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The EU OECD paper on gun-jumping

Thomas Wilson (Kirkland & Ellis, Belgium) · Monday, February 25th, 2019

Gun-jumping is a "hot topic" and increasingly on the radar of competition authorities in Europe and across the globe. As part of the OECD roundtable discussions, the European Union (and a number of other countries) recently submitted a note on the suspensory effects of merger notifications and gun-jumping (Article 7 of the EU Merger Regulation (**EUMR**)). The note is helpful as it gives an overview of the legal framework, the relevant EU decisions and investigations as well as some guidance on failure to notify and gun-jumping conduct. However, a number of practically-relevant gun-jumping issues are not addressed in the note which shows that additional guidance may be needed from the European Commission (**EC**).

At EU level, the two main cases relating to gun-jumping are:

- The judgment of the European Court of Justice (**ECJ**) in the EY / KPMG case (rendered on 31 May 2018, C-633/16); and
- The EC's fining decision of Altice in the context of the Altice / PT Portugal merger (24 April 2018, Case M.7993).

Both are discussed in the EU note.

EY / KPMG

In para 5 the paper briefly makes reference to the ECJ's EY / KPMG judgment according to which EUMR gun-jumping only captures "*a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*". The note states that the EY / KPMG judgment confirms that both a full and partial implementation of a deal are caught by the EU stand-still obligation, but no further views on the implications for the EC's post-EY / KPMG gun-jumping practice are given. This would however been helpful, in particular as the EC took a much broader view on what constitutes gun-jumping during the EY / KPMG court proceedings (including measures that "*significantly affect the prevailing competitive situation*"; see para 42 of AG Wahl's opinion of 18 January 2018). The following points would have been of interest:

- How does the EC interpret the ECJ's (open) formula in practice?
- As ruled by the ECJ, pre-clearance measures that have actual or potential market effects are by themselves not sufficient to assume a gun-jumping violation.
- Purely unilateral measures taken with a view to an upcoming merger do not yet constitute gun-

jumping.

- However, any measure that gives the purchaser the possibility to exercise control over the target pre-clearance, or even only contributes to this, is still caught by the stand-still obligation, e.g. in case the acquirer decides to change or influence the composition of the target senior management before closing.
- In its judgment, the ECJ also finds that the stand-still obligation is *lex specialis* to Article 101 TFEU, but outside of the scope of the gun-jumping provision Article 101 is applicable between merging parties. What does this mean in practice?
- Presumably, farther reaching preparatory measures prior to competition clearance are allowed in transactions involving non-competitors.
- The exchange of competitively sensitive information falls under Article 101 TFEU as long as possessing such information does not by itself put the acquirer in a position to exercise decisive influence over the target (or contribute to this).
- It would have also been helpful if the note had set out the EC's post-EY /KMPG understanding of "grey areas" such as a joint customer outreach or joint negotiations with future suppliers as well as traditionally less obvious risk areas such as IT and HR which merging parties and advisers have in practice been cautious about in light of the recent uptake in gun-jumping enforcement. Uncertainty also exists with regard to a partial or full purchase price payment prior to closing as there are deviating views from EC Case Teams.

Altice

Para 13 of the note mentions the Altice / PT Portugal case in which the EC imposed a record fine of €124.5 million on Altice for violating gun-jumping rules. Specifically, the EC found Altice's pre-closing rights under the SPA to veto and intervene in the target's business with regard to senior management, pricing strategies and certain commercial contracts, as well as its actual exercise of such rights, were too far reaching. In addition, according to the EC, the companies also extensively exchanged competitively sensitive information without the appropriate safeguards being in place (clean teams etc.). It is helpful that the EC established certain gun-jumping principles in Altice which are mostly also mentioned in the note (see paras 14 et seqq. and 33):

- It is clear from the Altice decision that clauses in an SPA contract which give the purchaser the possibility to exercise decisive influence over the target prior to clearance already constitute gun-jumping if not aimed at preserving the target value (i.e. no actual implementation conduct is required).
- The EC acknowledges that SPA pre-closing covenants that intend to protect the value of the target in the interim period are both common and appropriate (para 32 of the note). However, according to the EC, any intervention rights that give the acquirer the possibility to exercise decisive influence over the target are only permitted if they are directly related and necessary for the implementation of the transaction (reference is made to the EC's Ancillary Restraints Notice), see paras. 70 et seqq. of the Altice decision.
- Making such exception for commonly used pre-closing covenants seems convincing but does not appear to be fully in line with the ECJ's "contributing to a change of control" formula (however, admittedly, the EY / KPMG concerned very different facts and not pre-closing covenants).
- Para 32 of the EU note mentions that veto rights relating to ordinary course of business of the target it will likely not be relevant for preserving the target's value. However, according to the EC, even if the veto right falls outside of the ordinary course of the target's business it may still

not be relevant for preserving the target's value and careful analysis is required (para 99 of the Altice decision). Presumably this relates to particularly sensitive areas such as pricing and innovation, but unfortunately the note is silent on this point.

- The EU note is also silent on the the materiality thresholds for commercial contracts above which veto rights apply, e.g. in relation to debt commitments, liability or M&A activity of the target. According to the EC in the Altice decision, these must be based on objective criteria such as the size and scope of the target's activities by reference to (i) the total transaction value, (ii) global target revenues generated by the target and (iii) the value of the target's contracts seen by the acquirer in the data room (paras 106, 166, 235 of the decision).
- Setting thresholds by reference to transaction value and target revenues does not seem very practical and may lead to unnecessarily narrow intervention rights of the acquirer in order to avoid gun-jumping risks. Alternatively, one could, for instance, for M&A transactions done by the target look at the transaction values of the last few years and calculate an average figure in order to determine the threshold.
- In the Altice decision, the EC also considered the fact that the target business had pushed back on the materiality thresholds during the transaction negotiations, claiming that compliance would be burdensome, as evidence that they enabled Altice to direct the target's ordinary course activities pre-closing (para 96). One could however take the view that such "forth and back" between the parties (as well as the negotiated outcome) is a normal part of the commercial negotiation process and not necessarily an indication for gun-jumping.
- Paras 15 and 33 of the EU note mention that the exchange of competitively sensitive information between the parties is legitimate if the appropriate safeguards are put in place. Such safeguards can be clean teams, confidentiality agreements and NDAs (see e.g. para 53 of the Altice decision). Aside from the general point that such exchange would post-EY / KPMG normally not be considered gun-jumping it would however be useful to have more precise guidance on:
- What type of information precisely needs to be limited to clean teams? Can parties and advisers rely on the Horizontal Cooperation Guidelines (as is common practice today)?
- Can information sharing be less restrictive once the parties are close to closing, i.e. can a different approach be taken depending on the phase of the process we are in?
- Are there any limitations for parties becoming clean team members, e.g. in particularly sensitive areas such as future pricing, R&D and innovation?

Conclusion

Given that Altice has appealed the EC's decision it can be expected that the EU General Court will take a view on some of the points, e.g. on gun-jumping exceptions for SPA pre-covenants under the ECJ's formula and the EC's classification of confidential information exchange as gun-jumping (even though the summary of Altice's application does not seem particularly pronounced on these points).

Useful links

EU note to the OECD:

https://one.oecd.org/document/DAF/COMP/WD(2018)95/en/pdf

ECJ judgment EY / KPMG:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=202404&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=341365

Opinion of AG Wahl in EY / KPMG:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=198531&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=342174

EC Altice decision:

http://ec.europa.eu/competition/mergers/cases/decisions/m7993_849_3.pdf

OJ summary of the action brought by Altice:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2018.341.01.0020.01.ENG&toc=OJ:C:2018:341:TOC

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