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European Antitrust Merger Enforcement Update

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A primer on avoiding procedural breaches in EU Merger Control.

The European Commission (Commission) is cracking down on parties that break procedural rules in transactions subject to European Union (EU) merger control. A recent example is the €110 million ($130.78 million) fine it imposed on Facebook for providing misleading information in the merger clearance process for the acquisition of WhatsApp. The Commission is also investigating General Electric's acquisition of LM Wind as well as Merck KGaA's acquisition of Sigma-Aldrich on the same grounds, and the Dutch telecom operator Altice for alleged "gun jumping" in relation to its acquisition of PT Portugal (i.e., allegedly taking control of, and giving instructions to, the target regarding contract negotiations as well as exchanging sensitive information before closing). The agency also addresses gun jumping allegations at Canon in its acquisition of Toshiba Medical Systems Corporation. Below are some practical steps for companies to keep in mind to avoid similar investigations/sanctions in the context of transactions that are subject to merger control:

1. Avoiding the submission of false or misleading information

The Commission is increasingly requesting parties to submit substantial data and large volumes of internal documents as part of the merger filing within the very tight deadlines of the merger control process. The merging parties are under a positive obligation not to submit "any statement which gives a distorted picture of the true facts asked for, and which departs significantly from reality on major points".[1]

Creation, preservation, review, and management of internal documents is therefore critical. In particular, parties should consider

- appropriate advance planning and allocation of sufficient resources for the collection, review, and production of the relevant documents;

- instructions to deal teams (including investment banking and other management consulting advisers) to comply from the outset with antitrust counsel's guidance on document creation to avoid potentially harmful statements in documents that may need to be submitted to the Commission;

- preservation of documents to be able to comply with document requests from the authority. In complex cases, the Commission has started to request documents, such as emails, from specific custodians (including senior management and business personnel) based on search terms to be negotiated with the authority;

- careful review and fact-checking of internal documents with relevant employees before statements in the merger filing are submitted to the Commission;

- clarify broad follow-up information requests with the antitrust authority to properly define the scope of information to be provided; and

- identify and exclude documents protected by legal privilege that fall outside the scope of the information request of the antitrust authority.

2. Avoiding gun-jumping

Merging parties must continue to act as independent companies until the receipt of EU merger control clearance. In particular, the parties need to refrain from coordinating their competitive behavior, sharing each other's commercial strategy, and exchanging competitively sensitive information beyond what is necessary for due diligence purposes without the requisite safeguards (e.g., clean team arrangements). Consequently, the parties should consider

- carefully drafting conduct-of-business and access-to-information clauses in the purchase agreement and monitoring their performance;

- issuing guidance (e.g. with respect to product marketing, pricing, distribution, research and development, and personnel decisions) to relevant employees at the outset with do's and dont's, tailored to the facts of the transaction; and

- conducting appropriate integration planning prior to closing. No actual integration may occur.

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[1] Case IV/29.895 – *Telos*, OJ [1982] OJ L58/19. Para. 21.

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