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EU competition law considerations in M&A transactions in light of recent enforcement trends: when procedural breaches present significant risk

BY MÉLANIE BRUNEAU, ANTOINE DE ROHAN CHABOT AND ANTONIA ROUNTOU

The five-year plan for the 2019-2024 European Commission (EC) is now underway. In a time of change, a deliberate consideration of the rules enshrined in the EU Merger Regulation (EUMR) seems to be the focus of much attention. Indeed, increasing weight is being given to a more careful implementation of the merger control regime to ensure that it

achieves its overarching goal of preserving competitive market structures and that consumers fully enjoy the benefits of competition.

At the same time, antitrust enforcement has been significant in several jurisdictions within the European Union (EU). Although there has been a broader trend surrounding the EC's active enforcement policy over the past

few years, national competition authorities have also signalled a greater interest in pursuing transactions found to have potentially violated merger control rules.

In practice, the cases reviewed by the competition authorities after the implementation of the transactions concerned have also increased. As a result, fines for procedural breaches have been

imposed, notably for the submission of incorrect or incomplete information and in so-called ‘gun jumping’ cases.

Gun jumping: a continued focus of the EC and national competition authorities

Gun jumping is not a single legally defined concept in the EU. In its most clear-cut form, it occurs when the parties implement a transaction that has an EC dimension and meets the applicable reporting thresholds under the EUMR, absent a prior notification of the transaction to the EC. The duty to notify is complemented by the so-called ‘standstill’ obligation, whereby the parties must abstain from implementing a transaction, subject to notification, until it has been cleared by the EC and declared compatible with the common market. Together, these requirements are the key components of the procedural *ex ante* merger control regime, which ensures that potentially anti-competitive transactions will not take place, pending the outcome of the EC’s investigation.

Until recently, the EC and national competition authorities in Europe have pursued very few instances of gun jumping. The EC indicated its intention to ensure that parties abide by the EUMR’s procedural requirements when it fined Electrabel and Marine Harvest each €20m for gun jumping in 2009 and 2014 respectively. However, the EC’s stance to tighten the review of companies’ compliance with the EU merger control regime was clearly reflected in the intensified efforts to detect and punish gun jumping.

Gun jumping has acquired greater prominence in European competition enforcement, as well as on a national level. In November 2016, the French Competition Authority imposed a fine of €80m on the Altice Group for having prematurely implemented the SFR and OTL acquisitions. This fine for violation of the standstill

obligation was subsequently followed by a €125m fine handed down by the EC in April 2018, in the case relating to the acquisition by Altice of the telecommunications operator PT Portugal. The EC’s decision is noteworthy, as it was one of the rare instances in which the breach did not result solely from a failure to notify, but also from a systematic exchange of commercially sensitive information between the merging companies. The EC’s decision found that while some exchanges of information in relation to pre-merger due diligence may be justified, there are circumstances of pre-merger coordination that are still caught under the radar of antitrust laws.

Gun jumping can also amount to anti-competitive conduct under Article 101 of the Treaty of the Functioning of the European Union (TFEU), prior to the actual implementation of the transaction. The judgment of the European Court of Justice (ECJ) in the *Ernst & Young and KPMG Denmark* case, in May 2018, was also significant. In that case, the ECJ clarified the scope of the EUMR’s standstill obligation and its interplay with Article 101 TFEU. Most importantly, it ruled that, although gun jumping can take many forms, it requires a “change of control” of the target company. In this context, ancillary or preparatory transactions that do not present a “direct functional link” with the implementation of a concentration do not, in principle, fall within the scope of the gun jumping prohibition. This judgment was helpful in providing the parties with the necessary margin to implement measures ahead of a transaction, insofar as such measures do not confer decisive influence over the target business prior to clearance.

In June 2019, the EC rendered another decision in connection with a gun jumping infringement which imposed a fine of €28m on Canon for implementing the acquisition

of Toshiba Medical Systems (TMS) through the use of a two-step ‘warehousing’ deal structure before notification and clearance. The EC found that these two-steps were construed as constituting one single transaction, creating a need for further assessment of transactions involving warehousing arrangements. This decision is another example that the existence of substantive competition concerns in a transaction is by no means a prerequisite for the EC to establish liability for non-compliance with the EUMR rules.

Other merger control enforcement trends: sanctions imposed for the provision of incorrect or misleading information

A different uptick in enforcement of procedural violations can be found in the area of investigations where the parties involved have allegedly provided incorrect or misleading information during the reporting process. For transactions falling under the EUMR’s remit, notifying companies are obliged to provide correct and non-misleading information and the EC is empowered to levy fines for failing to observe such requirements. The striking €110m fine imposed by the EC in May 2017 on Facebook for providing incomplete and misleading information during the review of its acquisition of WhatsApp is the most indicative example in this regard. This case is notable because of the amount of the fine which is considerable – the largest fine imposed by the EC for breaching such requirement amounted to €90,000 in 2004 in the *Tetra Laval* case. Regardless of the fine imposed, this transaction was not further reviewed by the EC and the outcome of the clearance decision was not reversed. This underlines that the EC is ready to impose fines even in cases where there is no impact on the clearance

granted for implementing the transaction concerned.

In April 2019, the EC fined General Electric €52m on the same grounds, with Margrethe Vestager, commissioner for competition, stating that the fine imposed on General Electric is “proof that the EC takes breaches of the obligation to provide correct information very seriously”. This fine further stressed the EC’s increased vigilance on monitoring and intervening in relation to such conduct, but also added to the general perception that the EC will not hesitate to discipline companies by imposing high fines in the meantime.

Lessons learned and practical considerations

Considering recent decisions, the competition authorities’ attempt to draw distinct lines between competition enforcement and competitiveness is clear.

So far, the EC’s practice has shed light into what should be considered permissible and what would constitute gun jumping. This

included the legal regime to be applied in gun jumping cases, the circumstances in which the implementation of a concentration may infringe the procedural rules of the EU merger control regime, namely Article 4(1) regarding the duty to pre-notify and Article 7(1) regarding the standstill obligation, and the criteria to be taken into account when calculating the amount of fines to be imposed.

On the competition enforcement front, there is still not enough precedent to adequately determine the boundaries between gun jumping and the legitimate steps when planning and preparing a merger. That has also become evident at the international level. The OECD Competition Committee’s roundtable discussions on ‘Gun jumping and suspensory effects of merger notifications’, in November 2018, highlighted the need to clarify a number of dimensions on the matter, in particular regarding the need to strike a balance between compliance with the legislative framework on merger control, on the one

hand, and effective due diligence and time planning for the implementation of such transactions, on the other.

As a response to the increased scrutiny surrounding M&A transactions, companies are acknowledging the need to adopt a comprehensive set of best practices throughout the M&A process. While companies retain the chance of legitimate planning, it is important to ensure that no action will result in gaining premature control over the target. This includes the absence of any decisive involvement in the target’s ordinary course of business and its strategic decisions before proper observance of all obligations under the EUMR, or any national regime. Among others, such precautionary measures should be designed in a way to minimise the risk of exchange of sensitive information or any form of premature coordination between the parties that could take place in the context of an M&A transaction and would bear the risk of being regarded as anti-competitive. ■

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