Kluwer Competition Law Blog

Antitrust Deal Risks in 2018

Thomas Wilson (Kirkland & Ellis, Belgium) · Tuesday, January 30th, 2018

As authorities worldwide step up enforcement of their merger control rules, companies planning deals in 2018 must *pay even closer attention* to their obligations and conduct throughout the period from early planning up to final merger control clearance.

We are seeing more authorities impose *heavy fines for an increasingly wide range of pre-clearance conduct*, with accompanying strong signals that authorities will take tough action against any parties that *infringe procedural rules* this year.

Wider risks in 2018 include the trend in all regions for more intervention in merger review processes by third parties and, for deals affecting the EU and UK, legal uncertainty caused by the UK's impending exit from the EU's "one-stop-shop" for merger review.

The below focuses on three antitrust deal risks in particular:

- Gun jumping
- Provision of false or misleading information
- Safeguarding legal privilege in multi-jurisdictional reviews

Gun-jumping – tough enforcement against parties that fail to notify on time or integrate their businesses pre-clearance

Most companies are aware that failing to notify a deal on time or integrating businesses pre-clearance ("gun jumping") exposes them to risk of fines and other penalties. However, difficulties arise in practice when parties experience lengthy periods between signing and closing. In theory the distinction between permitted integration planning and illegal premature implementation of the deal is clear – many times in practice it is (currently) not.

Recent cases have shown that the price for getting it wrong can be very high. In late 2016, French competition authority imposed *a record €80m fine for early integration and illegal information exchange* on Altice. Several *gun-jumping cases are pending* before the EU Commission and the EU courts. Interestingly, Advocate General Wahl recently took a much narrower position than the EU Commission and the Danish competition authority on the scope of gun-jumping in the EY / KPMG case pending before the EU Court of Justice. But it remains to be seen whether the court will follow AG Wahl's views in its judgment. (For details on EY / KPMG, see my Kluwer blog post here).

Concerns have arisen in practice that *authorities may apply different criteria* when drawing the fine line between legitimate planning on the one hand and premature integration on the other, with (some) European authorities being more restrictive than their US counterparts. Current uncertainties, compounded by a marked increase in third-party complaints about alleged gun-jumping, are driving some companies engaged in global deals to change traditional approaches.

False and misleading information – the importance of verifying your facts and evidence

Recent cases have confirmed that merging parties face heavy penalties if they fail to disclose sufficient and correct information during reviews, or if they provide misleading responses to requests for information. For instance, at EU level *Facebook* was recently *fined €110 million* for providing false / misleading information during its the Commission's investigation of the *WhatsApp* takeover. For companies it proves particularly challenging to fully comply in all instances when authorities demand voluminous data and internal documents within very tight time frames, which then form core parts of their evidence.

Parties involved in complex deals should *ensure their document review tools and procedures for preparing and verifying submissions are watertight*. Disclosure of facts and evidence must be full and accurate, which includes future plans on product development or innovation. Authorities are often now requiring parties to file, for example, detailed methodology notes alongside substantive submissions to ensure transparency in relation to the way in which the parties collected the information.

Authorities are particularly sensitive to any allegations that the merging parties may have tried to influence the way in which customers respond to market testing. It is customary and legitimate for companies to engage with their customers following the announcement of a transaction, but this process must be managed to ensure that such contacts are not used to influence customers' feedback to the regulators.

Safeguarding legal privilege in multijurisdictional reviews

As parties face demands for substantial document production by more authorities, it is becoming *increasingly challenging to protect legally privileged materials*. The scope of legal privilege differs significantly across jurisdictions, with the EU position generally narrower than other jurisdictions (including the US and UK) but going beyond what some EU member states accept (including Germany). In Asia, legal privilege is less established: the concept does not even exist in mainland China, Japan or South Korea.

These *differences present challenges in cross-border deals* where disclosure in one jurisdiction may amount to waiver and lead to subsequent disclosure to other authorities and courts. Parties are advised to maintain detailed records of privileged materials in each jurisdiction, and be ready to justify such claims to avoid forced disclosure.

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