MERGER CONTROL – DODGE A REGULATORY BULLET: AVOID GUN JUMPING

The competition and regulatory clearance process for mergers, acquisitions and joint ventures has become more onerous and lengthy for many transactions. More than 140 countries have adopted some version of a merger control regime, adding a layer of complexity to international deals. It is not unusual for the clearance process to take up to a year or more. During this period parties will often want to begin planning for future integration. The authorities meanwhile are looking closely at potential "gun jumping" violations.

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“Gun jumping” refers to unlawful pre-merger co-ordination and is generally prohibited under competition law regimes. Many jurisdictions operate a ‘suspensory’ merger control policy which prohibits parties from integrating before the authorities give clearance and requires merging parties to continue to operate independently. A breach of these anti-gun jumping rules can lead to large financial penalties, as seen recently in the *Altice* case, where the French regulator imposed a record fine of EUR80 million on the telecoms operator.

Key principles

During the suspensory standstill period authorities expect merging parties to maintain independence and continue to act as competitors. A violation of these rules may involve price/terms fixing, market allocation, restrictions on investment or input, joint marketing, or sharing commercially sensitive information.

Nevertheless most authorities do allow buyers to take some steps to protect their proposed investment which may include, for example, limiting a target to act only within its ordinary course of business. However, it is clear that caution must be exercised to avoid the authorities perceiving this as integration in breach of the standstill obligation.

Reasonable steps or gun jumping?

There are no firm rules as to what constitutes an acceptable level of involvement in a target’s business so it must be considered on a case-by-case basis. However, recent cases do provide some guidance as to when conduct may be considered unlawful gun jumping.

In November 2016, the French competition authority imposed a record EUR80 million fine on telecoms operator *Altice* for gun jumping when it acquired targets SFR and OTL. Three main types of conduct were held to violate the prohibition and amount to gun jumping:

- The buyer’s involvement in the target’s management decisions.
- Taking steps to integration between the buyer and the target.
- The exchange of commercially sensitive information.

Involvement in target management decisions

The *Altice/OTL* share purchase agreement contained provisions purportedly protecting the purchaser against any variation of the target’s value between signing and closing. These covenants limited the target’s freedom to make investments, enter into or modify certain contracts, and open new shops.

The *Altice/SFR* share purchase agreement contained more standard covenants including those relating to price adjustment mechanisms and the target’s obligations to conduct business with due care. However, *Altice* construed these covenants widely and SFR did submit a number of strategic decisions for *Altice’s* approval in violation of the standstill obligation.

The French authority found that these rights gave *Altice* de facto control of the target’s strategy and operational decisions during the mandatory suspension period.

Integration steps

Altice and SFR entered into an agreement during the suspension period which prepared the launch of an *Altice* product through SFR's sales channels immediately following clearance. As a result of the agreement, which was found to anticipate the closing of the merger, the parties were thought to have gained more than six months on the merger control timeline and could capture customers more quickly. The effect of the agreement therefore went beyond mere planning and was unlawful.

Exchange of commercially sensitive information

The parties exchanged detailed information on pricing and strategy which was communicated directly to *Altice's* management on a weekly basis. The authority found that these updates were comparable to the information rights of a controlling shareholder. The validity of including in-house counsel and employees on clean teams (non-operational personnel who have access to commercially sensitive information of the other party) was also questioned.

More concerns following *Altice*?

The French authority imposed on *Altice* a high fine of EUR80 million, despite the authority's absence of case precedent on gun jumping in France in the period between notification of a merger and clearance. A number of concerns arise from the decision, including:

- Buyers' veto rights for non-ordinary business decisions. Buyers may protect their financial interests by using such provisions, but these are only lawful insofar as they do not restrain the target's autonomy to the point the buyer exercises decisive influence.
- The prohibition on preparatory steps, for example, on the launch of new products. The principle behind the suspension period is to prevent harm from emerging as a result of anti-competitive exchanges in advance of clearance. As such, the merging parties are required to remain independent competitors, even where collaboration on new products may be valuable to the consumer.
- The inclusion of operational employees on clean teams. The decision does not ban employees from participating in clean teams, particularly as not all information exchanged will be strategic. However, where operational employees are in clean teams it is unlikely that sensitive information could be exchanged. External counsel could potentially be used as a conduit for exchange of sensitive information.

What does this mean for your merger?

Parties must ensure that their interactions following notification but prior to clearance are carefully managed to avoid engaging in conduct which may amount to gun jumping.

Broadly speaking, the following rules should be followed:

- Clauses preventing non-ordinary course of business investments or decision-making are generally acceptable, but day-to-day control must remain with the target.
- Integration planning may be acceptable, provided that commercially sensitive information is not exchanged.
- Purchase price adjustment clauses are also generally permissible.
- Any purchaser consent rights for actions outside the ordinary course of business must be carefully considered and limited to actions which are necessary to preserve the target's value.
- Careful consideration should be given to the disclosure of confidential, competitively sensitive information and setting up clean teams.
- Steps must not be taken which may be construed as having the object or effect of integration, noting that co-ordination and the discussion of post-merger conduct may constitute gun jumping.

Similar principles apply in the context of due diligence undertaken to explore the merits of entering into an agreement.

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