Newsletter, 31 March 2017

Gun-Jumping – Antitrust Enforcement in M&A Transactions

Global trend of increased enforcement action in gun-jumping cases

Competition authorities worldwide are increasingly active in prosecuting parties found to have implemented notifiable transactions without previously obtaining merger control clearance. In a number of cases the parties had notified the merger, but implemented parts of the transaction before clearance ("gun-jumping"). Without many (if any) prior precedents in most jurisdictions, the recent decisions provide useful guidance with respect to the sometimes difficult distinction between permissible pre-merger preparations and unlawful premature implementation. They also set a strong reminder that parties need to strictly comply with antitrust rules during M&A transactions.

Legal background

Typically, when parties to a merger or acquisition enter into an agreement, there is a tendency to move the transaction along as quickly as possible. In transactions requiring merger control clearance, this interest conflicts with the obligation of the parties to not close the transaction before merger control clearance has been obtained ("standstill obligation"). The parties must continue to act as independent businesses and refrain from consolidating operations until the transaction is cleared.

Standstill obligations, as logic counterpart to the filing requirement, exist in most jurisdictions with some form of merger control (the UK being a notable exception in Europe). They aim at preserving market conditions in the status quo absent the merger. Parties who "jump the gun" risk substantial fines (under German and EU merger control rules up to 10 % of the respective companies' annual group turnover). In addition, premature closing actions may be void and competition authorities may initiate divestiture proceedings.

A clear cut infringement of the standstill obligation is found where parties close the transaction *de jure* by transferring the shares, assets or other means of control over the target before merger control approval is obtained. Pre-completion measures in anticipation of the imminent closing of the transaction, on the other hand, can be more difficult to assess (see below).

On a different but equally important note: Until closing of the transaction, the parties are independent companies and as such subject to the antitrust prohibitions against collusion and agreements that restrict competition. In particular in transactions between competitors it must be ensured that no sensitive information is exchanged before completion.

Scope of standstill obligation in Germany

The scope of the standstill obligation under German merger control law was subject of two decisions of the Higher Regional Court of Düsseldorf in December 2015 in the EDEKA/Tengelmann case.[1] The Court held that pre-completion measures constitute gun-jumping if they *de-jure* or *de-facto* effect consummation of (parts of) the transaction, even if such actions by themselves do not qualify as transaction under German merger control. In this light, *de-facto consummation* refers to situations where the parties effectuate the economic outcome of the transaction, be it by measures of the prospective acquirer that only a controlling shareholder could push through (e.g. a replacement of the company management, the transfer of management responsibilities) or by preempting the effect of the transaction on market conditions (e.g. through joint negotiations with suppliers or customers).

Following notification of the proposed acquisition of a number of Tengelmann supermarkets by its rival EDEKA, the FCO issued an interim injunction under which the parties until closing were prohibited from

- implementing a joint purchasing arrangement, and
- carving-out and closing a number of outlets which EDEKA did not want to acquire.

On appeal, the Higher Regional Court of Düsseldorf decided that entering into the joint purchasing agreement prior to clearance would constitute gun-jumping as it would lead to a *de-facto consummation* of the transaction. The

[1] Higher Regional Court Düsseldorf, decisions of 9 and 15 December 2015, cases VI-Kart 1/15 (V) and VI-Kart 5/15 (V).

Court based this assessment on the fact that Tengelmann would already exit the market on the demand side.

The carve-out was not deemed to be an early implementation of the transaction given that the parties expressly agreed that the carve-out markets would not be included in the transaction. As such, the carve-out itself could not be seen as (partial) implementation of the transaction. The Court noted, however, that the carve-out could conflict with the general prohibition of restrictive agreements pursuant to § 1 GWB, Art. 101 AEUV.

Enforcement actions worldwide

In a first of its kind decision in France, the French Competition Authority (FCA) imposed a fine of EUR 80m on the French telco operator Altice for gun-jumping in two separate acquisitions of mobile operators (SFR and OTL). The FCA (tipped off by competitors) found that in both cases Altice was already exercising influence over SFR and OTL and that it had access to strategic information prior merger control clearance. In the SFR case, the FCA identified the following actions to be in violation of the standstill obligation:

- the terms of participation by SFR in a public tender was subject to prior approval of Altice;
- Altice management was involved in renegotiations concerning certain network sharing deals of SFR;
- Altice influenced SFR's pricing policy for high-speed broadband offers;
- both parties already prepared the joint launch of new product under SFR brand.

With respect to OTL, the FCA held that Altice had already taken strategic decisions for its future subsidiary.

Several telco operators are currently set to sue Altice for damages resulting from its gun-jumping infringement.

In an interesting case in Denmark, a Danish court is currently seeking the European Court of Justice's (ECJ) guidance on the interpretation of the Danish standstill obligation in light of the EU merger regulation. In December 2014, Denmark's competition authority found that audit firms KPMG Denmark and Ernst & Young jumped the gun in their planned tie-up after KPMG Denmark cancelled its cooperation agreement with KPMG International before merger control approval was obtained. The decision of the ECJ is still pending.

The ECJ is currently also looking at a gun-jumping case brought forward on EU-Level by the European Commission (EC). In late 2015, the EC had imposed a EUR 20m fine on Norwegian Marine Harvest for acquiring control over a rival without seeking the EC's prior approval. Marine Harvest challenged the decision, referring to an exemption to the standstill obligation under EU merger control rules for takeovers via public bid.

Further countries in Europe that have been active (some for the first time) in enforcing in gun-jumping cases in the last two years include Austria, Croatia, Czech Republic, Hungary, Italy, Latvia, Lithuania, Norway, Portugal, Romania, Slovakia, Spain and the Ukraine.

Outside Europe we have seen cases in particular in Brazil, China and the US.

Comment

The continuously increasing activity of competition authorities all over the world with respect to gun-jumping highlights the importance of antitrust compliance in M&A transactions. The main area of risk beside gun-jumping is the exchange of sensitive information between competitors. With respect to gun-jumping, it is imperative that parties continue to act independently on the market and to limit cooperation to the carefully scrutinized permissible pre-merger planning until the deal is cleared and closed.

With respect to the issue of exchange of sensitive information in transactions between competitors, the competition authorities generally acknowledge that the negotiation process inevitably involves the transfer of commercially sensitive information. However, it is vital to ensure that the companies involved in the transfer of information take the necessary measures to minimize risks (e.g. by establishing Clean Teams, Black Boxes, etc.) so they remain fully in competition with each other until the transaction is closed.

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