E&Y/KPMG: Court of Justice sets boundaries on the scope of the standstill provisions during merger review

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Today's **decision** by Europe's highest court clarifying the scope of the 'standstill' obligation during an EU merger review is welcome, given the lack of detailed guidance and the high level of current regulatory scrutiny in this area. Against the background of the very large fines that the European Commission and other authorities have recently imposed for gun-jumping, it also serves as a reminder of the importance for merging parties of putting in place procedures to ensure that they do not fall foul of these rules.

Recent focus on gun-jumping

There has been significant regulatory focus on so-called gun-jumping recently by the Commission and other competition authorities in Europe. Gun-jumping refers to a breach by a purchaser of the obligation not to implement a notifiable merger before it is approved by the Commission (the "standstill obligation").[1] There is no clear definition or guidance in European Union law as to how the concept applies in practice and in particular which conduct constitutes implementation of a merger.

We have recently seen eye-catching fines for gun-jumping, including a €124.5 million fine imposed on Altice by the Commission earlier this year in relation to its acquisition of PT Portugal. This followed a fine of €80 million also on Altice by the French Competition Authority in relation to its acquisition of SFR and OTL in late 2016. The Commission has also imposed a fine of €20 million on Electrabel and a similar fine on Marine Harvest for failure to notify before completing a merger. Investigation into the Canon / Toshiba merger is ongoing.[2] This forms part of a wider Commission initiative to pursue procedural breaches of merger control rules.[3]

In the decisions relating to Altice both the French Competition Authority and the Commission reviewed various conduct by Altice, including the level of influence it had over the target business pending completion and the level of confidential information shared. The French Competition Authority censured conduct, including Altice's influence over matters such as significant investment decisions by the target and the target's participation in a tender. The full details of the Commission decision against Altice are yet to be published. However, it appears that, amongst other things, the Commission had concerns about

[1] Article 7(1) of Council Reg. (EC) No 139/2004 (OJ 2004 L24/1, 29.1.2004).

[2] European Commission Press Release, 6 July 2017: "Mergers: Commission alleges Merck and Sigma-Aldrich, General Electric, and Canon breached EU merger procedural rules".

[3] The Commission imposed a €110 million fine on Facebook in 2017 for providing misleading information to the Commission during the review of its acquisition of WhatsApp.

the influence that Altice exercised over a marketing campaign by PT Portugal as well as how confidential information was shared.

These decisions are particularly interesting as they provide some insights as to how the Commission and other authorities in Europe interpret gun jumping rules in practice. For a purchaser there is a commercial imperative to engage in integration planning before completion and to protect the value of its investment in terms of how the target business is managed prior to completion. Balancing these requirements with the standstill obligation, in particular during long-running merger reviews, can require careful judgement. As these decisions indicate, the risks of getting it wrong are significant.

Today's decision in E&Y / KPMG

The latest on the topic of gun-jumping is the judgment issued today by Europe's Court of Justice (CJ) in relation to the acquisition by E&Y of KPMG Denmark, following a referral by the Danish Maritime and Commercial Court.[4] In this decision, the CJ provides clarification on the meaning and scope of the standstill obligation (i.e. where the line is between legitimate pre-merger preparatory activity and early implementation of a merger).

The Danish Competition Council considered that the standstill obligation should be construed widely such that conduct which was merger specific, irreversible and had a potential market effect could constitute early implementation. In the case, KPMG Denmark terminated its membership of KPMG International (with effect from completion) after the merger agreements were signed and before the merger had been notified or approved. Following the termination, KPMG International announced its intention to remain active in Denmark and certain KPMG Denmark customers decided to change auditors. The Danish Competition Council considered that the termination by KPMG Denmark was therefore a breach of the standstill obligation as it was related to the merger, irreversible and had a potential market effect in the period between termination and approval.

The CJ (following AG Wahl's opinion of earlier this year[5]) disagreed and found that the standstill obligation should be interpreted more narrowly and only cover activities that actually contribute to the change in control under review. Conduct that relates to the merger but is not directly linked to the change of control is therefore not a breach of the standstill obligation even if it is ancillary or preparatory to the merger. The termination by KPMG Denmark of its membership of KPMG International was therefore not early implementation - despite being connected to the merger and having market effects - as it did not contribute to the change of control of KPMG Denmark.

[4] Case C-633/16 Ernst & Young P/S v Konkurrencerådet, judgment of 31 May 2018.

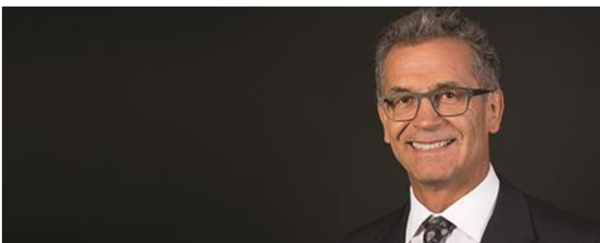
[5] Case C-633/16 Ernst & Young P/S v Konkurrencerådet - Opinion of Advocate General Wahl delivered on 18 January 2018.

Key take-away points

Today's decision defines the scope of the standstill obligation as prohibiting conduct which contributes to the change of control. This clarification is welcome given the regulatory focus on this area. However, even within this definition there will be considerable scope for interpretation as to whether particular conduct contributes to a change in control, depending on the facts of the case. For merging parties, key to limiting the risk of falling foul of gun-jumping rules will continue to be to:

- Operate independently in the market even after a merger agreement is signed - the purchaser should not influence day to day or strategic decisions of the target.
- Review carefully any contractual restrictions imposed on the target's conduct before completion to ensure they relate only to activities "outside the ordinary course".
- Ensure that confidential information in relation to the target is shared only within appropriately structured clean teams.
- Plan for integration post-completion but not to actually implement integration.
- Put in place clear guidelines on pre-completion conduct, which are circulated within the businesses and have management support with lawyers available to provide input where required.

The Commission's decision on Altice, when published in full, will likely provide further guidance.



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