KROMANN REUMERT

MERGER CONTROL: AN AREA OF CONTINUING FOCUS

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Breach of the procedural rules in merger control cases has lately been an area of increasing focus for the European Commission and the Danish Competition and Consumer Authority. Two recent fines serve two emphasize the regulatory focus on the area. Below we describe the background for the two fines and give an update on the latest prohibition cases.

By assistant attorney Andreas Riis Madsen

Circle K fined by the Danish Competition and Consumer Authority

On 4 October 2018, Circle K notified the Danish Competition and Consumer Authority of its acquisition of tools, equipment, inventory, employees, goodwill, etc. related to 72 gas stations from 12 different lessees (who had previously been leasing the stations under the Shell brand). On 22 October 2018, the Danish Competition and Consumer Authority approved the acquisition without remedies.

However, Circle K had already in May 2016 entered into transfer agreements with said lessees and terminated their leases following the European Commission's approval in March 2016 (with remedies) of Circle K's acquisition of Dansk Fuel (which constituted Shell's Danish activities).

The acquisition of the aforesaid 72 gas stations from the 12 lessees was not in itself covered by the European Commission's general approval, however, but should have been notified separately to the Danish Competition and Consumer Authority. On 29 May 2019, failing such notification, the Danish State Prosecutor for Serious Economic and International Crime gave Circle K notice of a DKK 6 million fine for having breached the notification requirement and the standstill obligation. Circle K accepted the fine.

Read the fine notice.

This is only the second time that the Danish authorities issue a fine for failure to submit a merger notification. As described by us earlier, in June 2018 SEAS-NVE and SE each accepted a fine of DKK 4 million for not having notified their acquisition of joint control over Clever A/S. It is unclear why the Circle K fine is 50%higher.

Canon fined by the European Commission

In August 2016, Canon notified the European Commission of its intention to acquire Toshiba Medical Systems Corporation ("TMSC"). Accordingly, Canon satisfied the obligation to notify the merger, but was still bound by an obligation not to implement the merger until it had been finally approved (the gun-jumping prohibition).

The Commission approved the merger without remedies on 19 September 2016. However, Canon had already implemented a so-called “warehousing” two-step

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transaction structure involving an interim intermediary that first bought 95% of the shares in TMSC, while Canon bought the remaining 5% of the shares and simultaneously obtained an option for acquisition of the intermediary's shareholding. On receipt of the Commission's approval, Canon exercised that option, thereby acquiring ownership of 100% of the shares in TMSC.

The European Commission found that the model applied constituted a single merger that had been implemented (already by carrying out the first step) before receipt of the Commission's approval. As a result, Canon had breached the notification requirement as well as the standstill obligation. Against that background, the Commission imposed on Canon a fine of EUR 28 million (approx. DKK 210 million). The Commission has thereby definitively and formally decided that it does not accept the so-called "warehousing" transaction model; a model whereby the parties "deposit" the target company with a bank or another interim owner in order to completely indemnify the seller from the risks involved with the outcome of the merger control proceedings (full deal certainty) and thus to leave the distribution of risks to the intermediary and the real buyer.

Read the European Commission's press release.

The fine has no impact on the approval of the merger, which remains in effect. The breach does not affect the substantive assessment of the merger's impact on competition.

An update on prohibition cases – the ultimate consequence of a merger control assessment

A merger control process seldom ends up in a prohibition; if it does, it is usually because the parties do not offer sufficient remedies or because the time-limit for the hearing of the case is exceeded. Since the merger control rules were introduced in Denmark in 2000, the Danish competition authorities have only once prohibited a merger, namely the prohibition in May 2008 of Lemvigh-Müller's acquisition of Brdr. A & O Johansen. But there are many examples of merging parties having given up on a merger before the authorities had an opportunity to reach a decision because of the parties' failure to eliminate the regulatory concerns by making remedies.

In a decision of 11 June 2019, the European Commission prohibited the creation of a joint venture between Tata Steel and ThyssenKrupp. The proposed remedies were not considered sufficient to address the concerns identified by the Commission, so the transaction was prohibited.

Earlier this year, on 6 February 2019, the European Commission prohibited Siemens's acquisition of Alstom and Wieland's acquisition of Aurubis. The Siemens/Alstom case was subsequently criticised and discussed in public because, as frequently claimed from many sides, Europe needs European champions to compete with rivals from China and the US. The Wieland case has been brought before the General Court of the European Union.

Since the introduction of the merger control rules, the European Commission has considered approx. 7,400 mergers and has issued 30 prohibitions, including three this year. As is the case in Denmark, the number of cases in which the parties have given up on the planned mergers themselves exceed the number of actual prohibition cases. In the same period, the merging parties have in 44 cases withdrawn their notifications at a late stage in the merger process.