

## **GLOBAL ANTITRUST/FDI ENERGY SECTOR NEWSLETTER**

### **MAY 2022**

Welcome to the 1st edition of the Clifford Chance Global Antitrust/FDI Energy Newsletter, providing an overview of recent antitrust and foreign direct investment ("FDI") developments of particular relevance to companies active in the energy sector.

#### **INTRODUCTION**

Since the beginning of this year, there has been a spate of new and updated rules and guidance in Europe relevant to the energy sector, including: the new EU guidelines on State Aid for Climate, Environmental Protection and Energy; revised EU State Aid rules on Important Projects of Common European Interest; the entry into force of the First Delegated Act of the EU Taxonomy, on sustainable activities for climate change adaptation and mitigation objectives; the entry into force of the UK's Subsidy Control Act 2022; and the UK's new national security screening regime. In addition, the EU introduced in March 2022 a State Aid Temporary Crisis Framework in direct response to the Russian invasion of Ukraine. In addition to the shocking human toll, the Ukraine war has severely deepened the energy price crisis – initially driven by high economic recovery demand relating to the loosening of Covid-19 restrictions and insufficient supply in conjunction with weather-related factors – and is causing gas prices to jump to near unprecedented highs.

These and other regulatory changes in Europe described below occur in the context of regulators' increasing focus on energy-related antitrust issues and energy policy more generally. This focus is also evident in jurisdictions in Asia Pacific, where, for example, the Australian Competition and Consumer Commission and the Philippine Competition Commission identified the energy sector as key enforcement areas for 2022 and beyond, and in the US where developments in US Congress augur heightened scrutiny of potential gas price manipulation. There has also been recent in-depth scrutiny of oil and gas transactions by US regulators, including an FTC challenge to the EnCap / EP Energy deal.

#### **ASIA PACIFIC**

**Chinese antitrust authority fined Munich Re for failure to file its acquisition of a minority interest in a UK company engaged in waste-to-energy business**

On 14 February 2022, the State Administration for Market Regulation ("**SAMR**") in China fined the German insurer Münchener Rückversicherungs Gesellschaft

This regular newsletter is a digest of key antitrust and FDI developments in the energy sector in the following regions:

- Asia Pacific
- Europe
- Americas

If you would like to know more about the subjects covered in this publication, please refer to the list of contacts on pages 10 and 11.

Aktiengesellschaft in München ("**Munich Re**") for failure to file its acquisition of a 15% interest (a controlling stake) in Covanta Europe Assets Limited. Covanta Europe Assets Limited is a UK company primarily engaged in the waste-to-energy business in Ireland and, based on publicly available sources, appears to have no nexus to China. According to the decision, a China filing was triggered owing to the sales of Munich Re and Green Investment Group (a Macquarie-controlled infrastructure investor which retained its 10% stake in Covanta Europe Assets Limited) in China. Whilst no competition issue was identified, Munich Re was nevertheless fined RMB 300,000 (approximately USD 47,000) for failure to obtain antitrust clearance in China before closing the acquisition. The official penalty decision (in Chinese only) can be found [here](#).

### **Australian antitrust authority includes energy sector among its 2022-2023 compliance and enforcement priorities**

On 3 March 2022, the Australian Competition and Consumer Commission ("**ACCC**") announced its [2022-2023 compliance and enforcement priorities](#) at the annual Committee for Economic Development Australia address. Notably, environmental and sustainability claims related to the energy sector have been identified as one of such area that ACCC will closely scrutinise in the coming years. Competition and consumer issues arising from the pricing and selling of essential services with a focus on energy are also mentioned as one of the enforcement priorities.

### **The Philippine Competition Commission identified the energy sector as one of its key enforcement areas for 2022**

On 10 January 2022, the Philippine Competition Commission ("PCC") published its [2021 Year-end Report](#), which summarizes its intended initiatives in 2022. Energy and electricity were identified as key sectors in which the PCC will ramp up enforcement in 2022.

## **EUROPE**

### **State Aid Temporary Crisis Framework in the context of Russia's invasion of Ukraine**

On 23 March 2022, the European Commission published a new State aid Temporary Crisis Framework to grant aid to companies affected by the crisis, in particular those facing high energy costs. The Temporary Crisis Framework provides for three types of aid under certain conditions:

- *Limited amounts of aid:* Member States will be able to set up schemes to grant up to EUR 35,000 per company affected by the crisis active in the agriculture, fisheries and aquaculture sectors and up to EUR 400,000 per company affected by the crisis active in all other sectors.
- *Liquidity support in form of State guarantees and subsidised loans:* Member States will be able to provide subsidised State guarantees, to ensure banks keep providing loans to all companies affected by the current crisis, and public and private loans with subsidised interest rates, subject to conditions in particular related to the loan's overall amount or minimum margins / premiums.
- *Aid to compensate for high energy prices:* Member States will be able to partially compensate companies, in particular intensive energy users, for additional costs due to exceptional gas and electricity price increases. This support can be granted in any form, including direct grants with the overall aid per beneficiary not exceeding 30% of the eligible costs and up to a maximum of EUR 2 million at any given point in time. Member States may grant aid exceeding these ceilings, up to EUR 25 million for energy-intensive

users, and up to EUR 50 million for companies active in specific sectors, such as production of aluminium and other metals, glass fibres, pulp, fertilizer or hydrogen and many basic chemicals.

The Temporary Crisis Framework will be in place until 31 December 2022, although an extension cannot be excluded. Further, State aid measures covered by this Framework may be cumulated with aid granted under the COVID-19 Temporary Framework, provided their respective cumulation rules are respected.

Several Member States, such as Italy, Germany and Spain, have already adopted State aid schemes to support the companies impacted, which have been swiftly cleared by the European Commission.

For a more detailed summary of the Framework and the RePowerEU Communication, see Clifford Chance's client briefing [here](#).

### **New EU Guidelines on State Aid for Climate, Environmental Protection and Energy**

In January 2022, the European Commission formally adopted the new [Guidelines on State aid for climate, environmental protection and energy](#) ("CEEAG"), which replace the 2014 Energy and Environmental State Aid Guidelines ("EEAG"), extending the scope to new areas such as hydrogen, clean mobility, circularity, energy efficiency and biodiversity in line with the EU 2030 and 2050 climate targets. The CEEAG provide guidance on the criteria that must be met in order for the EC to approve State aid in the energy and environmental sectors. The guidelines expressly exclude aid for the manufacture of environmentally friendly products, research & development, agriculture/forestry and fishery/aquaculture, and nuclear energy. In addition, natural gas projects are in principle not eligible for aid under the CEEAG, unless they meet certain exceptions, such as creating no lock-in effects (e.g., by virtue of binding decarbonisation targets or commitments).

Apart from significantly widening the scope of the guidelines compared to their predecessor, the CEEAG introduce several new elements, including a requirement for ex-ante public consultations for certain types of aid (e.g., relating to renewable energy), carbon contracts for difference as an aid to decarbonisation, reductions from electricity levies for energy-intensive users, and mandating competitive bidding as the default mechanism for aid allocation.

In brief, the CEEAG open the door to granting aid to more categories of environmental and/or energy projects, through a wider variety of aid instruments. The CEEAG will apply to the European Commission's decisions on aid in these categories going forward, while EU Member States must adapt their existing support schemes to comply with the CEEAG by 2024.

For a more detailed summary of the CEEAG, see Clifford Chance's client briefing [here](#).

### **Revised EU State Aid Rules on Important Projects of Common European Interest**

Important Projects of Common European Interest ("IPCEI") are transnational projects of strategic significance for the EU. In January 2022, new criteria for the assessment of the circumstances in which Member States can support IPCEIs through State aid entered into force, as set out in the European Commission's [Communication](#) on IPCEIs.

Under the revised State aid rules, candidate projects must: i) represent a concrete, clear and identifiable important contribution to the EU's objectives or strategies and must have a significant impact on sustainable growth; ii) demonstrate that it is designed to overcome important market or systemic failures; iii) be of wider relevance and application to the economy / society through positive spill-over effects; iv) ordinarily involve at least four Member States; and v) involve important co-financing by the beneficiary.

To date, more than 20 Member States have selected hydrogen projects that could receive State aid as IPCEIs, if approved by the European Commission. There are currently pre-notification contacts ongoing between the European Commission and Member States and, if the candidate projects meet IPCEI criteria, Member States will have to submit a notification to the European Commission of the aid scheme they are willing to grant to be assessed under the revised IPCEI Communication. If a project does not meet the IPCEI criteria, the compatibility of the aid will be assessed under the CEEAG (see above).

For a more detailed summary of the revised Communication, see Clifford Chance's client briefing [here](#).

### **Updated EU Guidance on Sustainability in Draft Revised Horizontal Guidelines and in Revised Vertical Guidelines**

On 1 March 2022, the European Commission [published](#) its draft revised Horizontal Guidelines and Block Exemption Regulations on Research & Development (R&D) and Specialisation agreements and invited interested stakeholders to provide feedback on its proposals.

A significant change in the revised Horizontal Guidelines is the addition of a new chapter providing guidance on the assessment of sustainability agreements under Article 101 of the Treaty on the Functioning of the European Union (TFEU). In its evaluation of the existing rules, the European Commission found that the current texts are not sufficiently adapted to recent developments in society, such as the pursuit of sustainability objectives, and recognises that "*[p]ro-competitive horizontal cooperation in the form of R&D and specialisation agreements covered by [the Horizontal Block Exemption Regulations] is essential for the digital and green transition.*" (see paragraphs 2 and 6 of the European Commission's overview of main proposed changes).

In the new chapter, sustainability agreements are defined as "*any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation.*" Indeed, the European Commission clarifies that sustainability agreements are not considered as a distinct type of horizontal agreements and that where a sustainability agreement concerns a type of cooperation described in any of the preceding chapters of the draft Guidelines, its assessment will be governed by the principles and considerations set out in those chapters, while taking into account the specific sustainability objective pursued.

The European Commission's new chapter provides guidance on the types of sustainability agreements that are unlikely to raise any competition concerns and on those that could be deemed to fall within the scope of Article 101(1) TFEU as well as the situations in which the latter may qualify for an individual exemption under Article 101(3) TFEU. The chapter also specifically discusses and provides guidance on the assessment of agreements that set sustainability standards as an example of a frequently encountered type of cooperation pursuing sustainability objectives.

Sustainability objectives are also reflected in the revised Vertical Guidelines adopted on 10 May 2022.

Mirroring the revised Horizontal Guidelines, the revised Vertical Guidelines also clarify that vertical agreements which pursue sustainability objectives are not a distinct category of vertical agreements and will benefit from the revised Vertical Block Exemption Regulation provided that they meet the conditions established

therein. The revised Vertical Guidelines also include examples to illustrate the assessment of vertical agreements pursuing sustainability objectives.

### **The EU Taxonomy Regulation and Delegated Acts**

The EU Taxonomy is a classification system establishing a list of environmentally sustainable economic activities. Under the EU Taxonomy Regulation 2020/852, the European Commission had to define technical screening criteria for each environmental objective through delegated acts. The first [Delegated Act](#) on sustainable activities for climate change adaptation and mitigation objectives entered into force on 1 January 2022, setting out greenhouse gas ("GHG") emissions thresholds relating to the production of hydrogen and hydrogen-based fuels. The GHG emissions threshold for hydrogen production is set at 3 tCO<sub>2</sub>e/tH<sub>2</sub> on a lifecycle basis rendering green hydrogen and carbon-efficient blue and turquoise hydrogen taxonomy-aligned. Lifecycle GHG emissions savings shall be calculated using the methodology that will be set out in the upcoming Delegated Act under EU Directive 2018/2001 ("RED II") which is expected to be published on 18 May 2022.

On 2 February 2022, the European Commission approved in principle a Complementary Taxonomy [Delegated Act](#) which includes, under strict conditions, specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy. In essence, natural gas-related activities can be considered sustainable if either i) the lifecycle GHG emissions of the gas-fired facility are lower than 100 g CO<sub>2</sub>e/kWh; or ii) the gas-fired facility for which the construction permit is granted by 31 December 2030 complies with a set of stringent conditions, such as that the new gas-fired facility will have to replace an existing coal-fired or oil-fired facility. Regarding nuclear energy activities, the Complementary Delegated Act covers, among other things, the construction and safe operation of new nuclear power plant projects for energy generation, which will be using best-available existing technologies (*i.e.*, Generation III+), allowing for the power generated to be used for the production of hydrogen (*i.e.*, pink hydrogen). If no objection is raised by the European Parliament or the Council within four months of notification a period of four months of notification of the Complementary Delegated Act to them, the Act will enter into force.

### **The UK's national security screening regime is now in full effect**

The UK's national security screening regime came into effect on 4 January 2022, which gives the UK Government the power to review certain acquisitions, investments, and intra-group restructurings for national security risks. It also allows the UK Government to impose remedies to address national security concerns, including forced divestments and unwinding of transactions.

The new rules impose mandatory filing obligations for investments in entities with specified activities in [17 sensitive areas of the UK economy](#) (with fines and criminal liability for failure to notify or completing without clearance). Two of these areas (energy and civil nuclear) are of particular importance to the energy sector as they cover activities and information related to energy network operation, electricity generation, and the production, transportation, and processing of fuel supplies. Qualifying transactions that do not trigger a mandatory filing obligation can be notified on a voluntary basis or called in for review by the UK Government, however the call-in risk is expected to be low for transactions outside of the 17 mandatory notification sectors. This means there is a risk that transactions in the wider energy sector could be called-in by the Government even if no mandatory notification is required.

Parties to transactions in the energy sector will need to take account of the new regime and, where relevant, factor the need for clearance into deal timetables.

For more information, please see our dedicated client briefing [here](#).



### **The UK's Subsidy Control Act 2022 has become law**

The Subsidy Control Bill, which fleshes out the UK-specific subsidy control regime that has been in place since EU State aid rules ceased to apply on 1 January 2021, received Royal Assent on 28 April 2022 and has become an Act of Parliament.

The Act broadens the UK's post-Brexit subsidy control regime to encompass competition and investment within the UK as well as trade and investment with non-EU countries, which are intended to strengthen the UK's internal market and ensure that the UK meets its obligations under international agreements (such as the WTO Agreement on Subsidies and Countervailing Measures). It requires public authorities to only give subsidies that are consistent with a set of principles set out in the Act (including an additional set of principles for subsidies in relation to energy and environment, excluding nuclear energy). The Act also gives the Competition and Markets Authority ("**CMA**") a role in the assessment of certain subsidies that are granted by UK bodies; however, this role is purely advisory, with enforcement of the regime remaining the sole preserve of the courts.

The Government published [illustrative regulations and guidance](#) in relation to the Act (then the Subsidy Control Bill) in January 2022, which will need to be issued in final form before the regime can take effect. The illustrative regulations provide that subsidies in the energy sector that would qualify as "of interest" or "of particular interest", which would give the CMA powers to opine on those subsidies, will be limited to certain schemes affecting the production of electricity (and not, for example, the transmission or distribution of electricity). Other important aspects of the regime (such as the monetary thresholds for schemes subject to the regime) are expected to be finalised in the coming months, and the new regime is expected to come into force in Autumn 2022.

### **Sustainability remains a key area of focus for the UK's CMA**

In March 2022 the CMA published its [Annual Plan for 2022/23](#), which confirms that sustainability will remain a top priority for the CMA for the foreseeable future.

The CMA recently [advised the Government](#) that it does not see the need for immediate, significant changes to the UK's competition and consumer laws in order to better support the UK's net zero and sustainability goals. However, it proposed a range of important measures to increase the beneficial impact of the existing competition law framework, such as increased stakeholder engagement, launching a Sustainability Taskforce within the CMA, publishing formal guidance on sustainability agreements, and launching at least one market study in a net zero related market in its next financial year.

The CMA also provided its views on how environmental benefits arising from a particular agreement can be offset against potential harm to consumers through losses of competition – in particular what constitutes a 'fair share' of benefits to consumers. Whilst the CMA did confirm that sustainability benefits to a wider group of consumers can be taken into account, it found that consumers which suffer harm as a result of any loss of competition must be fully compensated. This is generally consistent with the position of the European Commission, though the CMA stressed that there is scope for divergence from EU precedent going forward following the UK's departure from the EU.

## Reforms to UK competition and consumer policy

The UK Government published its highly anticipated [British Energy Security Strategy](#) in April 2022 (see our briefing [here](#) which discusses the key highlights), which includes a commitment to set up a new and independent Future Systems Operator (FSO) that is intended to take an increasingly significant role in shaping the energy system and promoting competition in the energy sector. Whilst the FSO is unlikely to be established before 2024 and its specific role has not yet been determined, we expect it could play a role in developing commercial models and tender processes to promote competition in nascent markets such as hydrogen and carbon capture, usage, and storage. We expect that the UK Government will also monitor competition across more established energy markets with a view to ensuring that it meets its net zero target.

On 20 April 2022, the UK Government announced a broad set of separate [reforms to its competition and consumer protection regimes](#) to help the UK Government progress its "levelling up" agenda, by fostering competition and reducing burdens on the private sector. Whilst many core aspects of the UK's competition law regime will remain unchanged, the proposed reforms are intended to boost the CMA's enforcement powers across the board (including for market inquiries, merger control reviews, and antitrust investigations) and increase the efficiency and flexibility of the CMA in promoting competition in the digital age.

One of our key takeaways is that the UK Government considers that market inquiries (such as the recent [energy market investigation](#)) are significantly underutilised and that more active intervention by the CMA, and potentially industry regulators such as Ofgem, may be necessary going forward. The UK Government also proposes to take a more active role in setting the strategic direction for setting competition policy, in particular by issuing clearer and more regular non-binding "strategic steers" to the CMA about the UK Government's priorities. These will be informed by "State of Competition" reports that the CMA will prepare for the UK Government (albeit with no additional information-gathering powers), which will be similar in nature to the latest [State of UK Competition Report](#) published on 29 April 2022.

For further information on the UK Government's announcements regarding reforms to competition and consumer policy, please see our dedicated Clifford Chance briefing [here](#).

## AMERICAS

### US Federal Trade Commission ("FTC") challenges EnCap / EP Energy transaction, requiring divestiture

In March 2022, the FTC [required](#) the divestiture of energy producer EP Energy Corp.'s entire business and assets in Utah, "*resolving allegations that EnCap Energy Capital Fund XI, L.P.'s proposed \$1.445 billion acquisition of EP Energy Corp. would eliminate head-to-head competition between two of only four significant producers and otherwise harm competition for the sale of Uinta Basin waxy crude oil to Salt Lake City refiners.*" The divestiture buyer "*is an experienced operator in crude oil and natural gas production, and it will be a new competitor in the Uinta Basin.*"

### In-Depth Reviews by US Regulators of Transactions in the Energy Sector

In October 2021, Reuters [reported](#) that "*U.S. antitrust regulators [had] extended the approval process for at least five oil and gas mergers and acquisitions in the last three months.*"

In August 2021, FTC Chair Lina Khan had written to the director of the National Economic Council that the FTC would scrutinize consolidation among gas station operators and also look at dealmaking in the energy industry more broadly.

In spite of the in-depth reviews in the form of second requests, several of the transactions ultimately went unchallenged, including ConocoPhillips's acquisition of Royal Dutch Shell's Permian Basin assets (for USD 9.5 billion), HollyFrontier's purchase of Sinclair Oil (for USD 2.6 billion) and pipeline operator Energy Transfer LP's proposed takeover of Enable Midstream Partners LP (for USD 7.2 billion). However, Vertex Energy abandoned its attempted sale of motor oil collection and recycling assets to Safety-Kleen Systems Inc (for USD 140 million), citing the cost of regulatory review, and as mentioned above, the FTC did challenge the EnCap / EP Energy deal.

### **FTC approves modification of order imposed on DTE Energy Company in 2019**

In November 2021, the FTC [announced](#) its approval of a petition by DTE Energy Company to reopen and modify the FTC's 2019 final order following the acquisition by NEXUS Gas Transmission (a natural gas joint venture between DTE and Enbridge Inc.) of Generation Pipeline LLC. The order had required the parties to remove a non-compete clause from the sales agreement and prohibited Nexus, DTE, and Enbridge from "*participating in any agreement that restricts competition with another provider of natural gas pipeline transportation*" in parts of Ohio. After DTE spun off its "*non-utility natural gas pipeline, storage, and gathering business*" (including its interest in Nexus), it no longer had any natural gas pipeline transportation assets or business in the area, and its successor agreed to be bound by the order. Therefore, DTE was released from the order's obligations.

### **Private Litigation Regarding Rate Changes in Electricity Pricing**

In the consumer lawsuit, *Ellis v. Salt River Project*, against the Salt River Project, an Arizona utility, consumers alleged that the Salt River Project had issued a rate change that discriminated against customers who received part of their electricity from home-installed solar and part from Salt River Project. The case was dismissed on several procedural grounds, including antitrust injury; on 31 January 2022, the Ninth Circuit affirmed in part and reversed in part, holding that antitrust injury had been adequately pleaded. The case is now back at the District Court for the District of Arizona (further information can be found at [Law360](#)).

### **Developments in US Congress Signal Potential Scrutiny of Gas Price Manipulation**

On 21 April 2022, several Democratic legislators introduced legislation that would require the FTC to investigate whether major oil companies are manipulating gasoline prices. [The Oil and Gas Industry Antitrust Act](#) calls for probing market conditions in the liquid fuel energy sector and considering a long-term strategy to stabilize prices during national crises. The proposed legislation is the most recent in a series of efforts by Democrats to cast a spotlight on the oil sector, which some members have accused of taking advantage of the war in Ukraine through price gouging. As with many previous sector inquiries Industry representatives said the increases are driven by tight crude oil markets, and that they have no control over retail prices.

In a separate but related development of interest, on 6 April 2022, oil and gas executives (from BP, Chevron, and ExxonMobil, among others) testified before Congress about high gasoline prices (further information can be found at [ABC News](#), [Time](#)).



### **FTC Annual Report on Ethanol Market Concentration**

On 1 December 2021, the FTC [issued](#) its **2021 Report on Ethanol Market Concentration**, in accordance with a statutory directive to perform an annual review of market concentration in the ethanol production industry. As in prior years, the 2021 report concludes that "*[t]he low level of concentration and large number of market participants in the U.S. ethanol production industry continue to suggest that the exercise of market power to set prices, or coordinate on price or output levels, is unlikely on a nationwide basis.*"

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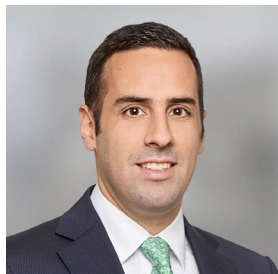
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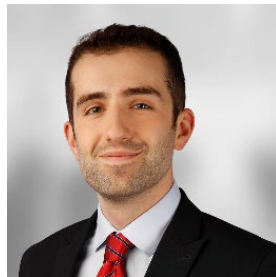
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