

Gun Jumping: Increasing Enforcement and Drawing Lines

Jay Modrall

The number of merger control regimes has exploded in recent years, by some estimates to as high as 150 or more.¹ These statutes vary widely in structure. Most make merger notifications mandatory for transactions that satisfy relevant thresholds, while others are voluntary. Under most of these regimes, merging parties must suspend the implementation of notifiable transactions until approval is received. Premature implementation is commonly known as “gun jumping.”

“Gun jumping” is a deceptively simple concept. The clearest case of gun jumping occurs where the parties close a notifiable concentration without filing a required notification at all. But conduct short of closing can also be considered an illegal “implementation” under applicable merger control laws or be caught by general laws prohibiting anticompetitive agreements, decisions, and concerted practices, such as Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)² or Section 1 of the U.S. Sherman Act.³ Practices that may be scrutinized from a gun-jumping perspective include the exchange of competitively sensitive information during pre-deal due diligence or after signing of an acquisition agreement; implementation of pre-closing “ordinary course” covenants between signing and closing; planning for or commencing the integration of the parties’ businesses after closing; and coordination of competitive behavior before closing.

Two 2018 European Union cases of first impression shed unprecedented light on the line between gun jumping and anticompetitive conduct in the merger context, as well as on what pre-closing conduct can be treated as gun jumping. In the May 2018 *Ernst & Young P/S v. Konkurrencerådet (EY)* ruling,⁴ the European Court of Justice found that a significant pre-closing action taken by the target in anticipation of an acquisition would not qualify as gun jumping for purposes of the EU Merger Regulation (EUMR).⁵ Under the ECJ’s ruling, the EU Commission is required to distinguish between pre-closing conduct challenged under the EUMR and under Article 101(1) TFEU, applying different procedures and substantive tests. In the April 2018 *Altice*

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¹ See, e.g., Peter Alexiadis, Elsa Sependa & Laura Vlachos, *Merger Control: Around the World in 80 Days: Management of the Merger Review Process of Global Deals* (Oct. 3, 2018), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=cce8566d-17a1-40fb-81c3-7e7d4638a594>.

² Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), 2012 O.J. (C 326) 47 [hereinafter TFEU], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2012:326:TOC>.

³ 15 U.S.C. § 1.

⁴ Case C-633/16, *Ernst & Young P/S v. Konkurrencerådet* (ECJ May 31, 2018) [(EY), <http://curia.europa.eu/juris/document/document.jsf?jsessionid=26B86FFBF621CCF67DBC3B5785C0CD39?text=&docid=202404&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4414588>].

⁵ Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings (EC Merger Regulation) (Text with EEA relevance) [hereinafter EUMR], O.J. (L 24) 1 (Jan. 29, 2004), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2004:024:TOC>.

case,⁶ the Commission imposed a global record gun-jumping fine of €124.5 million in connection with Altice's acquisition of PT Portugal, explaining in detail why Altice's pre-closing involvement in the target's business amounted to illegal implementation of the transaction.

Together, the twin EU cases will significantly impact how the Commission approaches future gun-jumping cases, as well as how merging parties negotiate transactions and plan for closing. These decisions come at an auspicious moment, as gun-jumping enforcement is increasing and attracting interest from antitrust authorities worldwide. This new focus was demonstrated in a November 2018 OECD roundtable on gun jumping and the suspensory effects of merger notifications, for which a record 31 contributions were submitted.⁷ In the coming years, the two EU cases may prove to be a model for other authorities as they further develop their own gun-jumping enforcement regimes.

Clearer Lines in the EU

As mentioned, in 2018 the ECJ and the Commission adopted landmark gun-jumping decisions, offering unprecedented clarity on conduct short of prematurely closing a notifiable transaction that is considered illegal implementation. This section summarizes the two suspensory provisions of the EUMR and discusses how these were applied in *EY* and *Altice*.

EU Merger Regulation. The EUMR contains two distinct suspensory provisions, Article 4(1) and Article 7(1). Article 4(1) EUMR provides that “[c]oncentrations with a Community dimension . . . shall be notified to the Commission prior to their implementation.”⁸ Article 7(1) EUMR provides that “[a] concentration with a Community dimension . . . or which is to be examined by the Commission pursuant to . . . [a referral from EU Member State authorities], shall not be implemented either before its notification or until it has been declared compatible with the common market,” subject to exceptions set out in Article 7(2) EUMR and the possibility for the Commission to grant derogations under Article 7(3) EUMR.⁹

Thus, Article 4(1) EUMR applies to pre-notification conduct, while Article 7(1) applies to pre-approval conduct, whether before or after notification. There are also other differences: Article 4(1) EUMR only applies to concentrations that are subject to mandatory notification under the EUMR, while Article 7(1) EUMR applies both to transactions subject to mandatory notification and to transactions referred to the Commission at the request of the notifying parties. On the other hand, Article 7(1) EUMR is subject to exceptions and possible derogations not applicable to Article 4(1) EUMR.

Both of the EUMR's suspensory provisions prohibit premature “implementation” of notifiable or notified concentrations. However, neither defines the term “implementation” or discusses what type of conduct may be caught. This gap was addressed by the ECJ in *EY*.

The EY Ruling. The *EY* case arose from a request from the Danish Maritime and Commercial Court (the Danish Court) for a preliminary ruling on the interpretation of the suspensory provisions of the Danish law on competition (the Danish Law), which are modelled on the corresponding provisions of the EUMR. The Ernst & Young (EY) network had agreed to acquire the Danish affiliate

⁶ Case COMP/M.7993—Altice N.V./PT Portugal, Comm'n Decision (Apr. 24, 2018), http://ec.europa.eu/competition/mergers/cases/decisions/m7993_849_3.pdf.

⁷ See <http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm>.

⁸ Article 4(1) EUMR, *supra* note 5.

⁹ Article 7(1) EUMR, *supra* note 5.

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of KPMG (KPMG DK) and notified the transaction to the Danish Competition and Consumer Authority. Without waiting for antitrust approval, KPMG DK terminated its cooperation agreement with KPMG's international network. The Danish Competition Council found that this action violated the Danish Law's prohibition against implementing a notifiable concentration prior to approval, because, *inter alia*, it was merger-specific, irreversible, and likely to have market effects prior to approval of the merger. EY challenged this decision in the Danish Court, which asked the ECJ whether the EUMR "must be interpreted as meaning that a concentration is implemented only by a transaction which . . . contributes to the change in control of the target undertaking" and in particular, "whether the termination of [the] cooperation agreement . . . may be regarded as bringing about the implementation of a concentration."

The ECJ noted that the EUMR does not indicate the circumstances in which a concentration is deemed to be "implemented" and thus referred to the EUMR's "purpose and general scheme." The EUMR's suspensory provisions only apply to "concentrations," which are defined as

the merger of two or more previously independent undertakings or parts of undertakings, or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings, that control being constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking.

According to the ECJ, "It follows that a concentration . . . arises as soon as the merging parties implement operations contributing to a lasting change in the control of the target undertaking." Whether or not such operations affect competition is irrelevant, because "it cannot be ruled out that a transaction having no effect on the market might nevertheless contribute to the change in control of the target undertaking and that therefore, at least partially, it implements the concentration." Thus, "it must be concluded that Article 7(1) must be interpreted as meaning that 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 undertaking."

Conversely, transactions that "are not necessary to achieve a change of control of an undertaking" are not subject to the EUMR's suspensory provisions, even though

carried out in the context of a concentration . . . [because] [t]hose transactions, although they may be ancillary or preparatory to the concentration, do not present a direct functional link with its implementation, so that their implementation is not, in principle, likely to undermine the efficiency of the control of concentrations.¹⁰

However, such transactions remain subject to the Commission's jurisdiction under Regulation 1/2003, which empowers the Commission to investigate and sanction infringements of Articles 101(1) and 102 TFEU.¹¹

Applying these principles to the situation at hand, the ECJ observed that "the termination of a cooperation agreement . . . [even if it is] subject to a conditional link with the concentration in question and is likely to be of ancillary and preparatory nature . . . does not contribute, as such, to the change of control of the target," even if it is likely to have effects on the market. That termination "did not give EY the possibility of exercising any influence on KPMG DK, which was independent both before and after that termination."

¹⁰ *EY*, *supra* note 4, ¶¶ 49–59.

¹¹ Council Regulation No. 1/2003, 2003 O.J. (L 1) 25) (explaining the implementation of the rules on competition in Articles 81 and 82 of the Treaty), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2003:001:TOC>, cited in *Altice*, *supra* note 6, ¶¶ 186, 215, 437, and 469.

The ECJ concluded that, for EUMR purposes, “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 undertaking.”¹² The termination of a cooperation agreement in circumstances such as those in the case at hand “may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects.” Although the ECJ discussed only Article 7(1) EUMR, the same considerations presumably apply to Article 4(1) EUMR.

In summary, in *EY*, the ECJ for the first time drew a clear line between conduct constituting gun jumping, which must be evaluated and sanctioned under the EUMR, and conduct to be evaluated and sanctioned under Article 101 TFEU. Conduct that “contributes to” a change of control of the target is illegal gun jumping under the EUMR, whether or not it has any competitive impact. The Commission’s procedure would be subject to the EUMR, rather than Regulation 1/2003, and the fining guidelines published by the Commission in relation to Article 101(1) TFEU infringements¹³ would not apply. By contrast, other pre-approval conduct between the buyer and target should be assessed under Article 101(1) TFEU, and any Commission investigation would be subject to Regulation 1/2003 and other Commission rules, potentially including the Fining Guidelines.

The Altice Decision. On April 24, 2018 (shortly before the *EY* judgment), the Commission fined Altice €124.5 million for gun jumping in connection with its acquisition of PT Portugal—€62.25 million for breaching Article 4(1) EUMR, and €62.25 million for breaching Article 7(1) EUMR. This 50/50 split seems rather arbitrary, but the Commission rejected Altice’s argument that the absence of guidelines for calculating fines under the EUMR breached the EU principle of legal certainty.¹⁴ Interestingly, the Commission did not investigate whether Altice’s conduct infringed Article 101(1) TFEU.

Altice, a multinational cable and telecommunications company based in the Netherlands, entered into an agreement (the Transaction Agreement) to acquire PT Portugal, a Portuguese telecommunications and multimedia operator, in December 2014. Altice carried out a due diligence investigation of PT Portugal between October 16, 2014 and November 27, 2014, without putting in place a non-disclosure agreement or clean team. Altice notified the transaction to the Commission on February 25, 2015, and the Commission approved it, subject to commitments, on April 20, 2015. The transaction closed on June 2, 2015. Following news reports about visits by Altice executives to PT Portugal before the Commission approved the transaction, the Commission opened an investigation into whether Altice had implemented the transaction within the meaning of the EUMR prior to notification, approval, or both.

The Commission found that Altice had indeed improperly implemented the transaction in a number of respects. First, the Commission found that the Transaction Agreement gave Altice a veto right between signing and closing over such a broad range of contracts that it gave Altice the possibility to exercise decisive influence over PT Portugal. The Commission acknowledged that an acquirer can have a degree of oversight over contracts a target can enter into, and the commitments it can make, to protect the target’s value between signing and closing. But in the Commission’s view the monetary thresholds in the Transaction Agreement caught contracts that were not relevant to preserving the value of PT Portugal’s business. In reaching this conclusion,

¹² *EY*, supra note 4, ¶ 62.

¹³ Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003 [Fining Guidelines], 2006 O.J. (C 210) 2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2006:210:TOC>.

¹⁴ *Altice*, supra note 6, ¶¶ 606, 614–615.

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the Commission analyzed how the parties came to an agreement on the materiality thresholds, which were subject to a negotiation process and not based on objective criteria. The thresholds also did not correspond to the value of contracts disclosed in the due diligence data room.

The Commission relied heavily on the concept of “ordinary course of business” to assess whether contracts and commercial actions covered by Altice’s consent rights were likely to have a material impact on the value of the target. It noted that contracts and actions in the ordinary course of business were unlikely to have a material impact on the target’s business. However, the Commission noted that even an issue falling outside the ordinary course of business may not be relevant to maintain the value of a target.

Second, the Commission found that a variety of commercial decisions for which Altice’s agreement was not required pursuant to the Transaction Agreement were not made unless and until Altice consented. The Commission pointed to instances in which the target sought Altice’s instructions and agreed to implement, or actually implemented, Altice’s instructions in relation to commercial decisions prior to the date of notification and/or prior to the date of the clearance decision. As with the matters subject to Altice’s veto under the Transaction Agreement, the Commission considered that these went beyond what could reasonably be considered as necessary for preserving the value of the target.

Third, the Commission found that the target engaged in the “systematic and extensive” provision of commercially sensitive information to Altice, partly prior to the date of the notification and prior to the date of the clearance decision. These exchanges occurred during meetings between the management of the two companies on an ad-hoc basis, often at Altice’s initiative, with Altice proposing meeting agendas and requesting specific information. The Commission concluded that these information exchanges contributed to demonstrating that Altice exercised decisive influence over certain aspects pertaining to the target before and after notification.

Interestingly, the Commission cited its own guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements¹⁵ regarding information considered competitively sensitive, but it did not discuss whether this information exchange violated Article 101(1) TFEU as well as or instead of the EUMR. The Commission did not deem it necessary to demonstrate that Altice used the information it received to exercise decisive influence over the target, because implementation for the purposes of Articles 4(1) and 7(1) EUMR takes place where the acquirer has the possibility to exercise decisive influence over the target.

In summary, the Commission concluded that Altice’s right under the Transaction Agreement to consent to contracts and actions by the target between signing and closing granted Altice the legal right to exercise decisive influence over PT Portugal’s business and that Altice actually exercised decisive influence. The Commission acknowledged that some provisions can legitimately be put in place by an acquiring company to preserve the value of a target’s business between signing and closing, but found that the Transaction Agreement enabled Altice to veto strategic and day-by-day commercial decisions going beyond what could have been considered justifiable for reasons of value preservation. Beyond these consent rights, the Commission found that Altice exercised decisive influence over a number of PT Portugal’s day-by-day business decisions and exercised operational control over other aspects of the company, effectively acting as the controlling shareholder. In identifying actions that are relevant to the target’s value (so that requiring buyer approval is allowed), strategic decisions are presumably more likely to impact

¹⁵ Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-Operation Agreements [Horizontal Guidelines], 2011 O.J. (C 11) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2011:011:TOC>.

the target's value than "day-to-day" or "ordinary course" decisions, but this distinction alone is not determinative.

Although the Commission adopted the *Altice* decision before the ECJ issued its ruling in *EY*, the Commission's analysis of these contractual provisions and pre-closing behavior seems in line with *EY*'s definition of gun jumping as an exercise of control. However, the Commission's approach to determining what contracts and actions can legitimately be subject to a buyer's control goes beyond *EY* and provides useful guidance to merging parties. In particular, *Altice* demonstrates that the thresholds used to identify matters requiring due diligence before signing, and the process for negotiating materiality thresholds in the merger agreement, may both be scrutinized to determine whether a buyer's consent rights are reasonably required to protect the target's value. By extension, a target should not seek consent for matters not covered by pre-closing covenants, since the buyer presumably did not consider such matters to be material to the target's value in negotiating the transaction agreement.

By contrast, it is less clear that the Commission's treatment of the parties' exchange of competitively sensitive information before and after signing the Transaction Agreement is in line with *EY*. The Commission treated this exchange as an indication that *Altice* was acting in the capacity of a parent company or controlling shareholder of the target. Although this behavior might be said to "contribute" to an exercise of control in a broad sense, it seems more natural to read *EY* to require such conduct to be assessed under Article 101(1) TFEU. It seems likely that the Commission will open parallel procedures for infringement of the EUMR and Article 101(1) TFEU in similar cases in the future.

Implications of *EY* and *Altice*

Read together, *EY* and *Altice* provide invaluable guidance on how the Commission will conduct future gun-jumping cases and how merging parties can avoid gun-jumping under EU law. Rather than opening a single investigation under the EUMR, for instance, the Commission may open parallel investigations under the EUMR and Article 101(1) TFEU, clearly defining which conduct is being assessed under which statute. The Commission sets fines under Article 101(1) TFEU based on its Fining Guidelines, but the Commission has so far not issued similar guidance on setting fines under the EUMR. The Commission may feel greater pressure to do so in future cases involving parallel investigations under both the EUMR and Article 101(1) TFEU. This would be especially helpful considering that the Commission's increasingly aggressive enforcement for procedural infringements includes not only gun jumping but also the provision of false or misleading information in merger proceedings.¹⁶

In addition to these procedural implications, the *EY* framework has substantive implications. For example, EUMR infringements can be found only with respect to conduct that takes place prior to EUMR approval, while Article 101(1) TFEU applies until closing. Finding an EUMR infringement does not require an analysis of the contested conduct's competitive effects, which is a requirement in an Article 101(1) TFEU case (although these effects may be presumed in the case of an infringement "by object"). Thus, the fact that the buyer and target are not competitors, as in many private equity transactions, will be no defense to an EUMR gun-jumping case, but could make Article 101(1) TFEU cases more difficult to bring. Since only the buyer is subject to the EUMR's

¹⁶ For example, on May 17, 2017, the Commission fined Facebook €110 million for providing false or misleading information in connection with the Commission's review of Facebook's acquisition of WhatsApp. Case COMP/M.8228, Facebook/WhatsApp—Comm'n Decision (May 17, 2017), http://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf.

notification and suspensory obligations, moreover, EUMR gun-jumping fines apply only to the buyer, while Article 101(1) TFEU infringements would involve the target and/or the seller as well.

Altice goes beyond *EY* in setting out the antitrust justification for common due diligence practices and M&A agreement provisions and illustrating how the Commission will determine whether the parties have gone too far. EU law permits a potential buyer to review competitively sensitive information for due diligence or integration planning purposes, provided appropriate precautions are taken. A buyer may also require the target to obtain consent to certain actions post-signing, so long as these are reasonably required to protect the target's value. The Commission will look closely at the transaction history to determine whether the buyer's rights are permissible. One factor the Commission can consider is the buyer's due diligence process, specifically the monetary thresholds used to identify contracts and other matters that the acquirer considered material. Another is how monetary thresholds applicable to pre-closing consent covenants were negotiated, specifically whether the amounts were determined with a view to protecting the target's value or based on other criteria.

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Altice's lessons on the treatment of information exchanges may be less clear in light of *EY*. In *Altice*, the Commission considered the parties' exchange of confidential information as an EUMR infringement. In future cases, however, the Commission may apply its Horizontal Guidelines and extensive case law under Article 101(1) TFEU, which, as noted, applies until a notified transaction closes, not only until approval is granted.

Read together, *Altice* and *EY* provide a framework for distinguishing between gun-jumping violations of the EUMR and of Article 101(1) TFEU, and provide helpful reminders of the antitrust implications of certain practices that merging parties should follow in any event. For example, buyers naturally determine the scope of their due diligence and pre-closing consent covenants to focus on the issues considered important to the target's value. *Altice* reminds us that this is not only good business practice; it is important to avoid gun jumping and should be made explicit in the transaction process.

Similarly, merging parties have sound business reasons to be careful about sharing competitively sensitive information before closing and to ensure that such information is protected in the event the transaction does not proceed. Again, *Altice* reminds us that common precautions such as entering into confidentiality agreements and creating clean teams are not only good business, they are important from an antitrust perspective as well.

Applying this framework will also help merging parties and antitrust counsel assess the legality of proposed conduct at different stages of the transaction process. Because the competitive justifications for sharing information during due diligence before signing and integration planning between signing and closing are different, what information can be shared, and with whom, may differ. Post-signing, there may no longer be a justification for sharing certain information that needed to be shared to negotiate the purchase price. Conversely, the need for integration planning may justify the sharing of information on a wide range of other topics, provided customary protections are implemented.

Discussion of permitted pre-closing conduct often focuses on bilateral conduct involving coordination between buyer and target, but gun-jumping concerns also arise in connection with unilateral decisions. For example, a party may wish to defer plans for major R&D projects or other capital expenditures that would be rendered superfluous or at least less efficient if the transaction proceeds. If a party decides to defer such an action pending antitrust approval, unilaterally and without sharing competitively sensitive information, under *EY* that decision would presumably not violate either the EUMR (absent an exercise of control) or Article 101(1) TFEU (absent an anti-

competitive agreement, decision or concerted practice). Absent *EY*, antitrust counsel might be tempted to advise their clients that gun-jumping rules require them to continue acting in the ordinary course without regard to the pending transaction, rather than adjusting their behavior in light of the transaction.

The clear line required by *EY* between EUMR gun jumping and Article 101(1) enforcement contrasts with the approach in the United States, where authorities have long applied Section 7A of the Clayton Act (the Hart-Scott-Rodino Antitrust Improvements Act of 1976)¹⁷ and Section 1 of the Sherman Act in parallel. In their contribution to the November 2018 OECD roundtable, the U.S. authorities noted that

during the pre-consummation period, competing firms . . . may be liable for agreements that violate Section 1 [such as] merging firms' jointly setting prices or contract terms, or entering market division or customer allocation agreements [or sharing] competitively sensitive information. . . . The agencies also may use conduct that violates Section 1, including exchanges and use of competitively sensitive information, as indicia of operational control to prove violations of Section 7A.¹⁸

In their enforcement practice, the U.S. agencies commonly treat the same conduct as violating both Section 7A of the Clayton Act and Section 1 of the Sherman Act.¹⁹

The clarity provided by *EY* and *Altice* is especially welcome because few jurisdictions have provided guidance on gun jumping in general, much less the distinction between violations of merger review statutes and violations of general antitrust prohibitions. While a number of submissions to the OECD roundtable indicated that pre-closing conduct could be assessed under either merger review statutes or general antitrust prohibitions, no authority provided guidance on how to differentiate between the two types of conduct or advice on how to negotiate and implement pre-closing covenants to avoid gun-jumping infringements.

Thus, *EY* and *Altice* will serve as useful guidance for authorities other than the Commission. Indeed, *EY* arose from a decision of the Danish Competition Authority, and the Danish courts have since confirmed that they will follow the *EY* framework. Even in the EU, however, alignment may be difficult; in a major German gun-jumping case, *Edeka/Tengelmann*, the German Federal Court of Justice refused to be bound by *EY*, noting that in the EU merger control regimes are not harmonized.²⁰ As a result, in a transaction subject to Member State review rather than the Commission's one-stop-shop review under the EUMR, merging parties may be subject to different criteria in different countries.

Conclusion

As indicated by the number of contributions and lively discussion at the OECD's recent roundtable, gun-jumping enforcement is on the rise. Merging parties must be ever more vigilant to

¹⁷ 15 U.S.C. § 18a.

¹⁸ Suspensory Effects of Merger Notifications and Gun Jumping - Note by the United States, Organisation for Economic Co-operation and Development (Nov. 27, 2018) ¶ 6, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)94/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)94/en/pdf).

¹⁹ See, e.g., Complaint, United States v. Flakeboard America Ltd., No. 3:14-cv-4949 (N.D. Cal. filed Nov. 7, 2014), <https://www.justice.gov/atr/case-document/file/496511/download>; Complaint, United States v. Computer Assocs. Int'l, Inc., Civ. No. 1:01CV02062 (D.D.C. filed Sept. 28, 2001), <https://www.justice.gov/atr/case-document/file/492466/download>; Complaint, United States v. Gemstar-TV Guide Int'l, Inc., No. 03CV000198 (D.D.C. filed Feb. 6, 2003), <https://www.justice.gov/atr/case-document/file/497081/download>.

²⁰ Federal Court of Justice, July 17, 2018, KVR 64/17—Edeka/Kaiser's Tengelmann II (Ger.). See Note by Germany on Suspensory Effects of Merger Notifications and Gun-Jumping, Organisation for Economic Co-operation and Development (Nov. 27, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)81/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)81/en/pdf).

ensure that they do not infringe antitrust rules in jurisdictions where merger filings are required. The compliance challenge is exacerbated by increasingly long review periods, especially for transactions raising substantive antitrust issues.

Despite the importance of the issue, merging parties have so far had relatively little guidance on what pre-approval conduct—short of prematurely closing a transaction—might infringe applicable merger review laws, prohibitions against anticompetitive agreements, or both. Few jurisdictions have issued guidance, and published decisions often focus on egregious conduct and are thus unhelpful under normal circumstances.

Under EU law, it is now clear that conduct contributing to a pre-approval exercise of control, for example through overly restrictive pre-closing consent covenants, will be treated as an infringement of the EUMR, regardless of its competitive effects, while pre-closing conduct not contributing to a change of control will be assessed under general EU antitrust principles. The distinction is not merely formal, but has significant implications for the Commission's approach to future EU gun-jumping cases and for merging parties' analysis of what conduct is permissible. In evaluating whether pre-closing consent requirements represent an impermissible exercise of control, the Commission will look closely at aspects of the transaction process that are not overseen by antitrust counsel.

The effects of *EY* and *Altice* are not limited to transactions subject to EUMR review. Authorities in EU Member States with merger control statutes modeled on the EUMR are likely to follow the *EY* approach, though Member States with different models, such as Germany, may diverge from this approach. Non-EU authorities would also do well to consider the lessons of *EY* and *Altice* as they develop their gun-jumping jurisprudence. ●