Navigating Luxembourg's new merger control regime: Implications for competition economics

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On 23 August 2023, the Luxembourg Ministry of Economy published the draft Bill of Law No. 8296 (the Bill), establishing a domestic *ex ante* merger control regime and positioning Luxembourg as the final European Union member State to adopt such a framework.

This not only signifies a pivotal shift in Luxembourg's regulatory approach to merger transactions but it compels entities engaging in mergers and acquisitions to integrate meticulous economic analysis as a fundamental component of their transaction planning and execution strategies, as well as due diligence processes to comply with the new legislative requirements once adopted.

The proposed new merger control regime in Luxembourg

Concentrations beyond the scope of Regulation (EU) 139/2004, also known as the EU Merger Regulation, can currently only be subject to controls *ex post* under existing competition laws in Luxembourg, if there is clear evidence of an abuse of dominance resulting from a merger or an acquisition. Hence, the core objective of the Bill is to implement an *ex ante* mechanism under the competence of the Luxembourg Competition Authority (Authority), enabling it to examine whether corporate consolidations could significantly hinder competition within the market before their implementation.

Further, the Bill delineates clear thresholds for compulsory notification of business concentrations, encompassing mergers, acquisitions, and the creation of joint ventures. Specifically, notification is required when (i) the combined turnover of the parties concerned generated in Luxembourg exceeds 60 million €, and (ii) at least two of the parties concerned have generated a turnover of over 15 million € each in Luxembourg. The outlined notification process mirrors the phased review approach of the European Union merger control regime, tailored with lower thresholds to fit the specific context of Luxembourg's market.

Once the notification is performed, structured review process is divided into two main phases:

- ***Phase I***: Luxembourg Competition Authority has 25 business days to perform a preliminary review to assess whether a concentration poses any initial competition concerns, aiming for a swift clearance of transactions unlikely to harm market dynamics.
- ***Phase II***: Should concerns arise, the process advances to Phase II, which involves an additional 90 business-day examination focused on the merger's deeper economic implications, including analyses of market dominance and competition hindrance. It features a more detailed and technical evaluation, using economic analysis to assess the potential impacts of the concentration. This phase allows the parties to propose solutions to mitigate/address identified competition issues, resulting in a decision to either approve, with or without conditions, or prohibit the transaction.

An innovative aspect of the regime is the Authority's capacity to review concentrations that do not meet the above-mentioned thresholds if they are deemed to be a threat to competition, albeit under exceptional circumstances.

The Bill also establishes strict penalties for non-compliance: companies that fail to notify a transaction and/or proceed with a merger without the necessary approval may face fines up to 10% of their total group worldwide turnover, emphasizing the Authority's commitment to enforcing the new regime. There are also additional penalties of up to 1% of global revenue for those who submit false, misleading or incomplete information. This penalty framework underscores the potentially severe financial repercussions for failure to comply, illustrating how breaches of the regulation could be particularly costly for businesses operating within Luxembourg's market.

Therefore, ensuring full compliance and employing rigorous economic analysis to assess the potential impacts of the concentration is crucial for companies to navigate the regulatory landscape and mitigate the risks associated with non-compliance.

Implications for competition economics

Central to this new regime is the role of economic analysis in evaluating mergers, where economic theories and quantitative models are instrumental in assessing the potential impacts of the concentration. The assessment framework leans heavily on criteria designed to evaluate whether a merger significantly impedes effective competition. When undertaking the economic analysis of a merger, several considerations are key for the assessment process. Initially, defining the relevant product and geographic markets is paramount as this shapes the understanding of the merger's landscape, pinpointing where and how the effects of the merger will unfold.

Additionally, a critical element of the assessment is investigating whether the merger could result in the emergence or reinforcement of market power. This analysis seeks to discern whether the merger could create or enhance a position of dominance, a scenario characterized with consequences, such as elevated prices, declining quality, or lower innovation. The central concern is the potential for this concentrated power to distort the competition, disadvantaging consumers.

The assessment of the merger impact requires the use of sophisticated quantitative methodologies. Merger simulations or concentration measures, like the Herfindahl-Hirschman Index, serve as key tools in envisioning potential future market configurations, forecasting the changes in competition that might result from the merger.

Moreover, the analysis could also entertain discussions around the merger's capacity to drive operational improvements and innovations, by unlocking efficiencies and creating consumer benefits.

In essence, the economic analysis undertaken is intricate and highly specialized, blending both qualitative and quantitative assessments through a comprehensive range of theoretical models and empirical techniques of the merger's potential effects on competition, focusing on issues like market concentration, entry barriers, market dynamics, and the potential for anti-competitive outcomes. This complexity and the time required to gather the necessary documents underscore the necessity of not underlooking economic analysis. It should be approached in a timely and thorough manner, involving technical experts to accurately articulate the transaction's impact — or lack thereof — on market competition.

Specific considerations for the Luxembourg market

Recent trends in merger control across Europe have seen heightened scrutiny in sectors, such as digital technology, pharmaceuticals, and energy, driven by their significant impact on competition and consumer welfare. In these industries, the potential for market dominance and the stifling of innovation have prompted regulators to take a closer look at mergers and acquisitions to ensure they do not lead to unfair market practices or are detrimental for consumers.

In Luxembourg, the introduction of the new merger control regime acknowledges these broader European concerns while also considering the local market's unique characteristics. It appears that the Bill – by providing notification thresholds based on the turnover generated in Luxembourg – focuses on transactions with an impact for the local markets. However, given the country's compact economic landscape, there's an amplified risk for companies to quickly assume dominant positions. Hence, the Bill provides for rather low notification thresholds, since the limited number of players in Luxembourg markets means that any consolidation activity could potentially have a significant impact on competition.

Further, the Bill takes into account the unique aspects of Luxembourg's financial, banking, and insurance industries. It makes exceptions for deals made by investment funds, securitisation funds, investment vehicles, and pension funds, except those related to private equity. Given the potential for significant fines for implementing a transaction before clearance and the detailed pre-notification discussions often required, private equity funds need to carefully plan transaction timelines and consider merger control issues early in the deal process. For private equity transactions, important considerations revolve around issues like the acquisition of control, the calculation of turnover, and the potential for coordinated effects or vertical integration concerns, depending on the structure of the deal and the market impact.

The Bill also includes a specific requirement for the Authority to share information with the financial sector's regulatory body, the Commission de Surveillance du Secteur Financier (CSSF), or the insurance sector's regulatory body, the Commissariat aux Assurances (CAA), if any party involved in the merger fall under the supervision of either authority, as outlined in Article 12 of the Bill. .

Hence, it's often necessary to work with legal and economic experts specialized in EU competition law and merger control proceedings to support the argument that a transaction does not harm competition, and also to structure the deals in a way that minimizes regulatory risks.

Conclusion

In conclusion, the Bill proposing Luxembourg's merger control regime marks a significant shift, underscoring the imperative for entities to diligently and proactively assess their transactions for regulatory compliance. This entails a thorough evaluation to determine if their mergers or acquisitions fall under the regime's scope and necessitate notification. Beyond the procedural requirements, the critical importance of robust economic analysis cannot be overstated. Entities, including private equity funds, must ensure that they have the necessary documentation and analyses prepared in a timely manner to articulate the transaction's impact — or lack thereof — on market competition.

Finally, once the new regulation takes effect, it will be imperative to include Luxembourg in the list of countries screened for competition impact in pan-European/global deals. The reduced thresholds applied in the local draft regulation might prompt an obligation to notify that may goes unnoticed by the involved parties. Failure to comply could result in penalties based on global revenue rather than revenue solely Luxembourg.

La Commission approuve le plan pour la reprise et la résilience modifié du Luxembourg

La Commission a rendu le 23 juillet une évaluation positive du plan pour la reprise et la résilience modifié du Luxembourg, qui comprend un chapitre REPowerEU. Ce plan, désormais doté d'une enveloppe de 241,1 millions d'euros sous forme de subventions, couvre 10 réformes et 13 investissements.

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Le chapitre REPowerEU du Luxembourg consiste en une nouvelle réforme et trois nouveaux investissements visant à atteindre les objectifs du plan REPowerEU consistant à rendre l'Europe indépendante des combustibles fossiles russes bien avant 2030.

Ces mesures mettent l'accent sur le déploiement des énergies renouvelables, l'accroissement de l'efficacité énergétique et le transport durable.

En plus des nouvelles mesures du chapitre REPowerEU, le plan pour la reprise et la résilience révisé acte le retrait d'un investissement et la modification de trois autres. Les changements apportés par le Luxembourg au plan original résultent de la nécessité de tenir compte :

- de circonstances objectives empêchant la réalisation de certains investissements tels qu'initialement prévus, comme des difficultés imprévues d'ordre technique et juridique échappant au contrôle des autorités nationales;
- de la disponibilité de meilleures solutions, plus simples sur le plan administratif, pour concrétiser l'ambition initiale.

Coup de fouet à la transition écologique du Luxembourg

Le plan modifié renforce encore l'accent mis sur la transition écologique, en allouant 80% des fonds disponibles à des mesures qui soutiennent les objectifs climatiques (soit plus que les 69% du plan initial). La nouvelle réforme et les nouveaux investissements figurant dans le chapitre REPowerEU contribuent de manière significative à la dimension écologique du plan.

La réforme, à savoir l'introduction d'une stratégie nationale relative au biogaz, modifie le programme de soutien du Luxembourg en faveur du biogaz et contribue à augmenter la production et l'utilisation de biométhane durable. Les investissements sont des mécanismes de soutien financier destinés à accélérer la transition écologique. Ils couvrent des projets de construction et de rénovation énergétique de logements, l'achat de voitures, d'utilitaires, de cyclomoteurs et de bicyclettes à zéro émission et des centrales électriques photovoltaïques à des fins d'autoconsommation dans les entreprises.

Renforcer la préparation numérique et la résilience sociale du Luxembourg

L'ambition numérique élevée et la dimension sociale du plan sont maintenues. Le plan révisé consacre 37,5% de son enveloppe financière totale au soutien de la transition numérique du pays, soit bien plus que la cible de 20%. Le plan du Luxembourg couvre des mesures visant à numériser l'administration publique et le système de santé, ainsi qu'une infrastructure de communication ultra-sécurisée basée sur la technologie quantique.

La forte dimension sociale du plan est également conservée. Le plan comporte un volet dédié aux compétences, vise des services publics plus efficients et comprend une réforme consacrée aux logements abordables (Pacte logement 2.0).

L'étape suivant l'évaluation par la Commission est l'approbation par le Conseil. La Commission autorisera de nouveaux versements lorsque le Luxembourg aura atteint de manière satisfaisante les jalons et cibles définis dans son plan pour la reprise et la résilience révisé, traduisant les progrès réalisés dans la mise en œuvre des investissements et des réformes.

Source : Commission européenne