

European Court of Justice Clarifies Rules on Gun-Jumping

19 June 2018

Introduction. The European Court of Justice (ECJ) handed down its judgment in the much awaited EY/KPMG case (C633/16) on 31 May 2018. The decision provides significant and welcome guidance on the enforcement of the rules on gun-jumping, which is a serious breach of the EU merger control regime.

**Debevoise
& Plimpton**

Legal context. Almost all global merger control regimes, including the European Union (EU), apply a strict mandatory suspensory obligation whereby the parties are not allowed to close their transaction or to coordinate behavior before obtaining clearance. That has been broadly interpreted so that, in certain cases, various forms of pre-closing cooperation can be viewed as partial implementation. Such conduct exposes the parties to the risk of infringement proceedings and substantial fines for so-called “gun-jumping”.

There has been a recent increase in enforcement activity in this area, both in the EU and globally. In May 2017, the EU Competition Commissioner, Margrethe Vestager, announced that if parties “*jump the gun, we take that very seriously indeed*” as “*otherwise, the harm to competition could already be done, before we have the chance to intervene*”.

Matching actions to words, the Commission in April this year imposed a record fine of €124.5 million on the telecoms company, Altice, for “gun-jumping” in relation to its acquisition of PT Portugal. Similarly, at a national level, the French competition authority recently fined Altice Luxembourg and SFR Group €80 million in relation to two mergers involving telecom operators.

Background. In November 2013, EY Denmark and KPMG Denmark announced they would be combining their Danish operations. The merger was approved by the Danish authorities in May 2014 subject to certain commitments.

At the time, KPMG Denmark was part of the international network of independent auditing firms known as KPMG International Cooperative. That relationship was governed by a cooperation agreement. The cooperation agreement essentially harmonized how the firms operated, allowing them to present themselves to clients as a

single network. In accordance with the merger agreement, immediately after its signature, KPMG Denmark announced its termination of the cooperation agreement with effect from 30 September 2014.

The Danish competition authority found that the prospective termination by KPMG Denmark was a breach of the gun-jumping rules under Danish law, which is modelled on the equivalent EU provisions. The reasons given by the Danish authority for its decision included that the action was merger-specific, irreversible (as notice could not be rescinded), and likely to have market effects in the period between the notice of termination and the approval of the merger. The Danish authority had also referred the case to the State Prosecutor with a view to possible criminal sanctions.

EY brought an action for annulment of the decision. In December 2016, the Danish commercial court referred a number of questions to the ECJ seeking clarification on the scope of the obligation not to implement the merger before approval.

Advocate General's opinion. The Advocate General, Nils Wahl (AG), delivered his [opinion](#) to the ECJ in January 2018. The AG disagreed with the Danish competition authority and concluded there had not been any breach of the gun-jumping prohibition. His opinion was that, although the termination formed part of the overall process, it was crucial that it was “*severable from the measures actually leading to the acquisition of the possibility of exercising decisive influence on a target undertaking*”. The AG was also of the view that the possible market effect of the agreement was actually irrelevant for the purpose of considering whether the standstill obligation had been breached.

ECJ judgment. The ECJ largely followed the Opinion of the AG and also [rejected](#) the interpretation of the Danish competition authority. The ECJ noted the EU Merger Regulation is itself unclear on the scope of the standstill obligation, and therefore the provision must be interpreted according to its purpose. In its judgment, the court determined that an action amounts to gun-jumping only where it “*in whole or in part, in fact or in law, contributes to the change of control of the target undertaking*”.

The ECJ also noted that the standstill requirement would similarly apply where a transaction is implemented in a series of partial steps as otherwise it may be possible to structure a deal to circumvent the obligation. However, for any of those steps to be considered gun-jumping, there would need to be “*a direct functional link*” with the implementation of the overall transaction.

The ECJ confirmed the AG's opinion that the question of whether there has been any impact on the market is irrelevant. The standstill requirement is purely a procedural safeguard and applies irrespective of whether an action has any substantive effect.

On the facts of the case, the ECJ held that the parties' actions fell on the right side of the line. The termination of the cooperation agreement was ancillary to the implementation of the merger and a preparatory step. However, despite the effect it was likely to have on the market, it did not contribute, as such, to a lasting change of control over the target prior to its effective date. EY and KPMG Denmark remained independent until after the transaction had been approved.

The Danish court will now decide whether KPMG Denmark violated domestic competition law, taking into account the ECJ's ruling.

Future implications. As the ECJ said in its judgment, "*the difficulty lies in drawing the line between legitimate preparatory measures and partial implementation*". This case has gone some way to help clarify how the EU gun-jumping regime should apply, and it would seem there may be more scope than previously thought for preclearance activities.

At the same time, the ECJ's "*contributes to the change of control*" test is still vague enough to give the Commission scope to interpret gun-jumping broadly. Moreover, premerger coordination between the parties falling outside of the scope of the standstill obligation - such as information exchanges—will still be caught by the normal antitrust rules (i.e., Article 101 TFEU); although that also requires the Commission to demonstrate there is a consequent restriction of competition.

Several other cases raising these issues are pending including Marine Harvest's appeal to the ECJ of a €20 million fine imposed by the Commission for failing to notify a transaction and a decision in the case of Canon/Toshiba where the Commission has challenged Canon's use of a two-step "warehousing" structure for its acquisition of Toshiba's medical-equipment unit (which also resulted in a fine from China's Mofcom agency).

Merging parties are therefore advised to keep track of developments in this area.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Timothy McIver
tmciver@debevoise.com

FRANKFURT

Dr. Andrea Pomana
apomana@debevoise.com