Time For M&A Parties To Take Gun-Jumping Rules Seriously

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Last week, on April 24, 2018, the European Commission announced that it had imposed a fine of €124.5 million ($152.3 million) on Altice, the Dutch cable and telecommunications company, for implementing its 2015 acquisition of PT Portugal before obtaining merger clearance from the commission (termed "gun jumping").

The record amount imposed by the commission dwarfs any other gun-jumping fine imposed by any other antitrust authority worldwide. While underlying rules that parties need to comply with during ongoing merger control reviews are not new, the fining decision stresses the need for merging parties to take gun-jumping rules seriously.

The Commission’s Decision

In February 2015, Altice notified the commission of its plans to acquire PT Portugal. The transaction was conditionally cleared by the commission on April 20, 2015. Then in May 2017, the commission outlined concerns it had about Altice implementing its acquisition of PT Portugal before obtaining the commission’s clearance, and to some degree even before it had given notice of the merger.

Until the nonconfidential version of the commission’s decision is published, there are only limited details in the public domain on the precise actions the commission has found infringed gun-jumping rules. Nevertheless, based on its press release,[1] the commission has found:

- certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal, for example, by granting Altice veto rights over decisions concerning PT Portugal’s ordinary business; and

- in certain cases, Altice actually exercised decisive influence over aspects of PT Portugal’s business, for example, by (1) giving PT Portugal instructions on how to carry out a marketing campaign and (2) by seeking and receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.
In the Altice decision, the commission imposed the €124.5 million fine to reflect (1) the seriousness of the infringement — it found that Altice had breached both the notification and standstill requirements, and (2) the fact that in its view Altice had been aware of its obligations under EU rules, and was therefore negligent.

The fact that this fine is record-breaking is no accident. As Commissioner Margrethe Vestager noted, the fine was intended to “deter other firms from breaking EU merger control rules.”

The size of the fine also comes as a reminder of the heavy penalties the commission can impose if it finds an infringement — it is entitled to fine up to 10 percent of worldwide aggregated revenues (i.e., not just profits).

**What Can We Learn?**

**1. What Is Gun Jumping?**

The EU and the U.S. regimes, as well as many merger regimes around the world, are “suspensory,” i.e. they require that merging companies notify the regulator of anticipated mergers that meet the thresholds (the "notification requirement") and not implement them until cleared by the regulator (the "standstill obligation").

From the regulator’s perspective, the purpose of this is to prevent any irreparable negative impact of transactions on the market, pending the outcome of the regulatory investigation. In practice, this means that there are limits on what can be done by a purchaser vis-a-vis the target between signing a deal and closing a deal.

**2. What Does This Mean in Practice?**

Regulators require that parties to a merger remain separate and independent entities until the transaction is closed. Therefore, premerger coordination and information exchanges can potentially violate these rules — as the rules prohibit a purchaser from taking control of the target prior to the expiration or termination of the prescribed waiting periods.

In addition, the premerger exchange of competitively sensitive information and the coordination of otherwise competitive business parties can also potentially violate antitrust laws — should they diminish preclosing competition between the parties.

Therefore, although it is acceptable to engage in planning for post-merger integration, under no circumstances should integration plans be implemented prior to closing. The parties must remain separate and independent economic actors until the deal is closed.

**Is There Any Guidance?**

Unfortunately, there is little in the way of legal guidance on what this means in practice. Nils Wahl, advocate general to the European Court of Justice, the EU’s highest court, recently called for the law to be further clarified so that companies have more legal certainty as to what is permissible between signing and closing while the regulatory process is still ongoing. In January 2018, Wahl stated that “the scope of the standstill obligation must be clearly demarcated” and that it would be “best done by
recourse to a negative definition, that is to say by defining what lies outwith the scope of [the standstill obligation].”[2]

Wahl made his remarks in the context of a gun-jumping finding by the Danish competition authority in relation to a merger of two accountancy firms in Denmark in 2014.

After the merger was announced in 2013 but before the Danish competition authority issued a clearance, one merging party (A) gave notice to terminate its membership agreement with its then-parent company. The Danish competition authority found such conduct amounted to illegal gun jumping as (1) the termination notice was irreversible, (2) the termination notice wouldn’t have been served absent the merger, and (3) A’s notice had potential effects on the market, as the future of A as a Danish audit firm outside of A’s international network would have been uncertain if the merger were to be blocked.

Upon appeal, on Jan. 18, 2018, Wahl issued his opinion disputing the Danish competition findings, stating instead that the termination of the membership agreement was not gun jumping but merely a preparatory measure for the deal, as (1) it did not lead to a shift in control over A’s unit, and (2) it would not have meant that the two merging accountancy firms would no longer have been competitors (prior to closing).

While promising, it should be noted that an advocate general’s opinion is not binding on the European Court of Justice, and practitioners and businesses alike will need to wait until the final decision.

Further guidance may be gleaned from another decision, again involving Altice, and at the time a record-setting fine of €80 million ($86.6 million) set by the French Competition Authority for gun jumping in 2016.[3]

The fine relates to two separate acquisitions by Altice in the telecommunications sector: SFR and OTL (operating the brand Virgin Mobile in France) were both acquired by Altice’s subsidiary Numericable. While the French competition authority cleared both mergers, it later fined Altice for gun jumping, finding that prior to clearance, Altice (1) was already exercising influence over SFR and OTL, and (2) had illegally exchanged competitively sensitive information.

Specifically, the French competition authority found that, during the suspensory period:

- Altice had intervened in the operational management of SFR by giving its prior approval for (1) the participation in a tender offer, (2) the renegotiation of a mobile network sharing agreement, and (3) the definition of SFR’s pricing and promotional policy;
- Altice and SFR had started the implementation of a coordinated strategy, namely for the launch of a new internet and television offer under SFR’s brand;
- Altice had received from both SFR and OTL a large amount of strategic and commercially sensitive information (e.g. relating to SFR’s recent business performance and forecasts for the coming months and the implementation of a system of weekly reporting to monitor OTL’s economic performance); and
- the managerial integration had already started (e.g. OTL’s managing director performed management duties within SFR-Numericable).
Procedural Rules in the Spotlight

While the rules on gun jumping may not yet be clear, what is already evident is the increasing focus of European — and arguably other[4] — regulators on procedural misdemeanors:

- In May 2017, the commission fined Facebook €110 million ($124.3 million) for providing incorrect or misleading information during the commission’s 2014 investigation of Facebook’s acquisition of WhatsApp.[5]

- In July 2017, the commission also announced it was looking into procedural infringements by General Electric,[6] Merck KGaA and Sigma-Aldrich[7] for allegedly providing incorrect or misleading information, and also to Canon for allegedly implementing a merger before notification and clearance.[8] The EU investigations are ongoing. Canon was also fined by China's Ministry of Commerce, or MOFCOM, in 2016 for gun jumping, the agency's first-ever fine on a pure foreign-to-foreign transaction.[9]

- In October 2017, the EU General Court upheld the €20 million ($26.6 million) fine imposed on Marine Harvest (a Norwegian seafood company) by the commission in July 2014 for failure to notify its acquisition of de facto control of Morpol.[10]

Comment

While the latest Altice fine is unlikely to have materially altered any substantive rules on gun jumping and failure to notify, the severity of the fine means, as the commission intends, that merging parties must ever more carefully consider their stand on transitional rules between sign and close, particularly in the current environment of regulatory scrutiny for adherence to procedural rules. Buyers/investors always have a legitimate interest, (1) pre-signing onwards, to conduct a fulsome due diligence to assess the value of a target, and (2) to ensure that the value of the target is preserved in the transitional phase between signing and close. While the present decision does not negate such legitimate interest, it cautions buyers/investors that acquire competitors to be mindful of the boundaries that are set by antitrust rules in this context.

While legal practitioners and businesses alike await further clarity on the scope of gun-jumping rules, whether from formal guidance issued by a regulator, or as can be gleaned from pending decisions, what is clear is that merging parties must manage their interactions carefully to balance the need to preserve the value of the target prior to closing the deal with the need to ensure that parties continue to act independently.

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[2] Case C-633/16, Ernst & Young P/S v Konkurrencerådet; the full Wahl opinion can be found here: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CC0633&from=EN.


[4] E.g., the Chinese competition authority in charge of merger reviews (MOFCOM) has issued a new record number of fines for gun jumping amounting to CNY 1.65 million ($244,331) in 2017.


