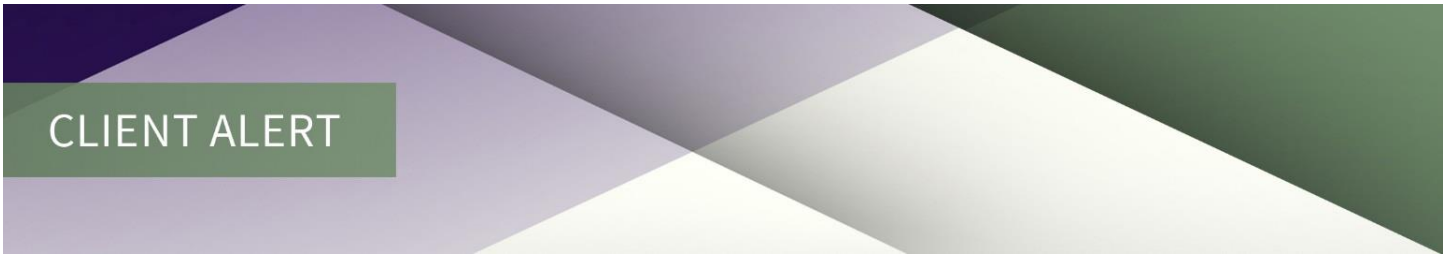

The European Commission Fines General Electric EUR 52 Million for Providing Incorrect Information in Relation to its Acquisition of LM Wind

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On 8 April 2019, the European Commission (the "**Commission**") imposed a fine of EUR 52 million on General Electric ("**GE**") for providing incorrect information during the Commission's investigation in relation to GE's acquisition of LM Wind (the "**Transaction**") in 2017. GE is a US-based globally active conglomerate with businesses in a wide range of sectors. LM Wind is a Danish company active in the design, testing, manufacturing and supply of wind turbine blades.

The decision provides another example of the Commission's significant shift in enforcement of infringements of procedural merger control rules and in particular the significant increase in fines for such infringements. Up until the Commission's *Facebook* decision in 2017, the Commission had never imposed a fine of more than EUR 100,000 for the provision of incomplete or misleading information[1]. A similar trend can be observed in cases that relate to the violation of the stand-still

[1] Commission decision of 24 May 2013 in Case M.6576, Munksjö/Ahlstrom (no fine); Commission decision of 7 July 2004 in Case M.3255, Tetra Laval/Sidel (EUR 90,000); Commission decision of 19 June 2002 in Case M.2624, BP/Erdölchemie (EUR 35,000); Commission decision of 12 July 2000 in Case M.1634, Mitsubishi Heavy Industries (Ahlström/Kvaerner) (EUR 50,000); Commission decision of 28 July 1999 in Case M.1543, Sanofi/Synthélabo (EUR 50,000); Commission decision of 14 December 1999 in Case M.1608, KLM/Martinair III (EUR 40,000); Commission decision of 14 December 1999 in Case M.1610, Deutsche Post/Trans-o-flex (EUR 100,000).

obligation under the EU Merger Regulation[2] (also referred to as "gun-jumping")[3].

The decision serves as a forceful reminder that parties need to verify the accuracy and completeness of all of the factual submissions with great care.

To mitigate any risks in this regard, parties are generally well advised to keep their submissions on matters of fact as focused and precise as possible, avoiding lengthy general descriptions of business practices and markets. In addition, it is good practice to undertake a specific verification exercise (similar to those undertaken by public companies in relation to regulatory stock exchange filings) of any final form submissions made to the Commission or other authorities in merger review cases.

1. Background

In October 2016, GE entered into a share purchase agreement to acquire sole control over LM Wind[4]. The completion of the agreement required, amongst other clearances, an EU merger clearance. In the final form notification, filed on 11 January 2017, GE apparently stated that it did not have any higher power output wind turbine for offshore applications in development, beyond its existing 6 megawatt turbine. However, through information collected from a third party, the Commission discovered that GE was in fact also offering a 12 megawatt offshore wind turbine to potential customers. As a result, on 2 February 2017, GE withdrew its notification of the acquisition of LM Wind. On 13 February 2017, GE re-notified the same Transaction, this time including information on its 12 megawatt offshore wind turbine capabilities. On 20 March 2017, the Commission approved the proposed acquisition unconditionally[5].

In July 2017, the Commission then sent a statement of objections to GE alleging that GE had breached its procedural obligations under the EU Merger Regulation. The Commission's investigation confirmed that, contrary to GE's statements in its first notification in January 2017, GE had indeed been offering a higher power output offshore wind turbine to potential customers. As a result, GE's statement in the notification form that it had no higher power output offshore wind turbines under development was incorrect. The incorrect information did not impact the Commission's approval of the Transaction as it was discovered prior to the decision and the approval decision was based on the revised notification form.

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2 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings of 20 January 2004, OJ L 24, p. 1 of 29 January 2004.

3 See e.g. Commission decision of 24 April 2018 in Case M.7993, Altice/PT Portugal.

4 Commission decision of 20 March 2017 in Case M.8283, General Electric Company/LM Wind Power Holding, para. 3.

5 See Commission Press Release, 8 April 2019, IP/19/2049.

2. Legal Analysis

Under Article 14 of the EU Merger Regulation, the Commission may impose a fine not exceeding 1% of the aggregate revenues of the undertakings concerned where, intentionally or negligently, they supply incorrect or misleading information in a notification and supplementing documents, such as responses to requests for information. In addition, the Commission may also compel the undertakings to provide the requested information by way of periodic penalty payments up to 5% of the average daily aggregate revenues of the undertaking for each working day of delay[6]. Last but not least, the Commission may revoke a clearance decision where the decision is based on incorrect information[7].

The Commission considered GE's infringement as "serious" because it prevented it from having all relevant information for the assessment of the Transaction. Moreover, the Commission considered that GE should have been aware of the relevance of the information for the Commission's assessment. However, the Commission also accepted that the omission was negligent and not intentional. Ultimately, the Commission imposed a fine of EUR 52 million.

The decision provides another example of the Commission's significant shift in enforcement of infringements of procedural merger control rules and, in particular, the significant increase in fines for such infringements. As indicated above, up until the *Facebook* decision in 2017, the Commission had never imposed a fine of more than EUR 100,000 for the provision of incomplete or misleading information[8]. The Commission first set a new level of fines to be expected for these types of procedural infringements in the future when it imposed a fine of EUR 110 million on Facebook for providing misleading information in the context of the merger review concerning the acquisition of WhatsApp[9]. The present decision confirms this trend.

It is worth noting that the Commission explains the shift with the amended fining provisions under the current EU Merger Regulation, which entered into force on 18 February 2004. The previous version had a ceiling of EUR 50,000 for each of such infringements, while the current EU Merger Regulation provides for a ceiling of 1% of global revenues. The *Facebook* (2017) and the present *GE* (2019) cases are the first such fining cases under the current EU Merger Regulation. That said, we note that a similar trend toward material fines being imposed can be observed in gun-jumping cases[10], where the ceiling for fines has always been up to 10% of global revenues.

6 EC Merger Regulation Article 15.

7 EC Merger Regulation Article 8(6).

8 See Commission decisions cited above.

9 Commission decision of 17 May 2017 in Case M.8228, Facebook/WhatsApp.

10 See e.g. Commission decision of 24 April 2018 in Case M.7993, Altice/PT Portugal.

The Commission is also currently investigating: (i) Merck and Sigma-Aldrich for providing potentially incorrect or misleading information in relation to Merck's 2015 acquisition of Sigma-Aldrich[11], (ii) Telefónica Deutschland for its alleged breach of commitments in relation to the Commission's conditional clearance of its acquisition of E-Plus in 2014[12], and (iii) Canon for alleged gun-jumping in relation to its acquisition of Toshiba Medical Systems in 2016[13].

3. What are the practical implications of the *GE* decision?

The decision serves as a forceful reminder that parties need to check and confirm all information supplied to the Commission carefully. To make this task more manageable, parties should resist the general trend to write lengthy notifications, keep all submissions as focused and precise as possible and filter all information strictly for relevance.

Companies, whether the notifying party or any other undertaking, must complete the notification forms and respond to the Commission's requests for information to the best of their knowledge, keeping the discussions they had with the Commission in mind and considering the possible purpose of the Commission's questions on that basis. Companies should, in particular, be aware of the following issues:

- Scope of the answers: Companies should, at all times, provide true, correct and complete information to the Commission to the best of their knowledge and belief. When in doubt, companies should clearly indicate the scope of their response and the limitations of their knowledge and flag areas of genuine uncertainty clearly to the Commission.

- Employee's knowledge is the company's knowledge: As seen in the *Facebook* and *GE* decisions, companies should provide the Commission with any relevant information that their employees have to the best of the company's knowledge. It is not possible to avoid this obligation by claiming that only some employees had that specific information. There are particular risks in relation to R&D activities and pipeline projects (which have become a specific focus of the Commission's merger reviews in recent years), as such activities may not be visible across the wider organization.

- No need for any effects on the Commission's ultimate decision: It should be noted that GE was fined even though it withdrew the first notification in which it provided incorrect information and re-filed it with complete and correct information. Furthermore, the Commission accepted that GE acted negligently and that the incomplete

[11] Commission press release of 6 July 2017, IP/17/1924, "Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules".

[12] Commission press release of 22 February 2019, IP/19/1371, "Commission alleges Telefónica breached commitments given to secure clearance of E-Plus acquisition".

[13] Commission press release of 6 July 2017, IP/17/1924, "Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules".

information did not have an effect on its clearance decision. This demonstrates that the Commission is prepared to impose material fines on companies for limited, technical mistakes which had no effect on the ultimate clearance decision.

- Large and/or acquisitive companies beware: The Commission can have regard to the qualification and the experience of the undertaking(s) concerned in determining if there is negligence, or even intention, in the supply of misleading or incorrect information. Larger companies, e.g., publicly listed companies and/or companies with significant merger and other regulatory compliance experience, will likely be expected to meet a high compliance standard.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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