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Antitrust Alert

Senior EU Court Adviser Provides Welcome Guidance on Gun-Jumping

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EU and US laws prohibit merging companies from implementing reportable transactions until their deal is cleared or the statutory waiting period has expired. Violations of this principle are colloquially known as "gun-jumping" and can have serious negative consequences for the parties. If the parties are competitors, pre-closing activity can also infringe the general rules against anticompetitive agreements (e.g., Section 1 Sherman Act and Art. 101 TFEU).

Navigating gun-jumping rules can be difficult because there are few bright lines and little concrete guidance—especially in the EU, where neither the European Commission (EC) nor the courts have set clear standards for permissible integration planning activity before merger clearance and closing. In a welcome development, Advocate General Nils Wahl, a senior adviser to the Court of Justice of the European Union (CJEU), recently clarified EU gun-jumping principles. The attached alert summarizes AG Wahl's opinion and other recent developments in gun-jumping doctrine in the EU and compares EU doctrine with that of the United States.

Key implications

- The EC is increasingly focused on procedural infringements of its merger law. Notably, it has fined companies for failing to notify acquisitions before closing.
- In his recent opinion, AG Wahl proposed that integration planning conduct that (i) occurs before and (ii) is severable from measures that result in a change of control should *not* constitute gun-jumping.
- The CJEU is not bound by Advocate General opinions, but often follows them. In any case, the CJEU should use this opportunity to provide guidance on how legitimate integration planning is distinguished from unlawful gun-jumping.
- The United States has provided significantly more gun-jumping guidance. However, the rules in this area remain fact-intensive, and parties should work closely with antitrust counsel to avoid gun-jumping violations.

Background

Investigations into gun-jumping are becoming more common in the EU. To date, however, most of these investigations have concerned failures to notify the EC of a transaction,[1] not pre-closing activity.

AG Wahl's opinion arose from the proposed merger of KPMG's Danish affiliates (KPMG DK) with Ernst & Young (EY). It has presented the CJEU with a chance to provide guidance on permissible pre-integration conduct.[2]

The facts briefly are as follows: KPMG DK agreed to merge with EY. Before receiving merger clearance from the Danish competition authority, KPMG terminated a cooperation agreement with the KPMG international network. The Danish competition authority subsequently cleared the merger. A few months later, however, the authority ruled that, by terminating the cooperation agreement pre-clearance, KPMG DK had infringed the standstill obligation.[3]

EY appealed the decision and the Danish court decided to ask the CJEU questions regarding the scope of the standstill obligation. In its pleadings, the EC indicated that it supported the Danish authority's interpretation of the standstill obligation.

Measures prohibited by the standstill obligation

The standstill obligation is triggered when a proposed transaction is reportable under EU or member state merger control law. That requires, among other things, an intent by one company to acquire control of another. Accordingly, AG Wahl reasoned, conduct can infringe the standstill obligation only when it allows the possibility to acquire control over a target's activities.[4] By contrast, conduct that does not result in the possibility to acquire control of the target before competition clearance—e.g., pre-closing integration planning—does not violate the standstill obligation.

The Advocate General made two significant observations in reaching his conclusion: first, he acknowledged that the standstill obligation proscribes both partial and full implementation of a transaction pre-competition clearance. Thus, even conduct that does not represent total exercise of control—such as an instruction to a target's management to take certain actions—can violate the standstill obligation. Second, he found that whether the conduct at issue will actually affect competition is irrelevant to determining whether that conduct violates the standstill obligation. According to the Advocate General, if every measure with potential market

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[1] Three recent investigations focused on cases where parties allegedly obtained control without obtaining prior merger clearance.
In October 2017, the General Court of the European Union ("GC") upheld a €20 million fine imposed on Marine Harvest for gun-jumping. Marine Harvest had initially purchased 48.5% of the shares of a target before notifying an intended acquisition of the remainder of the shares to the EC. The GC held that Marine Harvest could have exercised decisive influence over the target with its 48.5% shareholding, which meant that it had already acquired control.
Last summer, the EC announced that it is investigating Canon's use of a structure under which a third party acquired the voting shares of Toshiba Medical Systems Corporation in a nonreportable transaction, with an option for Canon to acquire the voting shares that was exercisable only after it obtained antitrust clearance. The EC's investigation is pending.
In November 2016, the French competition authority found that Altice had obtained strategic information about a target and intervened in the target's operational management before receiving merger clearance. The authority imposed a fine of €80 million.

[2] Although the case interprets Danish law, the relevant Danish law mirrors EU law, and the opinion therefore applies equally to the EU law standstill obligation.

[3] *See* Art. 7 of Commission Regulation (EC) No. 139/2004 (Jan. 20, 2004), on the control of concentrations between undertakings. Very exceptionally, the EC may grant a derogation, under Art. 7(3) of this Regulation, and allow parties to take certain actions before receiving merger clearance.

[4] Opinion of AG Wahl, Case C-633/16, *Ernst & Young P/S v. Konkurrencerådet*, ECLI:EU:C:2018:23, Jan. 18, 2018.

effects constituted gun-jumping, the standstill obligation would be too broad. Conversely, if actual market effects were necessary, the standstill obligation might be too narrow. Given that he deemed market effects irrelevant, the Advocate General did not address what types of market effects might be deemed to violate the standstill obligation if market effects mattered. It will be interesting to see whether the CJEU agrees that market effects are irrelevant to evaluating potential violations of the standstill obligation; and, if not, whether it provides any guidance regarding the role that market effects should play in the analysis.

Turning to the facts of the case, the Advocate General considered that the termination of the cooperation agreement was not *inextricably linked* to a pre-competition clearance change in control of KPMG DK. It was therefore merely a preparatory measure to the ultimate post-clearance change of control and not a violation of the standstill obligation.

Potential impact of AG Wahl's Opinion

As noted above, Advocate General opinions are not binding on the CJEU. The CJEU's judgment should be released in the next year and hopefully will provide additional certainty for parties involved in pre-clearance activities.

The Advocate General's opinion is noteworthy primarily because it rejects the EC's much broader interpretation of the standstill obligation. According to the EC's submissions in support of the Danish authority, even measures that do not give the possibility of exercising control over the target's business can violate the standstill obligation. This approach not only creates significant uncertainty regarding what pre-closing activities are permissible, but potentially outlaws categories of pre-closing conduct that can help merging parties achieve transaction efficiencies from Day 1 without impairing the target from competing independently pre-closing.

If the CJEU endorses AG Wahl's views, it will provide much-needed guidance to companies engaged in integration planning. They will know that they will not infringe the standstill obligation provided that they (i) avoid premature acquisition of the possibility to exercise decisive influence over the target[5] and (ii) comply with general EU competition law, including the prohibition, under Article 101 of the Treaty on the Functioning of the European Union (TFEU), on competitors engaging in illegal collusion or improperly exchanging competitively sensitive information.[6] Gun-jumping guidance from the CJEU would also be relevant in the EC's ongoing investigation into Altice, which the EC alleges began to implement its acquisition of PT Portugal before clearance.[7] EC Commissioner Margrethe Vestager has indicated that Altice allegedly gave instructions to PT Portugal regarding contract negotiations while the EC's merger investigation was still pending.[8]

[5] For further guidance on the notion of decisive influence, *see* Commission Consolidated Jurisdictional Notice, 2008 OJ 2008 C95/1 (Apr. 16, 2008).
[6] In Case No COMP/M.4734 *Ineos/Kerling*, the EC investigated whether (i) the acquirer had intervened in the management of the target while the EC's merger investigation was ongoing and (ii) whether the parties, who were competitors, had exchanged competitively sensitive information. The EC concluded that there was no evidence of EU law having been violated.
[7] *See* European Commission Press Release IP/17/1368, Mergers: Commission Alleges Altice Breached EU Rules by Early Implementation of PT Portugal Acquisition (May 18, 2017).
[8] *See* Margrethe Vestager, *Competition and the Rule of Law*, Speech Delivered at the Romanian Competition Council Anniversary Event, Bucharest (May 18, 2017) https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en.

Guidance in the United States

The Department of Justice (DOJ) and Federal Trade Commission (FTC) have given some guidance on acceptable pre-closing conduct, mainly through enforcement actions and speeches.[9]

Like in Europe, gun-jumping risks in the United States fall into two categories: (i) assuming control of the target before obtaining antitrust clearance for a reportable transaction and (ii) impermissible coordination between parties that are independent entities pre-closing.

Assumption of corporate control. Acquirers in the United States are prohibited from obtaining operational or financial control—described as "beneficial ownership"—of the target before the expiration of the applicable Hart-Scott-Rodino (HSR) waiting period.[10] Whether an acquirer has obtained beneficial ownership is fact-specific, and can include "indicia" of ownership that fall short of full control over the target, such as assuming control of contracts, integrating operations, making joint decisions, or transferring confidential business information for purposes other than due diligence or integration planning.[11]

In practice, this means the parties to a transaction must continue to operate independently until closing. It also means an acquirer may not interfere with competitive decision making or influence the ordinary course operations of the seller. Parties currently can be fined up to $40,654 for each day of the violation, an amount subject to regular adjustment for inflation.[12]

Pre-closing coordination. If the parties are competitors, coordination before closing can constitute illegal gun-jumping, even after the parties have obtained merger clearance from the agencies, or even if the deal was not reportable in the first place.

Section 1 of the Sherman Act prohibits agreements in restraint of trade, including coordinating with a competitor on price or contract terms, allocating customers or markets, or agreeing not to compete. Parties can also violate Section 1 by (i) exchanging competitively sensitive information that will dampen competition between them, such as providing customer lists, prices, or plans for future products or services, or (ii) coordinating customer negotiations for sales to be made after closing (such as negotiations for long-term contracts). Gun-jumping that violates Section 1 can be subject to serious penalties, including treble damages and possible criminal enforcement.

Practical considerations. The US agencies have recognized that parties to a transaction need to take reasonable steps to plan for closing. Prematurely acquiring beneficial ownership before the HSR waiting period expires will constitute a violation—whether or not it results in any actual anticompetitive effects. But absent that, the agencies evaluate whether the coordination could result in any actual anticompetitive effects and, if so, whether it is reasonably necessary to implement legitimate objectives of the merger agreement.[13]

This test has several implications for parties to a merger. First, parties should ensure that they continue to compete throughout the integration planning process. Second, parties should avoid

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[9] The last time the agencies made a comprehensive statement on gun-jumping was in 2005, when the General Counsel to the FTC made public remarks before the Association of Corporate Counsel. William Blumenthal, *The Rhetoric of Gun-Jumping*, Remarks Before the Ass'n of Corporate Counsel (Nov. 10, 2005).
[10] *See* 15 U.S.C. § 18a.
[11] William J. Baer, Former Director, Bureau of Competition, *Report from the Bureau of Competition*, ABA Antitrust Section Spring Meeting, Apr. 15, 1999, https://www.ftc.gov/public-statements/1999/04/report-bureau-competition.
[12] *See* US Federal Trade Commission, *FTC Publishes Inflation-Adjusted Civil Penalty Amounts*, Jan. 12, 2017, https://www.ftc.gov/news-events/press-releases/2017/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts.
[13] *See* Blumenthal, *supra* note 9, at 2, 7-8.

any actions that might suggest that the acquirer has assumed control of the seller. Parties should also continue to make their own business decisions independently, without consulting with one another and regardless of whether they are competitors. Although integration planning and certain information exchanges are permitted, parties should be careful not to cross the line between permissible integration planning on the one hand, and impermissible integration on the other. Where potentially sensitive information is exchanged, parties should consider using a "clean team" of employees or consultants, who may access the information for the limited purpose of integration planning without risking impairing pre-closing competition between the parties.[14] Whether or not the parties use a clean team, employees involved in the integration planning process should be counseled on gun-jumping, and should consult with antitrust counsel before disclosing any potentially competitively sensitive information.

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Complying with EU and US law before a contemplated merger closes can raise difficult and fact-intensive questions. Even if fines are not imposed, a gun-jumping investigation can negatively affect a proposed transaction by lengthening the review period, calling into question the parties' credibility when advocating for the transaction, and imposing costs and burdens. Parties should therefore work closely with antitrust counsel to avoid gun-jumping violations.

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[14] When a clean team is used, parties must take reasonable measures to ensure that sensitive information is not disclosed. Common measures used to protect information include (i) having each party's antitrust counsel review information before it is exchanged and (ii) agreeing that clean team members will not return to certain roles for a period of time if the transaction is not consummated.