



Gun-jumping under the EU Merger Regulation: State of Play

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Disclaimer: I speak in personal capacity and opinions expressed should not be attributed to the European Commission or DG Competition.

EU legal framework

- Concentration shall not be implemented before notification and clearance (standstill obligation)
 - Articles 4(1) and 7(1) of EU Merger Regulation ("EUMR")
- Cornerstone of *ex-ante* control
 - Prevent harm to competition while EC reviews concentration
 - Ensure effective remedies remain possible
 - Avoid need to "*unscramble*" a harmful transaction
- Fines of up to 10% of turnover
 - Article 14(2)(b) EUMR

Precedents (1/2)

Situations where control was acquired prior to the notification

***Electrabel /
Compagnie
National du Rhône***
(EC, 2009)

- Acquisition of *de facto* control prior to notification
- EC decision upheld by EU courts (T-332/09 and C-84/13 P)
- Fine EUR 20 million

***Marine Harvest /
Morpol***
(EC, 2014)

- Acquisition of *de facto* control prior to notification
- EC Decision upheld by General Court (T-704/14)
- Fine EUR 20 million

Precedents (2/2)

- Factual patterns involving interim covenants and exchange of commercially sensitive information
- More difficult scenarios – where do we draw the line between preparatory steps v. gun jumping?

***Altice / PT
Portugal***
(EC, 2018)

- Acquisition of Portuguese telecom operator by Altice cleared with remedies in 2015
- EC Decision on gun-jumping (24 April 2018)
- Fine EUR 124.5 million
- Appeal pending before the General Court (T-425/18)

Zoom-in on *Altice / PT Portugal*

- Agreement gave Altice the **right to exercise decisive influence** over PT Portugal
 - Clauses not aimed at value preservation but also covering ordinary course of business – i.e., beyond what is necessary
- Altice **actually exercised decisive influence**
 - Instructions on commercial decisions (contract negotiations, promotional campaign)
- **Exchange of commercially sensitive information**
 - Granular and up-to-date information
 - Without safeguards such as clean team

C-633/16, *Ernst & Young* (CJEU, 2018)

- Acquisition of KPMG Denmark by Ernst & Young
 - KPMG Denmark terminated agreement with KPMG network as of the SPA signing and prior to the authorization by Danish NCA. Gun-jumping?
- CJEU preliminary ruling clarified test:
 - A concentration is implemented only by a transaction which, **in whole or in part, in fact or in law, contributes to the change in control** of the target
 - **Transactions not necessary to achieve change of control and not presenting direct functional link** with implementation of concentration → outside scope of Art. 7(1) EUMR
 - In the case at hand: termination did not contribute to change in control → no gun-jumping

Warehousing structures

- Consolidated Jurisdictional Notice, para. 35
 - Warehousing scenarios involve a **two-step transaction structure with interim buyer**
 - First and second step constitute **a single concentration** ultimately aiming at lasting acquisition of control over target
- Case M.8719, *Canon / TMSC*
 - Two-step transaction structure involving interim buyer
 - Preliminary position of the EC: **by implementing first step prior to the notification**, Canon infringed Articles 4(1) and 7(1) EUMR
 - Commission decision pending

Practical tips

- Follow guidance in EU Courts' case law and EC decisions (e.g., EC, *Altice/PT Portugal*)
- Self-assess: better to err on the cautious side
- Consider possibility of Article 7(3) derogation
 - Effects of standstill obligation on parties and third parties?
 - Does concentration pose threat to competition?
 - Possibly subject to conditions

Thank you!