Connecting the dots: ECJ clarifies gun jumping rules

Most companies are aware of the prohibition on implementing a concentration prior to its notification to or clearance by the European Commission. Less clear is what conduct qualifies as gun jumping. However, companies may soon be able to connect the dots. Only weeks after the Commission imposed its highest fine ever for gun jumping, the European Court of Justice clarified that for gun jumping to come into play, the conduct needs to contribute to the change in control of the target company. The upcoming Commission decision on Canon’s alleged gun jumping could be the final dot to connect. Companies should keep in mind that actions which are ancillary or preparatory to the concentration, but have no functional link to the change in control, will not be regarded as gun jumping. For all other actions, buyers should keep their distance - in practice and in writing - from the target company’s day-to-day operational business decisions and strategic information until clearance is obtained.

The EU Merger Regulation requires companies to: (i) notify intended concentrations to the Commission for review if the required thresholds are met, and (ii) await the Commission’s clearance of the concentration before implementing it.

The European Court of Justice (ECJ) further clarified these gun jumping rules in the context of a preliminary ruling request by a Danish national court regarding the intended concentration between auditing firms KPMG Denmark (KPMG DK) and Ernst & Young (EY). On the same day KPMG DK signed the merger agreement with EY, it terminated its cooperation agreement with KPMG International, in accordance with the six-month notice period stipulated in the latter agreement. The question posed to the ECJ was whether the termination of the cooperation agreement could be regarded as bringing about the implementation of a concentration, violating gun jumping rules.

The ECJ explained that the gun jumping prohibition hinges on the concept of “concentration”. Under the EU Merger Regulation, a concentration is deemed to arise where there is a “change of control on a lasting basis”, with “control” being defined as “the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on a company.” The gun jumping rules therefore apply as soon as the merging parties implement operations contributing to a lasting change in the control of the target company. As a result, transactions which are not necessary to achieve a change of control, even if carried out in the context of a concentration, are not caught by the gun jumping prohibition.

As regards the question posed in the preliminary ruling request, the ECJ considered that
despite the fact that the termination of the cooperation agreement between KPMG DK and KPMG International could be regarded as preparatory to the concentration, it did not contribute as such to the change of control of the target company. The termination did not result in EY gaining the possibility of exercising any influence on KPMG DK. The companies remained independent, both before and after the termination.

Apart from the ECJ’s gun jumping clarification, the Commission has provided pointers on the scope of the gun jumping rules in its (still to be published) decision to fine telecom company Altice for gun jumping (see our earlier In context article). In addition, the Commission’s investigation on possible gun jumping by Canon remains ongoing and may provide more clues once finalised.

So even though this is not the end of the discussion yet, companies are well-advised to stay on the safe side of gun jumping by:

- ensuring they continue to operate as separate, independent companies and thus refrain from influencing any decision affecting the day-to-day business, such as on personnel, pricing, marketing, customers or suppliers
- carefully drafting their purchase agreements to avoid even the possibility of exercising control over the target’s ordinary business prior to obtaining merger clearance
- only exchanging current or future strategic or commercial information if there is a transaction-related justification to do so
- limiting the extent and impact of such information exchange by: (i) setting up clean teams, and (ii) concluding confidentiality and non-disclosure agreements.