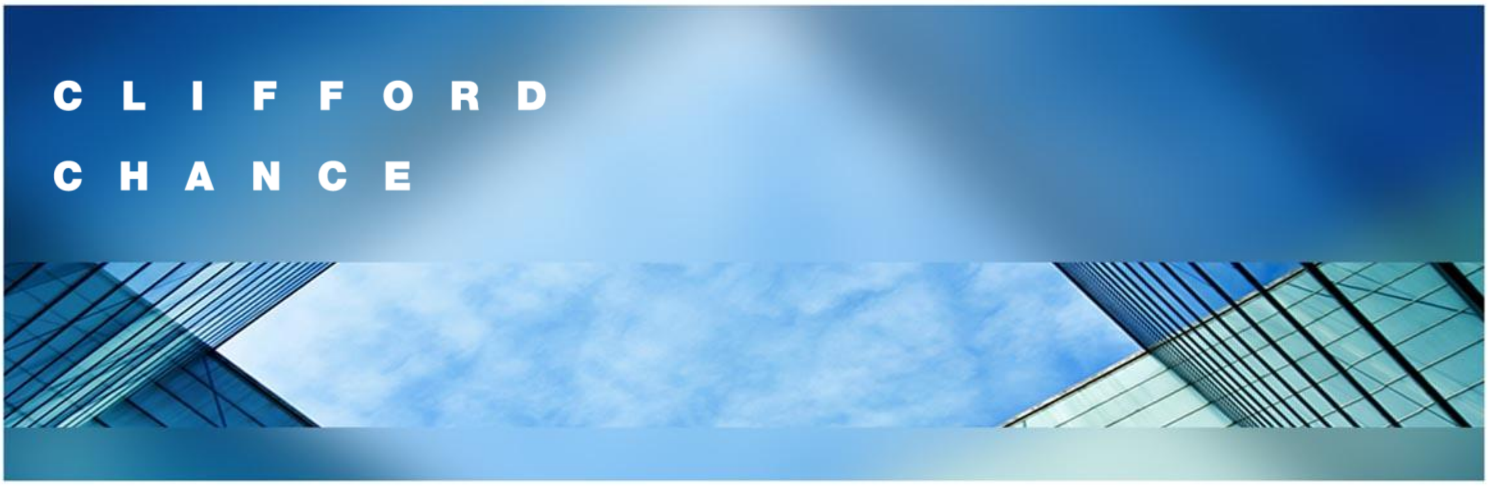

INTERPLAY OF EU MERGER CONTROL AND FDI REVIEW: IMPLEMENTATION OF NATIONAL FDI SCREENING REGIMES HAVE TO COMPLY WITH EU LAW

The European Commission (**the Commission**) has concluded that Hungary breached Article 21 of the EU Merger Regulation (**EUMR**) by vetoing the acquisition of AEGON's Hungarian subsidiaries by VIG on the basis of its national foreign direct investment (**FDI**) screening framework. The Commission reaffirmed the primacy of EU law over national law and its exclusive competence to assess transactions with an EU dimension.

As presented in detail in our blog article, on 29 October 2021, the Commission opened an investigation against Hungary to determine whether it breached Article 21 of the EUMR by vetoing the acquisition of AEGON's Hungarian subsidiaries by VIG (**the acquisition**) based on the Hungarian temporary FDI screening rules adopted during the COVID-19 pandemic. The acquisition was cleared by the Commission unconditionally under the EUMR. After reviewing Hungary's views, the Commission concluded on 21 February 2022 that Hungary infringed Article 21 of the EUMR, given that (i) it did not communicate its veto prior to its implementation and (ii) its veto was not justified based on legitimate interests nor suitable and proportionate, breaching one of the four fundamental freedoms under EU law, the freedom of establishment. The full text of the Commission's decision is not publicly available yet.

In the meantime, VIG, in an effort to close the acquisition, pending the judgement of Hungary's Supreme Court on the national veto, signed a memorandum of understanding (**MoU**) with Hungary agreeing that the latter would acquire a 45% minority state in Aegon and VIG's Hungarian subsidiary, Union Biztosito for EUR 350 million through a VIG / AEGON joint venture.

This briefing provides an overview of the events leading up to the Commission's decision and analyses the interplay between the Commission's exclusive competence to review transactions with an EU dimension and the Member State's competence to implement their national FDI screening mechanisms, within a context of an increasingly high-level of scrutiny over mergers and acquisitions.

Key issues

- The Commission found that Hungary breached Article 21 of the EUMR by vetoing a transaction with an EU dimension without getting the Commission's prior approval, while at the same time breaching the freedom of establishment.
- Member States have to comply with basic principles of EU law, when applying their national FDI screening rules.
- Article 21 of the EUMR confers upon the Commission an additional and expeditious tool to ensure compliance with such principles in the context of transactions subject to the Commission's exclusive competence under the EUMR.
- The assessment of a transaction under the merger control and national FDI screening rules may lead to different outcomes creating legal uncertainty, additional costs and delay to investors.
- The precedent could be perceived as a step towards further harmonisation of national FDI regimes and shows the increasingly high level of scrutiny companies have often to deal with when deciding to proceed with a transaction.

ARTICLE 21 EUMR

Article 21 of the EUMR provides that the Commission has exclusive competence to examine transactions with an EU dimension. That said, it stipulates that Member States may nevertheless "*take appropriate measures to protect legitimate interests*" such as public security, plurality of the media or prudential rules as long as they are compliant with EU law. Any other public interest must be communicated to and recognised by the Commission prior to any such measures being implemented by the Member State. Any measure must in turn be genuinely aimed to protect the alleged legitimate interest and be compliant with EU law. It is for the Commission to assess the compatibility of the measures claimed to be in the Member State's legitimate interests with EU law.

COMMISSION'S ASSESSMENT AND DECISION

Hungary vetoed the acquisition arguing that it threatened its legitimate interests on the basis of the national FDI regime. It is worth noting that Hungary amended its FDI screening rules to include the insurance sector around the time of the announcement of the acquisition.

The Commission assessed two questions: (i) did the veto aim at the protection of Hungary's legitimate interests within the meaning of the EUMR and (ii) was the veto compatible with EU law.

Regarding the first question, the Commission concluded that Hungary failed to adequately demonstrate how the acquisition could threaten a fundamental interest of society, especially given that both the acquirer and the target are well-established EU companies with an existing presence in Hungary. Accordingly, Hungary should have communicated its intention to veto the acquisition prior to its implementation and by failing to do so Hungary infringed its obligations under Article 21 of the EUMR.

As for the second point, the Commission considered that the veto restricted VIG's right to engage in a cross-border transaction, breaching EU rules on freedom of establishment. The Commission found that Hungary failed to show that this veto was justified, suitable and proportionate. Accordingly, the veto was incompatible with EU law and therefore infringed Article 21 of the EUMR.

Hungary will have to withdraw its veto by 18 March 2022 and if it fails to do so, the Commission may decide to launch an infringement procedure before the Court of Justice under article 258 of the TFEU.

It will be interesting to see to what extent VIG will attempt to terminate its MoU with Hungary, in view of the recent developments.

KEY TAKEAWAYS

14 years after its last Article 21 decision, this is the first time that the Commission has applied this provision within the FDI context. The Commission's decision sets a key precedent to be considered by Member States when applying their national FDI regimes.

While the EU FDI Screening Mechanism in Regulation 2019/452 provides a first step towards coordination of the various national FDI processes within the EU, FDI screening remains the competence of the Member States, which have the decision-making power to impose remedies or even block a transaction. It is implicit in the Commission's decision that it did not consider the acquisition to affect Hungary's national security or public order, in light of the factors that the

FDI Screening Regulation lists as relevant considerations, such as the effects on critical financial infrastructure and a buyer's access to sensitive information. Nevertheless, Member States have to comply with basic principles of EU law when applying their national FDI screening rules.

Article 21 of the EUMR confers upon the Commission an additional and expeditious tool to ensure compliance with such principles in the context of transactions subject to the Commission's exclusive competence under the EUMR.

In this context, the decision indicates the Commission's willingness to use Article 21 to evaluate the soundness of a Member State's administration of its FDI screening process and its compatibility with EU law

Furthermore, the enforcement of Article 21 in the FDI context may be perceived as an attempt by the Commission towards further harmonisation of national FDI legislations.

By reaffirming the primacy of EU law over all national rules, it sends a strong signal to the Member States to question their implementation of FDI rules from the perspective of the general principles of EU law. It remains to be seen to what extent Member States will assess their FDI mechanisms in light of this precedent, making sure they are in line with the relevant EU law provisions and if not, proceed with the relevant amendments.

It would be interesting to see whether an investigation would have a similar outcome in cases involving non-EU investors and, in particular, to what extent and how the Commission would, regardless of any procedural Article 21 violation, invoke the EU fundamental freedoms

Towards these efforts, the Commission, which previously underlined that "*Member States must ensure that their actions respect this division of competence, so that businesses can invest and make use of the single market with confidence*", seems to be willing to indirectly frame the national FDI regimes to avoid national decisions that would contravene basic principles of EU law. The Commission's decision implies that, in certain circumstances and in particular if vetoes cannot be justified on national security or public order grounds, parties to a transaction can seek legal recourse at EU level, before accepting remedies or adjusting their deals under the pressure of the host Member State.

Finally, the precedent demonstrates clearly the increasingly high level of scrutiny companies have often to deal with when deciding to proceed with a transaction. EU rules and the oversight of mergers and acquisitions in the EU are undergoing the most significant changes in decades. New and strengthened FDI screening regimes come on top of EU and national pre-closing merger control systems, recently reinforced by the new Commission referrals policy. Investors are generally facing a parallel review of their transaction for merger control and FDI purposes, which, in addition to increased costs, could also lead to different outcomes and increased legal uncertainty. A higher scrutiny is also expected from other EU initiatives, such as the Digital Markets Act proposal or the proposal for ex ante control of certain transactions involving foreign subsidies.

It is key that investors take this into account, when considering a transaction, given the significant impact these regulations may have, inter alia, on the transaction timetable, conditions precedent, remedies, and closing.

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