Kluwer Competition Law Blog

Competition Law in Times of War: Response to the Russian Invasion of Ukraine

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On 24 February 2022, Russia invaded the territory of Ukraine and triggered the largest European war since 1945. The war has led to unprecedented loss of human lives and the biggest refugee crisis since World Word II, according to the UNHCR. At this stage, the economic impact of the war is difficult to predict. Some early estimates anticipate that only direct budgetary losses of the EU Member States could amount to 1.1-1.4% of the GDP in 2022 alone. Overall, the EU economy will undoubtedly suffer from slower growth and increased inflation.

It is essential to highlight the repercussions of the invasion of Ukraine on the EU economy and the internal market to understand the possible future developments of EU competition law in response to the war. First, the EU industry suffers from the disruption of supply chains, particularly for grains, oils and fertilisers, shortage of raw materials, loss of turnover and decreased demand for some products typically exported to Ukraine. It is caused by the direct military action in Ukraine, the sanctions imposed by the EU and the so-called Russian ‘counter-sanctions’. The impact will be particularly felt by the agricultural, fisheries, food processing and farming industries. Second, the war has led to unprecedented increases in electricity and gas prices, which severely impacts not only energy-intensive sectors such as agriculture and livestock farming but also tourism and transport sectors already hit by the Covid-19 pandemic. Lastly, the financial industry is experiencing liquidity and market volatility concerns due to increasing uncertainty in the market.

State aid

In times of crisis, the EU State Aid framework steps in to guarantee that the internal market is not fragmented and the level playing field is preserved despite the extensive national support measures implemented. Consequently, the most crucial development in the EU competition law regarding the Russian invasion of Ukraine is the European Commission Communication on the “Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia”. It is the third Temporary Framework (TF) issued by the Commission after the Financial Crisis TF in 2008 and the Covid-19 TF (previously covered in our blog here). The new TF serves to provide legal certainty to governments mitigating the adverse effects of the war. While the TF was adopted on 23 March 2022 and no State Aid was notified under the TF so far, the Commission will apply it retroactively from 1 February 2022.

Due to the flexibility of State Aid rules, the Member States have various possibilities to provide support measures in line with the Treaty, notably through support for non-commercial consumers, non-selective measures, or aid to remedy the damage caused by exceptional occurrences, such as the Russian aggression against Ukraine, can qualify for an exception under Article 107(2)(b) TFEU. However, and most importantly, the TF sets out the ground criteria for assessing the State Aid granted to remedy the adverse economic effects of the war under Article 107(3)(b) TFEU since the Russian aggression undoubtedly constitutes 'a serious disturbance in the economy of a Member State' under that provision.

First, the Commission provides for three types of aid to remedy the disturbance of the economy, which it will consider compatible with the internal market:

- Limited amounts of aid in any form. This type of aid is reminiscent of aid granted under Covid-19 TF and can include direct grants and shall be provided to undertakings affected by the crisis based on a scheme with an estimated budget. The overall aid is capped at EUR 400,000 per undertaking. However, for companies active in agriculture, fisheries and aquaculture industries, the aid is limited to EUR 35,000.
- Liquidity support in the form of guarantees or subsidised loans. The Commission included similar provisions in Covid-19 TF. This aid type ensures that the banks can keep providing loans to companies affected by the crisis or offer them at a subsidised rate. The TF sets the minimum rates and caps the total loan amount for small and medium-sized enterprises (SMEs) and non-SMEs. Unlike Covid-19 TF, the Commission immediately allows for such aid to be granted directly to beneficiaries or financial institutions as intermediaries. This type of aid cannot be cumulated with similar aid awarded under the Covid-19 TF.
- Aid for additional costs to cover the increase in gas and electricity prices. This aid type, which was not previously introduced in Covid-19 TF and is specific to the circumstances of the current crisis, will allow the Member States to partially reimburse the increase in gas and electricity costs linked to the Russian invasion of Ukraine. The relative increase will be assessed against double the price of energy units in 2021, and the aid cannot exceed 30% of such increase or a maximum of EUR 2 million per undertaking. The Commission sets higher thresholds of 50% of energy cost and a maximum of EUR 25 million for 'energy-intensive businesses' under the Energy Taxation Directive, which incur significant operating losses due to the increased energy cost. The new TF also allows for a maximum of 70% of energy cost covered by State Aid for the undertakings in sectors particularly affected by the war, listed in Annex I of the TF, e.g., paper, aluminium, copper, iron, and basic chemical industries. Importantly, any aid under this provision may be cumulated with other direct grants and must be granted based on a scheme with an estimated budget.

Second, the Commission imposes additional safeguards for the aid to be compatible with the internal market:

- The aid under the TF must be temporary and can only be granted until 31 December 2022. However, the Covid-19 TF has already been extended six times (as explained in our latest post here or here). The present TF can follow suit in the extension of material or temporal scope if the war continues beyond that period.
- The Commission encourages the Member States to set various requirements on environmental protection or security of supply for granting aid under the TF. This non-binding provision was also present in the Covid-19 TF and served to enhance the objectives of the EU Green Deal.

Competition Law

In light of the economic repercussions of the war described above, companies in the EU will need to implement various measures to mitigate the disruptions to the economy, which can include different forms of cooperation to reduce the negative impact of the war and the EU sanctions and the conclusion of various agreements between undertakings secure the supply and distribution of products in shortage. However, similarly to the Covid-19 crisis, it causes concerns regarding the possible anticompetitive nature of such cooperation.

On 21 March 2022, the European Competition Network (ECN) issued a joint statement on applying competition law in the context of the war in Ukraine. This communication serves to clarify the undertakings facing increasing uncertainty in the market. The main takeaways of this communication may be summarised as follows:

- No general exemption for agreements concluded to mitigate the negative impact of the war or the EU sanctions against Russia and Belarus was discussed. The ECN states that current competition rules can already sufficiently consider this crisis's market and economic circumstances. It aligns with the ECN's early approach to the Covid-19 pandemic and comes with no surprise. As with Covid-19, it remains possible for EU and national competition law to provide for some exemptions at a later stage.
- Similarly to the Covid-19 statement, the ECN again provides generic guidance on conduct likely not to be prohibited under EU competition rules. The ECN reminds us that cooperation in such circumstances may either not amount to a restriction of competition under Article 101 TFEU or may enjoy an exemption under Article 101(3) TFEU or its analogue. The ECN explicitly recognises that the enforcers will 'not actively intervene' should the cooperation be strictly necessary, temporary, and specifically targeted to avoid the disruptions caused by the war or by the EU sanctions. The undertakings will be able to address the enforcers through an informal procedure to ensure compliance with EU competition law. The language of the communication is reminiscent of the rhetoric used in the Covid-19 statement, and undertakings can draw on their previous practices while performing self-assessment or addressing the competition authorities through informal procedures.
- However, one must not expect the competition agencies to abandon their active role in monitoring cooperation between undertakings. The ECN reaffirms that the enforcers will intervene should undertakings form cartels or abuse their dominance by taking advantage of the current economic situation.

In the context of the Covid-19 pandemic, the ECN statement akin to the one at hand was quickly followed by a Commission Communication establishing a "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak". The Commission is likely to introduce a similar communication regarding the Russian invasion of Ukraine in the future.

Lastly, it must be noted that the International Competition Network (ICN), unlike in its previous response to the Covid-19 pandemic, has not issued a statement on competition enforcement and the war in Ukraine. It might highlight that the companies active in the EU are susceptible to more economic repercussions than their peers elsewhere. In a move of solidarity, the ICN has officially excluded the Russian national competition authority (Federal Antimonopoly Service) from its upcoming events.

Merger control

The Commission has not put out any specific guidance on mergers affected by the war, but one could expect a cohesive approach comparable to the merger control during the Covid-19 pandemic. However, the merger control in Ukraine itself is of even greater interest. The merger notification thresholds are historically low, forcing many undertakings to notify in Ukrainian jurisdiction. With the beginning of the war, on 7 March 2022, the Ukrainian competition authority, the Antimonopoly Committee of Ukraine (AMCU), has announced its relocation to Lviv and the suspension of most proceedings, notably the consideration and clearance of notified and prospective mergers. This announcement has caused uncertainty for the undertakings and forced their counsels to ask the AMCU for clarifications on Facebook due to the lack of other means to contact the competition authority.

However, on 30 March 2022, the AMCU has provided more extensive guidance on notifications in times of war. It states that the merger regime in Ukraine does not cease to apply during martial law, and the parties are expected to notify the mergers according to the law. While the competition authority might be unable to review the merger under the statutory deadline, there has been no introduction of tacit clearance. It also does not relieve parties from possible fines due to closing the merger before the clearance. However, the AMCU states that it will be somewhat ‘lenient’ towards mergers notified in due time. Gun-jumping will only entail symbolic fines of around EUR 1,500 if the merger does not give rise to a significant impediment to effective competition. It is understood that the AMCU would only impose a legally required minimum fine, but the law could be amended shortly to allow AMCU to lift the penalties.

Outlook

The adverse effects of the Russian aggression against Ukraine and sanctions imposed by the EU will only increase in the upcoming months. Companies and competition enforcers should be prepared to face a rapidly changing regulatory environment with increasing sanctions, inevitably leading to more cooperation between undertakings. The European Commission and the ECN are well-equipped to tackle the current disturbance of the economy caused by the war. Competition enforcers can operate quickly by drawing on the recent experience with the Covid-19 crisis.

At the same time, the adaptations of EU competition law in crisis remain minimal in line with the response to the Covid-19 pandemic. While the changes to the legal framework are constantly discussed, only general guidance and rare specific exemptions are issued. The enforcers emphasise the existing flexibility and resort to introducing new rules only to accelerate the necessary proceedings based on current legal tools, as with the Temporary Framework under Article 107(3)(b) TFEU. While the EU competition law is again put to a test, this crisis only presents new opportunities to strengthen its resilience.

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