Legal Update

Merger Control Law:
Recent Developments on "Gun Jumping"

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1. Introduction

Large(r) transactions may require merger filings with competition authorities in one or several jurisdictions.[1] In that case, the parties to the transaction are generally required to notify it to the competition authorities ("notification obligation") and/-or to wait with its implementation until the authorities have cleared it ("standstill obligation").[2] The overall aim of these obligations is to prevent the market and its participants from negative impacts resulting from the transaction. If the parties disregard the notification and/or standstill obligation[3] by prematurely implementing the transaction before receiving clearance, this qualifies as so-called "gun jumping".

It may expose the parties to several severe risks, including considerable fines or ultimately the invalidity of the transaction as a whole under civil law. However, while it is obvious that, for example, the premature acquisition of 100% of the shares subject to the transaction qualifies as gun jumping, the qualification of particular actions (adopted by the parties in view of the future implementation of the transaction) as gun jumping can be quite delicate.

We will examine which actions between signing and closing of the purchase agreement are particularly risky (and therefore may qualify as gun jumping) and which the parties can adopt without risking legal disadvantages. In the process, this article will include the discussion of some recent – partly divergent – European developments on the topic. Please bear in mind that addressees (and potential infringers) of the standstill obligation are all companies involved in the transaction.

[1] In many jurisdictions the existence of a merger filing obligation depends on the fulfilment of two sets of criteria: (**1**) The parties involved need to meet certain turnover thresholds and (**2**) the acquisition in question needs to qualify as a „notifiable" transaction. In Germany (pursuant to Art. 35 – 38 of the German Act against restraints on competition), for example, a merger filing obligation is triggered, if (**1**) the parties in their last business year (i) jointly generated a worldwide turnover of EUR 500 million, (ii) one undertaking concerned generated a domestic (i.e. German) turnover of more than EUR 25 million and (iii) another undertaking generated a domestic turnover of more than EUR 5 million [turnover thresholds]. Moreover, (**2**) the acquisition needs to comprise – among other things – (i) a change of control or an acquisition of (ii) 25% or more or (iii) of 50% or more of the shares or voting rights in another company or (iv), it may comprise the acquisition of a competitively significant influence.

[2] (**a**) Please refer, for example, to Art. 4 and 7 of the EU Merger Regulation or Sec. 41 German Act against Restraints of Competition (GWB). (**b**) A few jurisdictions, such as the United Kingdom, have no standstill obligation in place; merger filings are voluntary. However, in some cases, it is advisable to submit a filing on a voluntary basis since the competition authorities may unwind a transaction after closing if it the authorities find it to be harmful to competition.

[3] Some jurisdictions, e.g. Germany, only set up a standstill obligation (the violation of which qualifies as gun jumping), but no notification obligation.

2. Decisional practice: What are the practical risks of gun jumping?

Recent examples of competition authorities starting investigations against companies based on the grounds of gun jumping demonstrate vividly, that the topic is not merely of an academic nature but has significant practical relevance. Overall enforcement levels seem to have increased in the past few years.

The majority of the cases focuses on "blatant" violations of the standstill obligations. In other words, the parties to the transaction failed entirely to notify a transaction to the relevant competition authorities despite there being no doubt on a filing obligation.

Recent examples include:

- In August 2018, the **Bulgarian** Commission for Protection of Competition (**BCPC**) opened proceedings against a local agricultural company for not notifying the authorities of an acquisition before it was implemented.[4] The BCPC became aware of the transaction through a national newspaper ranking of the top business deals every year. The decision shows, that the authorities are more and more dedicated to actively monitoring business transactions in their respective country
- The **French** competition authority (**Autorité de la Concurrence**) imposed a record fine of **€ 80 million** on the telecommunications company Altice in November 2016 for gun jumping during the acquisition of France's second-largest telecommunications provider SFR as well as OTL (Virgin Mobile).
- In April 2018, the **European Commission** (EC) imposed a fine of **€ 124.5 million** on Altice, which had acquired another operator in Portugal, for gun jumping.
- In 2014, the **EC** had imposed a **€ 20 million** fine on Harvest Marine, a Norwegian seafood company, for implementing its acquisition of salmon producer Morpol before obtaining clearance from the relevant authorities. The verdict was appealed by Harvest Marine, but dismissed in October 2017.

Even though the gun jumping fines imposed on companies by the European and national competition authorities appear to be increasing, they have not yet reached their absolute limit. In Germany, for example, gun jumping could result in a fine of up to 10 % of the total turnover achieved by the group during the previous business year. In the past, the **German Federal Cartel Office** (FCO) has – on some occasions – imposed rather moderate fines on companies for gun jumping: Mars Inc. (**€ 4.5 million**, B 6-026/04); Druck- und Verlagshaus Frankfurt am Main GmbH/-Stadtanzeiger (**€ 4.13 million**, B6-50/08); ZG Raiffeisen eG (**€ 414.000**, B2-80/09); Interseroh/fm (**€ 206.000**, B4-87/10). So far, the FCO seems to be focussing only on blatant violations of the standstill obligation.

3. Criteria: Which actions are allowed, which aren't?

Even though national and international authorities do not hesitate to impose significant fines for gun jumping, the criteria and thus the overall scope of the standstill obligation have not yet been subject to many decisions. **One of the key questions that remain mostly unanswered is whether the transaction itself has to be (partly) implemented or whether other actions between signing and closing (also) qualify as gun jumping.** The case law in this area is partly divergent.

On a separate note, it should be borne in mind that the various national merger control laws, as well as EU merger control law each, stipulate slightly varying criteria for what qualifies as a notifiable transaction. Most jurisdictions, including the EU Merger Regulation, focus on changes of control (including, for example, acquisitions of sole, joint, de facto or de jure control). A couple of other jurisdictions, however, also cover other "types" of transactions. For example, Germany (and to some extent Austria) also regard acquisitions of certain amounts of shares or voting rights (25%, 50%) or of a competitively significant influence as notifiable transactions.[5] The fact that the various jurisdictions set up (partly) different criteria on the "type of notifiable transaction" in question (see above), adds another layer of complexity to the topic.

Recent decisions:

- In the **Ernst & Young** decision of May 2018, the European Court of Justice (ECJ) found, that the scope of the standstill obligation only involves such measures that contribute (partly) to a change in control and therefore to a premature (partial) implementation of the transaction. In that case, KPMG Denmark (the Target in the transaction) following the announcement of the transaction had terminated a cooperation agreement with KPMG International. According to the Danish Competition Authority, this violated the standstill obligation, as it was merger-specific, irreversible and likely to have market effects. However, in the ECJ's view, where transactions, despite having been carried out in the context of a concentration, "*are not necessary to achieve a change of control*" of an undertaking, they do not fall within the scope of the notification/standstill obligation and hence do not qualify as gun jumping.
- In the **Altice** decision of April 2018, the **EC** came to a different conclusion. In the EC's view, Altice had implemented its acquisition of PT Portugal before obtaining the Commission's clearance, and in some instances, even before its notification of the merger. Different to the facts underlying the Ernst & Young decision, the purchase agreement gave Altice (legal) veto rights (i.e. "control") over decisions concerning PT Portugal's ordinary business. The EC also found that Altice actually exercised decisive influence (i.e., "control") over

[4] The last fine for a similar breach in Bulgaria was imposed on a company in 2012.

[5] We do not elaborate here on the different turnover thresholds applicable in the various jurisdictions.

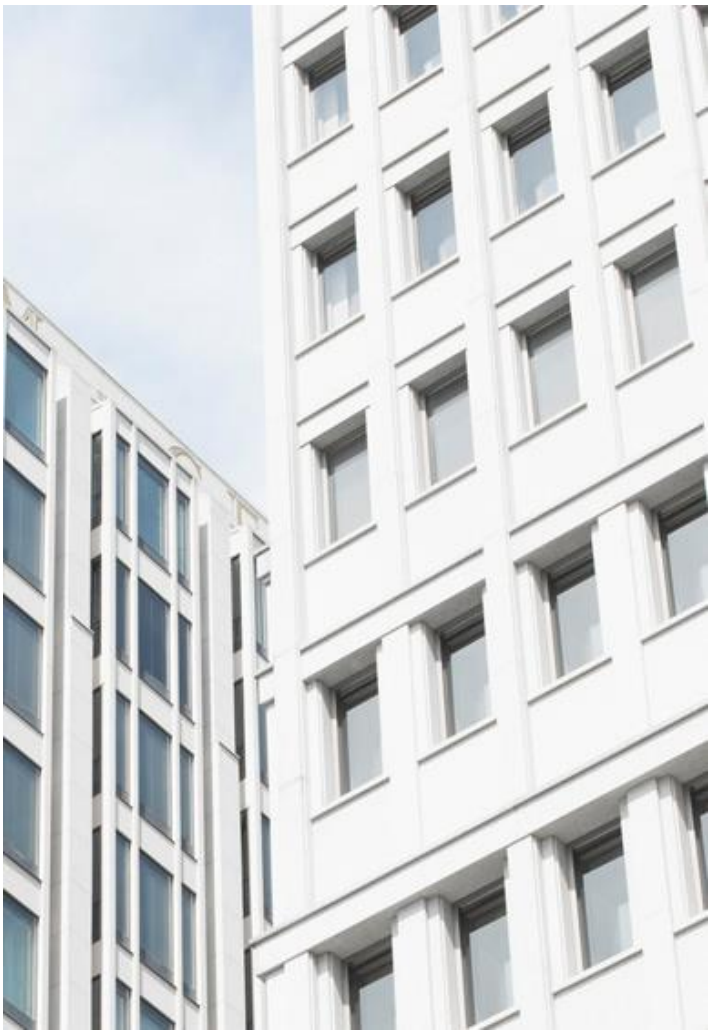
aspects of PT Portugal's business, for example by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.

- The German Federal Court of Justice (BGH) also addressed the topic in its **Edeka v Tengelmann** decision in November 2017. In essence, the case concerned the (premature) joining of purchasing activities of the two food retailers. The BGH also takes the change of control (as well as the other transactional types relevant under German law) as a starting point but draws the conclusion, that the scope of the standstill obligation not only comprises measures that already anticipate the acquisition of control. On the contrary, measures that do not comprise one of the transactional types relevant under German law, but are taken in view of their future implementation and can (at least partly) anticipate their effects, according to the BGH, may also be covered. In the court's view, this applied to the joint purchasing agreement entered into between the parties. Conversely, according to the court, actions of a purely *preparatory nature* do not qualify as gun jumping.

Excessive information flow between the acquirer and the target company:

Depending on the circumstances of the case, the Acquirer has a significant interest in gaining detailed information on the Target's activities.
This is true in particular if the Acquirer and the Target are actual or potential competitors. While competition law generally acknowledges the Acquirer's need to establish the Target's value (and to therefore gain information on the Target), it does not generally permit an exchange of strategically relevant information between competitors (or the unilateral passing-on of strategically relevant information) simply because the Acquirer considers the Target's purchase. For this reason, the parties are well advised to establish Clean Teams (as well as NDAs) and to avoid an unfiltered information flow during the transaction, e.g. *via* a data room. Violations of this general rule regarding the "ban on cartels" are often also qualified as "gun jumping". It is common understanding that in a transactional context this ban applies more or less rigidly depending on the transactional phase: At an early negotiation stage, only few indispensable information should be shared whereas shortly before or after signing more sensitive information can be exchanged.

Moreover, after signing, the Acquirer will often wish to ensure that measures adopted by the Target (between signing and closing) are still within its "ordinary course of business" and do not financially harm the Target business. However, actions going beyond that (either in the form of a premature de jure acquisition or in the form of an undue, excessive exchange on sensitive information to execute decisive influence over the Target) can also amount to gun jumping.



Do's, Don'ts and Critical situations

Do:

- Exchange on information that are publicly accessible or not of a (competitively) significant nature, e.g. because they are sufficiently aggregated or historic (if uncertain, consider NDAs/Clean Team arrangements),
- Hold general information events for employees,
- Create interfaces for the IT infrastructure (without actually blending the infrastructures),
- Agree on SPA clauses (e.g., "ordinary course of business" or "consent" clauses) to protect the Target business while ensuring that those clauses are truly indispensable to avoid substantial and irrevocable harm to the Target; if Target fails to comply, the acquirer may request payment of a contractual penalty[6] (however, see below, to exclude potential infringements).

Don't

***de jure* implement the transaction, e.g. via**

- The actual acquisition of the shares or the assets in question,
- The acquisition of the voting rights in question,

***de facto* (full or partially) implement the transaction, e.g. via**

- Joint commencing of business activities,
- Joining/merging of the Target organisation with the Acquirer organisation,
- Implementation of joint reporting structures,
- Coordination of joint purchasing, marketing or sales activities,
- Issuance of instructions by the buyer to the Target's management or employees.

Critical situations/Check in each case:

- Joint actions that *could* be viewed as partly anticipating the effects of the merger, e.g. joint management meetings or joint purchasing arrangements,
- Press releases (carefully check wording, e.g. if wording suggests that the transaction has already been implemented),
- Agreeing on ordinary course of business-clauses that are not truly indispensable to avoid substantial and irrevocable harm to the Target (case law so far does not offer reliable criteria as to when and to what extent such clauses are acceptable).

The aforementioned lists are non-exhaustive and only provide some examples for typical scenarios. They cannot substitute the professional legal assessment of an individual transaction by experienced competition lawyers pursuant to the (national) merger regime(s) applicable to the case.

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[6] The French authorities have deemed this as unproblematic.