THE EU GETS TOUGH ON GUN-JUMPING

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Like many international merger control statutes, the EU Merger Regulation (EUMR) prohibits the closing of a notifiable transaction until the European Commission (the Commission) grants or is deemed to have granted antitrust approval. Until recently, however, the Commission has pursued very few violations of this rule, known as "gun-jumping," in particular compared to the U.S. antitrust agencies. The Commission's recent actions, and tough talk by EU Competition Commissioner Margrethe Vestager, suggest that the relatively relaxed European approach to gun-jumping is over.

In her May 2017 speech on "Competition and

the Rule of Law," Commissioner Vestager said that if merging parties "jump the gun, we take that very seriously indeed," because "otherwise, the harm to competition could already be done, before we have the chance to intervene."[1] Also in May, the Commission announced gun-jumping proceedings against the French company Altice, which recently received a gun-jumping fine from the French authority in connection with two other transactions. Two months later, the Commission opened another gun-jumping case, against Canon. If these cases, involving alleged partial implementation of notified transactions, lead to infringement decisions and fines, they will be the first of their kind in the EU.

This article discusses the types of conduct that may lead to a finding of gun-jumping and the Commission's enforcement history in this area. In conclusion, this article offers some practical guidance on avoiding gun-jumping issues in future transactions.

What Is "Gun-Jumping"?

The expression ''gun-jumping'' is not clearly defined in EU competition law. The EUMR prohibits a company acquiring "control" of another company, or two or more merging companies, from putting their transaction "into effect'' before approval, if the transaction meets the EUMR reporting thresholds. The clearest case of gun-jumping occurs where the parties implement a notifiable concentration without filing a notification at all. Such an error is surprisingly easy to make under EU law because some of the EUMR thresholds are relatively subjective or difficult to apply, in particular in the case of minority investments in publicly-listed companies and joint ventures, where it can be difficult to determine whether a transaction involves an acquisition of control or whether a joint venture is a notifiable "full function" venture.

In addition to clear-cut closing of a notifiable transaction without notification, pre-closing conduct can lead to two different types of gun-jumping violations. First, pre-closing conduct that amounts to putting a notifiable transaction "into effect" prematurely may violate the EUMR. Second, if the parties to the transaction are competitors, pre-closing conduct may be caught by Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which prohibits restrictive agreements, decisions and concerted practices. Practices that may be scrutinized from a gun-jumping perspective include the exchange of competitively sensitive information during due diligence before or after signing of an acquisition agreement; implementation of pre-closing "ordinary course" covenants between signing and closing; planning for or commencing the integration of the parties' businesses after closing; and coordination of competitive behavior before closing. Pre-merger clearance does not legitimate previous infringements, so that a gun-jumping violation may be found even after a notified transaction is approved.

Thus, gun-jumping violations may be sanctioned in two different ways: as violations of the EUMR requirement that reportable transactions ''shall not be put into effect'' before approval, or as infringements of the Article 101(1) TFEU prohibition of restrictive agreements, decisions or concerted practices. In either case, violations may be punished with fines of up to 10% of the merging parties' aggregate turnover, but the applicable procedures and even the amount of any ultimate fine may vary depending on how the infringement is characterized, because the Commission

has adopted guidelines on how it sets fines in Article 101(1) TFEU cases but not in EUMR infringement cases.

The Commission's Gun-Jumping Enforcement History

The Commission's new gun-jumping cases suggest that the Commission is focusing more closely on gun-jumping issues, particularly in the relatively gray area of partial implementation of notifiable transactions. These cases should also clarify the Commission's approach to calculating fines for EUMR violations. The Commission's imposition of a €110 million fine on Facebook for provision of incorrect or misleading information in the WhatsApp transaction[2] may suggest that any future gun-jumping fines will also be considerably higher than in the past.

Enforcement in Failure-to-File Cases

As mentioned, the most clear-cut case of gun-jumping occurs where an acquirer takes action that amounts to an acquisition of "control" in a transaction meeting the EUMR thresholds without making a required notification. Although such cases are relatively rare, the Commission has imposed fines in two such cases in recent years: one against Electrabel in 2009 and a second against Marine Harvest in 2014. Electrabel ended a long drought of such cases; the only prior Commission fines for gun-jumping were imposed in 1998 and 1999. In an unusual 2002 case, the Commission found that the parties to a joint venture had implemented a notifiable transaction without notification, but it imposed no fine even though the transaction raised serious competition issues and had to be unwound.

Both *Marine Harvest* and *Electrabel* involved minority investments in publicly listed companies, where a large minority stake was considered sufficient to confer control (48.5% in the case of Marine Harvest and 47.92% of voting rights in the case of Electrabel). In both cases, the Commission imposed a fine of €20 million. The Commission indicated that it took into account the duration of the infringement and the amount required to create a deterrent in view of the parties' size, but also mitigating factors such as the fact that both parties brought the issue to the Commission's attention themselves and, in Marine Harvest's case, the prompt start of pre-notification discussions and the fact that Marine Harvest abstained from exercising voting rights and ring-fenced the target.

Marine Harvest and *Electrabel* represented a reminder that acquiring parties must look closely even at minority share acquisitions to determine whether they may involve an acquisition of control under EU law, and if so whether the EUMR thresholds are met. It seems likely that there will be fewer such cases going forward, though in such future cases the Commission may consider imposing even higher fines in view of the clear precedents these cases provide. As noted, the Facebook/WhatsApp case may signal the Commission's intention to increase fines for procedural violations in any event.

Enforcement in Partial-Implementation Cases

The Commission's 2017 cases, by contrast, involve the potential partial implementation of notifiable transactions, a much grayer area of law in the EU. Previously, the Commission has apparently detected and prohibited a pre-approval partial implementation of a notified transaction in only one case, and even in that case no fine was imposed.

The Commission's only pre-2017 partial implementation case, Bertelsmann/Kirch/Premiere, involved a joint venture between Bertelsmann, Kirch and Premiere for the launch of the first digital pay-TV channel in Germany. Shortly after execution of the joint venture agreement and prior to notification, Premiere reportedly started marketing Kirch's digital decoder to subscribers and using such decoder for the purpose of providing its digital television services. The Commission warned the parties that this conduct would amount to the partial implementation of the planned concentration contrary to the EUMR and threatened to apply fines of up to 10%. Following notification, the Commission insisted that, even though "the introduction of a single decoder is not a competition problem," the parties' behavior represented the partial implementation of the notified agreement and ordered them to cease this behavior. Nonetheless, after the parties undertook to stop their gun-jumping activities, the Commission did not pursue the matter and imposed no fine.

The Commission's new proceedings against Altice and Canon illustrate a potential hardening of the Commission's approach to partial implementation cases. In May 2017, the Commission announced that it had opened formal proceedings against the French company Altice, which notified the Commission of its plans to acquire PT Portugal in February 2015. Although the Commission cleared the transaction on April 20, 2015, the Commission believes that Altice actually implemented the acquisition prior to the adoption of the Commission's clearance decision, and in some instances, prior to its notification, by virtue of provisions in the acquisition agreement that put Altice in a position to exercise decisive influence over PT Portugal. Commissioner Vestager elaborated in her May 2017 speech, that "we found that [under] Altice's agreement to buy PT Portugal . . . Altice had already been acting as if it owned PT Portugal[,giving]. . .instructions on how to handle commercial issues, such as contract negotiations. And it also seems to have been given sensitive information. Information that only PT Portugal's owner should have had—and without any safeguards to stop it misusing that information." The Commission has not yet elaborated on the specific contractual provisions in question or the nature of the information disclosed. The Commission has also not yet clarified whether its investigation is limited to a potential violation of the EUMR's suspensory obligation, or also a potential violation of Article 101(1) TFEU.

Interestingly, the Commission's Altice investigation follows close on the heels of a November 2016 decision by the French competition authority imposing an €80 million fine against Altice and SFR Group for gun-jumping in two other transactions notified in 2014, Altice-SFR and Altice-OTL. The French Altice case, the first of its kind in France, illustrates that the Commission is not the only European authority taking a harder line on gun-jumping.

In July 2017, the Commission opened proceedings against Canon in connection with its acquisition of Toshiba Medical Systems, in which Canon paid the full price for non-voting shares in Toshiba Medical Systems and options for voting shares that were held by an interim buyer. Although Canon only exercised these options after clearance was obtained, the Commission considers that the combination of Canon's ownership of 100% of the target's non-voting shares and options to acquire the voting shares allowed Canon

to effectively acquire Toshiba Medical Systems before the transaction was even notified.

Although this transaction also triggered gun-jumping cases in other jurisdictions, including China and Japan, the Commission's case may differ from the Chinese and Japanese investigations, because Canon may have relied on a specific EUMR exemption that excludes certain acquisitions by banks or other financial institutions from the definition of a notifiable concentration if the acquirer does not exercise voting rights in the target and resells the shares within one year. While the use of such transactions to "warehouse" a target pending clearance of an acquisition by an ultimate purchaser has raised questions in the past, the Commission has never directly challenged the legality of such structures. Although the Commission has not yet published details of its analysis, the Canon case should clarify the Commission's treatment of so-called "warehousing" transactions and the circumstances in which the ultimate buyer's prepayment of all or almost all of the ultimate purchase price, transferring economic risk associated with management of the target, may amount to implementation of a concentration.

Conclusions and Practical Suggestions

The contrast between the aggressive U.S. prosecution of gun-jumping violations and the Commission's apparent lack of interest has been striking, since the legal principles underlying gun-jumping cases are similar in the European Union and the United States and in other areas the Commission has been as or more aggressive in finding and fining antitrust infringers. Whatever the reason for the disparity up to now, the Commission seems to have drawn a line in the sand, indicating that it intends to pursue gun-jumping cases aggressively going forward.

The Commission's decisions in the Altice and Canon cases will provide clarity in four important areas: the circumstances in which pre-closing exchanges of information and pre-closing integration planning may violate EU law; which legal regime will apply in gun-jumping cases (the EUMR alone, or the EUMR and Article 101(1) TFEU); the conditions on which an acquiror's assumption of economic risk without voting control can amount to a premature implementation of a notifiable acquisition; and how the Commission intends to calculate fines in such cases.

Pending the final outcome of these cases, transaction parties should take note of the Commission's newly aggressive focus on gun-jumping and take care to avoid potential violations of EU law, particularly in relation to unprotected exchanges of information; premature integration of the parties' businesses; transfer of management control; co-ordination of competitive behavior; and transfer of an excessive amount of the business risk associated with the target's business. More specifically:

The parties should not share competitively sensitive information beyond what is required for legitimate purposes such as negotiation, due diligence and integration planning. They should share such information only in accordance with a confidentiality agreement limiting the use of the information to consideration of the transaction and its disclosure to persons who need access and consider where special procedures, for instance limiting exchanges to members of a ''clean team'' not involved in either party's day-to-day business operations, may be appropriate.

The parties should avoid any changes in the target's business conduct prior to closing, including transfers of personnel or the target's employees holding themselves out as representatives of the buyer and vice versa. The parties should also be careful to avoid giving the appearance of acting as a single company, for instance by changing their business cards or letterhead, the target using the buyer's name when answering to customer phone calls, and the like.

Before closing, the buyer must not exercise or be in a position to exercise management control over the target's business, for example through ''ordinary course'' covenants limiting the seller's freedom to manage the target's business during the pre-closing period. While customary limits to unusual operations or material changes to the target's business are acceptable, subjecting the target's routine management decisions to approval by the buyer, or giving the buyer an influence over the target company's conduct, may constitute a gun-jumping violation.

Before closing, the parties should not under any circumstances co-ordinate their competitive behavior, for instance by coordinating their marketing strategies, agreeing on prices or allocating products, territories or customers. Examples of such conduct would include the parties' ceasing to compete against one another for particular contracts or allocating customers, the seller granting the buyer unlimited access to the target's premises and accounting and administrative records, or forming joint committees to monitor the target's business. Similarly, the parties should not conduct joint sales activities or enter into negotiations or commitments on behalf of the other party prior to closing.

Special care should be exercised in multi-step transactions where the parties believe that certain initial steps are not subject to notification and approval under the EUMR. In particular, in any warehousing transaction relying on Article 5(a) EUMR, it would be prudent to ensure that any transfer or allocation of economic risks does not remove the target's incentive to compete or damage the integrity of the target's business.

ENDNOTES:

[1]Margrethe Vestager, *Competition and the rule of law*, May 18, 2017, available at https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en.

[2]*See* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017M8228(03)&from=EN.