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Court of Justice of the European Union Clarifies Scope of Standstill Obligation Under EU Merger Regulation

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A transaction which falls within the scope of the EU Merger Regulation (EUMR) must be notified to the European Commission (Commission) before closing and must not be implemented until the Commission has issued its clearance decision (the "standstill obligation"). Parties that breach the standstill obligation (commonly referred to as gun-jumping) face fines of up to 10% of the company's worldwide turnover.

To date, there has been surprisingly limited guidance on the scope of the standstill obligation, yet the consequences of getting it wrong are serious. In April 2018, the Commission imposed a record fine of €124.5 million (c.$150 million) on the multinational telecoms company, Altice, for gun-jumping (see **here** for our briefing). In that case, the Commission found that Altice had acquired the legal right to exercise decisive influence over PT Portugal prior to clearance and that, in certain cases, Altice had actually exercised this right. That case forms part of a wider move by the Commission to take a stricter line against gun-jumping.

In the context of this enhanced enforcement by the Commission, a recent **judgment** by the Court of Justice of the European Union (CJEU) in a preliminary reference from a Danish court has provided welcome clarification of the scope of the standstill obligation under the EUMR. Specifically, the CJEU concluded that the standstill obligation applies only to measures that actually contribute to the change of control of the target business. Preparatory or ancillary measures that do not in themselves confer control, or directly contribute to a change of control, do not form part of the concentration and are therefore not caught.

Background

This case arose from a decision by the Danish operation of accountants KPMG to become part of rival firm Ernst & Young (EY). Due to the size of KPMG's Danish operation, the move to EY was subject to Danish merger control. Critically for the purposes of this case, Danish merger control applies a standstill obligation that is based on that imposed by the EUMR.

KPMG Denmark (KPMG DK) and EY duly entered into a merger agreement on 18 November 2013 to put this into effect. On the same date, and before the merger had been notified or approved by the Danish Competition Council (DCC), KPMG DK gave notice of its decision to terminate its existing cooperation agreement with KPMG International. The notice was effective immediately, although termination did not take effect until several months later. The KPMG DK/EY merger was subsequently notified to the Danish Competition and Consumer Authority in December 2013 and conditionally approved by the DCC in May 2014.

On 17 December 2014, the DCC ruled that KPMG DK had breached the standstill obligation by giving notice to terminate its cooperation agreement with KPMG International, on the basis that the termination notice was related to the merger, irreversible and likely to have market effects. EY challenged the DCC's decision before the Danish Maritime and Commercial Court, which subsequently referred the case to the CJEU for a preliminary ruling on the scope of the standstill obligation. The fact that the relevant provisions of Danish merger control law were drafted with the EUMR in mind meant that the position as a matter of EU law as to the scope of the EUMR's standstill obligation had a direct bearing on the Danish appeal and hence the CJEU had jurisdiction.

CJEU judgment

The CJEU started from the position that the scope of the standstill obligation is determined by the definition of 'concentration' under the EUMR, since that is the conduct that the EUMR is ultimately designed to control. Under Article 3 EUMR, a 'concentration' arises where there is a *"change of control on a lasting basis."* Accordingly, the CJEU held that the standstill obligation only prohibits conduct that contributes to a lasting change in the control of the target undertaking.

While this would catch acts that amounted to "partial implementation" of a concentration, ancillary or preparatory measures which did not have a *"direct functional link"* with the implementation of the transaction were not caught. The fact that such measures may produce market effects was irrelevant.

By choosing to focus on whether a measure "contributes as such" to a change in control, the Court adopted an approach that was significantly narrower than that favoured by the Danish Government and indeed by the Commission itself in these proceedings. The Court expressly rejected the argument that it should be sufficient that a step was a necessary prerequisite for a merger to take effect for it to be caught. While KPMG DK's notice to terminate its cooperation agreement with KPMG began the process by which it became free to move to EY, it did not in itself confer on EY any degree of control over KPMG DK. As a result, it did not amount to implementation of a transaction and hence did not infringe the standstill obligation.

Implications for merging parties

This judgment confirms that, as a matter of EU law, preparatory or ancillary measures taken in the context of a merger transaction should fall outside the standstill obligation. However, care must still be taken over early implementation of any steps under a merger agreement. It is notable that the CJEU ruled that implementation arises from any transaction which *"in whole or in part*, in fact or in law, contributes to the change in control of the target" (emphasis added). While this is a narrower test than assessing whether a transaction is severable, or interconditional on other elements of a merger, the Court has left some residual uncertainty over when an implementation step amounts to a transaction that 'partially contributes' to a change in control. (Although the Advocate General helpfully referred in his Opinion to the importance of severability in the assessment of whether a prior measure forms part of a concentration, and also noted that termination of the KPMG cooperation agreement was not “inextricably linked” to the change in control over KPMG DK, neither of these points was specifically adopted by the CJEU’s final judgment.) It remains to be seen whether further clarity will be provided in future cases. Given that this is the first CJEU judgment dealing with gun-jumping since the EUMR was first introduced in 1989, it may be a long wait.

In a timely reminder of the importance of detailed monitoring of merger implementation, the UK Competition and Markets Authority (CMA) recently imposed a fine of £100,000 (c.$132,000) on Electro Rent Corporation (Electro Rent) for failing to comply with the terms of an interim order imposed by the CMA which prohibited further implementation of Electro Rent's completed acquisition of Microlease pending the CMA's review of the transaction (see **here** for the CMA's decision notice). (While the UK does not impose a mandatory standstill obligation for all mergers, it does impose stringent standstill obligations on completed mergers that are under review, to prevent further integration until the CMA has determined whether the transaction raises material concerns.) In breach of the interim order, Electro Rent terminated the lease over the only premises Electro Rent had in the UK without the CMA's prior consent. Remarkably, the CMA ruled that the fact that Electro Rent had obtained the consent of the appointed Monitoring Trustee was not a "reasonable excuse" for failing to comply with the interim order. While the issues in this case were specific to the peculiarities of the UK regime, this is nevertheless of wider interest as it marks the first time that the CMA has fined a company for such a procedural breach. As such, it does appear to be part of a wider trend towards more robust enforcement of standstill obligations across the EU.

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