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Gun Jumping in Merger Control

A Jurisdictional Guide

Catriona Hatton - Yves Comtois - Andrea Hamilton

International Bar Association, Mergers Working Group of the Antitrust Section

Foreword by Richard Whish

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FOREWORD

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The majority of merger control regimes in the world today require the parties to a transaction to pre-notify it to the relevant authorities. A standstill obligation then comes into effect which requires them not to begin the process of integration of the two businesses until clearance has been given. There are a few systems, for example in the United Kingdom and Singapore, that do not mandate pre-notification, but these are the exception to the general rule. Penalties can be imposed for infringing the requirements to pre-notify and to refrain from implementation; in some regimes these can be imposed on natural as well as legal persons.

There is nothing particularly new about mandatory pre-notification: for example in the United States, the Hart-Scott-Rodino Antitrust Improvements Act ('HSR'), which created section 7A of the Clayton Act, is now more than 40 years old. The European Union Merger Regulation ('EUMR') required pre-notification of mergers from its inception in 1990. In the US there has been quite a lot of enforcement action under the HSR legislation, and that is where the most helpful decisional practice on the topic of 'gun jumping' will be found. The European Commission has also taken action from time to time against gun-jumping. It did so for the first time in 1997 in the case of *Bertelsmann/Kirch/Premiere*, but without reaching a formal conclusion. Subsequently the Commission imposed fines in a few cases for failure to notify a merger: the first decision was *Samsung* in 1998, in which a fine of €33,000 was imposed. Larger fines, each of €20 million, followed in the cases of *Electrabel/Compagnie National du Rhône* in 2009 and *Marine Harvest* in 2014. The *Marine Harvest* decision was unsuccessfully challenged before the General Court in 2017 and a judgment from the Court of Justice is now awaited in this case. Gun-jumping has also been penalised in various other jurisdictions around the world, for example in Brazil, China, India and Korea.

It follows that the duty to avoid gun jumping, and the risks associated with it, are a reasonably well-known part of the legal landscape. What is interesting, however, is that this is a topic that has not been explored very much in the legal literature, nor on the conference circuit. Little guidance has been provided by competition authorities on what constitutes gun-jumping, one notable exception to this being the *Guidelines for the Analysis of Previous Consummation of Merger Transactions* of the Brazilian Administrative Council for Economic Defence (CADE) published in September 2016.

Four recent cases in Europe have given the subject of gun-jumping much greater prominence. First, the French Competition Authority (*Autorité de la Concurrence*) imposed a fine of €80 million in the case of *Altice/SFR & OTL* in November 2016 for the premature completion of two mergers that had been notified in 2014. Altice was then fined a second time, this time by the European Commission, which imposed a fine of €125 million in the case of *Altice/PT Portugal* in April 2018. Perhaps most interesting

of all was the judgment of the Court of Justice in the *Ernst & Young/KPMG Denmark* case in May 2018, in which case Advocate General Wahl pointed out that the issue of gun-jumping had never been considered in the jurisprudence of the Court even though the EUMR had by then been in force for 28 years. More recently the Commission has imposed a fine of €28 million in the case of *Canon/Toshiba Medical* in June 2019.

Increased interest in the subject of gun-jumping led the OECD Competition Committee to hold one of its roundtable discussions on *Gun jumping and suspensory effects of merger notifications* in November 2018. Papers were submitted by 30 national competition authorities, the European Commission and by Business at OECD ('BIAC') containing a great deal of useful information about the decisional practice on gun-jumping around the world and, in the case of BIAC, a discussion of the difficulties for firms in complying with the various provisions on gun-jumping around the world while at the same time planning for the future integration of the businesses to be merged, preserving the value of the assets to be acquired and conducting effective due diligence. The roundtable, in conjunction with the four recent cases referred to above, revealed that a systematic approach needed to be taken to the subject of gun-jumping, both in terms of the substantive law and the practical steps that firms need to take in order to avoid transgressions of that law.

As far as the substantive law is concerned, the *Ernst & Young* case was of particular interest. The EUMR specifically imposes a duty to pre-notify mergers in Article 4(1), and the standstill obligation is to be found in Article 7(1) EUMR. In *Marine Harvest* and *Altice* those firms were fined for imposing both of these provisions. But *Ernst & Young* also made clear that conduct that does *not* fall foul of the standstill obligation may nevertheless amount to an infringement of Article 101 TFEU. It is relatively easy to work out whether and when there is a duty to pre-notify a merger; what is less clear is what constitutes the partial acquisition of control of the target business. Suppose that a would-be acquiror of a business obtains information about the target: is that a 'normal' part of the due diligence process and entirely innocent? Or a breach of the standstill obligation imposed by merger control? Or an independent antitrust infringement subject to Article 101? Given the obvious risks of infringing one or other of these provisions, firms need to know what practical steps need to be taken in order to avoid entanglement with competition authorities and to ensure a smooth and efficient integration of the two business.

These important and complex issues have led to the publication of this excellent work by Concurrences, containing the work product of the Mergers Working Group of the Antitrust Section of the International Bar Association. The book contains the first multi-jurisdictional survey of gun-jumping to have been undertaken, and looks at the decisional practice in 21 major jurisdictions, from Australia to the US via China, India and many other countries. The subject matter is presented in a highly accessible, systematic manner, looking at the substantive legal provisions, including the relationship between the merger-specific rules such as Articles 4 and 7 of the EUMR and antitrust law as such, for example Article 101. The actual decisional practice in various jurisdictions is analysed, and an excellent high-level view is provided in the introductory chapter by Catriona Hatton and Yves Comtois of Baker Botts and Andrea Hamilton of McDermott Will & Emery. Concurrences and the contributors to this project deserve to be congratulated on the production of a highly timely work which will be of immense benefit to firms, their business advisers and to competition authorities around the world.

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As gun jumping comes to the forefront of antitrust enforcement in a number of important jurisdictions, this book is a timely and helpful guide for both in-house and outside counsel involved in cross-border transactions. The Mergers Working Group ("MWG") of the Antitrust Committee of the International Bar Association has formulated a comparative guide concerning gun-jumping across 21 major jurisdictions, encompassing all global regions and both established and emerging merger control systems. Each country chapter comprises of a series of questions and answers based around the relevant legislation and illuminated by recent cases and decisions. These have been contributed by distinguished practitioners from around the world, and are followed by annexes on actual and hypothetical enforcement of specific conduct. The book also provides a high-level overview by the MWG of the survey's key results, to provide insight to the international business community, their advisors as well as to competition authorities.

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