Gun jumping

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Both the US and the EU impose on parties to merger and acquisition transactions notification requirements when certain thresholds are met. The purpose of these requirements is to ensure that competition authorities have the opportunity to review transactions that could substantially harm competition before they are closed.

Gun jumping relates to unlawful pre-merger co-ordination between the parties to an M&A transaction. More precisely, it is a term used to describe two types of scenarios:

- substantive gun jumping, and
- procedural gun jumping.

Substantive gun jumping

Substantive gun jumping occurs when merging parties are competitors and co-ordinate their competitive conduct prior to the actual closing of the transaction. It refers to impermissible joint conduct, such as the sharing of competitive-sensitive information between the parties to a merger transaction. As a general rule, competition laws prohibit independent undertakings from co-ordinating their competitive conduct.

This type of conduct is generally prohibited in the US under section 1 of the Sherman Act and in the EU under Article 101 TFEU. Violation of these provisions can involve price/terms and condition fixing, customer and geographic market allocation, restriction on investment or input, and other (explicit, implicit or inadvertent) agreements that restrain trade.

The parties can also breach laws by exchanging competitive-sensitive information such as:

- marketing and long term strategic and business plans
- current and future pricing and costs of production
- purchasing and customer-specific information that reveals the prices or profit margins of competitive products
- information on product innovation or R&D plans, and
- proprietary technology and manufacturing data.

The parties must bear in mind the risk of their behaviour being caught by antitrust laws even where no merger is contemplated or notifiable to the competition authorities under applicable antitrust laws, where the waiting period applicable under these laws has expired, or even absent substantive antitrust risks with the transaction. For example, in *Smithfield Foods and Premium Standard* Farms, the DOJ and the parties agreed a US$900,000 settlement for exercising beneficial ownership before closing, even though the DOJ ultimately decided that the transaction did not raise competition concerns.

References:
United States v Smithfield Foods and Premium Standard Farms 1:10-CV-00120 (DDC Jan 21, 2010)

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With respect to co-ordinated conducts between competing parties, the European Commission traditionally used the EU Merger Regulation for merger-related cases, and Article 101 TFEU for non-merger cases.

References:
Regulation (EC) 139/2004
Article 101 TFEU

However in 2009, the Commission conducted dawn raids at the offices of Ineos and Norsk Hydro in order to investigate whether the parties to the proposed acquisition had been exchanging competitively sensitive information that, according to the competition watchdog, could be in violation of both the EU Merger Regulation and Article 101 TFEU. With this case, the Commission suggests that it may investigate information exchange occurring in the pre-merger context under Article 101 TFEU.

References:
Case COMP/M.4734, INEOS/ Kerling

Procedural gun jumping

Procedural gun jumping occurs when parties fail to notify the competition authorities of a transaction triggering merger thresholds, and where they implement a notifiable transaction without observing mandatory applicable waiting period and/or clearance requirements under relevant merger control laws. Procedural gun jumping refers to matters of control such as the premature combining of parties (noting that the EU test for control is that a party has 'the possibility of exercising decisive influence on an undertaking').

References:
Article 3(2) of Regulation 139/2004

This type of conduct is prohibited under section 7A of the Clayton Act, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act) and under Article 7(1) of the EU Merger Regulation. Of course, in cases where the EU Merger Regulation is not applicable, transactions may nevertheless be subject to pre-merger notification requirements at the Member State level.

References:
Article 7(1) of Regulation 139/2004
M.5969 SCJ/Sara Lee (Art 7(3) decision

Under Article 7(1) of the EU Merger Regulation, a concentration with an EU dimension cannot be implemented either before its notification or until it has been declared compatible with the common market (standstill obligation). Article 7(2) provides for some automatic but limited exceptions applicable to public takeover bids, and Article 7(3) enables the Commission to grant a derogation from the standstill obligation where 'the effects of the suspension on one or more undertakings concerned by the concentration or on a third party (exceeds) the threat to competition posed by the concentration'. For the derogation to apply (it has rarely been used), the applicant must show that the threat is real and not merely hypothetical.

This prohibition effectively freezes the competitive status quo while the Commission assesses the competitive implication of the transaction. Although the Commission accepts that the parties to a merger can carry out due diligence and plan for integration, the parties must remain independent competitors (ie they cannot present themselves as a single entity or take any steps towards integration) until receiving clearance from the Commission. The limitation under Article 7(1) of the EU Merger Regulation is purely procedural, which means that a violation of the gun jumping provision does not require the parties to the transaction to be competitors or there be any actual effect on competition.

References:
M.4994 Electrabel/ Compagnie Nationale du Rhone (Art 14 decision)

Past enforcement actions show that prematurely transferring beneficial ownership of the target to the buyer by allowing the buyer to acquire the equity or assets of the target, or engaging in conducts amounting to such a transfer constitutes a violation of the gun jumping provisions. Therefore, allowing the buyer to engage in the *de facto* acquisition of the target and prematurely integrate or consolidate operations, such as when the buyer exercises control over the target's assets, day-to-day business, management or operations, must be avoided. Examples of gun jumping include cases where the merging

parties conduct their business jointly and merge their decision-making processes (such as submitting terms offered to customers to the buyer's approval); where the acquirer operates on the target's assets such as the manufacturing facilities; where the acquirer take control of the target's inventory, machinery, and customer and supplier lists; or where the parties transfer the target's employees to the buyer's facilities (note that the mere fact to give the target's employees new business cards bearing their new title of the name of the future entity is prohibited).

It should be noted that the Commission launched a white paper and consultation on the possibility of extending the EU Merger Regulation to cover non-controlling minority stakes where there is a 'competitively significant link,' which closed in October 2014. Since then, Commissioner Vestager acknowledged that 'the issues need to be examined further' and the project was put on hold. Undertakings will need to be aware of any future changes (although changes to the EU Merger Regulation are not expected in the short or medium term).

References:
White Paper: Towards more effective EU merger control—Brussels 9.7.2014, COM(2014) 449 final
Thoughts on merger reform and market definition—keynote address at Studienvereinigung Kartellrectht Brussels, 12 March 2015

Implications and consequences of breaching gun jumping laws

United States

In the US, even though enforcement actions involving gun jumping can be brought under both the HSR and the Sherman Act, they are often brought under the former. Violations of gun jumping provisions may be subject to fines of up to US$40,654 per day of violation, injunctive relief such as requiring the parties to implement an antitrust compliance programme, and disgorgement of any illegally obtained profits stemming from the violation.

One example of a recent complaint under the Acts concerned the proposed *Flackboad/SierraPine* transaction. In January 2014, Flackboard announced its plan to acquire two particle mills from SierraPine, one in Spingfield Oregon and the other in Medford, Oregon. During the transaction negotiations, SierraPine agreed under the asset purchase agreement to close its Spingfield mill five days before the transaction closed, and after the expiration of the HSR waiting period. However, due to a labour dispute that arose at the Spingfield mill, the parties agreed to close the mill before regulatory review was complete, which constituted a premature transfer of beneficial ownership. The parties also co-ordinated to transfer Spingfield's customers to Flakboard following the closing of the mill, and SierraPine provided competitive sensitive information about the Springfield mill's customers to Flakeboard (including contact information, customers names and types and volumes of purchases). As these actions occurred prior to the expiration of the HSR waiting period, the DOJ filed a complaint. The parties ultimately settled the charges by paying a combined US$3.8m civil penalty for violating the HSR Act and US$1.15m in disgorgement of illegally-obtained profits for violating the Sherman Act, which represented the value of diverted sales Flakboard earned from the premature closing of the mill. Both parties were prohibited, under the consent agreement, from closing production facilities, entering agreements that fixed prices or allocated customers, and disclosing information about customers, prices, or input. Each company was also required to select an antitrust compliance officer to monitor compliance with the term of the agreement. In the Flakeboard case, the civil penalties imposed under the HSR Act are relatively standard but the disgorgement remedies imposed under the Sherman Act are unusual remedies in gun jumping actions.

References:
United States v. Flakeboard America Ltd., 3:14-CV-04949 (ND Cal 2014)
Press Release, US Department of Justice: Justice Department Reaches $5 Million Settlement with Flakeboard, Arauco, Inversiones Angelini and SierraPine for Illegal Pre-Merger Coordination (Nov 7, 2014)

This strict approach to gun jumping has been applied in a more recent case also involving a violation of the HSR Act. In this case, the activist investment firm ValueAct purchased more than US$2.5bn worth of the two world largest providers of oilfield products and services in violation of the HSR notification requirement; ValueAct could not rely on the exception to notification according to which acquisitions of less than 10% of a company's outstanding voting securities do not have to be notified if the purchase is made 'solely for the purpose of the investment' (under section 7 of the Clayton Act), as ValueAct had bought the shares with the intent to influence Halliburton's and Baker Hughes' business decisions related to the merger. The DOJ sued ValueAct, who ultimately entered settled for the record amount of US$11m.

References:
United States v ValueAct Capital Master Fund, LP ValueAct co-Invest International, LP 3:16-cv-01672
Press Release, US Department of Justice: Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements (July 12, 2016)

European Union

The Commission has used its power under the EU Merger Regulation to conduct dawn raids at the premises of merging parties (under Article 13 of the EU Merger Regulation) in order to determine whether exchanges of sensitive information had occurred in violation of the gun jumping provision.

References:
Article 13 of Regulation 139/2004

For example, the Commission has carried out dawn raids in a number of cases, including *Bertelsmann/Kirch/Premiere, Yara/Kemira GrowHow, Ineos/Kerling and Caterpillar/MWM* although in each of these cases the Commission ultimately cleared the transactions and did not reach a finding of gun-jumping.

References:
Case IV/M.993, Bertelsmann/Kirch/Premiere
Case COMP/M.4730, Yara/Kemira GrowHow
Case COMP/M.4734, Ineos/Kerling
Case COMP/M.6106 Caterpillar/MWM

Even if fines are not ultimately imposed, parallel gun jumping investigations can negatively impact the review of the merger transaction itself: the review period may be more lengthy and intrusive, which implies more costs and bad publicity for the merging parties. It must therefore be kept in mind that during its extended antitrust investigation, the Commission will be able to review a broad range of company documents, giving the Commission a chance to analyse exchange of information and pre-merger co-ordination.

The Commission can also prohibit the transaction altogether and require it to be unwound, and impose fines. Under Article 14(2)(b) of the EU Merger Regulation, the Commission can impose fines up to 10% of the aggregate turnover of the undertakings concerned in the preceding financial year, as well as interim measures for the violation of the standstill obligation, irrespective of whether the infringement was committed negligently or intentionally and despite the fact that clearance might be ultimately obtained.

References:
Article 14(2)(b) of Regulation 139/2004

The Commission has no precedent of imposing fines for exchange of competitively sensitive information and a limited enforcement record in other gun jumping cases. It has yet to impose fines in situations where the parties do notify a transaction but implement it before it has been approved by the Commission (in *Bertelsmann/Kirch/Premiere*, the parties undertook to stop the gun jumping activity and the Commission ultimately decided not to impose a fine), and until 2009, the Commission had imposed fines in only two instances that relate to the parties failure to notify a notification altogether (a fine of €33,000 in *A.P. Møller* in 1998 and a fine of €229,000 in *Samsung/AST* in 1999).

References:
Case IV/M.993, Bertelsmann/Kirch/Premiere

On 10 June 2009 and 23 July 2014 however, the Commission showed that it became increasingly sensitive to gun jumping issues by imposing a €20m fine on both Electrabel and Marine Harvest (see below). These two cases show a hardening of the Commission's attitude towards procedural infringements. They are not only notable for the amount of fines imposed but also because the Commission found that although Electrabel and Marine Harvest had only acquired minority stakes in the target companies, they had acquired *de facto* control over the targets because each company held a majority of votes at shareholders' meetings. It must also be noted that in both cases, the Commission ultimately cleared the transactions (unconditionally in Electrabel and conditionally in Marine Harvest).

References:
Case COMP/M.6850 – Marine Harvest/Morpol
Case COMP/M.4994– Electrabel/Compagnie Nationale du Rhône

Electrabel

In 2009, the Commission fined Belgian electricity producer Electrabel €20m for failing to notify the acquisition of a minority stake in Compagnie Nationale du Rhone, another electricity producer.

References:
Case COMP/M4994 Electrabel/Compagnie Nationale du Rhone (Art 14 decision)

Electrabel appealed to the General Court, which upheld the decision in December 2012, finding that it was highly likely that Electrabel 'would obtain a majority at the shareholders' general meeting, even without holding a majority of the voting rights' (as it would have required for a minimum shareholders attendance of 95.84% and for all other shareholders in attendance to adopt a common position against the applicant). The General Court indicated that the fine imposed was at the 'lower end' of what could have been imposed. It also confirmed the Commission's view that a gun jumping offence cannot be considered as purely formal or procedural in nature—as it involves not only an absence of notification but also a conduct giving rise to a structural change in the condition of competition—and that, as a consequence, the five-year limitation period applicable to substantive infringements (as opposed to three for procedural infringements) should apply.

References:
Case T-332/09 Electrabel v Commission
Regulation 2988/74

The Court of Justice confirmed this approach in July 2014 in Electrabel v Commission, stating that the breach of the standstill obligation is serious, as it undermines the essence of EU merger control.

References:
Case C-84/13 P Electrabel v Commission

Marine Harvest

On 23 July 2014 in Marine Harvest/Morpol (failure to notify) (M.7148), Marine Harvest ASA, a large salmon farmer and processor in the EEA, was fined €20m by the Commission for having implemented in December 2012 an acquisition of a 48.5% shareholding in Norwegian competitor, Morpol ASA, without prior notification.

References:
Case COMP/M.7184 Marine Harvest/Morpol (Art 14(2) decision)

In its response to the Commission, Marine Harvest argued it had not acquired control of Morpol, since the share purchase agreement (SPA) stated that Marine Harvest was not entitled to exercise any voting rights until clearance of the transaction by the Commission. In January 2013, Marine Harvest submitted a public offer to acquire the remaining share of Morpol. Therefore, Marine Harvest also argued that the takeover of Morpol constituted one single concentration clearly structured as an acquisition of an initial shareholding followed by an immediate mandatory public offer for the remaining shares in Morpol (under the Norwegian Securities Trading Act, an acquirer of more than one-third of a listed company's shares is obliged to bid for the remaining shares), and that its decision to notify (in August 2013) only after full takeover in March 2013 was therefore in accordance with the exception applying under Article 7(2) of the EU Merger Regulation, which exempt public bids and creeping takeovers from the standstill obligation provided they are notified 'without delay' and 'the acquirer does not exercise the voting rights attached to the securities in question' (note—two conditions are required for Article 7(2) to apply: (i) that the concentration is notified to the Commission without delay, and (ii) that the acquire does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investment).

References:
Article 7(2) of Regulation 139/2014

The Commission, which had conditionally cleared the transaction on 30 September 2013, rejected the arguments, finding that the two transactions could not be considered as one single unitary transaction, and that the acquisition of the 48.5% shareholding enabled Marine Harvest to enjoy a stable majority at the shareholders' meetings as a consequence of the wide dispersion of the remaining shares (and previous attendance rates at these shareholders' meetings), and therefore gave Marine Harvest *de facto* control of Morpol. The Commission concluded that taking over the shares in itself constituted an implementation: what was mentioned on the SPA and the fact that Marine Harvest had not actually exercised the voting rights attached to the securities was not relevant to the

References:
Case T-282/02 Cementbouw Handel & Industrie BV v Commission
Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) p 1

question of control as it was 'at least possible that the competitive interaction between Marine Harvest and Morpol has been affected'. Furthermore, the Article 7(2) exception applicable to creeping takeovers did not apply as the company had acquired the minority stake from just one seller (and not 'from various sellers').

An appeal is currently before the General Court in Case T-704/14 (during the hearing before the General Court, Marine Harvest argued that it had never 'contemplated purchasing just the 48.% shareholding in isolation' and cited the *Cementbouw Handel & Industrie BV v Commission* case, which found that separate transactions constitute a single concentration if one would not have been carried out without the other).

Specific protections against gun jumping

Competition authorities generally accept that there might be legitimate business reasons for the parties to engage in certain forms of pre-closing co-ordination, such as pre- and post-signing due diligence and transition planning plan in order for the parties to co-ordinate their clearance strategy and allow for a successful implementation of the merger, but there should never be implementation. The recent developments reinforce the need for the parties to a transaction to take appropriate precaution and consult with legal counsel to ensure that the fact-specific nature of each operation is taken into account when exchanging information and planning for integration. The most difficult issues of gun jumping arise as a result of three types of pre-closing conducts:

- unprotected exchange of information and co-ordination of competitive behaviour pre- and post-signing
- steps to integrate the buyer's and target's business, and
- involvement by the acquiring party in the target's business.

Different considerations may also apply to the acquisition of minority shareholdings and/or *de facto* control.

Unprotected exchange of information and co-ordination of competitive behaviour pre- and post-signing

Pre-signing, information should only be exchanged if it is necessary in order to form a reasonable understanding of the target's business and its value. Post-signing, legitimate reasons for exchanging information may include: confirming the accuracy of representations made in the purchase agreement; monitoring the compliance with closing conditions and purchase agreement covenants; and planning for the integration of the businesses. In all cases, the information must be provided in a manner that would prevent the information from being used commercially (ie the parties should avoid information exchange that could facilitate collusion should the transaction fall apart). If a justifiable need arises to share competitively sensitive information with the other party prior to closing, the parties should establish appropriate safeguards before sharing the information. For example:

- limiting the exchange of information to members of a Clean Team (ie persons who are not involved in the parties' day-to-day business operations). Members of such team are usually retired employees or employees from the financial department of the buyer or third party consultants. Counsel should make sure that members work under a set of rules agreed upon by the merging parties, and are subject to confidentiality agreements. Strategic information should be labeled 'competitively sensitive—Clean Team use only' and reviewed by counsel to determine if it may be shared with the Clean Team (they will only be shared if they are necessary for the team to perform its tasks). The Clean Team may then perform all traditional diligence

functions such as visit company facilities and receive strategic information from both merging parties. When a Clean Team is in place, the competitively sensitive information is placed in a separate and restricted data room where the Clean Team can review it and prepare reports for the buyer in which competitively sensitive details are not disclosed (reports and findings will be presented to the management in an aggregate or summarised form after approval from by outside legal counsel). Setting up a Clean Team is expensive and should only be used if necessary. A Clean Team is particularly appropriate where there is substantial overlap between the merging parties and the transaction raises potential antitrust issues

- drafting of a confidentiality or non-disclosure agreement. The parties to a transaction should share confidential and sensitive information only in accordance with a confidentiality agreement or non-disclosure agreement that limit the use of such information for the purpose of the contemplated transaction and its disclosure to persons who need access to it for this very purpose. The agreement can also require the sensitive information to be stored in separate files in order to facilitate the return or destruction of the information exchanged at the request of the disclosing party
- consideration of the timing. Exchange of information may be particularly scrutinised where the parties were vigorously competing prior to filling. The risk that the information exchange could be seen as facilitating collusion between the merging companies decreases as the date of implementation of the transaction draws closer. The merging companies should therefore delay the exchange of sensitive information until any such exchange is absolutely necessary to complete the planning for a timely integration
- selecting the type of information to be shared. The parties must make sure that exchanges of information prior to closing of the transaction are justified for the purpose of the negotiation, due diligence or integration planning, and that the information is not disclosed to persons engaged in competition with the disclosing company. If the exchanges of information go beyond those purposes, or are not accompanied by measures that limit the scope of such exchanges (it is for instance advised that the parties make sure to tailor the responses given in response to specific questions), the parties take the risk of breaching gun jumping rules. Information that is considered legitimate to share are: information that is publically available; income statement and balance sheets; tax and finance information; aggregated and historical cost and price information; labor costs and non-specific employee information (general compensation plans can be shared); budget/financing planning for post-closing; information about offices and business licenses (eg leases, physical description of factories and offices); description and value of assets; information about IT and other systems; environmental, health and safety data; organisational planning such as human resources information that are necessary to complete integration plans and identify synergies (although, announcements regarding roles in the new entity should not be announced before closing). Any proposed exchange of competitively sensitive information between the buyer and the target company should be review by counsel prior the exchange.

Steps to integrate the buyer's and target's business

It may be legitimate for parties to engage in certain integration planning efforts prior to closing as long as these efforts are limited to planning and no actual integration occurs. Therefore, the parties should avoid activities that lead to changes (or that give the appearance of a change) in the target's business conduct. Activities amounting to premature integration include transfers of personnel (or even changing their business cards), providing one party with access to the other's IT systems or other support

functions, relocating physical operations, or allowing one party to negotiate contracts on behalf of the other party. Other conducts such as identifying employees to be retained, choosing benefits plans, determining how to best co-ordinate computer network are permissible. In order to avoid any risk of gun jumping, the parties should consider some safeguards:

- outsourcing planning that requires the use of sensitive information, or deferring non-critical planning where the sensitive information can be used after closing
- designating an integration planning team to handle specific integration planning tasks.

Involvement by the acquiring party in the target's business

During the time before closing, the parties must maintain separate control (ie the buyer must not exercise control or beneficial ownership over the target). The companies must remain independent and continue to unilaterally make commercial decisions despite having a merger or acquisition agreement in place. As explained above, this means that each company must maintain its separate entity, separate operations and separate personnel, and that the buyer should refrain from attempting to influence the target's business affairs and should not manage or participate in the target's routine management decisions, customer relationships, marketing programmes, research and development plans, price setting, output determination or new product or service launches. Counsel should carefully review the merger or purchase agreement to make sure the integrity of the target company is protected until the closing of the transaction. 'Ordinary course' covenants or purchase agreements limiting the buyer's influence in the conduct of the target's business affairs should be encouraged. The Commission itself recognises that some limitations on the target's conducts before the implementation of the transaction may be legitimately imposed in transaction documents, such as:

- restrictions on significant expenditure by the seller before closing
- restrictions on selling off significant assets to a third party, or
- restrictions on materially altering the nature of the business

Minority shareholdings and *de facto* control

The companies involved in a transaction should take into account different factors in order to determine whether they run the risk of being subject to the gun jumping rules. control was deemed sufficient to trigger a notification requirement.

Factors to consider include:

- the dispersion of the remaining shares
- whether the other shareholders are likely to support (or go against) the position of the largest minority shareholders, and
- whether other large shareholders have structural, economic, or family links with the largest minority shareholder

References:
Case COMP M.5250, Porsche/Volkswagen

Conclusion

The US Agencies and the Commission do not provide formal guidance on what behaviour can constitute gun jumping, but past (and recent) enforcement actions as discussed above give us a sense of what actions fall foul of the gun jumping provisions. Each transaction, however, comes with its own set of facts and circumstances that play a role in determining whether gun jumping has occurred.

As regards to the level of fines imposed by the Commission in the case of procedural infringements of the EU Merger Regulation, there is no formal guidance (although Article 14(3) of the EU Merger Regulation does mention some criteria to be followed such as the nature, the gravity and the duration of the infringement).

However, it is worth noting that the Commission does take potential mitigating and aggravating circumstances into consideration when deciding its cases. For instance, the Commission will look at whether the infringement was intentional, whether the parties have been negligent and if they had previous experience with national and EU merger control (for example, in *Electrabel*, the Commission noted that it was a sophisticated company which was very familiar with the EU merger control rules; in Marine Harvest, the Commission noted an earlier fine by the French Competition Authority for infringing an obligation to notify a transaction under national law), whether there was a prompt start of pre-notification, and whether there is actual competitive harm. In *Electrabel*, the Commission reduced the fine to reflect the fact that the company had approached the Commission voluntary after acquiring the minority stake. In Marine Harvest, one very specific mitigating circumstance was that the company had absented from exercising its vote in the target. In any case, companies should not assume that the Commission will impose high penalties only where their transaction can be expected to raise substantive competition concerns.

The risk of an investigation into a suspected gun jumping violation remains many years after the closing of a transaction occurs. It is therefore important to consult counsel in advance of any information exchange and integration planning meeting/conference call. If the parties have any doubts as to the interpretation of antitrust provisions, they should also not refrain from contracting the Commission, which is usually ready to give guidance through the consultation process.

References:
Article 14(3) of Regulation 139/2014

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