

EU Merger Control Standstill Obligation – EY Judgment

June 25, 2018

On May 31, 2018, the European Court of Justice (“ECJ”) provided welcome guidance on the scope of the gun jumping prohibition (*i.e.*, standstill obligation) under the EU Merger Regulation (“EUMR”).¹ The ECJ held that preparatory steps taken by merging parties to close a transaction that is subject to merger review prior to obtaining clearance will only constitute gun jumping if those actions contribute to a change in control of the target.² While the judgment gives merging parties more leeway with regards to certain preparatory steps to close a transaction, the test is somewhat vague, and continued caution is thus advisable.

Background

In the context of merger control, gun jumping refers to a situation where the merging parties close or take preparatory steps to close a transaction that is subject to review by a competition authority prior to having secured clearance from that authority. Gun jumping is a violation of the standstill obligation set out in Article 7(1) of the EUMR, which stipulates that a transaction cannot be implemented before either notification or clearance and can constitute an autonomous infringement subject to enforcement by the European Commission (“Commission”) and national competition authorities (“NCAs”).

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

BRUSSELS

Antoine Winckler
+32 22872018
awinckler@cgsb.com

Asa S. Hallsdottir
+32 22872176
ahallsdottir@cgsb.com

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

² Judgment of May 21, 2018, *Ernst & Young*, C-633/16, ECLI:EU:C:2018:371, para. 46.



In recent years, competition authorities across the EU have adopted an increasingly strict approach to the enforcement of merger control procedural rules, including the standstill obligation. This has been apparent both in terms of the number of infringement decisions adopted for procedural violations and the amounts of the fines imposed. Most notably, the Commission fined Facebook €10 million in May 2017 for providing incorrect or misleading information during its 2014 investigation of Facebook's acquisition of WhatsApp,³ imposed a fine of €124.5 million on Altice for gun jumping in April 2018,⁴ and has held in a Statement of Objections that Canon jumped the gun when acquiring Toshiba Medical Systems Corporation in 2016.⁵ At the national level, the French Competition Authority ("FCA") fined Altice €80 million in November 2016 for gun jumping with regards to its acquisitions of telecom operators SFR and Virgin Mobile.⁶ The *EY* judgement underlines this trend.

Facts

In November 2013, a number of KPMG entities in Denmark ("KPMG DK") and Ernst & Young ("EY") entered into a merger agreement. The following day, KPMG DK gave notice to terminate their cooperation agreement with KPMG International. The cooperation agreement established a framework under which the parties operated in line with certain standards and norms and presented themselves to clients as a combined network while remaining autonomous and independent for the purposes of competition law.⁷ Other provisions included allocation of customers, the obligation to service clients from other EU Member States, and annual compensation for participating in the network, as well as a rule preventing participants from entering into commercial contracts such as joint ventures or partnerships.

The merger was notified to the Danish Competition and Consumer Authority ("DCCA") in December 2013 and was subsequently cleared by the Danish Competition Council ("DCC") in May 2014, subject to commitments. However, in December 2014, the DCC found that, by terminating the cooperation agreement before obtaining clearance, KPMG DK and EY had infringed the standstill obligation under Danish competition law.⁸

EY filed an action for annulment of the DCC's decision with the Danish Maritime and Commercial Court, which referred the case to the ECJ for a preliminary ruling on the scope of the gun jumping prohibition under the EUMR.

ECJ's Reasoning

The ECJ held that KPMG DK had not violated the standstill obligation in Article 7(1) EUMR by giving notice to terminate the cooperation agreement. The ECJ recalled that the standstill obligation only applies to the implementation or closing of "concentrations" as defined in Article 3 EUMR.⁹ According to this provision, a concentration arises as a result of a "*change of control on a lasting basis*" resulting from a merger or acquisition by actions that either separately or together "*confer the possibility of exercising decisive influence on an undertaking.*"¹⁰ On this basis, the ECJ held that steps taken by merging parties to implement or close a transaction before clearance will only amount to gun jumping if such steps can be viewed as "*contributing to a lasting change in control of the target undertaking.*"¹¹

The ECJ also clarified that, where steps taken to implement or close a transaction prior to clearance are "*not necessary to achieve a change of control of an undertaking,*" they fall outside the scope of the standstill obligation.¹² The ECJ reasoned that such steps "*do not present a direct functional link*" with the implementation of the concentration and are therefore

³ Case M.8228 – *Facebook/WhatsApp*, Commission decision of March 17, 2017.

⁴ Commission Press Release IP/18/3522 of April 24, 2018.

⁵ Commission Press Release IP/17/1924 of July 6.

⁶ Decision n°16-D-24 – *Altice*, FCA decision of November 8, 2016.

⁷ *Ernst & Young* (n 2), paras. 12 and 13.

⁸ The standstill obligation in Danish competition law is modelled after and equivalent to Article 7(1) of the EUMR.

⁹ *Ernst & Young* (n 2), para. 43.

¹⁰ *Ernst & Young* (n 2), para. 45.

¹¹ *Ernst & Young* (n 2), para. 46.

¹² *Ernst & Young* (n 2), para. 49.

unlikely to undermine the efficiency of the EU merger control system.¹³

Finally, the ECJ held that an assessment of whether a transaction has had an effect on the market is largely irrelevant to establish a violation of the standstill obligation, because (i) such assessment is carried out in the context of the substantive review of the transaction,¹⁴ and (ii) it could not be ruled out that a transaction “*having no effect on the market might nevertheless contribute to the change of control*”.¹⁵

In applying this test to the case at hand, the ECJ concluded that, while KPMG DK’s withdrawal from the KPMG International network was subject to a conditional link with the concentration and was likely to be ancillary and preparatory in nature, it “[did] *not contribute, as such, to the change of control of the target undertaking*.”¹⁶ This was the case despite the fact that the merger agreement expressly provided for KPMG DK’s withdrawal from the cooperation agreement.¹⁷ Thus even though, absent the concentration, KPMG DK would likely not have terminated the agreement, the termination itself did not confer on EY any possibility of exercising influence over KPMG DK, as KPMG DK was independent from EY both before and after the termination.¹⁸

Conclusion

The judgement provides welcome and important guidance on the scope of the gun jumping prohibition, particularly given the Commission’s increased readiness to enforce its procedural rules. It confirms that merging parties can take certain preparatory steps to implement or close a transaction before clearance has been obtained, as long as those actions do not contribute to a change in control of the target. However, the test is somewhat vague as to which types of preparatory steps do in fact contribute to a change in control. This uncertainty gives the Commission some room for interpretation, which, in light of the recent enforcement trend, it may apply in a broad manner. Importantly, as noted by the ECJ, preparatory steps that fall short of the test and do not

constitute gun jumping can still be caught by Article 101 TFEU, which prohibits anticompetitive agreements.¹⁹ Merging parties should therefore continue to carefully assess each such steps on a case-by-case basis and seek advice when in doubt.

...

CLEARY GOTTlieb

¹³ *Ernst & Young* (n 2), para. 49.

¹⁴ *Ernst & Young* (n 2), para. 50.

¹⁵ *Ernst & Young* (n 2), para. 51.

¹⁶ *Ernst & Young* (n 2), para. 60.

¹⁷ *Ernst & Young* (n 2), para. 14.

¹⁸ *Ernst & Young* (n 2), para. 61.

¹⁹ *Ernst & Young* (n 2), para. 57.