
Developments in Merger Control: It Ain't Over 'til It's Over

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Two recent enforcement actions are reminders that there are antitrust risks to be addressed after the deal is signed and even after it has closed. In the United States, the Federal Trade Commission (FTC) challenged Valeant Pharmaceuticals' 2015 acquisition of Paragon Holdings, a transaction that was not reportable under the Hart-Scott-Rodino (HSR) Act. This case continues a long line of matters in which the US antitrust agencies have challenged non-reportable transactions long after closing. In Europe, the French Competition Authority brought an action against telecommunications company Altice for gun-jumping—that is, gaining control of the target of the transaction before completion of the regulatory review. This is the first gun-jumping action brought by the French agency and one of the few brought outside the United States.

Valeant: More Enforcement Against Non-Reportable Transactions

In 2015 Valeant acquired Paragon for \$69 million, below the size-of-transaction threshold for HSR notifications. Paragon makes polymer discs (known as “buttons”) that are used to make gas permeable contact lenses. Bausch + Lomb, a Valeant subsidiary, is also a major producer of buttons for gas permeable lenses. After acquiring Paragon, Valeant later acquired Pelican Products, the only FDA-approved supplier of packaging for a particular type of contact lens, potentially giving Bausch + Lomb the sole access to Pelican's packaging.

Even though neither transaction was reportable and both had been consummated, the FTC opened an investigation of both acquisitions. Earlier this month, 18 months after the acquisition of Paragon, the FTC challenged the Paragon acquisition.¹ At the same time, Valeant agreed to a settlement that requires it to divest all of the Paragon business it acquired along with the assets it acquired from Pelican.² The FTC alleged that Valeant and Paragon combined accounted for 65-100 percent of all buttons produced for three different types of gas permeable lenses. Thus, the FTC blocked Valeant's acquisition of Paragon—and insisted that the Pelican assets be included in the divestiture—more than a year after the deals closed and after a lengthy investigation.

While unusual in other jurisdictions,³ the US antitrust agencies regularly investigate and bring enforcement actions against transactions that do not meet the HSR Act's reporting thresholds. Nothing in that Act, or elsewhere in the US antitrust laws, prohibits review and enforcement against

unreported and/or consummated transactions. As a result, if one of the agencies learns about a non-reportable transaction that it thinks may raise antitrust issues, it can and often does open an investigation.⁴ Because such an investigation is not subject to the strict timelines in the Hart-Scott-Rodino Act, it can be lengthy and wide-reaching. Accordingly, just because a firm does not have to report its transaction does not mean it can relax if that transaction raises antitrust issues.

Altice: Gun-Jumping Becomes International

Cable operator Altice purchased SFR, one of the main mobile phone operators in France, in 2014 and obtained clearance from the French Competition Authority (*Autorité de la Concurrence*, ADC). Shortly thereafter, the ADC conducted dawn raids on both companies (and another Altice subsidiary). In those raids the ADC discovered evidence that Altice had been informed of and involved itself in some of SFR's corporate decisions before obtaining clearance from the ADC and consummating the transaction. For example, it appears that Altice had approved a tender offer in which SFR participated and the renegotiation of an infrastructure agreement with a competitor; Altice apparently also obtained withdrawal of a specific discount offer and influenced SFR's M&A strategy. Effectively, then, Altice gained control of SFR at least in part prior to receiving regulatory approval. To resolve these allegations, Altice paid a fine of €80 million.

In most jurisdictions, including the United States, if a transaction must be reported to the antitrust authorities, the transaction may not be consummated until the reviewing agency has granted clearance. This means not only that the parties may not close the transaction before clearance, but that they must also remain truly separate entities until closing. If one or more of the parties begins to operate less than fully independently before clearance, that is known as “gun-jumping.”⁵ To date, the vast majority of gun-jumping enforcement actions have been in the United States, where the agencies have aggressively challenged impermissible coordination between the parties or assumption of corporate control of the target by the buyer.⁶ Outside the United States, enforcement has varied from sporadic to nonexistent; indeed, the case against Altice is the ADC's first gun-jumping enforcement action. As this case shows, there is growing interest in gun-jumping enforcement outside the US, so it is reasonable to expect more such actions from non-US authorities in the future.

Determining what is permissible and what is prohibited in the period between signing and closing of a reportable transaction is complex. There is limited guidance from the antitrust agencies.⁷ In general, the parties must continue to act as independent entities until closing. They may not begin to integrate their businesses before closing, and a buyer may not influence the ordinary course day-to-day operations of the seller. The authorities, however, understand that parties need to engage in some integration planning before closing and that a buyer may have a legitimate reason for placing limits on the *non-ordinary course* behavior of a seller. Accordingly, what constitutes gun-jumping is highly fact specific and requires consultation with counsel with substantial experience in merger control.

Takeaways

The *Valeant* and *Altice* cases are reminders that merger control is not limited to reportable

transactions and the substantive antitrust/competition merits. *Valeant* is yet another reminder that parties to non-reportable transactions that may bring anticompetitive effects to a US market need to recognize that the lack of a filing obligation does not mean that the transaction is free from antitrust review or enforcement. Thus, parties to mergers between competitors or with potential vertical anticompetitive effects in particular should consider potential antitrust risk, even for small transactions.⁸ There are ways to manage risk of antitrust enforcement for non-reportable transactions (including, in some cases, voluntary notification of the transaction pre-closing), but parties to a transaction may have inconsistent incentives and so the level of risk and available methods of mitigating risk should be carefully considered pre-signing.

Altice is a reminder that managing the period between signing and closing can be complex when the transaction is reported in one or more jurisdictions. In some cases, the review period may be brief and therefore the complexity is limited. However, if the transaction raises material antitrust issues, the review period may be lengthy, often eight months or more, and in those cases any integration planning process or consultation on non-ordinary course matters must be handled with care to avoid gun-jumping violations. While only a few, and for the most part only the most egregious gun-jumping violations result in enforcement, any conduct that the agencies may view as gun-jumping can result in delay of the substantive merger investigation or harm the parties' credibility in arguing the substantive competition merits, and will definitely increase the cost of the review process.⁹

Please do not hesitate to contact us with any questions.

¹ The FTC's complaint can be found at

www.ftc.gov/system/files/documents/cases/161107valeant_paragon_pelican_complaint_2.pdf.

² The FTC's order can be found at

www.ftc.gov/system/files/documents/cases/161107valeant_paragon_pelican_do_public_version_2.pdf.

³ In most jurisdictions, the law permits review only of those transactions that meet reporting thresholds.

⁴ The agencies generally learn about non-reportable transactions through (a) press reports; (b) complaints from customers or competitors; or (c) other investigations in the same or related industries.

⁵ In some jurisdictions outside North America, the term "gun-jumping" is also used to describe the failure to notify a transaction that was required to be notified to the competition authority. However, this case, and all the gun-jumping actions brought in the United States refer to improper pre-closing coordination or integration.

⁶ See, e.g., *United States v. Flakeboard America Ltd.*, No. 3:14-cv-4949 (N.D. Cal. 2014); complaint available at www.justice.gov/atr/case-document/file/496511/download.

⁷ The most comprehensive gun-jumping guidance from either US agency is William Blumenthal, "The Rhetoric of Gun-Jumping," Remarks before the Association of Corporate Counsel (Nov. 10, 2005), available at www.ftc.gov/sites/default/files/documents/public_statements/rhetoric-gun-jumping/20051110gunjumping.pdf.

⁸ The US Department of Justice challenged the \$11.5 million acquisition of PowerReviews by

Bazaarvoice, resulting in a verdict after trial requiring Bazaarvoice to divest PowerReviews. *United States v. Bazaarvoice, Inc.*, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014) *available* at www.justice.gov/atr/case-document/file/488846/download.

⁹ For prior guidance on gun-jumping enforcement, see DOJ Obtains Fines and Disgorgement for Premerger Coordination in Flakeboard/SierraPine Transaction, *available* at www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179875396.

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