

e-Competitions

Antitrust Case Laws e-Bulletin

December 2020

The EU Commission rejects gun jumping claims in a merger transaction between two companies in the water and waste management market (*Veolia / Suez*)

MERGERS, ENVIRONMENT, UTILITIES, MERGER NOTIFICATION, SERVICES, JUDICIAL REVIEW, EUROPEAN UNION, HIGH MARKET SHARES, MERGER (NOTION), MERGER CLEARANCE (PHASE I), GUN JUMPING

EU Commission, *Veolia / Suez*, Case M.9969, 17 December 2020 (French)

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e-Competitions News Issue December 2020

In the midst of the Homeric battle between Veolia and its takeover target, Suez, the European Commission rejects Suez's gun jumping claim and provides further clarifications on the scope of the exemption to the standstill obligation in the case of two-step acquisitions encompassing a public bid.

On 30 August 2020, Veolia announced its intention to take over its main competitor in the French water supply market, Suez, as a way to create "the great French world champion of the ecological transition". This announcement was the start of a battle the likes of which France has not seen in years, which is playing out in the courts, the French political arena and now the European Commission (the "**Commission**").

Veolia structured its takeover project in two steps:

- First, a purchase of 29.9% of Suez's shares that ENGIE owned. This first step, which did not lead to any acquisition of control over Suez, was completed on 6 October 2020;
- Second, a public bid on the remaining shares of Suez.

Suez argued that Veolia infringed the standstill obligation pursuant to Article 7(1) of the European Union Merger Regulation (hereafter "**EUMR**") and therefore jumped the gun. In short, Suez's argument was that the two steps of this takeover constitute a single concentration by which Veolia sought to acquire control of Suez, so that Veolia should have obtained clearance from the Commission before implementing the first step of the acquisition (i.e., the acquisition from ENGIE of 29.9% of Suez's shares).

But the Commission rejected Suez's line of argument in a decision dated 17 December 2020. Suez filed an appeal against that decision before the General Court on 25 February 2021.

The two steps constitute a single concentration

Suez argued that the two steps – acquisition of ENGIE's minority shareholding and the public bid to take control – should be viewed as a single concentration. Indeed, the concept of a concentration may encompass several legally distinct but closely connected transactions, which may then constitute a "single concentration". Accordingly, Recital 20 of the preamble to the EUMR states that: "[it] is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time".

Relying on the factual context surrounding the transactions and in particular on Veolia's public statements, the Commission agreed with Suez that the two steps of the acquisition pursued the same economic objective (the full takeover of Suez), and were interdependent given that the first transaction would not have happened without the subsequent public bid. In particular, the Commission acknowledged that the first acquisition by Veolia of a 29.9% stake in Suez had the effect of significantly increasing the chances of success of such public bid. Interestingly, there was little to no debate on that point.

The public bid exemption to the standstill obligation also applies to the first step of the concentration...even if it in itself is not a public bid

The EUMR contains limited exemptions to the standstill obligation. Article 7(2) EUMR provides that the standstill obligation does not prevent two types of transactions from being executed: (1) a public bid, and (2) a **"series of transactions in securities, including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers."**

However, these exemptions are subject to two conditions. First, the concentration must be notified to the Commission without delay. Second, the acquirer may not exercise the voting rights attached to the securities in question, or may only do so to maintain the full value of its investments based on a derogation granted by the Commission.

Suez argued that the first step of the transaction was not a public bid (since the shares were acquired bilaterally from ENGIE only) and that the two steps, taken together, could not be seen as a series of transactions on securities involving several vendors. Suez further argued that applying the public bid exemption would broaden the scope of the exemption beyond the legislator's intent, and every exception should be interpreted strictly.

The Commission disagreed with Suez.

First, the Commission found no reason to exclude operations intended to acquire control from several vendors through both a (bilateral) transaction on securities and a public bid from the scope of application of Article 7(2) EUMR. Rather, the Commission considered the two steps to constitute "a series of transactions on securities" leading to the acquisition of control from several vendors.

Second, the Commission decided that it could not, on the one hand, consider that the two steps constitute one single concentration and then, on the other hand, decide that the two steps should be subject to two distinct regimes: the finding of a single concentration implies that the concentration needs to be appraised as a whole.

In that context, the Commission could only find either that the two steps taken together breached the standstill obligation (leading to a finding of gun jumping) or that the exemption provided by Article 7(2) EUMR applied.

The Commission went for the latter. Relying on the General Court's case law, it found that, to the extent the two transactions constitute a single concentration, the public bid exemption to the standstill obligation should also apply to the first step of the concentration, even though the first step is neither a public bid in itself, nor a "series" of transactions on securities.

This is in line with the General Court's *Marine Harvest* ruling, in which the Court held that: "**it is possible that the acquisition of a minority stake which does not confer control of the target undertaking, followed by a public bid, may form part of a single concentration which falls within the scope of Article 7(2) of Regulation No 139/2004**".

It is worth noting that this is the first case in which the Commission applied the exemption laid down in Article 7(2) EUMR to the first step of a concentration encompassing the acquisition of a non-controlling minority stake, followed by a public bid. It is interesting to contrast this approach with the *Marine Harvest* case. In that case, which also involved the acquisition of a minority stake followed by a public bid, the Commission – upheld by the Courts – found that *Marine Harvest* had already acquired control through the first step of the transaction, namely the acquisition of approximately 48.5% of the shares in the target company from a single seller, and that the two steps could not be considered a single concentration. As a result, consummating this first step prior to Commission merger clearance constituted unlawful gun jumping.

The main difference between the case at hand and ***Marine Harvest*** seems to have been that the first step in ***Marine Harvest*** already involved a **de facto** acquisition of control of the target, which was not the case in *Veolia/Suez*. So, in line with the Court's judgment in ***Ernst & Young***, it seems that in the Commission's view, two-step concentrations could only trigger a standstill infringement if the first step has already led to an acquisition of control (i.e., contributes to the change of control of the target undertaking, following the criteria set in *Ernst & Young*).

Many companies will likely welcome this approach as a contrast to the recent aggressive enforcement policy on gun jumping violations.

Next steps

As *Suez* has appealed this decision, it will be important to monitor whether the General Court confirms the Commission's reasoning or not.

It also remains to be seen whether *Veolia* will be granted a derogation to be able to exercise its voting rights before clearance, especially at the upcoming *Suez* Board Meeting. Indeed, *Veolia's* public statements suggest that it will request such derogation in order to protect the value of its 29.9% participation in *Suez*. Based on Article 7(3) EUMR, the Commission can grant derogations only under limited circumstances. In particular, the Commission will have to analyze whether the derogation can be justified by any emergency, or is necessary to protect the value of the acquirer's investment and has no adverse effects on third parties or competitors.

Since the EUMR's coming into force, the Commission has only granted 26 derogations (excluding simplified procedures), but the precedents show that the Commission tends to grant derogations only for some restricted voting rights. For example, in **STX/Aker Yards** (2008), the Commission authorized STX to exercise its voting rights during Aker Yard's General Meeting under restricted conditions. In that case, another shareholder of Aker Yards was threatening to replace Aker Yard's Board, with a serious risk that the new Board would dispose of some strategic assets. STX requested a derogation and the Commission allowed it to vote against any individual proposed as a member of the Board at the Board Meeting; it could vote against the removal of an existing Board member, and in favor of the election or re-election of any existing Board member. However, the derogation prohibited STX from voting in favor of any new candidate to the Board (different from the existing Board members). STX was also prohibited from having their representatives elected to the Board.

Nevertheless, the case at hand is different, so it will be interesting to monitor its future developments.