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Once bitten, twice shy? Would RoW authorities be able to block an exceptional dividend payment à la Albertsons/Kroger?

Last week, a Washington state judge took the extraordinary step of temporarily blocking a grocery chain (Albertsons) from paying out a $4 billion special dividend. The judge found that the payment would impair Albertsons' ability to compete with its rival, Kroger, if their proposed $24 billion merger didn't proceed. In this post we explain how, if a similar situation arose outside of the US, a dividend payment could be blocked under UK law, but would be more difficult to prevent under EU or Chinese rules.

The US proceedings

Albertsons' proposed dividend was disclosed as a "pre-closing" dividend when it announced that it would merge with Kroger on 14 October 2022. In his complaint, the Attorney-General for Washington State argued that the dividend – 57 times larger than its most recent quarterly dividend – would "*cripple Albertsons' ability to operate its stores and meaningfully compete with Kroger during the time before the deal closes and leave it in a weakened state if the deal subsequently falls apart*".

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The A-G cited previous experience with Albertsons in 2014 during its acquisition of Safeway. The case had required divestments of stores to a divestment buyer – Haggen – which paid out a $20 million special dividend to shareholders when it acquired the spun-off stores. According to the A-G, this drained it of funds needed to operate the new stores and crippled its ability to obtain new funds, ultimately resulting in Albertsons reacquiring many of the divested stores.

The special dividend was also the subject of a challenge in the Washington DC federal court, brought by the Attorneys-General of Washington DC, California and Illinois. They alleged that Albertsons and Kroger had reached an agreement, in violation of the anti-cartel provision of the Sherman Act, that Albertsons would issue the special dividend which would reduce output and harm consumers, with no countervailing procompetitive benefit. On 8 November 2022, the federal court refused to block the payment, ruling that the dividend was separate from the transaction and so was not an anti-competitive agreement.

EU and China – gun-jumping rules unlikely to prevent dividend pay-outs

In both the EU and China, deals must be notified prior to implementation. Severe gun-jumping penalties are imposed on parties that put a reportable deal into effect before it has been approved.

Under the EUMR, a merger is implemented when there is a change of control on a lasting basis and can occur where the acquirer gains the *possibility* of exercising decisive influence over the Target. In *Canon/Toshiba v Commission*, the General Court considered that in the presence of several legally distinct transactions, it is for the European Commission to identify the economic purpose pursued by the parties. The EC can do this by examining whether the undertakings concerned would have been prepared to enter into each transaction in isolation or whether, on the contrary, each transaction constitutes only one element of a more complex operation, without which it would not have been entered into by the parties.

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However, in the Albertsons case, payment of the special dividend was the action of the target (and its shareholders) – it was not required or encouraged to be paid by Kroger. The merger was not conditioned on the payment (although the Merger Agreement provides for a dollar-for-dollar reduction in the price paid to Albertsons' shareholders by Kroger if Albertsons paid the dividend), nor would it otherwise give Kroger the possibility of exercising control over the target or amount to a partial implementation of the transaction. It is, therefore, difficult to see that European gun-jumping rules would be breached.

The situation could be different if a special dividend were paid by the target at the direction of the acquirer. In those circumstances, the EC could seek to establish that the acquirer had exercised control prior to clearance. However, recent case law suggests such a narrow step may not go far enough and could simply be a preparatory step in contemplation of the merger. Alternatively, the EC could seek to establish a pre-closing infringement under Article 101 TFEU if it could show (i) an agreement between the parties to effect declaration and payment of the dividend, and (ii) such agreement had a negative effect on competition. This would need to rely on a very clear set of facts (i.e. a direct intention to harm the target's competitiveness absent the merger) before such a novel theory could succeed.

Similarly in China, where the test is whether one merging party has directly or indirectly acquired decisive influence over another merging party prior to clearance, classifying a dividend payment as gun-jumping is a stretch. If a similarly high-profile transaction were to occur in China, the Chinese authority could inquire into the extent to which the acquirer was involved in, influenced, or even directed the target's decision to distribute the special dividend. Any involvement of the acquirer would likely be scrutinised closely to see whether it would amount to an act of gun-jumping.

UK – hold separate requirements could restrict the payment of an exceptional dividend which impaired competition

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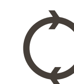

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The UK operates a voluntary, non-suspensory merger regime with no automatic prohibition against gun-jumping. However, the CMA imposes “hold separates” in all completed transactions to prevent action being taken by merger parties which would pre-empt and thereby prejudice the CMA’s ability to take remedies or unwind a blocked deal. It less commonly imposes hold separates in relation to announced deals which are conditional on approval, but will do so if it is concerned that pre-emptive action has been or will be taken during its review.

In *Facebook v CMA*, the UK Court of Appeal concept of pre-emptive action included “*activity which the merging parties might take in connection with or as a result of the merger that had the potential to affect the competitive structure of the market during the CMA’s investigation*”. The CMA guidance states that there is no exhaustive list of the kinds of conduct that may amount to pre-emptive action. And whilst the positive obligations contained in the CMA’s standard hold separate template do not prevent shareholders taking dividends or taking on loans in relation to the target business, there is a general (negative) obligation not to “*otherwise impair the ability of the acquirer or target business to compete independently in any of the markets affected by the transaction*”.

If the Albertsons circumstances had arisen in the UK, our view is that the CMA would have acted to:

(a) ask urgent questions of the acquirer once it learned of the intended special dividend (as the State A-G’s did in the Albertsons case);

(b) impose a hold separate on the merging parties once it learned of the intention of the target/seller to pay a special dividend of this scale; and

(c) put the target/seller on notice that the payment of a special dividend would not be compliant with the terms of the interim order.

Had the dividend been paid before a hold separate had been imposed, the CMA could seek to unwind the payment under its powers to unwind pre-emptive action. As the CMA’s Guidance notes:

“*Pre-emptive action can extend beyond the integration of business functions and systems. It can also include the merging parties entering into arrangements or agreements in anticipation of the merger; closer collaboration between the merging parties; or actions that might undermine the independent competitive capabilities of either business*”.