

Don't jump the gun! Mergers may be caught in the Romanian Competition Council's crossfire

Gun jumping refers to premature enforcement of a merger before obtaining clearance from the competition authority. While most companies are aware of this interdiction, it can be difficult to balance the scope of the competition standstill obligation during the pre-closing period and the measures taken by the acquiring company to protect the value of a target.

During the pre-closing period, most M&A transactions will put in place covenants that allow the purchaser to block certain decisions on the target business. In turn, these rights should be limited only to what is necessary to safeguard the value of the business and should not impact the target's ordinary operations.

However, since European competition authorities have recently started scrutinising gun jumping more closely, companies involved in M&A transactions should carefully weigh the steps taken during the pre-closing period to avoid high fines and cumbersome investigation proceedings.

The Corsar Online case

A recent case investigated by the Romanian competition watchdog targeted Corsar Online's takeover of several e-commerce domains and the premature implementation of the merger.

The Romanian Competition Council found that the acquiring company had breached the standstill obligation forbidding merging companies from taking any enforcement measures before obtaining competition clearance. In this case, Corsar Online listed its own products on the target's online platforms and several transactions were performed with clients via the target internet domains.

The Competition Council concluded that the purchaser had intervened in the target's business and penalised it with a fine of EUR 340,000.

How much further can the Competition Council's arm extend?

A recent fine imposed by the Competition Council confirmed that intervention by the competition authority is not time-barred and that it may investigate and sanction unnotified mergers, irrespective of the year they occurred.

The Competition Council thus applied a fine totalling EUR 655,000 for an unnotified economic concentration that took place in 2001, showing a strong commitment to crack down even on old procedural infringements.

Key takeaways

The parties should strictly observe the suspensory regime regarding merger control by avoiding any implementing measures.

Information exchange during the suspensive period should be carefully assessed as well, since this can also amount to gun jumping, to the extent the information allows decisive influence to be exerted over the target.

Where such information exchange is objectively necessary, sanitising the information by using clean teams or at least non-disclosure agreements is a mandatory condition.

The plethora of gun jumping cases tackled by the competition authorities means that caution is warranted when crafting the veto rights granted to the purchaser by the transaction documents to avoid any unnecessary competition issues and hefty sanctions.

Finally, the parties to a merger should seek to act independently pending the closing, to the extent practicable.