Avoiding "Gun Jumping" in M&A

Compliance with German Merger Control and FDI Rules

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In the world of high-stakes mergers and acquisitions, even the best-laid plans can falter. Just ask Illumina and GRAIL, who recently found themselves at the center of an unprecedented European Commission fine—EUR 432 million, no less—for allegedly "jumping the gun." While the Commission decision was later annulled by the European Court of Justice (CJEU) on jurisdictional grounds, the case underscores a critical lesson for businesses: the risks of prematurely implementing a transaction before securing the necessary clearances are all too real. As companies venture into the German market, navigating both merger control and foreign direct investment (FDI) rules becomes even more complex. Knowing where to draw the line between preparation and premature action is essential. The stakes are high, and compliance with these frameworks is crucial to avoid costly penalties and safeguard the successful completion of M&A transactions.

What is "gun jumping"?

"Gun jumping" refers to actions that implement a signed deal subject to filing obligations before it has been cleared by the competent authorities. It is therefore advisable for foreign investors intending to acquire a German company or shares thereof to determine whether their planned transaction will be subject to merger control and / or FDI screening. Both legal regimes provide for a standstill obligation stipulating that the transaction may not be executed before its official clearance. German and EU merger control law comprehensively prohibits the premature implementation of mergers, while the exact scope of this prohibition has been further substantiated by case law of competition authorities and courts. By contrast, FDI control law imposes a standstill obligation solely with regard to the exercise of voting rights and the disclosure of specific security-relevant information about the target company to the acquirer. Notably, in the absence of case law there is currently a lack of clear guidance in this area.

Both prohibitions apply as of signing of the SPA, although it is important to know that their effects may already extend into the pre-signing period of contract negotiations and due diligence.

What is covered by the stand still obligation?

Information Sharing

The exchange of information is a critical aspect of any transaction, particularly during the due diligence process, as the acquirer has a legitimate interest in obtaining adequate information to make an informed assessment of the target's value.

- **Competition law**: Antitrust rules set the boundaries of what can be considered illegal exchange of competitively sensitive information between current or potential competitors; these general rules also apply where such companies are involved in a merger, of course. In addition, merger control rules go beyond the scope of the general cartel prohibition: Even among non-competitors, the systematic and comprehensive sharing of commercially sensitive information (e.g. concerning pricing policy and customer contracts) in the context of a notifiable transaction constitutes "gun jumping". This was held, e.g., by the CJEU in Altice (C-746/21) and by the German Federal Court of Justice in Edeka/Kaiser's Tengelmann (KVR 57/16).

- **FDI law:** Under German FDI control law, sharing commercially sensitive information does not automatically result in a breach of the standstill obligation. Instead, only the exchange of certain explicitly regulated types of information is prohibited. This includes information that is relevant for evaluating and safeguarding the essential security interests of the Federal Republic of Germany or that needs special consideration when assessing any potential threat to public order or security in Germany, another EU Member State, or in connection with projects or programs of interest to the EU. Nevertheless, information exchanges within the context of FDI transactions should be handled with caution, always considering that the legal terms of "essential security interests" or "public order or security" are not defined by law and tend to be interpreted broadly by German administrative practitioners and courts.

As a security mechanism, so-called "clean teams" are set up in transaction processes to protect particularly confidential information: The disclosure of sensitive information is restricted to a limited group of specific individuals, who are subject to enhanced confidentiality obligations and who have no strategic or operational responsibility within the target (i.e. even in case the transaction is not completed, the sensitive information cannot be used to gain a competitive advantage over the disclosing company) and the information exchanged is documented in a very detailed and careful manner.

Exercise of controlling influence on the target

Both standstill obligations set forth in merger control and FDI legislation also prohibit the acquirer from exerting premature influence on the target company, though under merger control law, the scope of this prohibition is more extensive than under FDI law.

The German FDI regime only deems the actual exercise of control through voting rights obtained via the acquisition a violation of the standstill obligation. The exact meaning of "exercise of voting rights" is still unclear. However, the mere potential to influence the company *de facto* is arguably not sufficient to constitute "gun jumping".

In merger control law, by contrast, already more subtle forms of influence can breach the standstill obligation. The CJEU held in its *Ernst & Young*-Judgement (C-633/16) "*that a concentration is implemented … by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*". Thus, already the possibility of exercising *de facto* control over the target may constitute a prohibited implementing act (CJEU, C-746/21 – *Altice*), meaning an infringement of the standstill obligation may also occur below the threshold of legal acts completing the merger, such as the transfer of company shares or assets. In the past, European and German courts have considered *inter alia* the following behaviours as prohibited "gun jumping" under merger control regulation:

- De-facto possibility of control – *Electrabel* (CJEU, C-84/13 P); *Marine Harvest* (CJEU, C-10/18 P): The CJEU ruled in *Electrabel* and *Marine Harvest* that gun jumping already occurs when the buyer gains the potential to exercise control over the target company, even before formally completing the acquisition. To determine whether this potential control exists, various factors are considered, such as: the buyer's ownership share in the target company, the percentage of voting rights obtained, the composition of the target's management board, and the actual voting habits. In the case at hand, the remaining shares were so widely spread among many shareholders, and the attendance at previous shareholder's meetings was so low, that the buyers effectively held a secure majority, which allowed them to make key strategic decisions.

- Partly contributing to the change of control – *Ernst & Young* (CJEU, C-633/16); *Edeka/Kaiser's Tengelmann* (German Federal Court of Justice, Judgement of Nov 14, 2017 – KVR 57/16): The CJEU held in its *Ernst & Young* judgement that already a partial implementation of the concentration constitutes a violation to the standstill obligation. Displaying a functional link to the implementation, preparatory steps prior to closing may thus amount to gun jumping if they contribute to a lasting change of control over the target. The German Federal Court of Justice interpreted the standstill obligation even broader in *EDEKA/Kaiser's Tengelmann*, explaining that gun jumping may already occur through measures which are carried out in connection with the intended merger and are capable of at least partially anticipating the effects of its implementation.

- "Warehousing" - *Canon* (General Court, T-609/19): The *Canon* case in front of the General Court concerned a two-stage transaction, the first stage being the acquisition of the target by an intermediate buyer, the second step being the acquisition of the target from the intermediate buyer by the final buyer. The General Court found that the interim acquisition already amounted to a prohibited partial implementation of the merger because the interim buyer was holding the shares on behalf of the final buyer. However, for this to apply, the General Court required that the separate transactions in a "warehousing" arrangement be so

interdependent that one transaction would not have occurred without the other, making them a unified operation.

- Pre-Closing Convenants - *Altice* (CJEU, C-746/21): In *Altice*, the CJEU found that the provisions set out in the purchase agreement relating to veto rights of the acquirer on the target's staff policy, pricing policy and the termination of customer contracts already awarded the opportunity to exercise decisive influence over the target company beyond the extent necessary to preserve the target's value. It thus concluded that the pre-closing covenants between the target's buyer and seller constituted an infringement to the standstill obligation.

Legal repercussions of gun-jumping

Under both merger control and FDI rules, illegal implementation acts have *no legal effect* until the competent authority clears the transaction.

Additionally, fines can be imposed on companies and individuals:

- Under merger control law, standstill obligation infringements can result in fines of up to 10% of the group's global annual turnover; individuals who intentionally or negligently engage in prohibited implementing acts can be fined up to EUR 1,000,000. Since the CJEU confirmed in *Altice* that a separate fine can be imposed for breaching the notification obligation in addition to violating the enforcement prohibition under merger control, fines can quickly become substantial. The European Commission makes frequent use of its competence to issue fines for gun-jumping, a drastic example of the Commission fully utilizing the 10% cap being the EUR 432 Mio. fine imposed in the *Illumina/Grail* case. The fine was annulled by the CJEU in September 2024, however not due to any substantive flaw in the assessment of the fine itself, but because the Commission lacked jurisdiction to assess the merger in the first place.

- A negligent violation of the standstill obligation under German FDI provisions, including intentional or negligent failures to implement supervisory measures to prevent a violation, can result in fines of up to EUR 500,000 per violation. Unlike merger control, German FDI law does not foresee administrative fines for failing to notify the transaction to the competent authority, i.e. the German Federal Ministry for Economic Affairs and Climate Action.

- However, even more severely, German FDI law actually classifies an intentional violation of the standstill obligation as a criminal offense, punishable by up to five years in prison or by a financial fine.

Ensuring compliance with these distinct but overlapping frameworks is essential to safeguard the successful completion of M&A transactions in Germany and to mitigate the risks of premature implementation as well as severe penalties.

BLOMSTEIN will continue to monitor and assess the developments and practical application of European and German merger control and foreign direct investment provisions. If you have any questions on the topic, Leonard von Rummel and Pia Hesse and the entire BLOMSTEIN competition law and trade team will be happy to assist you.

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