Jumping the Gun: Some Clarification from the Court of Justice

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Introduction

In a recent blog post where we reflected on DG Competition fining Altice a record €124.5m for gun-jumping, we already anticipated the Ernst & Young P/S v Konkurrenceradet judgment where, for the first time, the Court of Justice of the EU (CJEU) provides guidance on the scope of the standstill obligation under the EU merger control regime. That judgment was handed down on 31 May. According to the CJEU, the “gun-jumping” prohibition only covers actions contributing to a change of control of the target undertaking. Because KPMG DK’s pre-clearance termination of its cooperation agreement with KPMG international did not contribute to Ernst & Young (EY) acquiring control over KPMG DK, EY and KPMG DK did not infringe the gun-jumping prohibition. This marks a welcome line in the sand finally indicating a limitation on the gun-jumping prohibition for merging companies.
Background

KPMG DK was a firm of auditors belonging to KPMG International’s network and which used KPMG International trademarks in Denmark pursuant to a cooperation agreement. On 18 November 2013, EY and KPMG DK entered into a merger agreement and KPMG DK gave notice to KPMG International to terminate the cooperation agreement. In December 2013, the parties notified the deal to the Danish Competition and Consumer Authority (DCCA) which cleared it in May 2014. In its decision of December 2014, however, the DCCA found that the parties had infringed the gun jumping prohibition by terminating the cooperation agreement before clearance had been obtained. In doing so, the DCCA characterized the termination as “merger-specific, irreversible and likely to have market effects”.

In June 2015, EY challenged the DCCA’s gun-jumping decision before the Danish Maritime and Commercial Court. As the Danish gun-jumping rules are modelled on those set out in the EU merger regulation (EUMR), the Danish court stayed proceedings and asked the CJEU: (i) to clarify the scope of the standstill obligation under the EUMR and (ii) explain whether the termination of the cooperation agreement in those circumstances infringed that obligation.

Findings of the Court

In line with the Opinion of Advocate General Wahl, the CJEU ruled that the standstill obligation covers operations which “in whole or in part, in fact or in law, contribute to the change in control of the target undertaking.” Similarly it also identified that measures that are “ancillary or preparatory to the concentration” but do not have “a direct functional link with its implementation”, i.e. do not contribute to a change in control, do not fall, in principle, within the scope of the gun-jumping prohibition, regardless of the effects which they may have on the market.

The Court considered that extending the prohibition to operations that do not contribute to a change of control would not only breach Article 1 EUMR, which defines its scope, but would also reduce the scope of Regulation No 1/2003 and Article 101 of the Treaty on the Functioning of the European Union (TFEU). This is because transactions which do not contribute to the concentration but lead to coordination between independent undertakings are potentially caught by Article 101 TFEU and Regulation 1/2003 (as well as, potentially by the equivalent rules at national level).

In the case at hand, the Court concluded that the termination of the cooperation agreement did not infringe the standstill obligation because it did not contribute to a change of control of KPMG DK.

Comment

The CJEU’s ruling substantially limits the scope of the standstill obligation which is good news for merging parties as they are now clearly allowed to take steps preparatory to a concentration provided they do not contribute to a change of control. This is likely to be the case in relation to any pre-closing step taken independently by the target, such as the termination of an agreement. However,
some pitfalls remain.

First, it is not entirely clear what the Court meant in practice by “transactions which in whole or in part, in fact or in law, contribute to the change in control of the target undertaking.” The Court appears to suggest that this covers any step contributing to acquisition of control, which has potentially a very wide scope; however the Court also clarified that the potential effects on the market of any such steps is not part of the assessment.

Second, the Court indicated that preparatory operations which are not covered by the gun-jumping prohibition may still be caught by the general prohibition of Article 101 TFEU, in particular if they lead to unlawful coordination between the merging parties. In other words, merging parties have to be vigilant not to take preparatory actions, which while falling outside the scope of the standstill obligation, lead to unlawful coordination or otherwise constitute a restriction of competition, for example through exchanging commercially sensitive information pre-clearance or through the imposition of non-compete obligations before clearance.

The CJEU’s ruling is also likely to have repercussions on the future approach of national competition authorities in Europe. They have recently sought to apply the standstill obligation more strictly and have imposed hefty fines on those they considered to have jumped the gun. This ruling is likely to necessitate something of a retreat in this regard.

In a nutshell, the CJEU’s ruling in EY brings some welcome clarification as to what, precisely, constitutes gun-jumping and permits merging parties to take preparatory steps under certain conditions. However, vigilance remains important as while merging parties may avoid gun-jumping, they must avoid breaching Article 101 TFEU. Practically, in particular in concentrations involving (potentially) competing companies, it remains essential to have appropriate antitrust protocols in place to ensure that not only the merging parties will not unlawfully coordinate their business behavior pre-clearance but also that confidential information is treated in conformity with competition rules during the negotiation, due diligence and antitrust clearance processes of the transaction.

Geoffrey Kalantari contributed to this post.

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