Gun-jumping and the EU Merger Regulation

WHAT IS GUN-JUMPING?

Where a transaction meets the thresholds of the EU Merger Regulation, the parties cannot complete the transaction before the Commission has approved it. Gun-jumping is the act of prematurely completing, or taking certain steps towards integrating the businesses. If they proceed with integration, without the Commission’s clearance, the parties may be liable to a fine of up to 10 per cent. of their aggregate world turnover.

The Commission has previously imposed heavy fines. For example, in June 2009, Electrabel was fined €20m for having acquired a minority stake in another company (sufficient to give it effective control) four years earlier and without prior approval from the European Commission. This fine was imposed even though the Commission subsequently concluded that the transaction did not raise competition concerns. The Commission reduced the fine to reflect the fact that Electrabel had approached the Commission voluntarily after the event. Much smaller fines of €33,000 and €219,000 were levied on Samsung and A. P. Møller, respectively, after they failed to receive clearance in due time prior to completing mergers. In both cases, their failures to notify were unintentional and the mergers did not harm competition.

As well as the threat of fines, parties suspected of gun-jumping may be subject to an unannounced inspection (dawn raid) pursuant to Article 13 of the EU Merger Regulation.

THE LEGAL RESTRICTIONS

The restrictions on gun-jumping come from two distinct parts of EU legislation. Firstly, gun-jumping is prohibited under Article 7(1) of the Merger Regulation, which prevents a transaction from being implemented before the Commission has decided that it is compatible with the internal market. Secondly, if the parties are competitors, gun-jumping may be prohibited by Article 101(1) TFEU, which covers anti-competitive agreements and concerted practices. By implementing a transaction, the parties to it are no longer acting in competition with each other.
They might, for example, share customer or pricing information with each other, or otherwise coordinate their competitive behaviour, and, in doing so, commit an offence under Article 101.

**CIRCUMSTANCES WHEN GUN-JUMPING MAY BE A CONCERN**

It should be noted that gun-jumping does not arise simply when two parties complete a transaction before it has been approved by the Commission. It can arise if steps are taken prior to formal completion. Where the Commission has jurisdiction over a transaction, the parties should observe the "standstill" restrictions which prevent them from closing. In these circumstances, the parties to the transaction should be careful not to take steps which might be regarded as implementing the transaction.

For instance, in *Bertelsmann/Kirch/Premiere*, the Commission threatened to fine the parties for taking steps towards implementing a transaction which had not been approved by the Commission. The parties had agreed to form a joint venture for the launch of a digital pay-TV channel in Germany. Before the joint venture had been cleared, Premiere reportedly started marketing Kirch's digital decoder to subscribers and started using the decoder. The Commission regarded this as partial implementation of the transaction. No fine was imposed after the parties undertook to stop the gun-jumping activities.

In general, three situations in mergers or acquisitions commonly give rise to concerns about gun-jumping.

1. **Due diligence and planning**

   When preparing for a merger or acquisition, it is common for the parties to share internal information for the purposes of due diligence and integration planning. When the parties are competitors, sharing such information may raise concerns under Article 101 if it might affect either party’s behaviour in the relevant market. This is a concern particularly in those markets where collusion could easily be achieved by sharing information. To avoid infringing Article 101, parties normally ensure that they have a confidentiality agreement in place and limit access to sensitive information, for example, to a "clean team" or external advisors.

2. **Contractual restrictions on expenditure**

   The general principle is that any strategic decision that either company makes between signing and completion should not consider the transaction, i.e. it should be justified in the company’s interest absent the transaction.

   In transaction documents, however, a purchaser will commonly impose restrictions on significant expenditure by the target business before closing. The Commission recognises that some limitations on the seller’s conduct before closing may be legitimate.\(^1\) However, if a party is restricted to the extent that it can no longer pursue a competitive business strategy, those restrictions may breach Article 101 and involve gun-jumping.

\(^1\) Ancillary Restraints Notice, OJ C56/24, 2005
3. Joint marketing of the transaction and other joint activity

Parties to a transaction may wish to make joint approaches to customers and other parties before the transaction has closed. These approaches can often be conducted in such a way that they do not alter the competitive relationship between the two companies; however, such approaches need to be considered carefully to ensure they do not do so.

GUN-JUMPING IN OTHER JURISDICTIONS

US regulatory authorities have historically been very active in pursuing gun-jumping under the Hart-Scott-Rodino Antitrust Improvements Act 1976 (the “HSR Act”). In Gemstar/TV Guide, 2003, for example, the parties had to pay a civil penalty of $5.7m (the maximum under the gun-jumping provisions of the HSR Act) to settle a gun-jumping case brought by the Department of Justice. Prior to closing a transaction, the parties had agreed to stop marketing in competition with each other, had allocated customers, and had shared information on prices, strategy and capacity.

Within the EU, national competition authorities have imposed fines on parties who have failed to notify a transaction before completion; for example, the German competition authority fined Mars €4.5m in 2008 for failing to seek clearance before closing a transaction.

In the United Kingdom, clearance by the Office of Fair Trading (the “OFT”) is not required before a transaction can complete (notification is voluntary); however, the OFT may still request that parties give “hold separate” undertakings where it is concerned that a completed merger may raise competition concerns. In such a scenario, the companies would be prevented from making any further progress with merging their businesses beyond that which had already occurred.
Merger Control

NOTIFICATIONS

5. AXA/Permina/Opodo/Go Voyages/EDreams (M.6163, 19.04.2011).
7. Simplified procedure cases
   - Sun Capital/Polestar UK Print Limited (M.6215, 19.04.2011).

PHASE I CLEARANCES

8. Unconditional clearances

9. Unconditional clearances: simplified procedure

Miscellaneous

10. Speech by Joaquin Almunia on ‘staying ahead of the curve in EU competition policy’ – On 19 April 2011, Joaquin Almunia gave a speech at the Global Competition Law Centre ("GCLC") in Brussels on EU competition policy. In his speech the Commissioner discussed recent developments in the role of antitrust enforcement. This referred, in particular, to the increased focus on economic effects on the companies’ behaviour. Almunia also discussed priorities in State aid control (SPEECH/11/291, 19.04.2011).