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AG Wahl in EY/KPMG – the latest on gun-jumping

Thomas Wilson (Kirkland & Ellis, Belgium) · Friday, January 19th, 2018

Most merger control regimes provide for so-called stand-still obligations, i.e. the parties cannot implement the transaction until the necessary merger clearances have been received from the relevant competition authorities. This means in particular that the acquiring company cannot starting controlling the target's business prior to closing – no "gun jumping" is allowed.

Competition authorities have become increasing active in this space. At the same time the **criteria for assessing what exactly constitutes illegal gun-jumping** (as opposed to permitted integration planning) **are not entirely clear** and can vary by jurisdiction.

Increased enforcement activity

Enforcement activity from competition authorities in this area has recently increased across the globe:

- In late 2016, the French competition authority imposed a **record fine of €80 million** on the French company Altice for illegal gun-jumping (relating to its acquisition of SFR and OTL);
- **Investigations against Altice** (in relation to its acquisition of PT Portugal) and **Canon** (relating to its acquisition of Toshiba) are pending before the EU Commission;
- **Other jurisdictions** where authorities have recently imposed gun-jumping fines include the **US, Brazil and China**.

At EU court level, **Marine Harvest** recently decided to appeal before the European Court of Justice (EUCJ) a decision from the EU General Court to uphold a **€20 million fine** imposed by the EU Commission for gun-jumping / failure to notify in relation to acquiring a *de facto* control stake in Morpol. And then there is the **EY/KPMG** case which a Danish commercial court referred to the EUCJ in December 2016, essentially asking the EUCJ to clarify the scope of the standstill obligation in Article 7(1) of the EU Merger Regulation.

What is EY/KPMG about?

In the context of a merger between auditing firms Ernst & Young (EY) and KPMG Denmark (KPMG DK), KPMG DK gave notice to terminate its membership agreement with KPMG International at the time of the deal announcement in November 2013, i.e. before clearance from the Danish Competition and Consumer Authority (DCCA) was obtained. The termination notice was irreversible as neither EY nor KPMG DK could individually or jointly rescind it. KPMG International and KPMG DK ended their cooperation, effective as of June 2014, after the DCCA

had cleared the deal in May 2014. In December 2014, the DCCA issued a decision finding that the transaction had been implemented prematurely by giving notice to terminate KPMG DK's membership in the international KPMG network at the time of deal announcement. In June 2015 EY appealed the DCCA's decision before the Danish Maritime and Commercial Court.

Gun-jumping criteria applied by the DCCA

- The DCCA found that the measure was **irreversible** (as the notice of termination could not be rescinded);
- The behaviour was **merger-specific** as KPMG would not have served the notice of termination absent the merger;
- KPMG's notice of termination had an inherent **potential for market effects** as the future of KPMG DK as a Danish audit firm outside of KPMG's international network would have been uncertain if the merger were to be blocked.

The EU Commission sided with the DCCA on the above at an oral hearing before the EUCJ in November 2017.

Opinion of AG Wahl

In today's opinion, Advocate General Nils Wahl took a **very different view**:

- The **termination of the membership agreement was a preparatory measure** that did not violate the standstill obligation; **although the termination might have had some effect** on the market **it would have not meant that KPMG DK would no longer have been a competitor of EY** (paras 85 et seq.);
- The standstill obligation does not affect measures that **precede and are severable** from the measures actually leading to controlling the target undertaking, even if these are taken in connection with the transaction (para 78);
- **None of the criteria suggested by the DCCA are of relevance** for determining the scope of the standstill obligation (paras 47 et seq.).

Conclusion

The opinion from AG Wahl shows that the **debate on the scope of the stand-still obligation is far from over** and **further clarification is necessary** so that companies have more legal certainty for any integration planning between signing and closing while the regulatory process is still on-going. It remains to be seen whether the EUCJ will follow the AG's opinion in its judgement – **watch this space**!

See below the link to AG Wahl's opinion:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0633

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This entry was posted on Friday, January 19th, 2018 at 9:00 am and is filed under European Court of Justice, Source: OECD

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