

Interactions between FDI and Merger Control scrutinies in M&A transactions





*The views expressed here represents the personal views of the panelist and do not reflect the position of Clariant

DENTONS

Outline

- 1. Setting M&A transactions in the geopolitical context
- 2. FDI and merger control compliance
- 3. Impact evaluation of filings on M&A contracts
- 4. Risk assessment of merger control obligations
- 5. Risk assessment of FDI obligations
- 6. Drafting M&A contract clauses
- 7. A practical example
- 8. Judicial review in merger control and FDI

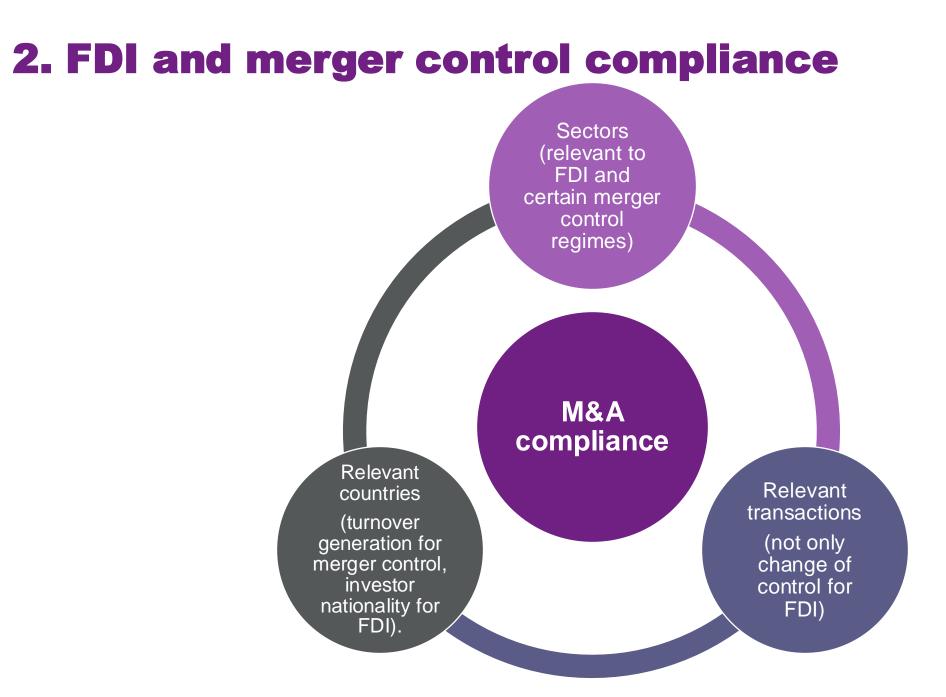
1. Setting M&A transactions in the geopolitical context

Europe must react to a world of less stable geopolitics, where dependencies are becoming vulnerabilities and it can no longer rely on others for its security: "Decades of globalisation have produced a high level of "strategic interdependence" between major economies, raising the costs of any rapid disentanglement?

There should be enhanced coordination in the EU's foreign direct investment (FDI) decisions:

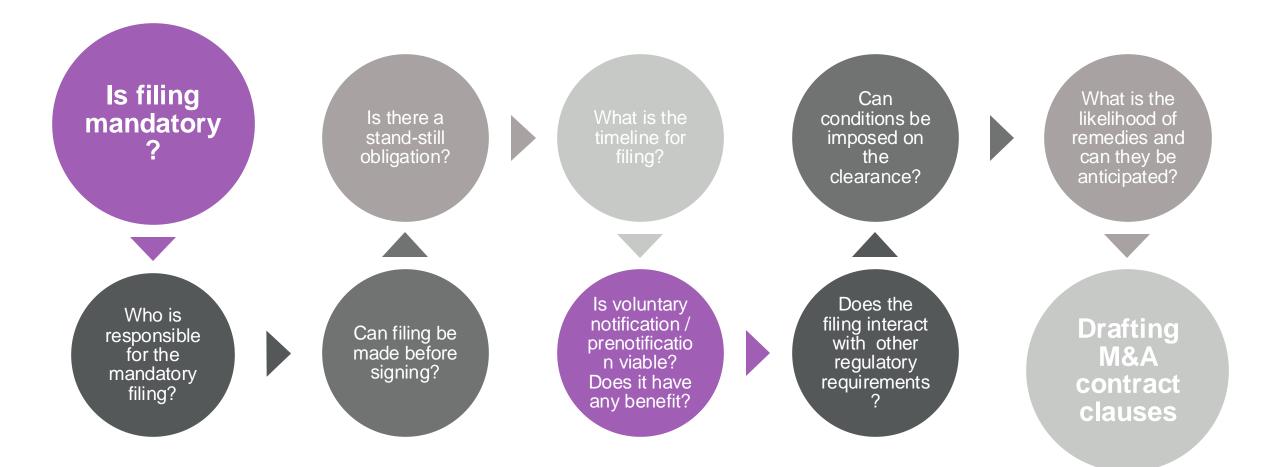
"Asymmetries arising from small Member States negotiating with large foreign investors could lead to unwelcome concessions being extracted by foreign countries, which is particularly concerning when a potential security threat and a geopolitical rival of the EU are involved. To counter these risks, the EU should strengthen its Investment Screening Mechanism. At present, FDI screening is a national competence, with Member States only required to exchange notifications and information. This fragmentation prevents the EU from leveraging its collective power in FDI negotiations and complicates the formulation of a common FDI policy. As outlined in chapter 3, coordination is important for the emergence of joint ventures in strategic sectors and ensuring that EU companies retain relevant know-how and can drive the next wave of innovation"

The future of European competitiveness: Report by Mario Draghi, September 2024



DENTONS

3. Impact evaluation of filings on M&A contracts



4. Risk assessment of merger control obligations

Reportability

Full-functionality

Control Test

Relevant Thresholds

Local Effects Test/Local Nexus

Party responsible to file

Enforcement of the competition authority

Risk of detection

Timing for clearance

Possible fines, other consequences

• Sustantive analysis: possible concerns

Market positioning of the parties

Horizontal overlaps

Vertical integration

Conglomerate effects

New theories of harm

Possible remedies (accepted)

Divestiture of a subsidiary / product facility

Brand divestiture

Abstaining from a certain behaviour

Entering a contract

Access to infrastructure / technology

5. Risk assessment of FDI obligations



 Substantive analysis: possible concerns

Focus on use and export of IP

Handling of key personnel

Access obligation to strategic assets

Preventing delocalization, etc.

• Possible remedies (imposed)

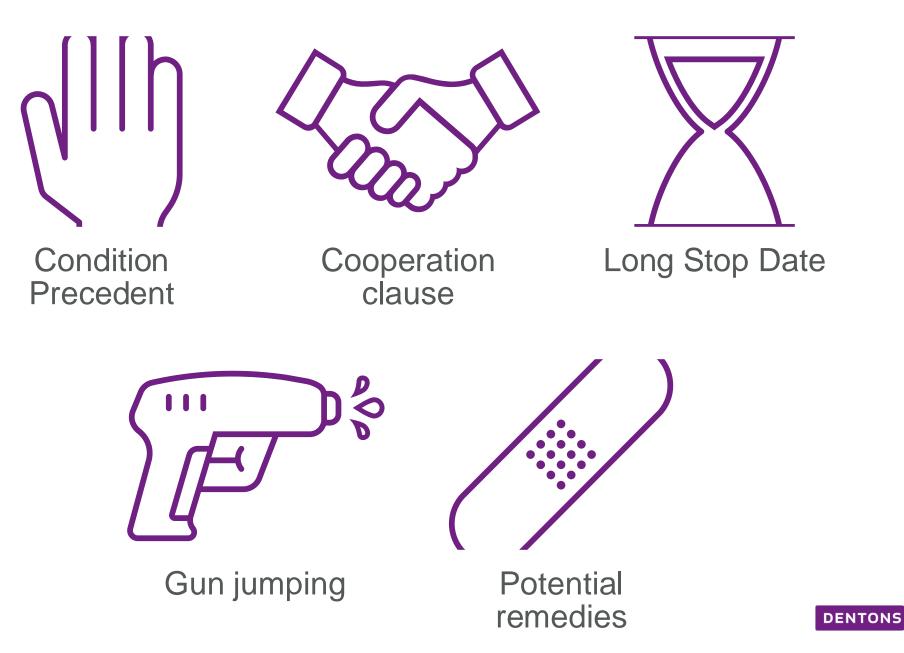
Duty to supply

Veto rights on strategic decisions

Abstaining from a certain behaviour

Preventing delocalization

6. Drafting M&A contract clauses



7. How it works in practice



Standard merger control CP is a good starting point. Customize definition and relevant jurisdiction annex.

Cooperation clauses must take account of jurisdiction specific obligations and potential outcomes.

Risk allocation clauses must reflect both merger and FDI related risks.



Collect lead times and pick the longest. Make it flexible to RFIs.

Avoid broad pre-closing covenants: limit them to what is strictly necessary to preserve the value of the target.



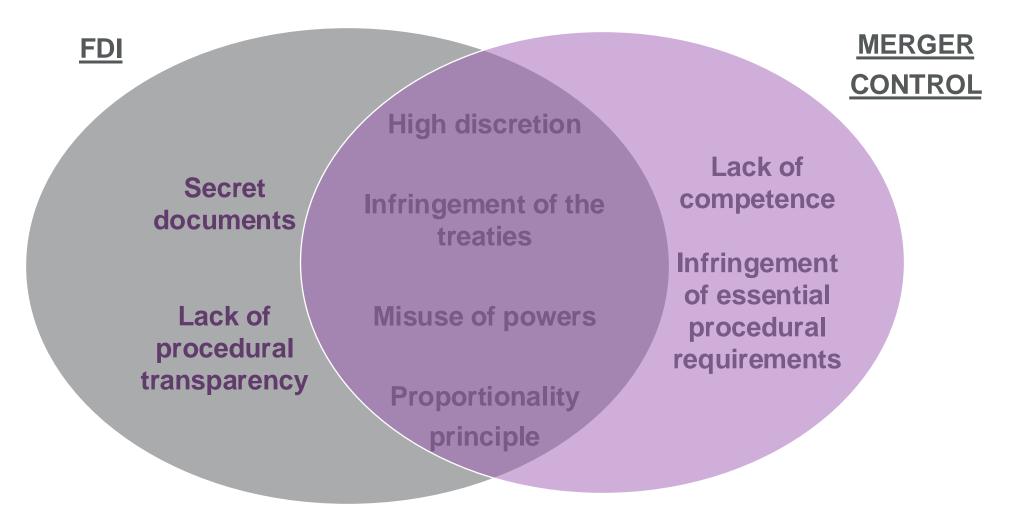
Consider the likelihood and impact of potential remedies (i.e. agreement on possible dismissal or wind up of the transaction) based on precedents if available

Do not underestimate the impact of media in terms of support / criticism



q

8. Judicial review in merger control and FDI



DENTONS



Want to know more? Tell us



Michele Carpagnano Partner, Italy Head of Competition and Antitrust, Dentons Director of Osservatorio Golden Power

ichele.carpagnano@dentons.com



Giulia Giordano Senior Associate, Competition and Antitrust, Dentons

giulia.giordano@dentons.com



Marcello Caramazza Head of Antitrust, Clariant*

© 2024 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal advice and you should not take, or refrain from taking, action based on its content. Please see dentons.com for Legal Notices.