CJEU GUIDANCE ON GUN-JUMPING: DOES THE MEASURE CONTRIBUTE TO A CHANGE OF CONTROL OVER ONE OF THE MERGING COMPANIES?

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Legal Briefings

For the first time since the EU Merger Regulation (EUMR) came into force the Court of Justice of the EU (CJEU) has provided guidance on the scope the standstill obligation (Article 7(1) EUMR) which prevents parties implementing their transaction before the EU Commission issues a clearance decision.

According to the CJEU the key issue in determining whether conduct is in breach of this provision and constitutes gun-jumping is whether or not it contributes to a change of control over one of the undertakings concerned. Preparatory measures which are taken in connection with the concentration but are severable from those measures actually leading to the change in control should not fall within the scope of Article 7 EUMR. Whether or not such measures have an effect on the market is not relevant in this context.

In a request for a preliminary ruling by the Danish Commercial Court, the CJEU held that KPMG DK and Ernst & Young did not infringe the standstill obligation under Danish merger control (which is based on the provisions of the EU Merger Regulation) when KPMG DK terminated its cooperation agreement with KPMG International before its merger with Ernst & Young received approval. Although termination of that agreement and the merger were interrelated, it was not a measure that resulted in Ernst & Young acquiring the possibility of exercising any influence over KPMG DK. Both parties remained independent before and after termination of that agreement.

The distinction between permissible planning activities and prohibited implementation activities under a suspensory regime is not always easy to make, yet getting it wrong can have serious consequences. Last month the Commission imposed a fine of €124.5 million on Altice, a multinational cable and telecoms company, for gun-jumping conduct (see here for our briefing on the Altice case and an overview of previous gun-jumping cases). The CJEU's ruling goes some way to clarifying this difficult distinction, but it is important to bear in mind that measures will always need to be assessed on the basis of the individual facts and context of each case.

1. BACKGROUND TO THE CASE

In November 2013 the KPMG DK companies and Ernst & Young entered into a merger agreement. At the time KPMG DK was a member of the international network of independent auditing firms KPMG International, which gave it exclusive rights to be included in the KPMG network and to use the KPMG International trademarks ("**the Cooperation Agreement**"). The Cooperation Agreement also contained provisions on the allocation of customers, the obligation to service clients from other Member States and the annual compensation for participation in the network. In accordance with the merger agreement KPMG DK ended this agreement with KPMG International on 18 November 2013, to take effect as of 30 September 2014.

The merger was cleared in May 2014, but in December 2014 the Competition Council issued a decision finding that KPMG DK had breached the standstill obligation under Danish merger control when it gave notice to terminate the Cooperation Agreement before its merger with Ernst & Young had been approved. The Competition Council concluded that termination of the Cooperation Agreement was a provisional step to carrying out the merger. The conduct was merger-specific, irreversible and likely to have an effect on the market during the period between the notice of termination and approval of the transaction and was therefore in breach of the standstill obligation.

Ernst & Young challenged the infringement decision before the Danish Commercial Court, which requested clarification from the CJEU on the scope of the standstill obligation in Article 7(1) EUMR which is similar to the equivalent provision under Danish merger control.

2. ADVOCATE GENERAL WAHL'S OPINION

In his opinion of January 2018 AG Wahl took the view that the termination of the Cooperation Agreement was a preparatory measure that was not in breach of the standstill obligation. According to AG Wahl, the three criteria relied on by the Danish Competition Council (whether the measure is merger-specific, irreversible and likely to have market effects) are not the relevant criteria for defining the scope of the standstill obligation.

Article 7(1) of the EUMR refers to a 'concentration' which may not be 'implemented' before its notification or until it has been approved. The concept of concentration is therefore crucial to the standstill obligation. Conduct will only infringe the standstill obligation where it allows the possibility of acquiring control over the target's activities. This will cover partial as well as full implementation of a concentration, but the prohibition does not apply to merely internal preparatory measures preceding the concentration.

In this case, although termination of the Cooperation Agreement and the merger agreement were interrelated, that termination did not in any way contribute to a shift in control between KPMG DK and Ernst & Young, so it was merely a preparatory measure, not gun jumping.

3. THE CJEU RULING

The CJEU has now endorsed AG Wahl's approach in this case. In light of the objectives of the EUMR, which is to ensure that the reorganisation of undertakings does not result in lasting damage to competition, Article 7(1) EUMR must be interpreted as prohibiting the implementation of any steps which, in whole or in part, contribute to a lasting change of control over one of the undertakings concerned by the concentration.

Measures which are taken in the context of a concentration, but are not necessary to achieve a change of control of an undertaking concerned, do not fall within the scope of Article 7(1). Although they may be ancillary or preparatory to the concentration, there is no direct link to the implementation of the concentration. Extending the scope of Article 7 to such measures would not only extend the scope of the EUMR in breach of Article 1 of that Regulation, but would at the same time reduce the scope of Regulation 1/2003 on the enforcement of Articles 101 and 102 TFEU, which would then no longer be applicable to such measures even if they could be in breach of Article 101 TFEU.

The CJEU also makes it clear that whether or not such transactions produce market effects is not relevant. It cannot be ruled out that a measure which has no effect on the market could still contribute to the change in control over the target and would therefore amount to a partial implementation of the concentration.

The CJEU held that, in light of the above, KPMG DK's termination of the Cooperation Agreement with KPMG International did not contribute to the change of control over the target undertaking, and did therefore not qualify as gun-jumping in breach the Article 7 EUMR.

4. COMMENT

This is the first time that the CJEU deals with the issue of whether preparatory steps to prepare and facilitate a concentration constitute (partial) implementation of the concentration within the meaning of Article 7(1). The judgment is a clear loss for regulators, including the European Commission (who intervened with submissions in favour of the approach of the Danish Competition Authority). This is because the Court's judgment narrows dramatically the scope of (partial) implementation under Article 7(1). The key test for the CJEU appears to be whether the conduct resulted in a (even partial) change of control.

It remains to be seen how the judgment will be applied to other specific instances of partial implementation such as for example: warehousing arrangements (it can be argued that the target is still independent during the warehousing arrangement and no change of control has taken place); payment of a significant or even the full value of the transaction upfront (does this give any control to the prospective acquirer or not?); changes to the target business in preparation of the concentration including for example changes to IT systems, personnel, scope of the business etc.

Given the significant uncertainty and severe consequences if errors are made, companies should seek specialist advice focussed on the specific situation they are facing.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

STEPHEN WISKING
MANAGING PARTNER, COMPETITION, REGULATION AND TRADE, LONDON
+44 20 7466 2825
stephen.wisking@hsf.com

KYRIAKOS FOUNTOUKAKOS
EMEA REGIONAL HEAD OF PRACTICE – COMPETITION, REGULATION AND TRADE, BRUSSELS
+44 7920 455 155
Kyriakos.Fountoukakos@hsf.com

KRISTIEN GEEURICKX
PROFESSIONAL SUPPORT LAWYER, LONDON
+44 20 7466 2544
Kristien.Geeurickx@hsf.com

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